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Remembering Gary – and Tort Theory

George P. Fletcher
Columbia Law School, gpfrecht@gmail.com

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REMEMBERING GARY—AND TORT THEORY

George P. Fletcher*

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INTRODUCTION

Tort theory has had a brief but wondrous history. Los Angeles and the UCLA School of Law lie at the core of that history—much more, I am sure, than is likely to be remembered.

In a critical time of my professional life—circa 1970 when I was writing my only widely cited article on tort theory¹—Gary Schwartz and I were almost office mates. We did not share the same room, but we might as well have. We had adjoining offices on the second floor of the old UCLA law school building. We were separated by an internal door, which was closed but porous. I heard everything he said on the phone, and he heard every click of my Royal Standard typewriter and every moan of my frustration in my efforts to write. Herb Morris, Dick Wasserstrom, and Jim Krier were all down the hall, and we could not pass each other without a provocative thought. Michael Tigar was there, too, ominously reminding us that revolution was around the corner.² It was probably the headiest hothouse of ideas I have ever known.

The world barely knew that at that time L.A. was buzzing with new ideas in legal theory, and that these ideas would come to constitute the nucleus of the field that we now call tort theory. Gary Schwartz was destined to become one of the most accomplished and broad-gauged scholars of the field and in many respects to occupy the very center of the movement.

The urgency at the beginning of the 1970s was due to the challenge then emerging from the economists on the East Coast. In New Haven and

* Cardozo Professor of Jurisprudence, Columbia Law School.

1. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

2. Tigar was one of the lawyers in the Chicago Seven trial. See his recent memoir MICHAEL E. TIGAR, *FIGHTING INJUSTICE* (2002).

Chicago, scholars led by Guido Calabresi,³ Ronald Coase,⁴ and Richard Posner⁵ were casting a new way of thinking that posed, in my view, a major threat to traditional ways of thinking about rights, duties, and justice in private law. On the second floor at UCLA, we felt the dramatic tension radiating from the East Coast—and this was before the days of e-mail and the Internet.

Here is how Gary once reflected on the mood at the time:

This initiation [of law and economics] bred, however, an unexpected counterinitiation. In 1972 and 1973, George Fletcher (then located next door to me) and Richard Epstein (who previously had been located down the freeway from me) published articles espousing a “rights” approach to the law of torts. Not since Holmes, perhaps, had ethical issues been pursued so theoretically and so provocatively in tort scholarship. Given the keen enthusiasm with which the Fletcher and Epstein articles were received, there was now underway a major review of the ethical implications of tort doctrine.⁶

In my view the centrality of Los Angeles in this movement was due, largely, to the influence of the philosophers Herbert Morris and Dick Wasserstrom, who in different ways made the younger UCLA faculty highly conscious of the fundamental conflict between utilitarian and deontological approaches to justice.⁷ This was the time, we should remember, that John Rawls published his theory of justice,⁸ and a few years before Morris had published, to great acclaim, his defense of retributive justice, *Persons and Punishment*.⁹ The beneficiary of Herb’s teachings were Michael Moore, then at USC, who developed a strictly retributive approach to punishment,¹⁰ and Herb’s neighbors down the hall—Gary and myself. Also, our remarkable students at the time contributed to my feeling that these ideas mattered. Sharon Byrd,¹¹ David Cohen,¹² and Paul Robinson¹³ were my constant con-

3. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

4. See generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

5. See generally Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

6. Gary T. Schwartz, *Tort Scholarship*, 73 CAL. L. REV. 548, 549 (1985) (citation omitted).

7. I was very much influenced by the intellectual rigor displayed in RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* (1961).

8. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

9. Herbert Morris, *Persons and Punishment*, 52 MONIST 475 (1968).

10. See Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061; Michael S. Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS* 179 (Ferdinand Schoeman ed., 1987).

11. See generally B. Sharon Byrd, *Kant’s Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution*, 8 LAW & PHIL. 151 (1989).

12. See generally DAVID J. COHEN, *LAW, SEXUALITY, AND SOCIETY: THE ENFORCEMENT OF MORALS IN CLASSICAL ATHENS* (1991).

13. See generally PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* (1984).

versational partners and all went on to distinguished academic careers. All three revealed the influence of the deontological, anti-utilitarian thinking then incubating in L.A. Mark Grady was also hanging around at the time, but he was destined for the other team. Alas, we lost him to the economists.¹⁴ With all of these first-rate scholars pouring out of the UCLA School of Law, we could say—perhaps with some risk of exaggeration—that the surge in American tort theory in the last third of the twentieth century had its beginnings not far from the second floor of the old wing of the law school.

Since the early 1970s, the center of gravity in tort theory has shifted to the East Coast, and indeed if a new center took hold, it was to be found in Toronto where Ernest Weinrib began in the 1980s to hold forth on corrective justice in torts.¹⁵ Weinrib brought a passion and a commitment to the project that inspired a new generation of scholars. I am thinking here of Stephen Perry,¹⁶ Peter Benson,¹⁷ Arthur Ripstein,¹⁸ and others who are just beginning to show their banners of fidelity to corrective justice. The Toronto School, together with Jules Coleman¹⁹ at Yale, converted a few sparks of resistance into a sustained philosophical movement.²⁰

This body of theoretical work has had remarkable success at the academic level, but it has barely affected the way the bar and the courts think about tort liability. The field has become more and more esoteric and in latest representations seems to be closer to legal philosophy than to tort law. Two of the prominent writers—Jules Coleman and Arthur Ripstein—teach in law schools without having received law degrees themselves. With few exceptions, the leaders of tort theory know very little about the practical aspects of tort law, certainly not by comparison with the expertise Gary

14. Grady's casebook is heavily oriented toward the economic analysis of law. See MARK F. GRADY, *CASES AND MATERIALS ON TORTS* 1–29 (1994).

15. See Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI-KENT L. REV. 407, 449–50 (1987); Ernest J. Weinrib, *The Insurance Justification and Private Law*, 14 J. LEGAL STUD. 681, 686–87 (1985); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 992–1016 (1988); Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37, 38–43 (1983) [hereinafter *Toward a Moral Theory*].

16. See generally Stephen R. Perry, *Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice*, in *TORT THEORY* 24 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993); Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 72 (Gerald J. Postema ed., 2001).

17. See generally Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 118 (Peter Benson ed., 2001).

18. See generally Arthur Ripstein, *Equality, Responsibility, and the Law* (1999).

19. See generally JULES L. COLEMAN, *RISKS AND WRONGS* (1992).

20. See the theoretical initiatives of American scholars, John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998), and Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1988).

Schwartz commanded in fields as diverse as insurance law²¹ and workers' compensation.²² The field of tort theory has become aligned with pure philosophy, in much the same way that law and economics has progressively become more technical and reserved for those trained in economics.

I remember a conversation I had with Gary circa 1980, in which we tried to ponder academic trends in the United States. Gary loved the question, "So what will come next?" I distinctly recall that conversation because neither of us anticipated the wave of feminist scholarship that was soon to come on the scene.²³ It is fitting, therefore, that one of the last occasions on which I heard Gary speak was in Tel Aviv in December 1999, when, ever open-minded and eclectic, he delivered a paper on feminist approaches to tort law.²⁴ I have the feeling that nothing disturbed Gary more than the thought that something might be happening in the world of ideas—tort ideas—and that he might not be on top of it. So in memory of Gary, I want to ponder to question, "What will come next?" I doubt that I can be more prescient than I was twenty years ago, and even worse, I lack the conversational partner who enabled the conversation to take place.

I. THE CHARACTERISTICS OF TORT THEORY

Because the articles in this issue of the *UCLA Law Review* represent a personal tribute to a departed friend and colleague, I have allowed myself to write a personal article—an opinionated account of tort theory, its past, and its possible futures. I will build my remarks around four defining features of tort theory: (1) its oppositional stance toward law and economics, (2) its commitment to the distinction between corrective and distributive justice, (3) its cultivation of the idea of private law, and (4) its preference for synthesis over a narrow range of ideas—thinking about common law torts to the exclusion of analagous fields. I support some of these features of the field and oppose others.

21. See Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611 (2000); Gary T. Schwartz, *A Proposal for Tort Reform: Reformulating Uninsured Motorist Plans*, 48 OHIO ST. L.J. 419 (1987).

22. See Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739 (1996); Gary T. Schwartz, *Waste, Fraud, and Abuse in Workers' Compensation: The Recent California Experience*, 52 MD. L. REV. 983 (1993).

23. The most frequently cited article is Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989).

24. See generally Gary T. Schwartz, *Feminist Approaches to Tort Law*, 2 THEORETICAL INQUIRIES L. 175 (2001).

A. Anti-Economics

As Gary pointed out, the first generation of articles was stimulated by a felt need to oppose the growing influence of economic thought in tort law. The economic school itself was foreshadowed by two influential movements. One was the utilitarian commitment to solving legal problems on the basis of the beneficial consequence of the decision for society as a whole, and the other was the growing prestige of the social sciences.

Since Bentham's writing in the late eighteenth century,²⁵ the utilitarian orientation had been ascendant in the values of common lawyers. The policy arguments of risk-distribution, deterrence, and enterprise liability all bespeak a utilitarian orientation, which provided the economists with a solid base to argue that the purpose of tort analysis should be efficiency, or cost-benefit analysis.²⁶ The economists were not really saying anything new. Admittedly, the Coase theorem²⁷ was novel, but in its pure form (the rule of liability is irrelevant to the efficient allocation of resources), it provided lawyers and judges with nothing they could use to solve real problems, that is, imposing rules of liability or nonliability. The pure theory—applicable only in nonexistent ideal situations—had to be adapted to imperfect markets in order to become practically relevant. This adaptation was accomplished by merging the Coasian analysis with the use of the Kaldor/Hicks standard of efficiency,²⁸ namely, allocating the rule of liability so that the benefits to the winners outweigh the losses to the losers.²⁹ This standard could be useful to courts but it was nothing new. When stripped of its economic jargon, it turned out to be simply another version of the Benthamite calculus of costs and benefits.³⁰

The economic jargon, however, was important. In the 1950s and 1960s, the law schools had undergone a quest for a method in the social sciences that would be suitable to legal argument. The best candidates at the time were techniques drawn from sociology³¹ and psychiatry.³² By the early 1970s these schools had worn themselves thin. They had produced few

25. See JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (J.H. Burns & H.L.A. Hart eds., Methuen & Co. 1982) (1789).

26. For early references to these ideas, see FOWLER V. HARPER ET AL., *THE LAW OF TORTS* (1956).

27. See Ronald Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1, 42–44 (1960).

28. See generally J. R. Hicks, *The Foundations of Welfare Economics*, 49 *ECON. J.* 696 (1939); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparison of Utilities*, 49 *ECON. J.* 549 (1939).

29. For a survey of the intellectual history of law and economics, see generally GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 158–70 (1996).

30. For a detailed analysis of this claim, see *id.*

31. Good examples of the sociological school are ARTHUR ROSETT & DONALD R. CRESSEY, *JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE* (1976), and JEROME H.

lasting results and there was growing hostility, in particular, toward the inflated claims of psychiatrists in criminal trials.³³ The tide was shifting against psychiatric influence as expert witnesses in criminal trials, and there was growing skepticism about whether any of these social sciences could explain criminal behavior. Our downtown colleague Steve Morse was a critical player in this new tide of humanistic skepticism.³⁴

Suddenly the economists came on the scene. Utilitarianism dressed up as a social science permitted normative judgments without serious empirical research.³⁵ Lawyers could remain in their arm chairs—no need to get their hands dirty with field work—and still expatiate, knowingly, about efficiency, the market, and human welfare as though they had scientific instruments at their disposal.

This is the juncture at which the first wave of tort theorists sounded a call to arms—well, at least to wield our pens, if not our swords.³⁶ We would not surrender the field of tort litigation so easily to those hawking the language of efficiency, transactions costs, cheapest cost-avoiders, and the like. In a surprisingly conservative shift in legal thought, scholars who were otherwise liberal in their politics invoked the authority of old philosophical texts (in particular Aristotle and Kant) and cultivated the tried and tested language of rights, wrongs, and duties. There were some relatively new elements—namely, the idiom of risk and of reciprocity—but otherwise the language of tort theory appeared to be a chapter out of Blackstone or another eighteenth-century treatise. In many respects, the debate in the early 1970s was simply a replay of the old feud between Bentham and Kant about those “who crawl through the windings of eudaemonism [or happiness theory] in order to discover”³⁷ some benefits that exceed the costs of their actions.

SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY (2d ed. 1975).

32. Good examples of the psychiatric school are RICHARD C. DONNELLY ET AL., CRIMINAL LAW: PROBLEMS FOR DECISION IN THE PROMULGATION, INVOCATION, AND ADMINISTRATION OF A LAW OF CRIMES (1962); ALBERT A. EHRENZWEIG, PSYCHOANALYTIC JURISPRUDENCE: ON ETHICS, AESTHETICS, AND “LAW”—ON CRIME, TORT, AND PROCEDURE (1971); and JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973).

33. See David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 390–97 (1976).

34. See the famous debate between David Bazelon and Steve Morse. *Id.*; Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976).

35. Arthur Leff was first to articulate this biting critique in Arthur Allen Leff, *Economic Analysis of the Law: Some Realism About Normalism*, 60 VA. L. REV. 451, 457–59 (1970).

36. Along with *Fairness and Utility*, Fletcher, *supra* note 1, the most frequently cited article in the “first generation” of the movement is Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

37. This famous phrase appears in IMMANUEL KANT, THE METAPHYSICS OF MORALS 141 (Mary Gregor trans., Cambridge University Press 1991) (1797).

But the new tort theorists hardly formed a common front against the welfare- or efficiency-minded economists. For Richard Epstein, it seems, the primary goal was to state simple rules of tort liability that would emphasize the elements of observable causation, for example, A hits B.³⁸ His theory of strict liability would have appealed to him, I think, whether economic theory had been a growing threat or not.³⁹

In my case, however, the opposition to economic thinking in tort law was deeply felt and enduring. There is no doubt that I was trying to do in tort law what Herb Morris was seeking to accomplish by revising theories of retribution in criminal law. I sensed that tort law was driven by tension between two paradigms (or models) of liability—the paradigms of reciprocity and of reasonableness. The former gave a good account of traditional law. The latter captured the spirit of economic analysis and cost-benefit analysis. I implicitly favored the paradigm of reciprocity, but I did not then and I do not now believe in a synthesis that could resolve the conflict between the thesis of reciprocity and the antithesis of reasonableness. In this respect my approach differed from Morris's, which seemed to endorse a single consistent view of punishment.⁴⁰

Rather than endorse “reciprocity” as the answer to problems of tort theory, I was drawn to the drama of the unending intellectual duel between the deontological and the efficiency theorists. The duel was an end in itself. Though I did not know it at the time, I was in fact in tune less with the Enlightenment ethics of Immanuel Kant than with a host of views in the late-eighteenth- and early-nineteenth-century school of German Romanticism—Hamann, Fichte, Herder, Schiller.⁴¹ Not surprisingly, this methodology of paradigmatic conflict found very few followers. The readers of my first article tend to focus on the paradigm of reciprocity as a proposed synthesis of tort law. Later writers like Weinrib and Coleman all favored a set of propositions as their theory of corrective justice,⁴² without worrying whether inconsistent ideas survived in the deep recesses of legal thought.

There were differences, to be sure, between Weinrib and Coleman. Weinrib shared my position of instinctive antagonism toward economic analysis and developed a host of theories to show that economic analysis of

38. Richard Epstein is well known for his later work in this vein, RICHARD EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

39. Epstein's theory was not really one of strict liability. See George P. Fletcher, *The Search for Synthesis in Tort Theory*, 2 *LAW & PHIL.* 63, 64–72 (1983).

40. See Morris, *supra* note 9, at 476.

41. I have explored this conflict in greater depth in GEORGE P. FLETCHER, *ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM* (2002), which I connect to tort theory. *Id.* at ix–xii.

42. See COLEMAN, *supra* note 19, at 361–85; sources cited *infra* note 43.

tort cannot account for the institutions of tort law as we know them.⁴³ From the outset, Weinrib emphasized the correlation of the defendant's wrong and the violation of the plaintiff's right. This correlativity, he claims, is implicit in our understanding of tort litigation. Plaintiff sues for the violation of a right and collects from the defendant who has wrongfully violated the right. This way of thinking was flatly incompatible with the economic argument that we tax the defendant in order to generate more efficient conduct and give the plaintiff money not because her right was violated, but because she has served as a private attorney general by bringing the dispute to the attention of the court.⁴⁴

The correlativity thesis, then, was Weinrib's way of showing that the very structure of tort disputes belied the claims of the economists. Coleman eventually came around to this position, but by a curious route. He began by adopting a distinction I introduced in my 1972 article,⁴⁵ namely between the violation of the plaintiff's right and the wholly separate question whether the defendant who caused the loss should pay for the loss.⁴⁶ This division was necessary, in my view, because in cases of excused wrongdoing, the defendant violates the plaintiff's right but need not pay for it.⁴⁷ Also, there are the converse cases of strict liability where the defendant acts properly, in keeping with the norms of society, but must nonetheless compensate the plaintiff for the loss. *Vincent v. Lake Erie Transportation Co.*⁴⁸ and *Rylands v. Fletcher*⁴⁹ became the leading cases for pondering this central problem. In both of these cases, the defendant's conduct (tying his ship to a dock during an emergency and maintaining a reservoir on his property) represent actions that are reasonable and socially beneficial and yet provide a basis for imposing liability.

It is difficult to follow Coleman's thinking about torts because he does not share the foundational opposition to law and economics one finds in much of corrective justice literature. He appears to yield to the claims of the

43. See generally Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277 (1994) [hereinafter *Gains and Losses*]; Ernest J. Weinrib, *Non-Relational Relationships: A Note on Coleman's New Theory*, 77 IOWA L. REV. 445 (1992); *Toward a Moral Theory*, *supra* note 15; Ernest J. Weinrib, *Utilitarianism, Economics, and Legal Theory*, 30 U. TORONTO L.J. 307 (1980).

44. The dramatic example of this theory in practice is *Li v. Yellow Cab Co. of California*, 532 P.2d 1226 (Cal. 1975), which recognizes the doctrine of contributory negligence but only prospectively. *Id.* at 1229. The plaintiff Li is included in the new rule presumably to reward her for having brought the case to court. *Id.* at 1244.

45. Fletcher, *supra* note 1, at 540-41.

46. See Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 423 (1982); Jules L. Coleman, *Justice and Reciprocity in Tort Theory*, 14 W. ONTARIO L. REV. 105, 106-07 (1975); Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II*, 2 LAW & PHIL. 5, 30 (1983).

47. Fletcher, *supra* note 1, at 551.

48. 124 N.W. 221 (Minn. 1910).

49. 3 L.R.-E. & I. App. 330 (1868) (appeal taken from Eng.).

economists on disputed issues and thus to accommodate rather than refute the opposition.⁵⁰ Nor does he seem to care very much about the Aristotelean roots of corrective justice. He seeks an understanding of some free-floating concept of corrective justice without any particular interest in the way the term has been used in the history of philosophy.⁵¹

Coleman and Weinrib share one important characteristic, which in my view represents a serious deficiency in both of their systems of thought. Neither of them can account for strict liability as manifested in *Vincent and Rylands*. Both recoil at the thought that there might be tort liability for the harmful consequences of reasonable, socially acceptable behavior. The reason for this blind spot is that they both think that wrongdoing is essential to tort liability. But strict liability—liability for harmed caused by risk-taking without wrongdoing—is a fact of modern tort law. It is a respectable, indeed favored, branch of liability. Gary wrote several articles documenting the relative influence, in practice, of negligence and strict liability.⁵² It is surprising that two leading figures of the field cannot account for an elementary fact point of the law, namely the practice of imposing strict tort liability.

B. Corrective Versus Distributive Justice

For all of our mistakes, corrective justice theorists properly separate themselves from the economists with their sense of the questions and issues at play in the law. Economists divide the universe of tort law into just two categories: efficiency and equity. Their standard line is that they are in favor of equitable distribution, but only at the second stage of analysis. The first job of any legal system, they say, should be to promote efficiency, in the familiar metaphor, to increase the size of the pie. The second stage of distribution focuses on the pie's fair distribution.

Ignored in this reduction of all forms of justice to "equity" is the critical Aristotelean distinction between distributive and corrective justice.⁵³ Distributive justice addresses the way in which an asset held by the state should be divided up among possible claimants. The standard of equal distribution represents a familiar default principle of distributive justice. Rawls offers a

50. See my critical review of Coleman's theory of torts in George P. Fletcher, *Corrective Justice for Moderns*, 106 HARV. L. REV. 1658 (1993) (reviewing COLEMAN, *supra* note 19).

51. I recall questioning Coleman about this point in a Legal Theory Workshop at Columbia, sometime in the early 1990s. His response was that he did not care about whether he was faithful to Aristotle's analysis.

52. See Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981).

53. This distinction is set forth in ARISTOTLE, *THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS* 125–34 (J.A.K. Thomson trans., 1953).

variation on the principle of equality by permitting deviations in favor of certain groups, provided that the imbalance benefits the least advantaged and the favored positions are open to all.⁵⁴ It is all right, for example, for CEOs to receive a higher salary than do workers, provided that the additional incentives generate an economic expansion that benefits low-paid workers as well.

Corrective justice addresses a localized problem of benefits and burdens produced by a single transaction. An accident occurs and victims are injured. How do we correct the loss that has occurred? This is the prototypical situation of corrective justice. Merely shifting the loss from the victim to the defendant causing the accident by requiring compensation does not "correct" the injustice—it merely relocates the problem. Instead of the victim's suffering a setback, the defendant bears the loss. In order to think about correcting the injustice and thus eliminating it, Aristotle indulged in the assumption that the person who causes a loss simultaneously gains from the same action.⁵⁵ If there is arithmetic parity between the gain and the loss and the shift in wealth is undeserved, then it is easy to correct the imbalance: Take away the gain and vest it in the victim. Thus, we can explain the phenomenon of requiring the defendant to compensate the plaintiff in tort cases. This is simply an application of Aristotle's principle of corrective justice.

There is only one problem—how do we know that the gain to the defendant is equivalent to the plaintiff's loss? In cases of theft, this seems plausible. But is it plausible in cases of intentional injury to persons or in cases of risk-taking? A hits B in the nose. Does A gain as much as B loses? Weinrib has struggled with this issue more than anyone, and he offers an account for how the gains can equal the losses, even if they are not quantitatively equal.⁵⁶

Whatever the problem of working out the distinctions between distributive and corrective justice, theorists ignore the distinction—as Oliver Wendell Holmes, Jr. would have said—"at their peril."⁵⁷ The distinction is fundamental to the way lawyers think, and economists who reduce both forms of justice to their notion of equity are simply oblivious to the nuances of legal thinking. For example, economists cannot account—so far as I can tell—for our commitment to an institutional differentiation between legislation and adjudication. Considering the wealth of taxpayers is relevant for a

54. See RAWLS, *supra* note 8, at 60–61.

55. See *supra* note 53.

56. *Gains and Losses*, *supra* note 43, at 282–97.

57. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 108 (1881). For my newly acquired appreciation of Holmes's wisdom in tort theory, see George P. Fletcher, *The Fault of Not Knowing*, in 3 *THEORETICAL INQUIRIES* L. 265 (2002).

sound system of income and estate taxation, but no one seriously proposes that we consider the wealth of the parties in tort litigation. Despite all the reckless talk in first-year torts classes about judges pursuing “deep pockets,” I have never heard anyone seriously advocate that we require litigants to declare their net income or their net worth in their complaints and answers. Why is this? Without an understanding of the difference between corrective and distributive justice, we cannot even begin to formulate an answer to this question, and we cannot account for our intuitive understanding that wealth is relevant to legislation and other ex ante regulation but not relevant to the ex post, transaction-oriented inquiries about correcting injustices that occur when people negligently or intentionally injure each other.

C. The Concept of Private Law

If you ask the typical lawyer or law professor, “Is tort law private or public law?”, I am inclined to think the response would be polite disdain. “What an irrelevant question,” might be the thought. Or, if there is any answer forthcoming, it would probably be, “Tort law is private law because the state is not involved.” But if I press the issue and say, “Yes, is not the public involved? Is not the purpose of tort law to serve the public by compensating victims, deterring dangerous conduct, and distributing risks?”, the answer might change. “Well, if that is what you mean by public law, then I guess tort law is public law.” If you rub the right political nerve, you might even get your conversational partner to quote the line I have heard attributed to Vladimir Ilych Lenin: “All law is public law.”

On this particular issue, I am afraid Americans conform to Lenin’s supposed views. In the United States the reigning view is that the resolution of private disputes is supposed to further the public interest. This is the standard view propagated in first-year courses emphasizing the importance of policy interests that invariably reach beyond the welfare of the particular litigants in court. Policies speak to the interests of the public. Against this backdrop of moves and countermoves, the Canadian School of tort theory has introduced a dramatic shift in the discourse of legal thought.

The shift is revealed in the title of Ernie Weinrib’s 1995 book, *The Idea of Private Law*.⁵⁸ Picking up the book recently, I was touched to find two blurbs of praise on the back cover—one by Gary Schwartz, the other by myself.

By locating torts squarely within private law, Weinrib provides a foundation for a series of interconnected claims about the correlativity of the defendant’s wrong with the plaintiff’s right, corrective justice, and the im-

58. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

portance of understanding tort law on its own terms rather than by an appeal to purposes like deterrence and risk distribution.⁵⁹ My problem with the exposition of that idea, however, is that the more I read, the more I am inclined to think that Weinrib and the Toronto school have simply turned Lenin on his head. I am not sure how they can avoid the conclusion that all law is private law.

European legal thought traditionally distinguishes between public law and private law, but the way these categories are interpreted and understood differs dramatically among the English, French, and German spheres of influence. The point of difference is the approach to criminal law. Blackstone treated crimes as public wrongs as opposed to torts, which were private wrongs.⁶⁰ The plot thickens when we notice the French treat criminal law as *droit privé* as opposed to *droit public*.⁶¹ This is a startling and generally unnoticed feature of French university life. It also explains why criminal law in France suffers from extraordinary neglect. Scholars who would become specialists in criminal law must sit for the same competitive exam in private law as students of commercial and corporate law. There is no room for someone who wants to cultivate criminal law on its own terms. In contrast with both the English and French approaches, German universities treat criminal law as a separate field, standing as an equal partner with private law and state law, which includes constitutional and administrative law.

The French approach is the most intriguing. How could a legal culture come to the conclusion that criminal law is private law? The answer given by French scholars is illuminating. Private law, they say, is about the rights and duties of individuals. Public law is about the prerogatives of the state.⁶² My way of understanding this claim is to think about our conventional understanding in constitutional law of the distinction between problems of governmental structure and the issue of restraining governmental action in

59. This, by the way, is the approach that leads Weinrib to deny the existence of strict liability. He raises the topic in *id.* at 171–203, but quickly dismisses strict liability as a deviation from the “true” principles of tort law.

60. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (8th ed. 1778).

61. See DAHL'S LAW DICTIONARY: FRENCH TO ENGLISH/ENGLISH TO FRENCH: AN ANNOTATED LEGAL DICTIONARY, INCLUDING DEFINITIONS FROM CODES, CASE LAW, STATUTES, AND LEGAL WRITING 120 (2d ed. 2001).

62. See MARCEL PLANIOL & GEORGE RIPERT, 1 TREATISE ON THE CIVIL LAW § 5A, No. 19 (Louisiana State Law Institute trans., 12th ed. 1959) (1939). Planiol writes:

One must in the first place distinguish public from private law, a distinction which is capital and quite unusual. The reason underlying it is not however always discerned. Public law regulates the acts of persons who act in the general interest, in virtue of a direct or mediate delegation emanating from the sovereign. Private law regulates the acts which individuals do in their own names for their individual interests.

Id. (citation omitted).

the name of individual rights. Whether President Bush has the authority as commander-in-chief to establish military tribunals belongs to the former category. Whether military tribunals violate the Sixth Amendment right to a jury trial belongs to the latter set of questions. In the French way of thinking, the former questions of competence are public law; the latter questions of individual rights are private law.

Criminal law is, of course, about rights and duties. Does the state have a right to punish? Does the individual in a particular situation have a right to counsel or a right to claim a particular instruction on the issue of self-defense? The elaboration of these rights and duties seems to have the same structure and the same formal correlation of issues and parties as we find in tort law. That one of the parties is the state turns out to be irrelevant. Congratulations to the French for bringing this brilliant argument to the table.

Weinrib makes the mistake of thinking that he can clarify the concept of private law without addressing the nature of public law. Perhaps there are deep reasons for this mistake. He believes that things should be understood on their own terms—not by the comparative method of asking how this thing differs from closely related things. If it is possible to understand private law just by examining private law, I need to understand how it is done. I confess that I am unable to think except by using the comparative method.

D. Synthesis over a Narrow Range

This brings me to the last of my four comments about the characteristics of tort theory, which I have dubbed a preference for synthesis over a narrow range of questions. The striking feature of tort theory, so far as I am concerned, is its persistently narrow focus. I have already noted the way in which some tort theorists chop over entire bodies of law in order to sustain their claims about, say, the essential role of fault or wrongdoing in liability.⁶³ The same tendency toward a limited focus is evident in the failure to engage in a serious study or discussion of tort law outside the English-speaking world. The field of comparative tort law—like most fields of comparative law—remains understudied. Rich conceptual and sociological insights await researchers who are willing to take the time to master tort law outside the English-speaking world.

Even more seriously, I detect a general disinterest in reaching beyond the boundaries of tort law in order to understand the way tort fits into the entire structure of legal liability. The natural points of comparison for theorists of torts would be the fields of criminal law and contracts. Criminal law

63. See *supra* notes 26–35 and accompanying text.

and torts raise almost all the same issues, so how is it possible to work in one field and not the other? Blackstone thought of both fields as “wrongs” but he did not pursue the comparison much further than that. It is fair to say that the criminal lawyers suffer more from not keeping abreast of tort theory than vice versa. As I have noted several times in print,⁶⁴ tort theory in the United States is far better developed than is substantive criminal theory—a phenomenon that itself requires additional study and explanation.

Despite some efforts to explore the interconnections between tort and contracts, one might expect even greater attention to these two fields as the core of the general theory of obligations. No one studies torts in the German or French spheres of influence without first learning the general theory of obligations. Of course, the economists are not the slightest bit reluctant to offer sweeping generalizations about all subdivisions of the law. The question for them is always the same—how to structure incentives in order to achieve efficient results. Tort theorists need not buy into this reductionist question in order to pursue synthesis over a broader range of questions.

My prediction is that the future of tort theory lies in exploring intersections with the closely related fields of criminal law and contracts. I am skeptical about whether comparative studies will receive the attention they deserve. Yet it is possible to remain at home—in our arm chairs, as Arthur Leff might have said⁶⁵—and cast our glance toward the neighboring fields of criminal law and contracts, thus acquiring a better perspective on the internal questions of tort law. The ongoing vitality of tort requires that we broaden the range of our inquiry. And thus we are called upon to confront whole new dimensions of philosophical and theoretical questions about the underlying unity of the legal culture. Will we do it? Well, as Gary knew, I always had a weak sense for predicting future trends.

64. George P. Fletcher, *The Fall and Rise of Criminal Theory*, 1 *BUFF. CRIM. L. REV.* 275 (1998).

65. See Leff, *supra* note 35, at 451.