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INTRODUCTION

For decades, the American legal academy has engaged in a lively debate over the foundations of tort law.[1] A schism between economic theorists and their critics has defined the fundamental arc of the dispute.[2]

Richard Posner, perhaps the most well-known proponent of the law-and-economics movement, conceives of tort law as an instrument for maximizing wealth.[3] According to this view, tort law's primary aim is to impose liability in ways that incentivize people to take cost-justified precautions that maximize societal wealth.[4] Viewing themselves as committed to a classic form of rationality, economic theorists recognize that they cannot do anything about sunk costs and, therefore, turn their attention toward incentivizing people to take cost-justified precautions on a forward-looking basis.[5] As Posner put it: "Rational people base their decisions on expectations of the future rather than on regrets about the past. They treat bygones as bygones."[6]

The most prominent critique of economic tort theory argues that tort law is all about achieving corrective justice by providing remedies in response to wrongs.[7] According to this view, tort law has a fundamentally

1. John Gardner, *What is Tort Law For? Part 1. The Place of Corrective Justice*, 30 L. & PHIL. 1, 2 (2011) [hereinafter Gardner, *What is Tort Law For? Part 1*].

2. John Gardner, *Tort Law and Its Theory*, *in* THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW 1 (John Tasioulas ed., 2020) [hereinafter Gardner, *Tort Law and Its Theory*].

3. Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 201 (1981) [hereinafter Posner, *The Concept*]; WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 1, 16 (1987) [hereinafter LANDES & POSNER, THE ECONOMIC STRUCTURE OF TORT LAW]; *see also* Donal Nolan & Andrew Robertson, *Rights and Private Law*, *in* RIGHTS AND PRIVATE LAW 23 (Donal Nolan & Andrew Robertson eds., 2012) [hereinafter Nolan & Robertson, *Rights and Private Law*]; Michael D. Green, *Apportionment, Victim Reliance, and Fraud: A Comment*, 48 ARIZ. L. REV. 1027, 1043–44 (2006);

4. LANDES & POSNER, THE ECONOMIC STRUCTURE OF TORT LAW, *supra* note 3, at 293; Gregory C. Keating, *Pressing Precaution Beyond the Point of Cost-Justification*, 56 VAND. L. REV. 653, 655 (2019) [hereinafter Keating, *Pressing Precaution*].

5. GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 27 (1970) [hereinafter CALABRESI, THE COST OF ACCIDENTS]; Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233, 1237–38, 1240–41 (1988) [hereinafter Coleman, *The Structure of Tort Law*]; Benjamin Zipursky, *Philosophy of Private Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 625 (Jules L. Coleman et al., 2004) [hereinafter Zipursky, *Philosophy of Private Law*]; Gregory C Keating, *Is the Role of Tort to Repair Wrongful Losses?*, *in* RIGHTS AND PRIVATE LAW 367 (Donal Nolan & Andrew Robertson eds., 2012) (citations omitted) [hereinafter Keating, *Repair Wrongful Losses?*].

6. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 7 (Aspen Publishers 2007) (1973) [hereinafter POSNER, ECONOMIC ANALYSIS OF LAW].

7. JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001) [hereinafter COLEMAN, THE PRACTICE OF PRINCIPLE]; ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (Oxford Univ. Press 2012) (1995) [hereinafter WEINRIB, THE IDEA OF PRIVATE LAW]; *see also* John C.P. Goldberg & Benjamin Zipursky, *Thoroughly Modern Tort Theory*, 134 HARV. L. REV. F. 184, 186 (2021) [hereinafter Goldberg & Zipursky, *Thoroughly Modern Tort Theory*].

backward-looking focus on remedying wrongs between parties who are situated bilaterally.[8] As explained by Jules Coleman, the notion that people should be responsible for repairing the wrongful losses they cause others to suffer is the "principle that holds together and makes sense of tort law."[9] For these reasons, defenders of this view reject economic theorists' forward-looking philosophy of tort liability as seeking to incentivize the taking of cost-justified precautionary behavior.[10]

Despite the strength of this critique, economic theorists have a response available to them. Although corrective justice describes the reparative aspect of tort law, it does not provide an account of the field's primary norms.[11] The violation of a primary right might require a remedy, but corrective justice does not tell us why and when it is important to recognize and protect such rights in the first place.[12] Although some theorists claim that it is not their department to tell us whether tort law's primary rights are sound,[13] they cannot remain agnostic on this topic.[14] Our obligation to not violate others' primary rights is analytically prior to our secondary obligation to provide a remedy when we wrong others.[15] The view that tort law's primary rights are justified by the principle of wealth maximization "may be asinine, the typical answer of one who knows the price of everything and the value of nothing. But, at least it is an answer. Whereas 'corrective justice,' as it stands, is no answer at all."[16]

Unfortunately, to date, this split remains unresolved because scholars on each side of this debate have devoted too much attention to refining their respective positions and too little time on setting the stage for resolving the dispute.[17] Several scholars—perhaps most notably Gregory Keating and the late John Gardner—have attempted to overcome this seemingly intractable schism by refocusing our attention on the primary

8. Goldberg & Zipursky, *Thoroughly Modern Tort Theory*, *supra* note 7, at 186; COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 7, at 15; Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 59 (2003) [hereinafter Weinrib, *Punishment and Disgorgement*]; Gregory C. Keating, *Corrective Justice: Sovereign or Subordinate?*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 44 (Andrew S. Gold et al. eds., 2020) [hereinafter Keating, *Sovereign or Subordinate?*].

9. COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 7, at 62.

10. Scott Hershovitz, *What Does Tort Law Do? What Can It Do?*, 47 VAL. U.L. REV. 99, 104 (2012) [hereinafter Hershovitz, *What Does Tort Law Do?*]; Gregory C. Keating, *The Priority of Respect Over Repair*, 18 LEGAL THEORY 293, 305 (2012) [hereinafter Keating, *The Priority of Respect over Repair*].

11. Keating, *Sovereign or Subordinate?*, *supra* note 8, at 52.

12. *Id.*

13. Gardner, *What is Tort Law For? Part 1*, *supra* note 1, at 3.

14. *See* Keating, *Repair Wrongful Losses?*, *supra* note 5, at 369.

15. Keating, *Repair Wrongful Losses?*, *supra* note 5, at 369; ROBERT STEVENS, TORTS AND RIGHTS 336 (2007) [hereinafter STEVENS, TORTS AND RIGHTS].

16. Gardner, *What is Tort Law For? Part 1*, *supra* note 1, at 17.

17. Keating, *Sovereign or Subordinate?*, *supra* note 8, at 37.

rights at the heart of tort law.[18]

Inspired by Keating and Gardner's work, my aim in this article is to explain how philosopher Alan Gewirth's principle of generic consistency can serve as the foundation of tort law's primary rights. Gewirth's theory articulates a rational standard governing the rights and duties we have with respect to one another.[19] According to the principle of generic consistency, humans are the sort of beings that constitute their agency by acting in pursuit of some goal, which requires them to have a minimum amount of freedom and well-being.[20] Further, humans are logically committed to claiming a right to at least a modicum of freedom and well-being because it would be contradictory to hold that we need certain goods to constitute our agency while also claiming that others may deny our having access to such goods.[21] Finally, insofar as we justify the rights we claim for ourselves by appeal to our most basic and generic needs, we must recognize—on pain of contradiction—that any other human agents needing the sort of goods we require also have a right to those same goods.[22] In other words, if I claim that the source or foundation of my rights are the needs I have as a rational human agent, I am logically committed to recognizing that any other being with those same needs also has a right to the sort of goods to which I claim a right.[23]

To be sure, Gewirth's principle of generic consistency is similar to Immanuel Kant's theory of morality and reason. Kant and Gewirth regard the supreme principle of practical reason as providing the cardinal standard for the obligations we owe to one another.[24] However, Kant conceives of an ideal form of pure reason that guides humans' practical reasoning without influence from "factors belonging to [our] nature as physically embodied beings."[25] In other words, the Kantian theory of pure practical reason abstracts away from the contingent needs and purposes of human agents.[26] The principle of generic consistency, on the other hand, is compatible with the requirements of the rational standard governing all human action being derived from the contingent desires or purposes motivating human agents to pursue whatever ends they set for

18. Gardner, *What is Tort Law For? Part 1*, *supra* note 1, at 1; Keating, *The Priority of Respect Over Repair*, *supra* note 10, at 295.

19. ALAN GEWIRTH, REASON AND MORALITY x (1978) [hereinafter GEWIRTH, REASON AND MORALITY].

20. *Id. supra* note 19, at 63–66.

21. *Id.* at 81.

22. *Id.* at 104–12.

23. *Id.*

24. DERYCK BEYLEVELD AND ROGER BROWNSWORD, HUMAN DIGNITY IN BIOETHICS AND BIOLAW 87 (2001) [hereinafter BEYLEVELD AND BROWNSWORD, BIOETHICS AND BIOLAW].

25. *Id.* at 105.

26. *Id.* at 100, 104–05.

themselves.[27]

Although much more can be said about the similarities and differences between Gewirth and Kant, my focus here is on the principle of generic consistency. As a rational foundation for all rights and duties we have with respect to one another, Gewirth's theory supplies a framework for articulating the obligations governing all human action.[28] Included among the human actions governed by the principle of generic consistency is the activity of lawmaking, which is the enterprise of guiding human conduct through the creation of legal rules.[29] In this way, Gewirth's theory can overcome the difficulty corrective justice theorists have in providing an account of tort law's foundations. Further, the principle of generic consistency can explain tort law's backward-looking concern with remedying wrongs in a way that economic theorists cannot.

Several European legal scholars have recognized the principle of generic consistency's promising implications.[30] For example, the "Sheffield School" refers a group of scholars who are perhaps the most sympathetic contemporary proponents of the principle of generic consistency.[31] Although the main protagonists of this group are no longer at the University of Sheffield, they have spawned growing number of scholars who have become interested in the principle of generic consistency's applications to various areas of law, including tort law and bioethics.[32]

Notwithstanding this group's influence, Gewirth's theory remains mostly unknown to American legal academics. One likely factor contributing to the lack of familiarity with Gewirth's work is the prominence of legal realism in America. Lawmaking, according to this view, is a state-imposed system of incentives and sanctions for resolving policy questions rather than an exercise of abstract reasoning about legal principles.[33] Despite the existence of high-profile alternatives to this pragmatic conception of law, its influence in the American legal academy

27. *Id.* at 104–05.

28. DERYCK BEYLEVELD & ROGER BROWNSWORD, LAW AS A MORAL JUDGMENT 120, 170, 180 (Sheffield Academic Press 1994) (1986) [hereinafter BEYLEVELD & BROWNSWORD, LAW AS A MORAL JUDGMENT]; Deryck Beyleveld, *The Principle of Generic Consistency as the Supreme Principle of Human Rights*, 13 HUM. RTS. REV. 1, 2 (2011) [hereinafter Beyleveld, *The Principle of Generic Consistency*].

29. BEYLEVELD & BROWNSWORD, LAW AS A MORAL JUDGMENT, *supra* note 28, at 120, 170, 180.

30. BEYLEVELD & BROWNSWORD, LAW AS A MORAL JUDGMENT, *supra* note 28, at 120.

31. Deryck Beyleveld, *Sheffield Natural Law School*, *in* ENCYCLOPEDIA OF THE PHILOSOPHY OF LAW AND SOCIAL PHILOSOPHY 1 (Mortimer Sellers & Stephan Kirste eds., 2020) [hereinafter Beyleveld, *Sheffield Natural Law School*]; Bev Clucas, *The Sheffield School and Discourse Theory: Divergences and Similarities in Legal Idealism/Anti-Positivism*, 19 RATIO JURIS. 230, 233 (2006) [Clucas, *The Sheffield School and Discourse Theory*].

32. Beyleveld, *Sheffield Natural Law School*, *supra* note 31, at 1.

33. John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1642 (2012) [hereinafter Goldberg, *Pragmatism and Private Law*] (citations omitted).

has arguably been pervasive enough to hinder the flourishing of a more reason-oriented understanding of law drawing on Gewirth's work.[34] Another possible reason for the lack of familiarity with the principle of generic consistency concerns the highly technical presentation of Gewirth's theory.[35] Gewirth claimed that his core argument can be understood by nearly everyone, but his work is perhaps most accessible to those with very specific philosophical interests.[36] Mischaracterizations of his view are other possible explanations for his theory not being more widely known.[37]

Regardless of the precise reason(s) for this unfortunate reality, Gewirth's work has promising implications for American tort theory. This article will not explore the principle of generic consistency's possible applications to tort law's doctrinal dimensions. For example, I do not illustrate how the principle of generic consistency can help us decide in any given case whether to apply strict liability or the fault standard, if a defendant breached their duty of care owed to a plaintiff, and more. Instead, my goals here are more preliminary and focused on the principle of generic consistency's ability to illuminate our understanding of tort law's conceptual roots.

This article proceeds in four parts. First, Section I provides a bird's eye view of the schism between economic theorists and their critics. Section II illustrates how the principle of generic consistency can serve as the foundation of law. I explain in Section III how the principle of generic consistency can help set the stage for moving past the debate in the American legal academy over the foundations of tort law by providing an account of the field's primary rights. Finally, Section IV considers a few alternatives to the principle of generic consistency.

I. A BRIEF OVERVIEW OF THE IMPASSE BURDENING MODERN TORT THEORY

In many ways, tort theory is very old.[38] Some contemporary tort scholars hold views like those expounded by Aristotle nearly 2,500 years ago.[39] In the *Nicomachean Ethics*, Aristotle described corrective justice

34. *See* Goldberg, *Pragmatism and Private Law*, *supra* note 34, at 1645–51.

35. Alan White, *If You Can Understand This Essay, Then You Have Moral Rights and Duties*, 3 OPEN PHIL. 161, 161 (2021) [hereinafter White, *If You Can Understand This Essay*].

36. *Id.*

37. *Id.* at 167–69.

38. David G. Owen, *Why Philosophy Matters to Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 2 (David G. Owen ed., 1995) [hereinafter Owen, *Why Philosophy Matters to Tort Law*]; Christina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1326–27 (2017) [hereinafter Tilley, *Tort Law Inside Out*].

39. Owen, *Why Philosophy Matters to Tort Law*, *supra* note 38, at 1.

as being concerned with resolving wrongful transactions through the addition and subtraction of resources.[40] In the centuries since he wrote the *Nicomachean Ethics*, Aristotle's skeletal conception of corrective justice has undergone important developments by various scholars.[41]

In other ways, though, tort theory is relatively young compared to contract, property, and other foundational areas of common law.[42] America's version of tort law is widely understood to have emerged in the second half of the nineteenth century.[43] By that time, industrial accidents had become inevitable by-products of people's professional and personal lives.[44] As a result, traditional tort doctrines came under intense strain.[45] Before the industrial revolution, traditional tort claims for battery, slander, malpractice, and more typically arose in response to situations where "A [harms] B" by violating some conventional standard of conduct.[46] Fault was perhaps the most important element of tort liability in the pre-industrial era.[47] In rough terms, the fault principle required plaintiffs to demonstrate that the defendant was both negligent (i.e., having failed to observe a standard of conduct) and the cause of their injury.[48] Holmes believed that the fault principle was well suited for the world in which harm typically arises out of "isolated" and "ungeneralized wrongs"; Keating helpfully refers to this world as the "world of acts."[49] According to Holmes, the world of acts was typified by the sort of isolated

40. ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 87–89 (Roger Crisp ed. & trans., Cambridge Univ. Press 2000).

41. Owen, *Why Philosophy Matters to Tort Law*, *supra* note 38, at 1.

42. G. Edward White, *The Emergence and Doctrinal Development of Tort Law*, 1870-1930, 11 U. ST. THOMAS L.J. 463, 469–75 (2014) [hereinafter White, *The Emergence*]; John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 517 (2003) [hereinafter Goldberg, *Twentieth-Century Tort Theory*].

43. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 467 (2d ed. 1985) (1973).

44. G.E. White, *Tort Reform in the Twentieth Century: An Historical Perspective*, 32 VILL. L. REV. 1265, 1269 (1987) [hereinafter White, *Tort Reform in the Twentieth Century*]. The increased prevalence of industrial accidents occurred most notably in the workplace, and employees had mostly become responsible for shouldering the burden of such accidents. *Id.*; White, *The Emergence*, *supra* note 42, at 463.

45. White, *Tort Reform in the Twentieth Century*, *supra* note 44, at 1269–70.

46. Goldberg, *Twentieth-Century Tort Theory*, *supra* note 42, at 517–19.

47. Nathan Issacs, *Fault and Liability: Two Views of Legal Development*, 31 HARV. L. REV. 954, 974 (1918); G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 19 (1980) [hereinafter WHITE, TORT LAW IN AMERICA].

48. *See* White, *Tort Reform in the Twentieth Century*, *supra* note 44, at 1270; White, *The Emergence*, *supra* note 42, at 463–64. Additionally, plaintiffs generally bore the burden of demonstrating that they were neither negligent themselves nor had they assumed the risk of being injured by the defendant. White, *Tort Reform in the Twentieth Century*, *supra* note 44, at 1270–71; White, *The Emergence*, *supra* note 42, at 463–64.

49. Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997) [hereinafter Keating, *The Idea of Fairness*] (citations omitted); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897) [hereinafter Holmes, Jr., *The Path of the Law*].

harms that commonly occurred prior to the industrial revolution.[50] For example, the dogfight in *Brown v. Kendall*[51] "arose out of a chance encounter between unrelated parties neither of whose activities were large enough to make such misfortunes commonplace and expected."[52] The fault principle served the world of acts well because it struck a fair balance between the liberty of prospective tortfeasors and potential victims' security.[53]

As the industrial revolution continued throughout the late nineteenth and early twentieth centuries, tort cases increasingly concerned instances of generalizable activities where defendants did not violate any standard of conduct recognized by law.[54] Insofar as such activities were the result of organized and predictable activities (e.g., railroad transportation or the increasing presence of heavy machinery in workplaces), they were distinguishable from Holmes's conception of the world of ungeneralized acts.[55] The world of activities presented judges with questions concerning the "social desirability or undesirability of particular forms of conduct."[56] The fault principle's focus on negligence and causation seemed ill-equipped to address this changing landscape. [57] As a result, plaintiffs' ability to receive compensation for injuries resulting from generalized and non-negligent activities was severely impaired.[58] Additionally, defendants were not being held accountable for the harm resulting from their actions.[59]

In response to this trend, several movements developed.[60] For example, workers compensation schemes arose as a means of ensuring that employees received compensation for the apparently inevitable, but costly, result of accidents occurring in the modern workplace.[61] The first

50. Keating, *The Idea of Fairness*, *supra* note 49, at 1331 (citations omitted); Holmes, Jr., *The Path of the Law*, *supra* note 49, at 467.

51. Keating, *The Idea of Fairness*, *supra* note 49, at 1331 (citing 1560 Mass. (6 Cush.) 292 (1850)).

52. Gregory C. Keating, *The Heroic Enterprise of the Asbestos Cases*, 38 SW. U.L. REV. 623, 629 (2008) [hereinafter Keating, *The Heroic Enterprise of the Asbestos Cases*].

53. *Id.* at 630–32 (citations omitted).

54. Goldberg, *Twentieth-Century Tort Theory*, *supra* note 42, at 525–26.

55. Keating, *The Heroic Enterprise of the Asbestos Cases*, *supra* note 52, at 630–32 (citations omitted).

56. Goldberg, *Twentieth-Century Tort Theory*, *supra* note 42, at 524; Holmes, Jr., *The Path of the Law*, *supra* note 49, at 467.

57. White, *Tort Reform in the Twentieth Century*, *supra* note 44, at 1271–74; White, *The Emergence*, *supra* note 42, at 464; Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 266–73 (1987) [hereinafter Nolan & Ursin, *The Revitalization*].

58. White, *Tort Reform in the Twentieth Century*, *supra* note 44, at 1271.

59. *Id.*

60. *Id.* at 1271–74; White, *The Emergence*, *supra* note 42, at 464; Nolan & Ursin, *The Revitalization*, *supra* note 57, at 266–73.

61. White, *Tort Reform in the Twentieth Century*, *supra* note 44, at 1268–77; George L. Priest,

half of the twentieth century also saw rising interest in expanding strict liability—which had historically been reserved for ultrahazardous activities—to serve as a more widely accepted alternative to fault as the standard for tort liability.[62] Around the same time, the principle of comparative negligence became increasingly prevalent and appeared poised to reform the tort system.[63] Whereas strict liability and workers compensation systems proposed abandoning the fault standard, comparative negligence aimed to quantify and compare degrees of negligence according to mathematical principles.[64]

These and other developments kicked off a debate over tort law's fundamental aims and norms.[65] It appeared that tort law had developed haphazardly in response to social and economic realities and, as a result, the field could not be tethered to any deep logic or coherence.[66] Consequently, tort scholars and practitioners began to wonder whether the field's doctrines could be organized around an overarching set of doctrinal principles.[67]

In the middle of the 20th century, as this debate continued to unfold, economic theorists surveyed the motley collection of tort doctrines and claimed that they could provide a comprehensive explanation of the field.[68]

A. Economic Analysis

In 1967, Guido Calabresi introduced the term "cheapest cost avoider" to articulate a distinctive conception of tort law.[69] Economic analysis, according to Calabresi, provided the best tool for reducing risk and fairly allocating the cost of accidents.[70] Calabresi proposed replacing "the core

The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law, 14 J. LEGAL STUD. 461, 466–70 (1985) [hereinafter Priest, *The Invention*].

62. White, *Tort Reform in the Twentieth Century*, *supra* note 44, at 1277–84; Nolan & Ursin, *The Revitalization*, *supra* note 57, at 258; Priest, *The Invention*, *supra* note 61, at 470–75.

63. White, *Tort Reform in the Twentieth Century*, *supra* note 44, at 1284.

64. *Id.*

65. WHITE, TORT LAW IN AMERICA, *supra* note 57, at 147.

66. John Fabian Witt, *Contingency, Immanence, and Inevitability in the Law of Accidents*, 1 J. TORT L. 1, 16–34 (2007).

67. Richard A. Posner & William M. Landes, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 853–56 (1980) [hereinafter Posner & Landes, *The Positive Economic Theory of Tort Law*].

68. LANDES & POSNER, THE ECONOMIC STRUCTURE OF TORT LAW, *supra* note 3, at 1; Richard Posner, *The Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Catherine M. Sharkey, *Modern Torts: Preventing Harms, Not Recognizing Wrongs*, 134 HARV. L. REV. 1423, 1424 (2021); Gardner, *Tort Law and Its Theory*, *supra* note 2, at 1.

69. *See* Guido Calabresi, *Changes for Automobile Claims? Views and Overviews*, 1967 U. ILL. L.F. 600, 608; CALABRESI, THE COST OF ACCIDENTS, *supra* note 5, at 135; Keith N. Hylton, *Calabresi and the Intellectual History of Law and Economics*, 64 MD. L. REV. 85, 86 (2005).

70. *See* Goldberg & Zipursky, *Thoroughly Modern Tort Theory*, *supra* note 7, at 185. He was

of tort doctrine with simpler, more direct liability rules that, on a statistical basis, would . . . load[] liability on the most appropriate actors (the cheapest cost avoiders)."[71] His ultimate aim was to use an economic analysis to replace the fault system in traditional tort jurisprudence with a "mixed system" relying heavily on strict liability.[72]

A decade later, William M. Landes and Richard A. Posner argued that tort law's aim was to assign liability in a manner that maximized the wealth available to society.[73] Posner and Landes agreed with Calabresi's claim that tort law is best viewed through an economic lens. However, whereas Calabresi's project was normative, claiming that the law of torts should impose liability on the cheapest cost avoider, Posner and Landes undertook a descriptive project to explain tort law.[74] They viewed tort law as maximizing societal wealth by incentivizing people to take cost-justified precautions on a forward-looking basis.[75]

Despite the differences between distinct economic theories, they share the view that tort law is fundamentally oriented toward "minimizing the combined costs of preventing and paying for accidents."[76] Viewing themselves as committed to a classic form of rationality, economic theorists recognize that they cannot do anything about sunk costs resulting from past liability schemes that failed to achieve their goals.[77] As Posner put it:

> [C]ost to an economist is a forward-looking concept. "Sunk" (incurred) costs do not affect a rational actor's decisions. . . . Rational people base their decisions on expectations of the future rather than on regrets about the past. They treat bygones as bygones.[78]

For these reasons, economic theorists turn their attention toward

careful to note, though, that he does not necessarily agree with everything an economist would have to say. *See* CALABRESI, THE COST OF ACCIDENTS, *supra* note 5, at 72. Although economic analysis provides helpful strategies for addressing certain problems in tort law, Calabresi thought other quandaries—such as those posed by identity or morality—are not most appropriately resolved with the help of an economic analysis. *Id.* at 18–20.

71. *See* Hylton, *supra* note 69, at 89 (citing CALABRESI, THE COST OF ACCIDENTS, *supra* note 5, at 312).

72. *Id.* at 89 (citing CALABRESI, THE COST OF ACCIDENTS, *supra* note 5, at 311–18).

73. *See* LANDES & POSNER, THE ECONOMIC STRUCTURE OF TORT LAW, *supra* note 3, at 1 16; Zipursky, *Philosophy of Private Law*, *supra* note 5, at 625.

74. *See* Posner & Landes, *The Positive Economic Theory of Tort Law*, *supra* note 67, at 857; Gardner, *Tort Law and Its Theory*, supra note 2, at 3; Tilley, *Tort Law Inside Out*, *supra* note 38, at 1329.

75. *See* LANDES & POSNER, THE ECONOMIC STRUCTURE OF TORT LAW, *supra* note 3, at 28, 293; Hershovitz, *What Does Tort Law Do?*, *supra* note 10, at 100; Keating, *Repair Wrongful Losses?*, *supra* note 5, at 367; Keating, *Pressing Precaution*, *supra* note 4, at 655.

76. Keating, *Sovereign or Subordinate?*, *supra* note 8, at 40.

77. POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 6, at 7; Keating, *Repair Wrongful Losses?*, *supra* note 5, at 367 (citations omitted).

78. POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 6, at 7.

minimizing expected costs in the future.[79]

Granted, economic theorists acknowledge that there is a backward-looking aspect to tort law.[80] They claim that redress needs to be provided to actual victims (as opposed to exacting a fee from injurers to fund various sorts of public works).[81] This acknowledgement is based on the thought that redress is needed because if plaintiffs do not receive compensation, they might take precautions (e.g., overinvesting in their own safety) that are not cost-justified.[82] Here, economic theorists are appealing to a form of rule-utilitarianism.[83] For rule-utilitarians, a law has utility when its net benefit outweighs the harm resulting from intruding on the rights of any individual or group.[84] This analysis takes into account the "widespread social insecurity and anxiety that would result if" the violation of certain rights were generally permitted.[85] Endorsing this line of reasoning allows economic theorists to claim that their conception of tort law is able to accommodate the field's bilateral structure.

Notwithstanding these backward-looking concerns, economic theorists claim that tort law's remedial features do not tell a story about what constitutes a wrong in the first place.[86] The economic view of tort law defines wrongful conduct as behavior that fails to conform with principles that "bring[] about an efficient (in the sense of wealth-maximizing) allocation of resources by correcting externalities in the market's allocation of resources."[87] It only makes sense to hold a party liable for their past wrongs if doing so will avert future harm.[88] So, economic theorists acknowledge that tort law has a remedial function of providing redress for past wrongs.[89] Nevertheless, they claim that tort law's remedial function is subordinate to its foundational principle of promoting an efficient allocation of resources by incentivizing people to

79. Keating, *Repair Wrongful Losses?*, *supra* note 5, at 367 (citations omitted). According to the economic view of tort law, the obligations people have toward one another matter only to the degree such obligations serve as wealth-maximizing instruments. *See* Keating, *Sovereign or Subordinate?*, *supra* note 8, at 43.

80. POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 6, at 192.

81. *Id.*

82. *Id.*

83. Gardner, *Tort Law and its Theory*, *supra* note 2, at 14–15.

84. Richard W. Wright, *Right, Justice, and Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 160–61 (David G. Owen eds., 1995) [Wright, *Right, Justice, and Tort Law*].

85. *Id.* at 161.

86. Posner, *The Concept*, *supra* note 3, at 201.

87. *Id.*

88. Keating, *The Priority of Respect Over Repair*, *supra* note 10, at 295.

89. Keating, *Sovereign or Subordinate?*, *supra* note 8, at 39–40; Hershovitz, *What Does Tort Law Do?*, *supra* note 10, at 100 (citing LANDES & POSNER, THE ECONOMIC STRUCTURE OF TORT LAW, *supra* note 3, at 28); Keating, *Repair Wrongful Losses?*, *supra* note 5, at 367.

observe cost-justified precautions on a forward-looking basis.[90]

It is not hard to see why an economic theory of tort law became, and has remained, so dominant.[91] Economics provides a powerful analytic framework for understanding the field.[92] In the middle of the twentieth century, it was unclear whether various tort doctrines could be organized around a coherent aim.[93] Economic theorists answered that question in the affirmative by claiming that tort law is fundamentally about wealth maximization.[94]

B. Non-Economic Analysis

Of course, economics is not the only discipline that can be leveraged to provide a unified understanding of tort law's aims.[95] Arguably, corrective justice is the most influential non-economic theory of tort law.[96] The theory's leading proponents conceive of tort law as being centrally concerned with the duty of repair generated by the violation of primary rights[97] prohibiting certain forms of conduct (e.g., assault, battery, and more).[98] Although there are several distinct flavors of corrective justice, it will be helpful to fix ideas by focusing on the version developed by Jules Coleman, who is one of the theory's most prominent defenders.[99]

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90. Keating, *Sovereign or Subordinate?*, *supra* note 8, at 39–40; Hershovitz, *What Does Tort Law Do?*, *supra* note 10, at 100 (citing LANDES & POSNER, THE ECONOMIC STRUCTURE OF TORT LAW, *supra* note 3, at 28); Keating, *Repair Wrongful Losses?*, *supra* note 5, at 367. Economic theorists are not the only scholars who view corrective justice as playing a subordinate role in tort law. Richard Epstein, for example, views a natural right to liberty as the primary norm upon which tort law rests, and corrective justice is implicated when that norm is violated. *See* RICHARD A. EPSTEIN, A THEORY OF STRICT LIABILITY: TOWARD A REFORMULATION OF TORT LAW (1980). Similarly, George Fletcher claims that corrective justice is subordinate to a Rawlsian conception of tort as a fair distribution of risk. *See* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

91. Sharkey, *supra* note 68, at 1424.

92. Zipursky, *Philosophy of Private Law*, *supra* note 5, at 626; Peter C. Carstensen, *Explaining Tort Law: The Economic Theory of Landes and Posner*, 86 MICH. L. REV. 1161, 1162 (1988).

93. Green, *supra* note 3, at 1043–44.

94. LANDES & POSNER, THE ECONOMIC STRUCTURE OF TORT LAW, *supra* note 3, at 1, 16.

95. Carstensen, *supra* note 92, at 1162.

96. Goldberg & Zipursky, *Thoroughly Modern Tort Theory*, *supra* note 7, at 185–86.

97. COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 7, at 22; Jules Coleman, *The Practice of Corrective Justice*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 56–57 (David G. Owen ed., 1995) [hereinafter Coleman, *The Practice of Corrective Justice*]; WEINRIB, THE IDEA OF PRIVATE LAW, *supra* note 7, at 140–42, 197–98; John CP Goldberg & Benjamin Zipursky, *Rights and Responsibility in the Law of Torts*, *in* RIGHTS AND PRIVATE LAW 257 (Donal Nolan & Andrew Robertson eds., 2012) [hereinafter Goldberg & Zipursky, *Rights and Responsibility in the Law of Torts*]; Zipursky, *Philosophy of Private Law*, *supra* note 5, at 627.

98. Gardner, *What is Tort Law For? Part 1*, *supra* note 1, at 33; STEVENS, TORTS AND RIGHTS, *supra* note 15, at 336.

99. Keating, *Repair Wrongful Losses?*, *supra* note 5, at 375; Keating, *The Priority of Respect Over Repair*, *supra* note 10, at 301.

Coleman rejects the conclusion that tort law's remedial function plays merely an instrumental role in maximizing wealth.[100] He complains that economic theory's forward-looking preoccupation with maximizing wealth fails to account for the field's backward-looking concern with remedying wrongs.[101] Simply because a party is the "cheapest cost-avoider with respect to a class of future losses" does not justify imposing liability if that party is not responsible for violating plaintiffs' primary rights.[102] For these reasons, Coleman and like-minded theorists do not view the principle that wrongful losses should be repaired as subordinate to the aim of wealth maximization.[103] Rather, the "principle that holds together and makes sense of . . . tort law" is a concern with seeing that those responsible for unjustifiably harming another are responsible for repairing wrongful losses.[104] In this way, corrective justice has a dual relationship to tort law: it grounds the practice of holding wrongdoers accountable while also giving "content to" and making the principle of corrective justice "explicit" in tort law.[105] Hence, according to proponents of this view, economic theorists cannot account for tort law's fundamentally backward-looking and bilateral focus on remedying the violation of primary rights.[106]

Economically inclined scholars can respond by claiming that their conception of tort law can accommodate these criticisms. As indicated earlier, economic theories of tort law require that a wronged plaintiff receive some form of redress.[107] The rationale for doing so is that failing to provide redress would incentivize victims to overinvest in safety precautions that are not cost-justified.[108]

But this response is descriptively and normatively deficient. The

100. Keating, *Sovereign or Subordinate?*, *supra* note 8, at 43.

101. Coleman, *The Structure of Tort Law*, *supra* note 5, at 1244; Keating, *Sovereign or Subordinate?*, *supra* note 8, at 43–45; John Oberdiek, *Introduction: Philosophical Foundations of the Law of Torts*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 2 (John Oberdiek ed., 2014) [hereinafter Oberdiek, *Introduction*]; Goldberg & Zipursky, *Rights and Responsibility in the Law of Torts*, *supra* note 97, at 257; Gardner, *What is Tort Law For? Part 1*, *supra* note 1, at 2.

102. Keating, *The Priority of Respect Over Repair*, *supra* note 10, at 303 (emphasis omitted).

103. Coleman, *The Practice of Corrective Justice*, *supra* note 97, at 62; Keating, *Sovereign or Subordinate?*, *supra* note 8, at 43.

104. Coleman, *The Practice of Corrective Justice*, *supra* note 97, at 62; *see also* COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 7, at 43–45, 58, 62; Keating, *Sovereign or Subordinate?*, *supra* note 8, at 43–44.

105. COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 7, at 58, 62.

106. *Id.* at 15; Coleman, *The Structure of Tort Law*, *supra* note 5, at 1244; Keating, *Sovereign or Subordinate?*, *supra* note 8, at 43, 44–45; Oberdiek, *Introduction*, *supra* note 101, at 2; Goldberg & Zipursky, *Thoroughly Modern Tort Theory*, *supra* note 7, at 186; Goldberg & Zipursky, *Rights and Responsibility in the Law of Torts*, *supra* note 97, at 257; Gardner, *What is Tort Law For? Part 1*, *supra* note 1, at 2.

107. POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 6, § 6.10, at 192.

108. *Id.*

structure of tort law is concerned with ensuring that the party responsible for the wrong provides redress to a victim.[109] According to economically inclined scholars, the individual or entity responsible for a plaintiff's injury might also be best positioned to maximize wealth for society and, therefore, be the appropriate bearer of liability.[110] In this way, the economic justification for holding the actual injurer liable is contingent on their also being the cheapest cost-avoider.[111] This contingent link between injurer and victim does not appear to be an accurate description of tort law, which has an interest in holding injurers liable. In addition to these descriptive limitations, the economic theory is normatively deficient.[112] An economic analysis of tort law does not take seriously the violation of individuals' rights.[113] According to economic theorists, protecting people's rights is incidental to wealth maximization.[114] If holding a defendant responsible for a wrong will not incentivize future deterrence, the economic perspective does not view liability as appropriate despite the fact that a plaintiff's right has been violated.[115] Contra economic theorists, corrective justice claims that the reason we hold a defendant liable for harming a plaintiff is because doing so is fair; it is not because doing so realizes the social objective of incentivizing behavior that maximizes cost-justified precautions.[116] Economic theorists' justification for holding injurers liable for their victims' injuries fails to account for an important normative relationship between the parties.[117] Many of these concerns have been discussed elsewhere and need not be restated here.[118] For our purposes, we merely need to note that a rule-utilitarian justification of tort law provides only "contingent or derivative" protection for individuals' fundamental rights.[119]

109. Coleman, *The Structure of Tort Law*, *supra* note 5, at 1244.

110. Keating, *The Priority of Respect Over Repair*, *supra* note 10, at 305.

111. *Id*. Further, it is not clear on this view why the plaintiff is the only person entitled to sue; any member of the community with an interest in setting liability standards to optimize cost-justified precautions could have the requisite standing to sue. *See also* Hershovitz, *What Does Tort Law Do?*, *supra* note 10.

112. Keating, *The Priority of Respect Over Repair*, *supra* note 10, at 330.

113. *Id.*

114. *Id.*

115. *Id.* at 295.

116. *Id.* at 303; Keating, *Sovereign or Subordinate?*, *supra* note 8, at 44 (citations omitted).

117. COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 7, at 66–67.

118. *Id.* at 12–24; WEINRIB, THE IDEA OF PRIVATE LAW, *supra* note 7, at 46–48; Wright, *Right, Justice, and Tort Law*, *supra* note 84, at 161–62. John Rawls claimed that utilitarianism should be rejected as a theory of justice because it allows a few to be sacrificed in the name of a "larger sum of advantages enjoyed by many." JOHN RAWLS, A THEORY OF Justice 3 (1971).

119. Wright, *Right, Justice, and Tort Law*, *supra* note 84, at 161.

C. The Impasse

As Keating, Gardner, and others have noted, although it seems correct that analyzing tort law in economic terms fails to explain the bilateral nature of the field,[120] defenders of corrective justice have not provided an adequate account of tort law's primary rights.[121] Coleman goes so far as to suggest that tort law's primary rights are irreducibly idiosyncratic.[122] Here is Coleman:

> I reject the suggestion that an adequate account of tort practices requires that there be a general theory of first-order duties from which we can derive them all systematically. Indeed, I am dubious about the prospects for such a theory. On my view, much of the content of the first-order duties that are protected in tort law is created and formed piecemeal in the course of our manifold social and economic interactions. . . . But while I thus have my doubts about the prospects for a general comprehensive theory of enforceable private duties, I certainly haven't proved that such an account could not succeed.[123]

Without an account of why we should correct the violation of a primary right, corrective justice lacks a justification for the principles upon which tort law is founded.[124]

Economically inclined scholars claim that their theory of wealth maximization provides a complete account of tort law's aims.[125] Economic theorists recognize that corrective justice is a necessary aspect of tort law because, without it, people will not be incentivized to observe the rules that the field stipulates.[126] But absent a standard explaining what counts as wrongful conduct, corrective justice is incomplete.[127] So, although corrective justice is a necessary aspect of tort law, economic theorists claim that corrective justice is a subordinate feature of the field in need of validation rather than a justification for tort law.[128]

However, as indicated above, wealth maximization fails to explain the duty of repair owed by a particular defendant to a specific plaintiff.[129] So,

120. Keating, *The Priority of Respect Over Repair*, *supra* note 10, at 302.

121. COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 7, at 34–35; Keating, *Sovereign or Subordinate?*, *supra* note 8, at 48–49.

122. COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 7, at 34–35.

123. *Id.*

124. Posner, *The Concept*, *supra* note 3, at 201; Gardner, *What is Tort Law For? Part 1*, *supra* note 1, at 14.

125. Posner, *The Concept*, *supra* note 3, at 206; Gardner, *What is Tort Law For? Part 1*, *supra* note 1, at 16.

126. Posner, *The Concept*, *supra* note 3, at 201.

127. *Id.*

128. Keating, *The Priority of Respect Over Repair*, *supra* note 10, at 301.

129. Keating, *Repair Wrongful Losses?*, *supra* note 5, at 379; Gardner, *What is Tort Law For? Part 1*, *supra* note 1, at 17.

economic theorists have not supplied an adequate account of tort law's backward-looking and bilateral focus.[130] At the same time, although tort law necessarily includes a remedial component, corrective justice does not provide a justification for the primary norms underpinning the field.[131]

Unfortunately, scholars on each side of this debate have devoted too much attention to refining their critique of their opponents while spending too little time setting the stage for resolving the dispute.[132] Thus, as Keating proposes, "[p]hilosophically inclined theorists of tort need to turn their attention toward the field's primary norms, and the reasons and values that either succeed or fail in justifying them."[133]

II. THE PRINCIPLE OF GENERIC CONSISTENCY AND THE FOUNDATIONS OF LAW

We can follow Keating's advice by developing a justification of tort law's primary norms with the help of Gewirth's work. The argument for Gewirth's principle of generic consistency leverages two important concepts, the first of which is the notion of a prospective purposive agent.[134] The basic idea animating this concept is that all humans, simply because they are human, are the sort of beings that constitute their agency by acting for the purpose of achieving some goal or goals they set for themselves.[135] To more clearly see how and why humans are beings of this sort, let's imagine I have a friend named Ollie. As a rational human agent, Ollie is unlike a leaf blown by the wind.[136] That is, he is the sort of being that has desires and beliefs about the world around him.[137] These mental faculties make it impossible for him to avoid self-consciously reflecting on, and making decisions about, his perceptions of people and things in his environment.[138] For example, suppose he wants to plan a trip

130. Coleman, *The Structure of Tort Law*, *supra* note 5, at 1244.

131. The overemphasis of corrective justice on the remedial aspects of tort law "puts the cart before the horse: primary tort obligations not to inflict wrongful harm are antecedent to and grounding of tort law's remedial responsibilities of repair." Keating, *Repair Wrongful Losses?*, *supra* note 5, at 369.

132. Keating, *Sovereign or Subordinate?*, *supra* note 8, at 37.

133. *Id.*

134. GEWIRTH, REASON AND MORALITY, *supra* note 19, at 135, 140–41; DERYCK BEYLEVELD, THE DIALECTICAL NECESSITY OF MORALITY: AN ANALYSIS AND DEFENSE OF ALAN GEWIRTH'S ARGUMENT TO THE PRINCIPLE OF GENERIC CONSISTENCY xxxvi, 1 (1991) [hereinafter BEYLEVELD, THE DIALECTICAL NECESSITY OF MORALITY].

135. White, *If You Can Understand This Essay*, *supra* note 35, at 162.

136. Wayne A. Davis, *The Causal Theory of Action*, *in* THE COMPANION TO THE PHILOSOPHY OF ACTION 32–35 (Timothy O'Connor & Constantine Sandis eds., 2010) [hereinafter Davis, *The Causal Theory of Action*].

137. *Id.* at 34–35; CHRISTINE M. KORSGAARD, SELF-CONSTITUTION: AGENCY, IDENTITY, AND INTEGRITY 105 (2009) [hereinafter KORSGAARD, SELF-CONSTITUTION].

138. Davis, *The Causal Theory of Action*, *supra* note 136, at 32–35; KORSGAARD, SELF-CONSTITUTION, *supra* note 137, at 1–2.

to Boston. Ollie can choose to not act on his desire to visit Boston, or he can purchase tickets and pack his bags. But, so long as Ollie is in control of his own faculties, he is inescapably faced with decisions about how to act.[139]

The second important concept is the dialectically necessary argument Gewirth uses to make the case for the principle of generic consistency. The method of dialectical necessity "begins from assumptions, opinions, statements, or claims made by protagonists or interlocutors and then proceeds to examine what these logically imply."[140] To see this method in action, let's suppose that the reason Ollie wants to visit Boston is because it is his favorite city. Based on that claim, he is also committed to either denying that Philadelphia is his favorite city or revising his earlier claim concerning Boston.[141] Similarly, Gewirth's argument for the principle of generic consistency begins with a premise accepted by someone like Ollie and proceeds to examine what else Ollie must accept upon pain of contradiction.[142]

These concepts position us to consider the argument for the principle of generic consistency, which proceeds in three stages.[143] According to the first stage, because Ollie is a prospective purposive agent, he has to act in pursuit of a goal he sets for himself.[144] Further, whatever goal Ollie sets for himself, he needs at least a modicum of freedom and well-being.[145] If the goal Ollie sets for himself is visiting Boston, he wouldn't be able to act in pursuit of his goal if I were to knock him unconscious and lock him in a trunk.[146] Although Ollie needs a variety of goods—such as transportation, financial resources, and more—to act in pursuit of this particular goal of visiting Boston, his most fundamental needs are the requisite amount of freedom and well-being.[147] Indeed, a minimum amount of freedom and well-being are the most basic or generic goods all rational agents need to achieve their goals, whatever those ends might

139. KORSGAARD, SELF-CONSTITUTION, *supra* note 137, at 1–2.

140. GEWIRTH, REASON AND MORALITY, *supra* note 19, at 43.

141. *See* White, *If You Can Understand This Essay*, *supra* note 35, at 167.

142. *Id.*

143. Thom Brooks & Diana Sankey, *Beyond Reason: The Legal Importance of Emotions*, *in* ETHICAL RATIONALISM AND THE LAW 132–33 (Patrick Capps & Shaun D Pattinson eds., 2017) [hereinafter Brooks & Sankey, *Beyond Reason*].

144. *See* Ari Kohen, *The Possibility of Secular Human Rights: Alan Gewirth and the Principle of Generic Consistency*, 7 HUM. RTS. REV. 49, 56 (2005) [hereinafter Kohen, *The Possibility of Secular Human Rights*]; BEYLEVELD, THE DIALECTICAL NECESSITY OF MORALITY, *supra* note 134, at 21; Beyleveld, *The Principle of Generic Consistency*, *supra* note 28, at 3–4.

145. *See* Kohen, *The Possibility of Secular Human Rights*, *supra* note 144, at 56–57; BEYLEVELD, THE DIALECTICAL NECESSITY OF MORALITY, *supra* note 134, at 21–24.

146. *See* White, *If You Can Understand This Essay*, *supra* note 35, at 163.

147. *See* GEWIRTH, REASON AND MORALITY, *supra* note 19, at 60–63.

be.[148] For example, an aspiring Olympian needs specialized training facilities not required by an agent whose goal is to become an accountant.[149] Nevertheless, whatever contingent goals rational human agents might have, they all require a sufficient amount of freedom and well-being.[150]

If Ollie accepts the arguments in stage one, the second stage commits him to affirming that he has a right to freedom and well-being, which he needs to act in pursuit of any goals he sets for himself.[151] Of course, Ollie's trip to Boston might be merely a contingent good that is not essential to his continuing to be a prospective purposive agent.[152] However, whatever goods are essential to Ollie's being an agent of a particular kind, he must recognize that he needs a modicum of freedom and well-being.[153] Based on this recognition, Ollie is dialectically committed to also accepting that he has rights to a sufficient level of freedom and well-being.[154] After all, Ollie would contradict himself if he were to "accept both that he must have freedom and well-being and that other persons may interfere with his having these."[155]

Pursuant to the third stage, Ollie is dialectically committed to acknowledging that all prospective purposive agents have a right to freedom and well-being.[156] This is so because Ollie recognizes that his being a certain sort of rational human agent justifies his claiming a right to these generic goods.[157] To the extent Ollie regards his possession of certain characteristics that make him the sort of agent condemned to act in pursuit of some goal(s) he sets for himself, he must accept that all other agents possessing those characteristics have the same rights he does.[158] Hence, all rational human agents contradict themselves if they claim rights for themselves and fail to respect those same claim-rights asserted

148. *Id.*

149. *Id.* at 61.

150. Donald H. Regan, *Gewirth on Necessary Goods: What Is the Agent Committed to Valuing?*, *in* GEWIRTH: CRITICAL ESSAYS ON ACTION, RATIONALITY, AND COMMUNITY 46 (Michael Boylan ed., 1999).

151. *See* Brooks & Sankey, *Beyond Reason*, *supra* note 143, at 133; Beyleveld, *The Principle of Generic Consistency*, *supra* note 28, at 3, 5; Kohen, *The Possibility of Secular Human Rights*, *supra* note 144, at 57; BEYLEVELD, THE DIALECTICAL NECESSITY OF MORALITY, *supra* note 134, at 24–42.

152. *See* White, *If You Can Understand This Essay*, *supra* note 35, at 163.

153. *Id.* at 163–65.

154. *See* GEWIRTH, REASON AND MORALITY, *supra* note 19, at 63, 66; Kohen, *The Possibility of Secular Human Rights*, *supra* note 144, at 57.

155. GEWIRTH, REASON AND MORALITY, *supra* note 19, at 81.

156. *See* Brooks & Sankey, *Beyond Reason*, *supra* note 143, at 133; Beyleveld, *The Principle of Generic Consistency*, *supra* note 28, at 3, 5–6.

157. GEWIRTH, REASON AND MORALITY, *supra* note 19, at 109–11.

158. *See id.* at 112; BEYLEVELD, THE DIALECTICAL NECESSITY OF MORALITY, *supra* note 134, at 44; White, *If You Can Understand This Essay*, *supra* note 35, at 163–67.

by others who possess relevantly similar characteristics, which serve as the foundation of their own rights.[159]

To briefly summarize, the principle of generic consistency provides the rational standard guiding all practical reasoning.[160] This guidance commits rational human agents to recognizing, on pain of contradiction, that we need—and have a right to—the minimum amount of freedom and well-being required to constitute our agency by acting in pursuit of some goal we set for ourselves.[161] Further, we contradict ourselves if we deny that because the needs we have as rational human agents provide the justificatory foundation of the rights we claim for ourselves, any other agents with the same needs have rights to the same goods.[162] In this way, the principle of generic consistency provides the rational standard governing the rights we, as rational human agents, claim for ourselves and the duties we have with respect to one another.[163] In other words, Gewirth's theory supplies a framework for articulating the obligations governing all human action.[164]

Now that we have a high-level outline for the principle of generic consistency on the table, we can examine what it means for law. If the principle of generic consistency is the rational standard governing all human action, we can think of our legal obligations that result from the human activity of lawmaking as a subset or branch of the actions subject to the principle of generic consistency's governance.[165] To better see how our legal obligations could be a branch of a broader range of actions subject to the principle of generic consistency, let's consider a few examples.

Suppose I promised my friend Ollie that I would attend his party.[166] In such a scenario, I have an obligation of the promissory sort, and my obligation arises in the context of my friendship with Ollie.[167] Now, imagine that my mother becomes ill, and I have to miss Ollie's party to take her to the hospital.[168] I might explain and justify my absence to Ollie by appealing to my family obligation to care for my sick mother.[169] Like

159. GEWIRTH, REASON AND MORALITY, *supra* note 19, at 135.

160. BEYLEVELD AND BROWNSWORD, BIOETHICS AND BIOLAW, *supra* note 24, at 3.

161. GEWIRTH, REASON AND MORALITY, *supra* note 19, at 63–66.

162. *Id.* at 135.

163. BEYLEVELD & BROWNSWORD, LAW AS A MORAL JUDGMENT, *supra* note 28, at 120, 170, 180.

164. *Id.*; Beyleveld, *The Principle of Generic Consistency*, *supra* note 28, at 2.

165. Beyleveld, *The Principle of Generic Consistency*, *supra* note 28, at 2; Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1198 (2015) [hereinafter Hershovitz, *The End of Jurisprudence*].

166. *See* Hershovitz, *The End of Jurisprudence*, *supra* note 165, at 1187.

167. *Id.*

168. *Id.*

169. *Id.*

my obligation to attend Ollie's party, I owe my mother an obligation, albeit one that arises in the context of a family relationship.[170] Scott Hershovitz suggests that this example illustrates how we can have obligations that arise in the context of, and are indexed to, different sorts of relationships or contexts (e.g., work, family, friendship, and more).[171] He claims that we can say the same sort of thing about our legal obligations, which are just obligations arising in contexts where our conduct is subject to legal regulation.[172]

If law is a specific sort of context in which we give and receive reasons for action, the principle of generic consistency is helpful for understanding the nature and validity of our legal obligations. In this way, the principle of generic consistency has promising implications for the debate between economic tort theorists and their critics. Insofar as the principle of generic consistency is the supreme principle governing all law, it can serve as the foundation for tort law's primary rights and assist in shaking loose the grip that the schism between economic theorists and their critics has on our understanding of tort theory.

III. THE PRINCIPLE OF GENERIC CONSISTENCY AND TORT LAW

The principle of generic consistency can justify tort law's bilateral and backward-looking structure in a way that forward-looking economic theories of the field cannot.[173] Tort law aims to recognize and protect people's fundamental rights.[174] These rights are not merely ways to incentivize people to take cost-justified precautions to maximize the wealth available to society.[175] A rights-based conception of tort law recognizes that the field's primary task is to articulate and protect the fundamental rights people have with respect to one another.[176] The principle of generic consistency provides an account of the primary rights serving as the foundation of tort law.[177] Redress is required when such rights are violated. Importantly, what is required is not simply "repair in the air" against nobody in particular or against the cheapest cost

170. *Id.*

171. *Id.*

172. *Id.* at 1187–92.

173. Keating, *The Priority of Respect Over Repair*, *supra* note 10, at 329; Keating, *Sovereign or Subordinate?*, *supra* note 8, at 44; Goldberg & Zipursky, *Rights and Responsibility in the Law of Torts*, supra note 97, at 257; Gardner, *What is Tort Law For? Part 1*, *supra* note 1, at 2.

174. Gardner, *Tort Law and Its Theory*, *supra* note 2, at 22.

175. Keating, *The Priority of Respect Over Repair*, *supra* note 10, at 330–31.

176. *Id.* at 330.

177. GEWIRTH, REASON AND MORALITY, *supra* note 19, at 112; *see also* BEYLEVELD, THE DIALECTICAL NECESSITY OF MORALITY, *supra* note 134, at 44; White, *supra* note 35, at 163–67.

avoider.[178] Rather, the reparative obligation demanded by the principle of generic consistency and tort law calls for redress against the particular individual responsible for the wrong.[179] For these reasons, the principle of generic consistency can explain the bilateral and backward-looking structure of tort law in ways that economic efficiency cannot, and it therefore appears to provide a preferable conception of the field.

Additionally, the principle of generic consistency provides a robust account of tort law's primary rights in a way that corrective justice does not.[180] At this point, it is worth noting that the conception of corrective justice we have been considering thus far has been a "thin" version.[181] Because the thin account is narrowly concerned with the remedial aspect of tort law, it is particularly susceptible to the challenge that it fails to justify tort law's primary norms.[182] Some theorists have attempted to blunt the force of this critique by developing what has come to be known as the "thick" account of the theory. Attributable to Ernest Weinrib, who stands alongside Coleman as one of the two most prominent defenders of corrective justice,[183] the thick version of the theory grounds tort law's primary norms in the Kantian conception of right.[184] For Kant, simply by virtue of being a certain kind of agent, people have rights, which means they are free to make plans and act in pursuit of the goals they set for themselves without undue restriction from others.[185] Further, insofar as being a certain sort of agent grounds people's right to freedom, they must acknowledge that other agents like them also have identical rights.[186] One's violation of another's rights is a wrong, to which corrective justice provides a correlative response.[187] Importantly, Weinrib doesn't believe that the violation of the primary right and the correlative remedial obligation are separate.[188] Instead, the violation of the primary right is a violation of corrective justice.[189] Put slightly differently, "the role of

178. Coleman, *The Practice of Corrective Justice*, *supra* note 97, at 66–67.

179. *Id.*

180. *Supra* Section I.C.

181. Zoe Sinel, *Through Thick and Thin: The Place of Corrective Justice in Unjust Enrichment*, 31 OXFORD J. LEGAL STUD. 551, 553 (2011) [hereinafter Sinel, *Through Thick and Thin*].

182. *Id.* at 553.

183. Keating, *Repair Wrongful Losses?*, *supra* note 5, at 375; Keating, *The Priority of Respect Over Repair*, *supra* note 10, at 301.

184. Sinel, *Through Thick and Thin*, *supra* note 181, at 556.

185. Zoe Sinel, *Concerns about Corrective Justice*, 26 CAN. J.L. & JURIS. 137, 143 (2013) [hereinafter Sinel, *Concerns*].

186. *Id.*; WEINRIB, THE IDEA OF PRIVATE LAW, *supra* note 7, at 58.

187. Sinel, *Concerns*, *supra* note 185, at 143; Ernest Weinrib, *The Structure of Unjustness*, 92 B.U.L. REV. 1062, 1068 (2012).

188. Gardner, *What is Tort Law For? Part 1*, *supra* note 1, at 23.

189. *Id.* As Weinrib puts it, "corrective justice serves a normative function: a transaction is required, on pain of rectification, to conform to its contours." WEINRIB, THE IDEA OF PRIVATE LAW, *supra* note 7,

corrective justice is not confined to the remedial relation between the plaintiff and defendant but should be understood as constituting their relationship from the very beginning."[190] Rather than thinking of the violation of a primary right as a condition or trigger for the remedy provided by corrective justice, the thick account of the theory conceives of the violation as a (perhaps the) *reason* for the remedy.[191] Hence, pursuant to the thick account, corrective justice only ever responds to prior instances of corrective injustice.[192]

Although the thick account is interesting, it doesn't seem quite right to call violations of primary rights instances of corrective justice.[193] To be sure, because the violation of a right requires a remedy, rights and remedies are reciprocal.[194] However, remedies are governed by and subordinate to rights, the latter of which fix the contours of the remedies owed in response to the violation of a right.[195] It appears correct to say that the theory provides an accurate account of the obligation to provide a remedy when a primary right has been violated.[196] But even the thick version of the view does nothing to ground primary rights.[197] Certain wrongs, such as strict liability, could be characterized as matters of corrective justice all the way down because in such instances, the wrong just is not repairing a harm that has occurred.[198] Yet, it is hard to see the violation of rights like those involved in torts of nuisance or defamation as matters of corrective justice.[199] In such instances, corrective justice is only implicated once primary rights have been violated.[200] In this way, primary rights are analytically prior to remedies.[201] Further, whereas the obligations of corrective justice are bilateral insofar as they concern the relation between the person who was wronged and the person responsible for the wrong, primary rights are omnilateral and owed to everyone at all times.[202] Remedies play a big role in tort law, but they do so because tort

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at 76 n.9.

190. Sinel, *Through Thick and Thin*, *supra* note 181, at 553; *see also* Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 631–34 (1992); ALLAN BEEVER, REDISCOVERING THE LAW OF NEGLIGENCE 41–70 (2007) [hereinafter BEEVER, REDISCOVERING THE LAW OF NEGLIGENCE].

191. Sinel, *Through Thick and Thin*, *supra* note 181, at 558.

192. Gardner, *What is Tort Law For? Part 1*, *supra* note 1, at 23.

193. Keating, *The Priority of Respect Over Repair*, *supra* note 10, at 319 n.70.

194. *Id.* at 311, 319–20.

195. *Id.* at 311.

196. Sinel, *Concerns*, *supra* note 185, at 145.

197. *Id.*

198. Keating, *The Priority of Respect Over Repair*, *supra* note 10, at 319 n.70.

199. Gardner, *What is Tort Law For? Part 1*, *supra* note 1, at 24.

200. *Id.*

201. Keating, *The Priority of Respect Over Repair*, *supra* note 10, at 318.

202. *Id.* at 308; Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV.

law is fundamentally about primary rights.[203] It seems right to place wrongs at the center of tort law, but it is not correct to claim that repairing wrongs is the fundamental purpose of tort law.[204] Rather, the primary aim of tort law is to articulate and recognize the primary obligations we owe each other, and these obligations are founded upon the fundamental rights we have as free, rational, and equal human agents.[205] For these reasons, "remedies are the handmaidens of rights,"[206] the latter of which are founded on the principle of generic consistency.

If the principle of generic consistency is the rational standard governing all human action,[207] we can think of our legal obligations that result from the human activity of lawmaking as a subset or branch[208] of the actions subject to the principle of generic consistency's governance. In this way, the principle of generic consistency can serve as the foundation for tort law's primary rights. By doing so, the principle of generic consistency can overcome the difficulty defenders of corrective justice have in providing an account of tort law's primary rights.

IV. ALTERNATIVES TO THE PRINCIPLE OF GENERIC CONSISTENCY

Before concluding, it is worth noting that the principle of generic consistency is not the only conception of tort law's primary rights. Partly in response to the fundamental schism identified by Keating, Gardner, and others, several scholars have developed rights-based theories in recent years.[209] The rights-based analysis of tort law is perhaps best summed up by Robert Stevens. He claims that the whole of private law, including tort law, "is simply about the rights we have one against another."[210] This approach to tort law is typified by a few characteristics: a *structural*[211] focus on the unifying theme(s) that underlie tort law and render the field intelligible; a *monist*[212] understanding of all[213]—rather than some parts—

67, 101–02 (2010).

203. Keating, *The Priority of Respect Over Repair*, *supra* note 10, at 311.

204. *Id.* at 311–12, 315.

205. *Id.* at 318.

206. *Id.* at 320.

207. Beyleveld, *The Principle of Generic Consistency*, *supra* note 28, at 2.

208. Hershovitz, *The End of Jurisprudence*, *supra* note 165, at 1179–81.

209. *See* Nolan & Robertson, *Rights and Private Law*, *supra* note 3, at 1. Although a rights-based analysis lends itself to all of private law, the law of torts has been the primary focus of many scholars. *Id.*

210. Robert Stevens, *The Conflict of Rights*, *in* THE GOALS OF PRIVATE LAW 139, 141 (A Robertson and HW Tang eds., 2009).

211. STEVENS, TORTS AND RIGHTS, *supra* note 15, at vii; WEINRIB, THE IDEA OF PRIVATE LAW, *supra* note 7, at 19.

212. BEEVER, REDISCOVERING THE LAW OF NEGLIGENCE, *supra* note 190, at 30.

213. Robert Stevens identifies misfeasance as "an exception to the rule that the deliberate infliction of loss, absent the violation of a right, is not actionable." STEVENS, TORTS AND RIGHTS, *supra* note 15, at

of tort law in terms of rights; a *formalist*[214] view of structural concepts determining the result of particular cases; and an *interpretive*[215] account of tort law. Although the scope of this article won't permit a comprehensive discussion of these various theories, I will briefly consider what has become perhaps the most well-known rights-based account of tort law: Benjamin Zipursky and John Goldberg's civil recourse theory.[216]

According to civil recourse theory, tort law is typified by two main prongs.[217] The first prong is relational. Goldberg and Zipursky claim that tort law is relational insofar as it concerns mistreatment between parties.[218] They view all of tort law's directives as relational in some sense or another because they "always enjoin certain actors from doing certain things *to* certain others, or to do certain things *for* certain others."[219]

The second key feature of tort law identified by Goldberg and Zipursky focuses on the role played by courts with respect to the relational aspect of the field.[220] Civil recourse theory views tort law as enabling "a wronged party to have a proportional response to a wrong."[221] Goldberg and Zipursky conceive of the field as empowering people to leverage the judicial system to hold another accountable for a wrong.[222] Empowering citizens to utilize "the state's dispute-resolution mechanisms" obviates the need for one to respond to a wrong through other means of self-help.[223] This empowerment aspect of civil recourse is a crucial feature of "what makes it reasonable to accept being subjected laws and state control."[224]

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214. WEINRIB, THE IDEA OF PRIVATE LAW, *supra* note 7, at 11, 29–46; BEEVER, REDISCOVERING THE LAW OF NEGLIGENCE, *supra* note 190, at 3, 34–35, 39, 71. Understandably, rights-based theorists in the United States are keen to contrast their theory of tort law with the legal realist project, which views tort law as tool used by government officials for pursuing policy objectives. *See* Goldberg & Zipursky, *Rights and Responsibility in the Law of Torts*, *supra* note 97, at 256. Although some rights-based theorists take a hard stance on there being any instrumental role for social policy in tort law, others believe that although rights should be the primary concern of tort law, public-interest considerations can be relevant to tort claims under certain circumstances. *See* Stephen Perry, *The Role of Duty of Care in a Rights-Based Theory of Negligence Law*, *in* THE GOALS OF PRIVATE LAW 83 (A Robertson and HW Tang eds., 2009); Nicholas J. McBride, *Rights and the Basis of Tort Law*, *in* RIGHTS AND PRIVATE LAW 339–41 (Donal Nolan & Andrew Robertson eds., 2012).

215. STEVENS, TORTS AND RIGHTS, *supra* note 15, at vii; BEEVER, REDISCOVERING THE LAW OF NEGLIGENCE, *supra* note 190, at 21.

216. JOHN C. GOLDBERG & BENJAMIN ZIPURSKY, RECOGNIZING WRONGS (2020) [hereinafter GOLDBERG & ZIPURSKY, RECOGNIZING WRONGS].

217. *Id.* at 4, 25 n.5.

218. *Id.* at 25 n.5.

219. *Id.* at 93.

220. *Id.* at 108.

221. *Id.* at 3, 69–70.

222. *Id.* at 3, 70.

223. *Id.* at 123.

224. *Id.* at 127.

According to Goldberg and Zipursky, the ability of individuals to leverage the court system to rectify unfair interactions rivals the right to vote in its importance to liberal democracies founded on "notions of equality, fairness and individual independence and sovereignty."[225]

There is much more to say for and about civil recourse, which has drawn significant attention in recent years. However, for our purposes, perhaps the most important characteristic of civil recourse and other rights-based theories is their interpretive aim. As interpretivist projects, many contemporary rights-based analyses of tort law purport to provide an account of the field "as it stands."[226] Drawing on H.L.A. Hart's notion of the internal point of view, Goldberg and Zipursky claim that laws qualify as valid because of their being created through the "right" sort of social processes, which officials in that legal system regard as validity-conferring.[227] Examples of such social processes might include a state legislature passing, and the governor signing, a bill requiring automobile owners in that state to carry a minimum amount of insurance.[228] Importantly, the internal point does not regard the legitimacy of legal rules as necessarily depending on the moral value of such rules.[229] Goldberg and Zipursky acknowledge that although certain principles of rationality and reasonableness have been codified into law by legislators and jurists, "the civil recourse principle does not itself provide an account of tort law's wrongs"[230] or "put forward an account of what the ideal law would be."[231]

The interpretive focus of rights-based tort theories seems to be a crucial limitation because it does not tell us anything about why and how law should be reformed. Interpretive theories of tort law are useful insofar as there is value in first understanding the law marked for reform before revising any law(s) in a particular legal system.[232] Nevertheless, interpretive theories do not provide the conceptual resources to determine whether laws are undesirable and, if so, what should be done. Granted, according to civil recourse theory, a judge's decision might be "bad" or "mistaken" because it misinterpreted or failed to apply settled precedent, which is entitled to deference if it was

225. *Id.* at 125.

226. *See* Nolan and Robertson, *Rights and Private Law*, *supra* note 3, at 6.

227. GOLDBERG AND ZIPURSKY, RECOGNIZING WRONGS, *supra* note 216, at 91, 96–97; Scott J. Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1157–59 (2006) [hereinafter Shapiro, *What Is the Internal Point of View?*].

228. GOLDBERG AND ZIPURSKY, RECOGNIZING WRONGS, *supra* note 216, at 91.

229. Shapiro, *What Is the Internal Point of View?*, *supra* note 227, at 1159.

230. GOLDBERG AND ZIPURSKY, RECOGNIZING WRONGS, *supra* note 216, at 26, 96 n.18, 230, 234; *see also* Nolan and Robertson, *Rights and Private Law*, *supra* note 3, at 10.

231. Nolan and Robertson, *Rights and Private Law*, *supra* note 3, at 5–6.

232. STEPHEN A. SMITH, CONTRACT THEORY 6 (2004).

enacted pursuant to the relevant social facts recognized as valid by some set of persons within that legal system.[233] Goldberg and Zipursky claim that settled doctrine deserves deference because if the "power to override the law" is "exercised too sparingly," the legal officials and the law they are charged with upholding will lose credibility.[234] However, defending the claim that it is bad for legal systems to lose credibility requires normative resources (e.g., conceptions of fairness or justice) that interpretive theories lack. A theory of tort law that is too interpretive risks failing to be sufficiently prescriptive, which is needed for developing and normative conclusions as to how to revise the law(s) in question.[235]

This is where the principle of generic consistency can be helpful. According to Gewirth's theory, law is in need of reform when it fails to satisfy fundamental principles of rationality and reasonableness. The principle of generic consistency provides a foundation for the rights owed to all human agents and the rights that tort law protects. Gewirth's theory stipulates the criteria that valid laws cannot violate, regardless of their social pedigree. Granted, if the principle of generic consistency is to be leveraged to provide a prescriptive theory of how the law of a particular legal system should be reformed, it will need to be attentive to the existing practices of that institution.[236] After all, a purely normative theory that ignores "the structure and history" of tort law in a particular jurisdiction "is an impossibility: it is a theory of something else."[237] Civil recourse and other rights-based theorists seem correct to attend to the interpretive task of understanding the law of a particular legal system. But they do not provide the normative resources needed to determine how and when law should be reformed. For this reason, the principle of generic consistency offers an improvement over civil recourse insofar as the former claims the validity of legal rules depends on considerations regarding fundamental principles of reason.

To be sure, the principle of generic consistency is not the only available account of tort law's primary rights. Ernest Weinrib, Arthur Ripstein, and others have developed rich Kantian theories of law that rival Gewirth's theory.[238] Keating's Rawlsian conception of the role played by fairness in

233. GOLDBERG AND ZIPURSKY, RECOGNIZING WRONGS, *supra* note 216, at 97, 269–70.

234. *Id.* at 269–70.

235. Felipe Jiménez, *Two questions for private law theory*, 12 JURIS. 391, 394 (2021).

236. *Id.*

237. *Id.*

238. WEINRIB, THE IDEA OF PRIVATE LAW, *supra* note 7; ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY (2019); ARTHUR RIPSTEIN, PRIVATE WRONGS (2016).

tort law is also worth comparing to the principle of generic consistency.[239] The task of carefully considering the principle of generic consistency on its own merits[240] and the degree to which it is preferable to other tort theories deserves further attention in future projects.

CONCLUSION

In America, debate over the foundations of tort law is burdened by a schism between economic theorists and those defending corrective justice.[241] Scholars on each side of this dispute have legitimate criticisms of their opponents.[242] Unfortunately, economic theorists and their critics have devoted too much attention to refining their respective critiques and too little time on setting the stage for resolving the dispute.[243]

I propose that we can make progress toward overcoming the schism by providing a justification of tort law's primary norms.[244] The principle of generic consistency can help accomplish this task. Gewirth's theory provides a rational standard determining the rightness and wrongness of all human conduct, including the enterprise of guiding human conduct through the creation of legal rules.[245] As such, the principle of generic consistency can serve as the rational foundation for the primary rights and duties at the heart of tort law. In this way, Gewirth's theory can overcome the difficulty corrective justice theorists have in providing an account of tort law's primary rights. Further, the principle of generic consistency can explain tort law's backward-looking concern with remedying wrongs in a way that economic theorists cannot.

This article does not explore the implications the principle of generic consistency has for tort law's doctrinal dimensions. Instead, my goals here are more preliminary and focused on the principle of generic consistency's ability to illuminate our understanding of tort law's conceptual roots. If I am on the right track, future projects examining the connection between the principle of generic consistency and tort law's doctrinal thickets will be worth the effort.

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239. Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996).

240. *See* Deryck Beyleveld, *Korsgaard v. Gewirth on Universalization: Why Gewerthians are Kantians and Kantians Ought to be Gewirthians*, 11 J. MORAL PHIL. 573 (2014); BEYLEVELD, THE DIALECTICAL NECESSITY OF MORALITY, *supra* note 134, at 65–396; GEWIRTH: CRITICAL ESSAYS ON ACTION, RATIONALITY, AND COMMUNITY (Michael Boylan ed., 1999).

241. Gardner, *What is Tort Law For? Part 1*, *supra* note 1, at 2.

242. Gardner, *Tort Law and Its Theory*, *supra* note 2, at 1.

243. Keating, *Sovereign or Subordinate?*, *supra* note 8, at 37.

244. *Id.* at 52.

245. BEYLEVELD & BROWNSWORD, LAW AS A MORAL JUDGMENT, *supra* note 28, at 120, 170, 180.