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The Special Morality of Tort Law

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This article outlines the morality latent in the structure of tort law. Rejecting both the instrumentalism of economic analysis and non-instrumental accounts that do not reflect tort law's special moral character, the author suggests that tort law reflects the morality distinctive to the relationship of doing and suffering harm. This morality — first formulated in Aristotle's discussion of corrective justice and elaborated by Kant — treats doing and suffering as an integrated normative unit that allows the court to fulfill a properly non-instrumental adjudicative function. Corrective justice thus illuminates the coherent normative structure of tort law and provides an internal standpoint for the critique of tort doctrine.

Cet article fait ressortir de la structure du droit de la responsabilité délictuelle la morale qui y est latente. L'auteur rejette l'instrumentalisme de l'analyse économique ainsi que les approches non-instrumentalistes qui ne réflètent pas le caractère moral spécial du droit de la responsabilité délictuelle. L'auteur suggère que le droit de la responsabilité délictuelle réflète une morale distincte: celle de la relation entre celui qui fait du tort et celui qui subit un tort. Cette morale fut d'abord formulée par Aristote à propos de la justice corrective puis elle fut élaborée par Kant. Elle considère la commission d'un tort et le fait de devoir en subir un comme une seule et même unité normative intégrée qui permet au tribunal de remplir une fonction adjudicative proprement non-instrumentale. La justice corrective fait donc ressortir la structure normative cohérente de la responsabilité délictuelle qui est la pierre d'assise permettant une critique de la doctrine de la responsabilité délictuelle de l'intérieur.

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I.

What is the moral significance of tort law? The economic writing that has dominated tort scholarship for two decades has largely ignored or circumvented this question. The terminology of moral discourse rarely appears in the immense and brilliant tort literature that revolves around efficiency, transactions costs, and cheapest cost avoidance. Yet most tort scholars would acknowledge that their subject has a moral dimension that economic analysis fails to illuminate.

Behind this contrast of the moral with the economic lie two grounds for dissatisfaction with economic analysis. The first is normative: because economic analysis is unabashedly instrumentalist, it depends on what many observers regard as a particularly problematic moral theory. The second is explanatory: whatever its general merit, economic analysis seems alien to tort law specifically. To take just one example, how can a mode of analysis that starts with the causal nihilism of the Coase theorem[1] yield an adequate account of a field of law for which causation is a central organizing concept? These two considerations may be different ways of saying that economic analysis does not take tort law seriously as a system of rights. By treating rights only instrumentally as the placeholders of certain economic values, economic analysis misses the significance of the rights-vindicating structure of tort law.

Reflection on the morality of tort law points us in a different direction. Tort law is to be considered not as a vehicle of economic regulation, but as a repository of non-instrumental judgments about action. Our concern is thus with the propriety, rather than the price, of activity.

How are we to specify the morality of tort law? I propose to start with a tempting but erroneous answer, in order to work back to an appreciation of what the question really involves. I will then outline a different approach, and conclude with some general comments. My aim is to take the contrast between the moral and the economic to its extreme by setting out a completely non-instrumental understanding of tort law.

II.

First, the tempting error. George Fletcher's article, "Fairness and Utility in Tort Theory"[2] is a magnificent attempt to elucidate the moral foundations

[1]R.H. Coase, "The Problem of Social Cost" (1960) 3 J. Law & Econ. 1.
[2](1972) 85 Harv. L. Rev. 537.

of tort law. Fletcher construes tort liability as a function of two considerations: did the defendant impose a non-reciprocal risk on the plaintiff, and was the defendant's act excused? I want to focus on the second of these considerations because it interestingly misapprehends the relation of moral notions to tort law.

Excuses occupy a second stage of a legal argument because they presuppose the liability that would obtain in their absence. If applicable to tort law, an excuse would supervene upon an already completed cause of action to frustrate the plaintiff's entitlement. Fletcher sees excusing conditions as suspending the defendant's blameworthiness in a concrete situation without denying the wrongfulness of what he or she did. The fact that the act was performed in circumstances of ignorance or exigence induces compassion for human failing in times of stress. Moreover, because anyone in similar circumstances would have done the same thing, the presence of excusing conditions removes the rational basis for distinguishing between the party causing harm and other people.

Throughout, Fletcher's analysis prescinds from instrumental judgments about collective welfare. Its focus is on the nature of the defendant's act and the fairness of holding him liable for it. Fletcher thus attempts to provide an alternative to instrumentalism by grounding liability in the moral quality of a tortious act.

The difficulty is that Fletcher does not explain why the excuse is allowed to affect the tort plaintiff at all. Because an excuse "excuses" from something, the plaintiff's right to recover from the defendant must be notionally complete before the excuse becomes juridically significant. What we now need — and what Fletcher does not provide — is an account not of why the excuse mitigates the defendant's blameworthiness generally, but of why it neutralizes the plaintiff's right specifically. Why should the probability that most people in the defendant's position would have committed the same wrong lead to the cancellation of the right of a particular plaintiff? Even if the excusing condition moves *us* to compassion, on what grounds does our compassion operate at the *plaintiff's* expense? By allowing the excuse, we are either obligating the victim to be compassionate to the wrongful injurer or we are exercising collective generosity with the plaintiff's right.

Fletcher's mistake is to incorporate excuses into his tort theory on the basis of the general moral significance he ascribes to them. He ignores the fact that tort law does not express morality at large but has a specific structure that a moral account of it must track. Fletcher's theory fails because his excuses are incompatible with the special moral nature of tort law as a medium for the vindication of the plaintiff's rights against the defendant. One can perhaps trace Fletcher's tort theory to his masterly writings on

criminal law, where he has expounded the role of excuses with great subtlety.[3] Criminal law, however, with its public prosecutions and its insistence on *mens rea*, has its own doctrinal and procedural structure. Although both tort and criminal law deal with responsibility, the moral concepts that inform each of them need not coincide.

Tort law itself gives evidence of its special moral character. Although concerned with culpability, it judges this culpability objectively and thus sets standards that may be beyond the capacity of particular defendants. A finding of liability can even be accompanied by an acknowledgment that the defendant is in no way morally to blame.[4] Some have concluded from this that tort law can make no moral sense. I wish to suggest, however, that tort law exhibits a specific kind of moral sense.

III.

This criticism of Fletcher reminds us that we seek not simply a non-instrumental morality, but one that captures and reflects the special moral character of tort law. Our question, "What is the moral significance of tort law?" is thus equivalent to "How can tort law be conceived as non-instrumentally normative?" At stake is our understanding of tort law, not merely our understanding of morality.

What, then, do we mean by tort law? Without prejudging the moral issue, we must identify our subject matter in a way that remains true to our juristic experience. I propose that we take as minimal a view as possible by concentrating on aspects of tort law that are indispensable to its intelligibility as a distinctive mode of legal ordering.[5] Among the mass of doctrines, holdings, principles, and institutional arrangements that we associate with tort law are features that are constitutive of our conception of tort law. The systemic absence of these features would preclude our identifying what remained as tort law at all. Whatever the morality of tort law, it is necessarily the morality of these constitutive features.

For example, causation is one such feature. I think we would not identify as tort law a mode of ordering that systemically exacted damages regardless of whether the defendant caused the injury that the damages were to repair. A legal arrangement under which compensation was triggered by the injury

[3]See especially G.P. Fletcher, *Rethinking Criminal Law* (Boston: Little Brown, 1978) at 798-875.

[4]*E.g.*, *Roberts* v. *Ramsbottom*, [1980] 1 W.L.R. 823, [1980] 1 All E.R. 7 (Q.B.D.).

[5]For an extended treatment of the methodology toward which this sentence gestures, see E. Weinrib, "Understanding Tort Law" (1988) 23 Valparaiso U. L. Rev. 486 (the 1988 Monsanto Lecture on Tort Law Reform and Jurisprudence).

itself and not by its tortious infliction might be desirable, but it would be an alternative to tort law, not a version of it.[6]

Of course, causation is under attack in American tort law to a degree unimaginable a generation ago. These attacks, however, do not undermine the conceptual centrality of causation for tort law. They carve out particular exceptions to a systemic requirement. Even in a case like *Sindell*,[7] causation is still present to our thinking, just as one can have sensation of a limb now amputated. Only because we recognize that causation is fundamental for tort law does the attenuation of that requirement in the *Sindell* case become a matter of celebrity.[8]

Features such as causation, which are constitutive of our conception of tort law, are doubly significant. Not only do they identify the tort law whose morality we seek; they also provide a principal justification for seeking it. Because they isolate a relationship of two litigants, they cut off the comprehensive consequentialism of instrumentalist and economic inquiry.[9] Hence the plausibility of attempting to account for tort law in terms of a non-instrumental morality.

IV.

The approach I now wish to outline recognizes that causation is constitutive of tort law as an identifiable legal field. Tort law is characteristically

[6]I mean this as a substantive, not a semantic, point. Whether or not we would *call* it tort law, we would be sensitive to a radical difference between this arrangement and the mode of ordering that we presently call tort law.

[7]*Sindell* v. *Abbott Laboratories*, 163 Cal. Rptr. 132, 607 P. 2d 924 (Cal. S.C. 1980).

[8]Even in *Sindell* the hold exerted by causation is evident from the fact that the defendants were allowed to disprove causation despite the incoherence thereby introduced into the court's reasoning. The justification for holding each defendant liable for the proportion of each injury represented by its market share is that, over the aggregate of DES cases, each defendant will be subject to a total liability that approximates its share of the costs of all the DES injuries. *Ibid.* at 145. This rationale requires apportioning the cost of each and every DES injury, not merely of the ones that the defendant may have caused; otherwise, the exonerated defendant's total liability will, at the end of the day, be smaller than its proportional share of all DES injuries. On the court's reasoning, apportionment should be ordered regardless of whether the evidence shows that the defendant did or did not cause the injury of a particular plaintiff. The inconsistency of causation with the *Sindell* court's larger rationale was recently recognized by the New York Court of Appeals, which held, in a DES case similar to *Sindell*, that "because causation is based on the overall risk produced, and not causation in a single case, there should be no exculpation of a defendant who, although a member of a market producing DES for pregnancy use, appears not to have caused a particular plaintiff's injury." See *Hymovitz* v. *Eli Lilly and Company et al.* (Ct. App. N.Y. April 4, 1989) (Westlaw NY-CS, 1989 WL 30301).

[9]For a discussion of the problems with economic interpretations of causation, see R. Wright, "Actual Causation vs. Probabalistic Linkage: The Bane of Economic Analysis" (1985) 14 J. Legal Stud. 435.

concerned with the defendant's doing and the plaintiff's suffering the same harm. The special morality of tort law, accordingly, is the morality that pertains to this relationship of doer and sufferer.

Our question is how to conceive of this relationship non-instrumentally. The answer is clear enough in general terms: the relationship of doer and sufferer must be seen as having in and by itself a normative dimension that tort law reflects. On this view the doing and suffering of harm is not the occasion to promote an independently justifiable goal, such as deterrence, compensation, or wealth maximization. Because the normative dimension is intrinsic to the doing and suffering, the tort relationship is not a means to an end. Rather, each harm done and suffered is the core of a single transaction that relates *this* doer to *this* sufferer, and each such transaction is a discrete unit of normative significance.

This non-instrumental conception of tort law has the following dimensions. First, because each transaction is a discrete unit, tort law is not an ordering over an aggregate of transactions. Accordingly, it does not seek to combine or to average utilities, however defined, across transactions. Of course, the norms of tort law apply to many transactions, but only because they apply separately and self-sufficiently to each. No consideration extrinsic to a particular instance of doing and suffering has any bearing. Thus it is irrelevant that the defendant who was negligent on this occasion may otherwise be a person of exemplary carefulness. Similarly, loss-spreading through insurance cannot be a basis for liability, because loss-spreading operates across a set of potential transactions rather than within a single transaction. Tort justification is therefore not geared to the desirable consequences of transactions in the aggregate, but to the entitlements of the doer and sufferer in each transaction.

Second, the treatment of each transaction as a unit implies that its elements are internally integrated. If the harm constitutes an integrated relationship of doing and suffering, the respective parties cannot be considered independently of each other. Normative considerations that are unilaterally applicable either to the doer or to the sufferer are, therefore, out of place. For instance, the tort relationship is not morally explicable in terms of deterrence, because deterrence can, without loss of any of its justificatory force, focus on the doer even in the absence of any particular sufferer. If deterrence were the justification for tort law, there would be no need for actual damage, nor for compensation to be paid to the plaintiff, nor for plaintiff's injury to be the measure of damages. Similarly, tort law is not understandable as a compensation mechanism, because compensation applies one-sidedly to the sufferer and does not necessarily encompass the doer. If compensation were the justification for tort law, there would be no reason to insist on causation by the defendant or to make compensation

take the form of a payment by the tortfeasor. The goals of deterrence and causation each fail to embrace both parties. This unilateral emphasis was also, as we have seen, the problem with Fletcher's excuses which, by focusing solely on the doer, imposed on the sufferer the cost of collective compassion.

Third, if the integration of the doer and sufferer is to count as a moral relationship, the parties must stand on a footing of equality. Doing-and-suffering is not a merely natural phenomenon beyond the range of morality; it has an intrinsically normative dimension. Because it is intrinsic, the normativeness cannot impinge upon the relationship from the outside. Moreover, because the parties may be strangers to each other, the law cannot properly require acts of love or generosity or the commitment that inheres in community.[10] Equality as between doer and sufferer is the only conception internally available to define the relationship's normative character. This equality is not an equality across transactions that would be satisfied by any liability rule so long as it was uniformly applied to all lawsuits. Considerations that order across transactions have already been excluded as irrelevant to the intelligibility of the transaction as such. Rather, equality must operate within each transaction. This, in my view, is the significance of the objective standard of negligence, which precludes the doer's personal qualities from being decisive to the relationship and thus dominating it.

Fourth, when the doer violates this equality, for instance, by acting negligently or inflicting an intentional harm, he or she wrongs the sufferer. The payments exacted by tort law are not taxes or licensing fees for acts that are permitted on condition that the defendants pay for damage thereby caused.[11] A tort is an act that wrongs the victim. The defendant owes the plaintiff a duty, operative at the moment of action, to abstain from committing such an act. The obligation to compensate is the juridical reflex of an antecedent obligation not to wrong.

Fifth, attention to the standpoint internal to the relationship of doer and sufferer allows the court to fulfill a properly adjudicative function. The court's task is to decipher and to specify what is required by the normative dimension of this relationship in the context of a particular dispute. Because tort adjudication is morally limited to what is inherent in the defendant's doing and the plaintiff's suffering of the same harm, a court cannot impose upon the relationship an independent policy of its own choosing. It intervenes at the instance of the wronged party in order to undo or prevent the

[10]The role of community in tort law is discussed in E. Weinrib, "Liberty, Community, and Corrective Justice" (1988) 1 Can. J. Law & Jurisprudence 3.

[11]For a discussion of the structure and implications of construing torts as permissible acts, see J.L. Coleman & J. Krauss, "Rethinking the Theory of Legal Rights" (1986) 95 Yale L. Rev. 1335.

wrongful harm. Adjudication thus conceived makes explicit what is latent in the relationship between the parties. It does not involve the legislative selection of a course of action that will promote the general welfare. In other words, tort law is not public law in disguise.[12]

These five aspects, and the relationship of doer and sufferer out of which they arise, account for all the fundamental doctrines of negligence law. The unit of analysis is the sequence from the unreasonable creation of risk by the defendant to the materialization of the risk in harm to the plaintiff. The transitivity of the doer's acting on the sufferer is reflected in the requirement of factual causation and, more broadly, in the law's insistence that liability presuppose misfeasance rather than non-feasance. The rubrics of duty and proximate cause also link doing and suffering, by requiring the plaintiff's injury to be within the ambit of the unreasonable risk created by the defendant's negligence.[13] The unity of the plaintiff-defendant relationship is further attested to by the damage award itself, which quantifies into a single sum both the defendant's wrongdoing and the plaintiff's injury. The equality of the parties is embodied in the objective standard of care, which prevents the terms of the relationship from being unilaterally determined by the subjective capacities of the doer. Finally, the entire moral relationship is implemented through the adjudication of the plaintiff's claim that the defendant's action has wronged him.

V.

For this account of the special morality of tort law I can claim no credit, if any credit be due. I have merely summarized and applied to tort law the oldest and most durable philosophical tradition about the nature of juridical ordering. The distinctive moral structure of the doing and the suffering of harm was first noticed by Aristotle, who termed it corrective justice.[14] This discovery marked the beginning of legal philosophy properly speaking, because it disclosed how an interaction between persons could be understood in terms that were purely juridical, rather than political, ethical or communitarian. Aristotle's achievement was all the more remarkable because corrective justice stood apart from the rest of his moral philosophy. Although

[12]Contrast L. Green, "Tort Law: Public Law in Disguise" (1959-60) 38 Texas L. Rev. 1, 257, reprinted in L. Green, *The Litigation Process in Tort Law*, 2d ed. (Indianapolis: Bobbs-Merrill, 1977) at 115.

[13]*Palsgraf* v. *Long Island R.R.*, 162 N.E. 248, N.Y. Supp. 339, 99 (1928); *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co. (The Wagon Mound, No. 1)*, [1961] A. C. 388, [1961] All E.R. 404 (P.C.).

[14]Aristotle, *Nicomachean Ethics* V, 2-4, discussed in E. Weinrib, "Aristotle's Forms of Justice" (1989) 2 Ratio Juris (forthcoming).

Aristotle's ethical writing explicates the nature of virtue, he nonetheless acknowledged that private law had a distinctive rationality based not on virtue but on the doing and suffering of harm.

Aristotle was a theorist of the good. This was the reason that he could only describe corrective justice but not absorb it into the fabric of his philosophy. For corrective justice concerns the right, not the good. Its thrust is entirely negative: not what one ought to do to achieve the good, but what the rights of another require one to abstain from doing. It sets out a structure of entitlement in interaction that does not engage the question of whether such entitlements are the optimal way of promoting well-being, however conceived.

Corrective justice was not integrated into a comprehensive moral philosophy until Kant's great elucidation of the concept of right.[15] For Kant the basic question of legal philosophy was whether the action of one freely willing person could be conjoined with the freedom of everyone in accordance with a universal law. The aspects of Aristotle's corrective justice that I set out above coalesce in Kant's reference to universal law: because the law is universal, it exhibits the normativeness intrinsic to each transaction on the basis of the equality of freely willing beings. The rights manifested by corrective justice are thus tied to Kant's notion of freedom and to the concept of right entailed in that freedom.

Although corrective justice has long been prominent in European thinking about law, it has not fared well in contemporary theorizing. In the United States corrective justice is most closely associated with Richard Epstein's promotion of strict liability.[16] In postulating that tort law should in principle hold the defendant liable for whatever injury he causes, Epstein confuses what tort law is about — the doing and suffering of harm — with what tort law requires. Because his suggestion allows the plaintiff's holdings to determine the limits of the defendant's action, it violates the equality of doer and sufferer. Epstein thus ignores the norm that pertains to corrective justice.

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[15]I. Kant, *The Metaphysical Elements of Justice; Part I of the Metaphysics of Morals*, trans. J. Ladd (Indianapolis: Bobbs-Merrill, 1965), recently discussed in E. Weinrib, "Law as a Kantian Idea of Reason" (1987) 87 Colum. L. Rev. 472, and P. Benson, "External Freedom According to Kant" (1987) 87 Colum. L. Rev. 559.

[16]See especially R.A. Epstein, "A Theory of Strict Liability" (1973) 2 J. Legal Stud. 151, and R.A. Epstein, "Defenses and Subsequent Pleas in a System of Strict Liability" (1974) 3 J. Legal Stud. 165.

As a result, his writings state and restate an elaborate intuition without ever supplying a convincing argument on its behalf.[17]

The notable feature of corrective justice in its Aristotelian version is that it is the moral idea *internal* to tort law. This internalism has two mutually sustaining aspects. First, corrective justice is internal to the relationship of doer and sufferer: it is the morality applicable when this relationship is considered on its own, without being oriented toward some extrinsic ideal. Second, the morality of doing and suffering inheres in the underlying conceptual structure of tort law: tort law is a distinctive and coherent mode of legal ordering only inasmuch as it actualizes corrective justice.

Because corrective justice is internal to tort law, an account that features corrective justice is both ambitious and modest. The ambition lies in showing how the basic doctrinal and institutional structure of tort law can be understood as embodying a coherent non-instrumental idea. Such an account has both the normative and explanatory dimensions that, as I mentioned at the outset, are problematic for economic analysis. Moreover, it provides the decisive standpoint for the criticism of specific tort doctrines, namely, the standpoint implicit in tort law itself.

However, such an account is also modest because, in representing only the special morality of tort law, it provides no reason for preferring tort law to its competitors. A general scheme of compensation for personal injuries has its own morality rooted in *distributive* justice. From its own premises, the morality of tort law cannot be established as superior to an alternative legal morality. Yet even in this context, attention to corrective justice allows us to filter out the bad arguments against tort law. A standard criticism of tort law that is supposed to justify its abolition is that the two-party structure of tort litigation accomplishes neither compensation for plaintiffs nor the deterrence of negligent defendants.[18] Such one-sided purposes, however, are alien to the relationship of doer and sufferer in corrective justice. Given the inherently bilateral nature of tort law, one can no more fault tort law for failing to achieve a purpose that implicates only one of the parties than one can criticize a turtle for failing to fly.

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[17]For criticism of Epstein's strict liability theory, see I. Englard, "Can Strict Liability Be Generalized?" (1982) 2 Oxford J. of Legal Stud. 245; S. Perry, "The Impossibility of General Strict Liability" (1988) 1 Can. J. of Law & Jurisprudence 147; E. Weinrib, "Causation and Wrongdoing" (1987) 63 Chi.-Kent L. Rev. 407 at 416-429. For Epstein's reaction to such criticisms, see R.A. Epstein, "Causation — In Context: An Afterword" (1987) 63 Chi.-Kent L. Rev. 653 at 657-664.

[18]See, for instance, M.A. Franklin, "Replacing the Negligence Lottery: Compensation and Selective Reimbursement" (1967) 53 Virginia L. Rev. 774; D. Sugarman, "Doing Away with Tort Law" (1985) 73 Calif. L. Rev. 555.

The popularity of these goal-oriented criticisms of tort law is a symptom of our estrangement from the internal mode of justification represented by corrective justice. Contemporary legal scholarship assumes that justification must operate as a normative lever that moves its object from without. Corrective justice, on the other hand, implies that tort law can be comprehended by reference to a normativeness immanent to it. Because it reveals how tort law can be a coherent juridical enterprise, corrective justice is the justificatory structure that renders tort law intelligible from within.

To talk of immanence and intelligibility is to harken back to the rationalism that began with the natural law of Greek antiquity and continued with the natural right of the Enlightenment. This tradition has little vitality amid the functionalism and skepticism of contemporary scholarship, both in tort law and more generally.[19] Until we return to its riches, we will continue to be perplexed about the morality of tort law. Having covered our eyes, we can hardly be expected to notice the path that has long been open before us.

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[19]E. Weinrib, "Legal Formalism: On the Immanent Rationality of Law" (1988) 97 Yale L.J. 949.