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Introduction

Search for an Explanatory Theory of Torts

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To an old-fashioned English lawyer, Sir Thomas Holland once said, common law is "a chaos with a full index" (Holmes 1870, p. 114). Anglo-American tort law, having evolved case by particular case, retains the common law character of its origins more than any other department of law. It is likely to strike a reader of any standard casebook to be little more than indexed chaos. Yet, at least since Holmes in the early twentieth century jurists and legal scholars have sought to identify some unifying and rationalizing themes or aims. Only lately, in the last generation or so, have philosophers signed on to this project as well. Over the past decade especially the philosophical contribution to this project has become increasingly sophisticated. As one might expect, this increased attention and sophistication has led on the whole to greater refinement of theoretical options rather than to increasing consensus with regard to one of those options. The essays commissioned for this book take theoretical reflection on the foundations of tort law in new directions. Each voice is distinctive, and there is a considerable degree of disagreement among the contributors on some key issues, but there is also more than a little agreement about the object of theoretical reflection and, in broad strokes, the appropriate methodology directing this reflection.

The primary aim of these essays is not critical or justificatory; rather they seek to contribute to the articulation and defense of an explanatory account of tort law. They seek to deepen our understanding of this corner of the law and the practice to which it gives structure. As we shall see, the appropriate methodology for this kind of study is contested. For the most part, essays in this book follow, and some of them spend considerable time defending (see essays by Stone and Coleman), a broadly "interpretive" methodology, which takes seriously, at least as a point of departure, the categories and patterns of reasoning of participants in tort practice, predominantly judges and lawyers.

I. First Attempts

With these patterns and categories in mind, it is useful to identify core elements of tort practice, even if we find later that we must refine our understanding of

the boundaries of this core. Tort law, it appears, has certain distinctive *substantive* rules as well as a distinctive procedural and conceptual *structure.* (See Section II of Stone's essay for a detailed description of these core elements of tort law.) The substantive law of unintentional torts in Anglo-American jurisdictions is dominated by negligence liability, with pockets of strict liability. The conceptual structure of torts is reflected in the litigation process. The substantive rules of tort liability are announced and enforced in case-by-case adjudication between private parties. A private party initiates the proceedings against another private party claiming on its behalf a right to recover damages from the defendant for losses caused by the defendant's act in breach of a duty of care. The state vindicates or rejects plaintiff's claim, but is not a party to the litigation. The litigation process, and the framework of concepts and rules governing the court's assessment of claims made in litigation, reflect an essentially private, bilateral structure. Plaintiff claims that defendant's wrongful action violated a duty of care to her and caused her injury, and she claims compensation for her wrongful loss from the party who injured her.

Naïve Moral Theory

Reflecting on these substantive and structural features of torts, a theoretically inclined observer might entertain the hypothesis that the primary objective of tort law is to vindicate the moral rights of individuals unjustly invaded by the culpable actions of others and to hold injurers to their moral duties to compensate the losses they wrongfully cause their victims. A moral theory of torts seems to be indicated by the dominant vocabulary of tort. For to act with careless disregard for the rights and interests of others seems not only legally wrong but also a moral failing, and people ought to bear the costs of their moral failings. Tort liability would seem to back up these moral judgments. It punishes these failings and grants redress to those who suffer the harm they cause.

This proposal needs refinement. First, we need to distinguish two different objectives this naïve moral theory might attribute to tort law, objectives issuing from distinct perspectives from which ordinary tort practice can be viewed. The *prescriptive* point of view regards social interaction wholesale, or *ex ante,* and considers how it might be influenced or guided with publicly articulated rules and standards. Viewed from the prescriptive vantage point, tort law defines ground rules for players on the field of risk-creating social interaction. The substantive rules of tort seek to guide the conduct of the players, prescribing certain modes of conduct and prohibiting other modes, and tort litigation seeks to enforce these rules. The *remedial* perspective, in contrast, deals in retail with concrete situations, specific parties, and the misfortunes they suffer. Our moral theory must decide which perspective to take and how to relate these objectives.

Second, naïve moral theory must explain the bilateral structure of tort law. To say, as it does, that tort law mirrors and serves background morality just

raises further questions. For example, does the relationship between the parties to tort litigation have any antecedent moral significance? Aren't they typically strangers, not conspicuously related in any morally significant way? If there is a morally significant relationship between them as private parties, one that distinguishes them from all other citizens and justifies treating them in the special way tort practice does, why think the state through the law has any title to intervene in matters between them? Law, we might argue, has a mandate to do the public's business, but what mandate or title does it have to intervene in strictly private matters?

However, investing in attempts to refine the naïve moral theory looks like a bad idea. For, if we probe beneath the surface vocabulary of torts to actual doctrines that give legal life to this vocabulary, we discover a reality that is, to a naïve observer, a shocking departure from our considered moral judgments. A few examples will suffice to make the point. Tort law appears to be utterly indifferent to the culpability of the injurer. A momentary lapse of care by one agent can result in liability for massive losses (Waldron 1995), while other agents, equally guilty of such lapses, or guilty of much greater lapses, escape liability entirely. It's all a matter of luck. Tort law puts all its liability chips on luck-dependent causation. Similarly, one may be liable in tort for losses even if one has taken every reasonable precaution to avoid them; indeed, one may be liable even if one has a recognized legal right to act in the way that injured another. And these cases are not merely exceptions or marginal deviations from a core with a firm moral focus, for the legal notion of negligence itself departs sharply from the ordinary moral notion. We are prepared to hold morally blameworthy those who injure others intentionally or knowingly, and even those who do so inadvertently so long as the agent failed to pay sufficient attention to the risks involved in her action. We regard the failure as the *agent's,* in virtue of a failure of the agent's moral control center. Ordinary morality attaches culpability to a state of mind – indifference, carelessness, or the like (Sverdlik 1993). However, as judged by the law, negligence is strictly a property of conduct, not of the agent's state of mind. Law, it appears, redirects our critical aim and thereby misses the moral target of culpability entirely. Moreover, the standard of conduct defined by negligence law is especially resistant to morally obvious excuses. It holds everyone to what the average reasonable person would do, taking no account of the individual agent's available information or mental capabilities.

A Positivist Response

Of course, this systematic departure of legal doctrine from considered moral judgments sharing the same vocabulary does not surprise any reader of Holmes's "Path of Law" (Holmes 1920). Long ago law may have sprung from moral judgments and concerns, but, Holmes reminded us, it has a logic and a

life of its own, and only confusion results from taking its vocabulary at face value. Explanatory tort theory, then, must begin its theorizing from a resolutely non-moral quarter, or at least so it appeared to Holmes and the tradition of tort theorizing he sired (Goldberg and Zipursky 1998, esp. pp. 1752–69). Seen in cold analytical light, he argued, law is a device for achieving certain public goals. Tort law in particular announces and enforces public standards of conduct with the aim of deterring the most harmful and costly forms of social behavior and indemnifying its victims. For this purpose, notions of culpability are simply out of place and "objective" definitions of due care are the most effective. Moreover, for Holmes, public norms of tort prescribe "absolute duties," duties not owed to anyone in particular. Tort litigation is distinctive, of course, because it offers recourse to private parties to vindicate their legal rights, but, on the Holmesian view, this is merely an arrangement of convenience, which is justified, in the best case, in terms of effective prosecution of violations of the public norms, or at least as less costly than alternatives. In brief, tort law, on this view, is a matter of private enforcement of public norms. This militantly non-moral theory is not, of course, entirely devoid of moral, or quasi-moral, notions. In particular, it presupposes a vaguely utilitarian notion of social good in terms of which the aim of public norms and the institutions of private enforcement could be understood and assessed. That quasi-utilitarian framework privileges the prescriptive point of view on tort practice, rationalizes without (explicitly) moralizing the basic doctrines of tort, and offers a strictly instrumental explanation of the distinctive bilateral structure and process of tort litigation.

The theoretical foundations of Holmes's approach remained in a rudimentary state until a group of legal academics, lead by Calabresi (1970), and Landes and Posner (1987), deployed modern economic concepts and models of explanation to construct a comprehensive and systematic theory of tort law (see Shavell 1987). In the place of Holmes's vaguely utilitarian rationalizing standard, economic analysis proposed the notion of efficiency, defined in terms of wealth maximization (or sometimes, less precisely, social welfare maximization). With the precision tools of welfare economics, theorists were able to analyze and explain systematically the basic components of tort law, both its substance and its structure. Following Holmes, it adopted a predominantly prescriptive theoretical perspective. The mode of explanation was broadly "functionalist" (see the essays by Stone and Coleman). It identified a goal of the tort system as a whole (e.g., wealth maximization) and sought to explain all the component elements of the system, and their complex relationships, as means of achieving this independently defined goal.

The economic theory of torts has proved enormously influential in legal academic circles. The influence is not difficult to explain: its basic conceptual elements are relatively simple and intuitive, its analytical tools are very powerful, and it promises truly to rationalize without thereby also recommending. As a bonus, it provides resources for explaining not only the traditional core of accident law, but also some of its more radical departures from orthodoxy, for ex-

ample, developments in product liability, especially market-share liability. Over the course of the last three decades, it has become the dominant theory of torts. It is the theory to meet and beat.

II. Moral Theories Refocused and Refined

In recent years the economic theory has been challenged from a number of different quarters. The essays by Stone and Coleman in this book develop one influential line of attack that strikes at the foundations of the theory. They both charge that it fails adequately to explain the distinctive bilateral structure of tort law. They argue that, far from explaining why tort law grants standing only to plaintiffs who can claim to have been injured by a specific defendant and why that defendant alone must indemnify this plaintiff, economic analysis makes this essential link utterly mysterious. More fundamentally, they charge that the functionalist methodology of economic analysis in general is simply unsuited to provide an explanation of the system and practice of tort law. A very different methodological approach is needed, they argue. New conceptual and normative resources must also be developed in the place of the conceptual apparatus of economics. Challengers have looked again to the categories of personal or political morality, but, fully aware of the pitfalls of the naïve moral approach, they have undertaken to refine these categories and to articulate them for the rather different context of tort practice.

Keating, Perry, Ripstein, and Zipursky join Stone and Coleman in the search for a more satisfying alternative to familiar economic explanations of tort practice along these lines. These essays disagree about whether the appropriate frame of reference is political morality or personal morality and whether the organizing concept is one of distributive justice or of corrective justice, but there is broad agreement that an "interpretative" rather than functionalist methodology is to be preferred. Geistfeld and Chapman take a different tack. Unwilling to abandon the economic model entirely, they seek rapprochement in quite different ways between the economic model and emerging alternative justice models of explanation. Geistfeld explicitly defends the economic model against substantive criticisms like those of Stone and Coleman, but at the same time finds merit in the more sophisticated moral models that have been proposed. He argues that the two approaches are complementary. Like economic analysis, Chapman starts from the same headwaters in the theory of rational choice, but he finds resources there for a systematic integration of the very different values represented by economic analysis and competing moral theories.

From the Prescriptive Point of View: Distributive Justice

Sophisticated "moral" theories fall into two groups depending on whether they accord theoretical priority to the prescriptive perspective or to the remedial perspective. One group largely accepts the theoretical template inherited from

Holmes and the economic theory, but rejects their fundamental organizing principles and goals. Public norms of care and conduct in social life, they argue, serve justice, rather than wealth- or welfare- maximization. Rather than focusing on personal moral responsibility as reflected in judgments of culpability, these theories take the basic normative questions posed by tort law to be questions of political fairness, specifically matters of distributive justice.

KEATING. George Fletcher's well-known fairness theory adopted this perspective (Fletcher 1972). Gregory Keating, in his contribution to this book, develops a theory from a similar perspective. Keating sets his inquiry in the political community. He maintains that standards of negligence and strict liability are best seen as the products of an attempt to balance the competing liberty and security interests of citizens. Adopting a Rawlsian-contractarian model of argument, he asks: What would potential injurers and victims, regarded as free and equal moral persons, seeking to establish social conditions for pursuit of their conceptions of the good, accept as fair rules for creating and imposing risk. Three broad principles for selecting and interpreting liability rules would emerge, he argues. First, risks are fairly imposed only when they promise to work to the long-run benefit of those most disadvantaged by it (namely, potential victims). Second, security interests take priority over liberty interests when the risks are grave (e.g., death, serious injury). These principles suggest the third: The benefits and burdens of a risky activity are balanced when the *harms* it causes are reciprocal in the risk community. Fletcher argued that impositions of risk on others are fair if those on whom the risk is imposed by the activity have equal opportunity and right to impose the same kind or amount of risk on the initial imposers. In contrast, Keating argues that actual harms, not just the risks of them, must be distributed reciprocally.

With these three general principles in hand, Keating sets out first to account for the division of labor between negligence and strict liability standards in tort law. Keating's "interpretative" account, however, appears to takes a decidedly critical or reforming tack at this point. Regarding activities involving grave risks, he argues (*pace* current tort law) for a presumption in favor of strict liability over negligence liability, on the ground it tends to encourage more effective and extensive reduction of the risks and distributes the costs of the materialization of those risks more fairly. This is especially true where there are adequate liability insurance markets for participants in the activities in question. Because insurance greatly eases the burden of compensating victims, it reduces the burden on liberty created by strict liability. This line of reasoning also supports enterprise or market-share liability, because it disperses the costs of non-negligent accidents across all parties benefiting from participation in large-scale, systematically organized risky activities.

Keating also argues that his contractarian principles help explicate the average reasonable person standard of due care for negligence liability. Keating ar-

gues that the familiar Hand Formula for determining reasonable precautions does not properly reflect the priority of security over liberty interests that free and equal citizens would insist on. Rather, at least where the injuries risked are severe, they would insist on a "disproportionality" test, which requires risk imposers to take all feasible precautions short of eliminating the risky activity.

Keating, it is interesting to note, assumes that the relevant parties to the contractarian deliberations are potential injurers and their potential victims, viewed as partners of sorts in patterns of risky social interaction. Given his starting point, this assumption may be surprising. Distributive justice takes the perspective of the political community as a whole. But, then, members of this community other than injurers and victims might also have stakes in the norms adopted for regulating risky conduct, since they or the community at large stand to benefit from and to bear some of the costs of conduct (or reductions in the level of certain activities) in accord with the rules of liability adopted. One wonders whether they should also be included in the deliberations. If so, might not third parties, or the community at large, also be considered a potential bearers of costs of risks that materialize? Nothing in the theoretical frame that Keating proposes requires that we pay special attention to specific injurers and victims. This, of course, leaves the apparent bilateral structure of tort practice unexplained. At least three responses are open to someone inclined to Keating's approach. First, one can argue in a reformist mode that there is no deep justification of the bilateral structure and, thus, that it should be phased out of tort practice. Second, one can try to fit his account of the substantive norms of tort liability to the Holmesian/economic theory template and offer an instrumental rationalization of the bilateral structure. Third, one can take seriously Keating's framing assumption that the class of relevant parties is restricted to potential injurers and victims and seek to identify a deep explanation for it, perhaps in some notion of corrective justice. Following this third tack, one might seek to integrate what looks like a manifestly political, distributive justice view of the substantive norms of tort law into a private, corrective justice frame.

Remedial Theories

Some tort theorists will welcome the potential expansion of the normative framework implicit in Keating's approach, but others will argue that it seriously compromises the conceptual integrity of tort practice. If they remain sympathetic with Keating's work, they would insist on the third response mentioned above. For them, structure shapes substance in the domain of tort law, and, hence, the remedial perspective is theoretically prior. The primary aim of liability rules, on this view, is not to guide conduct, but to determine who should bear the costs of certain kinds of misfortunes, especially those occasioned by human actions. This shift of focus is reflected in the moral concepts on which many of these remedial moral theories rely. For example, *duties* to repair in-

juries or losses are said to fall to those *responsible* for those losses. But, as Perry makes very clear in his essay for this volume, the concern here is not responsibility for actions, but rather responsibility for outcomes, and *outcome responsibility* is not tied directly to blame or a right to punish, but rather with "ownership" of losses. Hence, the moral concern of responsibility from this remedial perspective shifts from conditions of culpability (the focus of naïve moral theory) to conditions of liability. Similarly, duties to repair are said to be *owed by* a responsible injurer *to* her victim. Perry and Coleman insist that this implies that the duty generates an "agent-specific" reason for the injurer to act. Moreover, her reason applies to her specifically precisely because of some special relationship between her and her victim. So, not only is the reason specifically addressed to the injurer, but also her action in fulfillment of the duty is specifically directed to her victim.

COMPENSATORY JUSTICE. The remedial perspective on tort practice does not by itself favor one particular moral theory of the practice. Although there is wide agreement among legal philosophers that justice is the relevant moral concept around which the theory should be constructed, it is possible to move from this plateau in quite different directions. One direction is marked by the notion of compensatory justice. On this view, justice requires that losses that are undeserved or arbitrary from a moral point of view be offset. However, this notion is not likely to illuminate tort practice, since it looks to an ideal distribution of benefits and burdens and not necessarily to any historical event, let alone human action, as an essential component of the case for compensation. Compensatory justice is simply distributive justice applied to particular social conditions.

The "annulment theory" once defended by Jules Coleman (Coleman 1992b) is a refined version of a compensatory justice principle. The annulment thesis calls for compensation of wrongful losses, that is, losses caused by wrongful actions. It focuses on the causal upshots of wrongdoing and so might seem to be an attractive starting point for a justice-based theory of torts. However, as Coleman came to see, the focus on annulling wrongful losses is one-sided. It cannot explain the allegedly fundamental bilateral structure of tort practice and it offered no special reason for imposing a duty to compensate on the doer of the wrong.

RESTORATIVE JUSTICE. Restitution, rather than mere compensation, might seem to be a more promising point of departure. On this view, the unjust losses are departures from or distortions of a just set of holdings caused by some rights-violating action. Justice requires that those who take goods without their owner's consent return them to their owner; by the same token, the losses one imposes on others against their will must be "returned" to their "owner." Something like this idea of restorative justice seems to underlie the libertarian theory of tort liability. It has resources for explaining the traditional bilateral structure of torts and it utilizes a recognizable and plausible moral concept, but it faces

two major objections. First, both Perry and Coleman argue that the strictly empirical notion of causation at the heart of this theory cannot bear the weight of determining who "owns" the losses resulting from social interactions. Second, restitution theory subordinates justice in tort litigation entirely to distributive justice. The principle of restitution is arguably a relatively trivial implication of distributive justice, and this holds the justice pursued in torts litigation hostage to an assessment of the justice of the *status quo ante.* One distinctive feature of the duty to repair in torts is that it is imposed at least relatively independently of consideration of the background conditions of the parties.

CORRECTIVE JUSTICE. Some philosophers have concluded that the notion of justice that provides the conceptual structure of tort practice is conceptually distinct from distributive justice. It is a species of what has traditionally been called "commutative justice" – justice between particular persons arising from their commerce, exchange, and interaction. In the tort theory sweepstakes, such "corrective justice" theories appear to pose the most serious challenge to the hegemony of the economic theory, and versions of corrective justice theories have in recent years become increasingly sophisticated. The richness, variety, and sophistication of this theoretical approach are apparent in the essays by Stone, Perry, Coleman, and Ripstein and Zipursky.

PERRY. Stephen Perry does not set out to defend directly the explanatory thesis that tort practice seeks to do corrective justice between the parties in tort litigation; rather, he articulates the conception of corrective justice that, in his view, must figure in that explanation. Tort liability, he claims, rests on a notion of personal responsibility. To understand his point it would be useful to distinguish two notions of responsibility that seem to be at work in discussions of corrective justice in this book. We can distinguish between *ascribing* (or imputing, or attributing) responsibility to a person, on the one hand, and *assigning* (or allocating) responsibility, on the other. When we assign responsibility we give a certain person a task, make it his business. One mark of this task-oriented feature of assigned responsibility is that we speak in the plural of duties and responsibilities. Responsibilities may be assigned for many different kinds of reasons, among them reasons of expediency, efficiency, justice, or fairness. Also one can assume such responsibilities voluntarily, or find them assigned to one, for example, as part of a role in which one finds oneself. One may also have some task responsibility because one did something to bring about the situation calling for the task. In this case, one *has* that *responsibility* because one is *responsible* for the situation. The latter is a different notion of responsibility. At its core is not the notion of a job, or task, or business, but rather the notion of accountability typically tied to features of a person's character, actions, or the outcomes of those actions. This kind of responsibility is ascribed or attributed.

Although Perry does not use the terms I have introduced, we can use them to state his thesis. If tort law serves corrective justice, he argues, then tort law assigns responsibility – that is, liability and hence duties to repair – on the basis of judgments of ascribed responsibility. His essay seeks to articulate the notion of ascribed outcome-responsibility relevant to corrective justice and the link between outcome-responsibility and the duties corrective justice imposes on injurers to compensate their victims. He maintains that judgments of corrective justice are formulated in a two-stage process. First, we identify the parties who are outcome-responsible for the losses; then, we determine whether any of the outcome-responsible parties were at fault or imposed the risk of the harm suffered on the party suffering it, and if so we assign obligations to them to compensate the victims. Most of Perry's essay is devoted to articulating and defending his notion of outcome-responsibility, but he also suggests, although in less detail, the bases for judgments of fault and risk imposition.

On Perry's account, an agent A is outcome responsible for some state of affairs if and only if (1) A causally contributed to bringing about that state of affairs; (2) A had the capacities necessary to foresee that the state of affairs might be produced by her action; and (3) A had the ability and opportunity, on the basis of what A could have foreseen, to avoid the state of affairs. Perry distinguishes his view from two rivals that also make personal responsibility the ground of assignments of corrective justice responsibilities. The libertarian requires only causal contribution, whereas more robust moral theories call for some degree of actual advertence on the part of the agent (either actual intention or at least awareness of the likelihood of the harmful outcome). Perry's account adds to the causal contribution condition the requirement that the outcome responsible agent have the capacity to foresee and avoid the outcome, but *only* this capacity, not any actual advertence. His account of outcome-responsibility, then, is "objective" in the sense that no state of mind (even indifference) is requisite, but it is still "subjective" in the sense that the requisite capacities are assessed individually. On his view, we must ask with respect to each party whether he or she actually possessed the capacities to foresee and avoid the outcomes in question. The capacities of an average reasonable person are not the relevant test. This links outcome-responsibility closer to our ordinary moral notion of responsibility, but it also raises the question whether Perry can square it with the more strongly "objectivist" tendencies in modern Anglo-American tort law.

Outcome-responsibility, Perry argues, is not sufficient to ground a corrective justice obligation to compensate losses, for in many cases both parties in an accident meet the conditions of outcome-responsibility and so it does not provide in itself the basis for assigning exclusive "ownership" of the losses to one of the parties. Typically, losses result from the interaction of activities, not from actions of a single agent. Whether the risks of the harm resulting from this