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TORT LAW

INTRODUCTORY REMARKS: EXPLAINING TORT LAW

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This Symposium is about the intersections between law and morality. One way that the two can intersect is when moral principles are used to explain the law, that is, to describe and predict, in a fairly abstract way, what the law is like. There are at least two reasons to use moral principles when undertaking such an explanatory project. The first is that lawmakers usually claim to take morality into consideration when doing their job. We would therefore expect the law to track morality.

Of course, we might be disappointed. We may find that no plausible set of moral principles can explain the law, but that something morally neutral—or even morally reprehensible—can. But to at least *start* with the considerations to which lawmakers themselves appeal seems like a good idea.

The second reason to look to moral principles is that if they succeed in explaining the law, they might then be used to justify it. Trying to justify the law seems necessary, because the law is backed up by the coercive power of the state and coercion is the kind of thing that usually needs justification. Of course, that the content of the law overlaps with morality might, in the end, do little or nothing to justify state coercion. (Most people would certainly agree that it is not *sufficient* to justify coercion—just because you morally ought

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to cultivate your talents does not mean that anyone, even the state, may force you to do so.) But justifying the law certainly looks easier if the law requires people to do what they have a moral reason to do anyway.

For the past forty years or so, tort law has proved to be an exceptionally fruitful area for this type of explanatory project. A good deal of moral theorizing about tort law has taken as its starting point a rejection of the economic approach to torts. On the one hand, these critics argue that the economic approach cannot *justify* tort law, because efficiency is not a moral value. Perhaps more important, however, they also argue that the economic approach is explanatorily inadequate, for it mispredicts the positive law of torts. They then offer sets of moral principles that can do a better job explaining, for example, why the duties of conduct in tort law have the content that they do, and why violations of these duties generate the particular duties of repair that we find in tort law, rather than some other—or no—form of reparation.

Both of our essays are examples of this explanatory project. In *Sleight of Hand*, Ben Zipursky argues that Richard Posner's economic understanding of the negligence standard is explanatorily inadequate, for it cannot account for a number of aspects of the positive law of torts, including (1) liability for negligence that is the result of inadvertence rather than risk-taking,[1] (2) the employment of standards of care higher or lower than negligence,[2] and (3) the relational character of the duty of care—that is, the fact that the duty of care is a duty to the *plaintiff*.[3] What is more, Zipursky argues that an economic understanding of the negligence standard cannot be found in Learned Hand's opinion in *United States v. Carroll Towing Co.*,[4] even though Posner pointed to Hand's opinion as his inspiration.[5] Zipursky then offers an alternative conception of the duty of care in negligence law that, he argues, resonates with moral—and other nonlegal—norms of competence and considerateness in our behavior toward others.[6]

1. Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 2017-18 (2007).
2. *Id.* at 2019-21.
3. *Id.* at 2021-22.
4. 159 F.2d 169 (2d Cir. 1947).
5. Zipursky, *supra* note 1, at 2000.
6. *Id.* at 2033-40.

Arthur Ripstein's essay, *As If It Had Never Happened*, seeks to explain the particular form that the duty of repair takes in tort law, in particular, the availability of money damages as a remedy. Money damages are a puzzle, because money can do little to annul the harm that the plaintiff suffered. It cannot make him "whole." Ripstein starts with the fundamental question of the source of a duty of repair, and argues that it is simply the form that an abiding duty of conduct takes when its requirements are not satisfied.[7] The plaintiff's right that the defendant not wrong him survives the commission of the wrong in the form of the defendant's duty of repair. The two are analytically inseparable. Ripstein then argues that the fundamental duty of conduct in tort is not to avoid harm, but to refrain from depriving the plaintiff of the *means* that he has at his disposal, or to avoid using the plaintiff's means in a way that he has not authorized.[8] The remedy of monetary damages honors this duty in the breach because, although it can do little to annul harms, it can give to the plaintiff *means* equivalent to those he lost, or give to the plaintiff the gains that the defendant received from his unauthorized use of the plaintiff's means.[9]

7. Arthur Ripstein, *As if It Had Never Happened*, 48 WM. & MARY L. REV. 1957, 1961, 1978-82 (2007).

8. *Id.* at 1964-71.

9. *Id.* at 1971-72, 1982-87.