

Epilogue to

Risks and Wrongs (Marcial Pons, Spanish Translation 2010)

Originally published 1992 by Cambridge University Press and then by Oxford University Press

Jules L. Coleman

Wesley Newcomb Hohfeld Professor of Jurisprudence, Yale Law School;
Professor of Philosophy, Yale University

Abstract: Marcial Pons has just published the Spanish translation of **Risks and Wrongs** wonderfully translated by Diego Pappayannis. I agreed to produce a new Preface specifically for the Spanish edition, but what I produced proved more suitable as an epilogue. Because I will not publish the epilogue as a separate essay and because it will otherwise appear only in Spanish, I have decided to make it available in English through SSRN. The essay outlines the shifts in my thinking about the relationship of tort law to corrective justice from the time I first looked into the subject in the context of my dissertation to my current projects with Gabe Mendlow. This essay departs only marginally from the one that appears in the Marcial Pons edition of **Risks and Wrongs**. The latter part of this essay outlines very briefly the most recent project which takes the form of a series of essays on both tort law and corrective justice and which will culminate in a short book in the next few years.. Essays from that project will also be posted on SSRN as they are completed. The first 'The Place of Corrective Justice' (with Gabe Mendlow) should be available later next month.

1. In 1970 I was a PhD candidate at The Rockefeller University preparing to enter the dissertation stage. Joel Feinberg had committed to being my thesis advisor and we scheduled a meeting to discuss possible topics. Prior to this meeting I had had very few ideas of my own about my potential thesis, and to the extent to which I had given it any thought I imagined myself writing on the theory of responsibility in its relationship to the criminal law.

At that time, legal philosophy scholarship fell into two categories: analytical jurisprudence and philosophy of the criminal law. Though H.L.A. Hart's, *The Concept of Law* was broadly read, it had not yet spawned a significant research agenda among American legal philosophers. That would come in time but only after Ronald Dworkin and Joseph Raz emerged fully on the scene in the 1970s. It may seem odd now, but in the 1970s Hart's influence in legal and political philosophy was significantly greater on matters pertaining to the moral limits of the criminal law (e.g. *Law, Liberty and Morality*) and in the theory of responsibility in law (e.g. *Causation in the Law and Punishment and Responsibility*) than in jurisprudence.

Ironically, as a result perhaps of Hart's visiting appointment at Harvard Law School and his subsequent exchange with Lon Fuller in the *Harvard Law Review*, Hart's jurisprudential views were at the time of more interest to legal academics than to philosophers. This was soon to change, however, and the distinguishing feature of all but a few American law schools today is the absence of serious jurisprudence in the curriculum.²

Though no political or legal philosopher in the United States has been more self-consciously influenced by Hart than Joel Feinberg he shared neither Hart's interest in jurisprudence nor his commitment to the centrality of meta-ethics to it. Instead, Feinberg focused his attention on responsibility in the criminal law, the moral limits of the criminal law and on social philosophy.³

2. It helps to have some philosophical skill, but there is no overstating the importance of good timing – in philosophy as well as elsewhere in one's life. In 1971 or 1972, Ronald Dworkin presented a series of lectures at Rockefeller on jurisprudence. It was my first sustained exposure to legal positivism and to the character of Dworkin's early objections to it. I found Dworkin's objections powerful and his formulations of the distinction between his views and positivism riveting. These lectures were to become among the most influential moments in my academic career, as I have spent much of my academic career charting a path that could accommodate many if not all of Dworkin's insights about the nature of law within a positivistic framework. Had Dworkin given his lectures in 1969 rather than after I had started my dissertation, I might very well have never developed my fascination with the philosophy of the private law. More importantly, I believe I would have come to jurisprudence too early. It helps to understand how an area of law operates in order to fully grasp the structure of

¹ It has long been my contention that Hart's importance in jurisprudence from the 1970s through today can be traced in part to the extraordinary critical attention it has received from Ronald Dworkin. There is a lesson here and it is that a philosopher's work is kept alive by encouraging one's critics, by sympathetically responding to them and by appreciating the role they play in creating one's legacy. Those who instead seek to stifle objection and criticism, to beat it down at every turn, are kept alive only by their followers and their influence wanes accordingly.

² Indeed, two of the most important law schools in the United States – Harvard and Stanford – have no active researchers in jurisprudence on their faculty and as a result their students, some of whom go on to teach law have no idea at all of the fundamental questions about the nature of the very subject matter they teach. In contrast, law faculties on the Continent have entire departments of legal philosophy and the law faculties in the UK, Israel and at many Universities in South America are known for the important research done in jurisprudence.

³ Sadly, social philosophy has fallen somewhat out of philosophical favor. Given the extent to which various aspects of the social world – from the ties of friendship and family to those of social groups and other collectives – are central to our self-understanding – our place in the social world is sorely in need of philosophical as well as personal reflection.

the central issues in jurisprudence; and it is no surprise really that many of the best jurisprudential scholars are often experts in particular areas of substantive law.

Back for a moment to luck and timing. I had begun my graduate education at the University of Michigan where I had hoped to study ethics with the troika of Richard Brandt, William Frankena and Charles Stevenson. All were either approaching retirement or already retired when I arrived and only Brandt was teaching during my first year of graduate school. Among the materials for his course was a draft of John Rawls', *A Theory of Justice*. We did not read the book in its entirety and focused narrowly on the contrast with utilitarianism (unsurprisingly). I left Michigan after one year for personal reasons and was thinking of going either to Harvard or Rockefeller. Had we been treated to the entirety of that draft of *A Theory of Justice*, I might well have gone to Harvard, and had I gone to Harvard, I very likely would have fallen under Rawls' spell as so many of my contemporaries did, and would have pursued a career in political philosophy. As it was, I went to Rockefeller and the very first person I studied political philosophy with was Robert Nozick who, it happens, was soon to leave Rockefeller for Harvard.

So instead of plowing through *A Theory of Justice* with a fine-toothed comb as so many of my Harvard contemporaries were doing, I found myself working on problems in decision theory with Nozick. I had some formal training in game and decision theory and Nozick introduced me to the ways in which one might think about problems in social and political philosophy game-theoretically. As it happens, this turned out to be amazingly fruitful later in my career in two ways: first, in providing me with many of the tools for exploring the foundations of the economic approach to law; and second, in my own work in political philosophy – which focused on what I called 'rational choice contractarianism,' and especially on the relationship of social choice theory to democratic and liberal theory.

Ironically, perhaps, during the brief period I was a graduate student at Michigan, and largely because there were so few offerings in ethics at the time I found myself gravitating towards the philosophy of science which I studied with both Larry Sklar and Jaegwon Kim. Both were terrific teachers and very kind and helpful to me in particular. When I was committed to leaving Michigan, both encouraged me to transfer to Rockefeller to work with John Earman and both wrote letters on my behalf. When I got to Rockefeller, it turned out that there was less philosophy of science there than at Michigan and more ethics, social and political philosophy. Earman was basically the only person in philosophy of science whereas Joel Feinberg, Robert Nozick and Marshall Cohen were all working in political philosophy! So I went to Michigan to study Ethics, ended up studying mostly philosophy of science; transferred to Rockefeller to continue my studies in philosophy of science and ended up back in Ethics – well actually political and legal philosophy. As I said, timing is everything – well, luck is everything and timing is a matter of luck!

3. I had only the most modest ambitions for my dissertation and for

my career. My hope was to follow the lead of Feinberg and other legal philosophers whose work I admired, to find a faculty position, someday to secure tenure, raise a family and with luck produce work I could be proud of. It was no surprise then that I expected to be working on a problem in the theory of criminal liability that Feinberg and I agreed was both of interest and within my reach.

I was quite surprised, therefore, when Feinberg resisted my efforts to discuss possible topics in the criminal law. Not pushy by nature but no doubt taken aback by my insistence on finding a topic in criminal law theory Feinberg finally turned to me and said (and I paraphrase), “No matter how smart you are and how hard you work at it, there is very little chance that you will have something new or interesting to say about the criminal law at this point. You should consider working on another area of the law that may be ripe for philosophical investigation.” Not waiting for a response he presented me with a copy of Guido Calabresi’s, *The Costs of Accidents*, which had just been published. With this meeting and this gift began my life long fascination with the philosophy of the private law in general and tort law in particular.

After reading *The Costs of Accidents* twice I sensed that there was probably a great deal of philosophical interest in tort law and that I needed to learn more about tort law before I could undertake to write a dissertation on it. I informed Feinberg of my need to learn more about torts before committing to a dissertation on the subject, and with the aid of Hyman Gross (his co-author of the early editions of *The Philosophy of Law* anthology) he arranged for me to audit a course on tort law at NYU law school.

Between the readings the cases, immersing myself in Calabresi’s book and searching out whatever else I could find in tort theory I began to identify a series of issues in tort law that struck me as potentially of some philosophical interest. To be honest, I was flying blind here as there was virtually nothing written by philosophers on tort law and I lacked confidence in my own ability to create a field of inquiry on my own. I didn’t know where exactly I could plant my feet philosophically or what texts I could draw upon to get my bearings. I relied heavily on the framework Calabresi set out in the book and looked to make a useful intervention within a framework of thought that was not of my own making.

That is a point worth clarifying, and it is not a point whose full importance I realized until very much later. I didn’t need Calabresi’s book to help me think philosophically; but I did need it to help me identify the subject matter of my inquiry—namely, tort law. It would be several decades before I no longer identified tort law with accident law, or the central problem of tort law with the problem of allocating accident costs, so great was Calabresi’s influence on my framing of the problems that were to preoccupy me.

If Calabresi’s central concern was to identify what economic efficiency required in the allocation of accident costs, then my intervention would be to consider what justice required with regard to the same concerns. If Calabresi’s insight was that there is reason to think that the central allocative goals could

best be secured by abandoning tort law, then my question would be whether principles of justice required the tort system or whether they imposed no barriers to pursuing the large scale tort reform that so many tort theorists of that era had been clamoring for – namely, eliminating tort law in favor of a first- or third-party insurance scheme.

I presented my proposal to Feinberg and he was ecstatic – as much no doubt for my having discovered a topic outside of the philosophy of the criminal law on which to write as for the topic itself. Jointly we enlisted Donald Davidson to serve on my committee as a second reader. Within a year I completed a draft of my dissertation, *Justice and the Costs of Accidents*. I turned the draft in with little fanfare to both Davidson and Feinberg. Davidson refused to read it because it was inadequately polished and he would have to devote too much of his attention to editing it – or so he informed me. Feinberg read it, liked it and like Davidson (but with a significantly softer touch) encouraged me to polish it considerably.⁴

4

I never felt good about myself as a philosopher after a meeting with Davidson to discuss anything; so in time I developed a strategy of always arranging a meeting with Feinberg soon after a meeting with Davidson was scheduled to end. Even this strategy proved unsuccessful, so powerful was Davidson's capacity to make me feel incompetent (at best). I was so vulnerable to Davidson's criticism that even though I first took Feinberg's praise as genuine (and perhaps even warranted), it was not long before I regarded it merely as an act of benevolence intended entirely to keep me emotionally afloat; an act of kindness consistent with Feinberg's general character. Eventually, I took it as a defect in character on his part: and inability to tell the truth to me: namely that I was in fact the barely competent philosopher that Davidson assured me I was.

I probably would have gone through life with this view of my philosophical talent but for two events. The first occurred during a visit I made to Tucson to visit Feinberg after his retirement. At this point, Joel was experiencing many of the debilitating effects of Parkinson's disease. The dementia robbed him of his cognitive capacities ,especially his memory. Nevertheless, he would have moments of great lucidity and share strikingly vivid recollections periodically. Since we had spent years as colleagues as well as friends, we had many memories to share and I cherished those moments of lucidity. At lunch one day, he stopped mid meal to share with me a recollection he had that he reported to me as if it had happened just a day earlier. "Did I ever tell you that years after you left Rockefeller and were on your own I ran into Davidson and told him that I thought he had been way too hard on you; and that he should take a good deal of pride in your success?"

I had not heard the story before and frankly wasn't sure that I wanted to hear what, if anything, Davidson had to say in response. Undaunted, Feinberg continued. Davidson apparently responded by informing Joel that he took it to be the job of one's teachers to make life uncomfortable for the students and to see if they had the stuff to make it; that there were two jobs for the mentor – to figure out who has talent and who doesn't, and to strengthen the will and character of those who do (if they can handle it) by being unrelentingly hard on them. Since Davidson was unrelentingly hard on me, I inferred that he thought I had at least a modicum of talent. Why waste his energies otherwise? Later Davidson let on to me that he thought I was gifted and quite creative and that he was personally proud of my accomplishments: very pleased that I had stayed with my convictions.

Years later, Davidson passed away and I found myself surfing some blogs in which various remembrances were posted. I was drawn especially to one by a very distinguished philosopher, who, as it happens, was characterizing his experiences as Davidson's student at

I managed to rework the thesis several times to please both Feinberg and Davidson while keeping the central claim intact. The question I posed in my thesis was whether there is a principle of justice that requires liability to be imposed on the basis of fault. Were there such a principle it would act as a constraint on efforts to abandon tort law in favor of one or another no-fault insurance scheme. I identified two plausible conceptions of justice that might require a fault-based scheme for allocating accident costs -- principles of retributive and distributive justice – and argued that neither required that liability be imposed on the basis of fault. This was the meat of the thesis and its conclusion would prove welcome to those like Calabresi and Jeffrey O’Connell (of the Keeton-O’Connell no fault schemes which were all the rage at the time) among others.

4. I announced myself ready to enter the job market in philosophy; what I didn’t realize was that the job market might not be nearly so ready for me. Coming well recommended from Rockefeller’s elite and very idiosyncratic program – it was in fact more mysterious than idiosyncratic, as much to those enrolled in it as to the outside world – I secured a large number of job interviews. Precious few departments however warmed to my research project, however, and some were openly hostile to it. Not a surprise really – as in the 1970s emphasizing accidents, liability, cost-allocation and insurance was hardly the usual stuff of philosophical inquiry. I can laugh about it now, but when I first broke into philosophy many joked behind my back that I would eventually end up an ambulance chaser. Even some of my strongest supporters, like Bob Nozick, couldn’t resist introducing me to others as ‘the crazy guy working on no-fault automobile insurance.’ All in good humor, but I wasn’t laughing – at least not in my private moments.

I secured employment largely because I came from a fancy PhD program, worked with famous philosophers who were prepared to vouch for my competence and could teach a broad range of topics including epistemology and philosophy of science. But my research agenda remained a philosophical oddity and I harbored real concerns about whether I would ever be able to publish in mainstream philosophy journals, let alone secure tenure in a good department. My confidence suffered a set back when I sent my first essay, “On the Moral Argument for the Fault System,” off to the journal Ethics only to receive an incredibly nasty rejection letter from the then editor in chief Warner Wick penned in his own hand. He more or less encouraged me to pursue another line of work. I felt defeated but Feinberg encouraged me to send the paper to the newly formed Philosophy and Public Affairs. For reasons I frankly cannot recall, I decided instead to submit the paper to The Journal of Philosophy.⁵ The essay Princeton with words that could have come directly from my mouth. I emailed this philosopher; and we shared remembrances, laughed a bit. It is some measure of the perversity of our profession that hearing his tales of woe brought great comfort to me!

⁵ I think it was because I had a good relationship with Sidney Morgenbesser who invariably made

was accepted and published as the lead article in the Journal within six months.

Publication in JPhil did not fully vindicate my research project, but it did rejuvenate me while strengthening my commitment to see it through. I sent reprints to Guido Calabresi and to the many proponents of no-fault schemes including Jeffrey O'Connell and Robert Keeton. Invigorated, I began work on other essays including 'Justice and the Argument for No-Fault,' which extended the argument of the first paper and appeared in Social Philosophy and Policy. Probably with inadequate warrant, I began to sense that there might be an audience for my work – even if that audience would not be primarily philosophers.

5. Feeling more confident about my research project, I applied for and was awarded an NEH fellowship which would permit me to take a year off teaching in order to further my research agenda. At Guido Calabresi's suggestion I applied to the new MSL program at Yale Law School. The program was targeted for PhDs in other fields who had secured academic positions but whose research would benefit from a year of law school coursework. With the NEH funding, I entered the MSL program, which proved to be the most important decision of my academic career. I was enrolled in Calabresi's Torts course and completely fell under his intellectual and personal spell. In that class I also met A. Mitchell Polinsky and Robert Pritchard, the former enrolled in the MSL program and the latter in the LLM program. Along with Calabresi they were to become two of my closest academic friends and intellectual colleagues. All three were economically minded and so I simply engulfed myself in the project of understanding the economic approach not only to tort law but to the law more generally. Combined with my knowledge of game and decision theory (sharpened under Robert Nozick's watchful eye) my emphasis on the intellectual foundations of the economic approach to law proved to be critical in giving my work a distinctive character and over time has contributed to it enjoying a much broader readership than that of most legal philosophers of the private law.

Soon after completing the MSL degree, I published several articles in tort theory but my philosophical focus had turned to other areas – analytic jurisprudence, rational choice political philosophy and especially the foundations of law and economics. The stimulant for the direction of my work in jurisprudence was the publication of Ronald Dworkin's, *Taking Rights Seriously*. My first serious essay in jurisprudence was a review of Dworkin's book, and while it fractured our relationship for a time, it was the first time my work drew the

me laugh while teaching me more about philosophy than just anyone else other than Wilfrid Sellars. Both Morgenbesser and Sellars spent time at Rockefeller while I was a student there. Sellars taught a course on Kant with Margaret Wilson during which time he referred to Kant as an early Sellarsian. It took me a week to figure out what he meant by that. Later in my career Sellars took up a half time position at the University of Arizona when I was teaching there. I sat in on his classes, went for drinks with him after class and learned more philosophy than I had in three years of graduate school. Sellars did not write well or clearly but he was one of the great philosophers of the 20th Century and I feel fortunate to have studied with him.

interest of philosophers.⁶

In the review, I set about the project of seeing if I could defend Hart's positivism against the most serious of Dworkin's objections. I continued to take up that challenge in a number of papers and in the early 1980s, I published "Negative and Positive Positivism" which I took to be a formulation of the kind of legal positivism Hart really was committed to: a form of positivism that was consistent with Hart's other commitments and which met the most powerful objections that Dworkin then had on offer. Or so I argued. Many legal philosophers – including most notably, Hart—found my argument persuasive, and a new version of legal positivism – Inclusive Legal Positivism (I called it Incorporationism) was born. Many commentators now associate that paper with the beginnings of Inclusive Legal Positivism, but to be honest all I took myself to be doing was elaborating the kind of positivism that was really what Hart was after.⁷

I was beginning to feel like I was living in two academic worlds. The philosophy of law community had taken a genuine interest in my work in jurisprudence, and the legal academy showed interest in my work in tort theory. Few philosophers of law were much taken by the work in tort theory, and as far as I could tell at the time, no law faculty exhibited any interest at all in my work in jurisprudence. In fact, as I later learned when I was offered an appointment to the Yale Law School in 1985 the appointments committee that recommended the appointment had not only not read 'Negative and Positive Positivism' (which was published in 1982) but had never heard of it.

6. My interest in law and economics had begun when I read *The Costs of Accidents* but it developed more fully during my MSL year at Yale. Still, I mostly saw it as a different but illuminating way of approaching the same general issues

⁶ Before publishing the review I sent the penultimate draft to Dworkin and soon thereafter received a telegram urging me not to publish the review – that it was replete with fundamental mistakes in my interpretation of his position. The telegram was followed in short order by a letter of no less than six pages detailing my interpretive and philosophical failings. I was just a youngster professionally-speaking at the time and I barely was able to withstand either the telegram or the letter. On the advice of my wife, I sent the letter along with the draft of my review to several senior philosophers of law and asked them for their help in judging where and in what ways I may have gone awry in my interpretation. Bolstered by the response of my elders -- including Richard Wasserstrom and David Lyons, both of whose support and mentorship were invaluable to me – I stayed the course, evaluated Dworkin's objections to my review as best I could, made changes I thought were warranted or necessary and published the review nonetheless. It was not a happy experience for me but I learned a great deal from it.

⁷ I am happy to take a certain credit for being among the founding fathers of the philosophy of tort law, but I have had somewhat more difficulty accepting the label of the father of Inclusive Legal Positivism. I don't think I invented it. I think it was Hart's position, and all I did was more fully articulate it. In fact, as I have tried to make clear time and again, I have never actually defended ILP. I have merely argued that it is a plausible and defensible way of thinking about the nature of law and that it is not in fact subject to the objections that other jurisprudents have lodged against it. In a recent series of essays I have argued that the distinction between Inclusive and Exclusive Legal Positivism is of very little philosophical or jurisprudential interest.

in private law that I was addressing from a philosophical direction. I hadn't thought to write on law and economics as such and was content just to explore it as an account of tort law and to compare it with the alternative account I was developing. That changed, however, when I read the late Ed Baker's critique of law and economics in *Philosophy and Public Affairs*. Much admired by the philosophical community, which came prepared to treat law and economics as an ideology masquerading as a methodology, Baker's paper was held in relative disdain by practitioners of economic analysis. I found myself siding with the economists, though truth be told neither side was able to muster particularly impressive arguments. Those who saw economic analysis as an ideology lacked a basic understanding of the efficiency notions and of their place in economic theory, whereas those who defended efficiency did so by drawing on a rather naïve formulation of the distinction between efficiency and distribution. The one side showed an embarrassingly weak understanding of efficiency while the other displayed a sophomoric understanding of the diversity of the claims of justice (as well as a naïve understanding of philosophical issues in the foundations of social science).⁸

I was confident that I could do better than both sides had been able to do and turned my attention to explaining the conceptual foundations of economic analysis and exploring its relationship to various normative principles. Several of the papers I wrote during this period were especially well received by those advancing an economic approach to law in spite of the problems that I identified with it. They admired my sympathetic and 'internal' critique; and those who were critical of the economic analysis did not have to rely on the very poorly framed criticisms that Baker had put forward. Some of my criticisms led Richard Posner to abandon the claim that efficiency analysis is based on the Pareto concepts in favor of the view that the operative notion was Kaldor-Hicks. I had established as much in several papers. The problem is, as I noted, that the Kaldor-Hicks criterion is subject to the Scitovsky Paradox. Any effort to reformulate the K-H criterion in a way that avoids the paradox makes it vulnerable to analogous paradoxes. Abandoning the Pareto criterion in favor of the K-H criterion (or some variant of it) amounts to little more than going from the frying pan into the fire, or so I argued.

7. I was finally putting to use the time spent with Nozick on game and decision theory and for much of the next few years I focused my attention on employing these (limited) skills in areas of social and public choice, rational choice political philosophy and the foundations of economic analysis. When I wasn't thinking about the philosophical foundations of social science, I was responding to various objections raised against Inclusive Legal Positivism; and in doing so getting a sense of the deeper issues in jurisprudence even if I had as yet no thoughts as to how to address, let alone resolve them.

Even so it was during this period that I made the first major change in my thinking about torts, and the transition from the early essays to *Risks and Wrongs*

⁸ The latter persists to this day unfortunately.

was underway – though I had only the vaguest grasp of the implications of the direction in which I was headed. The turning point was the essay “The Morality of Strict Tort Liability,” which at the time seemed so right to me, but which I ultimately came to see represented everything that was mistaken in the approach to tort law that I had been developing.

There is a familiar objection that strict liability is unfair or unjust because it imposes a sanction or a liability on persons who are not at fault or to blame for the injuries their conduct occasions. By this time I had already argued that even the fault rule imposes liability in the absence of blame. For the most part fault liability is not defeasible by excuses. If there is a distinct problem with strict liability it cannot be that it is not defeasible by excuses. What then could be the distinctive injustice or unfairness of strict liability? My suggestion had been that if there is a distinctive kind of injustice associated with strict liability it must be that ascriptions of strict liability are not defeasible by justifications. Individuals who are free from blame and who are justified in what they have done may nevertheless be required to shoulder the costs their activities impose on others.

This formulation of the difference between strict and fault liability was widely accepted and was thought to capture the distinctive unfairness of strict tort liability. As a defender of strict liability, this was an objection I needed to address. “The Morality of Strict Tort Liability,” was my response to this objection. Roughly the argument is this. The fundamental question tort litigation addresses is whether the loss that has initially fallen on the victim should ultimately be borne by the defendant injurer or by the plaintiff victim. If the defendant is liable for the victim’s costs, the loss is his to bear and that burden is coercively enforceable. If the defendant is not liable for the victim’s loss, the costs are the victim’s to bear and the burden has to shoulder those costs is likewise coercively enforceable. That is to say, any efforts he makes to impose those costs on others without their consent is subject to being met by the coercive authority of the state. Judgments against either the defendant or the plaintiff are coercively enforceable, and for that reason it makes sense to describe each judgment as one imposing liability.

With that key move in hand, we can now re-characterize fault liability. The claim that fault imposes liability on those injurers who are at fault in virtue of the injury they cause being their fault is elliptical for the more precise formulation according to which the VICTIM/PLAINTIFF is liable to bear the loss unless she can show that the injurer is at fault for it. In the same vein, the rule of strict liability (with the normal defense of plaintiff fault) would then be recast as the rule that the INJURER/DEFENDANT is liable for the loss unless the victim is at fault for it.

Understood in this way rules of strict and fault liability both impose forms of strict liability in the sense that both impose the costs of misfortune on someone who is not at fault for having caused them in the event that no other party is at fault for having done so. What we call strict liability imposes those costs on injurers in the absence of victim fault; and what we call fault liability imposes those costs on victims in the absence of injurer fault. Both rules are essentially

mirror images of one another. Both rules have elements of strict liability. That fact about what we call strict liability cannot possibly be what is objectionable about it. Or if it is objectionable then so too is fault liability – for the same reason and to the same extent. Put another way, if there is something especially objectionable about strict liability in torts, it cannot be the fact that it imposes the costs of accidents in the absence of blame or wrongdoing. If there is a way in which it is objectionable that is not true of the rule of fault liability, it cannot (ironically) be the fact that it imposes strict liability. The soundness of my argument could not be seriously questioned.

8. Only later did I realize that this line of argument – indeed all of my work in tort theory – rested on accepting the basic economic framework of tort law even as I saw myself (and others saw me as well) as offering an alternative to the economic theory of torts. For what I had accepted was the basic framework of the economic analysis: that there is a social problem to which tort law is addressed. The problem is created by accidents and their costs, and it is basically, what is to be done about those costs? We can identify some set of goals with regard to those costs –say minimize or optimize them, distribute them fairly or justly, and so on. Tort law is a mechanism or instrument for addressing the problem in a way that allows us to pursue these goals. The central tool in the tort law tool box is liability, which is to be understood in terms of cost-allocation. Either allocation decision – to defendant or plaintiff – is a liability judgment insofar as either is a coercively enforceable allocation of costs.

I was ‘imprisoned’ by the economic framework for conceptualizing torts even though I was applying different principles to answer the same question. In other words, all of my theorizing took place within a framework that took the paradigm tort to be an accident, the normatively significant features of accidents to be their costs, and the central problem of liability to be the allocation of these costs. What I accepted was more important in characterizing my thinking than what I had rejected. I may have been offering an alternative to the economic theory of tort law, but in doing so, I had bought into the economic framework for theorizing tort law!

9. There have been many changes in my thinking both about tort law and tort theory over the years. The most fundamental, however, has taken the longest to make, and that is a complete rejection of the framework within which economic analysis proceeds and within which I too addressed the fundamental theoretical issues in tort law. The change was slow in coming and the mechanism through which it has occurred is a deepening understanding of the concept of liability. Little of the change at first was self-conscious, and it was not until recently that I even saw that the key changes have come from reconceptualizing the nature of liability in torts.

I began with a conception of liability as a form of ‘allocation.’ Of course, once one views liability as concerned primarily with allocation, the question becomes what the object of allocation is. On the prevailing view, what gets allocated are costs. The next question is, which costs, to which the answer is

‘accident costs.’ There you have the basic picture. Then different theories of torts just become different accounts of the goals for allocating these costs and the principles of allocation to be followed in doing so. On this and this alone did I originally disagree with the economists. By now, I disagree with them about virtually every aspect of the framework.

The first change came in response to Stephen Perry’s objections to my account of corrective justice. The key shift was to replace the idea of liability as allocation of costs with liability as a mechanism for assigning costs to those responsible for them. A liability judgment has consequences with regard to the allocation of costs, but the judgment itself requires a ground that justifies assigning the costs to someone as his or hers to account for. That ground must be something other than the consequences of the judgment; it must purport to explain why a person must answer for those costs – why they are to be his responsibility.

This, then, was the second account of liability in torts: liability as ‘accounting for’ or ‘answering for.’ We might think of it in terms of liability as a means of assigning costs. The costs are assigned to the defendant if he is responsible for them – if in other words he is appropriately required to answer for them. If he is not, then there is no basis for imposing them on him as something he deserves to shoulder. And tort is set up such that the costs are then the victim’s to bear, but not because she deserves to bear them, but because there is no one who can be liable for them: that is, there is no one who must answer for them. This is the view of liability that dominated my work from the period immediately prior to *Risks and Wrongs* until my current work. It marks a departure from the economic framework of liability as allocation, but it is otherwise compatible with much else within the basic economic framework – including the centrality of both accidents and costs.

If liability as assigning costs is a form of ‘accounting for’ then we can see it as a two part relationship: X is accountable for Z, where X ranges over persons and Z ranges over costs or other plausible objects of accountability. I have come to the view, however, that liability in torts is better understood as a three-part relationship: X is liable to Y for Z, where X and Y are variables ranging over persons (typically) and Z is the object of liability (usually but not always the losses that Y has suffered). The key insight here is that liability is primarily a mode of accountability -- of holding one person *answerable to another*.

There is no question that a consequence of liability in torts is almost always an allocation of costs. But that does not make liability a matter of allocating cost. And there is no denying that liability is imposed only if there is a basis for it in desert or responsibility; and so a person had liable for costs is answerable for them. But that does not make liability a matter of answering for. The key is that in torts a person is not merely liable for costs but to others for those costs. If only I had seen this earlier! The remainder of the Epilogue traces the changes in my thinking as reflected in these conceptions of liability in torts.

10. To appreciate the argument in *Risks and Wrongs* it helps to trace how I came to conceive of liability as requiring a ground other than the consequences of imposing liability. It had much more to do with a dispute about the nature of corrective justice than with direct objections to liability as allocation. The hero of the story is Stephen Perry and especially his objections to my account of corrective justice. To explain Perry's influence, I have to backtrack a bit.

The first stage of my theory of tort law emphasized addressing the place – if any – of retributive and distributive justice in tort law. I argued that there was no place for retributivism in tort law and there was no reason to suppose that considerations of distributive justice imposed constraints on the conditions of tort liability: that is, no reason for thinking that any plausible conception of distributive justice favored fault to strict liability or vice versa. In fact, it is just a mistake to think that distributive justice is the sort of thing that applies as it were to particular tort actions. As I came to argue later, there is an essential element of fairness in tort law, and it has to do with the content of the duties of care that those who engage in various undertakings owe to those whom they put at risk; but it is a mistake to confuse the concept of fairness with that of distributive justice, the latter applying in the first instance to the institutions of society and not to the disputes among persons.

By the time of 'Corrective Justice and Wrongful Gain,' I had shifted the focus of my attention to corrective justice and begun to develop the account of tort law with which I have been most closely associated since: the view that tort law is an institution of corrective justice. "Corrective Justice and Wrongful Gain" was not the first essay in which I introduced the principle of corrective justice, but it was the first essay in which I explored its implications for tort law in conjunction with another set of distinctions that would become essential to my thinking.

The building blocks of the view in my account of tort law were a particular conception of corrective justice – which held that wrongful gains and wrongful losses ought to be annulled -- and two crosscutting distinctions. These are: (1) the distinction between the *grounds of liability* and the *grounds of recovery/repair*; and (2) the distinction between the *grounds* of liability or recovery and the *modes* thereof. My argument was that the principle of corrective justice provides a ground of repair or recovery; less often, if at all, a ground of liability; it does not specify a distinctive mode of rectification or liability. Tort law does both; it identifies what counts as a ground of recovery and liability while also constituting a distinct mode of rectification as well. With these claims in hand, I argued that corrective justice explains the grounds of a justified tort action, but that the best explanation for the way in which those claims are made good in tort law – the mode of rectification constituted by tort law – is economic analysis. Imposing tort liability is the most efficient way of vindicating legitimate claims to repair – or so I argued.

This paper marked a turn away from offering an account of tort law that was set against economic analysis in favor of one that was designed to capture the insights of both corrective justice and economic analysis. I was pleased with the argument of the paper and felt – at least for a short time – that I had been

able to capture the core instrumentalist insights of economic analysis in a way that rendered them subservient to the core of justice in tort law.

As with almost all efforts to find a middle ground between two apparently conflicting views, my effort to forge an alliance between corrective justice and economic efficiency was met with skepticism from both sides. The most interesting of the economist's objections were those of Richard Posner. The most telling objections of a philosopher were advanced by Stephen Perry.

11. Posner resisted the distinction between wrongful gain and wrongful loss. He argued that every instance of wrongful loss in torts is accompanied by a wrongful gain and so it was impossible to separate out either wrongful gains from wrongful losses or the modes of rectifying the one from the modes of rectifying the other. He took me to be making a distinction without a difference – or at least one without a difference in tort law.

Posner's objection rests on a philosophical confusion. The distinction between wrongful gains and wrongful losses and that between the grounds of liability and those of recovery holds even if wrongful gains *always accompany* wrongful losses. The distinction between the concepts would hold even if one necessarily and not merely always accompanied the other. Concepts can be distinct even if they are always (even necessarily) realized jointly. This is a nicety that does not get to the heart of Posner's objection. His point is that whenever there is a wrongful loss, there will always be a wrongful gain; and so whatever the reasons are for annulling the loss will be those for annulling the gain.

His argument runs as follows. Allow that a wrongful loss is one owed to the wrongdoing of another and that we can understand wrongdoing in terms of fault. It follows that whenever there is wrongful loss there is fault. Now fault itself is best understood in terms of a failure to take precautions that one ought to have taken. The failure to take such precautions is a savings to the actor and if we hold that the precautions are one the injurer ought to have taken, they constitute ill-secured or wrongful savings, i.e. wrongful gains. Wrongful losses entail fault and fault entails wrongful gains. Therefore wrongful losses entail wrongful gains. Thus, my argument must be modified since corrective justice requires annulling wrongful gains as well as losses; and if there is a duty in justice to annul the one it entails doing so by annulling the other. There is no room in my account then for a role to be played by economic considerations. Or, better, my account lacks the resources it needs to provide the role for economic analysis that I have alleged it has.

11. The argument is fascinating and I found responding to it very helpful and clarifying. It fails as an objection for at least four reasons and attending to those reasons helps us to better understand the view I was advancing. In the first place, even if every wrongful loss were occasioned by a wrongful gain it would not follow that the only way to annul both would be by imposing the victim's loss on the wrongdoer. Both could be annulled separately

through different actions or institutions; and so it may yet be that if we are to annul both together in the same action the best reason for doing so is efficiency – that is, because doing so puts the proper incentives in place and meets the demands of justice in an administratively cost-reducing way. Even if the premises of Posner’s argument were true, the conclusion would not follow.

Secondly, and relatedly, even if the wrongdoer may benefit unjustly by failing to take precautions, he may on balance lose more as a result of his fault – as in the case of his causing an automobile accident through his negligence that results in his own serious injury or death. So to say that there is invariably a wrongful gain whenever there is a wrongful loss is misleading at best. The fault may cause loss all the way around. It may also cause gain for victims as well as injurers, as for example, when a faulty driver gets in an accident that results in his passenger and him being late for a plane that crashes, killing all of its passengers. There is a good deal that needs to be said about such cases and the claims (if any) that they give rise to, but nothing worth saying follows from the fact that the driver has wrongfully secured savings in failing to take precautions he had a duty to take.

Thirdly, it is just a mistake to think that wrongful losses require fault, as a wrongful loss can result from justified conduct that nevertheless breaches a duty one has to others. We know this from the familiar distinction that both Joel Feinberg and Judith Thomson have emphasized between rights-violations and rights-infringements. The former are wrongful wrongings; the latter include justified wrongings. The distinction has been central to my work and helps us understand the distinction in torts between fault and strict liability.

Even if wrongful gains always accompany wrongful losses, it does not follow that the existence of the wrongful loss is the *grounds* of the wrongful gain. Everyone who fails to take the precautions they ought to take or which they have a duty to take gains wrongfully, and this is so whether or not their failure has untoward causal upshots. The source of the gain is the failure to exercise the care required, not the loss that others suffer as a consequence. The former is identical to a failure to take due care; in fact, it follows necessarily as a matter of definition. In contrast, wrongful losses don’t follow necessarily at all. Sometimes fault occasions loss; sometimes not. It follows that when loss occurs it is not the loss that is the source of the gain to the injurer, but the failure to take due care itself. And just to cement my point further, were we serious about annulling such gains we would adopt an institution that did so apart from the causal consequences of the mischievous conduct. We would annul the gains that all faulty agents secure as a result of their fault; we would do so in a way that treated them alike; and this would mean annulling their gains apart from the losses that sometimes result from the wrongful mischief.

12. Unlike Posner, Stephen Perry acknowledged the legitimacy and importance of the distinctions between the grounds and modes of liability and that between the grounds of liability and the grounds of recovery. He denied that they play the role in tort law that I attributed to them. His reason for thinking so

was that as he saw it I had corrective justice all wrong, and because I misconceived the character of corrective justice I was led to find a place for economic considerations in tort law that they simply did not and indeed could not have – certainly not once corrective justice is properly understood.

His target was the Annulment Thesis as an account of corrective justice. According to the annulment thesis, wrongful losses (and gains) ought to be annulled. This implies that the principle of corrective justice gives rise to *agent-neutral reasons* for acting. Each person has the same kind of reason that every other person has to rectify or annul wrongful gains and losses; no one in particular has a reason as a matter of corrective justice to annul wrongful gains and losses that is not also a reason for everyone else so to act. Perry notes that it is distinctive of distributive justice that it gives rise to agent-neutral reasons for acting and so in characterizing corrective justice as a source of agent-neutral reasons for acting I have in effect collapsed the distinction between corrective and distributive justice.

The second objection is that corrective justice in fact gives rise to *agent-relative reasons* for acting. An individual who is responsible for causing a wrongful loss has a duty under corrective justice to repair it. The loss is his to repair and whatever interests others may have or take in the interaction between the parties, the duty to repair falls to the wrongdoer alone. In short, my account is doubly problematic: it mistakenly characterizes corrective justice so that it gives rise to agent-neutral reasons when in fact corrective justice is a source of agent-relative reasons for acting; and in so characterizing corrective justice it collapses the distinction between corrective and distributive justice.

Perry's objections were extremely influential. One way of putting his point is that characterizing corrective justice as I have left me unable to distinguish between it and distributive justice. The better account of corrective justice distinguishes corrective from distributive justice insofar as the former gives rise to agent-relative reasons for acting whereas the latter gives rise to agent-neutral reasons.

I found Perry's objections persuasive at the time and abandoned the Annulment Thesis as a result. All my efforts thereafter up to and including the argument of *Risks and Wrongs* were devoted to articulating a conception of corrective justice that: (1) explained the central features of tort law; (2) distinguished corrective justice from both distributive justice and economic analysis; (3) explained nevertheless the relationship between corrective and distributive justice.

My first attempt to provide a conception of corrective justice that satisfied at least some of these conditions was 'The Mixed Conception of Corrective Justice.' The central claim of the paper is that *corrective justice imposes a duty of repair on those responsible for the wrongful losses they impose on others*. So understood, the principle of corrective justice is characterized in terms of several basic concepts: **wrongful loss, responsibility, and a duty of repair**. In a sense I did not yet fully

appreciate, I was looking to replace the economic framework of tort law in terms of accidents, costs and liability as allocation; and in that essay I had taken some but not all the steps I would eventually need to take to do so. For I had replaced costs with wrongful losses and liability as allocation with liability as requiring a basis in responsibility for those losses and itself as a basis not for bearing costs or losses but as a ground of a distinctive kind of duty: a duty of repair. The duty of repair is a distinctive kind of reason imposed on the person responsible for the wrongful losses of others and. So understood, corrective justice gives rise to agent-relative reasons, thus distinguishing it from distributive justice.

13. Much of *Risks and Wrongs* develops this conception of corrective justice and explores its relationship to tort law. By the time of its publication several features of the view it presents were already familiar in the literature, the most well-known of which was the so-called bilateralism critique of economic analysis. The argument first appeared in 'The Structure of Tort Law' and a similar objection has been central to Ernie Weinrib's criticism of the economic approach to tort law. It is now part of the conventional wisdom of the field and does not bear repeating in detail. Roughly the claim is that adjudication in torts embodies a distinctive kind of practical reasoning that yields a distinctive kind of practical judgment – the imposition of a duty of repair or a liability to make repair. The premises in this argument relate the conduct of the defendant and plaintiff to one another, and their place in tort law cannot be explained plausibly by economic considerations.

The deeper point that the argument reveals is this: according to economic analysis, the normatively significant properties of the defendant and the plaintiff are the relations that they bear to the goals of tort law: most prominently the relative capacity of each to reduce the costs of accidents at this or that cost. In contrast, the scheme of practical reasoning in torts cares about the relationship that the parties bear to one another, not the relationship that each bears to the goals of tort law: for example, whether one owed the other a duty of care of a certain sort; whether that duty was breached; whether the breach led to harm of a certain sort; and so on. One needs a theory of tort law that explains the significance of the normative properties that tort law picks out and highlights in its scheme of practical reasoning; and this, I argued, is provided by the principle of corrective justice, not the principle of efficiency whose object is the relationship of each litigant and the goals of tort law.

In addition to objecting to the annulment conception of corrective justice on the grounds that it collapses the distinction between corrective and distributive justice, this is the point that Perry's arguments against me were trying to nail. Tort law has a bilateral structure and so too does corrective justice; and that is part of the reason that properly understood, it alone, and not it in conjunction with economic analysis, provides the best explanation of tort law; or at least of the normative structure of tort law.⁹

⁹ Very few, if any, find the objection to the economic analysis of the structure of tort law unpersuasive. Indeed I have never been offered a serious response to the objection by a

It is important that the bilateralism objection can be read as a criticism of economic analysis and as a defense of a certain number of conceptions of corrective justice. For to be honest, the argument more easily fits with the conception of corrective justice that I advanced since Perry's intervention and in *Risks and Wrongs* than it fits with the Annulment View. In fact, as I will argue in the concluding sections of this essay, it does fit with the Annulment View. The argument for that claim is considerably more complex and emphasizes values other than those expressed by corrective justice – in particular those captured by the accountability relationship.

14. It is important to the account of corrective justice in **Risks and Wrongs** that the object of justice is wrongful losses, not wrongs. My account is not that corrective justice seeks to undo or rectify wrongs, but to address certain consequences of wrongs, namely, wrongful losses. Wrongs are important to corrective justice insofar as they are the grounds of wrongful losses. Wrongful losses can result from wrongdoing – that is, conduct that is wrong though not a wrong to anyone in particular – as well as from wrongs – that is, conduct that constitutes a breach of a duty that one owes another. Wrongs are acts contrary to the constraints that the rights of others impose on one, and one can therefore justifiably wrong another. Thus there can be permissible, even justified, wrongs. In such cases, a loss can be wrongful without being the result of another's wrongdoing.

One can engage in wrongdoing without wronging anyone in particular, that is, without breaching a duty one owes to anyone in particular. On the other hand, one can wrong another -- that is, breach a duty one owes to another -- for very good reasons, thus rendering one's conduct permissible, even commendable on balance. Losses that result from either wrongdoing or from wrongings are wrongful and thus within the domain of corrective justice – or so I argue in *Risks and Wrongs*.

I argue as well that the distinction between wrongs and wrongdoing allows us to explain the ways in which both strict and fault liability in torts can be matters of corrective justice. Fault liability governs losses owing to wrongdoing

proponent of the economic analysis of tort law – though the reason for that may be that most simply don't pay attention to what those not advancing an economic account of tort law have to say! Frankly, I fear this is the truth; and it is an unfortunate and disappointing truth for someone like me especially, that is, someone who has spent more than a good share of his intellectual energies working to understand and appreciate the contributions of economic analysis to our understanding not just of law but of important parts of our social and political world. And when I hear from students of tort law how my views or those of other philosophically minded tort theorists are represented my blood curls. Worse, most still think that the central issue of justice in tort law is distributive justice which they somehow associate with the idea of equity in distribution. If we on the other side were as naïve about economic analysis as they are about philosophy we'd be barred from faculty lounges everywhere in the academy and laughed at. Intellectual monopolies of thought are dangerous and unproductive. It can make even a well-intended theorist pretty cranky.

(wrongdoing that often but not necessarily constitutes a wrong to the plaintiff), whereas strict liability often but not always governs losses owing to wrongings (that may or may not also constitute wrongdoing).

Not all cases of strict liability are cases in which there are wrongs or in which there are wrongful losses in the same sense. Not all of strict liability therefore is a matter of corrective justice. The key to that argument is the distinction among three kinds of cases. In the first kind of case the injurer breaches a duty (permissibly or otherwise) and loss results. The loss is wrongful and its ground is the breach of the duty. This is the paradigm case in which strict liability governs liability for wrongful losses. In the second set of cases, the injurer does no wrong in imposing a loss on the victim, but it would be wrong for him to engage in the conduct unless he compensates his victims. The conduct is not a wrong as such, but it would be a wrong in the absence of compensation *ex post*.

The third set of cases is importantly different from both of the first two since no notion of wrong is involved at all. In these cases, the injurer's conduct is neither wrongdoing nor a wrong to anyone; nor would it be wrongdoing or a wrong were he not prepared to offer compensation for any of its resulting harms. The key idea in such cases is that even if the injurer's conduct is permissible (and perhaps even commendable) whether or not he compensates the victim, *fairness* requires that the victim not be required to bear the costs of the injurer's conduct. These are cases in which no negative assessment is made at all of the injurer's conduct. Still, that does not settle the question of who should bear its costs; and considerations of fairness may provide good reasons for imposing those costs on the injurer rather than on the victim. Not all of these cases involve wrongful loss in any sense and so not all can be explained by corrective justice.

Thus, I argued, all or nearly all of fault liability could be understood as a matter of corrective justice, whereas some, but not all, perhaps not even most, of strict liability could be. This was the key claim of *Risks and Wrongs*, and as we shall see below, it is a very different kind of claim about the relationship of tort law to corrective justice than the ones I am inclined to defend now.

15. The other central challenge of the book is to explain the relationship between distributive and corrective justice. The problem can be posed as follows. Imagine a just distribution of resources. The justice of the distribution can be upset by wrongful actions of persons through fraud, theft, the imposition of unjustified harms and so on, the effects of which would create injustices in the distribution. One would think that such effects should be annulled or rectified and that the 'correction' called for is a matter of justice. The problem is that if correction is called for, the underlying grounds of repair are fixed by the principle of distributive not corrective justice. So understood, corrective justice is a matter of justice but not an independent principle of justice. Instead it is the *rectifying aspect* of distributive justice.

This suggests that corrective justice can be an independent principle only

if it calls for rectifying or annulling losses when doing so protects, entrenches or supports an unjust distribution of resources. In that case, the principle of corrective justice is independent, but the worry is that it is not a principle of justice. How could justice require entrenching an unjust distribution of resources? How can one have compelling reasons in justice for sustaining or entrenching an unjust distribution of resources? The problem is that corrective justice can either be independent or a principle of justice, but it cannot be both. Fending off this objection is one of the major challenges of *Risks and Wrongs*.

16. One can respond to the objection in either of two ways, both of which suffice, but in different ways, to meet the objection that corrective justice cannot be an independent principle of justice. The first strategy is to deflate the objection in either of two related ways. There is no question but that the objection gains much of its force simply because we are so accustomed to identifying justified state action with the demands of distributive justice, and so any use of the coercive authority of the state that might conflict with the requirements of distributive justice strikes us as *prima facie* problematic. But there is no reason why this should be so. There is after all no reason to suppose that two principles of justice cannot conflict with one another in the same way that principles of morality more generally can. It can hardly count as a decisive objection to corrective justice that its demands may from time to time conflict with those of distributive justice.

This brings us to the second deflationary point. Once we allow that principles of justice can conflict with one another, there is no reason to suppose that priority should be given to the principle of distributive justice in resolving any conflicts that might arise between it and corrective justice.

Together these two points take the sting out of the objection, but they give us no way of thinking about the actual relationship between corrective and distributive justice. To get a better handle on how we might think about the relationship between distributive and corrective justice, we might begin by ascribing a certain primacy to distributive justice and see if we can explain how to think about corrective justice given this point of departure. This is the strategy of argument in *Risks and Wrongs*.

The place to begin is to notice that there are important values beyond those expressed by distributive justice for sustaining a distribution of resources by a practice of corrective justice. The underlying issue concerns the grounds for the justified use of coercive authority, not distributive justice. In fact, the claims of both distributive and corrective justice must be interpreted and understood in the light of a general theory of political legitimacy and not the other way around. In *Risks and Wrongs* and then again in more detail in *The Practice of Principle* I argue that political values of stability and the significance of autonomy understood in terms of the capacity of individuals to take responsibility for how their lives go – which in turn reflects and expresses the difference between one's life being a matter of what one does and not a matter of what happens to one – as well as certain ideas of equality of respect for persons as members of the moral community set

the conditions under which a distribution of holdings or resources can legitimately be sustained and protected by a practice of corrective justice. The very same political ideals and values are needed to interpret the claims of distributive justice and to determine the strength of the obligations and powers they impose and confer.

Even if the claims of both corrective and distributive justice must be understood within a general theory of the conditions of legitimate political authority, we can still hope to capture the presumed priority of distributive justice with regard to corrective justice. In the first place in order for a distribution of holdings to be justifiably protected by a practice of corrective justice it must allow for sufficient autonomy and well being as characterized above – that is, enough to satisfy minimally the conditions for persons' lives to reflect what they have chosen rather than what has happened to them. Secondly, in saying that such a distribution of holdings can be secured by a practice of corrective justice – that is, a practice of imposing duties to repair to make good the wrongful losses their conduct has occasioned – we are not saying that those holdings are thereby secure against state action that redistributes those holdings in order to secure significant improvements in distributive justice. They are sufficient, in other words, to secure a distribution of resources against categories of private takings, but not against certain forms of public takings.

These are, for me anyway, the key features of the argument in *Risks and Wrongs* as regards the relationship between corrective justice and tort law on the one hand and corrective and distributive justice on the other.

17. Since the publication of *Risks and Wrongs* my thinking about both corrective justice and tort law and the relationship between the two has changed substantially. Though the changes have come incrementally the net effect has been a completely new and distinctive way of thinking about tort law. In the concluding sections of this essay, I want to highlight the changes in my thinking about tort law and about corrective justice – and most importantly, the connection between the two. Ironically, perhaps, my Clarendon Lectures published as *The Practice of Principle* were less significant to the development of my ideas than I would have thought.

These remarks will be necessarily brief and conclusory. As I said earlier, the framework that economists – but not just economists—bring to tort law can be characterized as follows. There is a social problem (there are of course many social problems) worthy of our collective attention. This is the problem of accidents and their costs. The question is what is to be done about those costs? Tort law is a mechanism for addressing that problem, and depending on what we take our aims to be in addressing the problem, it can be a more or less successful instrument. It's success depends in part on the tools at its disposal and in the case of torts the basic tool is tort liability – a mechanism for allocating those costs. So the framework is entirely instrumental and the central concepts in it are accidents, costs and liability as allocation.

Over time, I have come to reject all of these elements of the standard picture. Though I allow that there is a problem to which collective or social principles are properly addressed, it is not the problem of accidents and their costs. The problem is more general; it is the problem of losses owing to human agency. I will have more to say about the problem and the social response to it in the discussion of corrective justice below. I take up this matter in the context of social justice because in the first instance the problem is one to which social principles apply, not legal institutions. Legal institutions address these problems as ways of instantiating or realizing the demands of these social principles. We need to identify the principles first and come to the institutions that realize them later.

I reject as well the view of tort law as largely instrumental. I do not deny that tort law serves certain social goals and can be assessed by how well or poorly it does so. Still, tort law is an institutional realization or embodiment of certain social principles – as I have just suggested – and so it is simply a mistake to see it largely, let alone exclusively, in instrumental terms. This difference between the instrumental and non-instrumental aspects of tort law is reflected in a distinction I will come to in due course between a practice's foundational justification and its normative structure.

That there is a social problem (indeed more than one) to which tort law is addressed does not mean that the most apt way of thinking about tort law is instrumental, for we can understand the distinctive way in which tort law addresses those problems in terms of its normative structure: that after all is what distinguishes it from other institutions that may serve similar functions – e.g. regulation, workman's compensation, and so on.

There is no denying that the most prevalent tort is an accident. But it is important not to confuse the most prevalent or familiar tort with the paradigmatic tort. The paradigmatic tort is the one that most vividly captures and illuminates what it is that makes a tort a tort, and insofar as torts are wrongs, it is misleading to identify the paradigmatic case of a tort with an accident—many of which, perhaps even most of which – are harmless, unintentional, and otherwise faultless. The better view, I am inclined to think, is that insofar as torts are wrongs the paradigm tort is a trespass or a battery – an intentional tort. And we should understand accidents that are torts by demonstrating the ways in which despite their accidental nature they are wrongs to those injured by them.

I also reject the idea that the normatively significant feature of wrongs is the costs they impose. I also reject the view that from the point of view of corrective justice and tort law what matters most about wrongs is that they are wrongs: rather, my view is that what matters most is their connection with loss. I cannot argue for this claim here, but I fully acknowledge that it is among the most controversial and least well defended aspects of my overall view of both corrective justice and of tort law.

Instead of instrumentalism, I adopt a mixed view in which tort law is to be

understood and assessed not just in terms of its success in promoting certain ends or solving certain problems, but also in terms of the extent to which it embodies or expresses various principles and the values those principles give expression to. Instead of accidents and their costs I turn to wrongful losses, wrongs and losses.

18. The most significant change in my account concerns the concept of liability in torts. My view of the nature of liability has changed in two ways: first with respect to whether it is a two or a three-part relationship; and second with respect to the core role it plays. I began with the same conception of liability that the economists have: liability is a two part-relationship, the point of which is to allocate costs. It is a relationship that is between persons and costs. Liability is liability for those costs; and the judgment of liability is a judgment about who should bear those costs. If the costs that landed on the victim were shifted through a successful tort action to the defendant, then they were his liability. If a tort action proved unsuccessful and the costs remained the burden of the victim, then those costs constituted his liability. There was no difference to speak of between liability and allocation.

In economic analysis, there is no sense in which the party liable for a cost is thereby liable to anyone. It is easiest to see this in the case of the victim being liable for the costs that have fallen initially on him. He doesn't pay the injurer for those costs. He simply bears them. The best way to look at this notion of liability is in terms of a zero sum game in which costs are being divided. Whoever bears those costs is liable for them and that's all that is involved in a liability judgment with regard to them.

I abandoned this conception of liability largely in response to changes in the way in which I began to think about corrective justice. If corrective justice imposes a duty of repair on those responsible for the wrongful losses of others, then liability is a way of *assigning* costs or losses and not merely a way of *allocating* them. Of course there are grounds for allocating costs just as much as there are grounds for assigning them. But the deeper idea has to do with the nature of an assignment of costs or the imposition of a liability to bear those costs. The reason reflects the idea that in being liable for the costs torts is expressing the idea that one has to answer for the costs. And so what is distinctive of the grounds for assigning costs is that they specify the conditions under which one has to answer for the costs.

The principle of corrective justice specifies those conditions. If one is responsible for the wrongful losses one imposes on others then one has to answer for those costs; they are one's responsibility to amend or repair. If one is not responsible for the losses or if there are no losses or if there are losses but they are not wrongful, then one incurs no such responsibility. Absent such a responsibility there is nothing one needs to answer for and the loss, if any, is the victims to bear. The point of course is that in requiring the victim to bear his costs we are not *holding him liable*; no judgment is expressed that he must answer for them. They are simply his to bear.

Only recently, however, have I come to see that this formulation of the liability relationship too is inadequate. Liability in torts is a three-part relationship: X is liable to Y for Z, where X and Y range over persons and Z over losses. The conclusion of a successful tort action that Y brings against X is a judgment of liability against X that makes X vulnerable to Y's exercise of legal powers to impose a burden on X, typically, but not necessarily a compensatory measure of the harm that Y has suffered at X's expense. So it is a mistake to think of liability as either allocating or assigning costs. Rather liability is expressed in a scheme of normative powers between X and Y with respect to Z.

Put another way, it is not that X is answerable for Z; rather it is that X is answerable or accountable to Y, and that fact is expressed in the normative powers that Y has in torts with regard to X. He can demand X's liability to him or he can relieve X of his liability to him – and so on. It is *the accountability relationship* that is at the core of judgments of liability in torts and it is this fact about it that explains why the so-called bilateralism objection to economic analysis has the force that it does.

The concept of accountability is the key to understanding the normative core of tort law. Once we see that, we need a further account of the character of Z: that is, why is the accountability relationship expressed in terms of the imposition of a liability to repair as opposed to something else.

19. The concept of a normative core focuses our attention on an important distinction that is much overlooked in tort theory (and elsewhere in legal theory for that matter). This is the distinction between *the foundational justification* of a practice and its *normative structure*. It is helpful to illuminate the distinction by considering the practice of promising. There are a number of good reasons for an institution of promising. It promotes trust and vulnerability to others and in doing so makes friendship possible. It allows one to fix the future and thus to rely upon others and to save costs; and so on. These facts all contribute to its foundational justification.

There are many good reasons for having an institution of promising. But promises also have a distinctive normative structure. On some views, the key feature of this normative structure is the fact that under certain normal conditions those who make promises impose obligations upon themselves. On other views, the key feature is that in promising one subjects oneself to the authority of another – at least with regard to a set of choices that might otherwise have been one's to make; and so on. The normative structure is contestable and so there are likely to be conflicting accounts of it. What is not contestable is that promises have a distinctive normative structure and that the structure is different from and related to its foundational justification. The ability of the institution of promising to secure its valuable ends depends on its having the normative structure that it has.

20. The distinction between normative structure and foundational justification is important to my view of tort law. My central claim is that the

normative structure of tort law is a matter of corrective justice. This is what I have meant in claiming that tort law embodies or expresses a principle of corrective justice. I also believe that tort law annuls wrongful gains and that in doing so it promotes corrective justice as well; and that in doing so corrective justice is also part of the justification of tort law. So too is the reduction of accident costs and the deterrence of undesirable conduct.

The normative structure of tort law is constituted by its normatively significant features and by the relationships among them. These include the primary norms of tort law – that is, the norms expressing the care those of us who engage in various activities owe those who are put at risk by our undertakings as well as the mechanisms by which those norms are enforced – the structure of private actions. The most significant feature of the latter is the power of plaintiff/victims not merely to initiate such actions but the fact that when such actions succeed they give rise to a power the victim has to demand or impose liability on the defendant/injurer when such actions succeed. A theory of the normative structure of tort law offers an account of the content of the primary norms of tort law and their relationship to the normative structure of power and liability by which they are enforced.

Though distinct, the normative structure and foundational justifications of tort law impact one another. The normative structure contributes to tort law's ability to bring about certain desirable ends; and the extent to which tort law expands to pursue disparate ends impacts its normative structure.

21. Because of my emphasis on the relationship of corrective justice to tort law many of my critics have accused me of treating tort law as largely a remedial institution. They view me as giving short shrift to the primary norms of tort law and thus to its forward looking or conduct governing roles. They see me as advancing the view that tort law is about repair or remedy and not about guiding conduct. Sometimes they see me as so uninterested in the conduct guiding function of tort law that they take me to be absolutely indifferent as to what is to count as a wrong under corrective justice. Some even believe worse of me than that. Perhaps I have not been as clear as I should have been about the relationship between corrective justice and the primary norms of tort law, but these objections are groundless – though it is no doubt my failure to be more precise that has led my critics so far astray. So rather than answer every objection of this sort that has been raised let me be clear once and for all what my view about the primary norms of tort law is.

In the first place, I would have thought it implicit in my view that one of the fundamental aims of tort law is to identify the norms of conduct that govern the duties we owe to one another not to harm by failure to take appropriate care. After all, my view is that the structure of enforcement in torts consists in private actions to impose liability for wrongful losses. One might think that the very idea of a wrongful loss is that which results from a certain kind of breach, which is the failure to comply with a norm of conduct of a certain sort. So not only does my account of tort law take primary norms seriously, it cannot help but do so; for the

norms of tort law are those specifying the care those who undertake various activities owe others who are thereby put at risk, the breach of which creates a wrongful loss that is as a matter of justice to be annulled. The mechanism by which the loss is annulled is to be explained by corrective justice.

So one can specify abstractly not only that there are such norms but also the content of the majority of them and their importance to tort law. And more: for it is not simply appropriate as a matter of justice that one annul wrongful losses, but that one prevent them as well. After all, the reason for having a practice of annulling such losses is very likely connected to the reasons for doing what one can reasonably to avoid creating them. And so it is unimaginable to me that some would see me as not concerned with the primary norms of tort law or as missing the point that the aim of those norms is to govern conduct.

I have a good deal more to say about the primary norms of tort law, only some of which I can discuss here. First, I do not believe that all of the primary norms of tort law – the wrongs constituted by torts—can be neatly unified as expressing one basic idea or principle. I resist therefore the idea associated with Greg Keating, for example, that the norms of tort law give expression in one or another form to the value and importance of autonomy. On the other hand, I reject as well the view currently advanced by Ben Zipursky and John Goldberg that the best we can do is think of these norms as constituting a ‘list’ of wrongs the law recognizes and deems justifiably enforceable in the way in which tort law distinctively does. For them, there is nothing more that can be said about the primary norms other than that they are a loosely associated amalgam of legal wrongs. Instead, I want to argue that we can rationalize the central or core interests protected by tort law in the light of our understanding of corrective justice and the conditions under which the state can legitimately exercise its coercive power to realize the demands of corrective justice in law. I have no argument on offer here, but providing such an argument is among the tasks that remain for my account of tort law.

22. Before turning to the fundamental changes I have made to my account of corrective justice, let me offer two further brief remarks about the nature of the primary norms of tort law. The primary norms of conduct in torts specify what I and others have called relational duties: those one owes to others endangered by one’s undertakings to take appropriate care. Next, they are not merely duties to take appropriate care, but are instead *duties not to harm in virtue of the failure to take appropriate care*. This means that all the usual elements of a tort -- duty, breach, harm and causal relationship between the breach and the harm – are on my account best seen as unified in a proper understanding of the nature and scope of the duty itself. In other words, all the so-called elements of a tort are captured in the proper characterization of duties and so it is ludicrous to suppose that tort law can do without (or that it does without) the concept of duty. Tort theorists of certain persuasions, and the Restatement Three may do all they can to eliminate the word ‘duty,’ from torts; but eliminating the word does little to eliminate the concept. Tort law can do without the word; it cannot do without the

concept.

As I have said, the norms specify relational duties between those who undertake various activities and those who are put at risk by them. It is controversial of course as to how to specify the latter class and this is of course the central issue of Palsgraf. It is important to distinguish the question of to whom one owes a duty of care from the question of the content of the duty one owes. Often these ideas are run together and the effect is utter confusion. Once we determine whose interests I am required to attend to (to whom I owe the relevant duty), the question remains as to what it is I owe.

Those who follow a standard misrepresentation of Learned Hand's view in Carroll Towing take it that the content of the duty in the standard negligence case is to be filled out in terms of economic efficiency. One owes those to whom one owes a duty a responsibility to take all cost-justified precautions to guard against a harm to their protected interests. I say that this is a misreading of Hand because Carroll Towing is in fact a contributory negligence case; and we cannot assume that what we owe others as regards limiting injury to ourselves is the same as what we owe others more generally.

The more important point is that in my view we do not spell out the content of the duties we owe in economic terms at all. *Instead these duties express the requirements of fairness with regard to distribution of risk between two activities.* These judgments of fairness are not subject to a calculus in any obvious sense and reflect instead judgments about the relative value and importance of various conflicting activities and the desire to strike the proper balance between liberty and security. Thus, I continue to adopt the view I first expressed in Mischief and Misfortune (with Arthur Ripstein). So in a nutshell, corrective justice in tort law relies on the notion of wrong which is specified by primary norms of conduct that themselves express or embody standards of fairness in the allocation of risk, understood in terms of the relative values (in the circumstances) of liberty and security interests.¹⁰

23. I turn now to changes in my view about corrective justice, quite apart from its possible connection to tort law. Again, these remarks will necessarily be brief and supported by less argument than I am prepared to provide in another context. The most significant feature of my view of corrective justice is that it is a principle of *social justice*.

Is there a problem about losses owing to human agency that certain social groups or a society ought as a matter of justice address? One plausible view is that there are problems relating to losses owed to human agency but they do not

¹⁰ George Fletcher was on to something in thinking that liability in torts reflects notions of fairness, but he was mistaken in thinking that the fairness is expressed in terms of reciprocity of risk; rather it is expressed in the standards of care we owe to those we put at risk by our endeavors.

call for social response. Such a view might be that the problem is what is to be done about wrongful losses and that those who are responsible for them have a moral duty to repair them. The problem then is one that is to be addressed as a matter of principles of personal morality and not as a social matter. Or so one might argue.

Without denying that there can be or even that there are moral principles that govern what is to be done about certain losses owing to human agency, we might hold that such losses can also be the concern of social justice. We might hold for example that justice should be concerned to prevent such losses and to annul them or see to it that they are remedied or repaired. Following Rawls, we might say that the *concept* of justice in play (I think of it as corrective justice, but the name we give it is not important) and various conceptions of the concept – various formulations of the principle of justice – specify the apt social response. Principles of social justice are social in two senses: they identify a distinctive problem to which a group owes an answer as a matter of justice and the answer they give specifies what the social group is required to do in order to address that problem.

One consequence of this view is that corrective justice is not a principle of justice between the parties. Rather, it is social justice even if what it responds to are problems that arise between parties. Principles of private morality and social justice may be concerned with the same conduct though they may well pick out different features of the conduct as significant. There is reason to think that in the case of private wrongings, morality is concerned with matters of wrongdoing and culpability whereas corrective justice is concerned with wrong and loss (or gain). The social principle of corrective justice does not regulate the moral relations between parties; it specifies what is to be done about some of the upshots of the risks we impose on one another.

Corrective justice does not aim to enforce preexisting moral rights and duties. Rather if its demands are implemented in legal practices that specify conditions for imposing liability to annul wrongful losses or conditions for conferring powers to impose such liability, it creates debts which those held liable have a moral duty to see discharged. These are complicated thoughts and I am not here offering the arguments necessary to sustain the claims I am making. That is the burden of my current work with Gabe Mendlow. I am simply drawing out some of the implications of the claim that corrective justice is a matter of social justice; and making clear the difference between claims in justice and those in morality as regards private wrongs and wrongdoings.

Another interesting and important consequence of this view of corrective justice is that a corrective injustice is not the problem to which the principles of corrective justice respond. Indeed, the claim on offer here is that the problem to which principles of corrective justice respond is what is to be done about certain (or all) losses owing to human agency. Corrective injustice is the failure of the social group adequately or appropriately to respond to the relevant social problem. Injustice is not the wrong addressed (or in any event rarely is). Rather

it is the failure appropriately to respond to it.

24. There is a connection between principles of social justice and the exercise of political power. The relationship is not logical, however, for it does not follow from the fact that there is reason in justice to X that the state has the power to require those over whom it exercises authority to X. I am inclined to the view that the relationship between principles of social justice and political authority is one of practical inference, but more needs to be said about that relationship and this to is one of the burdens of my current research. The strategy of argument is to explore whether this relationship between corrective justice as social justice and political authority – especially constraints on the exercise of political authority – feed back into the content of the concept of the principle of corrective justice providing constraints on the kinds of losses that are its central concerns. If such an argument can be made out, then corrective justice will help explain features not only of the remedial aspects of tort law but of the content of the primary norms enforced by it. As I say, the argument needs to be developed. I want to give the reader a clue as to where my thinking is going, no more. And this thought is the key to my argument that, properly understood, corrective justice constrains the primary norms of tort law – insofar as tort law is an institution of corrective justice. This in turn explains why I remain baffled by my many critics who accuse me of thinking of tort law as primarily a remedial institution.

Many corrective justice theorists of tort law – most notably, Ernest Weinrib – believe that a structure of correlative rights and duties is part of the *concept* of corrective justice. We noted earlier that Stephen Perry's objections to the Annulment Thesis were at least in part similarly motivated. It is for this reason that these corrective justice theorists endorse the so-called bilateralism objection to the economic analysis of tort law. I simply reject the view that corrective justice presupposes a structure of correlative rights and duties. No doubt a particular conception of corrective justice may spell out its demands in that way, but a Hohfeldian structure of rights and duties is not part of the concept of corrective justice and should not figure in the best defense of the view that tort law is a matter of corrective justice.

25. As if these weren't enough changes in my understanding of corrective justice, I hesitate to add that I am no longer persuaded by the familiar objections to the Annulment View that we rehearsed earlier. Recall that Stephen Perry, the person most responsible for my abandoning the Annulment View, argued that such a view implies that corrective justice gives rise to agent neutral reasons for acting, thus rendering it indistinguishable from distributive justice and inadequate as an account of corrective justice – which in his view gives rise to agent relative reasons for acting: those who create wrongful losses have a duty in corrective justice to repair them.

Even if both corrective and distributive justice were to give rise only to agent neutral reasons that would hardly suffice to render them indistinguishable. Two things can share some of the same properties without being identical to one

another. They are identical only if they share all the same properties, which distributive and corrective justice clearly do not do.

Nor should I have been embarrassed by the thought that corrective justice gives rise to agent neutral reasons for acting. In fact, corrective justice gives rise to agent neutral reasons in two ways corresponding to the two senses in which it is a matter of social justice. First, the problem to which it is addressed – the fact of wrongful losses owing to human agency – gives everyone a reason to respond; and the principle of corrective justice itself – that such losses should be annulled – likewise gives everyone a reason to act: namely to put in place institutions that meet these demands.

Once such institutions are in place, they (and thus corrective justice only indirectly) can also give rise to agent-relative reasons for acting, as would be the case if the institution put in place calls for those responsible for creating wrongful losses to make amends or repair.

In fact, corrective and distributive justice provide both agent-neutral and agent-relative reasons for acting. And so the objections that had previously led me to abandon the Annulment Thesis are without warrant. Would that I had seen that earlier. *Risks and Wrongs* is the culmination of my thinking about tort law when I was in the spell of a particular conception of liability in torts and a particular conception of corrective justice. I am no longer in the grip of either of these notions. The theory of tort law and of its relationship to corrective justice and to ideal of accountability that emerges from my current thinking is the project that lies before me.