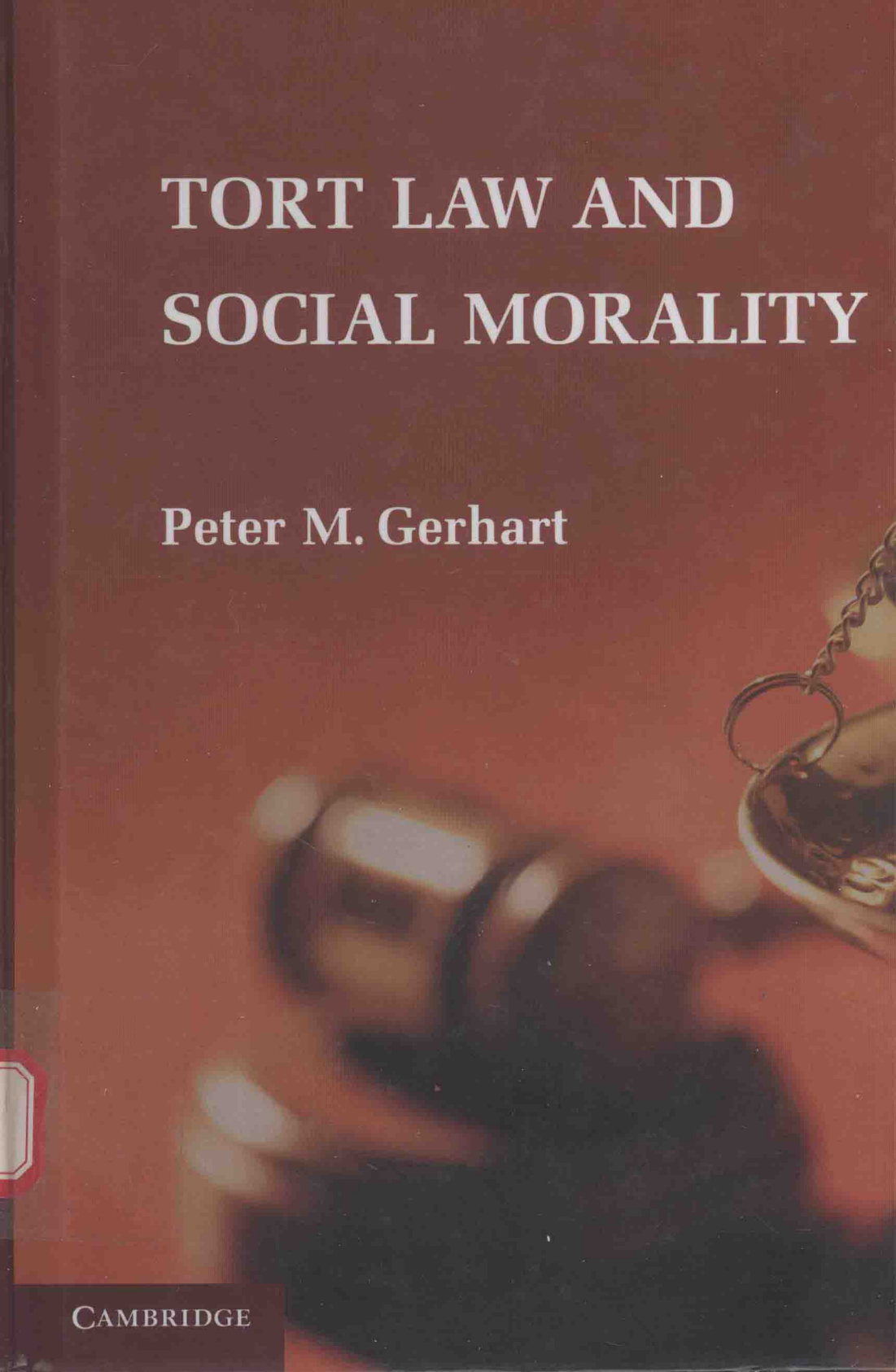
TORT LAW AND SOCIAL MORALITY

Peter M. Gerhart



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TORT LAW AND SOCIAL MORALITY

This book develops a theory of tort law that integrates deontic and consequential approaches by applying justificational analysis to identify the factors, circumstances, and values that shape tort law. Drawing on Kantian and Rawlsian philosophy, and on the insights of game theorist Ken Binmore, this book refocuses tort law on a single theory of responsibility that explains and justifies the broad range of tort doctrine and concepts. Under this theory, tort law asks people to appropriately incorporate the well-being of others into the decisions they make, explains when that duty applies, and explains the scope and limits of that duty. The theory also incorporates a theory of the evolutionary development of social values that people use, and ought to use, in meeting that duty and explains how decision making from behind the veil of ignorance allows us to evaluate the *is* in light of the *ought*.

Professor Peter M. Gerhart is a graduate of Northwestern University and Columbia University Law School. He practiced law with Weil, Gotshal, and Manges before entering teaching in 1975. Before serving as Dean of the Case Western Reserve School of Law from 1986 to 1996, he was an expert in antitrust law, publishing widely in the area and serving as consultant to both the ABA Commission on the Future of Antitrust Law and the Carter Commission for the Review of Antitrust Laws and Procedures. Since 1996 he has specialized in international economic law, tort law, and legal theory.

Preface

This book owes its origin to my dissatisfaction with the current state of tort doctrine and theory. When I began teaching tort law more than a decade ago, it became clear that the schisms in tort theory and the verbal patches holding tort doctrine together signaled the need for a deeper understanding of the normative theory that justifies tort law. Among the animating conundrums I faced were the deep, antagonistic, and seemingly unbridgeable divide between corrective justice and economic theory, the multiple goals that tort law is said to serve, and the inadequate justifications given for (among other things) duty and no-duty rules, proximate cause, and the injection of strict liability into the otherwise dominant negligence regime. Clearly, I thought, there must be a better way to understand tort law.

My search for a new way of looking at tort law led me to believe that the underlying problem was a failure of justification – that is, a failure to understand the reasons why tort law finds one person responsible for the well-being of others, and the limits of that responsibility. As I explored the justification for various decisions, I saw that too often our understanding of why the courts decide one way rather than another was not supported by sound analysis of the factors that would lead to a just outcome. The decisions were supported instead by bland appeal to generalized ideas that did not reveal the normative basis for the decision. My search for a better way of understanding tort law also convinced me that the positive and normative core of tort law emanates from tort law's foundational concept: the requirement that one person take into account the well-being of others when deciding how to behave (an expression of the requirements of the reasonable person). As I explored the concept of other-regarding behavior in various contexts, I began to see it as the thread that runs through tort law and brings it unity and coherence. I saw that it allows us to justify a range of tort doctrines that would otherwise be disparate and disconnected. This book presents the current state of my analysis.

This book, however, seeks not only a better positive and normative understanding of tort law; it also seeks a better methodological approach. I seek a methodology that is justificational, integrative, and coherent, as is explained immediately below, and those methodological goals become a theme that ties the various chapters of the book together.

THE JUSTIFICATIONAL PROJECT

My primary aim is to provide an account of tort law that is analytically justificational. As I hope this book illustrates, this term has a particular, and specialized, meaning that distinguishes it from existing theoretical approaches. I seek to present an account of tort law that identifies the circumstances, factors, and values that justify the imposition of liability in tort and an analytical framework that links those circumstances, factors, and values with a normative theory that makes it legitimate for the state, acting through courts, to compel one person to repair the harm another has incurred. A justification is a well-specified statement of the attributes of a dispute that compelled the court to decide the case the way it did. A justification cannot be complete unless it is founded on, and reveals, a normative vision of the law's values and explains the attributes of a dispute that are relevant to implementing those values in the context of the dispute, given the institutional character of the law.

All theory is justificational in a broad sense if it seeks to bring deeper understanding to a welter of disparate outcomes. The justificational theory I present is, I hope, distinctive in its specificity and coherence, bridging the gap between a normative theory of responsibility and its application in a way that links normative theory to determinate analysis. Theory can be conceptually coherent in its generality but not determinate in its application, or it can be specific in its application but untethered from an overarching theory of responsibility or from the values that animate the theory. I hope to combine the two in this book. My focus is on *how* we think about tort cases – a methodology of specific assessment – rather than on *what* we think about them. This is an important distinction, for it distinguishes between saying that tort law embodies a theory of corrective justice or wealth maximization (i.e., *what* we think about tort cases) and saying: "Here is the sense in which we can understand the corrective justice or wealth maximization notions embodied in tort law."

Because of its focus on specificity and coherence, this book bears a special relationship to the existing theory, building on much of what exists, but amplifying it in ways I believe to be important to fulfill theory's promise. First, the book is a reaction to, and an antidote for, what many regard as the considerable indeterminacy and overconceptualization of much existing theory. As

I illustrate throughout the book, tort theory is seriously underspecified because it fails to reflect and incorporate the circumstances, factors, and values that are necessary to apply the theory to particular instances of injury. My aim is to get underneath tort law's doctrine, principles, and central concepts to establish a framework that explains why and how they are applied to determine whether one person is responsible for the harm that befalls another. Thus, I seek to get a richer understanding of the meaning of the concepts of ordinary care, duty, proximate cause, and strict liability in order to give a fuller account of the factors, circumstances, and values that impel a court or jury toward one outcome over another. My project therefore seeks to develop a theory of tort law that overcomes what I view to be the major flaws in much existing theory: excessive generality and lack of specificity, the associated problems of lack of analytical rigor, and theory that is outcome-driven.

Let me elaborate.

Corrective Justice Theories

Theories of tort law tend to be conceptual in one of two ways, corresponding to the two main bodies of tort theory. Corrective justice theories are conceptual in that their concern is the form and function and interrelationships between tort concepts. This focus on form, function, and interrelationships allows theorists to understand tort law holistically, but not in a way that points to the specific circumstances, factors, or values that are relevant to deciding cases and evaluating in a particularized way whether the case was correctly decided. The indeterminacy of corrective justice is well known[1] and even acknowledged[2] (and sometimes celebrated[3]) by its practitioners. Corrective justice simply leaves too many questions open to do the kind of work that provides a satisfying and full understanding of tort law.[4]

My concern with the excessive indeterminacy of corrective justice must be understood through appreciative inquiry. My indictment is too generalized itself; some theory that can be grouped under the corrective justice rubric

[1] Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Law and Economic Analysis*, 93 VA. L. REV. 287 (2007).

[2] Ernest Weinrib, *The Disintegration of Duty* in Stuart Madden (ed.), EXPLORING TORT LAW, Cambridge University Press (2005).

[3] Jules L. Coleman, THE PRACTICE OF PRINCIPLE, Oxford University Press (2001). Among the justificational agnostics is Benjamin J. Zipursky, *Rawls in Tort Theory: Themes and Counter-Themes*, 27 FORDHAM L. REV. 1923, 1939 (eschewing the priority of justification in the analysis of law).

[4] I will not support this claim specifically here, for each chapter of the applications section of the book reviews the literature and the kind of justificational problems that arise.

is highly specified (even if unconvincing).[5] My project is not to dethrone or criticize corrective justice; it is to supplement it and build on it. The theory developed here is neither a brief for the supremacy of law and economics nor a claim that corrective justice theory is wrong. My claim is narrow: corrective justice theory can be made more meaningful by understanding it in the context of justificational analysis linking the relevant concepts to their applications.

In particular, much of this book follows the conceptual road carefully crafted by Arthur Ripstein, providing justificational analysis to implement his underappreciated conceptual analysis.[6] Like him, I view tort law to be working out "fair terms of interaction" and "social cooperation"[7] under terms of equality in a way that accounts for each person's interest in both liberty and security. Like him, I view the objective of analysis not as an inquiry into how much of one person's liberty must be sacrificed for another person's security – as if those two values could be balanced across persons – but rather as working out an accommodation between liberty and security that is acceptable to all people, as both injurer and victim, when their larger interests as part of the social collective are separated from their immediate interests in either freedom or security. And I follow Ripstein's lead in identifying the relevant foreseeability inquiry as neither an epistemic nor an ideal requirement, but instead as an integral part of what a reasonable person would understand. Above all, I take a theme developed by Ripstein – the notion that "[t]he point of the reasonable person standard is to specify the respects in which people can be required to take account of the interests of others"[8] – and raise it to be the central organizing feature of tort theory.

But I do two things with Ripstein's account of tort law that correspond to the two goals of my project. First, I make Ripstein determinate in a way that he does not, showing how we analyze the requirements of "fair terms of social interaction" and tying that analysis back into an overarching normative theory that explains the content of the concepts of equality and fairness that drive

[5] I am thinking of the work of Gregory Keating, who has developed a highly specific and grounded rights-based theory for distributing the burdens and benefits of activity between persons and requiring an actor to repair the damage so distributed. Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN L. REV. 311 (1989) and Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 72 FORDHAM L. REV. 1857 (2004).

[6] Arthur Ripstein, EQUALITY, RESPONSIBILITY, AND THE LAW, Cambridge University Press (1999).

[7] *Id.* at 7. Ripstein traces this view to T.M. Scanlon, *Contractualism and Utilitarianism* in Amartya Sen and Bernard Williams (eds), UTILITARIANISM AND BEYOND, Cambridge University Press (1982).

[8] Ripstein, EQUALITY, RESPONSIBILITY AND THE LAW, at 8.

the application of the theory. Second, I follow that normative and analytical theory of fairness and equality to its logical application as part of a coherent theory of responsibility that emanates through tort law.

My claim that corrective justice theory is not fully justified will be resisted by those who misunderstand what counts as a justification in the theory I develop. For my purposes, justificational analysis cannot rely on a description, a definition, or an unspecified concept (like fairness or duty) without trying to articulate, with as much analytical power as can be mustered, the meaning of the concept and how it is applied. The central normative concept of corrective justice is a "wrong," which involves the obligation to do something in a certain way and a breach of that obligation. Without providing a theory of "wrong" and "obligation" that gives those concepts analytical content – one that allows them to be applied by identifying the circumstances, factors, and values that justify the law in saying the defendant has committed a "wrong" or violated an "obligation" – the theory remains, in my terms, nonjustified. Under this reading, current accounts of corrective justice remain incomplete. Understanding the concepts of "wrong" and "duty" in their function and form – the goal of prominent collective justice theorists[9] – does not provide an understanding of their meaning or content.

Under the justificational analysis I champion, we understand concepts such as "wrong" and "duty" not as self-defining ideas with self-referential applicability. Rather, we understand them as placeholders for analysis that gives them content and makes them determinate. Too often, theorists write about concepts like duty as if they were inputs into deciding cases. We should not confuse inputs and outputs. What is important in understanding the law is the input – the considerations that an analyst takes into account and the way the analyst takes them into account. A concept like duty is an output not an input; it is the result of analysis, not an input into the analysis. Duty has no defined meaning that allows us to use it as an input into analysis; its role is to express a conclusion that flows from the appropriate analysis. The concept of duty is the concept that we are working to define as we analyze a case. Of course, we ask, for example, whether a store owner had a duty to the customer. But we do not ask this question as if the concept of duty would yield a determinate and justified answer. Instead, we are asking the following kind of question: Given the circumstances as we understand them and the way that we understand how the store owner ought to think about the well-being of her customers in light of those circumstances, how do we understand the obligation of the store

[9] John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 (2001).

owner to take on more burdens for her customers? Duty is a summary of the results of our analysis, not an input into the analysis. It is the concept that we are trying to elucidate in the context of analyzing the case, and points to the analysis we ought to use, but its content comes from the analysis not from the concept.

Law and Economic Theories

Law and economic theories are conceptual in a different way. They are built around a central concept – that tort law seeks to maximize individual benefit under some measurable notion of benefit. These theories appear to be determinate (which is what makes law and economics so attractive). Because this is a functional conception, its theorists present an understanding of tort law that appears to be analytically justificational – that is, they present a well-specified set of results that follow directly from the assumptions behind a proposed model. Both the model and the conclusions flowing from the application of the model are justified in the analysis. The conceptual lacunae of economic theory is not in its analytical apparatus, but in the assumptions it makes in order to undertake the analysis. Economics is specified without being justificational because it contains no normative basis for justifying the assumptions on which the relevant analysis is based.[10]

We can take it to be self-evident that it makes sense to spend $500 to avoid a loss of $501, that it makes no sense to spend $501 to avoid a loss of $500, and that in those terms minimizing losses (or maximizing wealth) makes good sense for all individuals. But we have an incomplete theory of tort law until we have a normative theory for thinking about how we figure out the value of the relative investments and returns. Where do the figures of $500 and $501 come from? The determination of those values is not self-identified from the fact that we would want to maximize wealth or minimize losses; no economic theory is complete until the methodology of the valuation is specified.

One can, of course, "do" welfare economics without specifying the origin of the values that one assumes in the maximization process (just as one can "do" corrective justice at a conceptual level). The ability of economists to strip out the value formation part of the analysis has been an important development in our understanding of tort law (and law in general) because it lays bare the underlying structure of the analysis that sets up the maximization problem to

[10] Arthur Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974). For a more recent statement of the need to integrate normative values into economic analysis, see Joseph William Singer, *Normative Methods for Lawyers*, 56 U.C.L.A. L. REV. 899, 915 (2009).

be solved. The formal modeling of the maximization process has revealed the many insights that are not easily seen without it – including the relationship between injurer care and victim care, the difference between due care and activity-level decisions, and the nature and role of externalities. Ultimately, however, welfare economics depends on some specification of the values that determine which trade-offs between various human capacities are important to society. That can be done only by specifying what makes a decision moral and how we identify decisions that we think were made with the appropriate deference to the well-being of others. Once we have a basis for specifying the necessary social values, we can solve the maximization problem that characterizes the law and economics approach, but without it we have only a guess as to the appropriate normative response of the law.

More generally, the statement that the goal of law is efficiency can be made determinate only by specifying the values that are to be taken into account in the allocation process. Slavery is efficient if society devalues the worth of Africans; by devaluing their worth, we are saying that the loss of freedom is not important in the allocation process, so its loss produces benefits without waste. On the other hand, if society values the worth and freedom of each individual, slavery is inefficient. The relevant normative analysis is in the valuation. In the context of tort law, we need to know which costs and benefits are relevant to determining the efficient result and how society understands those values. When a driver with epilepsy has a seizure and crashes into a bicycle shop, we can say we want an efficient resolution of the conflicting claims, but we cannot resolve the conflict without specifying how we understand the trade-off between the freedom of an epileptic to drive and the personal safety of those in the store. After we have made that specification, we can call the result efficient, but specifying the goal of efficiency or wealth maximization does not help us make the valuation.

Economic theory shares with corrective justice a common characteristic of nonjustificational theory: reliance on words whose meaning is not known or specified. We can all agree that tort law functions to internalize externalities, but that concept just begs the issue of how we recognize and define externalities. At one level, the externalities perspective is simply a statement of the problem that society faces. People engage in activities that impose costs on others. Society needs a mechanism for determining which of those costs ought to be internalized into which activity. Although we can conceptualize this as the need to balance external costs and benefits, for justificational analysis we cannot escape the obligation to identify which costs ought to be internalized to which activity and why. Not all externalities are internalized. If they were, the costs we impose on others would come close to deterring us from acting at

all. Whether to call a cost or benefit an externality (and therefore whether to internalize it) is itself a social choice that depends on which activities we value and why we value them. Some external costs of activities we internalize; some we do not. The choice depends on how we think we should allocate the costs and benefits from various activities and on the incentive effects of different allocation schemes.

We can therefore agree with welfare economists that legal outcomes should be chosen solely on the basis of their effects on the well-being of individuals in society. That is not a controversial statement. What is controversial, and is not sufficiently addressed in the economic literature, is the basis on which one values the effects that the decision of one person has on the well-being of others in society, given the inability to simultaneously achieve desirable effects for both parties. The theory presented here provides a basis on which we judge an actor's decisions, but that basis is not determined by the actor or even by the comparative general well-being of injurer and victim; it is determined by the community of individuals. Society creates a social index of the ranking of projects and preferences of different people that allows tort law to determine whether the projects of the victim or the projects of the injurer should be burdened. The values that determine which projects and preferences must be burdened are not derived from outside the social system; value creation is what the social system does. The social system, through the decisions of many individuals, determines, for example, whether a person should be required to drive more slowly so that others face less risk. It determines the means that are acceptable for separating two dogs and those methods that impose too much risk on society. It determines these factors based on the experience of people in everyday life and in how that experience shapes the values that determine how reasonable people behave. It gives economic theory the values needed to make the theory normatively determinate.

THE INTEGRATION PROJECT

Because both dominant theories of tort law are underspecified (although in different ways), it could be that these theories are less at odds than is conventionally thought. Could it be that the differences in the theories reflect the different levels of generality that each has chosen and that once we add specificity to them, we will see the theories converge? A second aim of this project is to explore the possibility that corrective justice and law and economics can be integrated into a single theory that harnesses the power of each while paying attention to the lacunae that keep them from being fully specified theories.

My approach is to recognize what the theories have in common, to understand the additional elements that must be added to each theory, and then to fill those lacunae in the hopes that what is added to each also integrates one theory into the other. This is not the first attempt to reconcile and integrate the two dominant theories of tort law, but none has achieved satisfactory traction with proponents of the opposite camp.[11]

From the time of Holmes (at least), tort law has been understood to "require a policy decision on how to mediate an actor's interest in liberty with the conflicting security interests of others."[12] All tort theory embraces this image. For economists, the liberty interest (the freedom to engage in valuable activity) is represented as the burden of precautions necessary to reduce risk and prevent harm, while the prevention of harm has been represented by the expected harm of not taking precautions. This is summarized in the Hand formula: that a reasonable person will take precautions – that is, curtail one's freedom to engage in valuable activity – whenever the actor's loss of liberty is less than the expected harm that would otherwise occur (or, more familiarly, when the burden of precautions is less than the expected harm to the victim). A similar image animates corrective justice theory, either explicitly or implicitly (although not in the form of the Hand formula).

From that common starting point, we can specify the considerations that are relevant to addressing the mediation between the two interests, essentially building our understanding of tort theory from the bottom up, specifying what society is trying to achieve, the causal mechanism society has chosen to achieve its goals, and the kinds of considerations that are relevant in implementing the causal mechanism. When we do, we find an integrated theory that is consistent with, and makes determinable, both corrective justice and law and economics.

THE COHERENCE PROJECT

This book also seeks to rethink how we understand and express tort doctrine. We should not be satisfied with our present understanding because too much turns on distinctions and devices that, on examination, seem artificial. As I make clear in this book, the lines between various doctrines are porous and malleable. We understand tort liability to be built around the fault concept, but we simultaneously believe that there are "pockets" of strict liability in the

[11] Louis Kaplow & Steven Shavell, FAIRNESS VERSUS WELFARE, Harvard University Press (2002).

[12] Mark A. Geistfeld, ESSENTIALS OF TORT LAW 13, Wolters Kluwer (2008).

tort landscape. This bifurcated system is coherent and sustainable only if we have a sound way of determining when the "pockets" of strict liability ought to be invoked as "exceptions" to the general "default" rule of the negligence regime. But do we? Similarly, we understand an actor's general duty to be reasonable and the simultaneous existence of "no-duty" rules. Without a coherent theory of duty that encompasses both the duty and non-duty rules – for they must surely act as a coherent whole – our understanding is unstable and incomplete. And the doctrine of proximate cause – the doctrine that relieves admittedly negligent actors from responsibility – begs an understanding of proximate cause that grows out of the fault concept rather than cutting holes through it.

Many will find the story I tell to be disorienting, for each of the fault lines I have identified is addressed by well-known devices. The theory of abnormally dangerous activities, for example, is thought to distinguish strict liability from negligence liability. The distinction between nonfeasance and misfeasance is thought to justify the duty and no-duty rules. And the scope of the risk concept is thought to justify proximate cause. As I hope to show in subsequent chapters, such justifications are unsatisfactory because they rely on distinctions that do not work. The fault concept that I portray is able to do away with what I consider to be artificial distinctions and to present a single (albeit unconventional) theory of fault that makes tort doctrine coherent.

My dissatisfaction with the current justifications for bringing order to the various tort doctrines reflects my conjecture that too often theorists have been outcome-oriented – assuming the answer they were trying to justify. Theorists believe that tort law embodies a concept of strict liability, so they develop a theory to justify a negligence regime with pockets of strict liability. Theorists think of no-duty rules as "policy-based" limitations on a general obligation to be reasonable and then construct a theory to explain the exceptions. Theorists think of proximate cause as a way of relieving an actor who has acted unreasonably from liability, so we understand proximate cause as an exception to duty or breach. I hope to do away with theory that is designed to reach preconceived outcomes. The purpose of justificational analysis is not to justify law as we think it to be, but to reason from a normative theory of responsibility to understand what the law *ought* to be and therefore *must* be.

A COMMENT ABOUT OUR CONCEPTION OF LAW

The kind of justificational theory I present reflects, and is derived from, a different concept of law and legal theory than the standard jurisprudential approach. The dominant conceptions of law – law as command, law as

principle, and law as function – assume that the law has content that is separate from, and imposed on, the subjects that the law is affecting – that is, on the parties to the suit and the social relationships that will be governed by the outcome of the case. Under this view, the task of legal analysis is to find the right "fit" between a concept of law and the particular dispute or social problem the law addresses. These conceptions assume, for example, that law starts with a set of rights and obligations, or with a set of goals, or with a set of principles from which rights and duties can be derived. Under these views, the law operates by discovering or addressing rationally – that is, by legal reasoning – how the law is expressed in commands or principles or functions and then applies that conception to resolve particular disputes. These are top-down approaches, moving from a concept of law to the facts of a case. They define the law separately from the law's understanding of how people interact; they address the problems that people bring to the law by imposing law or a conception of justice on the problems. These approaches assume that the words and concepts of the law – words like *fair* or *efficient* – have meaning that can be determined and applied independently of how people interact in the nonlaw world.

This work challenges that view by suggesting that we understand the central concepts of the law to be a reflection of how communities construct and understand, and ought to construct and understand, the concepts of the law – concepts such as justice, obligation, fairness, efficiency, and responsibility. If we conceive law to be derived from the social arrangements that allow society to flourish, then we need to understand the concept of law as a method of analysis. We start with the way that humans interact (with each other and with nature) and perceive the law to be a way of examining human interactions to see which are best (as measured by some standard of what is best). If our sense of justice is socially derived rather than imposed from the outside by law – if our sense of right is created by, and facilitates human interaction – then we need a concept of law that is premised on, rather than separate from, an account of social interaction. That is what I present here – a theory that derives law from an appreciation of the kind of social arrangements that are normatively compelling and socially productive and that, for that reason, guide lawmakers in determining whether and how to intervene in human affairs through private law.

Conventional jurisprudential understandings of law search for a concept of law that asserts the primacy of law; this formalist approach has been a natural part of the evolution of thought designed to legitimize the use of power by the state. However, the formalist approach has largely been a dead end, for it is not fundamentally a normative enterprise. It is either descriptive ("the law is what

the institutions of the law say it is") or it is disconnected from well-specified and empirically grounded normative theories (resulting in, "I know justice when I see it"). Legal realists came along to challenge the primacy of law but were not able to replace the formalist concept with a normative theory. Then legal functionalists (such as law and economics scholars) began constructing the normative basis for understanding and evaluating law, but only within a narrow behavioral and philosophical model. The approach developed here is the natural next step in this evolution, for it allows us to form a concept of law that is normatively and analytically sound. When we turn our concept of law upside down and make the law the handmaiden of social morality, we have a concept of law that is normative, responsive to human behavior, and socially relevant.

The starting point for this conception of law is not the law at all. Tort cases present social problems: a claim by one person that a relationship with another in the community should be repaired with the award of damages, a claim by a victim that another failed to regard the victim with sufficient solemnity. The analysis of the claim depends on situating and evaluating the social problem that gave rise to the claim – the conflicting claims to resources, space, capacity, or autonomy. The social problem, not the legal problem, is the starting point for analysis; the law simply describes the way the social problem is resolved. The law and its output are determined by the analysis of the social problem, but the input into the analysis is independent of the label attached to the output and is therefore independent of law as commands, principles, or functions.

This conception of law – one that would embed the law in an evaluation of the requirements of social morality – moves law from outside the social system to inside the social system. Law may be independent, but its independence comes not because it sits outside the social system but because the social system demands an independent method to evaluate social relationships and to select those that seem to embody traits that are good for the community. Under this conception, the law is the analysis and is not separate from the analysis. Law is the analysis that appropriately determines what circumstances, factors, and values influence the shape of the law and whether the law, thus shaped, is moral. To understand the normative content of law, and its institutional force, we need to understand the justification for the law – that is, we need to understand what it is that gives law its hold over human behavior and its claim to be called just or appropriate. The theory presented here supports a radical reconceptualization of law so that we see it as a method of analyzing human interactions and choosing an array of rights and obligations that enhance social interaction. Under this reconceptualization, law should not be

understood by its output – its commands, principles, or functional doctrine – but by its input: the modes of thought and empirical understanding that allow lawmakers to make decisions that they believe will improve what I call social cohesion.

What gives law its force as an engine of social cohesion is not *that* it commands but the reasons that it commands. The law's force comes from its appeal to a sense of justice that people find to be worthy of following and therefore use to guide their behavior. The force of the law, and therefore its content, is not in the command but in how we think about the justification for the command – the congruence between the sense of justice that is embodied in the command and the sense of justice that people use to decide whether and how to follow the command. The law is continually renegotiated in light of technological, demographic, social, and behavioral forces until the justifications for the commands of the law are congruent with the requirements of social cohesion. The way we think about the normative requirements of social cohesion provides both the reasons for calling the law just and the reasons for obeying the law.

To implement a concept of law as the analysis of social morality, we need to develop analytical theories that specify the determinants of social cohesion and the meaning of the concepts (like efficiency and fairness) that we use to determine the social arrangements that are best for social cohesion. When we do, we have a kind of theory, an analytical theory, that is distinct from traditional legal theories. Then, we have an output and can describe the behavior as wrong in the sense that we have defined it under the analysis we have undertaken, and we can articulate a theory of responsibility under the relevant analysis. We can conclude, in other words, that it is wrong to speed under the circumstance with which the defendant was charged and that the defendant violated a duty to the plaintiff by acting unreasonably in this or that way. We should not, however, confuse inputs and outputs. What is important in understanding the law is the input – the considerations that an analyst takes into account and the way the analyst takes them into account – not the command that results from the analysis.

Although an analytical theory of the kind I proffer reflects a radical reconception of the concept of law, the theory does not seek to overthrow conceptual or functional theories; the theory is purposefully integrative. The theory seeks to approach conceptual and functional theories from a different direction, moving from the social problems that the law addresses to an understanding of how the law identifies its concepts and functions to take account of the appropriate resolution of social problems. The theory here thus stands in relation to conceptual or functional theories not by denying them on their