OXFORD

PHILOSOPHICAL FOUNDATIONS OF

# The Law of Torts

edited by
John Oberdiek

OXFORD

# PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS

# PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS

EDITED BY

JOHN OBERDIEK

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries



First Edition published in 2014

Impression: 1



British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013952799

ISBN 978–0–19–870138–5

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

*For Ray Solomon*
*colleague, mentor, and friend*

# TABLE OF CONTENTS

# CONTRIBUTORS

**Larry Alexander** is Warren Distinguished Professor of Law at the University of San Diego School of Law.

**Peter Cane** is Distinguished Professor of Law at the Australian National University.

**Eric R. Claeys** is Professor of Law at George Mason University School of Law.

**R.A. Duff** is Professor of Law and Russell M. and Elizabeth M. Bennett Chair in Excellence at the University of Minnesota Law School.

**David Enoch** is Professor of Philosophy and Jacob I. Berman Professor of Law at the Hebrew University of Jerusalem.

**Kimberly Kessler Ferzan** is Distinguished Professor of Law at the Rutgers School of Law.

**John Gardner** is Professor of Jurisprudence at the University of Oxford.

**Mark A. Geistfeld** is Sheila Lubetsky Birnbaum Professor of Civil Litigation at New York University School of Law.

**John C.P. Goldberg** is Eli Goldston Professor of Law at Harvard Law School.

**Scott Hershovitz** is Professor of Law and Professor of Philosophy at the University of Michigan.

**Heidi M. Hurd** is David C. Baum Professor of Law and Professor of Philosophy at the University of Illinois, Urbana-Champaign.

**Gregory C. Keating** is William T. Dalessi Professor of Law and Philosophy at the University of Southern California School of Law.

**Rahul Kumar** is Associate Professor of Philosophy at Queen's University.

**John Oberdiek** is Professor of Law at the Rutgers School of Law.

**Stephen Perry** is John J. O'Brien Professor of Law and Professor of Philosophy at the University of Pennsylvania.

**Linda Radzik** is Professor of Philosophy at Texas A&M University.

**Anthony J. Sebok** is Professor of Law at the Benjamin N. Cardozo School of Law at Yeshiva University.

**Hanoch Sheinman** is Professor of Law and Philosophy at Bar-Ilan University.

**Kenneth W. Simons** is Professor of Law and the Honorable Frank R. Kenison Distinguished Scholar in Law at Boston University School of Law.

**Victor Tadros** is Professor of Law at the University of Warwick School of Law.

**Benjamin C. Zipursky** is Professor of Law and James H. Quinn '49 Chair in Legal Ethics at Fordham University School of Law.

# TABLE OF CASES

# Introduction: Philosophical Foundations of the Law of Torts

*John Oberdiek*

Philosophy of tort law, ironically, owes its preoccupations and shape, in large part, to an altogether different discipline: economics. H.L.A. Hart and Tony Honoré's 1959 masterpiece, *Causation in the Law*, was a key influence in the development of philosophy of tort law, but it was the surge of economic analysis of tort law in the 1960s and 1970s that stimulated the reaction that accounts for so much of what philosophy of tort law is today. Law and economics represented the culmination of various strands in the history of torts, providing a coherent and seemingly powerful lens through which tort law could be viewed. That efficiency and the maximization of aggregate wealth guided economic analysis, however, revealed the approach to be a particular, and particularly crude, version of consequentialism. Consequentialism in its various forms had long ruled moral and political philosophy, so it was only natural that it would penetrate the normative domain of tort law. But in the 1970s the tide began to turn. And it was in the wake of the general revival of non-consequentialism that George Fletcher, Jules Coleman, and Ernest Weinrib staked out non-consequentialist alternatives to the economic analysis of tort law.

Their early efforts were important as first-order contributions to theoretical debates about tort law, of course, but they also helped to substantiate philosophy of tort law's standing as a distinct subfield within philosophy of law. David Owen provides a succinct history of tort theory as a discipline in his introduction to *Philosophical Foundations of Tort Law*, Oxford University Press's 1995 predecessor to the present volume, and identifies a *Law and Philosophy* symposium as a signal event in the development of the field. What was so important about that two-issue symposium published in 1982 and 1983, according to Owen, was that philosophers, including Fletcher, Coleman, and Weinrib, presented a unified front against the economic analysis of tort law, and that Coleman and Weinrib presented early sketches of their quite different corrective justice theories of tort law alongside each other.

The work of all three, along with Honoré's ongoing interventions, would prove to be extraordinarily influential. Coleman extended his criticism of the economic account of torts in a series of papers, including a searching 1988 *Yale Law Journal* review of William Landes and Richard Posner's *The Economic Structure of Tort Law* and Steven Shavell's *Economic Analysis of Accident Law*, both published in 1987. In "The Structure of Tort Law," Coleman argued that economic analysis could not make sense of the constitutive bilateral plaintiff-defendant structure of a tort suit and, thus, had to fail. That criticism still stands and has influenced both critics and defenders of law and economics. Coleman presented his expansive and mature views in 1992's *Risks and Wrongs* and 2001's *The Practice of Principle*, each of which is a landmark of tort theory.

Weinrib joined Coleman in his assault on law and economics, but he went further. Weinrib's work reached its apotheosis in 1995's *The Idea of Private Law*, where he articulated and defended a formalist theory of private law as a whole, with tort law at its center. Weinrib agreed with Coleman that economic theories could not make sense of the structure of tort law (or private law generally), and that such theories therefore failed. But it was the explanation that Weinrib gave of why economic theories could not make sense of that structure that set his account apart: economic theories failed because they were instrumental theories. They did not respect the modes of reasoning internal to tort law, but sought to explain or justify the law of torts by reference to an extrinsic goal. In this respect, Weinrib's was not so much a criticism of economic analysis, but of any analysis that did not appraise and accept tort law on its own terms. Non-consequentialist theories that were instrumental, then, could also run afoul of Weinrib's formalism. Few have adopted Weinrib's view in all of its particulars, but his position remains influential—and his 2012 collection of essays, *Corrective Justice*, is sure to reinvigorate debate about formalism—because it emphasizes the importance of taking seriously the intelligibility and actual of practice of tort law.

Fletcher, for his part, by and large pivoted from tort theory to criminal law theory. Still, his seminal 1972 *Harvard Law Review* article, "Fairness and Utility in Tort Theory," remains a pole star. While Fletcher's Rawlsian approach to the law of torts has not gained the kind of following that Rawls's own theory of justice has—a high standard indeed—there is a critical mass of tort theorists who find at least some element in Fletcher's account illuminating. It was Fletcher, after all, who first argued that distributive justice plays an important role in tort law, that tort law could be interpreted in contractualist terms, and that symmetrical and asymmetrical risk impositions needed to be distinguished from one another. Each of these planks in Fletcher's platform have their defenders today.

While Hart, too, turned his attention to criminal law theory and, of course, to general jurisprudence, Honoré continued to develop his views about tort law following the initial publication of *Causation in the Law* and its 1985 update. Some of Honoré's most important work was collected in his 1999 book, *Responsibility and Fault*. In those papers, Honoré renewed his exacting inquiry into causation, but he also expounded upon the role of luck and agency in the assignment of legal responsibility and liability and examined the relative places of corrective and distributive justice in tort law,

among other topics. Honoré's contributions to tort theory have been very wide-ranging, as well as fertile, spawning a great deal of insightful work by others.

If Fletcher, Coleman, Weinrib, and Honoré are philosophy of tort law's pioneers, their many intellectual heirs now join them in leading an established field. Every contemporary tort theorist stands on the shoulders of these four in ways obvious and subtle. Citing some clear examples, the lineage of Gregory Keating's Rawlsian approach to torts can be unmistakably traced to Fletcher, Stephen Perry's conception of corrective justice and outcome-responsibility owes much to the work of Coleman and Honoré, respectively, and John Goldberg and Benjamin Zipursky's civil recourse theory shares much in common with Weinrib's approach, even if not its high formalism. Like any mature scholarly enterprise, philosophy of tort law builds on itself, relying upon and reworking the insights of those who have gone before to forge clearer insights and better theories.

The present volume is a testament to this rich heritage. Its contributors include Keating, Perry, and Goldberg and Zipursky, as well as other leading figures who have made important contributions to tort theory, like Peter Cane, Heidi Hurd, John Gardner, Mark Geistfeld, Anthony Sebok, and Ken Simons. Younger philosophers of tort law, like Scott Hershovitz, Hanoch Sheinman, and me, also contribute. This group is evidence enough of tort theory's vigor. While many of the aforementioned people also work outside of tort theory, it is a distinguishing characteristic of this volume that the balance of contributors work primarily outside of the field. Thus, Larry Alexander and Kimberly Ferzan, Eric Claeys, Antony Duff, David Enoch, Rahul Kumar, Linda Radzik, and Victor Tadros work principally in some other subfield of legal theory or philosophy, whether criminal law theory, property law theory, or moral theory. It was an important goal of this volume that it include scholars from cognate disciplines. And it seems to me another sign of philosophy of tort law's vitality as a discipline that it can reach across its borders and attract so many excellent contributions on questions of common concern from theorists whose work primarily lies elsewhere. Such inter-disciplinarity breathes new life into tort theory's old questions, offers new perspectives, and also helps keep the discipline honest.

This book is divided into four parts: Foundations of Tort Law; Harms, Wrongs, Responsibility, and Liability; Distributive Justice in Tort Law; and Skeptical Perspectives. Part I: Foundations of Tort Law comprises seven chapters that address questions revolving around the nature and aims of tort law. It is fitting that Part I and indeed the book as a whole should open with John Goldberg and Benjamin Zipursky's "Tort Law and Responsibility," as those frequent co-authors joined the field after Owen's 1995 volume and have made some of the most important contributions to philosophy of tort law since that time. Arguing for the centrality of responsibility to tort law, their chapter at once valorizes and challenges Stephen Perry's Honoré-inspired conception of outcome-responsibility. Goldberg and Zipursky maintain that, as powerful as Perry's account of tort law is, their now-famous account, which they have dubbed civil recourse theory, is more powerful still. Goldberg and Zipursky present civil recourse theory as corrective justice's cousin—related, but nevertheless quite different.

It is worth noting that many who advocate corrective justice, including Ernest Weinrib, have challenged that characterization, suggesting that civil recourse theory is closer to corrective justice's fraternal twin, or even its doppelgänger. In any case, Goldberg and Zipursky do emphasize certain features of tort law that most corrective justice theories do not. Civil recourse theory holds that the state institution of tort law enables private individuals, who have suffered legally cognizable harm, to seek redress against those who are purportedly responsible for their injury. The theory self-consciously adopts many elements central to corrective justice accounts of tort law, to be sure, but according to Goldberg and Zipursky, what drives civil recourse theory is not correction as such, but the *opportunity* for *recourse*. Civil recourse theory highlights the role played by a plaintiff in initiating a tort suit—the institution of tort law is not some government agency that seeks out unjustly harmed parties and automatically compensates them—as well as the fact that not all recourse comes in the form of corrective compensation, as corrective justice supposedly maintains. In this respect, Goldberg and Zipursky argue that civil recourse theory provides an interpretation of tort law's doctrines that is superior to corrective justice's in general, and in their chapter here, to Perry's in particular.

Among Goldberg and Zipursky's most prominent contributions to tort theory has been their defense of the duty of care element in the tort of negligence. It is here that civil recourse theory runs most closely parallel to many corrective justice theories, which also take the duty element seriously. On this shared view, the duty element introduces a distinctive question of law that cannot be reduced to a question of breach of duty or a question of proximate causation: namely, whether the defendant owed a duty of care to the plaintiff in the first place. William Prosser famously contended that the duty element is just a placeholder for the multifarious public policy considerations that should inform a judge's determination of whether to allow a negligence suit to go forward. The growing numbers of philosophers of tort law who dissent from this instrumental view argue, in reply, that the doctrinal platitude that the duty element is keyed to a non-instrumental conception of reasonable foreseeability is in fact defensible. In his contribution, "Torts, Rights, and Risk," Stephen Perry joins that defense. But he also shows just how complex the defense must be, as it cannot but raise hard questions about reasonable foreseeability, the nature of risk, and the concept of rights. While Perry is keen to offer a suitable interpretation of the positive law of negligence, he also seeks to clarify what he calls the "moral character" of duty.

Focusing on the duty element from the other side, as it were, Perry explores the content of the right that anyone has not to be harmed. When one does this, on his view, one sees that the torts of negligence and strict liability, often considered to be in conflict, share the same moral core: the two torts are different ways of accommodating anyone's qualified right not to be harmed. In the case of negligence, one has a right not to be harmed through the careless conduct of another, which correlates with a duty to exercise reasonable care towards others. In the case of strict liability, one has a right not to be harmed through reasonably foreseeable and seriously risky conduct of a certain kind, which correlates with a duty not to cause "reasonably foreseeable,

sufficiently proximate physical harm as a result of engaging in a certain type of activity". This leads Perry to expand on his illuminating prior work on the nature of harm, and ultimately, to expand on his equally illuminating and highly influential work on the nature of risk. The notions of acting carelessly towards another and of reasonable foreseeability depend upon a particular understanding of risk, and no one has contributed more than Perry to the understanding of risk in a legal and moral context. After rehearsing his well-known argument for why risks are not themselves harms in some fundamental sense, he argues at some length against those, like me, who have criticized different aspects of his views on risks, harms, and rights, before turning to reasonable foreseeability itself. Here, Perry fires back at Goldberg and Zipursky, essentially arguing that, their efforts to highlight the importance of the duty element notwithstanding, they fail to take that element seriously enough, for they underplay the importance of reasonable foreseeability to duty.

If different forms of responsibility figure as the lodestar of Goldberg and Zipursky's and Perry's contributions, Mark Geistfeld counters that compensation is tort law's fundamental concern in "Compensation as a Tort Norm." Geistfeld has long been a leading figure in tort theory, and is distinguished in part because, though trained as an economist, he takes seriously philosophical approaches to the subject. Indeed, Geistfeld has faced criticisms of the economic analysis of torts head-on, and has attempted to broker a détente of sorts between economists and corrective justice theorists. In his contribution here, Geistfeld continues the rapprochement.

There would seem to be nothing more obvious about tort suits than that plaintiffs bring them in order to be compensated for an injury that they have suffered. Yet, Geistfeld notes, few tort theorists have been moved by that explanatory fact to conclude that a norm of compensation justifies the practice of tort law. Geistfeld seeks to establish that commonsense conclusion. But the project faces an immediate interpretive challenge posed by the fact that negligence, and not strict liability, is the default tort used to compensate. If a norm of compensation truly justified tort law, one might expect all injuries to warrant compensation. Generally speaking, however, only those injuries caused carelessly warrant compensation. Drawing on Ronald Dworkin's celebrated equality-of-resources theory of distributive justice, Geistfeld maintains that exercising reasonable care in conformity with the tort of negligence distributes risk so as not to violate anyone's compensatory right. According to Geistfeld, the compensatory norm so understood also merges with the norm of deterrence—an animating value within many economic accounts of tort law. And the result, surprisingly enough, is a compensatory tort right that also satisfies the demands of corrective justice.

Upon consideration, it is not especially surprising that Geistfeld's compensation-based theory might implement corrective justice. Compensation seems to be exactly what the corrective aspect of corrective justice is about. Indeed, it is the close connection between corrective justice and compensation that lends credence to Goldberg and Zipursky's criticism that corrective justice is blind to tort law's other forms of recourse. But even they recognize that the central case of recourse within the law of torts is compensation. Might tort law also embrace more fulsome recourse? Scott

Hershovitz thinks so. He makes the case that tort law accords a prominent role to revenge, arguing in "Tort as a Substitute for Revenge" that tort suits can take the place of revenge. It does this in a number of ways. Tort suits can displace revenge by placating a plaintiff with money damages—a payoff of sorts. Or they can displace the hot revenge of violence with the cooler revenge of punishment, either in the straightforward sense reflected by punitive damages, or in the subtler sense in which exacting payment from another necessarily constitutes punishment. Like Geistfeld, Hershovitz casts his argument within the frame provided by corrective justice: tort serves as a substitute for revenge, according to Hershovitz, because both serve corrective justice. And just as revenge can send a message, so too does corrective justice. It sends a message about the plaintiff's standing and the defendant's responsibility. Hershovitz goes on to defend this novel expressive conception of corrective justice against the traditional reparative Aristotelian version.

Responsibility, compensation, and revenge are candidates for tort law's grounding values and concepts. In my contribution, "Structure and Justification in Contractualist Tort Theory," I explore and defend the possibility that a contractualist conception of justification underlies tort law. Where George Fletcher's and Gregory Keating's theories, for all of their important differences, converge in deploying a contractualist framework owing to John Rawls, I look to Thomas Scanlon's distinctive version of contractualism. It seems to me that the pride of place that Scanlonian contractualism accords to a particular compelling conception of moral justification, which accords normative primacy to claimants and their claims, imbues a theory of tort law founded on it with essential virtues. Principally, I argue that such a theory can account for tort law's primary and not merely secondary obligations, unlike corrective justice or civil recourse theories, as well as make sense of the definitive bilateral plaintiff-defendant structure of tort suits, unlike either economic or Rawlsian contractualist theories. Beyond these interpretive virtues, though, the theory I advance is unapologetically moral—I offer it as a justificatory account to rival economic accounts, highlighting the sense of wronging at its core. Though my contribution only introduces an overlooked contractualist understanding of tort law, I hope that in my presentation it is plausible enough that others might join me in exploring the theory's promise.

I assume in my chapter that any plausible theory of tort law must accord priority to primary over secondary obligations and make sense of the bilateral structure of a tort suit. In "On the 'Property' and the 'Tort' in Trespass," Eric Claeys pursues related questions, examining the possibility that rights-protection is more fundamental to normative justifications for tort, while corrective justice is more important for explaining tort's structure and organizing concepts. But he does so in an especially creative way. Most who work principally in tort theory take negligence to be the signal tort, and assume that what there is to understand about tort law can be best understood by unpacking the tort of negligence. Claeys is first and foremost of scholar of property law, however, and he brings to bear his special insight into property torts to illuminate the terrain. Just as switching from a road map to a topographical map can make familiar territory new, Claeys's focus on the interplay between substantive property

rights in land, on the one hand, and various actions and defenses protecting those rights, on the other, is at once alien and interesting. Ultimately, he defends the possibility he sets out to examine: property torts do indeed effect corrective justice, but they also depend upon an antecedent account of substantive property rights.

In the final chapter of Part I, Peter Cane ventures into territory that truly is uncharted. If the signal tort is negligence, then the paradigm tort suit involves one private party suing another. A great deal of theory has been spilled trying to delineate and appreciate the nature and importance of the juridically equal relationship between a private plaintiff and a private defendant. And yet, in "Tort Law and Public Functions," Cane points out that next to nothing has been written about juridically unequal relationships, which are hardly peripheral to tort law. A juridically unequal relationship, as Cane explains it, holds between a private plaintiff and a public agent acting on the public's behalf—basically, a citizen versus the state. If one desideratum of a tort theory is that it be able to make sense of the bilateral structure of a tort suit, then according to Cane, another is that it be able to accommodate juridically unequal relationships. It is hard to argue with Cane on this point, which makes it all the more embarrassing that tort theory has largely overlooked the importance and distinctiveness of such actions. Wisely prescinding from debate between non-instrumental and instrumental theories, Cane seeks to show how each theoretical family might make room for relationships of juridical inequality—his goal is refreshingly non-partisan. Regarding non-instrumental accounts, Cane maintains that our conception of justice will have to be developed, for the justice of interactions between a citizen and the state will have a different cast than justice between two private citizens. Instrumental accounts, also, will have to be reconceived. For example, instead of focusing on the incentives that a given liability regime creates to guide private parties towards efficient behavior, instrumental theories should highlight how tort law can be used as a tool to promote accountability, and thus legitimacy, in the exercise of state power. Cane's suggestions on this score are sensible. More important, though, is the new adequacy condition that he proposes: it is no longer good enough for a theory of tort law to dwell only on the juridically equal relationship between private parties. As the ever-growing administrative state increases the scope of government power, and thus the opportunity for the state to exploit its citizens, Cane's proposal should be taken very seriously indeed.

Where Part I takes up foundational questions about tort law as such, the eight chapters in Part II focus on fundamental questions within tort law. As the compound title, Harms, Wrongs, Responsibility, and Liability attests, the questions explored here revolve around the nature and significance of harm, wrongdoing and the responses it warrants, and the conditions and limits of responsibility and liability. Victor Tadros opens with "What Might Have Been," a characteristically subtle inquiry into the nature of harm. If tort law is going to compensate aggrieved parties for the harm they have suffered, then it is crucial that the conception of harm assumed by tort law's compensatory aim be sound. Tadros powerfully defends a counterfactual account of harm: an event harms a person if that event renders the person worse off than she would have been in some other possible world—hence the title of his chapter. But Tadros

introduces an important wrinkle. On his view, the possible world that serves as a benchmark is not necessarily the world in which the event would not have occurred, for other possible worlds may be relevant. Arguing against absolutist and temporal accounts of harm, Tadros also fends off the charge that over-determination cases undermine his counterfactual theory. He actually reverses the threat. On Tadros's view, only a counterfactual theory offers an adequate account of cases where more than one cause would be sufficient to bring about some harm.

Tadros assumes that harm triggers compensation. In "Why Reparations?," Rahul Kumar expresses doubts about that assumption. (It is independently interesting that both Tadros and Kumar, each of whom work primarily outside of tort theory, assume a conception of tort law like the one that Geistfeld defends.) Kumar approaches the issue from an interesting angle, by querying the normative basis of claims for historical intergenerational injustice. He argues that it is not harm that triggers reparations, but wrongdoing understood in a particular way. On his view, it is a serious distortion to characterize claims for reparations as calls for compensation for harm done. A harm-based view, which Kumar assimilates to tort law's approach, recognizes the importance of the fact that what was done matters morally, but it mistakenly emphasizes the harm that was done. The chief alternative to a harm-based view, emphasizing reconciliation, however, overlooks the importance of the past, according to Kumar. Justice is inherently backward-looking, but reconciliation looks to the past only instrumentally to determine what would make (essentially forward-looking) reconciliation most effective. Still, Kumar notes that the reconciliation-based approach recognizes the importance of people standing in a relation of civic trust to one another. So, Kumar opts for a middle way, which takes on board the sound elements in each of the two rival accounts: the basis of reparations claims lies in how some wrongdoer has related to some wronged person or peoples. Kumar thus favors a normative basis of reparations that appropriates a harm-based emphasis on responding to what was done in the past, and a reconciliation-based emphasis on the importance of the relation in which people stand to one another. He goes on to illustrate the merits and reach of his theory by discussing the basis of African-American claims to reparations for slavery.

Antony Duff's contribution fruitfully intersects with Tadros's and Kumar's discussions. Like Tadros and Kumar, Duff works primarily outside of tort theory, and like Tadros, he works primarily in criminal law theory—he is, in fact, one of the world's leading criminal law theorists. In "Repairing Harms and Answering for Wrongs," Duff considers civil recourse theory as developed by Goldberg and Zipursky, or "Goldursky" as he refers to them, and relates the conception of tort law that it underwrites to criminal law. Duff applauds the ability of civil recourse theory to get beyond compensation for harm, and to enable wronged persons to hold to account those who have wronged them. This is not surprising, as Duff can surely see his own important views about criminal law and the role of criminal trials finding an independent footing within tort theory. But that is the rub for civil recourse theory. For Duff argues that a civil recourse process must mirror the criminal process much more that Goldberg and Zipursky allow. From such a perspective, tort law appears to be unduly permissive:

third-party insurance coverage, which is the tail that wags the tort law dog, as well as pre-trial settlements that preempt the vast majority of civil trials, for example, would seem to undermine the efficacy of authentic civil recourse. At the same time, tort law seems unduly restrictive: criminal law's wide variety of justifications and excuses would seem to deserve a place within tort law that they presently lack. Duff's attention to the details of civil recourse theory reveals a number of questions that Goldberg and Zipursky and those who follow them must confront, and it also stands as proof that tort theory is not for tort theorists alone.

Just as Duff shows how civil recourse theory relates to criminal law and exerts pressure on the traditional doctrines and boundaries of tort law, Linda Radzik argues that corrective justice resonates well beyond the confines of tort law in "Tort Processes and Relational Repair." According to Radzik, a reconciliation-based conception of corrective justice whose home lies outside of tort law is far more dynamic than the variety officially recognized by tort law. Once it is recognized that corrective justice is dynamic in this way, playing roles in myriad social, political, and moral debates, the version on display in tort law looks exceedingly pale and cramped by comparison. Radzik goes so far as to argue that the contribution of tort processes to corrective justice is actually quite limited. Worse still, if founded on corrective justice as so many contend, then tort law is almost perverse. For on Radzik's view, if one has to resort to tort processes for corrective justice, then true repair—relational repair—is likely impossible.

The fuller form of corrective justice represented by Radzik's notion of relational repair suggests that corrective justice, in at least certain of its incarnations, is a value that we should not wish to live without, even if tort law fails to offer a variety of corrective justice that is particularly attractive. But perhaps tort law, and specifically tort liability, offers something worth wanting after all. David Enoch tentatively believes that it does. In "Tort Liability and Taking Responsibility," he maintains that tort liability has moral merit, at least in part, because it enables people to take responsibility—that is, to actively assume responsibility where one does not already bear it. Tort liability, on this view, thus presupposes a (literally) powerful conception of human agency, one in which it is possible to make it the case that one is responsible for another's injury. There is much to be said in favor of the capacity to take responsibility as Enoch understands it, and that value should give one pause before one rejects tort law for having no moral merit. On Enoch's view, however, it remains an open question what to do after that pause. A society without tort law will lack the particular way of taking responsibility that tort law enables, to be sure, but it does not follow that such a society will necessarily lack other adequate ways of taking responsibility. In this, Enoch's position resembles Coleman's, who has voiced something like the following qualified defense of corrective justice: the form of personal responsibility that tort law institutionalizes is a value that ought not to be forsaken, such that if society abandons tort law, it had better find some other way of valorizing personal responsibility.

Personal responsibility and the idea of taking responsibility also figures in "Exploring the Relationship between Consent, Assumption of Risk, and Victim Negligence,"

by Ken Simons. Where Enoch and those who share his sense of the importance of responsibility usually have in mind the responsibility of one who caused harm to others, Simons focuses on the responsibility for harm that is born by the person who suffered harm. Thus, he meticulously analyzes consent to harm, assumption of risk, and comparative fault, as well as their interconnections. Simons argues that the concept of consent differs in certain respects from assumption of risk, but that they nevertheless share a common core. He also maintains that both are complete defenses: they outright preclude and do not merely diminish damages, as under comparative fault. At the same time, however, assumption of risk rarely gains traction as a defense, while consent regularly does. This, Simons argues, is due not to any deep conceptual or normative difference between the defenses, but to significant factual differences between the most common scenarios in which each arises. Specifically, in standard cases of consent but not assumption of risk, the plaintiff and defendant each benefit from the harmful interaction, or at least the plaintiff justifiably relies on the defendant's apparent consent.

Simons's contribution underscores the fact that those who suffer harm are not necessarily true or innocent victims. For they can be responsible, innocently or not, for their own injuries. As this much makes clear, there are limits to a defendant's liability that have nothing to do with the defendant's own conduct. Of course, there are also defendant-derived limits to liability: some kind of fault is usually a condition of liability for harm. This is a consequence of the centrality of the tort of negligence in the wider constellation of torts. Weinrib is probably the most famous contemporary philosopher of tort law to argue that fault must be a condition of liability. In throwing down this gauntlet, he stands against the defensibility of strict liability. Strict liability appears to lack any justification if one approaches it, as Weinrib does, assuming that wrongdoing requires fault. In his contribution here, "Strict Liability Wrongs," Gregory Keating forcefully dissents from such an assumption. Keating argues that strict liability torts are genuine wrongs that violate rights. In making this case, he distinguishes between two domains of strict liability wrongs: harm-based wrongs and sovereignty wrongs. One commits a harm-based wrong that triggers liability if one harms another but fails to redress it. For example, if one engages in an ultra-hazardous activity like dynamiting a quarry that injures someone, even after taking great care not to cause harm, then one is duty-bound to compensate the injured person and wrongs them if one fails to do so. Keating maintains that one commits a sovereignty tort if one violates the fundamental autonomy rights of another, as when one uses another's property without permission. Even if one uses the property for shelter from a vicious storm, and thus uses the property justifiably, one nevertheless wrongs the property owner, for one violates the property owner's sovereignty. Keating, it is clear, defends a more expansive conception of liability than many are willing to countenance. Keating has his reasons, to be sure: limiting the liberty of would-be defendants is a lower price to pay than sacrificing the safety of would-be plaintiffs, especially when insurance is readily available to would-be defendants.

A regime of strict liability clearly expands the liability of those subject to it. But one's liability can be expanded along a different dimension as well. Just as fault-based liability can be supplemented by no-fault strict liability, compensatory damages can be supplemented by punitive damages. The final chapter in this section, by Anthony Sebok, addresses this latter expansion. In "Normative Theories of Punitive Damages: The Case of Deterrence," Sebok sizes up the deterrence argument for punitive damages. Contrasting tort law's punitive damages with the full-throated punishment that public law recognizes, Sebok makes a pair of key observations. First, the technical resources necessary to achieve deterrence are unavailable in common law punitive damages, making it unlikely that punitive damages could achieve their putative goal. Second, the common law of punitive damages eschews any appeal to political legitimacy to justify its choice of punishments. This, Sebok concludes, is a shortcoming. The chapter concludes with the revisionist claim that political legitimacy, rather than deterrence, should be foregrounded as the justification of punitive damages at common law.

Parts III and IV are shorter, including just two chapters apiece. Part III, Distributive Justice in Tort Law, includes a pair of sequels. John Gardner's "What is Tort Law For? Part 2. The Place of Distributive Justice," follows up on his already influential 2011 *Law and Philosophy* article, "What is Tort Law For? Part 1. The Place of Corrective Justice," while Hanoch Sheinman's "Tort Law and Distributive Justice," follows up on his excellent *Law and Philosophy* article from 2003, "Tort Law and Corrective Justice." Questions about the role of distributive justice in tort law have long been a part of debate in tort theory, even if debate surrounding corrective justice has garnered more attention. Fletcher, Coleman, Weinrib, and Honoré, among others, have all weighed in, in quite different ways, on the place of distributive justice in tort law. Here, Gardner and Sheinman each offer an account of tort law's special distributive role—the distributive role that tort law cannot fail to play. Gardner identifies two ways that tort law is concerned with distribution: it distributes rights to corrective justice between classes of people, and it distributes the loss between the parties in a tort suit. Though he recognizes ways in which tort law implicates distributive justice, however, Gardner also recognizes that corrective justice remains supreme. For what these two ways have in common is that they are both incidental to tort law's primary corrective goal. Sheinman disagrees in an interesting way with Gardner. Instead of seeing distributive justice as subsidiary to corrective justice, Sheinman actually identifies tort law's special distributive role with its corrective role. On his view, tort law's distributive justice just is its corrective justice. In this way, Sheinman's account rejects the prevailing assumption that corrective and distributive justice must be distinguished, for he rejects the widespread view that the two forms of justice are categorically distinct.

Part IV, Skeptical Perspectives, includes two chapters that raise troubling questions about the tort of negligence and tort law as a whole, respectively. Heidi Hurd's contribution, "Finding No Fault with Negligence," concludes that negligence liability is, despite appearances, a species of strict liability. Hurd begins by arguing that carelessness is not, in fact, blameworthy. She next equates fault with blameworthiness.

And on the force of this identification, Hurd reaches her startling conclusion: the tort of negligence is actually a no-fault tort, entailing that negligence liability is strict. Hurd contends that this presents the many corrective justice theorists who object to imposing liability without fault with the following trilemma: (1) they must give up their conviction that tort law should correct injustices; or (2) they must give up their conviction that injustices occur only when blameworthy persons cause harms; or (3) they must denounce negligence liability and work towards the adoption of a tort system that maps civil liability onto conditions of genuine moral fault.

Hurd does not jettison all of tort law, she just dislodges its keystone. Frequent co-authors Larry Alexander and Kimberly Ferzan take on the bigger job. They witheringly argue that tort law is an ad hoc collection of doctrines that are either incoherent or normatively indefensible or both. According to Alexander and Ferzan, tort law's mistakes begin with the conception of duty at its heart. There is no duty not to cause harm, for harm is reciprocally caused—every plaintiff necessarily plays a causal role in his or her own injury. Nor is there a duty not to cause harm through faulty conduct. Sharing Hurd's view, Alexander and Ferzan hold that there is no fault in not adverting to some risk, and thus that negligence liability amounts to strict liability. The only duty that Alexander and Ferzan recognize is a duty not to cause harm through culpable or blameworthy conduct. And yet even this duty must be revised, for one can be blameworthy without causing harm. This leads Alexander and Ferzan to conclude that tort law errs in requiring the causation of harm. This in turn leads them to catalogue the myriad supposed flaws in tort law's understanding of both actual and proximate causation. If tort law has any legitimate aims, Alexander and Ferzan conclude that they would be better met by some other institution. For my part, I am skeptical that Hurd's and Alexander and Ferzan's skepticism is warranted. Theirs are, however, powerful challenges that demand answers that will exercise anyone who seeks to defend tort law traditionally conceived.

This volume should enrich the study of torts and the broader issues that tort law implicates for some time to come. It is my hope that it will come close to the contribution made by *Philosophical Foundations of Tort Law*, which deserves a prominent place in any update to Owen's thumbnail history of tort theory. If it achieves that influence, it will represent a remarkable turnaround. For this book was literally born under a cloud. It grew out of a two-day conference in November 2012 sponsored by the Rutgers Institute for Law and Philosophy and held at the Rutgers School of Law in Camden, New Jersey, which convened just days after Superstorm Sandy had ravaged that state and the surrounding region. Amazingly, the storm forced just one cancellation, though it threw a spanner into the travel plans of many others, whether they were traveling from across the globe or down the New Jersey Turnpike. Still, the show did go on. And as the chapters here suggest, it was a great success.

I am grateful to the presenters and other participants for the high quality of the discussion at the conference. But as anyone who has organized a conference knows, it is not merely the participants who deserve credit for a successful scholarly event. Conference planner extraordinaire Carol Shaner handled a wide variety of crucial

details expertly and efficiently and was, as always, a pleasure to work with. I also enjoyed broader institutional support, the importance of which cannot be overstated. Dean Rayman Solomon deserves thanks from the community of scholars who contributed to and will benefit from this volume. No member of any faculty could ask for a better leader or a more ardent supporter of a law school's scholarly mission. And I am as lucky to count him as a friend as I am to call him my dean. I dedicate this volume to him.

I owe thanks to others for their roles in bringing the resulting volume to publication. I am grateful to Thomas Benton, Justin Corbalis, and especially Michael Edelman for their editorial skill and overall dependability in assisting me with the final product. Their work was tedious but essential. I also thank Alex Flach for initiating this volume and entrusting it to me, Natasha Flemming and Clare Kennedy for shepherding it through many phases of the publication process with so much patience, and Erin Pearson for seeing it through to press. Last but certainly not least, I owe my wife, Patty, and my three kids, Sophie, Lucas, and Greta, my infinite gratitude for their own patience with this project.

# PART I

# FOUNDATIONS OF TORT LAW

# 1

# Tort Law and Responsibility

*John C.P. Goldberg and Benjamin C. Zipursky**

## I. Introduction

When a court enters a judgment for a pedestrian who has sued a driver for negligence, it holds the driver responsible to the pedestrian. The basis of the driver's being held responsible, obviously, is the driver's careless injuring of the pedestrian. The same is true for a judgment entered against a manufacturer on a claim by a consumer who is injured by a poorly designed product, for a private citizen defamed by a magazine, for an investor defrauded by a swindler, and for a child molested by a caretaker. In all of these cases, the plaintiff has suffered an injury because of the defendant's wrongful conduct, and she demands that the court hold the defendant responsible for that injury. In ordinary parlance, the defendant must compensate the plaintiff for her injury because it was the defendant's fault.

Tort law is in the foregoing senses a law of responsibility. It allows for persons to be held responsible (or accountable) for having wrongfully injured others. When lawyers say that tortfeasors are "subject to liability," they mean that, in light of what the tortfeasor did and the injury suffered by the plaintiff, the tortfeasor is vulnerable to being held responsible or accountable to the victim through the court system.

Much of the debate in contemporary tort theory has pitted corrective justice theory against efficient deterrence theory. Among the problems with this framing is that it deflects attention away from what should be the main contenders in this domain, namely, *responsibility-based* theories of tort law. To be sure, there are many overlaps between responsibility-based theories and corrective justice theories. But the responsibility view is not best described as a version of corrective justice theory. This is for both positive and negative reasons. As to the positive: responsibility and accountability are the concepts at work on the face of the law; "justice" is not. As to the negative: it

* Thanks to John Oberdiek for arranging this volume and for organizing the conference at Rutgers School of Law from which it grew. We received many helpful comments from our fellow conferees, and especially our commentator Rahul Kumar, as well as from participants in the Notre Dame Law School Faculty Workshop. Remaining errors are ours.

is frequently untrue in a tort judgment that any kind of correction really occurs, and it is frequently the case that the judgment better conforms to a notion of who is *responsible* than it does to the more aspirational idea that the defendant must pay in order for justice to be achieved.

Responsibility-based views take many forms. Particularly influential versions have been offered by scholars from the UK, including Honoré and Hart,[1] as well as Strawson.[2] (Contemporary corrective-justice theory, by contrast, has been developed most fully by North American scholars including Epstein, Coleman, and Weinrib, who in turn have relied on Lockean, Aristotelian, and Kantian political and moral theory.[3]) A wide range of contemporary theorists probably are rightly treated as responsibility theorists, including self-proclaimed members of the corrective justice camp such as Coleman, Arthur Ripstein,[4] and Stephen Perry,[5] but also Peter Cane,[6] William Lucy,[7] Martin Stone,[8] and ourselves.

In what follows, we first outline Perry's impressive effort to craft a responsibility-based account of tort law. We invoke it to demonstrate the ability of responsibility theories to capture basic features of, and important modern developments in, tort law. Along the way, we contrast it briefly with views of tort that are problematic either because they fail to give responsibility a central place, or because they draw too close a connection between holding persons responsible and doing justice.

Having invoked Perry's theory to establish the plausibility and value of viewing tort law in terms of responsibility, we next argue that the account that we have developed under the banner of "civil recourse theory" provides a better version of responsibility theory. Tort law is best understood as law that defines duties not to injure others and leaves those who have breached such duties vulnerable to their victims' demands for responsive action.

By way of conclusion, we offer some thoughts on why it is especially important today to recognize the central place of responsibility in the law of torts.

[1] See, e.g., H.L.A. Hart and Tony Honoré, *Causation in the Law* (Oxford: Clarendon Press, 2d ed. 1985), 130–307; Tony Honoré, "Responsibility and Luck," 104 *Law Q. Rev.* 530 (1988).

[2] Peter Strawson, "Freedom and Resentment," 48 *Proceedings of the British Academy* 1 (1962). Obviously Strawson was not a tort theorist. His philosophical discussion of responsibility nonetheless has been broadly influential among moral and legal theorists interested in exploring legal responsibility.

[3] Richard A. Epstein, "A Theory of Strict Liability," 2 *J. Legal Stud.* 151 (1972); Jules L. Coleman, *Risks and Wrongs* (New York: Oxford University Press, 1992), 197–385; Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995).

[4] See, e.g., Arthur Ripstein, "As if it Never Happened," 48 *Wm. & Mary L. Rev.* 1957 (2007).

[5] Stephen R. Perry, "Responsibility for Outcomes, Risk, and the Law of Torts," in Gerald Postema (ed.), *Philosophy and the Law of Torts* (Cambridge: Cambridge University Press, 2001), 72–130 [hereinafter Perry, *Responsibility for Outcomes*]; Stephen R. Perry, "The Moral Foundations of Tort Law," 77 *Iowa L. Rev.* 449 (1992) [hereinafter Perry, *Moral Foundations*].

[6] Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002).

[7] William Lucy, *Philosophy of Private Law* (Oxford: Oxford University Press, 2007).

[8] Martin Stone, "The Significance of Doing and Suffering," in Gerald Postema (ed.), *Philosophy and the Law of Torts* (Cambridge: Cambridge University Press, 2001), 131–82.

# II. Responsibility Theories of Tort Law

## A. Perry on responsibility in tort law

Responsibility theories of tort make two basic claims. First, for any successful tort claim in which a defendant is deemed liable to a plaintiff, the court is *holding the defendant responsible to the plaintiff*. Second, the defendant's responsibility rests on the defendant's *being responsible* for having injured the plaintiff.[9] Obviously these claims are quite general, which is why responsibility theories can take different forms, depending on how they describe the terms on which the defendant is held responsible to the plaintiff and the grounds on which the defendant is deemed eligible for bearing that responsibility.

[9] John Finnis has urged us to discuss how our usage of "responsibility" and its cognates relates to Hart's famous taxonomy, which identifies four aspects of the concept: (a) role-responsibility, (b) causal-responsibility, (c) liability-responsibility, and (d) capacity-responsibility. H.L.A. Hart, *Punishment and Responsibility* (Oxford: Oxford University Press, 2d ed. 2008), 210–30.

Hart had relatively little to say about iterations (a), (b), and (d). As he defined it, the term "role-responsibility" refers to substantive duties that attend certain reasonably well-defined roles. To use his example, a ship's captain incurs a responsibility for the safety of his ship by virtue of assuming the position of captain. Tort law's duties of non-injury (and with them, the possibility of liability for injury) are often role-dependent or relationship-dependent. For this reason, any plausible account of tort law will incorporate notions of role-responsibility. However, these kinds of duties are not our primary focus here.

"Causal-responsibility" refers to uses of the term "responsibility" that provide normatively spare or agnostic descriptions of cause-effect relationships, as in the sentence: "Wilt Chamberlain was responsible for the National Basketball League changing its rules for free throws." A great deal of confusion stems from conflating causal-responsibility with the normatively richer notion of a person *being responsible for having caused* some state of affairs. (Indeed, Hart in his work on causation with Honoré was arguably guilty of such conflations.) To avoid these problems, we try to avoid using "responsibility" and its cognates as synonyms for "causation" and its cognates, and we follow that practice here.

"Capacity-responsibility" refers to characteristics that render a person eligible for attributions of responsibility, including faculties of reason, self-control, and the like. Any account that depicts tort law as law that holds actors responsible for injuries caused to others presupposes some conception of capacity-responsibility. It is not our present concern to specify that conception.

Hart gave a bit more attention to the idea of "liability-responsibility." To the extent it is helpful to situate this chapter and our work in relation to his, it is fair to say that our main concern is also with this form of responsibility. This is hardly surprising. As he suggested by his choice of label, Hart argued that liability-responsibility is closely connected to concepts of legal liability and moral blame. Determinations of liability-responsibility, he argued, require attention to the elements or components of liability and blame, including the mental or psychological attributes of an actor's actions, the possible causal connection between the conduct of the actor and the injury for which the actor is potentially liable or blameworthy, and the relationship between the actor and whomever or whatever brought about the injury in question.

As we note below, Stephen Perry's account of responsibility, on which we will focus in this chapter, builds directly on the work of Tony Honoré, who, famously, was Hart's co-author, and who developed an account of liability-responsibility roughly along these Hartian lines. We, like Perry, suppose that in the vicinity of what Hart called "liability-responsibility" there is a familiar usage of the term "responsibility"—one that alludes to or connotes a connection between actor, action, and injury, and does so as part of an inquiry into the propriety of deeming an actor liable or to blame. What those connections are (on our view) and how this view of these connections relates to the ideas of Perry (and, to a lesser extent, Honoré and Hart) are sketched below.

In his superb article on "The Moral Foundations of Tort Law,"[10] Stephen Perry offered a powerful version of responsibility theory. Building on the work of Honoré, Coleman, and Weinrib, Perry maintained that tort law holds a defendant responsible to the plaintiff in the particular manner of enforcing the defendant's moral duty to repair the plaintiff's loss. That duty is ultimately grounded, in significant part, in the defendant's being "outcome-responsible" for that loss.

Roughly speaking, a person is outcome-responsible for a loss if the person's volitional action was a necessary condition for the loss's having occurred, and if the loss was avoidable, in that the person could reasonably have foreseen that his action might cause the loss, and the person was capable of acting so as not to cause it.[11] Critically, for any given loss, there can be more than one outcome-responsible actor, including the victim herself.[12]

Perry calls this a "volitionist" conception because it centers on the idea that: (a) volitional action creates an agency connection between a person and certain outcomes, and (b) that agency-connection generates agent-relative reasons for action.[13] More is needed, however, to travel the full distance from the notion of outcome-responsibility to a defendant's being required, through a tort-based legal obligation, to heed his moral duty to repair another's loss. Outcome-responsibility generates moral reasons for action in relation to an outcome. But it is a relatively thin conception of responsibility. Again, one is outcome-responsible for a loss merely by virtue of having caused it where it was avoidable. Fault is not required. (Indeed, as Perry notes, Honoré originally invoked the concept of outcome-responsibility as part of an effort to provide a moral justification for strict liability.[14])

Correspondingly, outcome-responsibility often generates moral reasons for action falling short of reparation. If I carefully back my car out of my driveway, but nonetheless strike my neighbor's trashcan, I am outcome-responsible for its being knocked over and dented. My having been the one who collided with it gives me a moral reason to do *something* with respect to that outcome. However, given that I was driving carefully, it may be that I incur nothing more than a responsibility to pick up the can and place it in an appropriate spot. Making a difference in the world gives rise to reasons to take further actions, but the particular actions I have reason to take will depend on additional considerations.

According to Perry, to move from outcome-responsibility to a moral duty of repair requires the invocation of a distinct set of "distributive" considerations.[15] Suppose a pedestrian is crossing a residential street and a driver runs into him, knocking him over and breaking his arm. Because collisions of this sort are, unfortunately, commonplace, the scenario was reasonably foreseeable to both the driver and the pedestrian, each of whose actions (we can suppose) were necessary for the loss to occur.

[10] Perry, *Moral Foundations* (note 5). We recognize that Perry has developed his account of torts in subsequent writings. See, e.g., Perry, *Responsibility for Outcomes* (note 5). We nonetheless focus on this articulation as a particularly clear and powerful statement of a responsibility-based account of tort.

[11] Perry, *Moral Foundations* (note 5) at 505.

[12] Perry, *Moral Foundations* (note 5) at 498.

[13] Perry, *Moral Foundations* (note 5) at 507, 513.

[14] Perry, *Moral Foundations* (note 5) at 491.

[15] Perry, *Moral Foundations* (note 5) at 509–10.

Thus the pedestrian's loss is one for which both the pedestrian and the driver are outcome-responsible. If the pedestrian were to sue the driver in negligence, she would be seeking the state's assistance in holding the driver responsible. The law of negligence, however, will require the pedestrian to establish that the driver was at fault. It does so, Perry maintains, as a way of answering the question of which of these two outcome-responsible persons should, in fairness, bear the cost of the broken arm. The plaintiff's proof that the defendant was driving carelessly (and that she was crossing carefully) establishes that the defendant is not only outcome-responsible for the loss, but also morally responsible, such that he now has reason to respond to the loss by indemnifying the plaintiff.

In sum, according to Perry, when we assess whether an actor is morally responsible for a loss, we are seeking to ascertain the answer to a question of "localized distributive justice"—of who in fairness should bear a given loss—by reference to the relative faultiness of the conduct of all outcome-responsible persons.[16] When tort law determines legal liability by reference to this criterion, it is doing so because it is a scheme for holding actors to the moral responsibility to repair that they incur by virtue of being *both* outcome-responsible *and* at fault for a given loss.

It is worth noting one other aspect of Perry's analysis. He argues that an appreciation of the precise role that fault plays in the legal analysis of a claim such as the pedestrian's enables one to grasp why legal "fault," though a moral concept, departs to some degree from notions of culpability or blame that tend to attach to notions of fault. Because fault is being invoked to resolve the distributive question of who should bear a given loss and because the universe of candidates eligible to bear that loss is determined by outcome-responsibility, it is appropriate, he argues, for negligence law to focus on the nature of the defendant's action, rather than on the defendant's blameworthiness for having acted in that manner. When we are looking for a reason to distribute a loss among outcome-responsible persons, the failure to meet negligence law's "objective" standard is a good enough reason, even if the person who fails to live up to the standard cannot be blamed for failing to do so.[17]

Perry's particular responsibility theory of tort is powerful because of its ability to order in an intuitive manner a complex set of considerations that bear on moral responsibility, and to do so in a way that likewise makes sense of well-established features of tort law, particularly negligence law. In assigning a critical role to foreseeability, in isolating the importance of causation and injury, in permitting the recognition of multiple responsible actors (including the possibility of victims being partly responsible for their own injuries), and in creating room for the use of a less-than-full-blooded version of fault, it captures a set of widely held moral judgments and a parallel set of tort concepts and doctrines. In turn, it offers the promise of explaining the contours of tort law by reference to moral judgments, and thereby legitimizing key features of tort law. In this respect, the project is cheering to

[16] Perry, *Moral Foundations* (note 5) at 513.

[17] Perry, *Moral Foundations* (note 5) at 509–10.

those of us who believe we should have reason to suppose a domain of law is justifiable before we are willing to stand by it.

## B. Responsibility in the real world: Products liability, comparative fault, and affirmative duties

Although moral-philosophical theories of tort law are criticized for being unrealistic, responsibility theories are often more grounded and more helpful than supposedly down-to-earth instrumental theories in making sense of settled law and important modern doctrinal developments. Here, we briefly discuss three such developments: the emergence of strict products liability, the adoption of comparative fault, and the recognition of new affirmative duties in negligence.

Strict products liability is typically defended on overtly instrumental grounds. Some say it provides an insurance-like mechanism for spreading losses. Others say that it incentivizes those in the best position to avoid product-related accidents to take appropriate steps to prevent those accidents. Yet products liability law contains fundamental limitations on liability that are difficult to justify by reference to these instrumental considerations.

Courts continue to demand of a products liability plaintiff that she come prepared to show a causal connection between the defendant's product and her injury. Moreover, causation is not enough, for the product must also be "defective."[18] While there has been much debate over how to define "defect," it is clear that courts require a products liability plaintiff to identify a problematic feature of the defendant's product in order to recover.

In this respect, products liability law resembles negligence law. One can reject (as we do) the claim made by the reporters for the Third Restatement's products liability provisions that, for cases of design defect and failure to warn, proof of "defect" amounts to proof of seller carelessness.[19] Still, they were right in recognizing that courts have rejected the notion that products-related liability should be divorced entirely from notions of wrongdoing and responsibility. Even in "strict" products liability, tort liability involves holding an actor responsible for having *wrongfully* injured another.

Responsibility theory on the model of Perry's helps us to see how this can be the case. A seller can cogently be deemed morally responsible for its product having caused an injury when the injury was an avoidable consequence of selling the product. And the seller becomes accountable in tort law when the seller is not only outcome-responsible, but when it acted in a wrongful (even if not particularly blameworthy) manner by sending out into the world a product containing a defect. As far as modern tort law is concerned, it is the seller's responsibility to ensure that its products are safe

[18] Restatement (Third) of Torts: Products Liability, § 2 (1998).
[19] Restatement (Third) of Torts: Products Liability, § 2 (1998), comment a.

for ordinary use, and sellers are held responsible to injury victims when they fail to do so and that failure culminates in injury.

The widespread replacement in the 1970s and 1980s of the all-or-nothing contributory negligence regime with comparative fault is hailed as a signature progressive development in modern tort law. It is sometimes explained and defended on essentially political grounds—for example, as an instance of judges being less determined to protect businesses from liability. But the abandonment of contributory negligence is in many respects the recognition in law of commonsense notions of responsibility. When a person is knocked down as a result of a sidewalk collision, or one child accidentally injures another while playing, we often and unproblematically think that each was partly responsible for the bad outcome. An observer of such an incident might instinctively judge that both the injurer and the victim should have been paying more attention and conclude that each is properly deemed partially responsible for the ensuing injury.

Perry's notion of localized distributive justice among outcome-responsible persons is consistent with these moral intuitions and their legal counterparts. We start with all persons appropriately connected to a loss, and then ask who among them should bear which portion of the loss. Whether liability and loss are apportioned on a pro rata basis or in proportion to each actor's relative fault need not be resolved at the level of tort theory. Likewise, one can grant that apportionment is appropriate in many cases, yet also maintain that there are some instances in which the victim is blameless, or conversely, that the victim's contribution to her injury is so significant relative to the defendant's that there is reason to deny her recovery altogether (as is done in "modified" comparative fault systems and systems that still recognize implied assumption of risk). It is enough to observe that comparative fault often tracks ordinary notions of responsibility and fault, so much so that it is now difficult to grasp why courts were once attracted to an across-the-board rule of contributory negligence. Today we think it obvious that, on many occasions, each of those whose faulty conduct was a necessary condition of a foreseeable injury is at least partially responsible for that injury. Everyday notions of moral responsibility thus help explain why comparative fault seems like an obvious improvement over contributory negligence.

A third modern doctrinal development of note concerns the increased willingness of courts to allow plaintiffs to look past an immediate injurer (such as an assailant) to a background actor whose carelessness is alleged to have set the stage for the injury (e.g., the owner of a parking garage or apartment building who fails to provide adequate security).[20] Fifty years ago, courts were, on the whole, more willing to accept defense arguments that the immediate injurer's wrong—often involving intentional and criminal misconduct—functioned as a bar to the imposition of liability on the background actor. (The immediate injurer's actions were said to constitute a "superseding cause"

[20] See John C.P. Goldberg and Benjamin C. Zipursky, "Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligent Enabling," 44 *Wake Forest L. Rev.* 1211 (2009) (discussing the judicial recognition of, and limits on, remote-actor liability for injuries inflicted more immediately by another).

that blocked the attribution of responsibility to the background actor, even assuming that the injuring would not have occurred but for that actor's carelessness.) Today, property owners are held liable, to varying degrees, for injuries that would not have occurred had they not been careless in failing to prevent criminal attacks on their properties. Likewise, the adult host of a party for high school students is subject to liability if an underage guest gets drunk at the party, drives while intoxicated, and injures another driver.

It is not hard to identify instrumental concerns that might seem to explain this pattern. Often the immediate injurer is judgment-proof, whereas the background actor can pay for the plaintiff's losses. Thus, one might suppose that this doctrinal trend is another testament to the strength of the plaintiff's bar and the willingness of judges to let plaintiffs search for deep pockets. But this account flounders on the fact that the expansion of this form of liability has been quite circumscribed. Even before Federal legislation blocked them, negligent marketing and public nuisance claims against gun manufacturers were rejected by American courts. More generally, courts have rejected product liability claims where the alleged defect is that an over-the-counter product can too readily be put to criminal use. They have likewise overwhelmingly rejected "social host" liability for cases in which the drunk driver is an adult rather than a minor guest.

One can fashion an instrumental explanation for these limits too, but the more plausible account of the overall pattern is that courts are looking to distinguish instances in which the background actor can plausibly be deemed *responsible* for the victim's injury. It is common ground in such cases that there is quite a lot to be said, from the point of view of prudent conduct and foresight, in favor of requiring the background actor to act so as to reduce the probability that a direct injurer (e.g., a burglar in a crime-infested neighborhood, an illegal-gun-toting assailant, a drunk driver) would seriously injure a person in the position of the plaintiff. Thus, for example, one can argue that a welfare-conscious landlord in a dangerous neighborhood should ensure that there are working locks on a building's doors, a welfare-conscious manufacturer of handguns should refuse to sell to downstream commercial gun distributors with a record of illegal retail sales, and a welfare-conscious social host should be vigilant about guests' sobriety. The question in such cases is whether, after a victim has been injured by the wrongful conduct of the immediate actor, the victim should prevail in a negligence claim against the background actor on the ground that his injuries were a foreseeable result of the actor's failure to take steps like those outlined above. Overwhelmingly, the courts seem to be moved by the following question: Even granted that it would have been appropriate and praiseworthy for the background actor to take the sort of precaution that he or she failed to take, does it make sense to say that the background actor is therefore *responsible* for the tenant's being attacked by an intruder, *responsible* for the criminal assailant's shooting of an inner-city teen, or *responsible* for the drunken guest's careless injuring of others on the road? When it comes to commercial owners of property, courts routinely say that the safety of tenants from intruders *is* in part the responsibility of a property owner. Conversely, courts tended to deny that the safety of ordinary persons from the attacks

of criminals who have illegally purchased handguns is the responsibility of gun manufacturers. Similarly, they deny that adults are required to treat their adult guests as children who need to be minded, and hence refuse to deem hosts responsible to persons injured by their adult guests' drunk driving. In other words, they hold strong views concerning whether a background actor is appropriately deemed *morally* responsible for an injury inflicted wrongfully by a third party, and from there attempt to determine when there might sensibly be legal responsibility and, with it, liability.

## C. Corrective justice theory and responsibility theory

Most corrective justice theorists believe that a defendant who has wronged a plaintiff is properly vulnerable to the plaintiff's claim against her. At least in the sense that the defendant is deemed properly answerable to a plaintiff, the defendant is deemed legally responsible for having injured the plaintiff. To the extent that corrective justice theorists derive the claim that a defendant is properly vulnerable to the plaintiff's claim from the defendant's having breached a duty to the plaintiff, there is a substantial isomorphism between responsibility theories and corrective justice theory. Where, as has been the case in the work of Coleman, Ripstein, and Perry himself, the putative corrective justice theorist actually describes his view in terms of the defendant's responsibility for the plaintiff's injury or loss, it is more than an isomorphism.

Nonetheless, there is at least one idea that is central to corrective justice theories that need not be any part of responsibility theories. Corrective justice theorists deploy a notion of *rectification* or *correction* that is said to be central to the normative structure of tort law. In requiring that the defendant pay compensation to the plaintiff for injuring the plaintiff, tort law is said to see to it that the wrongful injuring of the plaintiff is corrected. The payment of compensation is in this sense the doing of justice. The notion of correction here is teleological (the legal system aims to realize some valued state of affairs—the rectification); it is dynamic (something happens over time—an injustice is rectified); and it imports the notion of an equilibrium (a state of affairs that once obtained is restored—the plaintiff is returned to the *status quo ante*).

There is no obvious reason why a responsibility theorist is required to *reject* the core claims of corrective justice theories. Indeed, in *Risks and Wrongs*, Coleman seemingly aims to be both a responsibility theorist, in the sense described above, and a corrective justice theorist.[21] (So too does Perry, though he seems less insistent that his moral reconstruction of tort renders tort a scheme of corrective justice.) On the other hand, there is no reason why a responsibility theorist is required to *accept* any of the above. One could, for example, take the position that what is demanded of a tortfeasor, in light of his having wrongfully injured the plaintiff, is to take responsibility by apologizing, and that tort law, by requiring that damages be paid, is requiring something akin to an apology rather than requiring the defendant to correct the wrong or the loss.

[21] Coleman, *Risks and Wrongs* (note 3) at 345–7.

Some corrective justice theorists, including perhaps Scott Hershovitz, might want to say that, even on this understanding, tort law would be treating the payment of damages as "making things right," and would, in that sense, be seeing to it that corrective justice is done.[22] Perhaps. The point is that a theorist need not take this position; he might think nothing will make things "right" between the parties (even in an extended sense of "right") but that tort law nonetheless requires the responsible party to own up to what he has done to the plaintiff. Being a responsibility theorist permits being a corrective justice theorist; it does not require it.

As is clear from our prior work, we think there are reasons to stick to responsibility without a corrective justice gloss. Indeed, we are skeptical about all three aspects of the concept of correction or rectification described above. Because we believe the state, in tort law, empowers a plaintiff to seek redress, but does not itself have the power to bring a victim's tort claim, we do not conceive of the state itself as *aiming* to see to it that compensation is paid by tortfeasors to victims. The normativity of liability-imposition lies in the empowerment of plaintiffs to obtain redress if they choose. Because we believe that myriad reasons lie behind a plaintiff's choice to seek redress, and myriad circumstances lie behind a defendant having legally wronged the plaintiff, and a range of variables typically characterize the relative positions of a defendant and plaintiff, we are skeptical of the claim that justice is done whenever damages are paid (though no doubt it is sometimes done). Because we reject the reduction of tort law's wrongs to interference with property or goods, and we do not understand how to stretch the idea of an equilibrium to the notion of wrongs detached from goods, we find the use of the notion of equilibrium either unpersuasive, mysterious or both.

# III. Civil Recourse Theory as a Responsibility Theory of Tort Law

## A. Civil recourse theory

The theory we have developed over the past fifteen years to make sense of the structure and substance of tort law belongs to the family of responsibility theories we have sketched above. For a variety of reasons, we often use the phrase "civil recourse" to denote our overall view, and others have found that label convenient too. We will continue to do so, but we note here that the distinctiveness of the term "civil recourse" was never intended to convey a rejection of the normative concepts that are pervasive

[22] Scott Hershovitz, "Corrective Justice for Civil Recourse Theorists," 39 *Fla. St. L. Rev.* 107 (2011), 118–25.

[23] The title of our Torts casebook, co-authored with Tony Sebok and first published in 2004, makes this connection explicit. See John C.P. Goldberg, Anthony J. Sebok and Benjamin C. Zipursky, *Tort Law: Responsibilities and Redress* (New York: Wolters Kluwer, 3d ed. 2012). Likewise, in a recent book chapter, we argued that one must tease apart the different notions of rights at work in tort precisely in order to grasp the particular form of responsibility that tort law instantiates and implements. John C.P. Goldberg and Benjamin

in tort law and tort theory.[23] Indeed, we maintain that our theory gives us a better purchase on the ways in which concepts of duty and right are at work in tort law. Still, we have not always succeeded in conveying the centrality of responsibility to our view. We aim to remedy that deficiency here.

As we have noted elsewhere,[24] civil recourse theory maintains that Anglo-American tort law is best understood in terms of three interlocking features: (1) *wrongs*, (2) *rights of action*, and (3) *remedies*. The theory maintains that these features hang together to form a body of law that provides recourse through law to victims of a certain kind of wrong.

Torts are wrongs. Each recognized tort stems from a norm of conduct that enjoins us not to mistreat others in certain ways. Because these norms are legal norms, torts are legal wrongs. Though the wrongs of tort tend to track the wrongs of ordinary morality, an actor's conduct being a moral wrong is neither necessary nor sufficient for it to be a tort. For each tort, the norm enjoining conduct is a legally authoritative directive or rule, even if a directive or rule only implicit in precedent.

Within the category of legal wrongs, torts are further distinguished because the substance of tort law's directives tends to be set by law rather than by agreement—a familiar way of separating tort from contract. Torts are also distinctive as legal wrongs in that they are *injury-inclusive* and *relational* wrongs. Absent an injury to someone, there is no tort, and even where there is an injury connected to wrongful conduct, there is still no tort unless the conduct was not merely wrongful in a generic sense but wrongful *as to* the injury victim.

Civil recourse theory further identifies as critical to tort law a particular linkage between the wrongs identified as torts and the idea of a *right of action*. The commission of a tort, we claim, confers on the tort victim a particular legal power, namely, the power to demand and (if certain conditions are met) to obtain responsive action from the tortfeasor. Liability is the Hohfeldian flipside of this legal power. The commission of a tort leaves a tortfeasor vulnerable to a claim initiated by the victim and backed by the power of the state. Because the vulnerability is to the victim, the wrongdoer's fate is to a substantial degree in the victim's hands. The victim, not a government official, decides whether to press her claim or not, and the victim in principle also decides whether or not to accept a resolution of the claim short of judgment. If the claim is successful, of course, the victim can enlist the state's aid in her effort to enjoin ongoing wrongful conduct, or to demand responsive action from the wrongdoer in recognition of the wrong done to her.

It is hardly coincidental that courts and legislatures have seen fit to connect wrongs and rights of action in the way that our tort law does. For the provision of tort law is

C. Zipursky, "Rights and Responsibility in the Law of Torts," in Donal Nolan and Andrew Robertson (eds.), *Rights and Private Law* (Oxford: Hart Publishing, 2012), 271–3.

[24] The following outline of civil recourse theory borrows substantially from a description we have offered elsewhere. See John C.P. Goldberg and Benjamin C. Zipursky, "Civil Recourse Theory Defended: A Reply to Posner, Calabresi, Rustad, Chamallas and Robinette," 88 *Ind. L.J.* (2013).

itself a political duty that the state owes its citizens. Following Locke and others, we have suggested that this duty is rooted in the natural privilege of individuals to respond to mistreatment by others. Insofar as individuals delegate such privileges to governments, and insofar as governments justifiably deny individuals the privileges of self-help and self-assertion in the name of civil peace and justice, it becomes governments' duty to provide alternatives. By granting to individuals who have been injuriously wronged a legal power to exact a remedy from the wrongdoer through the courts, a government complies with the *principle of civil recourse*—the principle that a person who is wronged is entitled to an avenue of civil recourse against the wrongdoer.

The third level at which our theory operates is at the level of *remedies*. Civil recourse theory asserts that the question of remedy in a tort case turns on the question of what a person who has proven that she has been wronged is entitled to demand of the wrongdoer. This, we insist, is a question apart from the question of what sort of response the defendant is duty-bound to provide. It is about the victim's right to redress for the injurious wrong done to her.

To be sure, the idea of "making whole" figures centrally in modern tort practice, a fact that has misled scholars of various stripes to suppose that tort law is all about making whole. We argue instead that making whole is but one remedial rule, albeit one that is in many instances a perfectly reasonable one to adopt, and that has, in fact, become quite salient (although less than sometimes assumed) in tort law. In other words, it is a rule that reflects a judgment regarding what constitutes reasonable redress for the victim of a tortious wrong. Redress is a capacious concept that is compatible with judicial provision of remedies ranging from injunctions to nominal damages. This is why the civil recourse account can address more satisfactorily than competing theories pressing contemporary questions about punitive and non-economic damages.

Thus defined, civil recourse theory can rather plainly be seen to carry the hallmarks of responsibility theory that we identified above. First, it emphasizes the significance for tort of a notion of accountability. It starts with a political-theoretic picture according to which, as a default matter, each person enjoys an immunity against certain demands by others. By prevailing in a tort suit, a plaintiff surmounts this default immunity and establishes that the defendant is properly subject to a legally enforceable demand for redress. In legal terms, we say that the defendant is subject to liability to the plaintiff because the defendant committed a tort upon the plaintiff, or tortiously injured him or her. This is but a legally institutionalized version of the more general idea that a person is properly subject to a demand from the victim for compensation or conduct ameliorating her injury where the defendant wronged her.

Second, the ground for the defendant's answerability to the plaintiff resides in the defendant's having wrongfully injured the plaintiff. Each tort is a wrongful injuring of another. An instance of negligence, for example, is an instance in which an actor injures another by failing to heed a duty owed to the other to take care not to cause such an injury. The defendant is subject to liability because it was the defendant's

wrong that brought about the plaintiff's injury, and the notion of a "wrong" is akin to that of a blameworthy moral wrong while not being identical to it.

Third, understood as civil recourse law, tort law formalizes and institutionalizes non-legal notions of wrongfulness, injuriousness, and redress. A tort defendant is deemed liable to the plaintiff on the basis of having committed a legally defined injurious wrong against the plaintiff. Tort law's definitions of wrongdoing depart to some degree from full-blooded moral wrongs. However, this scheme of responsibility runs parallel to, and, in this sense still implements, notions of moral responsibility. Hence, it is fair to explain why tort law imposes liability on certain people by saying that it deems them responsible for having injured certain others and infers from this responsibility a right in those others to demand compensatory damages.

In sum, civil recourse theory understands responsibility in tort law as accountability or answerability for what one has done to another. It is, in part, because there are certain acts upon others that count as wrongs upon them that it makes sense to regard some persons as accountable for having injured another. To say they are "responsible" is not necessarily to say yet what they should do. It is, however, to say that they are fairly treated as vulnerable to a claim by the plaintiff.

## B. Civil recourse theory contrasted with Perry's responsibility theory

Like Perry's, then, ours is a responsibility theory of tort. There are, however, at least two major differences between our view and his. Ours is not dependent, as his is, on the claim that there is a general moral duty of repair. And ours is dependent on a notion of wrongs, whereas his is dependent on a notion of responsibility for loss. Unsurprisingly, we believe that these differences count in favor of civil recourse theory.

### 1. Rights of redress without duties of repair

A critical question for any responsibility theorist is why the defendant's action in bringing about an injury should generate in the victim a claim against the defendant. Perry's answer is this: because the at-fault defendant is outcome-responsible for the plaintiff's harm and more fairly bears the plaintiff's loss in light of his fault, the defendant owes a duty of repair to the plaintiff. The defendant's outcome-responsibility for bringing about the loss, combined with the defendant's fault, generates a moral duty of repair, which in turn generates a moral right in the plaintiff to claim that compensation is owed. The legal duty of repair is an institutionalized version of the moral duty of repair, stemming from the defendant's responsibility for the loss, and the legal right to be paid damages flows from the legal duty of repair.

We reject Perry's account for reasons that, even though basic and far-reaching, are concededly nuanced. First, it relies on an indefensible picture of the structure of tort liability. There are many areas of law in which the state empowers an individual or entity to prevail in a claim against another for payment because the defendant has a legal duty to make that payment. Classic examples involve the federal government,

through the Internal Revenue Service, bringing an enforcement action against a taxpayer who has not paid taxes owed, and a Creditor bringing a breach of contract action for payment of a debt. Defendants in tort cases are not in this position. One of us (Zipursky) made this argument more than a decade ago against a variety of tort theorists, and it has never received a serious reply.[25] There has, moreover, been significant scholarship by others strengthening this critique.[26]

The second cluster of reasons for rejecting Perry's view assumes *arguendo* that there are moral duties of repair stemming from outcome-responsibility for a loss combined with fault, but observes that the domain of tort liability is poorly matched in substance to the domain of moral duties of repair. The mismatch occurs across several dimensions.

Whereas the make-whole norm serves as a default rule of remedy in tort law, we doubt that there is a comparable default rule in ordinary morality. Few, we suspect, would sign on to the idea that one who carelessly knocks over a fellow pedestrian incurs a *moral* duty to make the victim whole, at least if that entails paying tens of thousands of dollars to cover lost wages, pain and suffering, and the like. Whatever may be required from the careless injurer by way of repair, compensation of this magnitude is more than ordinary morality seems to demand. Indeed, the contrast between plausible conceptions of the moral duty to repair and the redress afforded by tort law is precisely what renders the thin-skull rule such a jarring feature of tort law.

Similarly, whereas moral judgments of others' conduct tend to take account of certain kinds of excuses, there is no comparable leniency in tort law. Again, negligence law is quite unforgiving of a person who is incapable of consistently meeting the objective standard of ordinary care. As matter of formal doctrine, the law's commitment to objectivity is so stark as to entail a willingness to hold accountable even persons who, at the time of acting, suffer from a serious mental illness or defect that renders them incapable of appreciating the dangerousness of their actions.[27] The irrelevance of this sort of excusing condition to tort liability contrasts sharply with ordinary moral intuitions that the duty of repair in such a case is at least diminished. The obligatory quality of acts of repair, within ordinary morality, springs in part from the full-fledged wrongfulness of the injurer's conduct. The fact that tort liability springs from acts that might be wrongful in only a thin sense is yet another reason to think a moral duty of repair does not provide the key link between an actor's commission of a tort and the imposition of liability. If the payment of damages were conceived as a sort of concrete *mea culpa*, we would expect tort doctrine to be anchored in a different, and more robust conception of culpability than it actually is.

[25] Benjamin C. Zipursky, "Civil Recourse, Not Corrective Justice," 91 *Geo. L.J.* 695 (2003).

[26] Peter Jaffey, "Liabilities in Private Law," 14 *Leg. Theory* 233 (2008); Nathan Oman, "Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law," 39 *Fla. St. L. Rev.* 137 (2011); Stephen A. Smith, "Duties, Liabilities, and Damages," 125 *Harv. L. Rev.* 1727 (2012).

[27] See, e.g., *Burch v American Family Mut. Ins. Co.*, 198 Wis.2d 465, 543 N.W.2d 277 (1996).