DETERRENCE AND CORRECTIVE JUSTICE

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This Article considers, from the standpoint of corrective justice, Gary Schwartz's suggestion that tort law should be understood through a mixed theory that affirms both corrective justice and deterrence. When corrective justice and deterrence are both treated as determinants of tort norms, such a mixed theory is impossible, given that corrective justice treats the parties relationally and deterrence does not. But if deterrence goes not to the justification for particular norms but to the operation of the ensemble of norms as a system of positive law, a mixed theory becomes possible even for a proponent of corrective justice. Such a theory could maintain its unity through the ordering of its elements in a conceptually sequenced argument. Illustrative of a conceptually sequenced argument is Kant's account of the excuse of necessity. Kant distinguishes between (and sets in their proper conceptual order) the role of the concept of right in determining legal norms and the role of positive law in deterring the violation of those norms. Because Kant provides a philosophical elucidation of corrective justice, the way he incorporates deterrence also applies to contemporary corrective justice theory. To that extent, a proponent of corrective justice can accept a theory that affirms both corrective justice and deterrence.

I. GARY SCHWARTZ'S SUGGESTION OF A MIXED THEORY

The passing of Gary Schwartz deprives tort law of one of its most erudite, perceptive, and judicious observers. Gary was passionate about tort law while being dispassionately fair in his judgments about developments in the tort world. Dogmatism was alien to him. Instead, he insisted on examining every idea on its merits and without preconceptions, critically but sympathetically evaluating it in the light of his enormous knowledge of tort law and his intimate familiarity with every variety of tort scholarship.

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One testament to Gary's balance and moderation is his article *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*.[1] In this article Gary attempts to bridge the divide between what he saw as the major competing approaches to contemporary tort law. One approach "understands tort liability as an instrument aimed largely at the goal of deterrence, commonly explained within the framework of economics. The other looks at tort law as a way of achieving corrective justice between the parties."[2] Gary observes that the proponents of the two approaches form unfriendly camps, each of which neglects or even derides the contribution of the other.[3] Gary's objective in this article is to suggest reasons for thinking of a "mixed theory" that might overcome, at least in part, the apparent dichotomy between these two rival conceptions of tort liability.[4]

Gary's discussion is rich and suggestive. He acknowledges his tentativeness about the precise form of the suggested mixed theory.[5] He suggests different formulations of the theory and different accounts of the relationship of deterrence to corrective justice. At some points he focuses on the structure of tort liability;[6] at others he is concerned with specific doctrines.[7] Clearly his intent is to raise possibilities for reconciliation between the two rival camps rather than to formulate the definitive terms for a permanent harmony.

In keeping with his conciliatory purpose, Gary avoids polemics. While he regards one approach as being better at some things and the other approach at other things, he evinces no interest in determining whether the deterrence theorists or the corrective justice theorists have the better of the argument at the end of the day. His suggestion of a mixed theory presupposes the validity of both its component aspects. For Gary, deterrence and corrective justice are not competing ideas that each leave no room for the other.

Instead, Gary proceeds on the basis of a fascinating and novel premise that even he himself does not explicitly articulate. Accepting the initial plausibility of both deterrence and corrective justice, he suggests, in effect, that each *from its own point of view* would have reason to incorporate the other in some form. On this premise the reconciliation of deterrence and corrective justice does not involve the betrayal of either. Gary's suggestion is that proponents of corrective justice, although unwilling to identify tort

1. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).
2. *Id.* at 1801.
3. *See id.*
4. *See id.* at 1801–02.
5. *Id.* at 1801.
6. *See id.* at 1815–19.
7. *See id.* at 1819–23.

law with the pursuit of deterrence, may nonetheless view deterrence as consonant with their ideal.[8] Similarly, champions of deterrence, although repelled by what they regard as the moralistic mushiness of corrective justice, might nonetheless view corrective justice as complementary to deterrence when the commission of a tort shows that undesirable conduct has not in fact been deterred. Thus, corrective justice and deterrence, despite their apparent incompatibility, each function to forward the other.

This premise perhaps accounts for the admitted tentativeness of the form that his mixed theory should take. His argument points to the possibility of mixing but is not designed to produce a single definitive mixture. A mixture in which deterrence serves the needs of corrective justice cannot be identical to a mixture in which corrective justice serves the needs of deterrence. Indeed, the very meaning of deterrence and justification would vary in the two kinds of mixture. For the proponent of deterrence, corrective justice would refer to the institutional framework of bipolar litigation that enforces tort norms without informing them.[9] In contrast, the proponent of corrective justice would see corrective justice as informing the norms of tort law, with deterrence referring to the need to prevent the occurrence of injustice as these norms define it.[10] Gary's suggestion, in other words, would produce no overarching theory of the interrelationship of deterrence and corrective justice but rather a variety of such theories, each one of which would assign a different significance to its component parts.[11] That, I suspect, would be sufficient for Gary's goal of weakening the scholarly barriers between the different approaches to tort law.

In this Article in tribute to Gary's scholarship, I want to take up and develop his suggestion about the role of deterrence in a corrective justice approach.[12] From the perspective of corrective justice, tort liability rectifies the wrong that one person has done to another. This attention to the relationship between the parties means that, so far as corrective justice is concerned, the norms of tort law—and indeed of private law more generally—reflect and are reflected in the bipolar structure of private law litigation. Because the only justifications that matter for corrective justice are those whose justificatory force is congruent with the bipolar relationship between

8. *See id.* at 1827.

9. *Cf. id.* at 1816–18 (contending that, although structurally imperfect for producing optimal deterrence, the tort suit produces results that are roughly acceptable for deterrence purposes).

10. *Cf. id.* at 1834 (noting that "tort law, when it deters negligence, prevents the occurrence of injustice").

11. For Gary Schwartz's survey of the varieties of deterrence, see *id.* at 1828–33.

12. I ignore the converse question of how a deterrence approach can accommodate corrective justice. For another appraisal of Gary's article, see Jeffrey O'Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137 (2000).

the plaintiff and the defendant, corrective justice purports to exhibit both fairness and coherence. It exhibits fairness because corrective justice attends to both parties in their interrelationship. It exhibits coherence because the relationship between the parties is conceived as a normative unit, any aspect of which is to be understood in the light of the relationship as a whole.[13]

Can corrective justice coexist, as Gary suggests, with the ascription of a deterrent function to tort law? At first blush, given the nature of corrective justice, the prospect is not promising. Corrective justice sees the remedy as corresponding to and undoing the wrong. One cannot, therefore, affirm both corrective justice and deterrence by regarding corrective justice simply as going to the remedy and thus compatible with even deterrence-based norms. Moreover, the particularly stringent notion of coherence with which corrective justice operates makes corrective justice internally monistic. On the corrective justice view, no room exists within the private law relationship for normative considerations, such as those based on deterrence, that are not themselves expressions of corrective justice.

However, in this connection it is helpful to distinguish between the two forms that the deterrent function can take. The first is that deterrence might be a component in the justification of particular tort norms. For example, a deterrence theorist might argue that the desirability of minimizing or avoiding a certain range of harms itself structures or ought to structure the legal doctrine concerning causation or reasonable care.[14] This is the form that is most common in current academic debate. As I shall describe in Part II, corrective justice is inconsistent with, and therefore cannot accommodate, this deterrence function. This is because the corrective justice approach to justification intrinsically links the parties to each other as the doer and the sufferer of an injustice, whereas deterrence can be applied independently to each of the parties. Corrective justice and deterrence thus represent incompatible modes of understanding the justification for particular tort doctrines.

In contrast, a second form of deterrence goes not to the justification for particular norms but to *the operation of the ensemble of norms as a system of positive law*. Whatever norms a system of positive law has and however they are justified, it also intends those norms to have an effect on persons' con-

13. For this conception of corrective justice, see ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995). *See also generally* Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349 (2002). On the relationship between this conception of corrective justice and that of other corrective justice theorists, see generally Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107 (2001) [hereinafter *Emerging Consensus*].

14. For outstanding examples by pioneers of economic analysis, see generally Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975), and Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

duct. Through the very process of defining wrongs and penalizing wrongdoers, the legal system signals its wish to deter wrongful conduct. Here, however, deterrence does not determine the norms (as is the case with the first form of deterrence), but is an additional feature that comes into play once the norms have been determined. Corrective justice, which deals with the norms' justificatory structure, is not inconsistent with this function of deterrence. Yet deterrence in this sense, which comes on the scene after the wrong has been defined, is not part of corrective justice either. Although not antagonistic, the two seem to be mutually indifferent. Thus, there remains the theoretical puzzle of how an approach as monistic as corrective justice can extend itself even to this deterrence function. Is corrective justice, with its stringent conception of coherence, nonetheless part of what Gary calls "a mixed theory"?

The notion of a mixed theory is at the heart of Gary's position. This notion is itself somewhat puzzling, because the adulteration of a theory supposedly diminishes its theoretical significance. How, one might wonder, is a mixed theory possible? Of course, this question was not uppermost in Gary's mind. His attention was directed not to theory as such but to the practical understanding of tort law. Nonetheless, it is the theoretical implications of a mixed theory on which I want to focus. It seems to me that this would be an apt continuation of the conversation that Gary's article was intended to stimulate.

Accordingly, in Parts III, IV, and V, I deal with the question of how a mixed theory, such as one that combines corrective justice and the second form of deterrence, can maintain its unity. Here I draw on an important recent article by my colleague Bruce Chapman on pluralism in tort theory.[15] Chapman suggests, instancing George Fletcher's treatment of excuses,[16] that one can understand the pluralism of genuinely diverse ideas as an ordering through a conceptually sequenced argument.[17] Developing this idea, I argue in Part IV that a more cogent example of conceptually sequenced argument surfaces in Kant's account of the excuse of necessity.[18] Crucial to this account is Kant's distinction between the role of the concept of right in determining legal norms and the role of positive law in deterring the violation of those norms. Because Kant's treatment of right provides a philosophical elucidation of corrective justice, the Kantian incorporation of deterrence also

15. Bruce Chapman, *Pluralism in Tort and Accident Law: Toward a Reasonable Accommodation*, *in* PHILOSOPHY AND THE LAW OF TORTS 276 (Gerald J. Postema ed., 2001).

16. George P. Fletcher, *Fairness and Utility in Tort Law*, 85 HARV. L. REV. 537, 551–56 (1972).

17. Chapman, *supra* note 15, at 308–10.

18. IMMANUEL KANT, *The Metaphysics of Morals* (1797), *in* PRACTICAL PHILOSOPHY 353, 391 (Mary J. Gregor trans. & ed., 1996).

applies to contemporary corrective justice theory. Accordingly, as I suggest in Part V, to that extent proponents of corrective justice can accept Gary's affirmation of both corrective justice and deterrence.

II. DETERRENCE AND CORRECTIVE JUSTICE AS DETERMINANTS OF TORT NORMS

Tort theory attempts to formulate a general conception of the justifications that underlie the norms of tort law. As determinants of tort norms, deterrence and corrective justice invoke different forms of justification. The difference consists in this: Corrective justice, unlike deterrence, views the justifications as intrinsically connected to the relationship between the plaintiff and the defendant.

The point of departure for corrective justice is that liability treats the parties as correlatively situated. This correlativity highlights the obvious fact that the liability of the defendant is always a liability to the plaintiff. Liability consists of a legal relationship between two parties each of whose position is intelligible only in light of the other's. In holding the defendant liable to the plaintiff, the court is making not two separate judgments, one that awards something to the plaintiff and the other that coincidentally takes the same thing from the defendant, but a single judgment that embraces both parties in their interrelationship. The defendant cannot be thought of as liable without reference to a plaintiff to whom such liability runs. Similarly, the plaintiff's entitlement exists only in and through the defendant's correlative obligation.

Because liability corrects an injustice, that injustice also is correlatively structured. In bringing an action against the defendant, the plaintiff is asserting that they are connected as doer and sufferer of the same injustice. As is evidenced by the judgment's simultaneous correction of both sides of the injustice, the injustice done by the defendant and the injustice suffered by the plaintiff are not independent items. Rather, they are the active and passive poles of the same normative occurrence, so that what the defendant has done counts as an injustice only because of what the plaintiff has suffered, and vice versa. Each party's position is normatively significant only through the position of the other, which is the mirror image of it.

This correlativity figures in the way that tort doctrine constructs the tort relationship. In treating the parties as doer and sufferer of the same injustice, tort law elaborates legal categories that reflect the identical nature of the injustice on both sides. Because the defendant, if liable, has committed the same injustice that the plaintiff has suffered, the reason the plaintiff wins ought to be the same as the reason the defendant loses. In specifying the nature of the injustice, the only normative factors to be considered sig-

nificant are those that apply correlatively to both parties. Normative considerations that reflect the correlative situation of the two parties set terms for their interaction that take account of their mutual relationship and therefore are fair to both of them. Such considerations also reflect the unity of the relationship between the plaintiff and the defendant, thus allowing tort law to function as a coherent enterprise in justification rather than as a hodgepodge of factors separately relevant only to one or the other of the parties.

The overarching justificatory categories expressive of correlativity are those of the plaintiff's right and the defendant's corresponding duty not to interfere with that right. The injustice of tortious conduct consists in the defendant's doing something that is incompatible with a right of the plaintiff. Right and duty are correlated when the plaintiff's right is the basis of the defendant's duty and, conversely, when the scope of the duty includes the kind of right-infringement that the plaintiff suffered. Under those circumstances the reasons that justify the protection of the plaintiff's right are the same as the reasons that justify the existence of the defendant's duty.

Under the corrective justice approach, then, correlativity becomes the key to understanding, justifying, and assessing private law's concepts, principles, and doctrines. The only considerations that conform to corrective justice are those that apply correlatively to both parties. Such considerations set terms for the two parties' interaction that take account of their mutual relationship and are consequently fair to both of them. Inadmissible are considerations whose justificatory force extends only to one party, because the fair terms of a bilateral interaction cannot be set on a unilateral basis. In this way, corrective justice holds the practice of liability to the normative implications of liability's own correlative structure.

In contrast, deterrence attaches no special significance to the relationship between the parties. The question of how the law might apply its pressure to prevent undesirable conduct has no intrinsic connection with the plaintiff-defendant link characteristic of a liability regime. The principal focus on deterrence in the tort context has been on prospective defendants, with prospective plaintiffs playing a secondary role at most. As Richard Posner once observed in his economic account of deterrence, the inducing of cost-justified precautions supports taking money from the defendant, "[b]ut that the damages are paid *to the plaintiff* is, from an economic standpoint, a detail."[19] Some of the most interesting and imaginative deterrence analyses have postulated "decoupling" liability, so that the incentives on the two parties can be modulated to the separate deterrence requirements of each of

19. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 143 (2d ed. 1977).

them.[20] Such analyses recognize that the plaintiff-defendant nexus as it appears in a liability regime constitutes an artificial restraint from the standpoint of deterrence. Other deterrence theorists, Posner himself for instance, explain that nexus by reference to a separate set of incentives that apply to the plaintiff.[21] However, even these more conservative accounts do not intrinsically link plaintiff to defendant, as corrective justice does. Rather, they construe the presence of both parties as the consequence of combining the incentives that are independently applicable to each.

Accordingly, one can formulate the contrast between corrective justice and deterrence as follows. Corrective justice necessarily joins the defendant as the doer of the injustice to the plaintiff as the sufferer of the injustice. To consider the plaintiff's injury independently of the defendant's tortious action is to render unintelligible the phenomenon of liability. Thus, a justification that pertains to a feature of liability must necessarily reflect the relational structure that is characteristic of a liability regime. Deterrence, on the other hand, is not necessarily relational. Deterrence must always acknowledge the possibility that its objectives might more adequately be served by treating the tortfeasor's action independently of the victim's suffering. And even when deterrence analysis does manage to forge a connection between the two, that connection is not intrinsic to deterrence as a justifying idea, but is the contingent result of unconnected incentives. Thus, corrective justice and deterrence presuppose radically different forms of justification.

This difference does not preclude the two approaches from arriving at the same results. Deterrence and corrective justice may, for instance, concur in a particular rule of liability. They cannot, however, arrive at the same results for the same reason. Because tort theory aims at a general account of the reasons for liability, concurrent results would not efface the theoretical differences that generated them. Nor, of course, would these results indicate the existence of a mixed theory. All we would have is a coincidence of results from two independent theories.

20. Schwartz refers to the suggestion by Mitchell Polinsky and Yeon-Koo Che that the defendant should pay more than the victim's loss and the victim should receive less than the actual loss, with the residue going to cover the state's administrative costs. Schwartz, *supra* note 1, at 1818 n.129; *see also* A. Mitchell Polinsky & Yeon-Koo Che, *Decoupling Liability: Optimal Incentives for Care and Litigation*, 22 RAND J. ECON. 562, 562 (1991). For an even more extreme proposal in the contracts context, see generally Robert Cooter & Ariel Porat, *Anti-Insurance*, 31 J. LEGAL STUD. 203 (2002), arguing that contract damages should go to a third party, not to the victim of the breach.

21. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 209 (5th ed. 1998).

III. Conceptually Sequenced Argument

This contrast shows that corrective justice and the norm-determining version of deterrence are genuinely diverse ideas. How can these ideas be combined into a single, albeit mixed, theory without having their distinctness blurred? And if they remain distinct, how does the theory that mixes them maintain the cohesion and comprehensiveness that give it theoretical significance?

One possibility is to regard deterrence and corrective justice as different aspects of a single set of principles. The idea is that despite their apparent differences, they simultaneously contribute to a more inclusive unity within a larger whole. A utilitarian, for instance, might say that deterrence and corrective justice refer to two different markers of utility that can be included in a suitably capacious utilitarian calculation. As my colleague Bruce Chapman put it in his recent illuminating treatment of pluralism in tort law, "Different values or choice criteria might in some direct sense be independent of one another, but nevertheless be indirectly related and, therefore, systematizable under some more comprehensive justificatory purpose."[22] After noting that this has always been the promise of utilitarianism, Chapman goes on to observe:

> Of course, this suggests that the pluralism with which we began is more apparent than real, for now the many criteria so systematized, while not immediately related to one another, are construed as mere aspects of some overarching super-value, such as utility or welfare, which provides a common measure, or commensurability, for them all.[23]

The possibility of thus transforming a mixed theory into a more general monistic theory—a possibility that Chapman rightly dismisses—does not plausibly apply to the treatment of tort liability as a mixture of corrective justice and deterrence. One has no reason to believe, in the absence of demonstration, that ideas as disparate as corrective justice and the norm-determining form of deterrence are indirectly combinable under some overarching super-value. Indeed, these ideas are so disparate—corrective justice dealing relationally with one person's wrongful infringement of another's rights, and deterrence dealing nonrelationally with the optimal avoidance of undesirable effects—that no common measure for bringing them under an overarching super-value seems available. Moreover, this possibility would be untrue to the premise elicited from Gary Schwartz's article, that corrective justice from its own point of view would have reason to incorporate deter-

22. Chapman, *supra* note 15, at 278.
23. *Id.*

rence.[24] From its own point of view, corrective justice self-sufficiently (rather than as an aspect of some more inclusive value) reflects the form of justification that pertains to liability.

Chapman mentions a second possibility that is more promising. He proposes that one can combine genuinely plural ideas into a single understanding of tort law if they are ordered according to a conceptually sequenced argument.[25] Because the different ideas enter the argument at different points in the sequence rather than all at once, they can be connected despite their noncommensurability. Yet the existence of a conceptual sequence guarantees that the combination of the different ideas is not arbitrary. In Chapman's view, it is possible that corrective justice, as the first member of this sequence, establishes the priority of the relationship between the parties, and then is followed by a different idea that operates within the bipolar framework thus established. In this way, a conceptually sequenced argument may provide both a formal structure of coherent pluralism and a content for that structure that is normatively attractive because of its combination of appealing ideas.[26]

Chapman draws on George Fletcher's famous discussion of excuses in tort law[27] to illustrate how the conceptually sequenced argument works.[28] For Fletcher, excuse is the legal concept through which the law expresses the compassion that flows from realizing that any reasonable person in the defendant's situation would have acted as the defendant did. From the standpoint of corrective justice, this conception of excuse is problematic, because it considers the situation of the defendant—that is, the relationship between the defendant's act and the excusing condition—independently of the wrong suffered by the plaintiff.[29] Chapman replies that this difficulty disappears once one notices that excuse functions within a conceptually ordered sequence. It is a conceptual feature of excuse that it presupposes the existence of the wrong that is being excused and thus necessarily occupies the second stage of a multistaged argument.[30] Because the existence of a wrong is a matter of corrective justice, the excuse supervenes upon an already established relationship between the parties and therefore cannot operate outside that relationship. One cannot conclude from the fact that the ex-

24. Schwartz, *supra* note 1, at 1834.

25. Chapman, *supra* note 15, at 277. For similar expositions of the role of sequence in ordering different values, see George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 950–54 (1985), which distinguishes between "flat" and "structured" legal thinking, and JOHN RAWLS, POLITICAL LIBERALISM 259–62 (1993), which discusses unity by appropriate sequence.

26. *See* Chapman, *supra* note 15, at 317.

27. *See supra* note 16.

28. *See* Chapman, *supra* note 15, at 308–10.

29. WEINRIB, *supra* note 13, at 53–55.

30. Chapman, *supra* note 15, at 309.

cuse itself does not reflect the correlativity of corrective justice that excuse has no role to play in a sequence in which corrective justice is prior to it. To be within that sequence while giving voice to a value that is genuinely different from corrective justice is merely what being an excuse means. In this way, excuse exemplifies the conceptually sequenced argument that coherently accommodates different normative ideas.

Does the notion of a conceptually ordered sequence help elucidate Gary Schwartz's suggestion of a mixed theory that affirms both corrective justice and deterrence? Chapman's article, which is intended to provide merely the beginnings of an account of pluralism,[31] does not itself give us the tools to answer this question. The principal difficulty is that Chapman has not yet indicated how corrective justice and deterrence (or any of the other goals often ascribed to tort law) form a conceptual sequence similar to one that connects wrong and excuse. In the case of excuse, the conceptual sequence is clear: Part of the meaning of excuse is that it excuses something that is wrong, so that the determination of wrong is prior to the application of the excuse. No similar relationship appears to exist between corrective justice and deterrence, at least on the economic understanding of deterrence.

Nor can one simply postulate a sequence in which corrective justice comes first to establish the bipolar relationship and then deterrence determines the norms within that relationship. This would be unsatisfactory from the standpoint of both corrective justice and deterrence. The proponent of corrective justice would object that corrective justice is interested in the bipolarity of the relationship only because that bipolarity matches the structure of correlative reasoning that informs liability. From the standpoint of corrective justice, it would be pointless to have the bipolar relationship while allowing the corresponding form of justification to be overridden by arguments of deterrence. Similarly, from the standpoint of deterrence, there is no reason to enclose deterrence in the straightjacket of corrective justice. Thus, the suggestion that one simply postulate a sequence would resolve nothing. Because such a sequence is not conceptually ordered, it would create the very arbitrariness that Chapman wishes to avoid.

Indeed, Chapman overstates the cogency of conceptually sequenced argument even for his particular analysis of excuse as expressive of compassion. One may agree with Chapman that excuse constitutes a paradigmatic instance of conceptual sequencing.[32] However, if compassion for the defendant's situation is normatively significant within the relationship of the doer and the sufferer of a supposed wrong, why does it come in only at the second

31. *Id.* at 280.

32. *See* Chapman, *supra* note 15, at 310.

stage after the wrong has been established rather than go to the definition of what constitutes a wrong in the first place? And if the reply is that compassion, as a notion oriented to the predicament of the defendant, is inconsistent with bipolar wrong-defining notions such as the objective standard of negligence, why are these wrong-defining notions overridden at the second stage by what was excluded at the first? To answer that compassion comes in at the second stage because excuse does is no answer at all: The questions are not about the sequencing of wrong and excuse but rather about the sequencing of wrong and compassion. This difficulty is concealed in Chapman's account only because he has accepted a particular explanation of excuse as given and then used excuse's place in the sequence to repel the corrective justice challenge to that explanation.

Chapman's exposition of the notion of a conceptually sequenced argument valuably connects pluralism to a structure of sequenced thinking ignored by many legal scholars. Chapman rightly emphasizes the sequential nature of the argument. However, he does not indicate why the components of the sequence have the content that they do. In other words, he does not treat the sequence as truly conceptual.

This difficulty points the way forward. A sequenced argument that is truly conceptual would indicate not only the sequence of concepts but also why the concepts refer to certain normative considerations rather than others, why these different sets of normative considerations should be kept separate and in the sequenced order, and why the sequence cannot stop at the first stage but must go on to the second one. For example, a sequenced argument should not only note that wrong is conceptually prior to excuse. It should also elucidate the considerations relevant to excuse and suggest why those considerations are both the concomitants of wrong and are nonetheless precluded from backing up into the prior wrong-defining stage. Similarly, to return to Gary's concerns, a sequenced argument should determine what considerations pertain to the kind of deterrence that necessarily coexists with corrective justice, why the corrective justice theorist cannot ignore those considerations, and how those considerations nonetheless leave corrective justice intact.

IV. KANT'S CONCEPTUALLY SEQUENCED ARGUMENT

In this part, I want to use Kant's discussion of the right of necessity[33] to illustrate this more stringent notion of a conceptually sequenced argument. Then, in the next part, I will apply the fruits of this discussion to the coexistence of corrective justice and deterrence.

33. KANT, *supra* note 18, at 391–92.

Kant is relevant to our present concerns in a number of ways. First, Kant's legal theory provides a conspicuous example of a conceptually sequenced argument. Kant's legal theory is an exposition of how self-determining beings are juridically related to one another through the concept of right, that is, through the sum of conditions under which the action of one person can coexist with the freedom of another. So far as private law is concerned, Kant traces the conceptual development of right from the notion that one is not to allow oneself to be a mere means for others, then to the relationship among persons as possessors of external things, and finally to the establishment of the state and its institutions of positive law.[34] Each stage in the argument presupposes the existence of the previous stage, which nonetheless necessitates the introduction of new considerations that would be misplaced if brought in earlier. Kant's legal theory is thus a suitable vehicle for developing Chapman's insight about conceptually sequenced arguments.

Second, Kant's treatment of right is consonant with—and is in part a philosophical elucidation of—corrective justice.[35] Corrective justice regards the plaintiff's rights and the defendant's corresponding duties as the general categories marking the correlative nature of liability. Kant provides an account of those rights and duties that relates them to the range of issues, from free will to the nature of the state, explored in his conceptual sequence. As a philosopher of right, Kant rejects the view that deterrence informs the norms of a liability regime. Yet Kant also recognizes that deterrence, when situated at its proper point in the conceptual sequence, performs a necessary function, identical to the second form of deterrence mentioned in Part I.[36] Accordingly, Kant is directly, albeit perhaps surprisingly, relevant to Gary Schwartz's suggestion of a mixed theory that affirms both corrective justice and deterrence.

In Kant's account, deterrence emerges out of the relationship between rights and the state's regime of positive law. Implicit in rights as the juridical manifestations of free will is the authorization to use coercion to counteract their infringement. Because rights are concerned only with the external relationships between persons, those rights cannot be secured by reliance on an internal quality, such as an ethical will that respects the rights of others

34. WEINRIB, *supra* note 13, at 100–09; *see also* Ernest J. Weinrib, *Publicness and Private Law*, *in* 1 PROCEEDINGS OF THE EIGHTH INTERNATIONAL KANT CONGRESS 191 (Hoke Robinson & Gordon Brittan eds., 1995).

35. On the relationship between corrective justice and natural right philosophy, see *Emerging Consensus*, *supra* note 13, at 114–25.

36. *See* WEINRIB, *supra* note 13, at 108; B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution*, 8 LAW & PHIL. 151, 184–93 (1989); *see also* Thomas E. Hill, Jr., *Kant on Punishment: A Coherent Mix of Deterrence and Retribution?*, 5 JAHRBUCH FÜR RECHT UND ETHIK 291, 305–09 (1997).

out of a sense of duty. Coercion acts extrinsically upon others and thereby corresponds to the external dimension of relationships of right. However, because the unilateral exercise of coercion is inconsistent with the equality of all persons, the state arises to secure the impartial and disinterested protection of the rights of all. This securing of rights requires not only the retrospective correction of past wrongs, but the prospective deterrence of future wrongdoing. Thus, the state, with its institutions of positive law, is born in the apprehension of injury, as a way of guaranteeing in advance the security of all rights. The state accomplishes this by endowing the norms of right with the determinate legal form of positive law and by providing the coercive apparatus for the enforcement of those positive laws. Deterrence takes its place within Kant's conceptually sequenced argument when positive law comes onto the scene.

Kant's treatment of necessity is a conspicuous example of the significance he attaches to deterrence. His analysis of necessity is particularly apposite to our present concerns because, although it deals with criminal rather than tort liability, it shares with Chapman's discussion an interest in the nature of excuse. However, although Kant conceives of necessity as an excuse that operates within a conceptual sequence, he does not base excuse on compassion. Rather, the sequencing of excuse reflects the role of the institutions of positive law in the overall architecture of the legal order.

The specific issue that necessity presents is whether someone whose life is in danger can save himself or herself by harming another. Kant gives the instance of the shipwrecked mariner who saves his own life by pushing another off a plank.[37] Kant regards the act of pushing the other off the plank as a wrongful violation of the other's rights. All persons have a right to be free from interferences with their physical integrity. If the person on the plank were interfering with the drowning mariner's right, the latter would, by virtue of that right, be entitled to use coercion to prevent the violation of it. However, the person initially on the plank is innocent of any wrongdoing. Although his remaining on the plank may result in the mariner's drowning, it is not an interference with the mariner's physical integrity. Accordingly, were the drowning mariner to have the right to shove the other person off the plank, the whole system of rights "would have to be in contradiction with itself,"[38] because one would then have a right to violate another's right.

37. *See* KANT, *supra* note 18, at 392. For the historical background to Kant's treatment of this problem, see generally Joachim Hruschka, *On the History of Justification and Excuse in Cases of Necessity*, *in* PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS 337 (W. Krawietz et al. eds., 1994).

38. KANT, *supra* note 18, at 391.

Nonetheless, Kant thinks that the mariner who saves himself in this way ought not to be punished.[39] To that extent, there is a right of necessity even though its exercise involves the commission of a wrong. Kant explains his apparently paradoxical view in the following way:

> It is clear that this assertion [of a supposed right of necessity] is not to be understood objectively, in terms of what a law prescribes, but only subjectively, as the verdict that would be given by a court. In other words, there can be no *penal law* that would assign the death penalty to someone in a shipwreck who, in order to save his own life, shoves another, whose life is equally in danger, off a plank on which he had saved himself. For the punishment threatened by the law could not be greater than the loss of his own life. A penal law of this sort could not have the effect intended, since a threat of an ill that is still *uncertain* (death by a judicial verdict) cannot outweigh the fear of an ill that is *certain* (drowning). Hence the deed of saving one's life by violence is not to be judged *inculpable (inculpabile)* but only *unpunishable (impunibile)*, and by a strange confusion jurists take this *subjective* impunity to be *objective* impunity (conformity with law).[40]

In Kant's view, necessity does not affect the legal obligation incumbent on the mariner to respect the rights of the person initially on the plank. It does, however, render the mariner immune to punishment. The reason for this is that the prospect of punishment "could not have the effect intended" of deterring the mariner from pushing the other off the plank. The premise of Kant's argument is that penal law has a deterrent function. Hence, if under the circumstances that function cannot operate, then a court should not act on the law.

The "strange confusion [of] jurists" that Kant mentions consists in mixing up two different stages in a sequenced argument. The first goes to "what a law prescribes," that is, to the positive penal law as it reflects the norms that govern a person's conduct under the concept of right. The second goes to how a court, acting in accordance with the positive penal law, ought to deal with an offender. Now usually this second stage presents no special problem: Because in Kant's view offenses have penalties that correspond to them according to a principle of equality,[41] the court simply imposes the penalty indicated. *Qua* positive, however, the law has the function of deterring the wrongful conduct that it proscribes. This is a function to which the court gives effect by enforcing the positive law. Therefore, when it is impossible for the law to have this function, the court cannot give effect to it and should not convict. In the strange confusion of jurists, the unpunishability

39. *Id.* at 392.
40. *Id.* at 391–92.
41. *Id.* at 473.

of the wrongdoer at the second stage of the sequence is mistaken for a judgment about the lack of wrongdoing at the first stage. Hence, the jurists think of a necessitous act as a right, but it is really a wrong that cannot be punished.

Unless one keeps the stages of Kant's argument separate, one can make no sense of Kant's argument, as a recent article on the plank problem illustrates.[42] The article enumerates three problems with Kant's account. All of them ignore the conceptually ordered sequencing of Kant's argument, and are easily dismissed when one considers this sequence.

"First, Kant's argument that necessitous killing cannot be deterred is a dubious one. There are punishments worse than death, and one need only threaten to inflict them with sufficient certainty to induce compliance in a rational agent."[43] For Kant, however, the measure of the penalty is determined not by the requirements of deterrence, but by the nature of the wrong, for only in that way can the positive penal law be consistent with the rights of the offender.[44] Thus, it is the penalty corresponding to the wrong that, for Kant, must be capable of deterring. It may well be that the mariner who saved himself would have been deterred if he had known that, instead of merely being executed like any other murderer, he would be drawn and quartered. But necessitous killing can have a harsher penalty than ordinary killing only if necessitous killing is a more serious crime—which is absurd. If the law increased the penalty beyond the offender's desert in order to serve the purposes of deterrence, it would treat the offender merely as a means. Deterrence becomes relevant for Kant only as a function of the positivity of the penal law; by the time deterrence comes upon the scene, the penalty has already been determined at a previous conceptual stage.

The second problem is articulated thus:

> Second, [Kant's] claim that undeterrable conduct ought not to be punished is problematic. Why should the State fail to punish the individual to the extent he deserves just because his evil conduct was inevitable, given his strong, self-interested motivation? That seems an unduly utilitarian consideration for a retributive theory of punishment.[45]

However, Kant's point is not that the law discounts the usual penalty by including the offender's self-interest in its utilitarian calculus. Nor is Kant saying that the law should not punish a crime that self-interested motivation makes inevitable; if that were so, any criminal, that is, anyone whose crimi-

42. Claire Oakes Finkelstein, *Two Men and a Plank*, 7 LEGAL THEORY 279, 281 n.9 (2001).
43. *Id.*
44. KANT, *supra* note 18, at 409 (stating that statutory laws "cannot infringe upon *natural right*").
45. Finkelstein, *supra* note 42, at 281 n.9.

nal act demonstrates the penalty's failure to deter, might plausibly claim that his self-interested motivation made the crime inevitable. What renders the necessitous killer unpunishable is not his self-interested motivation but the incapacity of the positive penal law to fulfill its own function. Kant is raising a consideration relevant to a particular stage—the positivity of law—in a sequenced argument. The deterrent function that he ascribes to the positive penal law operates through the prospect of suffering a penalty corresponding to the criminal act. In circumstances of necessity, a comparison of future execution and imminent death shows that future execution cannot deter.

The third problem is also easily dismissed: "[P]resumably a person of goodwill could conform to a penal law with moral content, even if this required him to act in the face of compelling considerations of self-interest."[46] This is true but irrelevant to the function of deterrence in positive law. A person of good will conforms to a morally acceptable law because of his or her good will, not because of the law's deterrent power. Indeed, from Kant's standpoint, if the law ignored the necessitous circumstances that render deterrence impossible, it would be punishing him for not acting as a virtuous person. For Kant, however, virtue does not belong to *any* of the stages in law's conceptually ordered sequence, but pertains instead to the different normative domain of ethics.

Kant's treatment of necessity illustrates the operation of deterrence within a rigorously sequenced conceptual argument. Norms of right reflect the rights and correlative duties that govern the interaction of free beings. For rights to be secure, however, they must be guaranteed by state institutions, which give them determinate form as positive law and provide the apparatus of coercive enforcement. This account of law features a conceptually multistaged process, in which the law's content reflects the norms appropriate to relationships of right, while its positive form reflects the necessity for deterrence. Both the concept of right and the positivity of law are necessary components of this process. Without the concept of right, positive law would be incapable of formulating norms that respect persons' rights; without positive law, those rights could not be given a determinate shape and securely enjoyed. The two stages are sequenced because the positive law takes over—and thus presupposes the existence of—norms that reflect the status of persons as bearers of rights. Because the two stages, although necessary, nonetheless remain distinct and sequenced, considerations of deterrence that belong to positive law cannot inform the content of the norms that emerge at the prior stage.

46. *Id.*

V. DETERRENCE AND CORRECTIVE JUSTICE

As noted at the beginning of the preceding part, corrective justice and the Kantian treatment of right are closely related. Corrective justice draws attention to the structure of correlativity that informs the rights and corresponding duties of private law. Kant provides a philosophical exposition of the normative significance of those rights and duties. Both corrective justice and the Kantian conception of right are hostile to the instrumentalism usually associated with deterrence. Nonetheless, as his treatment of necessity highlights, Kant sees deterrence as a function of the law as positive. Thus, deterrence belongs to one of the stages of Kant's conceptually sequenced argument, while yet leaving untouched the right-based norms worked out at the prior stage. Does deterrence play the same role in the corrective justice approach to tort law?

The answer to this question is "yes." On the one hand, corrective justice construes the wrongfulness of tortious conduct in terms of the correlative positions of the defendant and the plaintiff as doer and sufferer of the same injustice. For corrective justice, deterrence plays no role in defining the nature of the wrong. In emphasizing the correlative nature of liability, corrective justice purports to bring out the interior structure of liability as a practice situated within a system of positive law. Corrective justice illuminates this practice by exhibiting its fairness and coherence as implications of its correlative structure. On the other hand, inasmuch as this practice is ensconced in positive law, it participates in whatever functions the law has *qua* positive. Deterrence, that is, the influencing of behavior through the prospect of liability, is one of these functions. To that extent, the proponent of corrective justice can affirm, as Gary Schwartz suggested, both corrective justice and deterrence.

Thus, corrective justice figures within a conceptually ordered sequence in which deterrence has a place. One component in this sequence is the correlatively structured justifications that undergird the organizing concepts of tort law and private law more generally. Corrective justice points to the normative structure that informs a system in which the defendant's liability is always correlative to the plaintiff's entitlement. Corrective justice thereby encapsulates the mode of practical reason that is distinctive to liability as a fair and coherent juridical phenomenon. Deterrence plays no role in this mode of practical reason. However, the actualization of these norms through the institutions of private law is a further stage in this sequence. As a form of justice, corrective justice becomes operative in social life through a system of adjudication that endows it with both public meaning and coercive legal consequences. The prospect of these consequences motivates compliance with the law's publicly announced norms. At this stage deter-

rence plays an integral role, for now corrective justice not only illuminates a system of justifications but is also presupposed in a set of concrete social institutions devoted to remedying and avoiding injustice.

This treatment of deterrence conforms to the stringent notion of a conceptually sequenced argument suggested above in Part III. In this sequenced argument, corrective justice is prior to deterrence because it illuminates the nature of the wrongs that positive law deters. Deterrence is then necessary as a further element in this sequence by virtue of being implicated in the actualization of corrective justice through the legal institutions of positive law. When placed within this sequenced argument, deterrence furthers corrective justice while leaving it intact.

This affirmation of deterrence will, to be sure, provide little comfort to deterrence theorists, especially those operating within the framework of law and economics. Deterrence theorists attempt to show how considerations of deterrence are or ought to be woven into the fabric of tort norms. In contrast, the conceptually ordered sequence of corrective justice introduces deterrence in a way that, while assigning to the norms of positive law the role of influencing conduct, denies that deterrence has any relevance for the content of the norms themselves. Accordingly, situating deterrence within a conceptually ordered sequence that includes corrective justice affirms both corrective justice and deterrence without resolving the tension between them when each is claimed as the ground of norms.

Nonetheless, this role for deterrence within a corrective justice approach is consonant with Gary Schwartz's observations. In his article on mixed theories of tort law, Gary notes that the success of tort law in deterring tortious conduct "should be of keen interest to corrective justice analysts, since it minimizes the problem of injustice that those scholars address."[47] In developing this idea, he writes:

> Assume—along with many corrective justice scholars—that it is unjust or unfair for defendants to inflict harm on plaintiffs through their negligence. Relying on this perception, those scholars can explain why the goal of corrective justice is achieved by allowing the plaintiff to secure compensation after the fact from the defendant. But acknowledge now that negligence law, by requiring potential defendants to consider the prospect of liability, can deter those defendants from engaging in negligence and hence in bringing about an unjust result. Negligence law would here be serving as an instrument producing a result that can strongly be supported for reasons of justice rather than utility. It is common to say that "justice" or "rights" approaches to tort liability necessarily see tort liability in "noninstru-

47. Schwartz, *supra* note 1, at 1827.

> mentalist" terms. Yet the deterrence that negligence law provides can itself be understood . . . as a device for achieving justice . . . .[48]

These comments reflect exactly the role that deterrence plays when corrective justice is understood as part of a conceptually ordered sequence that includes the institutions of positive law. From the standpoint of the positive law, one of the functions of liability is to deter violations of rights. The idea of a conceptually ordered sequence allows this function to be integrated into a corrective justice approach without undermining the correlatively structured justifications for tort norms.

Gary himself seemed to envisage not only the affirmation of both corrective justice and deterrence but also the reconciliation of economic and justice approaches to negligence law.[49] This was perhaps too much to expect. If the essence of these contrasting approaches consists in their differing methodologies and assumptions, each will contribute to the overall understanding of tort law only through the rigorous explication of its own characteristic ideas. But Gary's article (as well as his academic demeanor more generally) reminds us that to the extent that ideas have truth, they are not the exclusive property of any particular school. For Gary, the normative appeal of deterrence meant that it should not be as alien to corrective justice as usually assumed. The present Article in tribute to him has attempted to show the extent to which corrective justice theory confirms Gary's insight.

48. *Id.* at 1831.
49. *See id.* at 1833.