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ESSAYS

ON BELLING THE CAT: RAWLS AND TORT AS CORRECTIVE JUSTICE

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ONCE upon a time, all the mice met together in council, to discuss the best means of securing themselves against the attacks of the cat. After several suggestions had been debated, [several mice] of some standing and experience got up and said, "I think [we] have hit upon a plan which will ensure our safety in the future, provided you approve and carry it out. It is that we should fasten a bell around the neck of . . . the cat, which will, by its tinkling, warn us of her approach." This proposal was warmly applauded, and it had been decided to adopt it, when [two small mice] got [up] and said, "[We] agree with you all that the plan before us is an admirable one: but may [we] ask [how are we] going to bell the cat?" Moral: It is easy to propose impossible remedies.[1]

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[1] Aesop, The Mice in Council, *in* Aesop's Fables (V.S. Vernon Jones trans., Avenel Books 1912).

INTRODUCTION

Recent scholarship has argued that post-institutional theories of distributive justice, specifically Rawlsianism, are compatible with a principled commitment to corrective justice.[2] We argue that, however attractive on independent or pre-institutional moral grounds a principled commitment to corrective justice and its corresponding model of tort law may be, it is misleading to think that the Rawlsian post-institutional conception of distributive justice is, at the level of principle, consistent with such an independent commitment. Specifically, we argue that holding the truth of a maximizing theory of distributive justice in conjunction with a principled commitment to corrective justice is inconsistent.[3] The attempt to hold both positions as true may flow, we suggest, from an unjustified presumption about the compatibility of post-institutional—particularly, maximizing—theories of distributive justice[4] and other

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[2] In discussing the compatibility of Rawlsianism with corrective justice, we have in mind a view of corrective justice in which it is understood as a moral principle (or set of moral principles) taken to be normatively independent of distributive justice. Distributive justice, in this view, concerns itself with what one might call "social justice," while corrective justice concerns itself with the causation of private harm and the private duty of repair. On this account, corrective justice is capable of generating a moral duty of repair: that is, a backward-looking duty to pay compensation for harm that one has caused another through wrongful or defective action. Stephen R. Perry, Tort Law, *in* A Companion to Philosophy of Law and Legal Theory 57, 74 (Dennis Patterson ed., 1996) ("In general, corrective justice requires *A* to compensate *B* for loss caused by *A*'s conduct (in a fault-based theory, by *A*'s *faulty* conduct)."). Typically, only harm caused by either morally faulty or unreasonably risky action is taken to be necessary (though not sufficient) for the imposition of liability (that is, the duty to pay compensation). Proponents of corrective justice often also hold that such liability for harm caused by one's faulty or unreasonably risky action must be fair, or reasonably proportional to the harm caused.

[3] Murphy and Nagel have made analogous arguments about the inconsistency between political liberalism and principled commitments to independent metrics of fairness in tax policy (for example, the benefit principle). Liam Murphy & Thomas Nagel, The Myth of Ownership: *Taxes and Justice* 16–19 (2002). While we have elsewhere expressed skepticism about the breadth of their argument—in particular, the purported incompatibility of non-maximizing (that is, decent social minimum, or "floor") conceptions of liberalism and independent metrics of fairness in tax policy—we argued that the incompatibility claim advanced by Murphy and Nagel is "most powerful if one's conception of distributive justice is maximizing." Kevin A. Kordana & David H. Tabachnick, Tax and the Philosopher's Stone, 89 Va. L. Rev. 647, 654 (2003) (book review).

[4] In our view, Rawls's two principles of justice are, in their application, both consequentialist and maximizing. While it is true that Rawls has an avowed general com-

non-maximizing moral commitments which one might hold or view as appealing on grounds independent of one's commitment to distributive justice.[5] In our view, the values enshrined in Rawls's two principles of justice (taken in lexical order) reflect the deontological features of Rawls's original position. Once adopted, however, the principles of justice themselves function as consequentialist maximizing principles, taken in lexical priority, in selecting between competing *complete* schemes of legal and political institutions.

While the tension between the corrective justice and the utilitarian or wealth maximization conceptions of tort law has long been

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mitment to Kantian deontology, his Kantianism is not found in the application of the principles of justice. See Thomas Nagel, Justice and Nature, 17 Oxford J. Legal Stud. 303, 306 (1997) ("Rawls's approach is theoretically deontological in foundation, though its development leads in a consequentialist (but nonutilitarian) direction. . . . This is the natural result of his method of identifying the principles of justice as those that would be chosen in the original position, under the veil of ignorance."). The principles of justice demand that the adopted *complete scheme* of legal and political institutions *maximizes* the position of the least well-off in terms of primary goods to no less extent than any other competing complete scheme (subject to the liberty constraints generated by the maximizing component of the first principle and the opportunity principle, taken in lexical priority). Citizens living *within* the chosen complete scheme, of course, are neither required to act so as to maximize anything nor are they required to directly apply the maximands of the principles in their individual actions. The principles of justice are consequentialist and maximizing in their inter-schemic application—in the comparisons they make in selecting the complete scheme of legal and political institutions.

[5] The chief distinguishing feature of post-institutional conceptions of liberalism is the proposition that *pre*-institutional morality requires (1) the existence or creation of political institutions, and (2) the construction of (specifically) institutional (that is, political) principles for the governance of such political institutions. For post-institutionalists, *pre*-institutional morality demands that such institutions be designed in service to such principles, but morality is (in the first instance) largely agnostic with regard to the actual content of such principles and the institutions they govern. For example, in Rawlsianism, the fundamental pre-institutional normative notions regarding freedom and equality that motivate the original position are (in the first instance) silent on the specific details and content of (for example) property rights and economic matters. Such fundamental values as freedom and equality, of course, inform the selection of the principles of justice and therefore guide institutional design. The crucial point, however, is that the details of basic economic matters are *not*, for post-institutional theorists, *normatively primitive*. For a discussion of the distinction between pre- and post-institutional conceptions of justice, see Kevin A. Kordana & David H. Tabachnick, Taxation, the Private Law, and Distributive Justice, 23 Soc. Phil. & Pol'y 142 (2006).

discussed and is well understood,[6] the relationship between the corrective justice conception of torts and post-institutional theories of distributive justice (in particular, Rawlsianism) has only recently received sustained attention. Recent articles by Professors Stephen Perry[7] and Arthur Ripstein[8] emphasize the compatibility—or even the necessity—of corrective justice (that is, as an "independent" component of justice) within the Rawlsian distributive scheme. We argue, contra this emerging view, that distributive justice—Rawlsianism in particular—conflicts at the level of principle with corrective justice, and that it is inconsistent to remain (as a matter of principle) independently committed to both, given the Rawlsian view of property. In short, our central claim is that Rawlsian ideal theory is best understood as adopting the consequentialist (outcome-oriented) theory of tort law.

Part I will explain Arthur Ripstein's view that tort law, for Rawls, is an independent (non-maximizing) corrective justice module that swings clear of the two principles of justice and will defend our thesis against Ripstein's claims. Part II will present Stephen Perry's argument that, even though Rawls adopts a maximizing distributive scheme, corrective justice finds an "independent" place within that scheme. In our view, the Rawlsian view of property is inconsistent with a principled basis for holding the corrective justice view, and incompatible with the "conceptual space" required for corrective justice to operate even if this view were so held. Part III will discuss the relationship between tort law and Rawls's first principle of justice. Finally, Part IV will explain the function of tort law in the post-institutional Rawlsian distributive scheme.

I. RIPSTEIN ON TORT LAW IN A RAWLSIAN SCHEME

Arthur Ripstein has discussed the relationship between the corrective justice (or, deontological) conception of tort law and Rawl-

[6] E.g., Jules Coleman, Tort Law and Tort Theory: Preliminary Reflections on Method, *in* Philosophy and the Law of Torts 183 (Gerald J. Postema ed., 2001).

[7] Stephen R. Perry, On the Relationship Between Corrective and Distributive Justice, *in* Oxford Essays in Jurisprudence 237 (Jeremy Horder ed., Fourth Series 2000).

[8] Arthur Ripstein, The Division of Responsibility and the Law of Tort, 72 Fordham L. Rev. 1811 (2004) (Symposium on Rawls and the Law).

sian political theory.[9] Ripstein presents his conception of Rawlsianism with a particular attention to his view of Rawls and the private law. His interpretation of Rawls "make[s] no direct use of the aspect of the theory of justice that has attracted the most attention among legal scholars."[10] "[T]he ideas of the 'original position'" and the "veil of ignorance"[11] are intentionally excluded from his discussion. Additionally, Ripstein says little about the two principles of justice, their derivation, and their role in the Rawlsian project. Ripstein maintains that "[i]t does a serious disservice to Rawls[] . . . to imagine that he [is] offering . . . an algorithm for determining how society's institutions should work."[12] Indeed, Ripstein does not appear to conceive of Rawls as offering a theory of pure procedural justice in which principles of justice are *definitive of* justice.[13] Instead, he appears to view "the contract argument" as an expression of substantive "arguments concerning the fundamental ideas of

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[9] We have found Arthur Ripstein's discussion of the relationship between Rawlsianism and corrective justice illuminating. While we ultimately disagree over the relationship between the two, our thinking has been shaped by his thoughts on the matter—as well as his thinking on the private law and its relationship to the public/private distinction.

[10] Ripstein, supra note 8, at 1812.

[11] Id. (internal quotations omitted). The original position is, of course, Rawls's hypothetical social-choice (justificatory) scenario in which idealized rational representatives, conceived of as free and equal, select principles for the governance of society's basic structure by deliberating so as to maximize their self-interest under conditions of partial ignorance (i.e., what Rawls describes as the veil of ignorance).

[12] Id. Whether, given these remarks, Ripstein would ultimately classify Rawls as a moral constructivist remains an open question. For a discussion of moral constructivism and its relationship to other types of moral theory, see Stephen Darwall et al., Toward *Fin de siècle* Ethics: Some Trends, 101 Phil. Rev. 115, 138 (1992) ("[Rawls writes] '[a]part from the procedure of constructing the principles of justice, there are no moral facts.' . . . Words like these might be read to suggest that as theorists we must step aside, to await the outcome of a social procedure. In the meantime we must regard ourselves not as theorists, each able, in principle, to reach conclusions himself, but as participants in the social construction of reasonable moral standards." (quoting John Rawls, Kantian Constructivism in Moral Theory, 77 J. Phil. 519 (1980))).

[13] See John Rawls, Kantian Constructivism in Moral Theory, *in* Collected Papers 303, 310–11 (Samuel Freeman ed., 1999) ("Now the original position . . . incorporates pure procedural justice at the highest level. This means that whatever principles the parties select from the list of alternative conceptions presented to them are just. Put another way, the outcome of the original position defines, let us say, the appropriate principles of justice.").

freedom and equality,"[14] which require the independence of the private law from distributive concerns.

The substantive values concerning freedom and equality that are embodied in the original position, Ripstein maintains, require a commitment to a division between public and private justice, which in turn requires a distinction between public and private law.[15] Ripstein maintains that Rawls "avoid[s] . . . the idea that relations between private individuals must be subordinated to distributive concerns. . . . [T]he Rawlsian idea of a division of responsibility [for justice] requires that there be separate institutions charged with the separate tasks required by that division."[16] Because Ripstein understands "the contract argument" as an "expository device[]"[17] for the expression of fundamental values concerning freedom and equality, he avoids the two principles of justice (and the original position from which they are derived) and attempts to justify the corrective justice conception of tort law by direct appeal to principles of freedom and equality.

Ripstein then turns to a discussion of the deontological values that he takes to be central to the corrective justice model of tort law. He argues that these values require the moral independence of the private law from general distributive aims or the demands of social welfare. For Ripstein, this independence of the private law is necessary to any plausible account of justice.[18] If corrective justice is a requirement of justice *simpliciter*, it must, he argues, be required by the Rawlsian conception of justice, particularly given the Rawlsian commitment to freedom and equality. For Ripstein, the values of freedom and equality found in the original position, and "the contract argument" in general, demand (for Rawlsianism) the independence of the private law from the public law and, therefore, the independence of tort and contract law from distributive concerns. The conclusion Ripstein draws is that the Rawlsian account of justice, despite its focus on distribution and the demands

[14] Ripstein, supra note 8, at 1812.
[15] Id.
[16] Id. at 1815.
[17] Id. at 1812.
[18] Id. at 1814–15 ("Justice requires that private law—tort, contract, property and unjust enrichment—have a certain kind of independence.").

of the principles of justice, *demands* the corrective justice conception of tort law.[19]

In this Essay we argue that however plausible the essentially *pre*-institutional view of political philosophy Ripstein articulates may be, it is not best understood as Rawlsian.[20] Despite Ripstein's insightful discussion of fundamental values such as freedom and equality, Rawls offers a post-institutional conception of political philosophy[21] in which the principles of justice, derived from the original position, are definitive of *justice*. While Ripstein may well be correct that any plausible pre-institutional deontological theory requires a distinction between public and private justice, and in turn requires the corrective justice conception of tort, a conception of the private law that includes corrective justice does not, in our view, appear to be required by Rawlsianism. We maintain that our disagreement with Ripstein is best explained by the fact that Ripstein does not appear to hold that for Rawls the two principles of justice are *definitive* of justice. This denial results in disagreement over the role of the private law in Rawlsianism and, more generally, in disagreement over whether corrective and distributive justice are compatible for Rawls.

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[19] Id. at 1815 ("[P]articular transactions can be judged on their own terms, rather than being subordinated to distributive justice. The same point applies to . . . tort law.") (footnote omitted).

[20] For Rawls, entitlements and legitimate expectations flow from the institutional rules constructed in accord with the principles of justice. He writes:

> [E]xpectations and entitlements are specified by the public rules of the scheme of social cooperation. . . . Given that these principles are satisfied by the basic structure, and given that all legitimate expectations and entitlements are honored, the resulting distribution is just, whatever it is. Apart from existing institutions, there is no prior and independent idea of what we may legitimately expect, or of what we are entitled to . . . .

John Rawls, Justice as Fairness: A Restatement 72 (Erin Kelly ed., 2001).

[21] See Stephen Perry, Ripstein, Rawls and Responsibility, 72 Fordham L. Rev. 1845, 1848 (2004) (Symposium on Rawls and the Law) ("But if we are not simply to turn Rawls into Kant there must presumably be something distinctively Rawlsian about the argument. Kant's own methodology . . . is essentially conceptual in character, and it makes strong metaphysical assumptions . . . . Rawls introduced the notion of the original position precisely in order to avoid these aspects of Kant's approach . . . .").

H.L.A. Hart recognizes this as well, crediting B.J. Diggs for having emphasized "important differences between Rawls' doctrine of liberty and Kant's conception of mutual freedom under universal law." H.L.A. Hart, Rawls on Liberty and its Priority, *in* Reading Rawls: Critical Studies on Rawls' *A Theory of Justice* 230, 234 n.6 (Norman Daniels ed., 1975).

While we agree with Ripstein that the original position is best understood as an expository device designed to articulate a philosophical argument, we are less clear about Ripstein's attempt to convert the original position back into argument form. Importantly, the conclusion of the Rawlsian expository device is clear—the two principles constructed in the original position define *justice* or, better still, the conception of justice. This is a matter of pure procedural justice. Thus, any argument that seeks to *replicate* the Rawlsian expository device must share in Rawls's conclusion. Ripstein's argument, while starting with crucial Rawlsian values—the commitment to freedom and equality—does not yield the two principles of justice (as a function of pure procedural justice). Instead, Ripstein's construction ends with a commitment to a conception of justice which preserves autonomy through a principled commitment to the independence of the private law. Ripstein's account, while quite plausible on its own terms, does not in our view appear to provide a proper account of the justificatory argument implicit in the Rawlsian "expository device."

While Ripstein's justificatory argument shares in Rawls's initial premises, it is not best understood as Rawlsian. Perhaps Ripstein's argument, which derives the corrective justice conception of torts from a commitment to freedom and equality, is better understood as a pre-institutional *critique* of Rawlsianism, as opposed to an exposition of Rawls. For Rawls, a commitment to freedom and equality ultimately justifies legal and political institutions that are constructed in service to the demands of the two principles of justice—including the institutions of the private law, should they exist. Presumably, Ripstein believes this conclusion to be inconsistent with the very principles of freedom and equality with which Rawls began.[22]

[22] Indeed, an objection to Rawlsianism is the claim that the theory is insufficiently deontological and is (paradoxically) consistent with some of the very deficiencies with which Rawls charged utilitarianism—namely, the failure to take seriously the moral distinction between persons. See John Rawls, A Theory of Justice 22–34 (1971) [hereinafter TJ]; A. John Simmons, The Lockean Theory of Rights 325–26 (1992) ("And we see similar claims about the inviolability of persons (and similar rejections of moral teleology) in Rawls, who reaches conclusions dramatically different from Nozick's after apparently employing a similar starting point."). This purported deficiency flows from the fact that once the principles of justice are derived from the original position, the theory is forward-looking (or consequentialist) in its selection of

The principles of justice adopted in the original position *construct* a complete set of legal and political *institutions*.[23] Importantly, the principles of justice derived from the original position satisfy *all* the requirements that representatives maximizing their self-interest under idealized conditions impose upon them. The result is that these requirements—which ultimately, as a purely procedural matter, define the conception of justice—are built into the principles themselves. Such principles, in turn, impose the selected requirements of *justice* upon (at least) all legal and political institutions.

Return to Ripstein's concern: the corrective justice conception of tort law. If representatives in the original position understood the demands of the corrective justice conception of tort law as necessary to the maximization of their self-interest, they would adopt principles of justice that require such an institution; corrective justice would then be *required* by the principles of justice and understood to be just by definition. In Rawlsian theory, however, the principles of justice adopted in the original position make no such demand.[24] Our point is this: once the principles of justice are adopted in the original position, they are taken to define justice. The commitment to alternative conceptions of justice (the corrective justice conception, for example) is incompatible at the level of principle. The principles of justice define the conception of justice,

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legal and political institutions that meet the demands of the principles of justice. The theory's methodological commitment to the deontological concerns for fairness and equality is found not in the *substantive* legal and political institutions constructed by the principles of justice (as Ripstein appears to hold), but rather in the assumptions explicit in the original position that serve as the basis for the derivation of the principles of justice themselves (for example, the veil of ignorance). Ripstein may have been better served to argue that, despite Rawls's avowed commitment to Kantianism, his theory is in tension with the fundamental Kantian commitment to corrective justice. See Robert Nozick, Anarchy, State, and Utopia 228 (1974) ("Some will complain, echoing Rawls against utilitarianism, that [Rawls's view] 'does not take seriously the distinction between persons'. . . .") (footnote omitted); Jonathan Wolff, Robert Nozick: Property, Justice and the Minimal State 122 (1991) ("If Rawls can be convicted on this score then the objection is particularly telling, for it is Rawls who argued that utilitarianism is seriously at fault for ignoring the separateness of persons."); Thomas W. Pogge, Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions, 12 Soc. Phil. & Pol'y 241, 258, 263 (1995).

[23] E.g., Rawls, TJ, supra note 22, at 7, 54–55, 108–10.

[24] We address this issue in further detail infra in Part III.

and legal and political institutions are designed in service to them; tort law is no exception.[25]

Ripstein is concerned with the distinction between public and private responsibility for justice in Rawls, however, and he is correct to point out that this distinction is made in Rawlsianism. Nevertheless, we disagree that the distinction for Rawls is foundational or drawn *directly* from *substantive* pre-institutional values of freedom and equality. For Ripstein, private ordering in Rawls (the law of contract, tort, property, and unjust enrichment) is justified in terms of values distinct from the principles of justice. He writes that "[d]ifferent rules regulate the justice of the basic structure and the justice of individual transactions, both voluntary and involuntary."[26] While it is certainly true that different *rules* govern tax and transfer and private ordering in Rawlsianism, Ripstein is incorrect to conclude from this fact that some institutions are a matter of *distributive justice*, justified in terms of the principles of justice, while others are justified in terms of principles of substantive moral philosophy. Rawls's position is that the rules of all significant legal and political institutions with pervasive effects are selected (in conjunction with one another) to meet the demands of the principles of justice.

To illustrate, take Rawls's views of the practice of promising (a practice typically understood as a matter even more "private" than conventional areas of the private law, such as tort or contract). Rawls writes:

> [T]he principles of justice apply to the practice of promising in the same way that they apply to other institutions. Therefore the restrictions on the appropriate conditions are necessary in order to secure equal liberty. . . . I shall not regard promising as a prac-

[25] Thus, Rawls writes, "[t]he basic structure comprises first the institutions that define the social background and includes as well those operations that continually adjust and compensate for the inevitable tendencies away from background fairness." John Rawls, The Basic Structure as Subject, *in* Political Liberalism 257, 268 (1993) [hereinafter PL]. Tort law would seem to be one such institution that adjusts for the "inevitable tendency" for there to be departures from "background fairness"—that is, accidents. As Rawls indicates, this institution is part of the basic structure in that it is subject to the two principles of justice and constructed in their service. This calls into question Ripstein's claim that Rawlsian tort law reflects an independent commitment to corrective justice, free from the demands of distributive justice.

[26] Ripstein, supra note 8, at 1836.

> tice which is just by definition . . . . There are many variations of promising just as there are of the law of contract. Whether the particular practice as it is understood by a person, or group of persons, is just remains to be determined by the principles of justice.[27]

Surely, if the "institution" of promising is constructed in service to the principles of justice, so, too, are matters of the "private law," such as tort and contract.

Importantly for Rawls, the "freedom" required for "private" transactions and the "private law," which to a large extent constitutes the private sphere, is not pre-institutional freedom (or, as H.L.A. Hart describes it, "freedom as such"), but rather consists in *options* constructed as *open* by the principles of justice.[28] In this regard there is no principled or foundational distinction in Rawls between public and private matters; for Rawls, freedom and the private realm are constructed by the principles of justice. Since the rules that govern "private matters" are post-institutional rules designed in service to the principles of justice, there is no conceptual space in Rawlsianism to advance a principled, independent commitment to the corrective justice conception of torts. The conception of justice embodied in the corrective justice module is inconsistent (in principle) with the distributive demands of the Rawlsian principles of justice.[29]

Rawls, of course, distinguishes between principles that apply to individuals and principles that apply to institutions. The two principles of justice are taken to govern institutions, while the original position-derived "natural duties" apply to individuals. Importantly,

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[27] Rawls, TJ, supra note 22, at 345–46.

[28] H.L.A. Hart notes this in commenting on the fact that Rawlsian 'liberty' need not pattern pre-institutional conceptions of liberty: "[The liberty principle] refers not to 'liberty' but to basic or fundamental *liberties*, which are understood to be legally recognized and protected from interference." Hart, supra note 21, at 235. Rawls later agreed with Hart's characterization. John Rawls, The Basic Liberties and Their Priority, *in* PL, supra note 25, at 289, 292 ("Hart noted, however, that in *Theory* I sometimes used arguments and phrases which suggest that the priority of liberty as such is meant; although, as he saw, this is not the correct interpretation.").

[29] Given this incompatibility, post-institutional liberals such as Rawlsians must either concede that pre-institutional deontic conceptions of contract, tort, and property can be accommodated *only* as a matter of occasional overlap with the demands of the overarching distributive principles or else (counterintuitively) abandon these commitments.

Rawls's original position-derived, so-called "natural duties" do not map in any one-to-one fashion the substance of common sense or of (genuinely natural) Kantian natural duties.[30] The moral value of corrective justice, were it to exist, is no exception. Given that Rawls's "natural duties" are, as is often ignored, original position-derived, it is a curious claim that the moral value of corrective justice drawn directly from Kantian comprehensive moral doctrine is required going forward from the original position, even for individuals. But, whatever the possibility of an original position-derived natural *moral* duty of corrective justice, we take it that tort *law*, were it to exist, finds its home on the institutional side of Rawls's distinction between individuals and institutions.

Tort law, then, given its pervasiveness, profound effect upon the distribution of primary goods, and (at least) partially coercive nature, is properly understood to be governed by the two principles of justice. For Rawls, of course, the bounds of the distinction between individuals and institutions are left vague. But given, as we have argued, that even the practice of promising falls on the institutional side of his divide, we take it that tort *law* would, too.

In maintaining that the principles of justice define justice, we are not claiming that once the two principles of justice are adopted there is no conceptual room for original position-derived natural duties that apply to individuals, nor are we denying that Rawls is properly viewed as a value pluralist. Rather, our point is that the first principle of justice constructs private space protected by the constitutional guarantee of the basic liberties, and the second principle of justice constructs whatever post-institutional economic "freedom" is to exist (what we call economic "options open"). Within the bounds of this private space and options open, the natural duties would, of course, still function.

For Rawls, then, the principles of justice are constructed from a plurality of values that constitute the original position and in turn

[30] Rawls, TJ, supra note 22, at 111 ("[I]n addition to principles for institutions there must be an agreement on principles . . . as these apply to individuals . . . . The intuitive idea is this: the concept of something's being right is the same as, or better, may be replaced by, the concept of its being in accordance with the principles that in the original position would be acknowledged to apply to things of its kind. I do not interpret this concept of right as providing an analysis of the meaning of the term 'right' as normally used in moral contexts . . . in the traditional sense.").

define the conception of justice; the original position-derived "natural duties" function within the open or private space constructed by the two principles of justice. If the corrective justice conception of tort *law* is to exist going forward from the original position, it must be derived from the principles of justice themselves; the original position-derived natural duty *of justice*, which takes as given the conception of justice embodied in the legal and political institutions derived from the two principles of justice,[31] cannot itself embody an alternative conception of justice.[32]

Ripstein's response to this line of argument may perhaps be that the disagreement is neither about pre- versus post-institutional conceptions of justice, nor about the defining nature of the principles of justice, but rather that he (Ripstein) subscribes to the "narrow" conception of the basic structure,[33] while our argument implicitly endorses a "broader" conception of the basic structure.[34] While we agree that the "public/private" distinction is crucial for Rawls, the distinction is not marked by the bounds of the basic structure. Rawls is clear that the basic liberties are constitutionally guaranteed; all other aspects of social life, however, are subject to the will of the democratic process. "Private space" for Rawls is the set of "basic" or constitutionally guaranteed liberties. Private space, then, is constructed by the principles of justice to protect such liberties which are themselves—in an important sense—*within* the basic structure. All other matters governed by rules, values, and precepts drawn from outside the basic structure (whatever that might mean) are subject to the democratic process and cannot

[31] Id. at 110 ("[W]hile it would be possible to choose many of the natural duties before those for the basic structure without changing the principles in any substantial way, . . . some natural duties also presuppose such principles, for example, the duty to support just institutions.").

[32] For Rawls, the natural duty of justice "requires us to support and to comply with just institutions that exist and apply to us." Id. at 115.

[33] See Arthur Ripstein, Equality, Responsibility, and the Law 10 (1999) ("Rawls limits his account of the basic structure to what he calls 'constitutional essentials.'").

[34] One might argue that the bounds of the basic structure in the narrow view are designed to create a "public/private" distinction for Rawls. The difficulty, however, is that in this view it is unclear why the rules of the *institutions* of the private law (for example, the rules of contract and tort) would be conceived of as being outside the scope of the principles of justice, given the post-institutional nature of property, the possibly coercive nature of such legal institutions, as well as the clear and pervasive effect these institutions have on the distribution of primary goods.

serve as the grounds of a matter of such great importance for Rawls as the private realm. In other words, part of the function of the basic structure is to guarantee the private realm—the rules that govern and construct the private realm are inside the basic structure.

In defense of the narrow view of the basic structure, Ripstein draws upon the well-known and controversial "page 268" of *Political Liberalism* where Rawls discusses contract law, and he reads Rawls as endorsing the narrow conception—specifically, that contract law lies outside the basic structure.[35] Ripstein argues by analogy that since Rawls views contract law as being outside the basic structure, all of private law, including tort, must also lie outside the

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[35] Rawls writes:

> Thus . . . we arrive at the idea of a division of labor between two kinds of social rules, and the different institutional forms in which these rules are realized. The basic structure comprises first the institutions that define the social background and includes as well those operations that continually adjust and compensate for the inevitable tendencies away from background fairness, for example, such operations as income and inheritance taxation designed to even out the ownership of property. *This structure* also enforces through the legal system another set of rules that govern the transactions and agreements between individuals and associations (the law of contract, and so on). The rules relating to fraud and duress, and the like, belong to these rules, and satisfy the requirements of simplicity and practicality. They are framed to leave individuals and associations free to act effectively in pursuit of their ends and without excessive constraints.
>
> To conclude: we start with the basic structure and try to see how this structure itself should make the adjustments necessary to preserve background justice. What we look for, in effect, is an institutional division of labor between the basic structure and the rules applying directly to individuals and associations and to be followed by them in particular transactions. If this division of labor can be established, individuals and associations are then left free to advance their ends more effectively within the framework of the basic structure, secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made.

Rawls, PL, supra note 25, at 268–69 (emphasis added).

For a discussion of the equivocal nature of these remarks, see G.A. Cohen, Where the Action Is: On the Site of Distributive Justice, 26 Phil. & Pub. Aff. 3, 19 n.36 (1997) ("Puzzlement with respect to the bounds of the basic structure is not relieved by examination of the relevant pages of *Political Liberalism*, to wit . . . . Some formulations on [page 268] lean toward a coercive specification of the basic structure. Others do not."); Liam B. Murphy, Institutions and the Demands of Justice, 27 Phil. & Pub. Aff. 251, 261 (1998) (arguing that the first of the two paragraphs quoted above is consistent with the broad conception of the basic structure—that is, contract and property law are within the basic structure).

basic structure.[36] While we have argued elsewhere that the broad conception of the basic structure is correct and that contract rules of law—if they are to exist—are properly understood as *subject* to the two principles of justice,[37] consider, for the sake of argument, Ripstein's view that the narrow conception is correct. Even if Rawls is best interpreted as holding that contract law lies outside the basic structure, it does not follow that tort law is both outside the bounds of the basic structure and suffused with the principles of corrective justice.

First, contract and tort need not be understood as analogous for Rawlsianism. The first principle of justice constructs equal maximal liberty packages that include a demand for security[38]—that is, the demand that *basic liberty* packages be protected. Security, however, may be provided in many ways, given that the first principle of justice is forward-looking in its inter-schemic selection of legal and political institutions. Rawls, for example, goes so far as to advocate the possibility of imposing strict criminal liability for firearms possession where "civil strife" threatens.[39] For Rawlsianism, liberty packages are to be protected in a consequentialist, or for-

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[36] Ripstein, supra note 8, at 1813–15.

[37] See Kevin A. Kordana & David H. Tabachnick, Rawls and Contract Law, 73 Geo. Wash. L. Rev. 598, 614–20 (2005). For example, regarding Rawls's remarks on page 268 of *Political Liberalism*, we argue that they

> [S]imply show[] that the rules of contract law . . . are not *sufficient* to provide full justice. But there is no reason to conclude from the fact that justice requires, for example, a system of tax and transfer that contracts are to be understood as outside the basic structure. So, Rawls's reason for focusing on the basic structure (i.e., the need for background justice) does not preclude contract law from being subject to the principles of justice. Indeed, quite the contrary: background justice may, in fact, require that contract law be deployed instrumentally in meeting the demands of the two principles of justice.

Id. at 619.

[38] See Rawls, PL, supra note 28, at 291 ("[T]he equal basic liberties in the first principle of justice are specified by a list as follows: . . . the freedoms specified by the liberty and integrity of the person . . . ."); Rawls, TJ, supra note 22, at 61 ("The basic liberties of citizens are, roughly speaking, . . . freedom of the person . . . ."); Rawls, supra note 20, at 45 ("Th[e] basic rights and liberties protect and secure the scope required for the exercise of the two moral powers . . . ."). Rawls's argument that the first principle might require coercive penal sanctions also seems to reflect its demand for security. See Rawls, TJ, supra note 22, at 241 ("It is clear from the preceding remarks that we need an account of penal sanctions . . . . I have maintained that the principles justifying these sanctions can be derived from the principle of liberty.").

[39] Rawls, TJ, supra note 22, at 242.

ward-looking, manner.[40] One form that security protection might take, then, would be a deterrence-oriented system that lawyers would identify as "tort law."[41] The details of such a system that protects distributive shares through civil suits and monetary damages, were it to be constructed, would of course be filled in (as with the details of all economic matters) by the second principle of justice in a manner consistent with the lexically prior demand for equal maximal liberty. Were such a system to be adopted, then, for Rawlsianism, "tort law" would answer to the demands of the two principles of justice, rather than to demands of corrective justice, even stipulating for the sake of argument that *contract* law lies outside the basic structure.

Second, even if tort law is outside the basic structure, it does not follow that it responds, as Ripstein holds, to the demands of corrective justice. When Rawls (arguably) notes that contract law lies outside the basic structure on the equivocal page 268 of *Political Liberalism*, he states that its rules must "satisfy the requirements of simplicity and practicality." He does not (and should not, given his view of property) maintain, for example, that contract rules must conform to some other deontic moral requirement, such as autonomy preservation (as in the Friedian conception of contract). Tort law, if it is to lie outside the basic structure, might then respond by

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[40] See id. at 241 ("[T]he principle of responsibility is not founded on the idea that punishment is primarily retributive or denunciatory. Instead it is acknowledged for the sake of liberty itself.").

While it is true that the two principles of justice are constructed in light of the deontic values that constitute the original position, the principles themselves are *forward-looking*. They evaluate competing (complete) legal and political schemes in a purely outcome-based manner. They evaluate such schemes in terms of the quality of life (as measured in terms of an objective index of primary goods) that citizens living under different schemes may reasonably expect. The principles of justice are indifferent to all backward-looking moral concerns (that is, how it is that results have come about—whether through luck or desert). In this sense, the principles of justice are *consequentialist*. This is true despite the fact that their aims are informed by deontic values derived from the original position. Pogge points out that it is the consequential nature of the application of the two principles that, in their inter-schemic selection, allows them to adopt strict criminal liability. Pogge, supra note 22, at 259 ("Once we countenance the broadly consequentialist reasoning suggested by a prospective-participant perspective, we are likely to find ourselves attracted to strict-liability laws . . . .").

[41] Surely, if strict criminal liability can be selected by the first principle of justice for reasons of deterrence, the first principle cannot rule out the adoption of deterrence-oriented civil liability.

analogy to the demands of simplicity and practicality rather than to the demands of corrective justice. *Justice*, for Rawls, has already been satisfied elsewhere: by the background conditions that are guaranteed by the basic structure. It is difficult to see, for Rawls, what (justice-oriented) values are at stake outside the bounds of the basic structure, apart from the natural duty of justice, which merely requires compliance with the just rules of the basic structure.

II. PERRY ON CORRECTIVE JUSTICE IN A RAWLSIAN SCHEME

Stephen Perry grounds a conception of corrective justice in "outcome-responsibility."[42] Outcome-responsibility arises when an agent is causally linked to a harm that he or she "had the capacity to foresee" as well as the "ability and opportunity to take steps to avoid." In addition, the agent must have "acted faultily" or "imposed certain kinds of unusual risks on the victim."[43] In discussing the relationship between distributive and corrective justice, Perry introduces—and then explains his disagreement with—the "distributive priority" view, which holds that distributive justice is "conceptually and normatively prior to corrective justice."[44] This means that, with respect to property, distributive justice defines distributive shares, and corrective justice then protects these shares. Perry argues that, on this account, corrective justice is actually not playing an independent role. Indeed, there is no need for an inquiry into fault or causation; it does not matter whether a particular setback to a person's distributive share occurred due to wrongful human action or natural disaster. All that is necessary is a broad practice of "maintaining the just distributive pattern."[45] Furthermore, in the distributive priority view, corrective justice may fail to maintain a desired (static) distribution, because it does not

[42] Perry is concerned in the first instance with the moral principle of corrective justice, rather than tort law. He does, however, state that he believes corrective justice to form "the normative foundation of tort law" and uses the situation in which "impoverished A negligently rams the Mercedes of extremely wealthy B" as an example of private liability for harm in the context of Rawlsianism. Perry, supra note 7, at 238, 261.

[43] Id. at 237–38.

[44] Id. at 239–40.

[45] Id. at 241.

account for what Perry calls global concerns. For example, imagine that *A* reduces some of *B*'s distributive share. If *A* must, as a matter of corrective justice, compensate *B*, *A*'s share is now too low as a matter of *distributive* justice, assuming that it was formerly just.[46]

Perry contrasts this problematic relationship between distributive and corrective justice with the relationship that obtains when the theory of distributive justice is what he calls "dynamic," rather than "static," as he maintains is the case for Rawls. In such a situation, he argues, "corrective justice should be conceived as an independent moral principle that operates within the context of distributive justice, but not as a part of it."[47] Corrective justice "protects legitimate entitlements simply because they are legitimate," not in order to further the ends of distributive justice *per se*; corrective justice is "complementary to, although conceptually independent of," distributive justice.[48]

Perry maintains that in the context of what he calls a dynamic theory of distributive justice, which he takes Rawls to be offering, people may "enter into contracts, make gifts, and so on, without thereby creating distributive disparities. The result is that such theories are highly indeterminate with respect to momentary distributive states and the extent of individual holdings."[49] Because a dynamic system of distributive justice creates rules within which people are free to operate (that is, the system constructs "options open"), it licenses "stable and enduring entitlements to property that are not subject to continuous, ongoing, or *ad hoc* redistribution."[50] For Perry, then, the indeterminacy of the system regarding momentary distributive shares "creates the logical space within which corrective justice is able to function."[51]

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[46] Id. at 243–44.

[47] Id. at 247. Perry acknowledges that Rawls may be best understood as holding the "distributive priority view" (as we maintain that he does and discuss further infra in Part III), in which case there is an incompatibility with corrective justice. Perry maintains that RawIsianism is "dynamic," however, and therefore compatible with the moral independence of corrective justice. Id. at 240 ("John Rawls arguably holds [the distributive priority view], although it is also arguable that he holds a view closer to [the moral independence view].").

[48] Id. at 254.

[49] Id. at 260.

[50] Id. at 261.

[51] Id.

While Perry is correct that Rawlsianism is consistent with a fair amount of constructed freedom within any selected complete scheme of legal and political institutions, it is not clear that Rawls's principles of justice are *inter-schemically* "dynamic." Since the two principles of justice are *maximizing* in their inter-schemic selection, it is not clear that the principles are properly understood as dynamic, if by "dynamic" Perry means "open" or "indeterminate." To be clear, the principles of justice select the complete scheme of legal and political institutions that maximizes the position of the least well-off, while first meeting the demands of the equal maximal liberty principle and the opportunity principle taken in lexical order. The result is that the complete scheme of legal and political institutions selected would be unlikely to include the corrective justice conception of tort law. In making inter-schemic comparisons, there would frequently be conflict between the principles of corrective justice and the nested maximands central to Rawls's principles of justice. While it is true that, within the complete scheme of legal and political institutions selected as maximally instrumental to the demands of the principles of justice, there is likely to be room for some voluntary economic choice that will cause distributive shares to fluctuate, it does not follow that there will be enough "openness" for the insertion of the principles of corrective justice. Thus, while Perry is correct that the principles of justice are consistent with fluctuation in holdings, it does not follow that they are dynamic (that is, indeterminate) in their inter-schemic selection of the complete set of legal and political institutions in a manner conducive to compatibility with the demands of corrective justice.[52] Whatever "openness" exists is demanded by the two principles of justice in their inter-schemic selection, and cannot be re-written in service to an alternative conception of justice.

[52] It is not clear that the complete set of legal and political institutions created by the two principles of justice *is* open in the sense that Perry maintains. The principles of justice are, as we have seen, in an important sense maximizing, so it is unlikely that there is room in the selected scheme for a set of pre-institutional (deontic) constraints, given that the scheme must be constructed so as to *maximize* the position of the least well-off while meeting the *maximizing* demands of the first principle of justice and the opportunity principle, taken in lexical order. A scheme of legal and political institutions that includes the corrective justice model of tort law is unlikely to *best* meet the demands of the principles of justice when compared to all other possible schemes.

Thus, we argue that Perry's view is misleading in the context of his broader argument that it is possible to maintain a meaningful commitment to corrective justice as an *independent* moral principle if one is a Rawlsian. For Rawls, while the political and legal institutions tasked with achieving distributive justice may be viewed as "dynamic" *intra*-schemically (that is, one's distributive share can rise or fall over time in the context of options constructed as "open"—for example, contracting or gift-giving), *inter*-schemically they are selected subject to the demands of maximizing principles of justice. This entails that there is insufficient "space" in Rawlsianism for corrective justice to function, even given Perry's correct view that Rawlsianism does not speak to momentary distributions. This is because the principles of justice will likely select rules that exclude corrective justice in a preponderance of cases—that is, rules that are arranged instrumentally in meeting the nested maximands of the principles of justice.

If this is so, then the arrangement selected by the principles of justice governs—regardless of the independent or exogenous demands of corrective justice. Thus, imagine that it is instrumental to satisfying the liberty demand of the first principle that certain conduct be deterred—in particular, that victims of the conduct be able to collect damages equal to 1.5 times the harm they suffer. Corrective justice has another demand, independent of the liberty demands of the first principle: victims should be able to collect damages equal to the harm they suffered. The principles of justice would select the scheme that includes the former measure of damages and reject the scheme that embodies the demands of corrective justice. Thus, we think it more accurate to say that, in embracing distributive principles that are in an important sense maximizing, Rawlsianism has *abandoned* a principled commitment to corrective justice.

It is true, as we noted in our Introduction, that in a limited number of cases it is conceivable that several alternatives might equally meet the demands of the two principles of justice. In such a situation, it would not be inconsistent for the Rawlsian to choose an alternative that "patterned" the demands of corrective justice.[53] It is

[53] Perry should acknowledge that even if the complete set of legal and political institutions that maximizes the position of the least well-off while first meeting the maxi-

misleading to maintain that corrective justice is an independently-held moral commitment that operates in a complementary fashion to distributive justice, however, for in each and every situation in which the two conflict (which, we argue, would be most situations, as the Rawlsian selection from among complete legal and political schemes is maximizing), the Rawlsian would abandon corrective justice in order to meet the demands of the two principles of justice. Thus, properly understood, Rawlsian tort law (should it exist) adopts an ex ante consequentialist (or deterrence-oriented) approach, while rejecting a principled commitment to the ex post corrective justice view.

III. TORT LAW AND THE FIRST PRINCIPLE OF JUSTICE

Assuming that tort law lies within the basic structure, contra the moral independence view, one may wonder to what extent it is constructed in service to the demands of the difference principle (maximizing the position of the least well-off), and to what extent it is constructed by the first principle of justice, given its focus on liberty. The difference principle, of course, is the second of two lexicographically ordered principles and is itself constrained by conditions of fair equality of opportunity. Thus, it is possible that considerations other than mere economic distribution are at stake in tort law—for example, *basic* liberty interests. To the extent that there are liberty-oriented values at stake in tort law, one might be attracted to the view that the corrective justice conception of tort might be selected (or constructed) in part by each of the two principles of justice.

As we discussed briefly in Part I, the first principle's demand for security requires that equal maximal liberty packages be protected. We also saw, however, that for Rawls liberty interests are protected in a consequentialist or forward-looking manner—consistent, for example, with strict criminal liability in certain in-

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mizing demands of the liberty and opportunity principles were to include the corrective justice conception of tort law, this would simply be a matter of overlap (or coincidence), as opposed to principled commitment. Given, as we have argued, that the two principles of justice define the conception of justice, there can be no independent commitment to the pre-institutional or deontic corrective justice conception of tort law; for Rawlsianism, there is a prominent conflict (or ordering problem) between *distributive* and *corrective* justice.

stances. Thus, any tort law constructions required by the first principle to provide security in liberty packages may well be similarly forward looking, to the extent that is instrumental to constructing equal maximal liberty packages. There is no guarantee that the backward-looking concerns of corrective justice would be embodied in the maximizing scheme constructed by the first principle of justice. Indeed, even if backward-looking rules were selected, it would be not out of any principled commitment to such rules, but rather because they happened to best serve the forward-looking demand for equal *maximal* liberty packages.

Further, the first principle of justice cannot require, for liberty-oriented reasons, that the corrective justice conception of tort law be constructed in order to protect people from economic harm, as opposed to security interests in basic liberties (for example, bodily integrity). The high Rawlsian position is that, strictly speaking, economic constructions are understood as second-principle matters. It follows from this that the first principle of justice (despite its focus on liberty) cannot play a role in the construction of significant or robust economic institutions. Given, for example, that the details of the right against economic injury or harm are a function of property rules that provide the relevant moralized baseline and must, therefore, be constructed as a second-principle matter, the first principle of justice cannot construct the specific details of any original position-prior corrective justice conception of tort. Importantly, the principles of justice are necessary even for the construction of the property baseline needed for the coherence of the so-called "natural duties." That is, for Rawls, it is not the case that all "natural duties" are pre-institutional.

Two points are instructive here. First, at the first-principle-of-justice stage, no principles of economic distribution have been selected. There is, for example, the open possibility of perfect equality, since economic inequalities are justified only to the extent that they are to the advantage of the least well-off, given a baseline of perfect equality. To a large extent, however, the corrective justice conception of tort *is* a set of principles for the governance of economic distribution. Despite the fact that there are liberty interests at stake, these liberties are largely a matter of *economic*, as opposed to *basic*, liberty, and therefore not available at the first-

principle stage.[54] The open possibility of perfect equality—which is inconsistent with corrective justice—makes this point plain. Or, by analogy, the basic liberties protected by the first principle of justice cannot speak to economic harm in the manner required by the corrective justice conception of tort, just as the basic liberties cannot impose a constraint of laissez-faire capitalism upon the selection of the economic scheme. Robust conceptions of economic rights and liberties are, quite simply, second-principle matters.

In *The Basic Liberties and Their Priority*, Rawls, of course, revises the first principle of justice from a maximizing principle to a sufficiency requirement, largely in response to H.L.A. Hart's important objections.[55] In this revised view, Rawls understands the first principle of justice as requiring sufficient basic liberty to "guarantee equally for all citizens the social conditions essential for the adequate development and the full and informed exercise of the [two moral] powers."[56]

A question then arises as to whether or not the full exercise of the two moral powers might require the moral value of corrective justice being instantiated into law. The idea could be this: corrective justice embodies a conception of freedom and responsibility that is constitutive (or is a pre-condition) of the full exercise of the

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[54] Importantly, then, the details of any protections against economic harms will be determined by the difference principle. For Rawls, the construction of a property baseline is a second-principle (that is, economic) matter. Since tort law constructions (or other methods of protecting the economic component of distributive shares) require a property baseline, such aspects of tort law must *also* be second-principle matters. Rawls does indicate that the first principle constructs what he calls "personal property," and analogously it may require (at the most abstract level) that at least some contracting options be "open" and some protection for economic shares be provided. The point, however, is that the specific *details* of rights of ownership, transfer, and compensation for harm require a property baseline that is not available at the first-principle level; thus, economic aspects of the private law are, for Rawls, a second-principle matter constructed in service to the *maximizing* demands of the difference principle. See Rawls, PL, supra note 28, at 298 ("Two wider conceptions of the right of property as a basic liberty are to be avoided. One conception extends this right to include certain rights of acquisition and bequest, as well as the right to own means of production and natural resources."). For a recent discussion of various conceptions of property and self-ownership, see Barbara H. Fried, Left-Libertarianism: A Review Essay, 32 Phil. & Pub. Aff. 66 (2004).

[55] See Rawls, PL, supra note 28, at 331–32 (citing Hart, supra note 21, at 239–44).

[56] Rawls, PL, supra note 28, at 332. Rawls goes on to define the two moral powers: "[t]he first . . . is connected with the capacity for a sense of justice . . . . The second . . . is connected with the capacity for a conception of the good . . . ." Id.

two moral powers. The corrective justice conception of tort law, then, is required of any scheme that provides what might plausibly be viewed as sufficient liberty to the full exercise of the two moral powers; or, simply put, corrective justice is necessary to any liberty scheme sufficient to the full exercise of the two moral powers.

This view of corrective justice, however central to Kantian or Lockean political philosophy, cannot, given his property skepticism, be Rawlsian. Even if one were to grant that the moral value of corrective justice is required by the first principle of justice, it does not follow that a corrective justice conception of *tort law* that embodies a conception of economic justice is required. The corrective justice conception of tort understands tort damages in economic terms—it aims to measure and compensate harms in economic terms. The trouble, however, is that such a robust economic conception must be a second-principle matter for the Rawlsian. Rawls does, of course, discuss the demands for personal property and the right to an economic social minimum as a first-principle (or basic) requirement, but his commitment to such demands is entirely instrumental to the exercise of more fundamental non-economic basic liberties that *are* central or necessary to the full exercise of the two moral powers (for example, freedom of thought and conscience, freedom of religion, and freedom of association).[57]

Thus, while it is true that Rawls believes personal property is required for the exercise of the two moral powers, this is not because of any *principled* commitment to the existence of pre-institutional natural property rights in the external world. The demand for personal property is merely instrumental to more fundamental and, for Rawls, higher-order liberties necessary to the full exercise of the two moral powers. To hold that the full-blown corrective justice conception of tort *law*, given its economic component and ramifications, is required at the first-principle level in order to meet the requirements of the full exercise of the two moral powers fails to take seriously Rawls's property skepticism. There can be, for Rawls, no principled commitment to any particular moralized or robust notion of property as a *basic* matter. To think otherwise is to fail to understand the important (though non-basic) role property plays for Rawls and, in particular, property's (non-basic)

[57] Rawls, supra note 20, at 114.

relationship to his view of persons as free and equal. To attribute to Rawls a view of persons conceived of as free and equal and intimately (or normatively) bound to a particular moralized conception of property—or a moralized conception of economic justice at the first-principle level—is (arguably) to invoke what Murphy and Nagel have called the "myth of ownership."[58]

While the first principle of justice limits the range of the second principle, given its lexical priority, it can do so only for (non-property-oriented) basic-liberty reasons pertaining to the full exercise of the two moral powers. Indeed, this is the explanation for Rawls's inclusion of a social minimum and his notion of "personal property" at the first-principle level. The idea is that once these two features are added at the level of the first principle of justice, the two moral powers are adequately satisfied *qua* property.

In this view, the second principle is then free to select economic schemes, consistent with the lexically prior basic-liberty requirements, without significant concern that the economic selection will have a deleterious effect upon the exercise of the two moral powers. The very minimal property demands required by the two moral powers are *not* met by specific or robust conceptions of property or economic justice, but rather by the minimal notions of the right to personal property and the social minimum. The guarantee of personal property and the social minimum are all that is required by Rawls for the adequate exercise of the basic liberties required by the two moral powers. A commitment to the corrective justice conception of tort would be, in our view, misplaced.[59]

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[58] This is, of course, a complicated matter. We more extensively discuss the relationship between the distributive conception of property and the first principle of justice, and the distributive conception's relationship to the transactional and (arguably) liberty-oriented aspects of the Rawlsian view of property, in Kevin A. Kordana & David H. Tabachnick, The First Principle of Justice and the Myth of Ownership (working paper, on file with authors).

[59] This is, as we have said, a complex matter, and there is reasonable disagreement over exactly how much work the first principle of justice can do in the property construction. For example, Thomas Nagel has written that:

> Rawls holds that people deserve the product of their efforts only in the sense that if they are entitled to it under the rules of a just system, then they have a legitimate expectation that they will get it. This view is I think more uncompromising than would be accepted even by most of those who would describe themselves as liberals. There are certainly those who would maintain that even preinstitutionally, people deserve what they gain by their own efforts .... That

One might object to our position by drawing a distinction between "underlying rights" and "transactional rights," arguing that the normative principles of corrective justice (instances of the latter) swing clear, as a conceptual matter, of underlying property holdings that are properly understood to be under the control of the difference principle. In this view, while principles of corrective justice may have indirect empirical effects upon underlying property holdings, as a conceptual matter the two are distinct and may be governed by separable principles.[60] The invited conclusion is that transactional rights are associated with and necessary for the exercise of the two moral powers, while distributive rights are not. Thus, the former may be constructed by the first principle of justice.

We are not convinced. In our view, rights concerning justice in transfer, for Rawls, are components of underlying rights (or the conception of property), as opposed to a sector of justice distinct from them. It is not our understanding that, for Rawls, economic rights exclusively pertain to holdings and are, therefore, silent with regard to transactional rights. Rights in transfer are features of "underlying rights" and not conceptually distinct from them.[61] To make the point plain, consider the distinction between a property rule and a liability rule: the change in the "underlying right" *is* a function of the right's transfer feature.

In more recent work, for example, Arthur Ripstein argues that there is an essential normative relationship between the corrective justice conception of tort law and the exercise of the two moral powers.[62] For Rawls, however, the liberty demand of the revised first principle of justice requires *sufficient* basic liberty for the development and exercise of the two moral powers. Given that the first principle is now conceived of as a sufficiency or adequacy (as opposed to a maximizing) principle, it may still be true that its demand can be satisfied through one and only one institutional de-

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might be expressed by some modification in the interpretation of Rawls's first principle to admit a measure of economic freedom as a protected right.

Thomas Nagel, Rawls and Liberalism, *in* Concealment and Exposure 87, 92 (2002).

[60] Our discussion here follows Jules L. Coleman, Corrective Justice and Property Rights, 11 Soc. Phil. & Pol'y 124, 135–36 (1994).

[61] Id. at 136.

[62] Arthur Ripstein, Private Order and Public Justice: Kant and Rawls, 92 Va. L. Rev. 1391 (2006).

sign, but it may also be true that the demand can be met through a variety of institutional designs. This, of course, turns on the nature of the demand. For Ripstein, corrective justice is required because he is concerned about the possibility of encroachments upon another's pursuit of her conception of the good. We disagree. One could be sufficiently protected from such encroachments through a variety of institutional schemes sufficient to the exercise of the moral powers. For example, a system including some mixture of regulation, criminal sanctions, and civil liability[63] may well be sufficient.[64] In short, we fail to see why corrective justice need be understood as constitutive of the exercise of the two moral powers, given Rawls's property skepticism.

To illustrate this point, consider Professor Jeffrie G. Murphy's well-known discussion of the justification of criminal sanctions, in which he addresses the relationship between a justified property baseline and retributive justice. Murphy argues that while Kantian retributive justice is *formally* correct, it is *materially* inadequate given the absence of a justifiable property baseline.[65] Our view is that Rawlsianism is not consistent with the claim that corrective justice is even *formally* correct. For us, but apparently not Ripstein, there is a glaring distinction between Kant and Rawls with regard to corrective justice (again, given Rawls's property skepticism). For Rawls, there is not only the question of a justified property baseline that Murphy addresses, but also the very questions of whether

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[63] Perhaps some forms of deterrence would be incompatible with the equal exercise of the two moral powers (for example, those imposing enormous punitive damages). However, more modest and equitable forward-looking systems of civil liability would seem to be compatible.

[64] See Rawls, TJ, supra note 22, at 241 ("[T]he principle of responsibility is not founded on the idea that punishment is primarily retributive or denunciatory. Instead it is acknowledged for the sake of liberty itself. . . . This principle is simply the consequence of regarding a legal system as an order of public rules addressed to rational persons in order to regulate their cooperation, and of giving the appropriate weight to liberty."). Take, for example, the distinction between (1) suffering a physical injury and being compensated via a corrective justice tort regime, and (2) being governed by a deterrence-oriented tort scheme (consistent with the first principle of justice) that prevents such injury in the first instance. We take it that the latter is *at least* as good from the perspective of the exercise of the two moral powers, given the property skepticism. We are grateful to Michael S. Moore for having raised this point.

[65] See Jeffrie G. Murphy, Marxism and Retribution, *in* Punishment 3, 18 (A. John Simmons et al. eds., 1995).

or not corrective justice is required for the full exercise of the two moral powers and, if not, if is it consistent with Rawlsianism.

Return now to our larger claim: that Rawlsianism and a principled commitment to corrective justice are incompatible. If more than one institutional scheme satisfies the *adequacy* demand of the (revised) first principle of justice, then the opportunity principle and the difference principle, taken in lexical priority, are free to select between them. As we have argued, since the difference principle is maximizing, it will be incompatible with economic arrangements derived from backward-looking moral concerns such as the corrective justice conception of tort. The difference principle simply demands the scheme that maximizes the position of the least-well off while meeting the sufficiency demand of the first principle of justice and the opportunity principle. Corrective justice, as we have argued, is not the *only* mechanism through which *sufficient* liberties for the development and exercise of the two moral powers can be established. Further, we are not even convinced that it may consistently be advanced. Thus, a prominent conflict between a principled commitment to corrective justice and Rawlsianism obtains, once one accepts Rawls's revised (adequacy) version of the first principle of justice.

IV. RAWLSIAN TORT LAW

Our claim is that the Rawlsian demand for security may take on a forward-looking form.[66] Importantly, given the post-institutional nature of the Rawlsian political and legal scheme, what might sometimes be viewed as the traditional (or principled) line between tort law and other areas of law is blurred.[67] Rawls's view, then, is plausibly contrasted with other views requiring self-contained or

[66] For example, Thomas Pogge's argument that Rawlsian theory's endorsement of strict liability in the criminal law is problematic turns on the truth that, for Rawls, political and legal institutions answer to the demands of the principles of justice in consequentialist fashion. Pogge, supra note 22, at 263–64 ("The paradoxical implications . . . are then connected to the fact that it focuses not on actors . . . but on the societal basic structure which produces various good and bad events in particular frequencies and is to be held morally responsible for them: for executions as well as for traffic deaths, for punishments as well as for crimes, for taxes as well as for bankruptcies.").

[67] This is analogous to the argument from law and economics that is skeptical of the autonomy of tort law. See Coleman, supra note 6, at 195.

independent bodies of law, justified by independent moral principles.[68] Further, it is possible that the Rawlsian scheme of legal and political institutions might not feature what is traditionally understood as "tort law." In other words, for Rawls, the two principles of justice would construct the range of legally permissible institutions. It does not follow, however, that the principles of justice need to allow victims to impose civil liability on persons whose impermissible action harmed them (in accord with the so-called causal condition); victims, for example, might be compensated through the system of tax and transfer, and persons engaging in impermissible action fined.

Suppose, however, that some form of "tort law" *were* instrumentally useful in (or necessary to) meeting the demands of the principles of justice. The principles of justice would then construct what might be described or viewed as "tort law." Importantly, however, the rules of tort law are constructed by the principles of justice in conjunction with all other bodies of law so as to create a *complete scheme* of legal and political institutions that is maximally instrumental to the demands of the principles of justice. Since each area of law must find its place in conjunction with all other aspects of the complete scheme of legal and political institutions, no single body of law is required to pattern or be "read off" the two principles of justice. For example, neither the rules of tort law nor the rules of contract law must directly enshrine the actual values embodied in the principles of justice. The principles of justice enjoin only the conclusion that the *entire* scheme best meets the demands of the principles of justice.

It is important to recognize that even though no particular body of legal rules (for example, tort law) need be constructed so as to directly pattern the principles of justice, all of the rules of the legal and political scheme are nevertheless distributive in nature. The

[68] Charles Fried, Contract as Promise: *A Theory of Contractual Obligation* 14–17 (1981). For a discussion of the distinction between deontic and consequential theories of contract, see, for example, Peter Benson, Contract, *in* A Companion to Philosophy of Law and Legal Theory 24 (Dennis Patterson ed., 1996); Jody S. Kraus, Philosophy of Contract Law, *in* The Oxford Handbook of Jurisprudence and Philosophy of Law 687 (Jules Coleman & Scott Shapiro eds., 2002). For a discussion of the will theory of contract and its relationship to what has typically been understood as a distributive matter—unconscionability doctrine—see Seana Valentine Shiffrin, Paternalism, Unconscionability Doctrine, and Accommodation, 29 Phil. & Pub. Aff. 205 (2000).

form of such rules ultimately answers (even if indirectly) to the (maximizing) principles of justice. While we are unconvinced by attempts to show that Rawlsianism is compatible with a principled commitment to corrective justice, we do hold that there is a demand for security, even given Rawls's commitment to ideal theory. For Rawls, although there is in ideal theory "strict compliance" with the principles of justice, this idealized conception is bounded by some of the facts of human psychology. Persons are taken to comply with the principles of justice subject to some (though certainly not all) of the "real world" imperfections of human psychology. For Rawls, strict compliance theory assumes only that citizens voluntarily comply with the principles of justice to the extent that is *humanly possible*—strict compliance does not assume that human beings are *perfectly* motivated beings. These imperfections mean that, for Rawls, strict compliance does not entail absolute or perfect compliance with the requirements of justice. Thus, some deterrence or incentives ("sanctions") are necessary in order to ensure security, even in ideal theory. Rawls's remarks on this matter appear to be decisive:

> Strict compliance means that (nearly) everyone strictly complies with, and so abides by, the principles of justice. . . . In this way, justice as fairness is *realistically* utopian: it probes the limits of the *realistically* practicable, that is, how far in *our* world (*given its laws and tendencies*) a democratic regime can attain complete realization of its appropriate political values . . . .[69]

Further, Rawls writes that:

> It is clear . . . that we need an account of penal sanctions however limited even for *ideal* theory. Given the *normal conditions* of *human* life, some such arrangements are necessary. I have maintained that the principles justifying these sanctions can be derived from the principle of liberty. The ideal conception shows in this case anyway how the nonideal scheme is to be set up; and this confirms the conjecture that it is ideal theory which is fundamental.[70]

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[69] Rawls, supra note 20, at 13 (emphasis added).
[70] Rawls, TJ, supra note 22, at 241 (emphasis added).

Thus, even in ideal theory there will be "accidents"—that is, some setbacks to one's legitimate distributive share will inevitably result. The Rawlsian can consider invoking tort law in order to reduce or deter such accidents. The Rawlsian scheme may well feature a system of "tort law," even given "strict compliance."

In *non-ideal* theory, more actions out of compliance with the demands of justice would be committed, and a Rawlsian might adopt legal and political institutions *other* than those that might be adopted with the assumption of strict compliance in place. It remains true, however, that a principled commitment to corrective justice is inconsistent with the two principles of justice—even in non-ideal theory. It is unclear why a Rawlsian in non-ideal theory would be drawn to the corrective justice conception of tort—a view that embodies its own conception of justice, distinct from the Rawlsian conception. Rawls's remarks, then, are correct: the *ideal theory* conception of tort law is to serve as a model for the non-ideal theory conception.

Consider, now, the manner in which tort law could function in the Rawlsian scheme. In order to satisfy the security demand of the two principles of justice, liability and compensation packages might be assigned to those who have performed "impermissible" action and to its victims, respectively. Because such rules of tort law would be constructed in service to distributive aims, questions of the magnitude of liability—to *whom* damages are paid—as well as the magnitude and manner in which victims are compensated, are all answered separately and instrumentally.

For Rawls, while it might be necessary to compensate the victim of the tort as a means of protecting citizens' legitimate distributive shares, the "compensation package" might come from a source other than the tortfeasor (for example, the state, an insurance pool, etc.) and be of a greater or lesser magnitude than the "liability package." Tort, then, is for Rawls a question of what, given the particular circumstances, best satisfies (in conjunction with all other aspects of the complete scheme of legal and political institutions) the demands of the two principles of justice.

CONCLUSION

Given Rawls's conception of property, what is conventionally referred to as "tort law" would be, for Rawls, constructed in service

to the demands of the two principles of justice. This renders any principled or independent commitment to corrective justice inconsistent with Rawlsianism. Corrective justice addresses a set of issues on which Rawlsianism is not silent: it creates normative demands without regard to what is required by the demands of the two principles of justice. In short, for Rawls, "tort law" would be constructed by a first-principle demand for security and/or as part of the second-principle property bundle that functions in a forward-looking manner. It is the determinacy of the two principles of justice (taken in lexical priority), in their inter-schemic selection with respect to security concerns and property construction, which renders any overlap with corrective justice a matter of mere "patterning," as opposed to normative or principled commitment.