

TORT LAW AND MORAL LUCK

John C.P. Goldberg[†] & *Benjamin C. Zipursky*^{††}

INTRODUCTION	1123
I. MORAL AND LEGAL LUCK	1128
II. CAUSAL LUCK AND THE CRITIQUE OF TORT LAW AS ARBITRARY	1132
A. Fortuity as to Realization	1132
B. Fortuity as to Extent of Loss	1140
III. COMPLIANCE LUCK AND THE NATURE OF TORTIOUS WRONGS	1143
A. Compliance Luck, Misfortune, and Loss-Shifting Theories of Tort	1143
B. What Compliance Luck Teaches Us About Torts....	1149
IV. IMPLICATIONS	1164
CONCLUSION	1174

INTRODUCTION

On its face, tort law is a law of wrongs. The word “tort” means wrong.¹ Before tort was identified as a legal category in its own right, torts were known as “private wrongs.”² Judicial opinions in modern tort cases speak of defendants who owe duties to refrain from wrongful conduct. Courts seek to determine whether those duties have

[†] Associate Dean for Research and Professor, Vanderbilt Law School.

^{††} Professor and James H. Quinn Chair in Legal Ethics, Fordham University School of Law. We wish to thank the participants in the conference on the Morality of Fortune, held at the University of Southern California in the spring of 2006, and particularly to our co-panelist Greg Keating and our commentator, Martin Stone. We have also benefited greatly from workshops at Florida State University College of Law, Fordham University School of Law, the University of Kentucky College of Law, Michigan Law School, Oxford University, and Vanderbilt Law School. Finally, thanks to Ronen Avraham, Tom Baker, Curtis Bridgeman, Jonathan Cardi, Nita Farahany, John Gardner, Abner Greene, Steve Hetcher, George Letsas, Arthur Ripstein, Peter Schuck, Nicos Stavropoulos, Robert Stevens, Michael Vandenberg, and Jeremy Waldron for their comments on earlier drafts of this Article. Our research has been generously supported by Fordham University School of Law and Vanderbilt Law School.

¹ BLACK’S LAW DICTIONARY 1526 (8th ed. 2004). The Latin root of “tort” refers to conduct that is twisted (i.e., lacking in rectitude) while also twisting (i.e., interfering with the rights of others). JOHN C. P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 3 (2004).

² See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 541–51 (2005). Medieval English law referred to torts as “trespasses,” using the term in its biblical sense to refer to transgressions by one against another. See GOLDBERG ET AL., *supra* note 1, at 47 (discussing actions for trespass and trespass on the case).

been breached. Substantive tort doctrine is filled with rules and concepts that express the idea of one person wronging another.³

Obvious as the foregoing observations may seem, the claim that tort law is a law of wrongs is today controversial, perhaps even in disfavor. A major source of the trouble is this: the idea of committing a wrong carries obvious moral connotations, yet some fundamental features of tort doctrine seem to cast doubt on whether tort really has anything to do with wrongful conduct. In particular, liability often seems to stem more from bad luck than from bad acts or bad character. Thus the question arises: Is tort liability so luck-dependent that tort law, despite appearances, cannot be taken seriously as a law of wrongs?

Consider the following passages, penned almost a century apart by Justice Holmes and Judge Posner. Note how they harness ideas of misfortune and happenstance to bolster a claim about tort law and negligence in particular:

The law considers . . . what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that. If we fall below the level in those gifts, it is our misfortune⁴

* * *

The morality of the fault system is very different from that of everyday life. Negligence is an objective standard. A man may be adjudged negligent though he did his best to avoid an accident and just happens to be clumsier than average. In addition, a number of the established rules of negligence liability are hard to square with a moral approach. Insane people are liable for negligent conduct though incapable of behaving carefully. Employers are broadly responsible for the negligence of their employees. . . . The moral element in such cases is attenuated.

. . . It is true that injury inflicted by carelessness arouses a different reaction from injury inflicted as the result of an unavoidable accident. We are indignant in the first case but not the second.

³ For example, many arguments that can defeat a tort action do so by establishing that the defendant's conduct was not a wrong or not a wrong to the plaintiff. A good example is consent; victim consent renders conduct that would otherwise be tortious non-wrongful. *See, e.g., Florida Publ'g Co. v. Fletcher*, 340 So.2d 914, 916 (Fla. 1976) (stating that consent is a defense to an action for trespass); *Duncan v. Scottsdale Med. Imaging, Ltd.*, 70 P.3d 435, 438 (Ariz. 2003) ("A battery claim is defeated, however, when consent is given."). Similarly, a shopkeeper's detention of a suspected shoplifter based on reasonable suspicion of theft is deemed privileged and therefore not a wrong. *See, e.g., Dillard Dep't Stores, Inc. v. Silva*, 148 S.W.3d 370, 372 (Tex. 2004). In asserting any of these and various other defenses, a defendant is claiming that conduct that would otherwise be wrongful is nonwrongful, or at least not a wrong to the plaintiff.

⁴ OLIVER W. HOLMES, JR., *THE COMMON LAW* 108 (48th prtg. 1923).

The interesting question is why. . . . The orthodox view [of negligence as a moral concept] gives no answer.⁵

Now consider how two other prominent scholars, Jeremy Waldron and Christopher Schroeder, emphasize fortuity and chance to make a rather different point about torts.

Two drivers, named Fate and Fortune, were on a city street one morning in their automobiles. . . . As they passed through a shopping district, each took his eyes off the road, turning his head for a moment to look at the bargains advertised in a storefront window. . . . In Fortune's case, this momentary distraction passed without event. . . . Fate, however, was not so fortunate. . . . His car ploughed into a motorcycle ridden by a Mr. Hurt. Hurt was flung from the motorcycle and gravely injured. . . .

When Hurt recovered consciousness in [the] hospital, the first thing he did was instruct his lawyers to sue Fate for negligence. Considering the extent of his injury, the sum he sought was quite modest—\$5 million. . . .

. . . .

Most of us would say it is only fair that Hurt should win his lawsuit: justice demands that Fate compensate him for the injury he caused. It is difficult, however, to go beyond this intuition and explain exactly why it is fair that Fate should be expected to come up with a sum of money this large.

. . . .

The difficulty is exacerbated when we consider the other driver, Mr. Fortune. . . . He took his eyes off the road for the same amount of time, violating the same duty of care owed to other road users, for the sake of exactly the same advantage. . . . No one would think it appropriate to require *him* to pay Hurt \$5 million; yet his behavior, morally speaking, was indistinguishable from that of Fate. . . .⁶

* * *

Under [tort rules that require proof of causation as a condition of permitting recovery], the fortuity of causation must support a sharp, dichotomous distinction between two individuals, one of whom has caused harm and the other one—in all other respects indistinguishable—has not. Likewise, the fortuity of causation must support an equally sharp and dichotomous distinction between otherwise indistinguishable victims, one of whom suffers loss at the hands of a human agent, the other of whom does not. Is there a moral principle of such weight as to justify thus partitioning defendants on the one hand and plaintiffs on the other hand, who are in

⁵ Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 31–32 (1972) (footnote omitted).

⁶ Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387, 387–88 (David G. Owen ed., 1995).

all other morally relevant respects equals? The fact of causation seems too slender a reed, too weak a foundation, upon which to base such sharp distinctions.⁷

Each pair of passages—Holmes's and Posner's, on the one hand, and Waldron's and Schroeder's on the other—makes a provocative claim about the significance of a particular form of luck for tort law. The latter pair argues that the way in which *causal luck* figures in the attribution of tort liability renders tort law morally arbitrary. The fact that causation serves as a predicate to tort liability and determines the extent of liability, provides a basis for condemning tort law as a practice that purports to right wrongs, yet does so on unfair terms. Alternatively, the former pair suggests that tort law's indifference to another kind of luck—what we will call *compliance luck*—provides a vital clue about how to make sense of this body of law. The suggestion is that, until one grasps that negligence law is prepared to treat as “wrongful” certain acts by persons who, because of bad luck, are incapable of acting otherwise, one will operate under the misimpression that negligence law is concerned with identifying and responding to moral wrongs. By the same token, once one grasps negligence law's tolerance of bad compliance luck, one can appreciate that tort law is a law of wrongs in name only; that the notion of wrong at work here is so distinct from standard usage that it is better not to think of tort as a law of wrongs at all.

Both arguments—that tort law is unjust because wrongdoers' liability turns too heavily on causal luck and that tort law must not be doing what it appears to be doing because a genuine law of wrongs would excuse bad compliance luck—are species of “moral luck” arguments, a philosophical genus that owes its name most immediately to the work of Bernard Williams and Thomas Nagel.⁸ Yet, in writing about moral responsibility, neither Williams nor Nagel was anxious to credit the sorts of arguments just discussed.⁹ Quite the opposite, both claimed that in judging the morality of an actor's conduct, it is a mis-

⁷ Christopher H. Schroeder, *Causation, Compensation, and Moral Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, *supra* note 6, at 347, 361.

⁸ See Thomas Nagel, *Moral Luck*, *PROC. OF THE ARISTOTELIAN SOC'Y* (Supp. L 1976), reprinted in *MORTAL QUESTIONS* 24–38 (Thomas Nagel ed., 1979); Bernard Williams, *Moral Luck*, *PROC. OF THE ARISTOTELIAN SOC'Y* 115–35 (Supp. L 1976), reprinted in *MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980*, at 20–39 (Bernard Williams ed., 1981). Both book chapters are revisions of essays bearing the same titles. See Nagel, *supra*, at 28 n.3; Williams, *supra*, at xiii. Nagel's essay was penned as a response to Williams's, with the latter generally credited with having coined the phrase. See Nagel, *supra*, at 28 n.3. We are hardly alone in linking these issues to the work of Nagel and Williams. See, e.g., Basil A. Umari, Note, *Is Tort Law Indifferent to Moral Luck?*, 78 *TEX. L. REV.* 467, 467 (1999) (noting that the imposition of tort liability under current doctrine will sometimes necessarily turn on luck and connecting the problems thereby raised to the work of Williams and Nagel).

⁹ See Nagel, *supra* note 8, at 33; Williams, *supra* note 8, at 37–39.

take to suppose that one must exclude consideration of aspects of that conduct over which the actor lacks control.¹⁰ Notions of wrongdoing, fault, and blame, they insisted, are not in practice so fastidious, and need not be as a matter of theory. In this Article, we develop a comparable set of claims about tort law.

Part I sets the stage for our analysis. In it, we briefly sketch how Williams and Nagel articulate the “problem” of moral luck. We then offer an equally compressed description of the relationship between our claims about tort law and their claims about moral responsibility.

In Part II, we take on the causal luck critics of tort law, arguing that the centrality of causation to tort liability provides no grounds for condemning tort law as morally arbitrary. Tort, we explain, instantiates a distinctively legal conception of wrongdoing and responsibility as opposed to a purely moral one.¹¹ And it does so for a very particular purpose, namely, to empower victims of certain legal wrongs to respond to their wrongdoers through legal action. Once tort law’s substance, structure, and purposes are properly understood, it becomes clear that the law is not capricious in requiring a victim as a condition of tort liability, or in permitting some victims to recover damage awards that are “out of proportion” to the gravity of the defendant’s wrong.

In Part III, we argue that despite the indifference to bad compliance luck seen in negligence and other torts, there is no need to resort to elaborate reconstructions of tort law to salvage its intelligibility. In particular, the problem of compliance luck does not warrant the move made by Holmes and Posner—as well as by prominent corrective justice theorists—to treat tort as ultimately concerned with losses and loss allocation rather than wrongs and the redress of wrongs. It is cogent and justifiable to hold an actor responsible for having wronged a victim even though the actor’s lack of certain competencies left him unable to meet the relevant standard of conduct.

In Part IV, we explore some of the implications of our rebuttal of the two strands of moral luck argument identified above. Among other things, we suggest that our perspective helps to clarify the sense in which tort is a law of wrongs and redress and to illuminate what values it serves within a modern administrative state. We also argue

¹⁰ See Nagel, *supra* note 8, at 38; Williams, *supra* note 8, at 37–39.

¹¹ As this clause suggests, we agree with the likes of Holmes and Posner in supposing that, as used in tort law, concepts like wrong and wrongdoing carry meanings that render them distinct from their counterparts in certain forms of moral discourse. We part company with them in rejecting the claim that these differences are radical, as opposed to subtle. As we explain below, the legal wrongs of tort are close cousins of moral wrongs. Thus, we maintain that one can think of tort law as a law of wrongs without distorting its substance, and indeed, that appreciating the sense in which tort is a law of wrongs is critical to understanding it. See *infra* text accompanying notes 91–135.

that tort law—which, notwithstanding the presence of causal and compliance luck, routinely holds individuals responsible to others in a very tangible way—can help elucidate more abstract philosophical debates about moral luck.¹²

I

MORAL AND LEGAL LUCK

Williams and Nagel invoked the phrase “moral luck” to capture a tension between a seemingly attractive abstract principle of moral theory, on the one hand, and various intuitively powerful moral judgments on the other.¹³ According to the abstract principle, the moral or immoral qualities of one’s acts—and indeed their worth—cannot depend on luck but must instead depend on how one chooses to act and whether one acts as one ought to have acted.¹⁴ From this premise, it seems to follow that when we consider holding an actor responsible for a wrong, we ought to focus only on certain characteristics of the actor’s actions, ruthlessly excluding from our evaluations various fortuities, including the actor’s innate endowments (“constitutive luck”), the background contours of the situation in which she finds herself (“circumstantial luck”), and the consequences that happen to flow from her actions (“causal luck”).¹⁵ Yet, notwithstanding the appeal of these ideas, when one actually considers how culpability and blame are assigned in real life, it is evident that ordinary moral judgment is sensitive to luck.

Consider Mr. Gower, the druggist from the movie, *It’s A Wonderful Life*.¹⁶ As the narrative first unfolds, Gower, devastated and drunk over the news of his son’s death from influenza, accidentally misfills a

¹² Our concern in this Article is the significance of two much-discussed forms of luck—causal and compliance luck—for holding actors responsible in tort. We will not address or address only in passing various other forms of luck that matter to the operation of the tort system. Obviously, “luck” also operates on the victim’s side of the equation, if only in the sense that it is the innocent victim’s bad luck to be injured by another. Some will suppose that an appreciation of the centrality of victim misfortune to tort law supports the normative proposition that tort ought to be replaced with a social safety net that, in providing a general form of disaster insurance, promises to do a better job of aiding victims in overcoming bouts of bad luck. Briefly, we regard this sort of position as resting on a non sequitur: it is desirable to provide individuals with a safety net, but that still leaves the question of whether we might also want a body of law that permits the subset of unfortunate victims whose misfortunes are caused by the wrongful acts of others to seek redress against those others. Along somewhat different lines, a number of prominent tort theorists have argued (more in an interpretive than prescriptive vein) that the very point of tort law is to set rules for determining which among all the setbacks suffered by innocent victims are another person’s responsibility and which are simply misfortunes that the victim herself must bear. See *infra* text accompanying notes 137–64.

¹³ See Nagel, *supra* note 8, at 24–25; Williams, *supra* note 8, at 20.

¹⁴ See Nagel, *supra* note 8, at 24–25.

¹⁵ See *id.* at 28 (distinguishing among these different forms of luck).

¹⁶ *IT’S A WONDERFUL LIFE* (RKO Radio Pictures 1946).

prescription with poison. Fortunately, young George Bailey catches the mistake before harm is done, and Gower lives out his life as a respected member of the community. Later, when we see what the world would have been like had George not existed, the course of Gower's life has changed markedly. Without George to catch his mistake, Gower serves twenty years in prison for poisoning a child and becomes a pathetic drunk. The harsher fate of the "second Gower" attests to the commonsense idea that a mistake is somehow worse and warrants a more severe assessment and response when it injures another. But, as a matter of theory, it seems plausible to argue that each of the two Gowers committed precisely the same wrongful act—drunkly substituting poison for medicine—and that one should not judge Gower's actions differently based on the mere fortuity of George's intervention or nonintervention. Is it right for the citizens of Bedford Falls to condemn Mr. Gower for his mistake when it happens to poison, but to refrain from condemning him or to condemn him on less harsh terms¹⁷ when it happens not to poison?¹⁸

For our purposes, three complementary aspects of Williams's and Nagel's analyses of this conundrum are most important.¹⁹ First, by reflecting on numerous examples that involve not only what people say or do in sanctioning others but also how people assess their own conduct and that of others, they make a case for concluding that contingencies influence moral assessments in a non-superficial way and that such influence is not a concession to "irrational" or merely customary ways of making such assessments. Indeed, they argue, contingencies play a deep and almost paradoxical role in ordinary normative thinking. Second, by establishing that moral judgments routinely invoke matters over which agents lack control as salient grounds for evaluation, Williams and Nagel provide at least *prima facie* grounds

¹⁷ For example, a licensing authority could have issued a fine or required professional recertification.

¹⁸ Although this episode mainly illustrates the causal luck version of moral luck, it also might be seen to present the problems of circumstantial luck (but for living amidst an influenza epidemic, Gower never would have lost his son and never would have been rendered distraught) and constitutive luck (but for his being blessed with a stronger constitution, Gower would not have coped with his devastation by drinking on the job to the point of substantial intoxication).

Gower's story is not a perfect example of causal luck because in the first scenario, George, on a vow to Gower, never tells anyone of Gower's mistake. Hence, we never learn how Gower's townfolk would have assessed his conduct. A clue is provided, however, in the fact of earnest George's vow, which suggests that the mistake was not sufficiently grave in his mind to require him to expose it. By contrast, it is hard to imagine George making the same vow if Gower's mistake actually poisoned the child. On this basis, we can perhaps assume that even if the good citizens of Bedford Falls had somehow learned of the first version of Gower's mistake, they would not have seen fit—and their law would not have permitted them—to send the druggist to jail for twenty years.

¹⁹ For thoughtful analyses of various aspects of Williams's and Nagel's articles, see *MORAL LUCK* (Daniel Statman ed., 1993).

for skepticism about the general principle that luck's influence should be excluded from such evaluations. Finally, by pushing hard on examples where fortuities significantly affect how one would regard an agent's character, actions, and even the successfulness of her life, their examples somewhat ironically highlight the appeal of a moral theory that promises to render moral assessment independent of bad luck. In a backhanded way, they help to portray moral theories that focus relentlessly on good will as understandable, if ultimately ill-fated, efforts to preserve morality as a domain in which fortune has no influence.

Williams and Nagel integrated these points in different ways. For our purposes, each position is illuminating. To Williams, the aspiration to understand value in such a way that our assessments of it can be immunized from bad luck was symptomatic of a wrong turn in moral theory traceable at least to Kant.²⁰ In his view, to recognize the extent to which assessments of conduct are luck-sensitive is to appreciate the artificiality of the aspiration to gauge wrongfulness exclusively by reference to an actor's will or efforts. This aspiration, according to Williams, ought to be abandoned for a mode of thought that is less systematic, less theoretical, and less insulated from the realities of what gives meaning to individual human lives. Nagel, on the other hand, emphasized a seemingly self-defeating aspect of the Kantian ideal of morality operating outside the realm of the contingent. Luck, he observed, is inevitably a component of human action, if only in helping to generate the circumstances for action. To purge contingencies from assessments of conduct is to undermine the very ideas of agency and responsibility.²¹ Yet Nagel did not see in this argument a straightforward refutation of the Kantian project. Instead, he argued that it is fundamentally incomplete—that it is only from one important kind of philosophical perspective that moral appraisal can be understood in a manner that leaves little or no room for luck. On his view, a full understanding of the nature of moral problems must address how it is that, in human thought, we shift back and forth be-

²⁰ Williams, *supra* note 8, at 20 & n.1 (citing Kant's work in connection with his description of a view of moral evaluation that seeks to exclude the influence of contingencies). We do not take a position on whether Kant himself was committed to a conception of morality that called for the exclusion of contingencies in moral assessment. See, e.g., John Gardner, *The Wrongdoing that Gets Results*, 18 PHIL. PERSP. 53, 66 (2004) (arguing that it is a mistake to attribute to Kant the aspiration to render morality an entirely "luck-free zone.")

²¹ See Nagel, *supra* note 8, at 35 (arguing that because choices and acts are themselves influenced by contingencies about the actor and his or her circumstances, luck cannot be fully removed from moral assessment without the adoption of a deterministic account of human behavior that is incompatible with treating acts and choices as genuinely volitional).

tween perspectives in which morality is luck-sensitive and perspectives in which it is not.

As our title suggests, this Article is in part inspired by Williams's and Nagel's work. Still, it would be misleading to claim that it builds upon their writing in a straightforward way, except in one important respect. We take for granted that, at least since the publication of their articles, the following argument is *not* self-evident or obviously sound:

- (a) the conceptual structure of moral duties is such that a person cannot have breached a moral duty by doing *A* if whether she did *A* was outside of her control;
- (b) the putative duties of tort law are such that a person can have breached that duty regardless of whether doing *A* was outside of her control;
- (c) the putative duties of tort law do not have the conceptual structure of moral duties.

If not actually proving (a) false, Williams and Nagel certainly cast serious doubt upon it, such that one can no longer assume (a) is true and therefore cannot assume that conclusion (c) is sound.²²

Gratefully accepting this starting point, we will in the remainder of our analysis offer a tort-theoretic argument that essentially runs parallel to Williams's and Nagel's moral-theoretic arguments. Thus, instead of contemplating the content and structure of moral judgments that people render and act upon in ordinary life, we will consider the content and operation of tort law. The latter, it turns out, not only permits but *requires* that fortuity play an important role in determining when and how actors will be held accountable for their actions. Second, we observe that, because the issue in tort law of whether one has breached a duty to another is so obviously luck-sensitive, tort practice poses a conundrum for tort theorists comparable to the problem of moral luck: either the notion of being held accountable for breach of a duty owed to another is not as luck-insensitive as some suppose, or tort law really cannot purport to be—as it does—a law of duties, wrongs, and responsibilities. Third, we mean to acknowledge and confront the discomfort that often goes hand-in-hand with legal luck—a discomfort of the same type as that which has led some moral

²² John Gardner argues on independent grounds that what we have labeled "(a)" in the text is false. As just mentioned, *supra* note 20, he maintains that Nagel and others have overstated in important ways the degree to which Kant's moral theory sought to divorce assessments of the rectitude of actions from factors beyond an actor's control and, likewise, have overstated the breadth of the principle that "ought" implies "can" to which Kant adhered. Nevertheless, he concludes that Kant did adhere to a version of the view that moral value is secured by trying to do the right thing, as opposed to succeeding in doing it, and that this view is insupportable. See Gardner, *supra* note 20, at 66–77. Of course, we do not necessarily mean to commit ourselves to the truth of (b) (at least in that broad form).

philosophers toward good-will oriented views of moral value. In particular, we aim to expose and grapple with the pressure felt by theorists to reconceptualize tort liability in a manner that detaches tort from notions of wrongfulness or wrongdoing. Like Williams, we are hopeful that, by exposing an important source of these theorists' attraction to non-wrongs-based views of tort, we can begin to establish the untenability of such views. Like Nagel, we are hopeful that candor about the deep and pervasive role of luck in tort law will point toward a richer, more satisfactory theoretical framework for understanding concepts of duty, wrong, responsibility, and liability in the law. Such a framework, we argue, renders the idea of "legal luck" less discomfiting in part by demonstrating the perspectival or contextual nature of normative assessment.

II

CAUSAL LUCK AND THE CRITIQUE OF TORT LAW AS ARBITRARY

Here we consider and rebut two iterations of the causal luck critique of tort law. The first focuses on the role of causation in determining whether or not a tort has occurred. The second concerns the role of causation in determining the extent of a tort victim's injuries and therefore, to some degree, the extent of the tortfeasor's liability.

A. Fortuity as to Realization

Nagel illustrated the significance of causal luck for attributions of responsibility with a now-familiar example:

If someone has had too much to drink and his car swerves on to the sidewalk, he can count himself morally lucky if there are no pedestrians in its path. If there were, he would be to blame for their deaths, and would probably be prosecuted for manslaughter. But if he hurts no one, although his recklessness is exactly the same, he is guilty of a far less serious legal offence and will certainly reproach himself and be reproached by others much less severely.²³

As Waldron's contrastive tale of Fate and Fortune demonstrates,²⁴ the same example plays out even more starkly under basic tort principles. In tort, the morally lucky driver not only faces a lesser penalty or sanction; he faces none at all as there is no one with grounds to bring a claim in response to his reckless driving. This observation in turn provides the basis for criticizing what can be dubbed the "realization" requirement in tort law.

²³ Nagel, *supra* note 8, at 29.

²⁴ See *supra* text accompanying note 6.

Via tort, government is prepared to force someone who has behaved badly—that is, in violation of a legal norm of right conduct—to compensate another by virtue of the wrongdoer’s having so behaved. Yet the duty to compensate only attaches if the behavior happens to cause a certain sort of harm, such as physical injury. As critics of the realization requirement argue, law that imposes sanctions on actors for having behaved badly ought to tie those sanctions to the existence or absence of the qualities that render the relevant conduct bad in the requisite sense (e.g., insufficiently careful, in the case of legal negligence). But tort law does not do this because fortuities as to realization, which have no bearing on the moral qualities of the defendant’s act, necessarily figure in the determination of whether the duty to compensate will attach. Therefore, tort law is morally arbitrary or otherwise so normatively unappealing as to be an unjustifiable feature of our legal system, at least given the presence of less luck-dependent alternatives for responding to misconduct and losses.²⁵ At a minimum, tort law is subject to serious criticism for being unfair.²⁶

²⁵ For iterations of this argument in addition to Schroeder’s and Waldron’s, see GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 306 (1970); Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 *L. & PHIL.* 1, 12–17 (1987); and Ronen Avraham & Issa Kohler-Hausmann, *Accident Law for Egalitarians*, 12 *LEGAL THEORY* 181, 181 (2006).

²⁶ Waldron’s critique is more cautious than this sentence might suggest because he denies that he is judging the intelligibility or fairness of tort liability by measuring it against principles underlying criminal punishment. See Waldron, *supra* note 6, at 390–91. Yet, as indicated below, his arguments are still vulnerable to the critique put forward here.

Although he does not wish to characterize liability as punishment, Waldron nonetheless ignores the distinction between the state itself imposing a sanction, a fine, or liability, on the one hand, and the state empowering an individual to exact damages, on the other. A case of liability-imposition, in his view, is a case in which the state orders that the victim’s loss be shifted to the tortfeasor and not an instance of the state authorizing the victim to seek redress.

Admittedly, Waldron at one point acknowledges that some theorists emphasize that tort is about holding a defendant responsible to the plaintiff for having wrongfully injured the plaintiff. See *id.* at 399. But with one peculiar hypothetical involving multiple careless drivers—an example that probably should be analyzed as an instance of joint liability on a concert-of-action theory—he dismisses the possibility of harnessing causation and the realization of harm to flesh out a cogent conception of a law that holds tortfeasors *responsible* for having wrongfully injured victims. *Id.* at 399–400.

Finally, while Waldron’s critique focuses less on the incoherence of tort law and more on its supposed unfairness, he does not anticipate how tort law can be understood to instantiate values that cohere with many of our legal and political system’s basic normative commitments, including the recognition of core individual rights, by standing ready to provide each citizen with a power to seek redress in the event she is wronged. See Goldberg, *supra* note 2, at 596–611. Moreover, he dismisses too hastily the mechanisms that ameliorate the unfairness in tort law. See Waldron, *supra* note 6, at 388–89. These include mandatory liability insurance for automobile owners, a broad delegation to juries on the issue of the quantum of damages that may be fairly awarded, and a broad array of settlement practices largely keyed to available insurance coverage. See Tom Baker, *Liability Insurance, Moral Luck, and Auto Accidents*, 9 *THEORETICAL INQUIRIES L.* (forthcoming Jan.

Our response to those who treat fortuity as to realization as the basis for a critique of tort law is that they have failed to appreciate the particular sort of institution tort law is and the particular notions of wrongdoing and responsibility to which it gives expression. In denouncing tort law as morally arbitrary, these critics mistakenly treat tort as if it instantiates a notion of culpability-based punishment.²⁷

Suppose for the sake of argument that criminal liability and punishment are properly determined only by reference to the “intrinsic” quality of an actor’s actions (i.e., the actor’s capacities, her mental state at the time of acting, her reasons for action, and the potential for harm associated with her actions) and not based on any consequences flowing from them. Now further suppose that, under these criteria, Nagel’s two reckless drivers deserve identical criminal punishments because both undertook the identical act of reckless driving for the same reasons under the same circumstances. Even conceding these points, we maintain that they do not provide the basis for a critique of tort law. For what underwrites them is an implicit view about the perspective that the law adopts when condemning and punishing the drivers’ conduct. This is the perspective of a community, a society, or a state, where the question being asked is: How should we, as appropriately disinterested observers, assess the propriety of and respond to a given actor’s misconduct?

By contrast, if one considers the conduct from the victim’s perspective, the issue of how to assess the conduct is framed quite differently.²⁸ The reckless driver who hits the pedestrian has not only committed an antisocial act of a sort that entitles observers to condemn his actions and the state to sanction him; he has also wrongfully injured the victim. The victim is specially situated with regard to the driver’s actions, such that it would be odd not to expect that her reaction to those actions will be distinct from others’. The point is not

2008) (explaining how insurance law systematically ameliorates the apparent harshness displayed by Waldron’s examples).

²⁷ See Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 214, 222–23, 225 (Gerald J. Postema ed., 2001) (emphasizing the distinction between tort liability and punishment).

²⁸ Others have emphasized (as have we in earlier writings) that, in both law and morality, responsibility to a victim is a special form of responsibility, distinguishable from responsibility to the state or to persons who stand in some other relation to wrongdoing. See, e.g., CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 20–22 (2000) (noting that moral norms, like norms of etiquette, are often “positional” in the sense that those more immediately affected by norm violations are generally thought warranted in having a different sort of reaction than, say, bystanders); JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 146 (rev. ed. 1990) (in contrast to crimes, “there are no torts without victims and their losses”); JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 21 (1988) (distinguishing forgiveness from mercy in part on the ground that only a victim has standing to forgive an offense insofar as it is a wronging of her).

simply that one can predict the pedestrian to be resentful and vengeful toward the driver. It is that the pedestrian is *entitled* to feel that way because the driver has done something wrong *to her* that he has not done to anyone else (assuming that no one else was run over, frightened, or otherwise adversely affected).²⁹ The reckless driver, when his recklessness ripens into the running down of a victim, is literally *response-able* by (and therefore to) the victim—and perhaps the victim’s kin—in a way that the reckless driver who does not injure anyone is not. True, it is perfectly plausible to say that the lucky bad driver who hits no one has acted in a blameworthy fashion. But because his conduct has no victim, it cannot be blameworthy as a wrongful injuring of someone else.

At a minimum, these considerations suggest that a legal regime in which only the “unlucky” driver is saddled with liability is neither incoherent *qua* law of wrongs nor facially puzzling and unappealing from a normative perspective if the liability takes the form of a response by a person who can justifiably complain that the conduct constitutes a wrong to her. And, of course, that is exactly what is going on in a standard tort suit. What renders tort law distinctive as a law of wrongs is that it is *not* a device by which the state sanctions or penalizes blameworthy conduct on behalf of itself or the populace. Rather, it is a law that empowers victims to respond to wrongdoers whose wrongs have injured them. Absent an “injuring,” there is no victim to complain of the conduct, and hence no basis for a tort suit or tort liability.³⁰ To say the same thing affirmatively, tort law *requires* that fortuities as to realization be considered in assessing liability precisely because tort law is a victim-based law of wrongs rather than a community-based or society-based law of wrongs.³¹ Tort law identifies domains of conduct

²⁹ See KUTZ, *supra* note 28, at 20–25 (discussing “warranted” responses to inappropriate conduct).

³⁰ John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1636–60 (2002) (arguing that tort does not permit recovery absent injury).

³¹ These are precisely the terms by which tort was distinguished from crime by Locke, Blackstone, and many subsequent eighteenth and nineteenth century jurists, as well as by the likes of Cardozo. Goldberg, *supra* note 2, at 541–51. Professor Weinrib has made a similar point in referring to the inherent “bipolarity” of tort liability as a form of corrective justice. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 155–56 (1995). Although our account of tort shares Weinrib’s emphasis on relational wrongs and their rectification, it does not advance a corrective justice theory of tort and does not mount an argument derived from Aristotelean and Kantian theory.

Needless to say, it has been popular among twentieth and twenty-first century theorists to treat tort law as if it were law by which the state harnesses private lawsuits to achieve public policy goals such as deterrence or loss spreading. We have criticized such theories as interpretively deficient elsewhere. See, e.g., John C.P. Goldberg & Benjamin Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 384–408 (2005) (criticizing Calabresi’s effort to reduce the aspiration of tort law to the goal of accident cost minimization); John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 521–62 (2003) (discussing criticisms of various instrumentalist theories of tort).

that constitute a mistreatment of one person by another, such that the person who suffers the mistreatment is entitled to some sort of recourse against the wrongdoer. Accordingly, moral luck critiques that focus on the fortuity of realization simply have no bearing on the enterprise of tort law given what that enterprise aims to accomplish.

Describing tort as a law of privately actionable legal wrongs does not require us to deny government's role in tort. After all, the government provides the institutions, the officials, and the law that enable one person to sue another and to secure enforcement through court order or police assistance. For this reason, it may be tempting to suppose that tort judgments, no less than criminal punishments, are issued from the perspective of society or the state.³² But the government's job in this arena is that of Lockean umpire, not criminal prosecutor. By providing tort law and related remedies through its courts, government grants a victim the power to exact a remedy from one who has legally wronged her. This empowerment is significant not only because of the identity of the recipient—private citizens, firms, and government in its capacity as right holder (e.g., as property owner)—but also because it is irrevocable and non-reviewable. If the victim decides to sue and follows the right procedures, executive branch officials have no authority to stop or take over the litigation, as they do, typically, in criminal prosecutions and *qui tam* actions. Likewise, if the victim decides *not* to sue, the state has nothing to say; governmental officials cannot force prosecution of a claim even if they have compelling grounds for supposing that the suit would promote some important public objective.³³ Tort law is a government-sponsored system for responding to wrongdoing by arming putative victims with *private rights of action*—legal powers to bring claims, at their discretion, for damages and other relief based on wrongs done to them.³⁴

That tort law is victim-initiated law is only part of the story, though. Other structural features suggest that it is concerned with wrongful conduct only insofar as that conduct amounts to an injuring of one or more victims.³⁵ Consider, for example, the legal concept of injury. A person who is affected by another's misconduct in a manner

³² And, of course, the Supreme Court has on occasion deemed the enforcement of tort judgments to be state action for purposes of constitutional law. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 n.17 (1996); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

³³ See Benjamin C. Zipursky, *Philosophy of Private Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 623, 632–36, 49–51 (Jules Coleman & Scott Shapiro eds., 2002).

³⁴ *Id.*

³⁵ Injuring in this sense means, roughly, one person depriving another of rights by virtue of conduct that amounts to wrongful interference with a basic interest.

that the law does not credit as a cognizable harm has no standing to pursue a claim on the basis of that conduct.³⁶ In addition, for conduct to be tortious, it must not only be wrongful in some generic sense (i.e., antisocial) but also *relationally wrongful*—wrongful with respect to the victim who complains of the wrongdoing.³⁷ As we have observed elsewhere, torts are structured around norms that are relational in their analytic structure.³⁸ These norms specify how a certain kind of actor must act or must not act *toward* other persons. For example, the tort of libel (leaving aside constitutional refinements) dictates that one may not publish a statement *about the plaintiff* that tends to harm reputation so as to cause injury to the plaintiff's reputation. Thus, if one prints a statement that tends to harm reputation but that is about a third party (not about the plaintiff), the plaintiff has no cause of action for defamation because the statement has not defamed *her*.³⁹ This is so even if the statement causes her injury and even if injury to her was foreseeable.⁴⁰ Likewise, while the tort of trespass to land forbids one from physically invading another's property,⁴¹ only persons with possessory rights in the relevant property can claim to have been trespassed against by acts that amount to an invasion of that property.⁴² Absent such rights, they cannot sue for trespass even if the invasion caused them harm, for the trespass is only a trespass as to others, differently situated.⁴³ Similarly, the tort of fraud requires not just a misrepresentation that causes loss to another, but a misrepresentation that amounts to the deception of that other.⁴⁴ And so too for negligence, which requires that the defendant's conduct not merely constitute "negligence in the air," but carelessness *with respect to* the plaintiff or persons such as the plaintiff.⁴⁵

³⁶ Assume, for example, *D* is driving recklessly in pedestrian *P*'s presence, and that *P* is intensely annoyed, but does not fear for his physical well-being. *P* has suffered an adverse effect because of *D*'s wrongful conduct as to him, but not the sort of adverse effect that counts as an injury in the eyes of the law.

³⁷ The idea of relationality, expressed through the notion of "substantive standing," is first articulated in Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 3–5 (1998). Various writings have subsequently developed and deployed this concept. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1812–32 (1998).

³⁸ See Zipursky, *supra* note 37, at 17–18.

³⁹ *Id.*

⁴⁰ See *id.* at 17 n.53.

⁴¹ RESTATEMENT (SECOND) OF TORTS § 158 (1965).

⁴² See, e.g., *Lal v. CBS, Inc.*, 726 F.2d 97, 100 (3d Cir. 1984).

⁴³ See *id.*

⁴⁴ E.g., *Banco Popular N. Am. v. Gandhi*, 876 A.2d 253, 260 (N.J. 2005). See John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1011 (2006); Zipursky, *supra* note 37, at 18–20.

⁴⁵ *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928) ("Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right."); Zipursky, *supra* note 37, at 7–15, 27.

Our basic point, then, is this: Tort law identifies conduct that is wrongful in the particular sense of being a mistreatment of one by another, and provides recourse through law to the victim against the wrongdoer. It is, in short, a law of wrongs and redress, not a law of punishment on the basis of blame or desert. Criticizing this sort of law for linking attributions of responsibility and liability to the fortuity of realization simply misses the point of having it in the first place. The wronging of one person by another is the very essence of the enterprise, and until such an event happens, there is no occasion to inquire whether an actor can or should be held to have acted wrongfully by violating a moral or legal obligation of conduct.

A causal luck critic might complain that we are relying on an unduly narrow notion of injury and thus have overstated the contrast between criminality (using the conception we have presumed for purposes of argument) and tortiousness. A broader definition of injury that includes not only physical harm, emotional distress, and property damage but also increased risks of those harms would leave less of a role for fortuity as to realization in tort law and thereby narrow the gap between criminal law and tort. Given the latter definition of injury, for example, there will be fewer “lucky” reckless drivers since persons who are sufficiently proximate to bad driving to be placed at greater risk of physical injury would now have the basis for a viable tort claim.

This line of criticism suffers from several weaknesses. First, it does not eliminate the significance for tort of fortuities as to realization. Instead, it promises only to reduce the number of instances in which the problem will arise. Even under a heightened-risk-as-cognizable-harm conception of tort, there still must be someone who is exposed to heightened risk of harm by an actor’s wrongful conduct for there to be a possible tort claim. Whether such a person is present is no less a matter of fortuity than whether a person ends up suffering physical harm as a result of that conduct.

Moreover, as we have argued elsewhere, the idea of treating exposure to risk of harm as an injury for purposes of tort law is both descriptively and pragmatically problematic.⁴⁶ Courts do not define the tort of negligence as the careless exposure of another to heightened risk of harms such as bodily injury. Instead, they typically require the defendant to have acted carelessly with respect to another so as proximately to cause harm. In other words, negligence law in its main applications does not enjoin us to take care against *risking* harm to others. Rather, it enjoins us to take care against *causing* harm to others. Suppose *P* can prove to a certainty that *D*, by driving carelessly

⁴⁶ See Goldberg & Zipursky, *supra* note 30, at 1650–60.

in proximity to *P*, increased for a moment the odds that *D*'s driving would physically harm *P* from one in a million to one in two. If that risk never materializes, *P* and *D* are both lucky, and *P* will not have a viable negligence claim.⁴⁷ That negligence law treats mere risk exposure as noncognizable tells us something about the type of duty on which it is built. It is, as one of us has explained elsewhere, a duty of *noninjury* as opposed to a duty of *noninjuriousness*.⁴⁸

Nor is it merely happenstance that negligence law and tort law more generally are built on the idea that one owes duties to conduct oneself in certain ways so as not to cause certain harms and not on a duty to conduct oneself so as to avoid increasing others' risks of experiencing those harms. The latter sort of law would be difficult to administer reliably.⁴⁹ And, to the extent certain classes of tortfeasors (e.g., product manufacturers) engage in conduct that wrongfully risks physical injury to others, there is a worry—very much at issue in the asbestos context today—about giving equal priority to claimants exposed to the risk of harm and plaintiffs who actually have suffered harm.⁵⁰ Finally, courts' disinclination to fashion tort law around mere duties of noninjuriousness probably reflects a political decision to allocate luck in a certain way. This allocation, in effect, is quite similar to the political choice generally to hinge liability for accidental harms on a showing of fault rather than by means of a rule of strict liability. As Holmes famously argued, one reason why tort law as applied to accidentally caused injuries usually looks for fault is to give actors room to act.⁵¹ To hold actors accountable simply on the ground that their acts have caused injury risks generating overly burdensome obligations that could significantly infringe on liberty of action. The same problem might well be true of a system that hinges liability on fault but then treats increased risk of harm as injury sufficient to support a tort cause of action. Indeed, the obligation to take care to avoid increasing others' risks of injury could overwhelm a citizen who is inclined to conform with tort law's directives.⁵² Add to this the fact,

⁴⁷ We are assuming that *P* does not suffer physical harm, emotional distress, or property damage. The same holds true for unrealized risks. To take an illustration we have used before, suppose mall owner *M* is under a duty to take reasonable care to protect patrons from criminal activity on the premises and that *M* is presently failing to do the sorts of things that would fulfill that duty (e.g., providing adequate lighting or security guards in its parking lots). Even though *M*'s breach exposes patrons to the heightened risk of a criminal attack, they have no basis for bringing a tort claim against *M*. *Id.* at 1651–52.

⁴⁸ Ripstein & Zipursky, *supra* note 27, at 222–23.

⁴⁹ Goldberg & Zipursky, *supra* note 30, at 1652–53.

⁵⁰ *Id.* at 1654.

⁵¹ HOLMES, *supra* note 4, at 95.

⁵² For example, anyone who is momentarily inattentive during a drive through a residential neighborhood stands a decent chance of increasing the risk of physical harm to others and hence of committing a completed tort.

noted above, that tort actions are private in the sense of being substantially controlled by victims, and there is a worry that one could find oneself facing lawsuits on the basis of a good deal of everyday conduct. Thus, in requiring realization in the form of physical harm, emotional distress, property damage, or loss of wealth, tort law reflects a political decision to circumscribe the kinds of injuries citizens are obligated to be vigilant of, and thereby to give relatively greater room for liberty of conduct.⁵³

For all these reasons, the idea that risk exposure is an injury unto itself cannot eliminate or even substantially diminish the role of fortuity as to realization in tort law. This form of luck has always mattered and should continue to matter in determinations of tort liability.

B. Fortuity as to Extent of Loss

A related critique of tort law's tolerance for moral luck does not concern fortuities as to whether *some* harm will occur to another by virtue of one's wrongful acts but fortuities as to the magnitude of such harm. The thin-skull rule is the most striking illustration of this problem. Under this rule, a tortfeasor whose tort causes massive harm only because of a victim's hidden vulnerability is subject to liability for the full value of the harm.⁵⁴ This result occurs even if the tortfeasor could not have anticipated causing harm of this magnitude and even if requiring her to pay for such harm would amount to a disproportionate punishment and could not be justified on grounds of specific or general deterrence.⁵⁵ But the problem goes beyond the thin-skull rule, as Waldron's Fate and Fortune parable nicely illustrates.⁵⁶ What is generally taken to be the basic principle of tort damages—the idea of making the victim whole—often entails a disjunction between the sanction that a tortfeasor “deserves” for his misconduct, or the sanction that would appropriately deter, and how much he must actually pay. Fortuity as to extent of liability thus seems to provide an independent ground for criticizing tort law's tolerance of moral luck.

Our reply to this criticism parallels our response to the criticism of tort law for tolerating fortuities as to realization.⁵⁷ Tort law does

⁵³ This is not to say that all law must do so. Often, criminal law and regulatory law deem risk creation to be offenses, and one can of course be cited for speeding without having harmed anyone. (Needless to say, there is a significant difference between the risk of a regulatory fine for speeding and the risk of paying thousands or millions of dollars in damages.) Our aim here is to adduce plausible reasons why the tort system, as a law of private wrongs and redress, does and should shy away from giving victims a right of action for damages against the wrongdoer merely for wrongful risk exposure.

⁵⁴ See, e.g., *Vosburg v. Putney*, 50 N.W. 403, 404 (Wis. 1891).

⁵⁵ *Id.*

⁵⁶ See *supra* note 6 and accompanying text.

⁵⁷ See *supra* Part I.A., II.A.

not attempt to impose punishment on the tortfeasor in accordance with a notion of desert or deterrence.⁵⁸ To say that a driver, for an instant, drove carelessly and thereby proximately caused millions of dollars in losses to another driver or a pedestrian is not to say that the attendant liability represents a just or fair punishment of the driver. Quite the opposite, *qua* criminal punishment, such liability might be excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment.⁵⁹ Yet the Supreme Court has said quite clearly that compensatory damages payable to victims in civil actions are not fines within the meaning of that Amendment,⁶⁰ and this holding is a crucial piece of doctrinal evidence suggesting that our legal system does not treat damage awards as punishments keyed to a notion of desert. Likewise, it is now a familiar point of tort theory that the make-whole measure of damages renders descriptively implausible those theories of tort that purport to describe it as a scheme for deterrence. If tort law really were built around forward-looking concerns for deterrence, then it ought to focus less than it does on the retrospective issue of how much loss a given victim happens to have experienced. This is why some have advocated for decoupling the deterrence function of tort from its compensatory function.⁶¹

But if tort damages are not issued in the name of punishment or deterrence, can they be justified on some other basis? Or to put the question more directly: How does the notion of make-whole compensation fit into tort law, understood as a law of wrongs and redress?

⁵⁸ This claim needs to be qualified both as to punitive damages and as to tort theory more generally. (1) Punitive damages. In some cases, victims can request that the factfinder award punitive damages. Considerations of deterrence frequently influence the size of that award. This is not to say, however, that the point of tort law or even of punitive damages is to deter certain forms of wrongdoing. See generally Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005) (explaining punitive damages largely in terms of plaintiff's expanded right of individual redress, while recognizing respects in which some jurisdictions have invested punitive damages with a significant deterrent role). (2) Tort Theory more generally. We are of course aware that the law and economics approach to tort theory—arguably the dominant theoretical paradigm today—is based largely on the deterrence capacity of tort law. Suffice it to say that it is not our aim in this Article to address that approach; we have done so elsewhere. See, e.g., Goldberg & Zipursky, *supra* note 31; Goldberg & Zipursky, *supra* note 37; Zipursky, *supra* note 37.

⁵⁹ U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed . . .”).

⁶⁰ *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263–64 (1989) (“[T]he Excessive Fines Clause . . . does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.”).

⁶¹ See James J. Heckman, *The Intellectual Roots of the Law and Economics Movement*, 15 LAW & HIST. REV. 327, 328–29 (1997). It is also why others, including Judge Posner, maintain that courts should award punitive damages on very different terms than they have historically—to make up for instances of “under-litigation” or under-regulation, as opposed to allowing victims of egregious wrongs a special form of redress. See Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 676–77 (7th Cir. 2003).

Our initial response is to emphasize that the issue is not exactly one of tort law, but of tort law's compatibility with a certain rule of damages. That rule says, roughly, that when a tort victim successfully sues her tortfeasor, she is ordinarily entitled to collect damages equal to the value of past and future economic losses, pain and suffering, and other losses. Although this rule provides a plausible metric for what should count as meaningful redress in standard cases, tort law could also operate in conjunction with other remedial rules. For example, one can readily envision the tort system incorporating a rule that a tort victim may recover as much as a jury might consider fair or reasonable under the circumstances.⁶² Another (probably abhorrent) rule might give the victim the option of collecting damages or demanding corporal punishment of the tortfeasor.⁶³ Each of these options is broadly compatible with the idea of tort law as a law of wrongs and redress. In each case, the victim may initiate proceedings against a person who has wrongfully injured her and stands to obtain a meaningful remedy. By contrast, if the rule of damages allowed the victim to receive only a framed certificate acknowledging her injury, the system would fail to provide redress.⁶⁴ The question, in the end, is whether the remedy is such that the victim should reasonably feel that the law has taken her grievance seriously.

But what of the unfairness to the defendant who is made to pay for massive losses resulting from minor delicts? The short answer is that the law of tort remedies does not require proportionality between the reprehensibility of the defendant's conduct and the amount of the plaintiff's losses. Thus, the plaintiff may sometimes demand much

⁶² This was perhaps the dominant rule in Anglo-American law for personal injury cases during the 1700s and into the mid-1800s. See John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 442-43 (2006). It may still be the rule in many instances, given that jury instructions often direct jurors to assess compensation that is "reasonable" or "fair." See, e.g., KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 128.01 (5th ed. 2000) (stating that the jury should "award plaintiff such sum as you believe will fairly and justly compensate plaintiff"). Alternatively, it may be the de facto practice in many tort cases, given the jury's broad discretion to determine damages, at least for nonquantifiable losses.

⁶³ This option was available to the victims of felonies in medieval English law. David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 61-68 (1996).

⁶⁴ For some tort victims, namely those wrongfully injured by judgment-proof tortfeasors, this sort of acknowledgment is about the only relief they stand to receive (minus the frame). That the legal system lets some tortfeasors escape liability in this way does not reflect a principle of tort law or damages law. Rather, it results from the availability of various asset-protection measures (e.g., the recognition of limited liability entities), bankruptcy law, and a lack of alternative remedies, such as the ancient-law remedy of impressing a tortfeasor into the victim's personal service. The fact that other bodies of law impinge on tort law's operation raises separate questions. In addition, we do not discuss here whether there are judicially enforceable constitutional limits on the ability of courts and legislatures to cap damages or otherwise eliminate or significantly curtail tort liability. See Goldberg, *supra* note 2, at 611-26.

more than the defendant, in one sense at least, deserves to pay. But to note this facet of tort law is simply to observe that it provides recourse through law and, as such, is not a system of proportional punishment or efficient deterrence. The remedial question in standard tort cases is not what the defendant deserves to pay given his wrongful behavior. Nor is the question what the defendant ought to pay in light of the state's interest in deterring such conduct. Rather, the question is what the victim may legally extract from the defendant as redress for the wrong done to him by the defendant. Surely, a plausible answer to *this* question, at least for standard cases, is an amount equivalent to the losses suffered because of the wrong. For other cases that involve egregious wrongdoing, i.e., insult atop injury, a potentially broader measure of damages might be appropriate.⁶⁵

Finally, tort law's reliance on a sometimes unforgiving remedial rule does not suggest that the legal system *as a whole* should ignore the actual and potential injustices resulting from that rule. Presumably, this is one reason why modern law denies victims the right to demand punishment of tortfeasors and why it affords bankruptcy protection for tortfeasors who commit nonwillful torts. Concern for potential unfairness may also help explain and justify the modern institution of liability insurance. Although historically condemned as permitting actors to pass off responsibility, liability insurance is now generally regarded as a legitimate way to guard against potentially ruinous liability arising from certain forms of wrongdoing.

III

COMPLIANCE LUCK AND THE NATURE OF TORTIOUS WRONGS

A. Compliance Luck, Misfortune, and Loss-Shifting Theories of Tort

Despite the scholarly attention paid to causal luck, it is not the most troubling form of luck at work in tort law. After all, when one focuses on fortuities linked to causation, one is looking at instances in which an actor is presumed to have acted wrongfully in some respect and thus can be presumed to deserve some type of sanction. Another form of luck is not about the comparative fortune of differently situated wrongdoers or the undeserved good fortune of those whose wrongful conduct does not generate injury. Instead, it is about how easily tort liability is sometimes generated. Specifically, it is about actors who seem not to have behaved wrongfully in a full-blooded sense but nevertheless face liability for injuries they have caused. Often enough, an actor causes harm despite diligent efforts to comply with a

⁶⁵ See Goldberg, *supra* note 62, at 442, 455–62; see also Zipursky, *supra* note 58, at 151–55.

standard of conduct. On these occasions, only the actor's bad luck leads to her failure to comply with that standard. As a result, she faces potential tort liability.

The form of liability just described is sometimes placed under the ambiguous—and here positively unhelpful—heading of “strict liability.” Instead of using that label, we will refer to these situations as raising the issue of “compliance luck,” that is, luck affecting one's ability to meet a relevant norm of conduct. Compliance luck is what Holmes and Posner had in mind when arguing that negligence law does not embrace a moral conception of fault.⁶⁶ The classic doctrinal exemplar of compliance luck is the 1837 decision in *Vaughan v. Menlove*.⁶⁷ Menlove stacked hay in a manner that created a risk of spontaneous combustion.⁶⁸ The haystack later ignited, causing a fire that damaged the property of his neighbor, Vaughan.⁶⁹ Menlove's lawyer argued that his client had acted in the good faith belief that he was behaving prudently and thus should not be held liable to Vaughan.⁷⁰ The court disagreed and famously held that negligence law sets an “objective” standard that measures conduct against the care a person of ordinary prudence would have taken under the circumstances.⁷¹ As Holmes later observed (and Posner echoed), the objective standard entails that persons who are, for whatever reason, accident-prone or not well equipped to act with caution and prudence, can be found legally at fault.⁷² For such people, this is a bit of bad constitutive luck, i.e., the misfortune of not being well suited to comply with certain demands of the law.

One can readily find versions of the same sort of misfortune in more modern settings. A driver who rounds a corner ineptly and slips off the road, injuring a pedestrian, can be held liable regardless of whether she was trying her best or has made efforts to improve her driving. And compliance luck need not be limited to cases of innate inability. As Mark Grady famously emphasized, each of us will slip up sooner or later and fail to act as the law requires. But only some of us are unlucky enough to do so in circumstances that generate injury.⁷³ A very good surgeon who, on one occasion, happens to shake her wrist at just the wrong moment so as to nick an artery is subject to

⁶⁶ See *supra* text accompanying notes 4–5.

⁶⁷ (1837) 132 Eng. Rep. 490 (C. P.).

⁶⁸ *Id.* at 491.

⁶⁹ *Id.*

⁷⁰ See *id.* at 493.

⁷¹ See *id.*

⁷² HOLMES, *supra* note 4, at 108–09.

⁷³ Mark F. Grady, *Res Ipsa Loquitur and Compliance Error*, 142 U. PA. L. REV. 887, 897–98 (1994).

liability for malpractice.⁷⁴ A reliable waiter who on one occasion clumsily drops scalding hot liquid on a customer can face liability.⁷⁵ A drug manufacturer that adopts generally sound safety protocols but fails despite these measures to identify a harmful interaction between its drug and another can be held responsible for causing those harms.⁷⁶ In cases like these, good will, best efforts, and a track record for responsible behavior is not enough to ward off negligence liability.⁷⁷

Furthermore, negligence law's objective standard is not the only instance of tort law's indifference to bad compliance luck, which can take the form of circumstantial rather than constitutive luck.⁷⁸ For example, the tort of trespass to land enjoins each of us to refrain from interfering with property owners' rights of undisturbed possession. It is possible that a defendant who is acting in an impeccable manner will end up committing a trespass. Suppose *D*, prior to fencing his yard, consults all relevant records to determine the location of the property line between his property and his neighbor *P*'s property. Suppose also that *D* builds his fence strictly in accordance with the information in those records. If it later turns out that the records were, unbeknownst to anyone, erroneous, such that *D*'s fence is in fact sitting on *P*'s property, *P* has a cause of action against *D* for trespass.⁷⁹ As in *Vaughan*, this is an instance of bad compliance luck. *D* violated a norm of conduct forbidding one from physically invading another's property, but *D*'s violation did not stem from any lack of diligence on *D*'s part. Insofar as the liability is generated by features of the defendant's action that would not have been visible or otherwise accessible to a person in the defendant's circumstances who was conscientiously choosing a path of conduct, liability is turning on bad luck.

Examples such as these have led some tort scholars to worry about the intelligibility and coherence of tort law. Yet, unlike causal luck critics who purport to demonstrate the irredeemably arbitrary nature of tort law, many tort theorists who focus on tort law's insensitivity to compliance luck claim that this facet of tort provides the key to understanding tort law's aspirations. Holmes, for example, argued that the objectivity of negligence law's conception of "fault" revealed

⁷⁴ See, e.g., James Goudkamp, *The Spurious Relationship Between Moral Blameworthiness and Liability for Negligence*, 28 MELB. U. L. REV. 343, 350–52, 355 (2004) (identifying doctrinal features of negligence law, such as the objective standard of care, that undercut the claim that liability for negligence is based on notions of moral blameworthiness).

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See Nagel, *supra* note 8, at 28; *supra* note 15 and accompanying text (explaining the difference between these forms of luck).

⁷⁹ *Burns Philp Food, Inc. v. Cavalea Cont'l Freight, Inc.*, 135 F.3d 526, 529 (7th Cir. 1998) (applying Illinois law).

that the law is not actually concerned with holding people responsible for committing wrongs against others.⁸⁰ Instead, he argued, it marks off the set of instances in which governments wedded to the classical liberal principle of nonintervention in private affairs could nonetheless justifiably shift a loss suffered by one person to another.⁸¹ In a related but distinct vein, Posner argues that negligence law's tolerance of compliance luck tells us that, despite appearances, negligence law (and tort law generally) is not a law of wrongs, but instead a scheme by which private lawsuits predicated on victims' losses are harnessed by judges as occasions on which to craft liability rules that incentivize actors to make efficient expenditures on safety precautions.⁸² Judge Calabresi similarly predicates his effort to design a scheme for the efficient deterrence of accidents on the idea that the legal wrongs of tort are wrongs in name only.⁸³

The tendency to seize on the problem of compliance luck as a basis for reconceptualizing tort law can be seen in the work of moral skeptics such as Holmes, as well as law and economics advocates, such as Posner and Calabresi.⁸⁴ Some noninstrumentalist corrective justice

⁸⁰ According to Holmes, this was precisely John Austin's mistake in characterizing torts as a law under which the sovereign punished moral wrongs by holding wrongdoers liable to their victims. HOLMES, *supra* note 4, at 107.

⁸¹ *See id.* at 79.

⁸² *See generally* Posner, *supra* note 5 (arguing that negligence law is set up to promote efficient expenditures to prevent injury).

⁸³ *See* Guido Calabresi, *The Decision for Accidents: A Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965). In this early statement of his efficiency-based conception of liability, Calabresi begins with the following observation:

I take it as given that the principal functions of "accident law" are to compensate victims and reduce accident costs. . . . The notion that accident law's role is punishment of wrongdoers cannot be taken seriously. Whatever function we may wish to ascribe to punishment in criminal law, it simply will not carry over to civil accident suits. If the time-honored, though somewhat shopworn, distinctions between legal and moral fault and between damages and degree of culpability which prevail in tort law do not sufficiently demonstrate this proposition, then surely the prevalence of insurance priced on the basis of categories that have little to do with any individual insured's "goodness" or "badness" must.

Id. at 713-14.

⁸⁴ Compensation theorists have likewise argued that the objectivity of the fault standard reveals that negligence law, and tort law generally, cannot be understood as concerned with redressing wrongs, but instead are clumsy, expensive vehicles by which government attempts to deliver compensation to unlucky accident victims. *See* PATRICK S. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 116-17 (1970). As Professor Patrick Atiyah argued:

If the object were simply to condemn the defendant for paying insufficient attention to the interests of others, for preferring to risk the safety of others in his own interest, for 'fault' or immoral conduct, then there would plainly be a justification for subjectivising the standard of care. It is hard for an inexperienced person to be condemned for failing to observe that degree of skill which a more experienced person could show, to be told that he should have foreseen this or that risk or should have taken this or that precaution. But since the ultimate purpose of applying the negligence

theorists have made similar arguments. For example, Arthur Ripstein and Jules Coleman have argued that tort law is not concerned with defining and articulating wrongs, but with achieving a fair allocation of “misfortune,” namely, losses that undeserving victims incur by virtue of others’ conduct.⁸⁵ And although corrective justice theorists including Ripstein, Coleman, Stephen Perry, and Tony Honoré all contend that tort law is fundamentally about *responsibility*, what they have in mind is *responsibility for losses*, not *answerability for wrongs*.⁸⁶ Hence, they do not view tort as a law for the redress of wrongs. Instead, they conceive tort as law that starts with the fact of the victim’s “misfortune” (her undeserved loss), then determines whether to shift or reallocate that loss to another (or others) who may fairly be deemed responsible for it. And the problem of compliance luck seems to provide one of the reasons behind their attraction to loss-based conceptions of tort even where they recognize some conceptual role for “wrongs.”⁸⁷ That is, tort law’s willingness to ignore the limited

formula is to decide if compensation should be paid to an innocent accident victim, the merits of whose claim may have little to do with the demerits of the defendant, there is a stronger tendency for the law to pull the other way.

Id.; see also PETER CANE, *ATYIAH’S ACCIDENTS, COMPENSATION AND THE LAW* 41 (5th ed. 1993) (reasoning that the objective fault standard demonstrates that it is not intended to reinforce norms of right conduct or deter anti-social conduct but to compensate accident victims).

⁸⁵ See JULES L. COLEMAN, *RISKS AND WRONGS* 324–26 (1992); ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 3 (1999). See generally Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 *MCGILL L.J.* 91 (1995) (arguing that tort law instantiates a political conception of fair loss allocation).

⁸⁶ COLEMAN, *supra* note 85, at 324; TONY HONORÉ, *RESPONSIBILITY AND FAULT* 76–82 (1999) (arguing that tort law seeks to fairly allocate responsibilities for harms caused by one to another); RIPSTEIN, *supra* note 85, at 56; Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *IOWA L. REV.* 449, 506–07 (1992) (invoking and refining Honoré’s concept of outcome-responsibility to support the claim that tort law determines when a person owes a duty to repair another’s loss on the basis of when that person is responsible for having caused the loss).

One way to gauge the commitment of these corrective justice theorists to a notion of tort as a law that shifts losses rather than as a law that provides recourse for victims of wrongs is to consider the degree to which they distance themselves from Professor Weinrib. Weinrib explicitly argues that tort corrects *wrongs*, not *losses*. See generally WEINRIB, *supra* note 31. Notably, both Coleman and Perry have argued that Weinrib’s focus on wrongs instead of losses renders his theory interpretively problematic because it can only explain why a wrongdoer ought to be punished and ignores what they see as the hallmark question of tort law—why a wrongdoer owes the duty to compensate his victim. See COLEMAN, *supra* note 85, at 320–21; Perry, *supra*, at 479–80. By contrast, Professor Ripstein continues to profess allegiance to a roughly Weinribian view of tort law as embodying the moral obligation of wrongdoers to repair their wrongs. RIPSTEIN, *supra* note 85, at 265–66. As Ripstein also rejects Perry’s critique of his views as essentially distributive, we are left unsure of how, finally, to characterize his position.

⁸⁷ See COLEMAN, *supra* note 85, at 324–25 (arguing that while tort is wrongs-based in some sense, the fact that the “wrongs that fall within the ambit of corrective [justice] do not mark a moral defect in the agent or in her action” should lead us to regard the normative system that tort law exemplifies as one requiring tortfeasors to bear the costs of the

capacity of certain persons to comply with tort standards seems to provide a reason, in their view, for treating tort law as a law of fairness-based loss allocation rather than a law for the redress of wrongs.⁸⁸

We will refer to the members of this diverse family of views as “allocative” tort theorists. Amidst their very pronounced differences, they share two core ideas. The first is that the conduct that tort law identifies as wrongful—as evidenced primarily by negligence law’s objective fault standard and its indifference to compliance luck—is sufficiently removed from standard moral conceptions of wrongdoing that tort cannot plausibly be what it appears to be, namely, law that empowers victims of wrongs to obtain redress from wrongdoers. The second is that, given tort law’s idiosyncratically capacious notion of wrongdoing, tort is more accurately and usefully understood as a scheme by which government, for reasons of policy or principle, shifts or allocates losses initially born by the unfortunate victim who has suffered physical injury, property damage, lost wealth, or emotional distress. Thus, the inquiry in a negligence or trespass case is not whether an actor wronged the plaintiff in anything like a standard moral sense, such that the plaintiff is now entitled to redress from the actor. Instead, the issue is whether the defendant’s conduct renders him or her an appropriate bearer of the victim’s loss. In this view, the relevant question of liability entails consideration of one or more of the following factors: Who within our society is well situated to prevent or spread the costs of accidents? What sort of actor ought to be given an incentive to take steps to avoid certain harms or adverse consequences in the future? When is it fair to ask one person to shoulder a burden that has initially befallen someone else? Can or should the defendant be deemed one who is responsible for the loss?

Critically, in the eyes of allocative theorists, once one recognizes that tort law is not really a wrongs-based law of redress but instead allocates the tangible manifestations of victims’ misfortune, the problem of tort law’s indifference to compliance luck dissolves. If in fact

losses they cause rather than rectifying their wrongs); HONORÉ, *supra* note 86, at 85–86 (noting that tort law, as compared to criminal law, often attaches liability to conduct that is minimally faulty and that this feature is consistent with tort law’s effort to allocate responsibility for harms in a fair manner); RIPSTEIN, *supra* note 85, at 85 (arguing that *Vaughan*’s use of an objective standard demonstrates that tort law seeks to set fair terms of social interaction rather than to attach liability to morally wrongful conduct on the grounds that it is wrongful).

⁸⁸ Again, we emphasize that these theorists, in contrast to Posner and Calabresi, do not depict tort law as a collection of judicially-imposed liability rules that function—or can be made to function—as instruments for promoting a goal such as causing actors to take efficient precautions against harming others. Still, they insist that tort is not a law of wrongs, but instead a law that gives expression to principles of fair loss-allocation. And for them, fairness is determined not by principles of distributive justice or need but by a conception of when one person may justifiably be deemed responsible for another’s loss.

torts like negligence and trespass are not primarily concerned with setting norms of how to behave toward others, then one need not worry that tort law may deem actors to have done “wrong” even though, because of compliance luck, their conduct was faultless in the sense of not involving conscious or advertent wrongdoing.⁸⁹ When an opinion in a tort case speaks about the defendant’s conduct in terms of breach of duty, injury, and the like, and that language is taken at face value, notions of blame and morality are in play. And those whose conduct is so described might wonder if they are getting the worst of both worlds—the judgmentalism and opprobrium that goes with notions of wrongdoing—without the nuanced and more luck-resistant categories associated with Kantian approaches to morality. By contrast, an approach that asks, “Who can justifiably be asked to bear this loss?” is not concerned with who committed a wrong, but rather who can, on grounds of efficiency or fairness, be ordered to pay. The notion of wrongful conduct fades to the background and, with it, the problem of compliance luck.⁹⁰

B. What Compliance Luck Teaches Us About Torts

In Part II.A we suggested that the problem of compliance luck provides the launching pad for theories of tort law that seek to drive a wedge between torts and wrongs. These theories, by recasting tort as allocating victim misfortune according to notions of fairness or efficiency, stand apart from genuinely wrongs-based conceptions of tort. The most prominent current proponent of a robust wrongs-based tort theory is Ernest Weinrib.⁹¹ In his view, a tortfeasor incurs a moral duty of repair just because he has wronged the plaintiff.⁹² The legal system recognizes this moral duty by defining certain wrongs and imposing a legal duty of repair on persons who commit them. For Weinrib, the requirement to compensate the loss is an artifact of a

⁸⁹ Of course, this phenomenon might be problematic for some other reason; it might be inefficient, unfair, or otherwise undesirable from a policy perspective to reallocate losses to the Menloves of the world because they cannot take steps to prevent those losses. But this is now a different sort of concern. The problem lies not in a deep conflict between morality and tolerance of luck, but instead in debatable empirical or normative propositions about when and why losses should be reallocated.

⁹⁰ Coleman’s theory of corrective justice purports to offer an account of torts as “wrongs,” but he is careful to indicate that he uses the term “wrongs” only in an extended sense. He also emphasizes that the hallmark of tort law is the assignment of losses to tortfeasors. See COLEMAN, *supra* note 85, at 324–35. As suggested below, we share Coleman’s sense that the wrongs of tort law are distinct in some ways from full-blooded moral wrongs. We do not agree, however, that this entails that tort law can only be understood as instantiating a just scheme for allocating losses.

⁹¹ See WEINRIB, *supra* note 31, at 134–36, 142–44.

⁹² See *id.* at 135 (“With the materialization of wrongful injury, the only way the defendant can discharge his or her obligation respecting the plaintiff’s right is to undo the effects of the breach of duty.”).

more fundamental requirement—the moral requirement of undoing or rectifying a wrong that one has done to another.⁹³ To explain tort liability as based on a determination of who should bear the costs of which injury is to put the cart before the horse.⁹⁴ The tortfeasor must bear the costs of the victim's injury, according to Weinrib, only because requiring him to do so is the appropriate response of the legal system to the tortfeasor's having wronged the victim.⁹⁵

Although we reject important aspects of Weinrib's approach—including his commitment to formalism,⁹⁶ his belief that Aristotelean corrective justice, when combined with a Kantian notion of agency, captures the sense in which tort is a law of wrongs,⁹⁷ and his notion that tort law instantiates a moral duty of repair⁹⁸—we share his view that wrongs are basic to tort, rather than an offshoot of principles of fair or efficient loss allocation.⁹⁹ In short, as noted above, we believe that tort liability is predicated on the commission of a wrong—a failure to act in accordance with a relational norm of right conduct—that in turn generates in a victim of the wrong a power to respond to the wrongdoer. We therefore cannot explain away the problem of compliance luck by means of the strategy we have attributed to allocative theorists. Instead, as this subpart will argue, a wrongs-based view such as ours can incorporate and will be clarified and improved for having incorporated an account of how one can, at least in some cases, act wrongfully even though one lacks the ability to have acted otherwise.¹⁰⁰

Worries about compliance luck form only one of several overlapping objections to wrongs-based conceptions of tort. Specifically, we have in mind three major interpretive difficulties that scholars have identified as afflicting views of torts as genuine wrongs. We label these the “Moralist's Problem,” the “Positivist's Problem,” and the “Doc-

⁹³ See *id.* at 135, 143.

⁹⁴ See *id.* at 143 (“Because the actor's breach of duty infringes the sufferer's right, liability reflects the defendant's commission of an injustice. Liability is therefore not the retrospective pricing or licensing or taxing of a permissible act.”).

⁹⁵ See *id.*

⁹⁶ See *id.* at 22–55.

⁹⁷ See *id.* at 56–83.

⁹⁸ See *id.* at 122 (“[H]aving a right implies that other actors are under the moral necessity to refrain from infringing it.”).

⁹⁹ Unlike Weinrib, we do not maintain that tort law's wrongs are pre-political in any strong sense.

¹⁰⁰ Here we will be pursuing a path marked by Coleman, among others, who distinguishes between acts characterized by “fault in the doer” and “fault in the doing.” COLEMAN, *supra* note 85, at 333. The latter are acts that can plausibly be described as wrongful even though not connected to any moral defect in the wrongdoer. *Id.* Our analysis attempts to capture more explicitly why a thinner, less character- and control-dependent conception of wrongdoing is plausible generally and why tort law is a particularly apt locus for the use of such a conception.

trinalist's Problem." Each raises the following distinct objection to wrongs-based understandings of tort.

The Moralist's Problem. The alleged wrongs of tort law are not necessarily moral wrongs and are frequently not even close enough to what is meant by "wrongful" to merit the appellation "wrong."¹⁰¹ Torts are wrongs only in the sense of having been labeled as such; moral wrongfulness is neither necessary nor sufficient for liability. In other words, the idea of "wrong" figures in tort only in a question-begging manner.

The Positivist's Problem. Tort law is constituted by rules that specify when liability is or is not to be imposed. It is true that the imposition of liability is often connected to judgments of how people should or should not behave, and that tort law often tries to provide incentives for not committing such conduct or to constrain the imposition of liability based on whether the defendant was engaging in such conduct. But insofar as the law itself exists as an autonomous set of rules, these are not rules of right conduct—of how one really ought to behave. Instead, they merely specify when conduct will have the particular consequence of subjecting the actor to a governmentally imposed fee in the form of liability for damages.

The Doctrinalist's Problem. Even if some areas of tort law involve wrongs-based liability, many areas—namely, those that are governed by the principle of strict liability—clearly do not. These include not only torts pertaining to property rights, ultra-hazardous activities, and product sales, but also rules of vicarious liability and workers compensation schemes. A purportedly descriptive theory of tort that excludes all of these is untenable; hence tort law cannot accurately be described as a law of wrongs.

Our major concern in this subpart is the Moralist's Problem, but it will be helpful to address briefly the other two.

Although we address the Positivist's Problem in greater detail elsewhere,¹⁰² we can summarize our basic point as follows: one can insist that law is largely distinct from morality without thinking that the difference consists of a division between a realm of genuine duties (morality) and a realm of liability rules that merely resemble genuine duties but are not (law). Rather, one can distinguish between moral and legal duties by reference to the sources, structure, and content of each type of duty. In this view, tort law is best understood as generating obligations (i.e., setting rules and standards of how one must be-

¹⁰¹ For example, as noted above, trespass can be committed even where the trespasser is acting reasonably or in a manner that is innocent. See *supra* note 78–79 and accompanying text. Likewise, a person doing his or her best can still commit actionable negligence. See *supra* note 72 and accompanying text.

¹⁰² See John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 *FORDHAM L. REV.* 1563, 1586–90 (2006) (addressing the Positivist's Problem by building on H.L.A. Hart's response to Holmes and John Austin).

have toward others) that are legal (i.e., formulated and enforced by judges in the process of deciding cases) rather than moral. Admittedly, this sort of Hartian conception of what makes obligations legal is easiest to grasp when dealing with rules of conduct stated clearly in statutes. But it is not the case—as Hart himself insisted¹⁰³—that legal rules need be legislative in origin to be legal. There is plenty of evidence, both in torts and elsewhere, that rules of right conduct often are judge-made or judge-articulated. Indeed, the various judicially-fashioned tort causes of action state on their faces that persons must refrain from acting, or are required to act, in certain ways toward others. In light of these rules of conduct, legal duties exist to treat or not treat others in those ways. The wrongs of tort law are violations of these duties.

The Doctrinalist's Problem has been overstated by a few decades' worth of academic work built on a theoretically-driven attraction to strict liability.¹⁰⁴ Our view—and the view of tort law both traditionally and still in most courts—is that it is often a mistake to equate “liability without fault” with “strict liability.” For example, vicarious liability is not strict tort liability. Indeed, it is not a rule of tort liability at all. Rather, it is a doctrine of agency law that is concerned with when an agent's wrongful conduct toward a third party can be attributed to the principal on whose behalf the agent was acting.¹⁰⁵ In addition, many torts are articulated in terms of elements and defenses that do not prompt an inquiry into whether the alleged tortfeasor was at fault. Yet such torts also do not impose strict liability in the sense of liability without regard to whether any wrong has been done. As we have seen, trespass does not require proof that the person who has invaded another's property has acted unreasonably or even unjustifiably.¹⁰⁶ But it is still a wrong to commit trespass in that one has run afoul of the legal directive that one must not violate another's property rights by intentionally occupying or invading property owned by another.¹⁰⁷ The failure to comply with this directive is the legal wrong of trespass. This observation does not necessarily end the argument, for there remains the question of whether the combination of intent and “strict

¹⁰³ See *id.* at 1588.

¹⁰⁴ See Goldberg, *supra* note 31, at 537–38 (discussing efforts by enterprise liability theorists to cast tort history and doctrine as broadly supportive of strict liability).

¹⁰⁵ Which is presumably why the doctrine was and still is restated in the Restatement of Agency rather than the Restatement of Torts. See RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006).

¹⁰⁶ See *supra* text accompanying notes 78–79.

¹⁰⁷ One can commit trespass unknowingly by intentionally occupying land that one has no reason to know is owned by another. But one cannot commit trespass accidentally, in the sense of acting without any intent to occupy the land in question—for example, carelessly losing control of one's car so that it ends up, against one's will, on property owned by another.

liability” that figures in trespass is robust enough to make it meaningful rather than circular to talk about it being a “wrong.” However, this merely leads us back to the Moralists’ Problem. The point is not that the Doctrinalist’s Problem is defeated but that, in this context, it does not constitute a separate line of argument.¹⁰⁸

So let us return to the Moralists’ Problem, focusing on negligence. As we noted above in connection with *Vaughan* and other examples,¹⁰⁹ the objectivity of the standard of care in negligence law naturally leads to the concern that legal negligence is not a wrong in any meaningful sense because it is indefensible to treat someone who does his best to be careful as having acted in a wrongful manner. And here is where luck figures into tort law in a very significant manner: it is bad (constitutive) luck to be born awkward or imprudent. But as both *Vaughan*, Holmes, and the overwhelming majority of courts and tort scholars have agreed, tort law determines whether there has been careless conduct and whether there shall be liability without considering this luck. It is just the defendant’s bad legal luck.

One can extract from this and other examples of objective negligence two reasons that seem to undercut any claim that negligence law is wrongs-based. First, conduct clearly can be the basis for negligence liability even though it does not manifest bad character. The reliable physician and waiter we imagined above might well be stellar, upright members of the community who just happen to make mistakes. Second, negligence liability can attach whether or not the putative wrongdoer had the ability to adjust his or her conduct to comply with the norm of taking reasonable care not to injure others. The wrongdoer may not merely have *tried* to do his or her best but may have actually *done* his or her best to be careful. There are both direct and indirect routes by which to use these two reasons as arguments that negligence law is not wrongs-based. The direct route would claim

¹⁰⁸ To say that the Doctrinalist’s Problem is significantly overstated is not to say that it has no purchase. In fact, by pressing it, its advocates have perhaps helped to isolate pockets of truly strict, non-wrongs-based liability that stand in contrast to the general character of tort as a law of wrongs. For example, liability for blasting or other abnormally dangerous activities may not be genuinely wrongs-based. At a minimum, one likely can find language in judicial decisions applying this doctrine that emphasize that the law in no way disapproves of the activity in which the defendant engaged and that there is no legal directive or injunction to refrain from the conduct in question. Liability, on this rationale, attaches despite the fact that the conduct is not enjoined by the law as wrongful.

Although those who pose the Doctrinalist’s Problem are prone to expand out from special cases of socially valuable but highly dangerous activities such as blasting so as to treat more mainstream doctrines—particularly the law of products liability—as likewise not wrongs-based, we think this is a mistake, although the issue is difficult and may depend on the category of products liability claim. For now we can say that, in many cases at least, the products liability cause of action does treat as a wrong the act of injuring someone by placing a dangerously defective product on the market for use by consumers.

¹⁰⁹ See *supra* text accompanying notes 66–83.

that a necessary component of the concept of a wrong is that the action manifests (or normally manifests) a shortcoming of moral character or that the action is one that a person could, by exercising conscious choice rightfully, have avoided. The indirect route would claim that both of these are fundamental features of the concept of a moral wrong and that if putative legal wrongs deviate too far from moral wrongs in their nature, then they are not recognizably instantiations of the notion of a wrong.

We do not want to address either of these arguments head on, at least for the time being. Rather, we want first to identify reasons why it might be plausible to see legal negligence as a form of wrongdoing. That is, we want to consider how much of a notion of wrongdoing is left when we are dealing with a standard or norm of conduct that does not assess behavior in terms of or with sensitivity to incompetencies or other comparable causes of noncompliance.

The first feature of negligence law that connects it to the idea of wrongs is that it consists in large part of norms enjoining people not to act (or to act) in certain ways with respect to certain interests of others. For example, negligence law enjoins drivers to drive with ordinary prudence so as to avoid causing bodily injury (or apprehension of imminent bodily injury) to others including drivers, cyclists, pedestrians, and outdoor café patrons. That tort rules articulate norms of appropriate conduct, as opposed to setting prices or providing liability rules, is evidenced by various features of our language and practices. Most mundanely, it is perfectly commonplace to describe the act of driving around a corner too hastily as “wrong,” regardless of whether the driver is Menlovia. Moreover, such conduct is of the sort that people are taught that they ought not to do and that most drivers will concede falls below relevant standards of good driving. Feelings of guilt, shame, or regret often accompany such conduct even if it does not injure another, but especially if it does. However demanding, norms requiring objective reasonable care as to others differ from rules that impose genuinely strict liability (i.e., for reasons not having to do with an assessment of the tortfeasor’s conduct as in some sense falling short or being inadequate). Negligence law sets standards of how to do right by others, violations of which are quite intelligibly understood as wrongs.

Second, victims of these norm violations are likely to regard themselves as having been wronged and tend to have concomitant feelings of resentment and blame in response.¹¹⁰ The point here is

¹¹⁰ See P. F. Strawson, *Freedom and Resentment*, 48 Proceedings of the Aristotelean Society (1962) (generating a well-known theory of responsibility that builds, in part, on the observation that the human response of resentment to those who injure us is fundamental).

not that victims will expect or demand compensation; rather, it is that they will probably feel ill-treated, a response that may be classified as one of having been wronged. In other words, there is a category of tort-victim responses that resembles responses to clear cases of having been morally wronged.¹¹¹ In these cases, the nature of the feeling is not simply affective and noncognitive; it is a feeling of having been victimized that goes along with recognition of a norm enjoining people from behaving toward others in the way in which the tortfeasor behaved toward the victim. This is the non-question-begging sense in which these sorts of responses constitute a feeling of having been wronged.

Third, and connecting the first two points, various systems and practices of education and norm reinforcement exist that involve identifying norms of careful conduct, identifying transactions in which the norm has been violated with respect to some person, and then permitting, sanctioning, or facilitating a response by the victim that involves isolating the norm-violator and subjecting such person to adverse treatment. Most parents, teachers, and other authority figures strive to instill in others a sense of obligation to adjust one's actions in light of potential consequences for others. ("Be careful." "Don't run indoors." "Watch what you're doing." "Watch out for others." "Don't do it that way or you might hurt somebody." "Driving is not a game.") Departures from norms of careful conduct are often met with opprobrium, blame, and possibly punishment. These practices in turn lend legitimacy to victims' sense that they are not merely unlucky to have suffered an injury, but have grounds for complaining about it when it arises because another person has acted carelessly toward them. Picture another driver hitting your car by heedlessly drifting into your lane. You might think to yourself, "Just my luck!" Still, it is unlikely you would mean this in the same sense as if you uttered it after a hailstorm damaged your unoccupied, parked car. Rather, you would likely mean something like, "Just my luck to have been driving next to an idiot!"—a way of speaking that (effortlessly) assigns responsibility and blame while acknowledging the role of luck. Negligence law grows out of and connects with everyday events such as these. It enables a plaintiff to recover damages from another if she succeeds in persuading a court that the defendant acted wrongfully toward her so as to injure her. The state will in this sense enable the plaintiff to hold the defendant responsible for having wronged her.

Fourth, the language of wrongs fits quite naturally with negligence law's core idea that one has a duty—is literally obligated—to refrain from acting toward others in certain ways, and correlatively,

¹¹¹ One example is the case of a gratuitous, intentional physical attack.

with the idea that others have the right not to be acted upon in such ways. Individuals rely daily on others heeding their duties, on having others respect their rights, and on a legal entitlement to respond if others wrongfully violate those rights. Although each of us drives knowing that others will occasionally drive badly (as will we), we also drive *expecting* that most drivers will drive responsibly and carefully.¹¹² Moreover, many victims of careless conduct would probably be surprised and frustrated if, for example, the legal system forbade them from responding to their wrongdoer in some way. Victims expect, either as a matter of self-help or the law, that they can respond to their wrongdoers if they so wish.

Finally, the issue of whether an individual has wronged another generates a series of questions regarding how the wrongdoer should be treated. At a minimum, tortious behavior such as negligence stands to harm the wrongdoer's reputation. This consequence goes hand in hand with the opprobrium that accompanies the determination that a person has acted negligently toward another. The upstanding and highly skilled physician may rightly retain his overall standing in the relevant social circles. Yet his commission of negligence against another will count as a black mark on an otherwise stellar record.

In all of these respects, acting without reasonable care so as to injure another constitutes a way of mistreating others. And this form of mistreatment shares a great deal with the notion of a moral wrong, even though linkages to character and control are severed. These five features are quite enough to earn legal negligence, and torts more generally, the status of wrongs. As we noted above,¹¹³ several philosophical theorists of tort law—Honoré and Perry, to be sure, and perhaps Coleman—insist that tort law has a moral foundation primarily because tort liability is predicated upon responsibility for outcomes and that this sort of responsibility is a moral notion. Still, these thinkers have displayed far less confidence—and at times have even rejected—the notion that the concept of wrong (or wrongdoing), as it is used in tort, is a moral notion. Even Gardner, who has expressly defended the idea that duties requiring success, rather than duties requiring best efforts, are genuine duties and that such duties are embedded in tort law, ultimately seems to agree with Honoré on the sense in which tort law can be understood as instantiating legal counterparts to moral duties. For it is Honoré's account of outcome-responsibility to which Gardner turns for the source of his response to

¹¹² The same goes for patients seeking treatment from doctors and purchasers buying consumer products from retailers and manufacturers.

¹¹³ See *supra* text accompanying notes 86–90.

what he terms the “moral intelligibility objection” to a wrongs-based description of tort law.¹¹⁴

The conjunction in torts of wrong-like features with the missing character-and-control components, once appreciated, is neither awkward nor mysterious. Our society teaches and institutionalizes norms of responsible conduct. When people violate these norms in a way that injures others, victims are resentful and respond to their wrongdoers. Society is prepared to stand behind these victims, to issue various kinds of responses to and judgments upon the violator, to let the violation and the injury affect the wrongdoer’s reputation, and to treat that person as a rights violator and a person who has wronged another. And the violator faces these consequences notwithstanding that it is often a matter of bad luck, not bad character or bad choice, that leads to the wrong being done.

Why would the law do this? Our short answer—which borrows but also departs from Gardner’s helpful usage—is that tort law has generally sought to set norms defined in terms of *success* rather than best efforts.¹¹⁵ This is partly due to the law’s prophylactic concern to be overinclusive. It may be that the prototypical negligence case involves wrongdoings with both bad character and failure to take care well within the actor’s control: conduct that, even if not willful, is not

¹¹⁴ John Gardner, *Obligations and Outcomes in the Law of Torts*, in *RELATING TO RESPONSIBILITY: ESSAYS IN HONOUR OF TONY HONORÉ ON HIS 80TH BIRTHDAY* 111, 135–41 (Peter Cane & John Gardner eds., 2001) (presenting Honoré’s idea of outcome-responsibility as providing the basis for a successful reply to the “moral intelligibility” objection to an account of tort law as a law of genuine duties). Coleman, Perry, and Ripstein emphasize the idea of allocating losses to a defendant who is outcome-responsible for those losses. Their view puts so much weight on the concept of responsibility that they cannot attribute adequate significance to the role in tort of wrongs—i.e., conduct that amounts to a wronging of a victim by an actor. We recognize that this is a somewhat tendentious claim as to each theorist, in light of Coleman’s overt linkage of torts to “wrongs,” Perry’s reliance on notions of fault and duty to identify outcome-responsible agents who bear duties of repair, and Ripstein’s embrace of Weinrib’s work. A similar caveat is in order with respect to Gardner’s work given his conception of tort as a realm of genuine duties. We cannot adequately address these interpretive questions with regard to any of these four theorists in the present Article.

¹¹⁵ Gardner distinguishes between duties (and reasons) to try and duties (and reasons) to succeed. *Id.* at 117; Gardner, *supra* note 20, at 53. Where we perhaps part ways with Gardner is over his apparent inclination to characterize the tort of negligence—or more precisely, the duty and breach elements of negligence—as instantiating a duty to try, rather than a duty to succeed. *See* Gardner, *supra* note 114, at 120 (arguing that, although the tort of negligence embodies a duty to avoid injuring, as opposed to a duty to avoid unduly risking injury, that duty is qualified in requiring only that the duty holder “try *assiduously enough* to avert . . . the unwelcome side-effects of one’s . . . endeavours” (emphasis added)). Although we too have argued that the tort of negligence articulates a qualified duty to avoid injuring another, we think that the qualification is properly cast in terms of a success concept rather than an efforts concept—i.e., as a duty to avert injury to another by *successfully exercising* the care required of an actor under the circumstances.

innocent in the way that Menlove claimed his to be innocent.¹¹⁶ Suppose that the target wrongdoings of negligence law—those that negligence law unambivalently aims to identify as wrongful and for which it intends to permit redress—are character- and control-linked. Questions would still arise as to how these norms should be defined, what the means of identifying their violations are, when the law should allow redress, and what the parties should have to prove. The judges in *Vaughan* thought that enforcing norms of conduct would be impractical and difficult if they defined right conduct by reference to both individual characteristics and good faith.¹¹⁷ Indeed, they were worried¹¹⁸ that the adoption of a best efforts standard would invite arguments regarding the limited abilities of each tort defendant.¹¹⁹

Although the foregoing point is typically couched in terms of evidence and administrability,¹²⁰ our argument goes beyond recognizing that judges and legislators should avoid resting legal determinations on questions that are difficult to adjudicate. Rather, part of what is behind negligence law's reliance on a relatively broad conception of fault—failure to act reasonably, not failure to make best efforts to act reasonably—is a sense that such a conception provides the most appropriate substance for these sorts of norms, as opposed to being a second-best accommodation of administrative difficulties. A system of norms that uses success verbs to define required conduct and failure verbs to define impermissible conduct sends a stronger message about how society expects its members to behave. From an educational perspective, it is probably desirable to articulate norms in terms of what citizens are ordinarily able to do rather than what a given individual can do.¹²¹ In terms of fairness to potential defendants, the distribution or characteristics of accident-proneness in the population surely

¹¹⁶ Indeed, notwithstanding this argument—and notwithstanding *Vaughan's* serving as the poster child for the objective standard of care—there is good reason to believe that this is exactly the scenario in *Vaughan*. Menlove was advised repeatedly that it was dangerous to stack hay in the manner in which he did. *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490, 491 (C.P.). Instead of heeding that advice, Menlove responded that his hay was insured and that he was therefore willing to “chance” having the hay catch fire. *Id.*

¹¹⁷ *See id.* at 493 (Tindal, C.J.) (“Instead . . . of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.”).

¹¹⁸ This worry may have been justified given the suggestion that Menlove was fully aware of the risk in question. *See id.* at 491.

¹¹⁹ The concern here is akin to the concern that if the diminished mental capacity defense were expanded, criminal defendants would routinely invoke it.

¹²⁰ *See Vaughan*, 132 Eng. Rep. at 493 (Tindal, C.J.).

¹²¹ A point made by the wise Yoda, responding to his pupil Luke Skywalker's hedge that he would “try” to master the ways of the Force. Says Yoda to Skywalker: “Do, or do not. There is no try.” *STAR WARS EPISODE V: THE EMPIRE STRIKES BACK* (Twentieth Century Fox 1980). Thanks to Bob Rasmussen for this reference.

matters. Suppose that what distinguishes some or many of Holmes's "hasty and awkward" persons¹²² from more capable persons is not that they are incapable of prudence, but that they are prone to act imprudently at a somewhat higher rate than the general population. Under this supposition, the law would be on strong ground in requiring the unlucky Menloves to do what they are most often able to do.¹²³ Finally, norms articulated in terms of success rather than effort may better define or capture the content of certain individual rights. For example, battery law renders actionable intentional touchings of others that are not physically harmful but violate social norms of acceptable touching even if the person doing the touching is unaware of those norms.¹²⁴ Battery law does this because such a rule fully expresses the idea that people have the right to control when they are purposefully or knowingly touched by another.

Of course, the law could take this type of reasoning further and exchange norms such as "do not injure others through imprudent conduct" for the more demanding strict liability norm of "do not injure others." Arguably, this strict liability norm is more readily taught and more easily administrable than the objective reasonableness norm or the norm against inappropriate intentional touching. It also better matches victims' perceptions of the rights they possess and their entitlement to feel resentment whenever they are injured by another. And perhaps there is some historical precedent for it.¹²⁵

¹²² HOLMES, *supra* note 4, at 108.

¹²³ See Stephen R. Perry, *Responsibility for Outcomes, Risk and the Law of Torts*, in PHILOSOPHY AND THE LAW OF TORTS 72, 101–08 (Gerald J. Postema ed., 2001) (discussing the general capacity to foresee and avoid injuries). By contrast, the argument against having tort law hold mentally incapacitated persons—e.g., a person suffering from severe mental retardation—responsible for wrongs strikes us as more compelling. Black-letter rules make no room for an insanity defense to tort claims, or at least to negligence claims. See, e.g., *White v. Muniz*, 999 P.2d 814, 818 (Colo. 2000) (holding that a battery cannot be committed by a person who, because of mental incapacity, lacks the awareness necessary to form an intent to cause harm or offense to another, but such a person can be held liable for negligently injuring another). It may matter that this rule will more likely apply to seriously mentally disabled persons in assessing their comparative fault for their own injuries. Even as applied to tort defendants, the doctrine may not be best explained as holding incapacitated persons responsible for having wronged others but instead as a means of reallocating losses as between actors and innocent victims or of holding persons with custodial responsibilities vicariously liable. See, e.g., *Breunig v. Am. Family Ins. Co.*, 173 N.W.2d 619, 624 (Wis. 1970) (articulating these rationales).

¹²⁴ See RESTATEMENT (SECOND) OF TORTS § 18 (1965) (offensive contact). Depending on the rule of a given jurisdiction, offensive-contact battery may require only that the defendant intentionally touch the plaintiff in a way that society deems unacceptable. So, for example, a newly arrived immigrant who strokes a stranger's hair and is unaware that doing so is an unacceptable form of touching might be liable for battery.

¹²⁵ The old writ of trespass required victims merely to allege bodily injury directly caused by the forcible act of another. However, juries were permitted to consider extenuating circumstances, including absence of fault (however defined) in rendering their verdicts. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 403–05 (4th ed. 2002).

The answer to why the law might nonetheless sensibly fashion norms of care rather than norms of not injuring is three-fold. First, the state must determine the appropriate extent of legal redress. The further norms of conduct move away from defining wrongs that implicate character and factors over which an actor has control, the more anxious we will—and should—feel about a system that purports to assign liability on the ground of genuine wrongdoing deserving of opprobrium, sanction, etc. Even if tort law could be built around a collection of strict liability norms or a single strict liability norm, it might then be so disconnected from other categories of right-conduct norms as to be what Posner and others claim (erroneously) that it already is—a law of wrongs in name only and hence one that risks illegitimacy.¹²⁶

Second, strict liability norms threaten greater infringement on liberty.¹²⁷ To embrace unqualified standards of noninjury as genuine norms of conduct is to place on actors a very demanding set of responsibilities. Even if the substitution of a strict liability norm for a care-based norm might not incentivize a certain kind of rational actor to be more careful,¹²⁸ it may incentivize the actor to partake in the activity less frequently or to forego it entirely.¹²⁹ The same effects would be more dramatic on citizens who view legal obligations as carrying a kind of weight or force and who aim to conform their conduct to those obligations. A care-based system thus allows for more liberty of action than one with stricter norms.

Third and most importantly, law that sets norms of conduct that are too demanding undermines the cogency of treating them as something with which one should aspire to comply. The claim of a norm to be a norm of right conduct, and hence wrong-defining, is diminished if compliance with the norm is completely outside the control not just of the occasional Menlove (or a person having a Menlovian episode), but of anyone. If the law articulates norms *purely* in success terms, such norms cease to function as guides or standards of conduct with which everyone of a certain description must comply.

For all of these reasons, negligence law has settled on an intermediate path. Its norms of conduct are defined in terms of success, but in a qualified form. The qualifications permit the norms to be something for which actors can aim and usually satisfy. In doing so, these qualifications circumscribe the nature of victim's correlatively recog-

¹²⁶ See *supra* note 5 and accompanying text.

¹²⁷ See, e.g., HOLMES, *supra* note 4.

¹²⁸ See, e.g., STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 24 (1987) (“Under both strict liability and the negligence rule injurers are led to take socially optimal levels of care, but under the negligence rule they engage in their activity to too great an extent because, unlike under strict liability, they do not pay for the accident losses they cause.”).

¹²⁹ See *id.* at 24–25.

nized rights and diminish the availability of redress for injured victims. As such, this conception of wrong is objective, meaning that legal negligence is character- and control-independent and that the question of whether an actor has committed negligence is subject to luck. Negligence law's remedies and its wrongs-based language and imagery will sometimes apply to an "innocent" defendant. This is his or her bad legal luck. In many instances, drivers, doctors, manufacturers, retailers, publishers, accountants, underwriters, employers, teachers, and camp counselors, among others, are held liable in tort for substantial amounts, causing them pain and shame, because, notwithstanding good faith, their conduct crossed a line set by the law. In some instances, these cases leave defendants disillusioned by our system in part because it has treated them as wrongdoers when, with some justification, they do not consider themselves wrongdoers in a full-blooded, culpable sense.

We have sought thus far to explain why the categories of wrong in tort law can be, at least in some standard instances, objective and qualified.¹³⁰ We have based our account on normative and practical considerations concerning certain kinds of primary legal rules. But there is another set of reasons that relates more specifically to the nature of tort law as a law of redress. As we noted at the outset, tort liability is imposed in response to the commission of a wrong.¹³¹ We have argued, contrary to allocative theorists, that the notion of wrongdoing here is not a gap-filler but is genuinely a species of the same genus as moral wrong.¹³² However, we do not deny that the use to which the idea of a wrong is put in tort law affects its institutional and political characteristics. The wrongs of tort law are articulated in the particular context of deciding whether a plaintiff shall be permitted to exact compensation or some other remedy from the defendant. It is, in short, a finding that an act has been done that authorizes redress of a wrong, a right of action.¹³³

Just as there is a question of how tort rules of conduct should look if they really are going to function as norms of conduct or guidance rules, there is also a question of what acts should permit aggrieved persons to prevail in lawsuits conceived of as redress for a wrong done to them. Recall the examples above of the surgery slip, the driver's skid, and the drug company's failure to warn.¹³⁴ The reasons for deeming these to be wrongs does not simply relate to the administrative ease, educative value, or rights-reinforcing characteris-

130 See *supra* notes 67–83 and accompanying text.

131 See *supra* text accompanying notes 1–3.

132 See *supra* notes 109–29 and accompanying text.

133 See GOLDBERG ET AL., *supra* note 1, at 3; Goldberg, *supra* note 31, at 517.

134 See *supra* text accompanying notes 74–76.

tics of rules that define as wrongful certain conduct that does not reflect bad character and that is not fully within a given actor's ability to avoid. In all of these cases, victims appropriately and reasonably feel mistreated and not just because they are part of a society with a legal system that dubs these acts as wrongs. All of the victims have been injured in a way that warrants their thinking that someone else is responsible for mistreating them and that their wrongdoer is an appropriate person from whom to demand redress or satisfaction. A patient can plausibly say to her otherwise very accomplished and successful doctor: "I'm sure you are a great doctor and a decent, well-meaning person. And I believe that this slip-up was an aberration. But the fact remains that you did slip up and that you did so with me on the operating table. Whether or not this is an isolated departure from the way you usually do things doesn't diminish the sense in which you are responsible for doing what you did to me. You injured me and you did so by failing to act as you were supposed to act." It is likewise quite possible that the imagined defendant would feel responsible and regretful and would regard herself as at least somewhat culpable in a moral sense and owing some sort of amends to the victim, if only an apology. Insofar as the state provides rights of action in place of other forms of redress—in particular, vigilantism—it makes sense for the dimension of the wrong to be broader than rigid character-and-control conditions would admit.

Criminal law, at least on one conception, provides a useful foil in this respect. The "wrongs" that generate criminal liability are of a different sort than the "wrongs" of tort. In criminal law, the state is not empowering private parties to redress wrongs done to them. Instead, the state itself is punishing an individual because of his wrong.¹³⁵ For this reason, the wrong in question does not need to be a wrong to anyone. These features may help explain why, generally speaking, we ask criminal law to define its wrongs with greater clarity and apply standards of conduct that are linked more tightly to character-and-control criteria.

Consider the example of a patient who is undergoing a relatively straightforward operation to repair a hernia. Through the fault of an anesthesiologist who provides too much anesthetic by a factor of ten, the patient is rendered a paraplegic. Now suppose that the doctor in question is a well-trained, highly competent professional who has practiced for twenty years without mistake, that she is perfectly well-rested on the day in question, and that there is nothing in the preparations or procedures she followed that day indicative (in a non-question-begging sense) of a failure to act conscientiously in terms of

¹³⁵ See HOLMES, *supra* note 4, at 42.

being attentive to the well-being of the patient. Still, her preparation, procedures, and vigilance do not prevent her from erring in the manner described. It seems unlikely, on these facts, that there would be a basis for criminal prosecution.¹³⁶ The state's interest in this matter, as opposed to the victim's, does not warrant the administering of punishment or the incapacitation of the doctor.

On the other hand, tort liability is quite likely. Our system would treat the plaintiff as entitled to redress for the wrong done to her—she was negligently rendered paraplegic. Again, this legal result reflects various considerations. Among them is the notion that, when the question involves an injurer's responsibility to a victim, there is more room to identify conduct as wrongful. That the defendant perpetrated a wrong may have been, in some senses, a matter of bad luck. But because this bad luck occurs in a context in which the law attributes a special kind of responsibility as between wrongdoer and victim, bad luck is not treated as a ground for denying responsibility. The larger point is that the concept of wrong at issue is sufficiently objective that we can plausibly view our system as functioning in just the manner it is supposed to operate. This view holds even when judges and jurors conclude that tortious conduct has occurred though the defendants would justifiably—and perhaps correctly—regard themselves as having acted in a manner that, from a moral point of view emphasizing character and control, was not wrongful.

We have argued above that in very significant respects the wrongs of tort law are recognizably wrongs, sharing much in form and character with moral wrongs. And, of course, they share a great deal in content, too. To the extent that tort wrongs are of the same species as moral wrongs and even though tort law accepts the role of luck as we have articulated it, tort law is a normative practice that accepts moral luck not simply in consequence, but in its very definition of what counts as a wrong. And we have argued that there are good reasons for selecting such a normative system, notwithstanding that it may sometimes be difficult to accept the consequences of doing so.

¹³⁶ This contention depends on how best to characterize criminal law. We assume for the sake of argument that criminal law seeks to punish and deter wrongs that rise to a certain level of gravity or particularly concern the state given its interest in maintaining public safety. If it is instead conceived of more on a regulatory model, in which the aim is to steer conduct through sanctions and threat of sanctions regardless of whether the conduct in question is a serious wrong or a wrong at all, then prosecutions for minimally faulty (or even non-faulty) conduct might be warranted.

IV IMPLICATIONS

The problem of compliance luck does not prevent us from viewing the law of torts as a law of wrongs. Likewise, tort law's tolerance of causal luck does not leave it vulnerable to charges of injustice.¹³⁷ To establish these claims is by no means to show that, all things considered, tort law is always preferable to schemes that are less luck-dependent for their operation, such as victim-compensation funds fueled by tax revenues or fines.¹³⁸ Nonetheless, it does shed important light on this sort of issue.

First, we now have grounds to reject arguments that leading scholars have characterized as dispositive critiques of tort law or as grounds for completely reconceptualizing it. According to causal luck critics like Larry Alexander, Christopher Schroeder, and Jeremy Waldron, tort law should be supplanted by alternative schemes at the first possible opportunity.¹³⁹ But neither logic nor justice in fact counsels that "[w]e should abolish the tort system."¹⁴⁰ Likewise, Posner and many who have followed in his methodological footsteps argue that the unintelligibility of tort as a law of wrongs necessitates a fanciful reconstruction of tort law as an instrument for achieving efficient deterrence.¹⁴¹ We have shown that there is no such necessity, which in turn provides one less reason for scholars to jump on that particular methodological bandwagon.

Moreover, by rebutting these arguments, we have not merely established that tort law is coherent in the minimal sense of being intelligible. Rather, we have shown that the idea of responsibility within tort law meshes well with familiar and powerful everyday judgments about responsibility that are deeply embedded in social practices. Tort, in other words, is entirely recognizable. Thus, if one conceives of political justification in terms of attaining a Rawlsian reflective equilibrium between abstract principle and ordinary intuition, it seems very plausible to suppose that tort law's mode of holding actors responsible is a justifiable feature of our political and legal system.

¹³⁷ See *supra* Part II.

¹³⁸ Cf. Avraham & Kohler-Hausmann, *supra* note 25, at 181 (arguing that, even if justice-based accounts of tort law are internally coherent, they fail to justify having a body of laws devoted to the instantiation of tort justice because there are other schemes that could be used to respond to accidents that are less influenced by luck).

¹³⁹ See generally Alexander, *supra* note 25 (posing the question of whether tort law "makes sense" and concluding that it does not).

¹⁴⁰ *Id.* at 23.

¹⁴¹ See *supra* note 5 and accompanying text.

Second, our responsive arguments support a conception of tort law that is descriptively superior to alternative accounts.¹⁴² As we suggested at the outset of this piece and at various times since, the same wrongs-and-redress view that underlies our rebuttal of the causal luck critics and our response to allocative theories of tort also provides the interpretive advantage of taking the vocabulary and syntax of tort law at face value rather than second-guessing it.¹⁴³ Likewise, this view best explains otherwise puzzling features of that law, including the requirement that a tort plaintiff establish that the defendant committed a wrong *as to her* and the availability, under some circumstances, of punitive damages, understood as a special form of redress available for a special class of wrongs.¹⁴⁴ It also captures better than competing theories the centrality of private rights of action to tort law.¹⁴⁵ And this account may fit best with ordinary citizens' views of what the tort system in principle aims to do.¹⁴⁶

¹⁴² See also Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003) (arguing for the descriptive superiority of wrongs-and-recourse theory over both corrective justice theories and law-and-economics theories of tort).

¹⁴³ See *supra* text accompanying notes 1–3.

¹⁴⁴ See *supra* text accompanying notes 34–49, 65.

¹⁴⁵ See *supra* text accompanying note 34. The nearest competition for interpretive “fit” are the allocative views of certain corrective justice theorists, described briefly above. But even these views face significant challenges. As we have seen, they are predicated on the idea that tort law starts with the loss that the unfortunate plaintiff suffered and asks when it is appropriate to shift that loss to someone else. Doctrinally, this seems far too narrow a view to capture the domain of tort. Tort law is about redressing injury, which may or may not be accompanied by losses. See GOLDBERG ET AL., *supra* note 1, at 3; Zipursky, *supra* note 142. While negligence law requires proof of tangible losses for the plaintiff to have a cause of action, it is unusual in this respect. Battery, assault, trespass, fraud, libel, and many other torts do not require proof of harm or loss in any non-question-begging sense. Instead, they require injury—an interference with an interest of the plaintiff’s (e.g., an interest in undisturbed property ownership or bodily control) that may or may not give rise to tangible losses. See *supra* text accompanying notes 73–79. For example, if *D* as a practical joke surreptitiously sedates *P*, such that the only effect on *P* is that *P* experiences a deep sleep for ten hours, *P* may still, in principle, sue *D* for battery. Any recovery would constitute redress for the invasion of *P*’s dignitary interest in not being deliberately made to ingest a substance she did not choose to ingest.

In addition, tort law quite evidently has a guidance function; it does not simply allocate losses after the fact. A lawyer advises her magazine-publisher client on what she can say without committing the tort of libel or invasion of privacy; a lawyer advises his psychiatrist client whether certain people need to be warned of a victim’s dangerousness; a lawyer advises her pharmaceutical company client what harms physicians and patients must be warned of and instructed about. Tort law sets norms of right conduct. This, as we noted above, is why it is cogent to regard torts—treating someone in a manner tort law calls tortious—as legal wrongs.

¹⁴⁶ As indicated above, loss-shifting views, whether economic or fairness-based, attempt to divorce the wrongs of tort law from ordinary notions of moral wrongs to solve or minimize the problem of compliance luck. See *supra* text accompanying notes 67–89. However, if our supposition is correct—that the prevalent social understanding of tort law is as a law of wrongs and redress—then there is a possibility that loss-shifting views will in the end not dampen but intensify concerns over tort law’s substantive rules from conventional moral norms. A push to justify liability on the ground that it promotes efficient precaution-taking

Third, the wrongs-and-redress conception of tort law we have invoked and developed here contains a normative dimension in that it captures how tort meshes with other aspects of our legal and political system in achieving certain goods or instantiating certain values. Jurists and theorists ranging from Locke to Austin have offered considered views about why a government founded on democratic and liberal principles will have reason to provide its citizens with law that empowers victims of wrongs perpetrated by others to respond to them without resort to self-help.¹⁴⁷ Indeed, Blackstone as well as American jurists of the eighteenth and nineteenth centuries spoke comfortably of citizens possessing a *right* to a law of redress and of governments being under an affirmative duty to provide such law.¹⁴⁸

Of course, since the mid-twentieth century, law professors have generally been suspicious of common law and the common law of torts in particular.¹⁴⁹ However, at least when presented as wholesale critiques, these positions are misguided or overblown.¹⁵⁰ Consider the sentiment, prevalent since Holmes's time, that people living in modern or post-modern times have "outgrown" the need for legal redress.¹⁵¹ No doubt it is a mark of civilized government that it generally outlaws simple vengeance and private retaliation. But it is far less clear that a government that fails to empower victims with legal recourse can claim to be more modern or more civilized as opposed to being less attentive to citizens' legitimate demands. As the victims' rights movement in American criminal law may suggest, citizens can be legitimately frustrated with a government that essentially says: "We're sorry for your loss. If you need money or other assistance, you can apply for benefits. Otherwise, go away and let us deal with the one who did this to you."

or achieves a fair allocation of losses may well be perceived not as succeeding in removing the wrongs from tort but rather as rendering tort doctrines unjust and inexplicable deviations from the core idea of wrongs that underwrites the enterprise of tort law in the first place. We suspect that this unhappy constellation of trends may be one of the reasons the tort reform movement is so able to capture the public imagination, in spite of what we regard as its largely ill-advised proposals.

¹⁴⁷ Goldberg, *supra* note 2, at 532–44 (Locke and the common lawyers); Goldberg, *supra* note 62, at 462–64 (Austin).

¹⁴⁸ Goldberg, *supra* note 2, at 549–76.

¹⁴⁹ See Goldberg, *supra* note 31, at 520–21; John C.P. Goldberg, Essay, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1506–07 (2002).

¹⁵⁰ See, e.g., Goldberg & Zipursky, *supra* note 37, at 1799–1811 (suggesting that modern efforts to read the duty element out of negligence mistakenly treat particular applications of that concept as if they demonstrate the inherent incoherence and regressivity of the concept itself); Goldberg & Zipursky, *supra* note 31, at 384–408 (criticizing as simplistic "Great Society" critiques of the common law of tort).

¹⁵¹ HOLMES, *supra* note 4, at 10, 46, 130–31, 149, 161–62 (suggesting a movement in the common law generally from primitive notions of vengeance to modern notions of prevention and compensation).

As a law of wrongs and redress, tort law meshes well with, and can help realize, other core values. In holding all persons—rich and poor, powerful and powerless—to the same duties and by empowering each to seek redress when duties are breached and injuries result, tort law embodies and enforces notions of social equality.¹⁵² It literally empowers citizens, entitling them to make demands that a court must hear rather than treating them as recipients of government beneficence.¹⁵³ Additionally, tort law fashions a set of obligations that help maintain civil society as a non-atomistic, not purely contractual social world.¹⁵⁴ At the same time, tort law—which tends to hold strangers only to negative duties of non-injury—expresses “liberal” values by not being overly demanding.¹⁵⁵ Tort also “speaks” to citizens through guidance rules that tend to track familiar norms of behavior rather than imposing an alien code of conduct.¹⁵⁶ As such, it is not forced to rely as heavily on threat and sanction for its efficacy, nor does it require a large bureaucracy for its implementation.¹⁵⁷

In observing what tort law, as a law of wrongs and redress, stands to deliver, the foregoing analysis makes a fourth contribution by helping to clarify the ways in which tort and non-tort regimes interact. Although we have disputed the need to resort to “allocative” or loss-shifting theories to make sense of tort and the ability of these theories to provide satisfactory interpretations of tort doctrine and practice, we do not mean to dispute the obvious appeal, in many circumstances, of the idea of loss shifting as a response to victim misfortune. Because of the acts of others, victims sometimes suffer major setbacks and incur significant costs that they have not brought upon themselves. Given that these losses are bad luck for the victim, it is natural and often justifiable to decry as harsh or unfair a legal system that is content to let these sorts of losses lie where they fall.

Still, to observe that victim misfortune is a ground for demanding a response from the legal system is not to say what form that response should take, nor is it to say that any body of law concerned with victim

152 See Goldberg & Zipursky, *supra* note 31, at 406–07.

153 *Id.* at 406.

154 See *id.* at 405–07.

155 See *id.*

156 See *id.* at 404.

157 We should make clear that we are not denying the existence of pathologies associated with a law of wrongs and redress, including, for example, excessive litigiousness and indefensible attributions of responsibility and liability which sometimes result when attorneys exploit or over-stimulate the moral sensibilities of both jurors and judges. In fact, our account of tort law as setting norms of proper conduct that are in some ways relatively unforgiving might help on this last score. One of our central aims is to dissociate the idea of committing a wrong from the idea of engaging in highly culpable, easily avoidable conduct. If judges and jurors can appreciate that torts often do not carry the full weight associated with other forms of wrongdoing, perhaps they will also see that victims of such wrongs are entitled to less substantial redress than is owed to victims of out-and-out moral wrongs.

misfortune is thereby built on loss-shifting principles. In fact, during the period from roughly 1880 to 1980, judges and legislators often addressed the problem of undeserved losses by expanding the reach of tort law. In particular, judges extended the domain of legal negligence.¹⁵⁸ In pursuing this course, the courts did not thereby give up on the idea of tort as a law of wrongs and redress, supplanting it with a law of fairness-based loss shifting, much less efficiency-based loss shifting. Instead, they treated victims' demands for compensation as an occasion to reconsider the contours of negligence—i.e., of who might fairly complain of having been wronged by the carelessness of another.¹⁵⁹

That courts have historically taken instances of victim misfortune as an occasion to rethink when certain actors are answerable for wrongs to others demonstrates that the pressure to respond to undeserved losses is often tied up with not just the fact of loss, but the sense that certain people are being victimized. When this is the case, tort law—a body of law known for its responsiveness to changing norms of conduct and changing conceptions of cognizable harm—is available to fill the legal void. In this way, tort law occupies space that might otherwise be occupied by loss-shifting regimes and eliminates some or all of the need for reliance on such regimes. Of course, government is not limited to responding to losses through a law of wrongs. Indeed, if it is faced with losses that are not plausibly traceable to others' wrongs (e.g., certain losses stemming from natural disasters) or if the losses in question cannot for some other reason be adequately dealt with by a law of wrongs, government will instead want to implement systems built on principles of fair loss shifting or, for that matter, principles of distributive rather than corrective justice. In the area of workplace injuries, workers' compensation systems have arguably substituted a law of loss shifting for a law of wrongs. Likewise, federal legislation built on notions of loss shifting or redistribution have provided some measure of relief to victims of black lung disease, vaccine-

¹⁵⁸ See Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 605–17 (1992).

¹⁵⁹ We take this to be the very significance of watershed modern negligence cases like *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). See Goldberg & Zipursky, *supra* note 37, at 1812–25. Obviously, there is considerable debate over how to understand the emergence of strict products liability in the 1960s and 1970s. Some will argue that the doctrine provides an example of courts responding to victim misfortune by identifying a new wrong. Others will contend that the doctrine implements non-wrongs-based loss-shifting principles. Our view is that at least some—and perhaps many or most—instances of products liability rest on the notion that product sellers commit a wrong against consumers by releasing a product with a defect posing dangers of physical injury during ordinary use, which danger is later realized.

related illnesses, and those who lost loved ones on 9/11.¹⁶⁰ Although these examples may establish that there are kinds of undeserved loss that are better handled by laws not built on tort principles, they in no way suggest that laws designed to shift losses or redistribute wealth somehow carry priority over law that renders wrongdoers answerable to their victims. At most, they demonstrate only that different laws respond to losses in different ways, based on different rationales, and that lawmakers must attempt to determine when it is appropriate to rely on one or another type of law or create hybrids that attempt a compromise among different rationales and results.

Courts and scholars have rightly been impressed by the demonstrated capacity of tort law, in the hands of twentieth-century judges and juries, to address the needs of a larger number of accident victims and to set norms of right conduct for a larger number of actors whose conduct risks harm to others. In the process, many have noticed the actual and potential ability of tort actions such as negligence and strict products liability to achieve important governmental goals in an age of accidents, most obviously compensation of victims and regulation of risk. Ironically, the elasticity of tort law in serving these practical ends has sometimes misled these same courts and scholars to infer that tort law has no substance other than its capacity to serve these ends—that tort law *just is* a scheme for compensating victims and deterring risk-producers. In several prior articles, we have argued—in the same vein as corrective justice theorists such as Jules Coleman and Ernest Weinrib—that there is no basis for such an inference and that a purely functional or instrumentalist view of tort has no hope of interpretive adequacy.¹⁶¹ In this Article, we wish to draw out one further point, which is particularly relevant to the topic of luck and tort law.

Although the luck problems we have focused on pertain to treatment of risk generators (defendants and would-be defendants), some critics of tort have focused on the role of luck with respect to injured parties (plaintiffs and would-be plaintiffs). They argue that tort law is unjust because innocent accident victims stand to receive compensation only if another's faulty conduct has caused the accident. If no one else was at fault, victims receive nothing even though every (innocent) victim's injury is equally a misfortune. The differential treatment of "equally deserving" accident victims is a feature of tort law that, according to these critics, renders it unfair.¹⁶²

¹⁶⁰ Alan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1086 n.204 (2005) (referencing these programs).

¹⁶¹ See, e.g., Goldberg & Zipursky, *supra* note 31; Goldberg & Zipursky, *supra* note 37; Zipursky, *supra* note 37.

¹⁶² See, e.g., Avraham & Kohler-Hausmann, *supra* note 25, at 182.

We assume that this plaintiff-side fairness critique is meant to convey something more than the commonplace and unhelpful observation that life is “unfair” in how it “selects” individuals for good or bad fortune. Rather, the idea must be that there is an unfairness in our legal system *for which the state is responsible*, such that to point out the unfairness is to provide a reason to revise our legal and political system. This idea can be broken down into two components: (1) that our *tort law* is unfair because, for no sufficient reason, it excludes some accident victims from recovering their losses but not others, and (2) that the *set of systems that, in one way or another, address accident losses* (of which tort law is a part) is unfair for permitting some but not others to be compensated.

As noted above,¹⁶³ nothing that we have said in this Article speaks to whether the state should deploy institutions other than tort law to compensate innocent victims of non-fault-based accidents to the same degree as the victims of fault-based accidents. There may well be needs-based and distributive-justice based arguments in favor of doing so. However, for reasons that we have pointed out elsewhere, none of these arguments is quite as obvious as one might have thought. One need only look at the next plausible question—why should accident victims be treated any better than disease victims?—to see that this is not a straightforward or simple question.¹⁶⁴ One also has to take into account nongovernmental devices, such as first-party insurance, that can provide a relatively efficient way to compensate victims, in turn raising the question of how extensive the state’s involvement in victim compensation needs to be.¹⁶⁵ All of these possibilities for supplementing our legal system merit further consideration both because many accidents have no tortious source and because tort law is frequently slow, costly, under-remunerative, inaccurate, and otherwise unreliable even for victims of wrongfully-caused accidents. But this sort of inquiry is precisely an inquiry into what would constitute a desirable *mix* of governmental and private institutions to deal with accidents and losses. Our claim is that there is plenty of reason to suppose that tort law belongs in that mix even though, as a law of wrongs and redress, it is law that conditions the compensation of innocent victims of accidents on a wrong having been done.

It is one thing to recognize fairness- or need-based arguments for *supplementing* tort law with other avenues of compensation for accident victims. It is quite another to claim that a system of *tort law* like

¹⁶³ See *supra* text accompanying note 138.

¹⁶⁴ See Ripstein & Zipursky, *supra* note 27, at 230–31 (arguing that, once freed of the notion that liability is what a wrongful injurer can be held responsible for, legal systems have no reason to select accident victims over other innocent but unfortunately needy people as the beneficiaries of largesse).

¹⁶⁵ See Baker, *supra* note 26.

our own, in which some accident victims are adequately compensated and some are not, is unfair in its own right. This critique presupposes that all accident losses are properly construed as free-floating costs and that tort law is therefore a means by which the state chooses how to allocate those costs among the population. With this view in place, tort law's willingness to let innocent accident victims' misfortunes lie where they fall in some cases but not others generates an unfair and indefensible scheme of allocation.

We reject the entire picture of tort law that this critique presupposes. Through tort law, courts recognize claims that an actor has committed a legal wrong against a victim, thereby empowering the victim to obtain redress from the wrongdoer. An accident victim who has no plausible claim to having been legally wronged—even under a broad conception of legal wrongdoing—has no tort claim. From the perspective of tort law, harm suffered by an accident victim is just that—the victim's harm—not some free-floating bundle of costs. To be sure, there is the question of whether money can be obtained that would mitigate the suffering incurred, but within tort, this is always a question of whether there is *someone else* from whom the accident victim should be able to recover money. Since the basis of a defendant's vulnerability to an action for damages in tort is the defendant's having wronged the plaintiff, there is no basis for reallocating losses where there is no wrong, and the injured plaintiff's claim to compensation must fail.

It will not suffice now for the victim-luck critic to say that we are begging the question on what a "wrong" is, or that we are being formalistic. A major point of this Article has been to explain what is special about the wrongs with which tort is concerned and how tort deploys "wrongs" in a way that is flexible and capacious without being vacuous. We have also emphasized why it might matter—in terms of the way our legal system works and in terms of our political system's values—whether we do or do not retain a law of tort. Finally, we have noted that, even if one accepts our arguments, many questions remain regarding whether non-tort mechanisms for accident compensation should be harnessed as a supplement or partial substitute for tort. And yet we have argued against the notion that these supplements or substitutes, simply by virtue of being more luck-resistant, enjoy some sort of obvious normative superiority to tort. There is nothing question-begging or formalistic about any of these arguments.

Finally, and with some trepidation, we suggest that our analysis of the significance of moral luck for tort law has potentially interesting implications for the treatment of moral luck in its original locus—

moral philosophy.¹⁶⁶ Perhaps the most obvious lesson is that ideas like wrongdoing and responsibility are not unitary but instead form a cluster of related ideas with different shadings and implications in varied settings. As writers in both the natural law and legal positivist traditions have pointed out, there are important respects in which custom, law, religion, and morality form distinct domains notwithstanding their overlap. Thus, although each is a source of rules and standards of appropriate conduct, the character and content of these norms as well as the consequences of breaching them vary in important ways.

Moreover, as we have shown, even within the domain of law, one can and must distinguish between different modes of attributing responsibility. As Anglo-American lawyers well understood 200 years ago, there is a fundamental difference between the state engaging in criminal punishment of a wrongdoer on behalf of society and the state empowering a private party to exact some sort of remedy from one who has wronged her. Luck plays distinct roles within these different domains. In tort, whether a wrong amounts to the wrongful injuring of another is the whole ballgame. The law seeks to determine whether there is a victim who is entitled to seek redress and to whom the wrongdoer must answer. If this can be the case for a body of law, it seems reasonable to suppose that there are parallel modes of holding actors responsible in the moral realm. Whether in law or morality, the matter of one's responsibility for another's injury because of misconduct is distinct from the matter of one's culpability or blameworthiness for that conduct. Morality, like religion and custom, presumably distinguishes among relational wrongs, abstract wrongs, injuries, losses, repairs, and so on. To understand the role of luck in morality with more nuance, one should proceed from thinking about these different levels of responsiveness in moral categories, not just legal categories.

Second, we noted that courts have typically insisted on defining the wrongs of tort law objectively. Their reasons for doing so relate to a range of considerations, many of which pertain to educability, rule-of-law values, the capacity to institutionalize various standards of conduct and to administer them. Yet it is not only law that must answer to at least some of these systemic values. A variety of informal standard-setting normative practices must do so as well. In short, moral conceptions of wrong often need to be defined in an accessible and non-particularistic way. There is a trade-off between the capacity of a sys-

¹⁶⁶ See generally Benjamin C. Zipursky, *Two Dimensions of Responsibility in Crime, Tort, and Moral Luck*, 9 THEORETICAL INQUIRIES L. (forthcoming Jan. 2008) (developing aspects of the causal luck analysis offered above to elucidate moral luck problems within moral philosophy).

tem to define wrongs in a manner better immunized against fortune and its capacity to satisfy these other desiderata—a trade-off that will apply in morality, not just law. The problem of moral luck is not simply a paradox or an intellectual conundrum. It is not just inevitable, given the way things are. It exists as the flip-side of various desirable attributes of normative systems.

Of course, it remains to be seen whether there are other normative systems that we can rely upon less for the enjoyment of system values and more for the relative immunity from luck. Assuming, with Williams, that the concept of morality cuts across all the ways we think about standards of conduct and that we assess and respond to conduct with those standards in mind, there is no possibility of transcending the domain of luck though there might be particular, narrower domains in which there is greater immunity from the ravages of fortune. Still, it would be a mistake to suppose that these domains are somehow fundamental. Rather, they exist only as part of a more robustly defined and sustainable set of practices—both legal and non-legal—of holding individuals responsible. If this is so, then what Williams referred to as the Kantian conception of morality is less important than it purports to be not only because it is unable to transcend luck¹⁶⁷ but also because the image of moral assessment as a luck-free zone can be seen to be in some sense artificial and derivative rather than basic or essential.

Finally, Nagel used the topic of moral luck to explore deep philosophical questions about naturalism and determinism, internal and external perspectives on human action, and the role of will rather than nature in bringing things about.¹⁶⁸ Nagel suggested that over time, we come to see others' conduct as regular and predictable and therefore as natural or "caused" phenomena. Yet, he claimed, we at the same time read will, intent, and choice into others' conduct because we regard our own actions as free in this manner. In other words, we are able to experience others' conduct as morally blameworthy or praiseworthy, in part because we are able to regard our own in this manner.¹⁶⁹

An obvious variant on Nagel's idea—one frequently made in the analogous context of skepticism—is to flip around the self/other point within moral psychology. Perhaps our highly nuanced reflective emotions and self-assessments should be understood, in part, as growing out of external practices of assessment, holding responsible, and blame. To be sure, we learn to empathize with others and to imagine what they feel by thinking about how we feel or would feel. But part

¹⁶⁷ See Williams, *supra* note 8, at 39.

¹⁶⁸ See Nagel, *supra* note 8, at 36–38.

¹⁶⁹ See *id.* at 37–38.

of socialization in general and moral education in particular involves learning how others regard the way we have treated them.¹⁷⁰ One need not go to a full-blown Freudian theory of parent as superego to accept the observation that holding oneself accountable is in some sense a matter of learning to regard oneself as others do.

All of these observations add up to a more general strategy for thinking about the rich and puzzling domain of moral intuitions with which Williams and Nagel flooded readers in their celebrated essays on moral luck. We have argued that tort law consists of a highly structured, institutionalized means of empowering victims to redress the wrongs done to them by others. For many unsurprising and sound reasons, whether such avenues of redress against others are available literally depends on fortune. What we see in tort law we also see in the more informal normative practices of morality and custom. For example, a school teacher will hold a child responsible for knocking over her classmate and will instruct her to help the child up and apologize. And now we can go one step further: a child learns to feel responsible for the injury she has inflicted upon another. Whether a hard shove on the staircase results in a scare or a tumble down the stairs makes a big difference not just in tort but in other social practices in which one is held responsible for injuring another. It should not be at all puzzling that our internal self-assessments are in similar ways luck-dependent. This is not just a matter of armchair moral psychology. It is so because the concepts of responsibility and wrong that we apply to ourselves are concepts that belong, in significant part, to a realm of institutionalized practice in which they play important systemic roles. There may well be good philosophical reasons to try to isolate the more institutionally dependent from the less institutionally dependent aspects of these concepts. Perhaps the aspiration to define a realm of morality that is luck-free is connected with this separation effort as well. But it would be dogmatic to suppose that these less socially and institutionally dependent aspects, if there are any, are logically, morally, or historically prior to the more dependent.

CONCLUSION

We have made several claims in this Article. First, we argued that the most frequently mentioned luck-related reason for criticizing tort law is unsound. Tort law's differential treatment of actors engaged in

¹⁷⁰ See JOHN DEWEY, *HUMAN NATURE AND CONDUCT* 315 (1922) ("Liability is the beginning of responsibility. We are held accountable by others for the consequences of our acts. . . . In vain do we claim that these are not ours; that they are products of ignorance not design, or are incidents in the execution of a most laudable scheme. Their authorship is imputed to us. We are disapproved, and disapproval is not an inner state of mind but a most definite act.").

identical wrongdoing, based on whether that conduct causes injury, is entirely defensible. To see this, one need only recognize the difference between private rights of action and liability, on the one hand, and government prosecutions and punishment on the other.

Second and conversely, we argued that there is a more serious luck-related concern about tort law, which we labeled the problem of compliance luck. Whether a defendant has committed a tort is often unconnected with his character and his control because many torts, most importantly negligence, take an objective stance on wrongfulness. Although this feature of tort law has led many theorists to deny that it is a system for redressing wrongs, we argued that this conclusion is unwarranted. Once one understands that tort rules are guidance rules and that these rules form part of a framework that aims to define wrongs for the purpose of empowering victims of wrongs to obtain redress from wrongdoers, the character-and-control independence of wrongs are defensible features of that law.

Third, we have argued that appreciating tort's distinctive characteristics as a law of wrongs offers various advantages. Among other things, it permits a better grasp of legal doctrine, a more nuanced appreciation of what values tort law serves within our legal system, and a more acute sense of tort law's limits, its connection to other forms of law, and the tradeoffs between tort and non-tort regimes. We have also suggested that defusing the problems of moral luck in tort law sheds light in the parallel domain of moral philosophy.

Although this is, broadly speaking, a "law and philosophy" article, its aim has not been to offer a reinterpretation of an area of law by reference to a prefabricated philosophical framework. Indeed, our claim is that tort scholarship has been bedeviled by critical doubts only because of the force that scholars have attributed to the abstract philosophical proposition that, if an actor is genuinely to be held accountable for a wrong, his act's being a wrong cannot depend on mere luck. Our goal has been to ward off the criticisms and doubts driven by this philosophical proposition so that we might gain a better understanding and appreciation of the actual practices of tort as a law of wrongs and redress.

