

Book Review

The Structure of Tort Law

The Economic Structure of Tort Law. By William Landes* and Richard A. Posner.** *Harvard University Press*, 1987. Pp.ix, 329. \$27.50

Economic Analysis of Accident Law. By Steven Shavell.*** *Harvard University Press*, 1987. Pp. xii, 312. \$30.00

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The economic analysis of tort law, like the economic analysis of law generally, has both positive and normative dimensions.¹ Positive economic analysis seeks to explain tort law by rationally reconstructing it: in other words, by demonstrating how and to what extent existing doctrines further economic efficiency. Normative economic analysis can be understood as making either of two claims. In its modest version, normative economic analysis makes a conditional claim: *if* the (or a) desirable goal of tort law is to promote economic efficiency, *then* the rules of liability ought to be such and such. In its ambitious version, normative economic analysis drops the conditional, turning the hypothetical into a categorical imperative: The rules of liability *ought* to be such and such.

All forms of the economic analysis of torts require specifying a model from which one can derive the efficiency of various kinds of liability rules

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1. For an example of the positive dimension of tort law, see Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). For the normative, see generally G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

under different circumstances.² The difference between positive and normative economic analysis lies in the use to which the model is put. The point of positive economic analysis is to establish the extent to which existing law conforms to the model's implications. The point of normative economic analysis is to argue for legal reform by showing how existing law departs from the model's implications, or to rationalize existing law by showing how it conforms to the model.³

I. TORT LAW AND ECONOMICS

Steven Shavell's *Economic Analysis of Accident Law* is devoted almost entirely to specifying a model from which the efficiency of various rules of liability can be derived. As the model increases in complexity, its implications become less determinate. In general, Shavell employs the model for weakly normative purposes: If judges are to decide cases to promote efficiency, then whether they should employ a strict or fault liability rule will depend on various factors. For example, the model implies that in a one-party accident, both strict and fault liability are efficient, whereas in a two-party accident strict liability is inefficient.⁴ Strict liability with the defense of contributory negligence, however, as well as simple negligence and negligence with the defense of contributory negligence, is efficient in the two-party case.

Does this mean that a judge seeking to promote efficiency should be indifferent in choosing among equally efficient rules? No, Shavell asserts, because the various liability rules differ in their informational requirements, distributional consequences and impact on the level of activity by potential injurers and victims (activity levels). To apply a negligence rule, a jury must know both the injurer's *benefit* schedule and the victim's *damage* schedule. The reason: In efficiency terms, an actor is negligent only if the expected damage of his conduct (as expressed by the victim's damage schedule) exceeds his expected prevention costs (as expressed by his benefit schedule). In contrast, under strict liability, the burden of deciding whether an accident is worth its costs falls on injurers, not jurors. And in each case, the *injurer* already has special access to his benefit schedule, and need only determine the victim's damage schedule.⁵

To say that the rules of strict liability and negligence are equally efficient in one-party accident cases means that, at a given level of the relevant activity, both rules will lead to the same number of accidents. How-

2. See generally A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983).

3. Because economic analysis can provide a basis for economic reform, it is erroneous to assume that it is inherently *conservative*, just as it is erroneous to assume that corrective justice analysis is inherently re-distributive. See *infra* text accompanying notes 33-34.

4. See S. SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 5-47 (1987).

5. There would be a higher number of cases under the strict liability rule, but the determination of liability would be more costly under the negligence rule, and it is unclear which effect would dominate. See S. SHAVELL, *supra* note 4, at 264.

ever, the rules differ in their effects on both wealth and activity levels. The reason is straightforward. Under strict liability, the costs of faultless accidents fall on injurers; under negligence, they fall on victims. Thus, strict liability is costlier to injurers than to victims. Because strict liability makes engaging in potentially harmful activities costlier to injurers than negligence liability does, strict liability can be expected to reduce a rational injurer's output. If we restrict the domain of activities to those in which the injurer and victim are engaged, strict liability would shift resources from the injurer's activity to the victim's, thus reducing activity levels of the former and raising those of the latter. The negligence rule would have the opposite effect. Thus, the decision between strict and fault liability will depend on a variety of factors: the costs of obtaining information, the social desirability of various injury-causing activities, the prevalent attitudes toward risk, and the existence of insurance.

The strength of Shavell's book is its lucid, structured development and explication of the economic model. It represents the best systematic presentation of the relevance of economic argument for issues of risk allocation. On the other hand, the model's assumptions are not defended, nor is its explanatory power fully explored. For example, Shavell does not take up the question of whether real agents are or could be utility maximizers in the narrow sense the model specifies. Nor is empirical evidence marshalled to support the deterrence hypothesis: namely, that liability rules have a substantial impact on deterrence in negligence cases. Very little of the book is turned over to discussion of cases or doctrines. In fact, only a paragraph or so in each section is devoted to summarizing the current state of the law on the subject at hand. Moreover, on only a few occasions does Shavell employ his model explicitly to explain the existing case law.

In contrast, William Landes and Richard Posner's *The Economic Structure of Tort Law* makes the case for positive economic analysis of torts in several areas of tort law, from accidents to defective products. In their book, which is in fact a considerably revised collection of previously published materials, the authors employ the methodology of their general corpus of scholarship: They take the world as they find it, and they find it (more or less) efficient. To be fair, Landes and Posner do retreat slightly from their earlier micro claims on behalf of the efficiency of the common law—that is, the efficiency of all manner of doctrine.⁶ Still, while the authors may have modified particular claims for economic analysis' explanatory power, they indicate no intention of modifying the *sweep* of their general claim on behalf of economic analysis of the law. Though particular doctrines or lines of cases may not fit neatly into the efficiency scheme, there is apparently no area of law (or of life generally)⁷ that cannot be

6. See W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 23-24 (1987).

7. See *id.* at 157 (economic analysis of rape); see also E. Landes & Posner, *The Economics of the*

illuminated by conceiving of it as promoting (or inhibiting) an efficient allocation of resources.

Unlike many who employ economics for legal analysis, Richard Posner deserves credit for confronting the issue of efficiency's normative undergirding.⁸ What, after all, makes efficiency normatively attractive? What entitles courts (and legislatures) to exercise coercive authority to promote efficiency, especially in areas of private law?⁹

Posner has not lost his zest for advocating the normative appeal of economic efficiency, especially his version of it, social wealth maximization. Though Landes and Posner present no systematic defense of the normative claims of efficiency, they clearly present their claims on behalf of efficiency as both positive and normative. This collection is therefore a spirited *defense* of economic analysis in a way that Shavell's book is not.

On the other hand, while Shavell's book is systematic, each section motivated by the preceding one, the Landes/Posner collection is less successful in its organization, motivation, and presentation. Some of their chapters are very mathematical while others include no mathematics at all. (Whereas Shavell opens each chapter with a tidy narrative of his theory and concludes each chapter with a mathematical appendix.)

Moreover, Landes and Posner ignore some important issues developed by Shavell. One example is their concededly preemptive treatment of insurance in products liability.¹⁰ If one applies economic analysis to tort doctrine, one can understand or justify liability rules only on grounds of deterrence, insurance, or both. The authors assume that victims are either risk neutral or that their insurance needs are elsewhere satisfied. If victims are risk neutral, they have no need for insurance. If they have a need for insurance, but that need is satisfied in some other way, the insurance rationale for strict products liability simply disappears. Given their assumptions, Landes and Posner simply remove insurance from the feasible set of possible explanations for strict products liability, leaving efficiency in the form of deterrence as the only plausible alternative. Such a move begs the question if it relies on the assumption of risk neutrality.¹¹ In contrast, if it relies on the victims' insurance needs being elsewhere satisfied, thus rendering them de facto risk neutral with respect to defective products, this move begs the more interesting question of whether we

Baby Shortage, 7 J. LEGAL STUD. 323 (1978).

8. See R. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

9. These questions may demand three answers: one to explain efficiency's normative attractiveness, one to legitimate its use as a principle of decision by judges, and one to legitimate its use as a principle by legislators.

10. See W. LANDES & R. POSNER, *supra* note 6, at viii (book was completed before relevant liability insurance literature explosion).

11. Another reviewer has made a similar objection. See Balkin, *Too Good To Be True: The Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447 (1987) (review of *The Economic Structure of Tort Law*).

would want insurance needs to be handled through liability rules for defective products.¹²

Whatever the books' respective technical weaknesses, together they constitute the most comprehensive defense of the economic analysis of tort law currently available, and are strongly recommended accordingly.

II. THE EFFICIENCY HYPOTHESES

The claim that tort law is more or less efficient can be supported in at least four distinct ways. First, the most general defense of the efficiency of tort law follows from an even more general defense of the efficiency of social norms. In this view, agents are assumed to pursue individually rational, utility-maximizing strategies. Under the very stringent and unrealistic assumptions of perfect competition, individually rational utility-maximizing strategies converge on a Pareto-optimal or efficient outcome. Normally, however, as a consequence of the fact that the payoffs one secures from choosing a course of conduct depend on the choices of others, agents pursuing respective individually rational strategies will be unable to secure collectively efficient or rational outcomes. Individually rational strategies often produce collectively irrational outcomes. The standard example of this problem of individually rational strategies converging on an inefficient equilibrium is the Prisoner's Dilemma.¹³ To avoid the inefficiency of pursuing individually rational but collectively irrational strategies, agents must coordinate their activities. Rational cooperation consists in agreement upon and general compliance with norms that act as constraints on individually rational strategies. To be rational, these normative constraints must themselves be efficient. In the case of certain norms rational compliance requires the coercive enforcement of a legal order. Thus, given the assumption of individual rationality, the legal norms that *emerge* in society will tend to be efficient. For similar reasons, the norms that *prevail* will tend to be efficient. For whenever a pattern of norms exists that is inefficient, there exists an alternative pattern capable (by definition) of making everyone better off. Over time, efficient and enforceable norms will drive out inefficient ones. Therefore, tort law, like law generally, will converge on optimality.¹⁴

A second line of argument for the efficiency of tort law is suggested by the first. It is often said of contract law, for example, that the default rule judges apply to fill in the interstices of contracts is to confer those rights

12. See, e.g., Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).

13. On the Prisoner's Dilemma see B. BARRY & R. HARDIN, *RATIONAL MAN, IRRATIONAL SOCIETY: AN INTRODUCTION AND SOURCEBOOK* (1982); R. LUCE & H. RAIFFA, *GAMES AND DECISION: INTRODUCTION AND CRITICAL SURVEY* 94-97 (1957).

14. The so-called "folk theorem" holds that any outcome (efficient or not) can be sustained as an equilibrium in repeated play. So it doesn't follow that inefficient practices or rules will necessarily be driven out by efficient ones. This is also the conclusion derived by common sense.

and impose those responsibilities that the parties would have bargained for ex ante. The argument for the default rule rests on two ideas: the fully specified contract and transaction costs. A fully specified contract is, by definition, efficient. Because the costs of fully specifying a contract are too high, rational parties do not specify all of a contract's terms. Transaction costs make a fully specified contract irrational. Where the contract does not specify correlative rights and duties, the court imposes those which the parties would have bargained for in the absence of transaction costs. But a rational fully specified contract is efficient, so a judge should in applying the default rule impose efficient contractual terms on the parties. What does all this have to do with tort law? We can characterize tort law as necessary only because contracting is too costly. Transaction costs make tort law inevitable in the same way, and for the same reasons, that they make a fully specified contract impossible. For example, automobile drivers cannot plausibly contract with all those individuals who might be put at risk by their negligence. Thus, tort law is necessary to protect rights not adequately secured by a regime of contract. This is just another way of stating the standard economic argument for the move from property to liability rules.¹⁵ Tort law is a response to contract failure owing to high transaction costs. And in contract, high transaction costs require application of the default rule; thus, the general principle for assigning rights and responsibilities in tort is the default rule writ large. Whereas in contract judges are forced on occasion to ask themselves what the parties would have agreed to ex ante, *all* of tort law consists of those rules of liability which the parties would have chosen ex ante. Because the ex ante contract is modeled as a rational bargain, and because optimality is a necessary condition of rational bargaining, the rules of tort liability are to be interpreted by judges employing the generalized "ex ante contract" device as promoting efficiency.¹⁶

The striking feature of these two accounts of the efficiency of tort law is that they have nothing to do with any particular tort law doctrine. In the first account, the efficiency of tort law derives from a general rational choice theory of efficient norms.¹⁷ In the second, the efficiency of tort law follows from the ex ante contract as a device rendering tort doctrine coherent.

The argument from the efficiency of social norms marks one end of the explanatory spectrum. At the other end of the spectrum lies the third

15. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089-90 (1972); Coleman, *The Economic Analysis of Law*, in NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW 83 (J. Pennock & J. Chapman eds. 1985); Klevorick, *The Economics of Crime*, in NOMOS XVII: CRIMINAL JUSTICE 289 (J. Pennock & J. Chapman eds. 1985).

16. See, e.g., Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353 (1988).

17. Coleman, *Market Contractarianism*, 2 SOC. PHIL. & POL'Y (1984).

(least abstract and least plausible) argument for tort law's efficiency: In deciding *particular* cases, a judge will invariably ask herself, what does efficiency tell me about which party ought to be liable in *this* case? In this view, tort cases invite judges to formulate social policy. Litigants are not people demanding decisions as a matter of right; rather, they are instruments in the pursuit of a global policy. Their claims are not constraints on, but opportunities for, judges.

No one seriously advances the view that judges in tort cases throughout history have engaged directly in the forms of economic argument which cast litigants as instruments in a larger cost/benefit calculation. Nevertheless, judges may increasingly do so, especially those who have been students in one or another mini-course on economic analysis for judges.

What is required is a fourth account of tort law's efficiency, one rooted in practice and doctrine yet not reliant upon the implausible claim that tort law is efficient because judges have always decided particular cases by putting economic argument in legal terms. This explanation begins by drawing the obvious distinction between liability based on the injurer's fault (fault liability) and strict liability. Does there exist a coherent principle or set of principles that can account for both strict and fault liability?

The obvious difference between strict and fault liability suggests it would be hard to find a single, internally coherent principle that would explain and justify both—both a faultless injurer's liability in some cases (strict liability) and his freedom from liability in others (negligence). Economic analysis appears to provide one solution to the problem. When an injurer is strictly liable, he is required to internalize the full social costs of his activity. That puts the burden on the actor of deciding whether the marginal benefit of engaging in the activity exceeds its expected marginal cost. If it does, the actor will engage in the activity and compensate his victims. If it does not, the actor will not undertake the action.

From the point of view of efficiency, those are the decisions we want the agent to make. For in the first case his decision to engage in the threatening conduct reflects the efficiency of the expected outcome: Expected marginal benefit exceeds expected marginal cost. Similarly, in the second case, his decision not to act in a harmful way reflects the inefficiency of the expected outcome of his doing so: Expected marginal cost would exceed expected marginal benefit. Whenever a rule of strict liability is employed, then, it has the effect of forcing injurers to internalize the social costs of their activities. Internalizing costs thus ensures that parties will act in injurious ways only when efficiency would permit (and require) them to do so. Where strict liability exists, it can be justified in efficiency terms.

So can fault liability. What makes an agent's conduct negligent? According to Learned Hand's simple mathematical formulation of the duty

of care in *United States v. Carroll Towing*,¹⁸ potential injurers are required to take only cost-justified precautions. Whenever the cost of prevention is less than the potential harm discounted by the probability of the harm's occurrence, precautions are obligatory. Failure to take obligatory, efficient precautions is negligence. Negligence liability forces actors to internalize the social costs of their (lack of) investment in accident prevention measures. Whenever the expected value of the harm exceeds the agent's expected benefit from not investing in adequate precautions, he will be held liable for the harm, thereby forcing him to change his calculation of costs and benefits.¹⁹ Thus wherever a rule of negligence liability exists, it can be rationally reconstructed in efficiency terms, whether or not judges or juries in particular cases have engaged in explicit economic argument.

Once the general framework of strict and fault liability is given an economic rationale, everything else becomes a matter of engineering, of fine-tuning the liability rules to their most appropriate circumstances--as Shavell's model does.

Given these fairly compelling accounts of tort law's fundamental efficiency, what is left for noneconomic theories? What *aspects* of tort law could alternative theories hope to explain that economics cannot? What might a competing theory explain *better* than economics does?

III. THE STRUCTURE OF JUSTICE

A. *The Argument Against Economic Analysis*

We should begin by distinguishing substantive from formal or structural dimensions of tort law. The doctrine of strict liability for ultrahazardous activities is a substantive feature of tort law; the fact that disputes are resolved on a case by case basis in which the question who should bear an accident's costs is normally restricted to plaintiff-victims and defendant-injurers, is a formal or structural feature. A full theoretical reconstruction of tort or accident law will provide an analysis of both its substantive and formal features. An advocate of a noneconomic theory of tort law, then, might hold that noneconomic factors, for example considerations of corrective justice, provide a better account of either (1) tort law's central substantive doctrines or (2) its fundamental structural constraints (and as good an account of the other). Most advocates of a corrective justice account of tort law, including Richard Epstein,²⁰ George Fletcher,²¹ Ernest Weinrib,²² and myself,²³ have tried primarily to make good on the

18. 159 F.2d 169, 173 (2d Cir. 1947).

19. We are assuming that the agent's calculus includes the probability of (non)enforcement.

20. See Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

21. See Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

22. See Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37 (1983).

23. See Coleman, *Moral Theories of Torts: Their Scope and Limits Part II*, 2 LAW & PHIL. 5 (1983).

first of these claims: specifically, that certain substantive requirements for liability and recovery in tort law are best understood as enforcing an ideal of justice between the parties, or that political authority is justifiably exercised only if the duties imposed by tort law express requirements of justice, not economics.

I now wish to address the question of whether noneconomic theories of tort law, especially those that rely on principles of corrective justice and personal responsibility, provide a better explanation of the following structural feature of tort law: Tort suits bring victim-plaintiffs together with injurer-defendants, and only within this structured context do questions regarding who should bear a particular accident's costs arise. That is, the goals of compensation, deterrence and insurance are pursued only within an established structure: the structure of case-by-case adjudication between individual victims and their respective injurers. Does the theory of corrective justice provide a better account than does economic analysis of this structure of who pays?

A first response is that corrective justice must provide a better account of tort law's structure than economic analysis because economic analysis provides no explanation at all. To the economist, tort law is a pliable instrument in pursuit of optimal deterrence, optimal insurance or both. But neither of these policies requires nor otherwise adequately explains why the liability decision must be restricted to particular defendants and plaintiffs. Indeed, because determining who is the best insurer or cheapest cost avoider is always an *empirical* inquiry, it is not even obvious that injurers and their victims should be invariably *included* in the set of candidates for tort liability, let alone that the set should be restricted to them.

The problem with any form of economic explanation goes deeper, for economic analysis' inadequacy results from its fundamentally *forward-looking* conception of liability running into a structure of litigation that embodies an essentially *backward-looking* theory of liability and recovery. This backward-looking dimension of existing tort law limits the extent to which it can be used to pursue economic goals.

Thus, tort law asks whether *A* who harmed *B* should be liable to *B* in damages, or whether *B* should be made to bear the costs. However that decision is made, it will be structured in terms of *A* and *B*, two parties whose presence before the court is a consequence of a past event: namely, what *B* alleges *A* did. In contrast, the search for optimal insurers or cheapest cost avoiders is not similarly constrained by history. Accidents between *A* and *B* may in fact be most easily prevented by *C*. Consider as an example automobile accidents. Whenever *A* rams his car into *B*, *B* brings suit against *A*. And on the economic analysis we are then to decide

whether *A* or *B* is the person who is in the best position to reduce accidents of this type. Yet the party best suited to optimize accident costs may be neither *A* nor *B*, the only parties the law considers. Instead, the cheapest cost avoider may well be the relevant car manufacturer(s), who is (are) party neither to the accident nor to the litigation.²⁴

On the face of it, neither considerations of optimal deterrence nor of insurance requires us to structure litigation so that only victims and their injurers are liability candidates. Yet this *structure* of litigation is surely one of tort law's essential characteristics. Economic analysis can therefore only assume, but never explain, the structure of tort law. To that extent, it constitutes an incomplete theory of tort law.

B. *The Legal Economist's Reply*

There are three responses the legal economist could make to this objection. The first response would accept both the centrality of the injurer-victim *structure* of litigation and our ordinary understanding of the key concepts of injurer and victim, but provide an economic explanation of both. The second response would deny that the injurer-victim structure of tort law is as central a feature of tort law as the objection makes it out to be.²⁵ The third response would be to accept the centrality of the injurer-victim *structure*, but offer an economic analysis of the terms "victim" and "injurer." Such an analysis might have the effect of infusing economics' forward-looking impetus into tort law's backward-looking structure (for example, in this view, the injurer might be (re)defined as the cheapest cost avoider).²⁶

Consider the first response. Is there a compelling economic explanation of tort law's structuring of the problem of who pays? We can begin by asking why structures for answering questions of liability for loss always include the victim. One reason for making a victim party to the litigation is that by doing so we provide him with an incentive to bring an action. If the injured party does not initiate litigation, the court is not given the opportunity to pursue optimal risk reduction or spreading. In order to provide courts with the opportunity to seek efficient accident reduction someone must initiate litigation. A victim will only do so if he stands to gain thereby. The possibility of securing compensation for his loss provides the requisite incentive. I shall call this "the private enforcement argument."

24. I do not refer to cases in which a defect in the car is the harms cause, but rather to cases like the following. Suppose three factors influence the number and severity of automobile accidents: roads, cars and drivers. It's just possible that the cheapest way to reduce accident costs is to put losses on manufacturers regardless of their responsibility for particular accidents. By doing so we might encourage manufacturers to lobby for safer roads and to adjust their cars for unsafe drivers.

25. See *infra* text accompanying note 10.

26. See *infra* text accompanying notes 35-36 for a development of this view.

A second reason to include victims in the litigation is that we want to encourage them to take optimal safety measures. This is the deterrence argument. It has two components. First, we sometimes put victims in a position of *liability* to encourage them to take precautions. Second, we put victims in a position of *recovery* when otherwise they would be induced to take too many precautions. Thus, victims are always relevant to decisions about who pays, and structures designed to resolve these questions must always include victims.

Once the victim is included, two questions remain: (1) Why include injurers? (2) Why include only victims and injurers? The obvious economic reason for including injurers is deterrence. If injurers are freed from potential liability, their incentive to take precautions is dramatically reduced. Victims are included to give them incentives to litigate, to take precautions, or both; injurers are included to give them incentives to take precautions. No one else is included because the cost of *searching* for better risk reducers or spreaders from the populace at large is too high. This last argument rests on two empirical premises. The first is that the choice set comprised of the injurer and victim contains at least one and perhaps two *plausible* candidates for securing the ends of efficiency; the second is that while other more plausible, even significantly better candidates may exist in individual cases, in categories of cases, or perhaps in all cases, the costs of identifying them and making them parties to actions are generally too high. Thus, the fact that in tort law the set of potentially liable parties is restricted to victims and their injurers can be given an explanation consistent with the general form of economic argument.

These are plausible economic arguments for restricting the liability decision to victims and their particular injurers. Thus, the objection that economics lacks an explanation of tort law's structure is unfounded. The question is whether the explanation the economist offers is persuasive.

The private enforcement argument presupposes the necessity of at least some private enforcement as a prerequisite for optimal deterrence. If private enforcement were not necessary for optimal deterrence, then no need would exist to present judges with the opportunity to use civil actions for this particular public end. Then, if civil actions initiated by victims were desirable, their desirability could not be explained by optimal deterrence. Were we able to reach injurers more cheaply in some other way, victim-instigated suits in torts would be inexplicable from an economic point of view. Second, it may not be true that if a victim fails to bring suit to recover damages, courts would be disabled from pursuing the private enforcement of public norms. We could simply give other parties incentive to litigate. Including victims in the choice set is neither necessary nor sufficient for the optimal enforcement argument. More important, economic analysis renders the victim's place in tort law radically contingent and far too tenuous to explain its centrality to our actual practice.

The deterrence argument, that victims are included so that we may induce them to take efficient precautions and to avoid taking inefficient precautions, rests on the mistaken premise that including someone in litigation is the only way to influence her behavior.²⁷ In a system of precedent, individuals not themselves parties to civil or other actions alter their behavior as a consequence of legal rules. If the only way we could influence someone to take safety measures were through tort liability, and if the costs of being made party to litigation were nil, then we should include nearly everyone in nearly every action. Once all the relevant facts were available—that is, once we knew who in a particular case is the cheapest cost avoider, best insurer, etc.—we could determine in each case who to hold liable. But that's just not the way tort law structures the problem. Not everyone is a potential candidate for liability in every case. Victims and injurers are almost always candidates, however, while almost no one else ever is.

The private enforcement argument does not require the victim's inclusion in the structure of litigation. One need not be a victim in order to be given incentive to litigate. Moreover, because the argument presupposes the desirability of private enforcement, alternative means of promoting optimal deterrence leave the victim's place in litigation completely unexplained. Thus, the centrality of the victim to tort litigation is lost. The deterrence argument, that victims are always included because sometimes we may want to influence them to take safety measures, attempts to reintroduce the victim's centrality to the structure of the problem. It also fails; first, because one need not be a party to litigation to be influenced by its outcome; second, because if we had to include individuals in litigation in order to influence their behavior, we should want *prima facie* to include everyone in litigation whenever the costs of doing so were sufficiently low.

Surely the economist would agree. In principle, because the search for the cheapest cost avoider or best insurer requires empirical inquiry, there is no reason why the decision of who should bear the costs of particular accidents should be restricted to victims or injurers. However, considerations of *administrative efficiency* narrow the domain considerably so that in most cases the decision is structured in terms of identifiable injurers and identifiable victims. It follows, of course, that there is nothing sacred about the structure. As the costs of identifying third parties better suited to avoid or to spread risks decrease, we should expect alterations in the structure of litigation, or, in some cases, the abandonment of tort litigation entirely. That is, we would expect to find cheapest cost avoiders increasingly becoming parties to litigation even when they bear no causal or other responsibility for the harm of which the victim complains. Or we

27. For a constitutional law analogue to this mistaken premise, see Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983 (1987).

would expect to find a reduction in the incidence of resolution through litigation in favor of some other form for reaching the cheapest cost avoider, for example, regulation—a different structure. The economist would now make the second response: In fact there *is* no fixed structure of tort litigation that needs explanation. Tort litigation can take many forms. The form of litigation depends on tort law's substantive ambitions. Structure is determined by substance constrained by factual limits. Changes in either variable result in changes in structure.

In effect, the economist's response to the objection that economic analysis merely assumes and cannot adequately explain the structure of tort litigation has two components. First, the economist denies the premise of the argument, that there is a structure of tort litigation that requires explanation. Rather, there are many structures. Second, the structure the corrective justice theorist is so fond of—case-by-case, victim-injurer litigation—can be given an economic explanation. That way of structuring decisions about who should bear the costs of accidents is one very natural response to any attempt to pursue optimal deterrence and insurance within certain constraints. The economist's explanation, moreover, has predictive implications: changes in constraints or aims should yield alterations in structure. To make matters worse for the corrective justice theorist, we observe many of the structural changes the economic theory predicts.²⁸

The economist does not pretend that she can explain the necessity of the structure of litigation, only its plausibility. Given the costs of locating third parties, the victim-injurer structure of tort litigation provides a plausible framework within which the law can pursue the aims of optimal risk reduction and spreading.

If the objection to economics is that such a structure is not simply a plausible way of securing the aims of tort law, but that it is a necessary feature of it, the economist's response would be to deny the premise. The injurer-victim structure makes considerable sense; it may not, however, be *central* to tort law; it is surely not *necessary* to it.

We began by chastising the economist for her inability to explain central structural features of tort law. In piecing together a plausible response to this objection, we find ourselves on the defensive. For the economist has an explanation of the structure of litigation, but one which views it as subordinate to the law's substantive ambitions. Moreover, what the objection takes as fixed and given, the economic analysis reveals to be fluid and derivative. Current trends in tort law altering not only the scope of liability and recovery, but the structure of litigation as well, lend further

28. For example, changes in products liability, including enterprise liability, see generally Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 681 (1985), and the development of market share liability, see *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

credence to the economist's position. Is there a position left for the proponent of corrective justice worth staking out? In fact, there are at least two.

One strategy for the corrective justice theorist would be to abandon the view that the structure of tort litigation is best understood as advancing the goal of corrective justice in favor of the claim that the substantive doctrines of tort law are matters of corrective justice. This is the view that the substance of tort law is a matter of justice, though its structure may well be a matter of economics. Substance may constrain structure, but it does not compel it. The structure of tort litigation represents a compromise; given the costs of alternatives, it is the best available way of securing the aims of corrective justice.²⁹

Another strategy is to reassert the centrality of structure to the aims of corrective justice. The argument is this: The problem with economic analysis is not that it provides no explanation at all of tort law's structure. Rather, in the analysis it provides, the victim and injurer are only contingently and tenuously connected to tort law's substantive aims. Only corrective justice makes real sense of the structure of tort law, because only corrective justice explains this structure as logically connected to the law's substantive ambitions. Corrective justice compels a particular structure. To the extent economic analysis lauds departures from the structure as evidence of institutional plasticity, corrective justice laments them as mistakes, or in some few cases, as justifiable departures from the demands of justice. There are two distinct senses in which a corrective justice theorist might view departures from the injurer-victim structure as mistakes: in one sense the mistake is *normative*, in another sense it is *conceptual*.

The normative argument begins with the observation that much of tort law can be explained by seeing it as embodying an ideal of corrective justice. More importantly, tort law can be justified only if it seeks to promote the aims of justice. For law involves the coercive exercise of political authority, and that authority is warranted only within the bounds of justice. To employ the state's power to maximize wealth or otherwise to promote efficiency is illegitimate. This is a decidedly normative argument, which can take either of two forms. In the strong form of the argument, the legitimate purpose of tort law is to do justice; in its weaker form, corrective justice establishes a side-constraint on any other of tort law's ambitions. In neither form does the argument contest the explanatory power of economic analysis. The argument merely regrets its accuracy. For to the extent tort law departs unjustifiably from the requirements of justice, it involves the illegitimate use of power. To the extent that departures from the individualist structure of litigation are departures from the requirements of corrective justice, tort law makes a (normative) mistake.

The sense in which extending the net of liability and the forms of liti-

29. See Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982).

gation constitute *conceptual* mistakes is based on the view that tort law in particular, and private law more generally, embody a certain kind of structure. This formalist conception of tort law is espoused primarily by Ernest Weinrib.³⁰ For him, relations and concepts have an internal logic or structure which specify constraints on their coherent use. The key concepts involved in tort law, for example “wrongdoing” and “causation,” have an internal logic that jointly specifies constraints on their use in institutional settings. One simply cannot call everybody one wants to sue an “injurer” any more than one can call every sort of relationship “causal.” For Weinrib, these constraints specify a particular structure of litigation he associates with the formal concept of corrective justice. That structure approximately coincides with the case-by-case/victim-injurer scheme of tort litigation. Departures from that scheme, as in mass torts, market share and products liability are wrong, not necessarily morally, but conceptually. They are an inappropriate structural embodiment of the relevant concepts. Consequently, the further tort law moves away from individually structured litigation, whatever the motivation and merits of its doing so, the less it is “tort law.” This formalist position is probably best summarized by Weinrib’s view that tort law itself has no purpose, that, instead, its only responsibility is to be tort law—which is to say, to have a certain structure, one defined by the conditions of coherence and logic in the use of its central concepts.³¹

We have, in effect, a spectrum of views about tort law’s structure. At one end is the economic analysis according to which tort law, *qua* tort law, has no inherent structure. Tort law is a social construct designed to serve certain substantive human ends. Those ends define the structure tort law takes over time. This is the radical instrumentalist position implicit in the proposition that institutional forms are (in theory) infinitely pliable: their shape, at any moment a function of social constraints and human desires.

At the other end of the spectrum, we have the anti-instrumentalist-formalist position represented by Weinrib. In this view, tort law is social structure whose coherence as structure is constrained, not by ambition or contingency, but by the logic of its central concepts. The constraints of language are as powerful as are the constraints of history. Structure constrains substance; and structure, while not given by God or Nature, is nevertheless given a priori, by the logic of the concepts.

Given the spread between these two polar opposites, just about everything else can be said to occupy the middle ground. The next Section outlines and defends such a middle position.

30. See Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

31. See Weinrib, *The Insurance Justification and Private Law*, 14 J. LEGAL STUD. 681 (1985).

IV. CORRECTIVE JUSTICE AND THE STRUCTURE OF TORT LAW

In my view, tort law is a social construct designed by humans to serve certain purposes. Its ability *legitimately* to serve those purposes depends on its satisfying certain side-constraints, in particular the principle of corrective justice. While it does not require a particular form of litigation, the principle of corrective justice constrains the forms of litigation. Moreover, the principle of corrective justice, as I will specify it, gives a better account of the core form of litigation than does economic analysis. The relationship between victim and injurer which in the ordinary view is central to understanding litigation becomes, in the economic view, tenuous and radically contingent. Corrective justice, as I understand it, suggests a deeper connection between victims and injurers than any economic analysis allows.

Corrective justice requires that wrongful gains and losses be annulled.³² The principle of corrective justice is thus both *backward-looking* and *conservative*. It is backward-looking because it seeks to recompense individuals in order to annul their undeserved losses, not to influence their future behavior. Of course, compensating those who are entitled to repair and not compensating those who are not will affect the behavior of both; no one denies that. The point of compensation, however, is not to influence future behavior, but to annul wrongfully inflicted losses. The principle of corrective justice is conservative in the sense that one may invoke it to rectify departures from patently unjust distributions of resources when the departures are wrongfully created.³³ Consider the following example. Imagine *B* is very wealthy and *A* extremely poor, and that this state of affairs is unjust according to distributive justice. (Suppose, for simplicity, that *A* and *B* should be equally endowed.) Poor *A* negligently or recklessly rams his car into rich *B* and reduces *B*'s wealth so much that *A* and *B* are now roughly equally well off. The new state of affairs is in some sense more distributively just than the former. Nevertheless, in my view, *B* has a valid claim that he has suffered a wrongful loss and is, therefore, entitled as a matter of corrective justice to its repair.

I draw two other distinctions regarding corrective justice relevant to this discussion. The first is the difference between the *grounds of recovery* and the *grounds of liability*. *B* may be entitled to repair as a matter of corrective justice if *A* wrongfully creates his loss. However, if *A* secures no gain through his harming *B*, then *A* has secured no gain that corrective justice requires he forfeit. So if he is to be liable to *B*, his liability cannot be a matter of corrective justice. *A*'s liability and *B*'s recovery have different normative bases. Second, I distinguish between the *grounds of rectifica-*

32. See Coleman, *supra* note 23.

33. For a contrast of the potential conservatism of corrective justice with the redistributive reformism of economic analysis, see *supra* note 3.

tion (and liability) and modes of rectification (and liability). Corrective justice tells us *which* gains and losses must be annulled as a matter of justice: after the victim's grounds of recovery have been established (the necessary but insufficient predicate for recovery), the grounds for liability on the part of the injurer must be established. Corrective justice does not tell us what *mode* we should use to rectify them, though particular conceptions of corrective justice may restrict our choice among alternative modes of rectification.³⁴

Many *substantive* features of existing tort law can be illuminated by understanding them as embodying ideals of corrective justice. However, because corrective justice does not specify a particular mode of rectification, we cannot claim that all of tort law's structural features are easily derived from corrective justice. Corrective justice does require, however, that a person's claim to recompense be vindicated by an institutional structure. Tort law is one such structure for identifying and vindicating legitimate claims to compensation. A claim to compensation is a matter of corrective justice if the loss the claimant seeks recompense for is wrongful, that is, if it results from another's wrongdoing—for example, another's negligence.

Given that tort law is a legal device for determining whether certain claims to compensation are legitimate as a matter of justice, it is plain why much of tort law takes the shape it does. The reason the victim brings to court his injurer, rather than bringing the world of potentially cheaper cost avoiders, is that his claim to compensation as a matter of justice is *analytically* connected to some facts he seeks to establish about the injurer's conduct. In particular, in most cases his claim is valid only if he can show that his loss is the result of the injurer's fault. To the extent tort law is a forum for vindicating claims to repair, the victim's connection to his injurer is fundamental and analytic, not tenuous or contingent. That his injurer acted towards him in a way that gives rise to a legitimate claim in justice to compensation is the heart of the victim's assertion. This assertion connects the victim and his injurer in an analytic way: they are connected to one another and to no one else, in a way that makes a kind of sense of the structure of tort law that economic analysis simply cannot.

It is easy to misunderstand my position as endorsing the view that tort law *requires* a particular structure. Instead my view is that the principle

34. The general point is that corrective justice constrains the mode of rectification in the sense that no scheme of rectification can create gains or losses that themselves, from the point of view of corrective justice, ought to be annulled. Permissible modes of rectification will depend, therefore, on the relevant characterization of "wrongful loss." For example, suppose one adopts the view that any nonconsensual taking creates a wrongful loss (and gain). Then, if in order to compensate *B* for his wrongful loss, we take from the rich without their consent, in doing so we create wrongful losses which, from the point of view of corrective justice, must be annulled. Such a scheme of rectification would be incompatible with that conception of corrective justice, but perhaps compatible with others, for example with those that do not entail the view that any unconsented-to taking creates a wrongful loss.

of corrective justice requires answers to two distinct questions: one having to do with the *grounds* of recovery and liability, the other having to do with the *mode* of recovery and liability. Current tort law has one institutional form designed to answer both of these questions. The structure of tort litigation, bringing victims together with injurers, is best explained by corrective justice's requirement that we identify legitimate claims to repair: grounds for the victim's recovery, and grounds for the injurer's liability. Only those claims require rectification as a matter of corrective justice. Corrective justice renders the relationship between victim and injurer analytic; economic analysis fails to do so.

The legitimacy of a victim's claim to repair in economic analysis depends on the effects of compensation on his willingness to litigate or to take safety precautions, not on some connection between the injurer and him. The same is true of the injurer. The legitimacy of holding him liable depends on the economic consequences of doing so, not on some connection between the victim and him. The relevance of his having done something to the victim is *epistemic* at best, for it may provide some evidence of the injurer being someone who needs to take additional safety measures. That evidence can be overcome by other evidence that someone else is in a better position to reduce accidents than he is.

The relationship between injurers and victims in economic analysis is never really a relationship between injurers and victims but is instead a relationship between injurers and the goals of tort law *and* victims and the goals of tort law. Because of this, it is easy to see why economists find it so easy to make the third response: to *redefine* concepts like injurer and causation in purely economic terms, as we shall see.

Corrective justice provides a sense in which an analytic connection between injurers and victims matters. But only one dimension of corrective justice does that, namely the need to determine the legitimacy of claims to repair. Once an individual has a legitimate claim to repair, corrective justice does not require that he be compensated by his injurer. It is the basis of the claims-to-repair dimension of corrective justice, not the *mode-of-rectification* dimension of it, that explains tort law's structure.

In my view, corrective justice does not require a victim-injurer institutional form for deciding who pays whom, though it may require such a form to determine who has a *right to repair* and who, if anyone, has a *duty to pay*. How these rights and duties are to be discharged is a further question. It may be a matter of administrative efficiency to lump the two questions together in one institutional form. However, I contend it is not a requirement of justice.

Compare this argument for the structural feature of tort law with the economic one. In the corrective justice argument the victim brings an action against his injurer because the victim's claim to compensation as a matter of justice is based on his claims about what the injurer *did* to him,

not on the fact that the injurer is better suited than he is to reduce accident costs. If it suddenly turned out that some third party were the cheapest cost avoider, there would be no reason as a matter of corrective justice for including him in the suit. Nothing about the cheapest cost avoider's prior behavior has anything at all to do with the victim's claim to recompense being a matter of justice. On the other hand, when the goals of deterrence and insurance are no longer constrained by concerns to reduce administrative costs, there is no purely economic reason for preventing the victim from suing the cheapest cost avoider. Thus, even if the current structure of tort litigation is consistent with economic analysis, it is better understood as embodying some conception of corrective justice. For as long as tort suits are so structured, even when their being so is made plausible by the higher administrative costs of alternatives, we can understand that structure as embodying the ideal that in torts a victim seeks to show that the loss he has suffered is a wrongful one, one which requires recompense as a matter of right, not utility. And central to that claim is showing that the loss results from the mischief of the defendant.

To this objection the legal economist might make the third response, the third line of defense to the charge that she cannot explain tort law's structure. The argument for corrective justice I just outlined depends on the existence of pre-theoretical conceptions of the terms "victim," "injurer" and "causation," such that it makes sense to say that the injurer, who was not the cheapest cost avoider or best insurer, caused the victim harm for which he rightly seeks redress. In fact, the economist responds, there are no clear pre-theoretic conceptions of these terms. The economist, after all, is simply an instrumentalist. Not only is tort law as a practice or institutional form infinitely pliable, but so are its basic concepts. The notions of "injurer" and "causation" can be given economic interpretations or meanings. For example, the "injurer" in any given case is not necessarily the chap who smashed the poor fellow over the head, but is instead that individual who could have prevented the head-smashing incident at the lowest cost. The concept of causation is as empty as that of injurer. We are free, therefore, to give an economic rendition of it. After all, the objection that economic analysis cannot explain the backward-looking structure of tort litigation presupposes a non-economic meaning of the key terms: *injurer, victim, fault and causation. But all these terms can be given economic renderings.* Once these concepts have been reconstructed from an economic point of view, the conflict between the backward-looking structure of tort litigation and the forward-looking aims of economic analysis evaporates. The sentence "The injurer wrongfully caused the victim's loss," which appears to express a proposition about past events that may only *contingently* be connected with the economic aims of cost avoidance is, through the magic of economic reconstruction, *analytically* connected to it. The wrongful injurer is by definition the cheapest cost avoider, and the

causal connection between his act and the victim's loss is spelled out in terms of some statistical relationship whose normative significance is also a matter of economic policy.

The obvious problem with such an enterprise is that by reconstructing the key concepts of tort liability in economic terms, economic analysis could hardly be said to be providing an explanation of legal practice as it finds it. Instead, it finds the practice void of content and constraint, remakes it in economic terms, and then quite unsurprisingly provides an economic analysis of it. Nowhere is this intellectual practice more common than it is in the economic analysis of causation. If serious legal theorists bemoan the Critical Legal Studies movement's fixation on law's indeterminacy, they have only the economists of law and other rampant reconstructionists to blame. For it was economic analysis and not Critical Legal Studies that first treated legal concepts as if they could be remade at will in the light of one's preferred normative theory.

If we are to explain our social and legal practices we must assume that they have a content that is the object of explanation, a content that constrains what can count as an adequate explanation of it. Surely there will be aspects of a practice or a concept that will be contestable or controversial, that require affirmative acts of interpretation.³⁵ These interpretations will aim to give structure and coherence to our practices, and in doing so, they may invoke normative premises. But it does not follow from the fact that a normative theory is required to settle controversial cases, that the uncontroversial cases or settled aspects of a practice impose no constraints whatsoever on the shape and substance interpretive theories can take. The fact that there are hard or controversial cases in which genuine doubt about the meaning of "injurer" or of "causation" exists provides no excuse for remaking entire concepts. If controversy were to provide an invitation to remake altogether our concepts and practices by the lights of our normative theoretical commitments, we could hardly be said, by invoking those theories, to have explained those practices. For part of the argument for radical reconstruction is that, in a suitable sense, there is no practice to explain: there is no there there. One literally cannot have it both ways.

To say that practices constrain their explanations or that concepts have content independent of normative theories is not to align oneself fully with the formalist. Practices have significance and concepts have meaning. From that it does not follow that the meaning of the concepts are fixed or that they must constrain the form of the practice. Some concepts, such as "responsibility," "victim" and "wrongdoer," derive their meanings in part from the practices in which they figure. More important, conceptual moves cannot decide normative disputes. One is reminded of the debate about the legitimacy of punishing the innocent. At one time, the objection

35. R. DWORKIN, *LAW'S EMPIRE* (1986).

was made to utilitarian theories of punishment that they could sometimes justify punishing the innocent. One response to these objections was that utilitarianism could do no such thing since punishment, by definition, was an act of the state against a *guilty* person. Thus, the objection must be misplaced. This argumentative move was given a name—the definitional stop—and rejected accordingly. No conceptual move can solve a normative dispute. Whatever we call the practice of imprisoning innocent people—punishment or “telishment”—the question remains whether utilitarianism endorses it, and whether, if it does, that weighs heavily or decisively against it.³⁶

Most tort theorists, myself included, want to know whether a practice that imposes liability without regard to fault is a good or defensible one, not whether it accurately reflects a pre-institutional analysis of the concepts of fault and causation. We want to know whether the constraints of the normative concept of corrective justice permit the net of tort liability to extend further and further, not whether in doing so tort law ceases to be tort law.

In fairness to Weinrib, he does not commit the fallacy of the definitional stop, for he does not mean to resolve any issues on the merits by appealing to the logic or definition of the concepts or to the structures those concepts are presumed to entail. As far as his arguments go, if we find our institutions unsatisfactory we might eliminate tort or private law entirely. If we are to have them, however, then they must take a certain form. The problem with his formalism is not, then, that it seeks to reduce normative questions to ones of structure, but that it simply ignores normative questions completely. It thus marginalizes itself from the debate and in doing so invites doubts about its relevance. Why should we care?

The answer may have something to do with the concept of integrity. For the formalist, the integrity of the institution is everything. Institutional integrity is a matter not of substance but of structure. The structure in turn is given by the logic of the relevant concepts. For the instrumentalist-economist, institutional forms lack any inherent integrity. They are pliable instruments in the pursuit of abstract economic goals. Their integrity, if they have any, is bound up with their capacity ultimately to secure those goals.

In the picture I am sketching, integrity is a property of institutions over time. It is captured in the story of how institutions, designed by humans for social ends, transform themselves over time to serve changing conceptions of their purposes in ways that recognize the constraints of entrenched practice and the meaning(s) of the concepts central to those practices.

36. Cf. Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955).

