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Article

Rethinking the Theory of Legal Rights

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In the economic approach to law, legal rights are designed, in part, to overcome the conditions under which markets fail. In correcting for market failure, economic analysis endorses two rules for assigning legal rights.

The first specifies the allocation of rights under conditions of rational cooperation, full information and zero transaction costs. Provided that exchange is available and that obstacles to exercising it are insignificant, rational cooperators will negotiate around inefficiencies. Under these conditions, legal rights are not assigned in order to establish optimal levels of resource deployment directly; rather, they establish well-defined entitlements or negotiation points which create a framework in which mutually advantageous bargains leading to optimal outcomes can be realized. This role of legal rights in securing optimal outcomes is suggested by the Coase Theorem.[1]

The second rule for assigning legal rights specifies the procedures to be followed in the event the conditions of full information, rational cooperation and zero transaction costs are inadequately satisfied. Where impediments to successful negotiations are substantial, inefficiencies in the initial allocation may not be overcome through mutually advantageous exchange. Unable to rely upon the exchange process to overcome inefficiencies, a

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1. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

court must allocate entitlements efficiently from the outset. In doing so, the court continues to rely upon the exchange process, though in a different manner. Instead of relying upon exchange to *rectify* inefficiencies, including inefficient judicial decisions, the court relies upon the market paradigm to help it *identify* the efficient outcome it seeks to replicate.

Let's refer to an exchange market in which the conditions of the Coase Theorem are met or approximated as a "Coasean" market. When a court cannot avail itself of the Coasean market, it is left to imagine what the parties would have agreed to in a *hypothetical*-Coasean market. In this market, the right to use a resource would have been secured ultimately by that party who would have paid the most for it. The court then mimics the outcome of the idealized, but unrealized Coasean market by "auctioning" entitlements to those who value them most—as judged by each litigant's willingness to pay.[2]

Once assigned, entitlements need to be secured. In their seminal piece which sets out the accepted framework for securing legal entitlements, Calabresi and Melamed distinguish among three ways of protecting entitlements: (1) property rules, (2) liability rules, and (3) inalienability rules.[3] In their view, property rules protect entitlements by enabling the right bearer to enjoin others from reducing the level of protection the entitlement affords him, except as he may be willing to forgo it at a mutually acceptable price. If a right is protected by a liability rule, a nonentitled party may reduce the value of the entitlement without regard to the right holder's desires, provided he compensates *ex post* for the reduction in value. The value of the reduction, that is, damages, is set by a collective body, usually a court; it need not coincide with what the entitled party would have been willing to accept for a reduction in the value of his entitlement.

If transaction costs are high, a property rule is likely to prove inefficient because transfer to more valued use requires negotiations. Consequently, property rules may lead to entitlements being held by individuals who value them less. Under a liability rule, individuals who value entitlements more than those on whom the rights are initially conferred can secure the entitlements without *ex ante* negotiations: they can compel transfers to themselves and pay damages. In such cases, the entitlement is secured by the party who most values it, thus duplicating the outcome of the Coasean market exchange process. When transaction costs are high, therefore, effi-

2. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986); Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 ETHICS 649 (1984).

3. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105–15 (1972).

ciency considerations may necessitate the foregoing of property rules in favor of liability rules.

If damages under a liability rule set by a court are equal to the reduction in the value of the entitlement to the injured party, the optimal outcome is secured through a Pareto superior, or mutually beneficial, *forced transfer*. If damages are set below the value of the entitlement to the injured party, the forced transfer is not Pareto superior, even if it is Pareto optimal. Property rules, therefore, induce optimal transfers through Pareto improvements, whereas whether liability rules involve Pareto improvements depends on the level of compensation, and on the transaction costs of administering them.

When a right is protected by an inalienability rule, transfers of any sort are prohibited. The right to one's freedom from servitude and the right to vote are examples of rights protected by inalienability rules. On first blush, protecting a right by an inalienability rule appears to be a decision foregoing efficiency in favor of promoting some other social good. After all, some people might well wish to exchange their rights, and their doing so might be efficient; blocking such transfers might then seem inefficient. However, a willingness to exchange a right, like freedom from servitude, for money may indicate a lack either of full information or of rationality. Presumably such transfers would not occur in a costless market populated by fully informed, rational persons. Inalienability rules, therefore, may also be explained (justified) in efficiency terms.

HOW TO PROTECT

WHOM TO ENTITLE	Property Rule	Liability Rule
B	(1) Injunction for *B*	(3) Damages for *B*; Liberty for *A*
A	(2) Injunction for *A*	(4) Damages for *A*; Liberty for *B*

In encouraging the efficient distribution of resources, a court actually has four options. Suppose a polluter, *A*, claims an entitlement to continue

polluting; and the victim-plaintiff, *B*, seeks an injunction to prohibit *A* from polluting further. The court's options are represented in the above matrix.

The court can, as it does in cells (2) and (4), decide in favor of the polluter; or it can, as it does it cells (1) and (3), decide in favor of the plaintiff. In the usual jargon, this constitutes the court's "entitlement decision." The court's decision in favor of the plaintiff, represented in (1) and (3), can differ in the nature of the protection it affords the plaintiff. If the entitlement is protected by a property rule, then *A* is enjoined from polluting *B* unless *A* can reach an accord with *B* that would permit it to pollute at a price *B* finds acceptable. In contrast, if the court opts to protect *B*'s entitlement by the use of a liability rule, as in cell (3), then *A* may pollute *B* and pay damages at a price set *ex post.*

Similarly, if the court decides in favor of the polluter, it may protect its right to pollute by a property rule, as it does in (2), which enjoins *B* from reducing *A*'s pollution without first securing *A*'s consent. The court may alternatively protect *A*'s right to pollute by a liability rule, as it does in (4), which grants *B* the liberty to reduce the level of *A*'s output provided he compensates *A ex post.*

Each of these four options have in fact been employed by courts in establishing and securing legal entitlements. The celebrated *Spur Industries* case was resolved by use of the last, and least obvious, option.[4] The Calabresi-Melamed framework and the *Spur* case are widely viewed as mutually supportive. The theoretical framework locates and legitimates the decision—one which might otherwise have seemed to lack a foundation. At the same time, the decision suggests the usefulness of the framework. This is not to say that the decision itself cannot be or has not been criticized.[5] Still, whatever objections to the decision have been made, it remains true that no commentator has thought to criticize it on the grounds that the decision is deeply paradoxical, this is surprising. The *Spur* case, and the Calabresi-Melamed framework that encompasses it, suggest that it is possible to protect a person's right by giving *others* the liberty to invade it provided they compensate for the invasion. *Ex post* compensation can sometimes be adequate both to legitimate forced transfer and to secure or protect a legal right. It is surely odd to claim that an individual's right is protected when another individual is permitted to force a transfer at a price set by third parties. Isn't the very idea of a

4. Spur Indus., Inc., v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (1972) (court enjoined cattle feeding but required real estate developer to pay relocation or termination costs).

5. For example, one could argue, given that there were only two litigants and the costs of the transactions were low, it is surprising the court did not choose to take a property, rather than a liability, rule approach.

forced transfer contrary to the autonomy or liberty thought constitutive of rights?

A perfectly natural way of characterizing what it means to have a right to a resource or to property is in terms of autonomy or control. Rights, in this view, demarcate a realm of liberty or control. Rights are secured or protected liberties.[6] But how can my liberty or control over a resource or over a set of choices be protected by denying me autonomy or control, and instead by conferring control on others, even on the condition that they compensate me for whatever *diminution in the value* of my resources their conduct occasions? The point of conferring an entitlement arguably is to secure a domain of control, *not* to guarantee a particular level of welfare or utility. One who conceives of rights as securing a sphere of liberty does not believe that the concept of a right is reducible to or otherwise identifiable with a point on a right bearer's indifference curve. The liberty attendant rights ownership is not equivalent to any particular level of welfare: certainly, not if one wants to maintain the distinction between autonomy and utility.[7]

If rights entail or secure liberties, then it is hard to see how liability rules protect them. Let's refer to the thesis that part of what it means to have a (legal) right to a resource is to have a secured domain of autonomy as the classical liberal theory of legal rights.[8] Faced with a conflict between his understanding of rights and the property-liability rule framework, the classical liberal may simply give up the latter, that is, deny that liability rules *protect* entitlements.

It is important that we not misunderstand this response. Someone who denies that liability rules protect rights does not deny either that liability rules play a role in reducing the incidence of "takings," or that they protect something. Of course liability rules can deter, and for an obvious reason. Rendering compensation *ex post* imposes a cost on potential "takers," hopefully adequate to reduce the level of forced transfers. Moreover, liability rules protect something. Compensation under a liability rule is for harm done and loss suffered. The loss is the diminution in value of one's resources or, loosely speaking, one's property. In this sense the "objective" value of one's holdings is protected by liability rules; the value of the interest is left intact. But a liability rule confers no liberty or autonomy on an entitled party, and therefore secures no such liberty. Quite the contrary. In the classical liberal view, the right is the liberty, not the value

6. J. FEINBERG, SOCIAL PHILOSOPHY 55–59 (1973).

7. Coleman, *The Foundations of Constitutional Economics*, in CONTAINING THE ECONOMIC POWERS OF GOVERNMENT (R. McKenzie ed. 1984).

8. This is the view, for example, of Charles Fried: "The regime of contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights." C. FRIED, CONTRACT AS PROMISE 2 (1981) (footnote omitted).

(i.e., utility) to anyone of having or exercising that liberty. Thus, in the view that rights entail liberties, the most liability rules can secure is a level of welfare equal to the value of the right bearer's interest, including even his interest in his autonomy. However, because utility is *not* autonomy, and because liability rules neither confer nor respect a domain of lawful control, liability rules cannot, in this view, protect rights. The "cannot" here is a conceptual one. The very idea of a "liability rule entitlement," that is of a right secured by a liability rule, is inconceivable.

We have, then, at least two alternative conceptual frameworks for thinking about the relationship between rights and the property-liability rule scheme. The discussion to this point suggests that in the framework within which economic analysis operates, rights can be secured by liability rules if rights are not thought of as entailing autonomy or liberty. Rights secure a level of well-being or utility. Liability rules protect rights by compensating for diminutions in the level of well-being owing to the conduct of others. In the classical liberal framework, rights entail a realm of control which cannot be secured by liability rules. Rights secure a domain of autonomy. Liability rules permit others to act without regard to the right holder's autonomy over his holdings. The tension between the two frameworks appears to require that we give up one or another plausible claim: either that a right is a domain of protected control, or that liability rules protect rights. Both claims are plausible, but apparently incompatible. Which ought we abandon?

Answering this question, we believe, requires a theory of legal rights, meaning an account of what it means to have a legal right, as well as an account of the role of property and liability rules within any such theory. In what follows, we take up the challenge of providing a conceptual theory of legal rights whose point of departure is a reinterpretation of the Calabresi-Melamed framework. One consequence of our analysis is that once the concept of right is properly understood, it is necessary to give up both the claim that rights entail liberties *and* the claim that liability rules protect rights. The correct theory of legal rights, in other words, demonstrates the inadequacies of both the economic and classical liberal theories of rights.

I. A Theoretical Framework for Institutional Rights

A. *The Basic Questions*

An adequate theory of institutional (e.g., legal) entitlements must address three different sorts of questions:

(1) What is the *foundation* of rights? What goals or aims are institutions which create rights designed to promote? A foundational theory of

institutional rights provides their *normative basis*. Among the possible foundational views are those which are liberty-based and those which are, in some sense, welfare-based. In these views, institutions which create rights are designed either to promote individual liberty or to promote welfare (individual, average, or general). Justificatory questions—for example, why confer upon individuals a right to freedom of speech, to a speedy and fair trial, or to private property—are answered by reference to the "foundational" theory.

(2) What is the correct *analysis* of rights? Theories of the correct analysis of rights typically assert that rights are or entail, for example, interests, liberties, or claims. But these theories conflate two distinct questions concerning the proper analysis of rights. A correct analysis of rights distinguishes between the *logical form* and the *content* of rights.

A theory of the logical form of rights seeks to specify the necessary features or properties of rights. These properties hold of rights analytically; that is, all institutional rights possess them necessarily. Further, these properties, whatever they are, remain constant across foundational theories. In contrast, the content of rights may vary depending on the foundational or normative theory of rights advanced. A theory of the content of rights is a theory of their *constitutive elements*. And these elements are not constitutive of rights as a matter of logical form, but rather as a matter of contingent fact. In any overall theory of institutional rights, the constitutive elements of rights are a function of the foundational theory.

The difference between the logical form and the content of rights is analogous to the distinction between syntax and semantics.[9] We might say, then, that a proper analysis of rights addresses both the syntax and the semantics of rights. By separating the logical form from the content of rights, we seek to draw attention to an important point: different views of the purpose of institutional rights may require different theories of their content, while maintaining that certain features of rights may be necessary features of them which obtain irrespective of the range of various foundational theories.[10]

(3) How might or ought a system of institutional rights be *enforced*?

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9. *See generally* A. CHURCH, INTRODUCTION OF MATHEMATICAL LOGIC (1956).

10. The content of particular legal rights will always be contingent upon the foundational theory, whereas the syntax of rights is independent of any commitment at the foundational level. This means that even if rights necessarily entail claims, the specific claims entailed would always depend on the foundational theory. Moreover, even a commitment to a utilitarian or welfare theory at the foundational level would not strictly entail that rights marked *interests*. Sometimes, the best way to promote utility is to secure by rights a domain of autonomous control. Even within a utilitarian framework, institutional rights may sometimes mark *liberties*. Whether rights mark liberties or interests in this theory will depend on contingent features of the world and the structure of interaction. This is the kind of utilitarian theory of rights currently being pursued by Russell Hardin, and, to some extent, by Jon Elster, Richard Epstein and Jules Coleman.

How should the claims given by rights be vindicated? What institutions are available to enforce rights, and which are appropriate to use and why? This is the question of institutional enforcement. At this level, we want to know, for example, whether we ought to enforce or vindicate a particular set of claims by providing injunctive relief, tort liability, some combination of the two or, perhaps, by imposing criminal sanctions.

B. *The Basic Answers*

In keeping with the distinction we draw between the logical form and the content of rights, we shall argue first that, regarding their logical form, rights are best understood as "conceptual markers," or "place-holders," used to designate a subset of legitimate interests or liberties to be accorded special protection by law.[11] Once chosen, the relevant interest or liberty enjoys a privileged status by being labeled a right or entitlement. Secondly, property, liability and inalienability rules are best understood as devices for generating or specifying the *content* or *meaning* of such rights. Because property and liability rules specify the meaning of rights, they enter into the overall theory of institutional rights at the level of providing an *analysis* of them. This is the point at which our conception of the property, liability and inalienability framework departs from previous work which, following Calabresi-Melamed, locates the transaction structure squarely within what we are calling the domain of institutions for securing or protecting entitlements.

Finally, because the property-liability-inalienability rule framework concerns only transactional aspects of institutional entitlements, we conclude that part of the content of a right is a claim specifying the conditions of legitimate transfer. These claims must be respected in order for transfers governed by rights to be legitimate.

Putting these points together, our thesis is as follows: (1) All institutional rights are *necessarily* conceptual markers designating certain legitimate interests or liberties as warranting a privileged status. (2) The privileged status is to be spelled out as follows: Each legitimate interest, for example, that is marked as a right is *necessarily* associated with, and in fact entails, some legitimate claims.[12] In contrast, whether or not a legitimate interest that is not marked as a right generates enforceable claims is a contingent matter.[13] Rights, however, entail legitimate claims. (3) The

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11. To say that legal rights are "markers" is to treat them as place-holders. When interests or liberties are marked as rights, it is only as if an asterisk is placed by them. The right which secures them is as yet (analytically) content free. The content is to be given in terms of claims.

12. For a lucid discussion of what it means to have a legitimate claim, see J. FEINBERG, *supra* note 6, at 64–67.

13. Jones has an interest in a job, but no right to it. That is, he cannot prevent others from

specific content of these claims is a function of the rule—property, liability or inalienability—applied to them. Therefore, we say that property and liability rules specify the content of rights by generating specific legitimate claims from them. (4) The claims property and liability rules generate specify conditions of legitimate transfer. Thus, we refer to them, following Alvin Klevorick,[14] as constituting a "transaction structure." Though the claims given rise to by rights within the domain of transactions are a function of the transaction rules applied to them, (5) the choice of which rule or rules to apply depends on the foundational theory. That is, we cannot say whether a right's content should be given by a property or a liability rule or by some combination of the two until we know what general purpose we want institutional rights to serve. (6) Finally, besides providing the basis for determining the content of rights, the foundational theory specifies the appropriate institutions for enforcing the claims these rights create. In this way, the foundational theory fuels the complete theory of institutional rights. A commitment at the foundational level will suggest, though it will not strictly entail, certain views about the content and enforcement of rights. We should, therefore, expect that different foundational or normative theories will endorse different institutional arrangements, confer somewhat different institutional rights, and suggest different mechanisms for their enforcement.

C. *Rights and the Transaction Framework*

The goal of every theory of institutional rights is to specify a set of rights which will create claims which, when respected, will best promote the goals set forth by the foundational theory. We can understand the process of designing a system of institutional rights by imagining a temporal progression beginning with the endorsement of a foundational theory. For ease of exposition, let us assume that the purpose of a system of institutional rights is to maximize net welfare. In seeking to promote this goal, we might begin by designating a set of legitimate interests as rights, which at this level of analysis just means "conceptually marking" them. In choosing among the set of legitimate interests for demarcation, we would select those which, if protected, would maximize overall welfare. Of course, whether elevating these interests to the level of legal rights would in fact maximize net welfare depends on the specific content or meaning given to them; that is, the claims they give rise to, as well as the mechanisms by which those claims are to be vindicated or enforced.

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seeking the same job. But his interest in securing the job can be protected if he is given a claim against others that they not prevent him from pursuing it.

14. Klevorick, *The Economics of Crime*, in NOMOS XXVII: CRIMINAL JUSTICE 289, 301-04 (J. Pennock & J. Chapman eds. 1985).

The next order of business is to specify more completely the content of the rights, which means associating particular legitimate claims over various domains with them. Prior to specifying the content or meaning of a right, we know only that the entitled party has a legitimate claim or set of such claims, but we have no idea of the precise nature of the claims. Property, liability and inalienability rules enter at this juncture as devices for generating particular, fully specified, legitimate claims from rights or entitlements.

The general point is really rather straightforward. We begin by supposing that a community has chosen to design its legal institutions to maximize welfare. (Our choice to focus on welfare maximization is, in this context, based purely on expository considerations.) In order to maximize welfare, some interests, but not others, are accorded the status of rights. At this point in the analysis rights are just place-holders: each right has yet to be filled in, given specific content. The content of rights is then given in terms of claims. The claims entailed by rights range over several domains, including the domain of transfer or transaction.

The specific claims given rise to by rights are in turn derived from norms or rules governing the terms of legitimate transfer. Again, the idea is simple enough. Once a community settles on a set of legitimate holdings (or entitlements), it needs to specify the uses to which these holdings might be lawfully or otherwise legitimately put. Among the uses to which right-holders may wish to put their entitlements are those which involve or require transactions. Consequently, a community requires a set of norms that specify the conditions of lawful or legitimate transfer. These rules constitute a community's transaction framework. The transaction framework is a normative one specifying legitimacy conditions.

We can imagine a wide range of norms comprising a transaction framework, from those conferring liberties in setting the conditions of transfer to those imposing duties on the bearers of rights. Consider some examples. One possible rule would give right-holders complete autonomy to alienate their claims; another might prohibit alienation altogether. Still others would impose a duty to give up part or all of that to which one is lawfully entitled, either at one's discretion—as in the duty to be charitable—or at the command of the state—as in the obligation to pay taxes. The terms of transfer can vary widely and in many respects. Different communities, pursuing different social goals through their legal institutions, facing different socio-economic and other conditions, will employ and emphasize different rules from the general category of transaction norms. The point we are anxious to emphasize is that property, liability and inalienability rules are best thought of as constituting a subset of the set of norms governing the transfer of lawful holdings. They are transaction-norms. By

generating claims entailed by rights ownership, property, liability and inalienability rules (as well as combinations of them) specify the *content* of rights over the domain of transfer.

A useful way to think about the role played by property, liability and inalienability rules in our theory is to view them as mathematical functions whose domains are the set of institutional rights specified, and whose ranges are a subset of legitimate claims. Thus, these rules act like functions which take rights or entitlements as their *arguments* and generate particular legitimate claims as their values. These claims in turn specify the content of an entitlement *over a certain domain*: the domain of transfer. Property, liability and inalienability rules constitute a transaction structure specifying the range of legitimate claims individuals have with respect to the transfer of the objects of their entitlements, such as resources or property.

The particular claims associated with property, liability and inalienability rules are as follows:[15]

> (1) If the content of an entitlement is given by a property rule, then the entitled party has a legitimate claim to *ex ante* agreement as both *necessary* and *sufficient* to the justifiable transfer of that to which he is entitled.
>
> (2) If the content of an entitlement is given by a liability rule, then the entitled party has a legitimate claim to *ex post compensation*, as both *necessary* and *sufficient* to the justifiable transfer of that to which he is entitled.
>
> (3) If the content of entitlement is given by an inalienability rule, then the entitled party has a *non-relinquishable* or non-transferable legitimate claim to that to which he is entitled.

Two points need to be emphasized. First, whether legitimate transfer is governed by property or liability rules only, or by some combination of the two depends entirely upon the foundational theory *and* the facts of the world: that is, by a theory of what is desirable as constrained by what is feasible (and at what cost). There is absolutely nothing in the meaning of rights that entails or requires that the conditions of transfer be set by any one rule or other, or by any combination of them. This is important, for it means that someone's liberty to dispose of his property as he sees fit, far from being a logical implication of what it means to have a right, is a contestable normative assertion connecting a particular normative theory about the point of legal rights with a particular conception of the constitu-

15. The following characterization of the claims conferred by transaction rules follows closely their standard meaning since Calabresi-Melamed, with the important qualification that in our view transaction rules specify the content of particular rights.

tive elements of rights. The rule of liberty of transfer is thus a *normative, not an analytic*, one supportable, if at all, by substantive argument, not linguistic convention.[16]

Secondly, there is an important difference between conceiving of property and liability rules as partially specifying the terms of legitimate transfer and conceiving of them as entitlement-securing devices. In the latter view, entitlements "come" to the property-liability rule or transaction structure fully specified, their content somehow otherwise given. But how? Either the claims of rights-ownership follow analytically from the very concept of a right or they derive from normative rules. If we say that Jones has a right to his watch which we "protect" by a liability rule, what does the expression "right to his watch" mean? What is the right's content? That is, just what is it that the liability rule is protecting? What are the claims that liability rules enforce or vindicate? What does the claim that Jones has a right to his watch tell us about the scope of his entitlement, in particular, about the conditions under which he might transfer it to others, or the conditions under which the interests of others in the use of Jones' watch will be recognized? Marking a legitimate interest as a right does not, by itself, give content to the right. It does not specify in any detail the claims entailed by rights-ownership. Put another way, if liability and property rules *protect* rights by enforcing or vindicating the claims entailed by rights, as traditionally thought, then what rules give rise to the claims enforceable by them? Once one recognizes that the content of rights is not given *a priori*, then it is clear that the specific content of any right is a function of a set of norms. If liability and property rules are not among these norms, what are?

Giving the meaning to rights, at least over the domain of transfer, is the task of property, liability, and inalienability rules. That is all the transaction rules do. That is why it is unhelpful to think of them as tools or

16. Contemporary communitarians are quick to contrast the community conception of a legal order with a rights-based order. But in fact, the contrast is too quick, as this analysis of transaction rules reveals. One possible norm of transfer might be that no one can exchange or trade without *everyone's* consent. Thus, the content of particular legal rights can be given in communitarian terms. We might then understand communitarianism not as an alternative to rights-theory but as specifying a particular foundational view with implications for how the content of particular rights is to be given.

One trouble with the new communitarianism is that one never knows at what level of analysis communitarian ideals are supposed to enter. The problem is not insignificant. Consider that late in his life Frank Knight held the view that markets were desirable not because they are efficient (they may not be) but because free and equal persons recognizing the importance of social consensus to the community would desire above all else to restrict the occasions on which broad consensus was necessary for any form of social interaction. Consensus is hard to come by and fragile once reached. Nevertheless it is the ultimate foundation of social communities. That is why it is important to minimize the extent to which our institutional life relies upon it. If Knight is right, then communitarianism at the level of institutional design could lead to many non-communitarian institutions, like markets. For a general discussion of Knight's view, see J. Coleman, Libertarian and Rational Choice Contractarianism: Consensus and the Market, (unpublished manuscript) (on file with authors).

instruments for protecting entitlements. Thus, we insist upon a distinction between the rules by which claims are generated and the rules that create the institutions for enforcing those claims: a distinction all too often blurred in previous work on the property-liability rule distinction. Conflating this distinction between right and remedy is commonplace within the Realist tradition that so dominates American Jurisprudence. However commonplace the conflation, it is a mistake, and in conceiving of property and liability rules as we do, we mean to be taking issue with Legal Realist strands within the accepted interpretation of the Calabresi-Melamed framework.[17]

D. *Deepening the Property-Liability Rule Distinction*

So far we have a skeletal version of the property-liability-inalienability rule distinction, and an account of the role it is to play in the larger theory of institutional rights. We also have presented some reason for thinking ours is an appropriate way of thinking about the distinction. Having come this far, we now turn our attention to developing more fully the distinctions between property, liability, inalienability rules.

1. *Two Versions of the Liability Rule*

We can distinguish between two understandings of liability rules. In our view, if the content of someone's entitlement is specified by a liability rule *only*, then he is *not* at liberty to seek a voluntary exchange with others. In a plausible alternative view, if the content of someone's entitlement is given by a liability rule, he *is* at liberty to negotiate the transfer of

17. First, not every lawful claim is in fact enforceable by law, so that an entitlement cannot be analyzed entirely in terms of the forms of remedial relief available in the event of noncompliant behavior. Secondly, entitlements specify the conduct others must exhibit if they seek to conform to the relevant norms, not just the sanctions or liabilities they are likely to incur in the event their conduct fails to conform. Finally, it is unlikely, but possible, that the legitimate claims created by the transaction structure may be enforceable by an enlightened conscience or even by a constrained self-interest. More likely, it will be necessary to create formal institutions of enforcement. In doing so, distinguishing analytically between claims and the institutions that enforce them permits us to employ the claims as premises in arguments for the creation of appropriate institutions. By separating the enforcement mechanisms, like injunctions, from the claims being enforced, like those generated by property rules, we allow the maximal theoretical flexibility required to construct the system of institutions that most efficiently promotes the ends specified at the foundational level. For example, by treating as analytic the relationship between property rules and injunctions or that between liability rules and tort-like compensation schemes, (both of which are contingent and in need of substantive argument), the Realist interpretation of property and liability rules inadequately reflects the actual degree of flexibility available in creating institutions to enforce claims. At the same time, the Realist argument obscures the important point that the institutions created to enforce various claims always depend on the foundational theory and do not follow logically from the content of rights. We want to emphasize that the relationships between rights and their specific content on the one hand, and between their content and the institutions designed to protect them on the other, are all fundamentally contingent and normative. They are not logical or otherwise analytically derived.

his entitlement, but others are also free to circumvent negotiations and to impose transfers at their discretion.[18]

In the language of claims, rather than liberties, we distinguish between our understanding of property and liability rules and the alternative view as follows:

In our view:

(1) If the content of *B*'s entitlement is specified by a *property rule only*, then he has a legitimate claim against *A* that any transfer of his resources from *B* to *A* must proceed according to terms established by *ex ante* agreement. Agreement is necessary and sufficient for legitimate transfer.

(2) If the content of *B*'s entitlement is specified by a *liability rule only*, then *B* has a legitimate claim to compensation against *A* in the event *A* takes what *B* is entitled to. But *A* has a legitimate claim that *B* not prevent him from securing that to which *B* is entitled, provided *A* is prepared to render adequate compensation.[19]

(3) If the content of *B*'s entitlement is given by *both a property and a liability rule*, then *B* has two claims: one is to the liberty to seek a transfer through *ex ante* agreement with *A*; the other is to recompense in the event *A* imposes a transfer upon him.

In the alternative view:

(1') If the content of *B*'s entitlement is given by a *property rule only*, then *B* has a legitimate claim against *A* that any transfer of *B*'s resources to *A* must proceed according to terms established by *ex ante* agreement. Agreement is necessary and sufficient for legitimate transfer.

(2') If the content of *B*'s entitlement is specified by a *liability rule* only, then *B* has two claims: One is to the liberty to seek a transfer through *ex ante* agreement with *A*; the other is to recom-

18. In our view, then, property and liability rules differ in the liberties they afford *entitled* parties (as well as in other respects). If the content of an entitlement is specified by a liability rule only, then the entitled party is *not* free to seek a voluntary transfer on terms agreeable to him *ex ante*. Only under a property rule would he be. This distinguishes our view from the alternative according to which both property and liability rules afford the entitled party a liberty to secure *ex ante* agreement. In the alternative view, the difference between liability and property rules, therefore, is to be understood entirely in terms of the liberties each affords non-entitled parties. Under property rules the non-entitled party is not at liberty to impose a transfer on terms other than those agreeable to the entitled party, whereas under a liability rule, he is at liberty to impose transfers provided he compensates *ex post*.

19. This last point is important because it demonstrates that legitimate claims (and liberties) may exist even where a party has no prior entitlement. *A* may have no right to pollute, for example, but if *B*'s right that *A* not pollute is given content only by a liability rule, *A* is at liberty to pollute under certain conditions. Because he is at liberty to pollute, he has a claim against *B*, who ironically is the entitled party, that he (*B*) not interfere with his (*A*'s) forcing a transfer (of pollution for dollars) upon him.

pense in the event *A* foregoes negotiations and imposes a transfer upon him.

Both views characterize property rules in the same way: (1) and (1') are identical. What we refer to as a combination of property and liability rules—(3)—is equivalent in the alternative view to liability rules—(2'). The alternative framework provides no place for what *we* think of as liability rules. Is the difference important?

Yes, and there are reasons for preferring our account of liability rules. Any account that distinguishes among property and liability rules and the combination of the two provides more options of giving content to entitlements. This would not be a genuine virtue of our approach if occasions did not arise when we might want to avail ourselves of the additional options. But in fact, such occasions do arise. Suppose *B* has a right against *A*, the exact content of which is given by a liability rule only. This means that *A* can seek to secure what *B* is entitled to provided he pays damages. *A* might want to negotiate around his potential liability to *B*. One reason we might choose to give content to *B*'s entitlement with a liability rule is to rule out the possibility of *A* reducing or eliminating entirely his potential tort liability.[20]

2. *Two Ways of Combining Property and Liability Rules*

We think it important then to give a narrow characterization of the kinds of claims to which liability rules give rise, especially to avoid conflating them in any way with property rules. Part of the reason for doing so has to do with potential combinations of property and liability rules. Let's consider two ways of combining property with liability rules. One way of combining them has been characterized above:

> (3) If the content of *B*'s entitlement is given by both a property and a liability rule, then *B* has two claims: One is to the liberty to seek a transfer through *ex ante* agreement with *A*; the other is to compensation in the event negotiations fail, or if *A* foregoes them and imposes a transfer upon him.

In this view, it is sufficient to legitimate a transfer that *A* and *B* settle on the terms *ex ante*. It is *not* necessary, however. *A* may legitimately compel a transfer provided he renders compensation *ex post*. Such action does not constitute a violation of *B*'s right, the content of which is to be

20. We might choose a liability rule rather than a property rule if we thought that *B* was likely significantly to underestimate his damages. This is not intended to suggest that the liability rule is the only alternative. We might choose to set the terms of transfer by an inalienability rule and a liability rule. The inalienability rule forecloses alienation and a liability rule gives rise to claims for damages.

spelled out in terms of two claims: the claim to (i) freedom to negotiate *ex ante*, and (ii) compensation *ex post* should a transfer be forced upon him. In (3), *B* does not have a legitimate claim to *ex ante* negotiation as a *necessary* condition for legitimate transfer.

The point of specifying the content of an entitlement by this sort of arrangement is that in doing so we enable *B* to pursue a jointly favorable voluntary agreement, but we do not limit legitimate transfers to all and only those cases in which he succeeds. Obstacles to successful negotiations which, for example, were not known or did not exist at the onset of negotiations might emerge. And while we might not want to foreclose *B*'s seeking a transfer on terms acceptable to him, we might also not want to preclude transfer in the event satisfying those terms should prove infeasible, or if obstacles to negotiating should make voluntary transfer too costly or impractical. Moreover, compensation may be set too high, so that inefficiently few transactions will take place if voluntary transactions are forbidden. The key feature of this combination of liability with property rules is that once the non-entitled party (in this case *A*) has either negotiated *ex ante* to affect a transfer or forced a transfer and compensated the entitled party (in this case *B*) *ex post*, the entitled party's claims have been exhausted.

Compare this way of combining property and liability rules with the following alternative:

> (3') If the content of *B*'s entitlement is given by a combination of property and liability rules, then *B* has two legitimate claims: One is to *ex ante* agreement as *both necessary and sufficient* for legitimate transfer; the other is to recompense in the event *A* imposes a transfer on him after either negotiations fail or *A* foregoes them.

According to this way of combining property with liability rules, *A* is never at liberty to impose a transfer upon *B*. The only legitimate form of transfer is *ex ante* agreement. Should *A* fail to seek agreement with *B* and take what *B* is entitled to, *B* has a claim to repair against *A*. Even when *A* renders compensation to *B*, the forced transfer remains *illegitimate*, and *B* retains a claim against *A*. *B*'s claim to *ex ante* negotiation as a *necessary* condition for legitimate transfer has been *violated* rather than exhausted. *A*'s rendering compensation does not satisfy *B*'s claim against him. The liability rule aspect of this combination affords the non-entitled party no liberties in setting the terms of legitimate transfer.

We might characterize the difference between (3) and (3') as follows: If the content of an entitlement is specified by the property-liability rule scheme represented by (3), then both voluntary exchange and full compensation after forced transfer are sufficient to legitimate transfer. If,

however, the content of an entitlement is given by a combination of property and liability rules as represented by (3'), only voluntary exchange is a legitimate basis for transfer. Under (3') compensation does not legitimate transfer, but functions instead to secure more firmly the integrity of the property rule as stating both the necessary and sufficient conditions of legitimate transfer.

Integrating the discussion in this and the preceding section provides a fuller characterization of liability rules. If the content of an entitlement is given by a liability rule only, then it cannot be part of the meaning of the entitlement that its holder is free to set the terms of legitimate transfer. A liability rule may, however, be used in conjunction with a property rule. Sometimes when it is so conjoined, the liability rule is intended to enable non-entitled parties to effect legitimate transfers; on other occasions the point of the liability rule is to strengthen the integrity of the property rule as specifying the only terms under which transfer is legitimate.

One way to see how liability rules might strengthen the integrity of the property rule is to imagine that we wanted to establish *ex ante* agreement as both necessary and sufficient for legitimate transfer, and that in order to do so we specified the content of an entitlement by a property rule only. In that case, the non-entitled party would not be at liberty to set the terms of legitimate transfer. Suppose, however, that the non-entitled party acted beyond the range of his liberty and took what he had no right to. If we had not also conferred a liability rule on the entitled party, the "victim" would have no claim to repair against a non-entitled party. In the absence of a liability rule, *A*'s failing to abide by the terms of property-rule governed transfer, *B* would be left without a claim to compensatory relief, where such relief is either necessary or otherwise desirable. But then the presence of a liability rule cannot be understood to signify the legitimacy of forced transfer.

All this suggests that liability rules are employed sometimes to generate a claim to repair in the event the conduct of a non-entitled party is wrongful, that is, in the event it fails to respect the conditions of transfer under a property rule; whereas, on other occasions, liability rules are employed to generate a claim to repair as part of the conditions of legitimate transfer.

It is odd even to think of functions like (3') as combinations of property and liability rules. Combinations of rules are better thought of as specifying jointly or individually sufficient conditions of legitimate transfer, whereas the liability rule in (3') does not specify terms of legitimate transfer. Instead, the liability rule in (3') provides a layer of potential "enforcement" for entitlements whose conditions of transfer are otherwise fully specified by a property rule. It does so by creating a legitimate claim to repair in the event a non-entitled party fails to respect the terms of legiti-

mate transfer set forth under the property rule. Whether liability rules themselves are employed to set out a sufficient condition of legitimate transfer or to create claims to repair in the event the terms set out elsewhere, e.g., by a property rule, are disregarded will depend, in part, on the foundational theory.

II. Implications of the Theory

A. *Appreciating the Importance of the Difference Between (3) and (3')*

The distinction between (3) and (3') has implications for tort theory both with respect to explaining and justifying claims to repair, and to the debate over whether liability rules serve to justify "private takings," or to buttress property rules and thereby discourage and penalize "private takings."

1. *Compensation and Rights*

Following Joel Feinberg[21] and Judith Jarvis Thomson,[22] it has become commonplace in classical rights discourse to distinguish between two ways in which non-entitled parties might invade or act contrary to the rights of others. In one case, *A wrongfully* or unjustifiably invades *B*'s right; in the other, *A permissibly* invades *B*'s right. Consider two cases. In the first, *A* happens upon *B*'s cabin in the mountains and wantonly destroys it. In the second, *A*, caught in a blizzard, takes shelter in *B*'s cabin, burns the furniture to stay warm, and avails himself of whatever food is stored in the cupboards. We can suppose that in neither case does *A* seek to secure *B*'s permission to enter, use, or destroy his property. In the first case, *A*'s conduct is invasive and *impermissible*. In the second case, *A*'s conduct is invasive though *permissible*. Feinberg and Thomson agree that *B* is owed compensation in both cases. The problem is to locate the foundation or source of *B*'s claim to repair.

Suppose we begin by following Feinberg and Thomson in holding that in both cases *B* has a valid claim to repair. One possible explanation of *B*'s claim to repair is that *A*'s conduct in both cases is invasive of or contrary to *B*'s right. This is the Rights or Infringement Thesis, according to which compensation is justified if and only if it is to repair loss resulting from an invasion of a right.

There are at least two arguments to support the contention that the basis of a legitimate claim to repair is conduct infringing upon a right.

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21. Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 Phil. & Pub. Aff. 93, 102 (1978).

22. Thomson, *Rights and Compensation*, 14 Noûs 3 (1980).

According to the first, when *A* harms *B*'s right, there are two normative dimensions of the event: *A*'s conduct and *B*'s right. *A*'s conduct, as the above example illustrates, can be either wrongful or not. If *A*'s action is both wrongful and invasive, then we might be inclined to hold that *B*'s right to repair could be supported by either wrongfulness of *A*'s conduct, e.g., his recklessness in harming *B*, or by the fact that in harming *B*, he invaded a right of *B*. No help here in sorting out the source of *B*'s claim. Let's consider, then, the case in which *A* acts justifiably. If wrongfulness is a necessary condition of a legitimate claim to repair, then *B* ought not recover whenever *A* acts reasonably. In this case, we are assuming that *B* ought to recover. If *B* ought to recover, his claim cannot rest on the wrongfulness of *A*'s conduct, because in this case *A* acted reasonably. If *B* has a claim to repair it is because *A* invaded a right of his, even if, under the circumstances, his doing so was reasonable. Then, if compensation is *B*'s due whenever a right of his is invaded, the moral character of *A*'s conduct is not the source of the claim to repair. Instead the right to repair rests on a victim's suffering loss due to a right of his being injured. Therefore, compensation requires rights.

Alternatively, one could argue that the invasion of a right is necessary (and sufficient) for compensation to be warranted by deriving that claim from a particular conception of corrective justice. This argument proceeds by claiming first that the point of institutional or legal rights is to do justice. Because compensation falls within the domain of corrective justice, those legal institutions, like torts, concerned to make available compensatory relief, are best understood as pursuing the ideal of corrective justice. Precisely what does corrective justice require? One conception of corrective justice requires that all and only losses owing to the invasion or infringement of a right deserve to be repaired: that a wrongful or compensable loss is one occasioned by the infringement of a right. The gist of the argument is that only rights can create other rights. How, after all, could someone have a right in justice to recompense for harm done to him, if, in causing him harm, no right of his had been invaded, that is, if he had no right not to be harmed in the first place?

At best, the first argument for the Infringement Thesis establishes only that action contrary to a right is sufficient as the basis of a claim to recompense. To establish the general thesis or claim that rights-invasions are necessary and sufficient for compensation to be justified, one needs to argue that losses occasioned by wrongs that invade no rights ought not be compensated. Or, at least, that justice does not require that they be compensated. The argument from corrective justice we just sketched provides the missing premise. It holds that all and only wrongful losses deserve to be annulled, and that in order to be wrongful a loss must result from the

invasion of a right. Other losses, even those resulting from negligence or recklessness, are simply not compensable as a matter of corrective justice. It makes sense then to treat the two arguments for the Infringement Thesis sketched above as a complementary pair.

If it turned out that corrective justice required that losses other than those occasioned by action contrary to a right be annulled, the Infringement Thesis would fail. As it happens, one of us has argued for precisely such a conception of corrective justice.[23] In that view, a claim to repair exists for losses occasioned by the *wrongful harming of interests*, as well as for losses resulting from the invasion of rights. Not every interest, not even every legitimate interest, is a right. To harm is to invade an interest. So I can harm you without invading a right of yours. And if I harm you *wrongfully*, say through fraud, deceit or simple negligence, then my conduct, though it invades no right of yours (*ex hypothesi*), causes you a wrongful loss. Wrongful losses, so conceived, require rectification as a matter of justice.

One way of trying to save the Infringement Thesis from this objection is by arguing that your right to repair derives from my violating your right that I-not-harm-you-wrongfully. The argument is this: Whenever I harm you through my wrongful behavior, that is, my negligence or recklessness, I violate the general right of yours (and others) not-to-be-harmed-wrongfully. Thus, the right to repair rests on the invasion of another right: the right not to be harmed wrongfully.

But this is not a very persuasive way of reintroducing the concept of a right as essential to the claim to repair. The right grounding your claim to repair would be the right not to be *harmed wrongfully*. This "right" has no content independent of the category of "wrongful harmings." The right here does no work. What does the work is the concept of a wrongful harming. Moreover, the point of the Infringement Thesis is that it distinguishes between justified and unjustified invasions of rights. (Recall the example with which this section began in which the victim's claim to repair is assumed to be justified quite apart from the reasonableness of the injurer's conduct.) But if your right against me *is* the right that I not harm you *wrongfully*, then that is *not* a right that can be invaded justifiably.

The debate at this level is a *normative* one between two conceptions of corrective justice. Although we are confident that the broader conception of corrective justice, in which justified claims to repair do not require the invasion of preexisting entitlements, is the correct one, we may be wrong.

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23. Coleman, *Moral Theories of Torts: Their Scope and Limits* (pts. 1 & 2), 1 LAW & PHIL. 371 (1982), 2 LAW & PHIL. 5 (1983).

It may turn out that every legitimate claim to repair requires reference to a preexisting right. Even then, it would not follow that the legitimacy of the claim to repair depended on a right's having been *invaded*. To see this, simply return to the analysis of liability and property rules introduced above. This analysis, which emphasizes a distinction between two ways in which liability rules generate claims to repair, allows us to explain the legitimacy of someone's claim to repair without necessarily relying on the characterization of others' conduct as invasive of a right.

Assume that *B* is legally entitled to his property. This just means that *B*'s interest in his property is being marked or identified as special. But the precise nature of the claims attending *B*'s entitlement are fully determined only after some rule or combination of rules from the transaction structure have been applied to it. Whether *A*'s harming of *B*'s interest, for example, by taking what *B* has a right to, constitutes an *invasion* of *B*'s right depends on the exact nature of the claims afforded *B* by his entitlement, and that, in turn, depends on the transaction rule applied.

If we imagine that the content of *B*'s right includes the claim to voluntary agreement as a *necessary condition* for the legitimate transfer of his property *in all cases*, then *A*'s conduct, whether or not it is morally permissible, constitutes an invasion of *B*'s right. That is because the content of *B*'s entitlement is given by a combination of property and liability rules like (3') above. Under this combination, agreement *ex ante* is both necessary and sufficient for legitimate transfer; and in taking from *B*, *A* did not secure, indeed he might not even have sought, *B*'s consent. If the content of *B*'s entitlement is given by (3'), then in taking without first securing *B*'s consent, *A* acted without regard to *B*'s legitimate claims against him. He invaded *B*'s right whether or not, on balance, he would be justified in having done so. *B*'s claim to repair is justified because his right so defined was invaded. Moreover, *A*'s rendering compensation to *B* does *not* exhaust *B*'s claims regarding the terms of transfer. *B* maintains his claim against all such imposed transfers. The Infringement Thesis can now be seen to rely upon a particular analysis of what it means to have a right, namely what we have called the classical liberal account.

B's entitlement could, of course, generate quite different claims, such as those set out in (3) above. Under these circumstances, *B* may be free to seek *ex ante* agreement with *A*, and should they reach an accord, the ensuing transfer would be legitimate. Should negotiations fail, or should *A* choose to circumvent them from the outset, he is free to impose a transfer upon *B*. In doing so, *A*'s rendering *B* compensation is a condition of his doing so legitimately. If compensation is full and otherwise adequate, *B*'s claims against *A* are fully exhausted.

In this case, *B*'s claim to repair does not rest on his right having been

invaded. On the contrary, compensation for *A*'s taking is all that *B* is entitled to. A claim to repair that arises from a liability rule as in (3) does not rest on a right having been invaded, but is instead a condition of a right having been fully respected—of its claims having been fully exhausted.

In sum, legitimate claims to repair need not presuppose action contrary to a preexisting right, for two reasons. First, wrongful harming of an interest can give rise to a right to repair for subsequent damages even if the interest does not rise to the level of a right. Second, even in those cases in which compensation presupposes a right, it need not presuppose action *contrary* to the right; in some cases rendering recompense is all that is required to *respect* the right and to exhaust the claims it entails. This is another way of saying that if a person's entitlements in the domain of transfer happen to be specified by a combination of property and liability rules like (3), in which case *ex post* compensation specifies a condition of legitimate transfer, then recompense is what is required to respect a right; it is not someone's due in virtue of his right having been in some sense disrespected.[24]

Let's stay with this distinction between (3) and (3') for a moment. If, by connecting compensation with the invasion of a right, philosophers have taken inadequate notice of transaction rules like (3), rules that treat *ex post* compensation as satisfying the claims entailed by a right, economists have been guilty of precisely the opposite mistake: that is, of failing to appreciate the extent to which compensation *ex post* does not legitimate transfers. Economists, in other words, inadequately appreciate rules like (3'). Let's see where they go wrong.

B. *Compensation, Rights and Utility*

At one end of the tort-theoretic spectrum, recompense is conceived of as a device for respecting prior entitlements and for reinforcing the claims to which those rights give rise. This is the view of torts that certainly emerges within the libertarian and perhaps within other rights-based traditions. It is a view of torts suggested by the Infringement Thesis and exemplified by the role liability rules play in (3').

At the other end of the spectrum are theorists who view compensation

24. The debate does not end here (even if we wished it would). All that we can claim to have shown is that we can specify the content of a right in such a way that compensation exhausts the relevant claims. This means that one cannot defend the Infringement Thesis by appealing to the essential nature of rights and by arguing that the meaning of a right is such that it entails compensation for its *violation*. But this may just shift debate back to the foundational level. For the claim may then be that no rights should ever be for compensation only. If the point of having institutions is to do justice, then that cannot be done by giving content to rights in terms of claims to *ex post* relief and to no more.

rendered *ex post* as a kind of licensing fee one has to pay in order to take things to which others in fact are entitled. In this view, tortious actions are conceived of as *private* takings in which the role compensation plays between private parties is analogous to the role it plays under the takings clause of the Fifth Amendment to the U.S. Constitution. In that context, compensation is understood as legitimating transfers of private resources to public uses. Making one's victims whole is viewed as the price one pays to make justifiable or legitimate use of another's resources for one's private purposes.

While the rectificatory conception of liability rules emerges from the "justice" or "rights" traditions, the "takings" view of them falls out of the larger economic framework. To see this, suppose that the norms governing legitimate transfer were derived from the principle of efficiency. What turns out to be efficient depends of course on contingent features of the world. If the parties are rational and transaction costs are low, governing their relationships by property rules is jointly wealth maximizing. When transactions are costly, however, wealth maximization requires foregoing property for liability rules. Liability rules, then, define a realm of takings which may be rendered legitimate (because efficient) by *ex post* compensation. In a well-formulated, efficient tort law, injurers do not have a duty to refrain from harming others, but to compensate for the harm they cause. Compensation, in this view, is not redress for wrong done; indeed, it cannot be; liability rules exist to specify the terms of legitimate transfer when the costs of setting those terms in a market are too great. Instead, it is instrumental in ensuring the movement of resources to more highly valued uses, an end, given the overall goal of efficiency, that renders the "forced exchange" legitimate.

In contrast, if liability rules in torts function as they do in (3'), compensation serves not to legitimate forced transfer, but to redress wrongs done. Compensation for loss owing to a wrong is not equivalent to righting the wrong. It does not serve as a way of righting what would, in its absence, constitute a wrong. The difference between (3) and (3') is just the difference between the claim that conduct is conditionally wrong depending upon the payment of compensation, and the claim that some conduct is wrong, whether or not compensation is paid. Compensation is due in the latter case to *redress* losses resulting from failure to comply with the conditions of legitimate transfer, not to legitimate it. Compensation can legitimate transfer, as it does in (3), only if both the liability and the property rule specify *sufficient* conditions of legitimate transfer. Once the distinction between (3) and (3') is clarified, it is obvious that the key, but inadequately examined, issue in tort theory is whether liability rules ought to be thought of as they are in (3), as justifying forced transfer, or in (3'), as

denying the legitimacy of forced transfer. The difference between the takings or conditional liability view of torts and the rights view of torts is *just* the difference between the interpretation liability rules are given in (3) and (3') respectively—and that is all the difference in the world.

This discussion suggests two questions: one normative, the other positive. In an ideal world, what sort of tort system ought we have: one in which compensation legitimates forced transfers only (as in (3)) or one in which compensation is paid because all forced transfers are wrongful (as in (3')), or some combination of the two? The answer to this question ultimately depends on one's foundational view. The second question is positive. It asks whether the best explanation of current tort law is an economic or a justice one: one that emphasizes the legitimating (3), or the rectificatory (3') dimensions of tort liability. Both accounts of current tort law have been enthusiastically endorsed. Neither strikes us as completely compelling.[25]

When Lake Erie Corporation is required to pay the damages caused by its ship ramming into Vincent's dock, its liability payment can be interpreted plausibly as a condition of legitimating its use or taking of the dock.[26] Similarly, when the Perini Corporation is required to make good garage owner Spano's losses resulting from Perini's non-negligent blasting, it is plausible to interpret Perini's liability as constituting a condition of its legitimately blasting.[27] Non-negligent blasting is permissible provided compensation is paid, otherwise not. On the other hand, when drunken Jones recklessly rams his car into someone, it is not plausible to interpret his liability as necessary to legitimate the activity in which he is engaged (drunk driving), or as sufficient to justify or warrant the transfer of resources from that person to him. In such cases, it is simply ludicrous to interpret the liability rule as specifying terms of legitimate transfer. This becomes even more obvious once we note both that certain intentional torts warrant punitive damages or even criminal sanctions, which can only make sense if we deny that rendering compensation is always sufficient to legitimate transfer.[28]

The claim that liability rules invariably constitute forms of legitimate transfer is ludicrous, but that has not prevented intelligent people from

25. On the economic side of the debate, see Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); S. Shavell, An Analysis of Accident Law (unpublished manuscript) (on file with author). On the corrective justice side, see Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). Some of the most interesting work on corrective justice currently being done is by Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37 (1983).

26. Vincent v. Lake Erie Trans. Co., 109 Minn. 456, 124 N.W. 221 (1910).

27. Spano v. Perini Corp., 25 N.Y.2d 11, 250 N.E.2d 31, 302 N.Y.S.2d 527 (1969).

28. For a contrasting view, see Coleman, *supra* note 2.

embracing it explicitly or being otherwise committed to it. Of all economic analysts of torts, Richard Posner seems to be most obviously committed to precisely this position. (He is committed to this claim, we will show, by the internal logic of his argument, not by any explicit assertion.) In arguing in another context for the claim that adopting Pareto improving policies is *morally* justified, Posner claims that because a Pareto improvement makes at least one person better off and no one worse off, it secures the *consent* of each affected party. Thus, Pareto improvements are justified on *consensual* grounds, that is, they are justified because all the affected parties consent to them. It is this line of argument that creates the problem for Posner's tort theory. Let's see why.

If we suppose that Pareto improvements are consented to, then it must also follow that an individual gives his consent by accepting compensation *ex post.* That is because some Pareto improvements are made by imposing losses and then rendering compensation. And if all Pareto improvements are consented to by the relevant parties, the initially injured party must be presumed to give his consent by accepting compensation *ex post.* Under a liability rule, therefore, *full* compensation turns an illegitimate act, that is, a forced transfer, into a legitimate one, that is, an "*ex post* consensual exchange." In this view, the legitimating force of liability rules comes from the fact that in accepting full compensation injured parties give their consent. When conjoined with the presumption that injurers act voluntarily (consensually), the net result is a *consensualist* defense of liability rules. Liability rules set up "forced but consented to exchanges." Because the exchanges are consented to, they are legitimate. Liability rules, therefore, always specify terms of legitimate transfer.[29]

An argument like Posner's treats liability rules as *normatively* equivalent to property rules. In both cases consent turns out to be the necessary and sufficient condition of legitimate transfer. Under property rules consent is given *ex ante*; under liability rules it is given *ex post*—through the acceptance of compensation. The difference between them is temporal, i.e., when consent is given. And that is a function of relevant facts or conditions of the world, for example, the presence or absence of significant transaction costs. In the standard economic account, liability rules substitute for property rules when transaction costs are significant.

If Posner is right, one kind of economic response to our puzzle about *Spur*, namely how liability rules can protect rights if they turn control or autonomy over to others, is that on a deeper level, liability rules *return* autonomy or control to entitled parties by requiring their consent to

29. *See* R. POSNER, THE ECONOMICS OF JUSTICE 231–407 (3d ed. 1983).

"forced transfers": that consent being given by their acceptance of compensation *ex post*. Because Pareto improvements through liability rules are consented to (by definition), there is no real incompatibility between the economic and classical liberal conceptions of rights. A Posnerian account of liability rules simply eliminates the tension between liability rules and the classical liberal conception of rights, a tension that motivates our analysis in the first place. Posner pulls the rug from under us by arguing, in effect, that efficiency is just another way of talking about autonomy.

Fortunately for us, the Posnerian reduction of efficiency to autonomy rests on the deeply confused claim that accepting compensation entails giving one's consent.[30] If Posner were right, the only way in which a victim of another's wrongdoing could refuse to give his consent to being wronged would be to refuse compensation. If however he demands and receives compensation as his due because he has been wronged, then he consents to his being wronged. Surely this is a perverse enough consequence of the compensation-as-consent claim to dismiss it as implausible, if not incoherent.

Nonconsensual economists—those who argue for liability rules on straightforward efficiency grounds—do not face this objection. Of course, they face the problem of defending efficiency on normative grounds other than consent. Interestingly, like Posner, these economists treat liability and property rules on a normative par. Both are defensible because, used properly, both can be efficient. Liability rules can be efficient, but an efficient transfer can nevertheless be an illegitimate transfer, if, for example, it violates someone's rights. The problem is how can a transfer imposed under a liability rule be legitimate if it involves taking that to which another is entitled. The problem, once again, is to square the efficiency of liability rules with the concept of right. Liability rules can be efficient, but are they compatible with rights? Can they protect or secure rights?

One approach the economist could take would be to assert that efficiency, not compatibility with or respect for rights, is the criterion of legitimacy. Alternatively, he could stipulate a definition of efficiency such that action in violation of a right is necessarily inefficient. A more intriguing solution to what we take to be a genuine, serious problem would try to render efficiency and rights compatible by providing an efficiency theory or analysis of rights. The trick is to analyze a right to something as giving someone a guarantee of a stream of welfare or utility, and no more. Facts of the world will then dictate how this stream of welfare or utility is to be

30. *See* Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's* The Economics of Justice (Book Review), 34 STAN. L. REV. 1105, 1117–31 (1982) (reviewing R. POSNER, *supra* note 29).

realized. When transaction costs are low, the stream of utility is secured by exchange; when exchange is sufficiently costly, it may be secured by liability rules. In neither case does having a right entail any control or liberty, but in every case having a right guarantees a stream of utility.

Here, as in the compensation-as-consent view, property and liability rules are treated as normative equivalents: not because liability rules are really property rules with a temporally delayed consent element, but because both liability and property rules are ways, in differing circumstances, of giving right holders what they are entitled to, namely, a particular level of welfare or utility.

The Posnerian account of the relationship between liability, property rules, and rights analyzes rights in terms of a realm of autonomy or control and then argues that, contrary to what we might otherwise have thought, liability rules, in virtue of their compensatory element, specify a realm of autonomy. The traditional economic approach analyzes rights entirely in terms of individual utilities,[31] in which case property and liability rules are simply instruments; and the choice between them is entirely a function of pertinent facts of the world, such as transaction costs. In both accounts, liability rules legitimate forced transfers in spite of the fact that the transfer is a taking of what another is entitled to. Both accounts achieve this result by offering distinct conceptions of what it means to have a right. The Posnerian opts for the classical or autonomy theory of rights, and argues that by accepting compensation an individual fully exercises his autonomy over his holdings. In contrast, the traditional economist opts for a welfare or utility conception of rights, and argues that, provided the compensation is adequate, paying compensation fully exhausts one's claims within the scope of one's rights.

Both theories, in addition to justifying liability rules as legitimating transfers (rather than as compensating for wrongs), solve as well the conflict between liability rules and the classical liberal conception of rights. The Posnerian manages this feat by accepting the classical theory and reconstructing liability rules as instruments of autonomy. The traditional economist solves the riddle the easy way; he dumps the classical liberal theory of rights in favor of a more convenient, economic one.

The argument to this point is a bit misleading. We have argued at length that liability rules do not always serve a legitimating function. Yet we have just taken pains to show how on two different economic theories

31. It is important to distinguish between two claims: that rights are just guarantees of utility, and that the rights we have, whatever rights are, can be justified on utilitarian grounds. The first claim is an analytic one about the meaning of rights. The second is a normative one about their foundations. Someone can hold both, of course. But someone who asserts the normative claim need not be committed to the analytic one. We are here discussing the economic *analysis* of rights, not their economic foundation.

of them, liability rules seem invariably to legitimate. This last discussion, in particular, would appear to suggest that economic analysis is unable to contemplate liability rules other than as setting conditions of legitimate transfer. But economic analysis can in fact comprehend alternative uses of liability rules, though only at the expense of abandoning the economic analysis of rights. Because we have argued for a theory of rights in which rights are neither necessarily utilities nor liberties, this is a price well worth paying. The first task is to show that it is a price that must be paid.

We have taken some care in distinguishing between two forms of economic analysis comprehending two different economic theories of rights. In the traditional theory, acts, rules or institutions are justified if and only if they are efficient; while in consensualist theory they are justified if and only if they are (or would have been) consented to. In Posner's view, for example, the consent or autonomy theory is the deeper one, because only it provides an independent, non-question-begging reason for pursuing efficiency. Moreover, only it renders efficiency and the classical theory of rights compatible. Happily, the two forms of argument, efficiency and autonomy, converge on outcomes, or so he believes. Now let's see how these two conceptions of rights fit with the role of liability in torts.

Consider the case of the reckless driver, whose unjustifiably risky conduct injures a pedestrian. Under the classical liberal view, the victim's right not to be injured or harmed entails that others are not free to "injure" or "take" without securing his consent. In this analysis his right not to be harmed is intended to secure a realm of autonomous control over what happens to him. Under the compensation-as-consent thesis, if the reckless motorist fully compensates his victim, he secures the injured party's consent, and thereby rights what otherwise might have been a wrong. Compensation under a liability rule gives consent and thereby satisfies the autonomy condition imposed by rights ownership. The reckless driver did no wrong, and in the end, violated no one's rights, or, alternatively, the victim consented to the wrong.

This is the merger of classical liberalism and economic efficiency achieved by the compensation-as-consent trick. The merger, if it worked, would have one desirable property, but one fatal flaw as well. It's the same property in both cases. The problem is that the same argument that legitimates forced but efficient transfers legitimates forced but *inefficient* transfers as well. The elements of consent are present whenever the victim accepts compensation and the injurer acts voluntarily (which is distinguishable from whether he acted *rationally* or *efficiently*). Neither actor need to have acted efficiently. The consensual form of economic analysis is compatible with the liberal conception of rights as secured liberties, but it is overbroad; if the compensation-as-consent account justifies anything, it

justifies too much, at least from an efficiency point of view. Presumably, the economist wants to justify liability rules only if they are efficient; but they can be consented to (in the Posnerian sense) even when they are inefficient!

The traditional form of economic analysis can avoid the problem of having to hold that the "forced exchange" between the reckless driver and the pedestrian is legitimate, but not without cost. The traditional efficiency economist almost certainly will begin by noting that reckless conduct is, by definition, inefficient. Negligence is, following the Hand formula, inefficient: the costs of accident avoidance are less than the expected value of the harm. Recklessness is just gross negligence. Therefore, the reckless motorist who makes repair under the liability rules does not legitimate "his taking." So the economist wants to deny—with good reason—that such a transfer is legitimate, even if consented to. But can he? There's a problem in his doing so, and here it is.

In the standard form of economic analysis rights are defined in terms of guaranteed streams of utility or welfare. This is the move that makes it possible for liability rules to legitimate transfers in the first place. By compensating someone an amount equal to the level of utility secured by his right, a "taker" insures that his "victim's" right is fully respected; its claims against the taker fully exhausted. But look what happens when this analysis of rights is transposed to the reckless motorist context. If the "forced transfer" is not legitimate, it cannot be because in taking without the pedestrian's permission, the injurer violated the pedestrian's right. By rendering full compensation under the liability rule, he gave the pedestrian all that his right entitled him to—given the economic account of rights. If the transfer is illegitimate, it cannot be because it violates the pedestrian's right. So considerations of efficiency lead the economist to deny the legitimacy of the transfer, but his analysis of rights prevents him from doing so.

The culprit is the economic conception of rights and the corollary conception of liability rules either as legitimating transfer or as exhausting the claims of rights. One way of avoiding the conclusion that by compensating the pedestrian, the reckless motorist violates no right of his, is to deny that a pedestrian's right is to a level of welfare or utility only. The pedestrian's right against the motorist is not a right to compensation only. It is not a right in other words whose content can be given by a liability rule as in (3). Instead, the pedestrian's right must be specified by a liability rule such as in (3'). As between (3) and (3'), only in (3') does the payment of compensation fail to legitimate. The failure is because, according to (3'), only voluntary agreement legitimates transfer. So if the economist wants to deny that the reckless motorist's conduct is legiti-

mate—which he rightly wants to do—then he has to claim that by paying compensation, the motorist does not give the pedestrian what he is entitled to, does not respect his rights. What we need is a transaction rule like (3') in which compensation fails to legitimate, or alternatively and more naturally in this context, an inalienability-liability rule combination. This discussion leads to two important conclusions. First, the economist has to give up what we called the economic conception of rights in which rights are merely secured levels of welfare. For the reckless motorist example shows that the only way to deny the legitimacy of inefficient forced but fully compensated transfers is to claim that some rights are more than guarantees of utility alone. Secondly, and perhaps more importantly, sometimes the foundational goal of efficiency is best secured by having rights secure liberties rather than interests. Sometimes, autonomy preserving rules like (3') can be utility maximizing. A domain of rights as secured liberties may be required on utilitarian or efficiency grounds. So even if the goal of the law is to promote overall welfare or utility, it does not follow that the legal rights created for that end are themselves conceptionally no more than guarantees of welfare or utility. As a matter of logic or necessity, legal rights are neither protected domains of autonomy or levels of protected welfare. Their content is a contingent matter depending on the foundational theory. Moreover, as this discussion shows, even a broad utilitarian foundational theory will not, indeed cannot, always specify the content of rights in terms of utilities or interests only.

Standard economic analysis emphasizes the role of liability rules in legitimating transfer under conditions of high transaction costs. This emphasis leads the economist to think of legal rights in largely utilitarian terms, as protected levels of welfare, and to ignore at the same time the role of liability rules in redressing for wrong done. Focusing on illegitimate forced transfers, however, enables us to broaden the economist's understanding of legal rights, while allowing us to demonstrate once again our central claim, namely that it is a mistake to analyze rights as necessarily specifying either a realm of autonomy or a level of welfare. Rights are just conceptual markers. The extent to which rights turn out to secure a realm of control or to guarantee a level of welfare will depend on the foundational theory and the structure of human interaction. It will rest on normative argument, in the light of pertinent facts of the world, not on conceptual analysis.

More importantly, whether liability rules in particular contexts turn out to specify terms of legitimate transfer will depend on whether particular rights secure a realm of control or a level of utility. Consequently, it is a mistake to treat liability rules as if they always specified terms of legitimate transfer: no greater a mistake, however, than to treat them as if they

never did. The simple truth is that liability rules in torts play both roles. Distinguishing between them in a principled manner is *the* task of tort theory.[32]

III. The Transaction Structure and the Criminal Law

One purported advantage of the property-liability-inalienability rule framework is that it suggests a plausible explanation of the existence of the criminal law. In the Calabresi-Melamed view, the criminal law exists to discourage individuals from turning property rules into liability rules. Richard Posner advances roughly the same position. The criminal law exists to encourage market forms of transfer (property rules) when individuals might otherwise prefer to impose nonconsensual transfers.[33] In both the Calabresi-Melamed and Posner views, the basic idea is simple. Circumstances are likely to arise in which the costs to non-entitled parties of respecting property rules exceed the costs of imposed transfer. Absent adequate incentives, non-entitled parties will naturally opt for the less costly (to them) means of transfer. The criminal law provides the incentive necessary to induce respect for property rules. In this sense, it prevents non-entitled parties from converting property rules into liability rules.

In a recent, excellent article, Alvin Klevorick expands upon the Calabresi-Melamed-Posner explanation.[34] Klevorick argues that in addition to discouraging individuals from turning property into liability rules, the criminal law discourages individuals from turning both inalienability and liability rules into property rules. In short, Klevorick's view is that the criminal law attempts to induce compliance with the entirety of the transaction structure.

In our view, the transaction framework partially specifies the content of rights by setting forth conditions of legitimate transfer. The property-liability rule framework does not in general protect rights. One question we might ask then is whether the economic argument for a criminal category is affected by our understanding of the role of transaction rules in the analysis of entitlements. This is the question we want to raise and answer in this Part; but before we reach it, we want to consider whether the familiar economic explanation outlined above is persuasive.

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32. The conclusion of the argument in this Part is analogous to that in the previous one. We cannot claim to have demonstrated the inadequacy of economic analysis by showing that in our legal system liability rules do not always serve a legitimating function. What we have demonstrated, quite convincingly we hope, is that it is not analytically necessary that liability rules play a legitimating role and that to the extent to which they do not play such a role in our legal system, economic analysis cannot explain current tort law.

33. *See* R. Posner, *supra* note 2, at 201–22.

34. *See* Klevorick, *supra* note 14, at 289.

Before we evaluate the economic argument, a bit of clarification is in order. Despite having a system of injunctions and tort-like remedies to enforce certain claims, an enjoined party might refuse to comply with an injunction, or a party liable in torts might refuse to pay damages. A criminal law might then be necessary to enforce compliance. In this sense the criminal law is always in the background of the transaction structure, supporting it as a whole. The criminal law, or some institutional arrangement very much like it, is therefore necessary to enforce the primary means of institutional relief. Notice that this is by no means a purely economic argument for the criminal law. Nor is it a very robust one, for the essential crimes are easily enumerated: (1) failure to abide by an injunction; (2) failure to pay tort damages; (3) failure to pay damages awarded for breach of contract, etc. All "crimes" would be contingent upon other forms of remedial relief. And the criminal law would itself enforce no standards of behavior other than those imposing the duty to comply with injunctions, damage awards and the like.

Those who have attempted to explain the existence of a criminal category by reference to the transaction framework have invariably had something else in mind. In their view, the criminal law is necessary not just because a person who is enjoined may seek to ignore the injunction, but because individuals may seek to convert transaction rules of one sort into rules of another sort. The claim is that for every transaction they face, individuals will decide whether to seek *ex ante* agreement or to pay compensation *ex post* entirely on utility maximizing grounds. The transaction structure is intended to make this decision non-optional, but in the absence of a criminal law, rational individuals will consider themselves free to conduct transactions on terms dictated by expediency rather than on terms specified by the transaction structure. But this analysis of the necessity of the criminal law is inconsistent with the standard economic interpretation of the transaction structure.

In the Calabresi-Melamed view, property rules provide for injunctive relief. The post-Calabresi-Melamed literature also treats the availability of injunctive relief as *entailed* by property rules. That is why the prevailing wisdom is that a rational person would prefer to have his entitlements "protected" by property rules rather than by liability rules. At best, liability rules guarantee compensation set by a third party. A rational person should expect to do at least as well negotiating on his own behalf—especially if the property rights are well defined and if his entitlement is secured by injunction.

But, if injunctions are part of the meaning of property rules—as standard economic analysis assumes—then the criminal law cannot be necessary to induce compliance with property rules. A person who is enjoined

from taking is prevented from taking. Because he is prevented from taking, he is not in a position to treat the property rule as if it were a liability rule. If injunctions can be sufficient to prevent individuals from converting property rules to liability rules, the criminal law cannot be necessary.[35]

A better argument for the criminal category, consistent with the argument advanced by Calabresi-Melamed, Posner and Klevorick, relies on a distinction between known and unknown injurers. Not everyone who might invade *B*'s rights will be known to him. Against those individuals, an injunction affords *B* no relief. The reason is obvious; *B* doesn't know whose conduct to enjoin. In these cases, injunctive relief is not available. A taking contrary to the property rule will call for compensation only, and strangers who cannot be enjoined will thus be free to treat property rules as if they were liability rules. Here is a place for the criminal law, not as an enforcer of injunctions, but as a "kicker" which, when conjoined with potential damage awards, may suffice to induce compliance with property rules among *strangers*. The combined costs to a stranger of liability (discounted by the probability of its being imposed) and the criminal sanction (similarly discounted) can be designed to exceed whatever gain he anticipates by foregoing voluntary agreement in favor of forced exchange. Properly set, the combined costs may be sufficient to induce compliance with property rules. This is the right sort of economic argument for the criminal category because it explains the role that criminal law plays in inducing compliance with property rules when, in the absence of a criminal law, individuals (in this case, strangers) would, in fact, have reason to ignore them in favor of liability rules.

Unfortunately, this argument for the criminal law explains a good deal less than the traditional economic argument purports to. It applies only to strangers, because only against strangers are injunctions infeasible. The standard argument is more robust, but unsound.

We now want to consider whether the economic argument for the criminal law is more robust if, instead of treating property and liability rules as ways of protecting rights, we treat them, as we suggest they ought to be treated, as normative rules specifying the content of rights within the transactional domain. It is not.

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35. It is no response to this objection, moreover, to argue that the criminal law is necessary to enforce injunctions. It may well be. Indeed, we have conceded as much. Still, it is one thing to allege that a criminal law is necessary to enforce the institutions that enforce property and liability rules, i.e., injunctions and compensatory awards; it is quite another to say that the criminal law is necessary to prevent someone from converting property to liability rules. Injunctions may suffice to enforce the property-liability rule distinction. At best, the criminal law may be necessary to render injunctions and compensatory awards adequately effective. But here the criminal law plays no role peculiar to an economic analysis; rather it plays an enforcement role countenanced by every theory of law.

Transaction rules themselves *entail* no institutions of enforcement. They merely specify terms or conditions of transfer. Consequently, in the absence of enforcement mechanisms of any sort, non-entitled parties may be encouraged to disregard entirely the legitimacy of the claims of entitled parties, whether to *ex ante* agreement or to *ex post* compensation. Suppose *B* is entitled to be free of *A*'s pollution, and that we specify in part the content of that right by a property rule. *A* cannot pollute *B* other than on terms agreeable to *B*. If no enforcement mechanism of any sort is available to vindicate *B*'s claim, *A* may be encouraged simply to bypass it. It's not as if he will treat *B*'s claim differently, as a claim to repair under a liability rule, as if he had any intention of paying damages. Absent means of enforcement, non-entitled parties do not "turn" or convert one sort of rule into another, so much as they may be disposed to ignore the lot of them.

A criminal law which penalizes individuals for failing to respect property, liability and inalienability rules may be adequate to induce compliance with the conditions set forth in each, provided that both the absolute level of the penalty and the probability of its being administered quickly are sufficiently high. But this argument for a criminal law is *not* that in its absence non-entitled parties will substitute one sort of transaction rule for another. Instead, this argument for the criminal law is that in its absence non-entitled parties may be inclined to treat the entitlements of others as if they imposed no constraints on them at all.

However sound, this reinterpretation of the economic argument for the criminal law establishes only that the criminal law may be *sufficient* to induce compliance with the transaction structure, not that it is *necessary*. Nor does this argument suggest that the point of the criminal category is to prevent individuals from substituting transaction rules for one another.[36]

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36. Economic analyses do not speak with one mind when it comes to the criminal law. There are at least two ways of thinking about the criminal law that are, broadly speaking, economic. In the line of argument we have been discussing in this Part, the criminal law is represented as either parasitic upon other enforcement institutions or in the "background," "supporting the transaction structure as a whole." At the very least, the criminal law is of a different order of enforcement than is, say, torts. Whenever economists discuss the criminal law outside of the context of giving an economic explanation of the need for it, however, they treat the criminal law as if it were on a par with torts. In those contexts, the question often is whether to enforce public norms publicly (via the criminal law) or privately (through torts). The question is never whether a criminal statute is established in order to prevent conversion of a property rule to a liability rule. Instead, it is invariably of the following sort: given an enforcement budget, how much ought to be allocated to public enforcement, and how much to private? Putting the matter this way reveals a very different conception of the relationship between criminal and other branches of the law than that which emerges within the economic explanation of the criminal category.

We should note as well that both forms of economic analysis of the criminal law attend inadequately to the fact that the conditions which must be satisfied before the criminal sanction can legitimately be imposed are more demanding than those necessary for civil liability. The scope of potential excusing conditions and severe restrictions on the scope of strict liability in the criminal law—at least compared to the expansive scope of strict liability in torts—suggests a difference in the normative

IV. Interests, Liberties and Transaction Structure

Calabresi-Melamed do not address the question of whether the transaction structure is compatible with all possible analyses of rights. In contrast, our account of the property-liability rule distinction is motivated in part by a desire to respond to the tension between liability rules and the classical liberal conception of rights. The tension is expressed in the questions raised in the *Spur* case: how can liability rules protect entitlements if a liability rule provides non-entitled parties a liberty to impose transfers on terms set by third parties? How can forced transfer be made compatible with the liberal conception of rights?

We said earlier that a correct analysis of rights would require giving up both the classical liberal conception of rights as well as the economic conception of the proper role of property and liability rules. The time has come to see if we have made good on our promise. In the economic conception of them, property and liability rules protect rights. We have argued that they do not, that instead they specify the content of rights over the transactional domain. The classical liberal conception holds that rights necessarily specify a domain of autonomy or control. We have shown that the claims to which rights give rise depend on the transaction rules applied to them, and that the choice of transaction rule depends on the foundational theory. Sometimes one's rights require others to seek agreement as a condition of transfer; other times not. This is one consequence of the distinction, much emphasized here, between (3) and (3'). In either case, moreover, the choice between (3) and (3') depends on the purposes for which institutions are designed; and so whether rights provide autonomy or are designed purely to guarantee a level of welfare is a contingent feature of them, resolved not by appeal to *meanings* but by appeal to *justifications*. To the extent the classical liberal conception of rights is taken as providing an account of the meaning of the concept, it too fails.

Having made good on our basic claim, we want to close by exploring briefly some other connections between rights and liability rules. The alleged incompatibility of the economic framework and the liberal conception of rights presupposes not just that rights secure a domain of autonomy but that liability rules necessarily place non-entitled parties *at liberty*. In fact, there are at least two kinds of cases in which liability rules fail to confer a liberty to compel transfer. The first is by now very familiar. If the content of an entitlement is given by a combination of property and liability rules—in which case *ex ante* agreement is both *necessary* and *sufficient* for legitimate transfer, and a taking creates a claim to recom-

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dimensions of criminal and civil law inadequately comprehended by either of the ways in which economic analysis thinks about the relationship between criminal and civil law.

pense but does not legitimate (as in (3'))—the liability rule does not warrant forced transfer.

Secondly, suppose I have a right against you that you not do *X*, and that the content of my right over the domain of transfer is given by a liability rule only. If you do *X*, I have a claim against you to repair, no more. It does not follow that you are *at liberty* to do *X*, even if you compensate me—even if my claim against you has been exhausted—because doing *X* may be wrong on other grounds. And if it is wrong to do *X* (e.g., torture me), then you are not at liberty to do *X* even if I am no longer entitled or empowered to prevent you. It is not, therefore, part of the meaning of liability rules that they place non-entitled parties at liberty to compel transfer. Another way, therefore, in which the tension between liability rules and classical liberalism can be eased is simply to emphasize that liability rules do not always function as economic analysis suggests they do: as setting terms of forced transfer.

We have argued against both the economic conception of liability rules and the classical liberal theory of rights. Given our analysis of liability rules, it is possible, even within classical liberal theory, to convey a sense in which liability rules protect rights. That is, even if rights necessarily secure a domain of autonomy or control, liability rules could sometimes be construed as protecting them. Here's how. Once again, the key is (3'). Under (3'), property rules specify fully the conditions of legitimate transfer, so that the liability rule component plays no role in legitimating transfers imposed against a right holder's will. The liability rule simply provides the right holder with a claim to relief grounded on the injurer's conduct *violating* the conditions of transfer set out by the property rule: i.e., its invasion of the relevant right. The right to relief is grounded not just in the harming of an interest, but in the transfer occurring without the right holder's *ex ante* consent. Where property rules specify fully the content of a right over the transactional domain, as they must if rights mark liberties, and as they can even if rights mark interests, then a liability rule can serve to protect the relevant liberty or interest, not by specifying an alternative mode of *legitimate* transfer, but by increasing the costs to injurers of their invasive conduct. This is not to say that liability rules are sufficient to secure liberty of control and transfer, only that there is a limited sense even within the liberal-libertarian conception of entitlements in which liability rules protect rights.

Ultimately what sets apart the classical liberal and economic conceptions of rights and liability rules is the case in which liability rules are thought sufficient to justify a transfer, not the case in which liability is imposed because the injurer failed to respect a victim's rights. For it can never be any part of the classical liberal account that by compensating

someone for taking what is his without his consent, an injurer respects the victim's rights; whereas the core of economic analysis is the possibility that by compensating a victim, an injurer (at least sometimes) gives his victim all that he is entitled to, thereby legitimating the taking. And it is precisely this sort of role for liability rules that emerges within the economic account in which liability rules are introduced because transaction costs preclude voluntary movement of resources to higher-valued uses.

It is not surprising, then, that while we have shown that the transaction structure is not restricted to economic analysis, it was first developed and, to this point, fully appreciated only within the overall economic framework. Our hope is that by more accurately and fully analyzing the transaction structure especially its role within an overall theory of institutional entitlements, we have helped to widen its applications, while locating and strengthening its foundations.