

HARRY POTTER AND THE TROUBLE WITH TORT THEORY

Scott Hershovitz*

Economists argue that tort law promotes an efficient allocation of resources to safety, while philosophers contend that it dispenses corrective justice. Despite the divide, the leading tort theories share something in common: they are grounded in an unduly narrow view of tort. Both economists and philosophers confuse the institution of tort law with the rules that are distinctive of it. They offer theories of tort's substantive rules, but for the most part ignore the procedures by which those rules are implemented. As a consequence, both miss and misconstrue much about tort law.

The problem is particularly acute for economists. They analyze the impact of tort's substantive rules on accident and accident avoidance costs. Yet, the institution of tort law generates many other costs and benefits for society, and those costs and benefits affect the optimal arrangement of tort's rules. The fact that economists have not factored these additional costs and benefits into their analyses calls into question their descriptive and normative claims about tort.

Corrective justice theory is not in as much trouble as the economic approach, but it is troubled still. Philosophers' neglect of the procedural dimension of tort has caused them to overlook ways that tort does justice between wrongdoers and victims. And it has led them to make misleading claims about the nature of both corrective justice and tort law.

This Article draws out the trouble with tort theory through a thought experiment, starring Harry Potter. Potter's magic helps to highlight the features of tort that the leading theories overlook. Once they are in view, the Article considers the ways in which the omissions cast doubt on the claims those theories make, investigates ways they might improved, and offers several observations about the choice between them.

* Assistant Professor, University of Michigan Law School. Thanks to Joe Bankman, Jules Coleman, Steve Croley, John Goldberg, Daniel Halberstam, Don Herzog, Jim Hines, Jill Horwitz, Greg Keating, Jody Kraus, Kyle Logue, Gabe Mendlow, Bill Miller, Stephen Perry, Richard Primus, Don Regan, Arthur Ripstein, Gil Seinfeld, Scott Shapiro, Jason Solomon, David Uhlmann, Mike Wells, John Witt, and Ben Zipursky for helpful comments and conversations. I also benefited from discussion with participants at the 2010 Yale-Stanford Junior Faculty Forum and workshop audiences at the University of Georgia, University of Southern California, University of Toledo, and Georgia State University. Finally, thanks to the editors of this journal for their hard work and helpful suggestions and to Eli Best and Alex Sarch for valuable research assistance.

INTRODUCTION.....	68
I. HARRY POTTER AND THE COSTS OF ACCIDENTS	69
II. HARRY POTTER AND THE DUTY OF REPAIR	93
III. HARRY POTTER AND THE NATURE OF TORT LAW	105
IV. HARRY POTTER AND THE TROUBLE WITH LEGAL THEORY	113
CONCLUSION.....	114

INTRODUCTION

The last several decades of tort theory have left us with competing visions. Economists tell us that tort law promotes efficiency by giving people incentives to take account of costs they impose on others.¹ Philosophers tell us that tort law dispenses corrective justice by requiring wrongdoers to repair the wrongful losses they cause.² There is much to recommend both views, but there are also reasons to think we cannot have it both ways. My sympathies, I should say up front, lie with the philosophers. However, the aim of this Article is not to defend the claim that tort metes out corrective justice. Rather, the aim is to show that the leading theories of tort are radically incomplete and for roughly the same reason.

A tort theory ought to explain tort law, of course, and in a sense, that is what both economists and philosophers set out to do.³ They generate theories to explain the doctrines that first-year law students study in torts, or, more broadly, those that one might find in the *Restatement of the Law of Torts*, or in a torts treatise. But the institution of tort law is not exhausted by the rules that are distinctive of it. The doctrines in the *Restatement* are not self-executing. They must be applied by litigants, lawyers, judges, and juries. A law student learns how that is done primarily in civil procedure. The first-year curriculum has a certain sort of logic. For the most part, the procedural rules that govern tort claims also govern contract disputes and, of course, much else beyond. Thus, as a pedagogical strategy, it makes sense to segregate civil procedure from “substantive” courses, which focus on the distinctive aspects of tort, contract, property, etc. The trouble is that tort scholars have mistaken the subject of the first-year torts class for the institution of tort law. The leading tort theories are theo-

1. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1 (1987) (defending “the hypothesis that the common law of torts is best explained as if the judges who created the law . . . were trying to promote efficient resource allocation”).

2. See, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* 325 (1992). Of course, tort theorists’ substantive views do not sort perfectly by discipline, but the sort is good enough that it is not misleading to juxtapose an economist’s view of tort with a philosopher’s.

3. Though the notion that efficiency explains tort doctrine remains deeply influential in the legal academy, it is no longer fashionable for theoretical economists to make descriptive claims about tort law. Instead, most aim to model an ideal accident law. As will become clear, the problem Harry Potter will raise for economic approaches to tort afflicts both descriptive and normative projects.

ries of tort's distinctive rules—roughly, who is entitled to tort remedies, when, and why. However, we cannot understand the contribution tort law makes to our lives if we restrict our attention to those aspects of it. To be sure, a theory of tort must explain what is distinctive about tort law, but if it explains just that, it runs the risk of missing much about the institution.

That is just what has happened with the leading accounts of tort law. Both economists and philosophers have missed much about tort, and worse yet, much of what they say may be wrong because they have not accounted for what they have missed. The primary aim of this Article is to expose problems with the leading accounts of tort. I shall argue that both the economic and corrective justice accounts are defective on their own terms. That is, economists must revise their account for reasons internal to their theory, not because of the philosophers' critique. The reverse is true too. A secondary aim of this Article is to explore how the leading theories might be fixed. Fixing the economic account will not be all that hard, at least in principle. There will simply be more costs and benefits to tote up. However, as we shall see, it is doubtful that we are capable of gathering the information necessary to put the economic account on firm footing. For philosophers, matters are more complicated. In fact, I shall argue that to generate an adequate corrective justice account of tort, we must revise our understanding of what corrective justice is. A final aim of this Article is to say something about the merits of the economic and corrective justice accounts. However, that will not be my main focus. This Article is an invitation to broaden tort theory, not an effort to end it.

We are now three paragraphs in and I have not yet mentioned the star of the show. What does Harry Potter have to do with tort law? Well, it is Harry's magic that will help us see the trouble with tort theory.

I. HARRY POTTER AND THE COSTS OF ACCIDENTS

Imagine that upon graduation from Hogwarts School of Witchcraft and Wizardry, Harry Potter goes to law school. As a 1L, he takes torts from a professor with an economist's view of the institution. She teaches Potter that tort law aims to minimize the sum of the costs of accidents and the costs of accident prevention.⁴ Tort law does this, she explains, by giving people incentives to take account of costs they impose on others.

Like many first-year students, Potter is enamored with economic analysis. He appreciates the elegance with which it accounts for central features of tort law, and he finds the normative theory underpinning it attractive. But the more enchanted Potter becomes with the economic account of tort law, the more dis-

4. Here, Potter's professor borrows from Guido Calabresi's famous formulation. *See* GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 26 (1970) ("I take it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents.").

enchanted he becomes with tort law itself. “Tort law is awfully expensive,” he thinks. “Surely, there must be a cheaper way to reduce the costs of accidents.” Then, remembering that he is the world’s most powerful wizard, he raises his wand. Potter casts a spell that works like this. Every time a person imposes a cost on another that would be compensable by the tort system (say, by flying carelessly and knocking someone off her broomstick), the spell transfers a sum of money equal to the cost from the bank account of the injurer to the account of the victim and dispatches a message informing the person of the debit to his account and the reason for it. Potter eliminates the administrative costs of the tort system with one swoop of his wand, and the results are impressive. The spell pushes accident costs nearer their optimal level than the tort system, because all and only those who are liable are made to pay, they are made to pay immediately, and they cannot avoid paying by investing in lawyers rather than safety.

That is no small feat, yet Potter’s professor will surely tell him he has cast the wrong spell. Tort’s rules, she will explain, are shaped by administrative costs. Because Potter can dispense with them, he should not replicate tort doctrine blindly. Potter’s professor will start by encouraging him to cast a spell that charges cheapest cost avoiders, rather than tortfeasors.⁵ Tort law, she will tell him, does not hold cheapest cost avoiders liable consistently only because the cost of identifying them is high.⁶ Potter does not face that constraint. He can cast a spell that effortlessly determines whether, for example, it is more cost-effective for a municipality to invest in accident prevention by installing a traffic light than it is for drivers at an intersection to take extra care. If the municipality faces lower accident avoidance costs, the spell will better reduce accident costs by charging the municipality for mishaps, whatever tort doctrine might tell us about the drivers’ responsibilities.

Potter’s professor will also point out that the money taken from cheapest cost avoiders need not be given to victims. She will explain that tort requires defendants to pay victims primarily so that victims have an incentive to sue defendants.⁷ No inducement to litigation, however, is needed once Potter casts his

5. *See id.* at 135 (“A pure market approach to primary accident cost avoidance would require allocation of accident costs to those acts or activities (or combinations of them) which could avoid the accident costs most cheaply.”).

6. *See* Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233, 1243 (1988) (book review).

7. *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 192 (7th ed. 2007) (stating that damages must be paid to the victim rather than the state because “otherwise the victim w[ould] have no incentive to sue”); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 48 (1972) (“By creating economic incentives for private individuals and firms to investigate accidents and bring them to the attention of the courts, the system enables society to dispense with the elaborate governmental apparatus that would be necessary for gathering information about the extent and causes of accidents had the parties no incentive to report and investigate them exhaustively.”); *see also* Coleman, *supra* note 6, at 1243 (noting that “victims are included to give them incentives to litigate”).

spell. Of course, other considerations may support transferring money to victims. If a defendant is in a better position to absorb a loss than a plaintiff, compensation may reduce the costs of bearing the costs of accidents. Moreover, compensating victims encourages them to take optimal care.⁸ However, it is an open question whether these are the most productive uses to which the money the spell seizes could be put. Perhaps the money is better transferred to the state's treasury, or channeled to the poor, or spread among all those suffering physical infirmities, regardless of their source.⁹ If Potter's spell can identify the cheapest cost avoider of an accident, surely it can determine the optimal recipient of seized funds.

Potter's professor may continue to tinker. She might suggest that Potter's spell take money from those who create risk, whether or not the risks are realized. She might suggest that Potter adjust tort's mix of strict liability and fault where necessary to encourage efficient activity levels. Or that the spell hold people liable for causing pure economic loss. Or . . . well, you get the point. As the professor revises Potter's spell, it will look less and less like tort law, but it will better achieve tort law's aims.

* * *

The question what form Potter's spell should take boils down to this: what is the optimal legal regime if there are no administrative costs? That is an interesting question, even if it has limited practical upshot. However, I want to pursue a different question through this thought experiment: If Potter were here, right now, offering to eliminate tort's administrative costs by making its rules self-executing, should we have any reservations about accepting his offer? What, if anything, would we sacrifice by eliminating tort law in favor of such a costless scheme?

That may strike you as a silly question. Potter's spell hardly seems to involve a sacrifice; it reduces accident costs at no cost to us. Yet even if we are concerned with nothing but welfare, the question is not silly. In addition to eliminating tort law's administrative costs, Potter's spell erases some of its benefits too. The primary benefit tort generates—lower accident costs—is preserved by Potter's spell. In fact, it is enhanced. However, tort law generates benefits beyond those that its substantive rules aim at. We can call these tort's *collateral benefits*.¹⁰ The wrinkle here is that many of tort's collateral benefits (though

8. See POSNER, *supra* note 7, at 192 (stating that damages must be paid to the victim rather than the state because otherwise the victim "may take too many precautions"); Coleman, *supra* note 6, at 1243.

9. As Jules Coleman points out, the argument that "victims are included so that we may induce them to take efficient precautions and to avoid taking inefficient precautions, rests on the mistaken premise that including someone in litigation is the only way to influence her behavior." Coleman, *supra* note 6, at 1244.

10. Tort's collateral benefits must be distinguished from its external benefits—the

not all) are generated by the process that implements tort's substantive rules, not by application of the rules themselves. Thus, in rendering tort's substantive rules self-executing, Potter sacrifices some of the benefits tort law produces.

An example will help. Tort suits convey information. Tort litigation allows plaintiffs, for example, to discover facts about their injuries that may not be available from other sources. Suppose you want to know why you awoke from a surgery partially paralyzed, and the doctor will not answer your questions. Your only recourse may be to file a lawsuit alleging malpractice, so that you can take advantage of the subpoena power of the court. Of course, you are subject to sanctions if you do not have a good faith belief that the doctor has committed malpractice, so a tort suit is a viable option only if your curiosity is accompanied by suspicion that you were the victim of a tort. However, when you do have such a suspicion, you may demand information about the doctor's conduct. And there is evidence that many people file lawsuits for just that reason. In a recent study of the motivations of medical malpractice plaintiffs, fifty-three percent said they sued to get "answers."¹¹ That was nearly three times the number of plaintiffs who claimed money as their primary motivation for filing suit.¹²

After Potter casts his spell, tort law will no longer empower people to demand answers from those they believe injured them. To be sure, victims may still get some of the information tort suits provide. For example, the very fact that a victim is compensated by the spell tells her that someone else was responsible for her injury. That is important to note, as it means that Potter's spell has collateral benefits too.¹³ Potter did not cast his spell in order to convey in-

benefits it generates that fall on people who do not participate in the system. Some of tort's collateral benefits are also external benefits but, as we shall see, others accrue to the parties in a lawsuit. Moreover, most of tort's primary benefits—lower accident costs—are external.

11. Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 723 fig.4 (2007).

12. Eighteen percent said that money was their primary motivation. Thirty-five percent said it was of secondary importance. Only six percent said money was their sole motivation, while forty-one percent did not cite money as a motivation at all. *Id.* We should probably not take these numbers too seriously. Medical expenses are often covered by collateral sources, and lawyers commonly take malpractice cases on contingency. Thus, plaintiffs in medical malpractice cases may have less reason to be concerned with money than plaintiffs in other sorts of suits. More importantly, plaintiffs might be embarrassed to admit monetary objectives to researchers, or think that they will come off less greedy if they emphasize other interests. See Judith Resnick, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 369 (1996) ("[P]ost hoc explanations by plaintiffs of their reasons for pursuing remedies may be influenced by a desire to downplay certain motives and highlight others perceived to be more socially desirable or noble."). However, even if we have reason to be skeptical when plaintiffs deny monetary motivations, we have no reason to doubt that many also have nonmonetary goals. Indeed, the fact that we worry about whether plaintiffs are telling the truth suggests that we think they think lawsuits properly serve some other purpose, such that it is gauche to mention the money.

13. Any system for implementing rules—whether litigation, regulation, or magical

formation to victims of torts; the fact that the spell does so is a bonus. The bonus here, however, is likely less substantial than the corresponding benefit tort generates. The curiosity on display when a plaintiff says she wants answers surely extends beyond the question whether someone else is liable for her injury. Presumably, she wants to know how and why she was harmed. Tort law may tell her, but Potter's spell will not. Indeed, if it turns out that plaintiffs are not the optimal recipients of seized funds, victims may not learn anything from Potter's spell.

We are now in a position to see why the answer to the question we started with is yes, we should have a reservation about accepting Potter's offer to cast his spell, even if we care about nothing but welfare. Plaintiffs value the information they learn through discovery, information they would rarely acquire through the spell.¹⁴ Of course, to say we should have a reservation about accepting Potter's offer does not mean that we have sufficient reason to reject it. Indeed, for all we have seen so far, it is doubtful that we do. The answer depends on how much plaintiffs value the information they learn through discovery, as well as on the costs of alternative methods of conveying that information. If tort suits are a comparatively expensive way of answering victims' questions, we might choose to replace tort with Potter's spell and adopt other means to share information (e.g., we could require doctors to disclose their mistakes). If plaintiffs place little value on the information tort suits shake loose, no substitute may be warranted. These are empirical questions, about which we have little information. However, it is virtually inconceivable that plaintiffs value the information they obtain through tort suits enough to outweigh the massive savings we would get from Potter's spell.

That, however, is not the end of the story. Answers for plaintiffs are merely one of tort's collateral benefits. What are the others? I doubt we can work up a complete list, but we can get a start. In addition to conveying information to plaintiffs, tort suits disseminate information to people interested in litigation but not involved in it. Court records contain information bearing on all sorts of topics, ranging from the trustworthiness of potential employees to the rate at which products cause injuries. To be sure, this information might be compiled and shared in other ways. Indeed, tort may be terribly inefficient at assembling and distributing it. However, the information tort makes publicly available is a

spell—has at least the prospect of generating benefits beyond those that the rules aim at. So it would be a mistake to think that only tort law has collateral benefits, or even that only tort law can generate the benefits that it does. Another legal regime might do just as well or better.

14. A natural thought to have at this point is that Potter could tweak his spell to give plaintiffs the answers they seek. No doubt that is true. The information plaintiffs are after could be printed on parchment and delivered by owl. However, to indulge the thought that Potter's spell could be tweaked is to miss the point of the thought experiment. Potter's spell, as we imagined it, does just what economists tell us tort's substantive rules aim to do. The spell does not guarantee that victims will acquire all the information they do in a tort suit because that benefit is collateral to the aim of tort law, as economists construe it.

collateral benefit of the system.

Leaving information aside, tort provides a forum for conversations we might value having in public. Through tort suits, judges work out what duties we owe one another. By hypothesis, Potter's spell adopts the most efficient set of duties, so we might think that there could be no benefit in allowing judges to muddle along, case by case. Yet, what counts as the most efficient set of duties is in part a function of the public conversation we have about what we value. Our preferences are, after all, dynamic. If there is value in public conversations about what we owe one another, tort suits serve a purpose, even if Potter could implement tort's rules without them. Likewise, litigants may value trials despite the fact that Potter's spell always arrives at the right result in individual cases. Litigants often have reasons to tell their stories in public. Plaintiffs may find a chance to do so empowering or cathartic; defendants may appreciate the chance to defend a sullied reputation. Tort provides these opportunities; Potter's spell does not.

I could go on for pages listing tort's collateral benefits. Some would be trivial, like the entertainment that public galleries offer courtroom observers. Others might be significant, like the security we get from living in a society in which disputes are resolved peacefully. Most would fall somewhere in between. To know whether we should prefer Potter's spell to tort law, we would need a full accounting of tort's collateral benefits. However, we can stop here, because the question whether to take Potter up on his offer is not pressing. For our purposes, it is more important that we see that tort has collateral benefits than that we figure out exactly what they are.

Of course, even a full accounting of tort's collateral benefits would not be enough to tell us whether we ought to accept Potter's offer. We also need to know what lies on the other side of the equation. We said before that Potter's spell eliminates tort's administrative costs. That is one of its major attractions. However, tort has other costs that Potter's spell might mitigate. We can call these *collateral costs* to distinguish them from administrative costs. To follow through on our earlier example, note that tort liability may discourage doctors from disclosing information about injuries they cause. If tort law inhibits doctors from sharing information that victims of medical mistakes value, that is a cost of the system, but it is not an administrative cost.¹⁵ Under Potter's spell, there is less to be gained by hiding medical errors, as one faces liability whether one discloses an error or not. If Potter's spell leads to more disclosure, it would mitigate a cost of the tort system. Other collateral costs Potter's spell might mitigate include litigation-related aggravation and the resentment people

15. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 262 (1987) ("Administrative costs are the various expenses borne by parties in resolving the disputes, or the potential disputes, that arise when harm occurs. Administrative costs thus include the time and effort spent by injurers, victims, and their legal counsel and insurers in coming to settlements and in litigation, as well as the publicly incurred operating expenses of the courts.").

feel toward trial attorneys.

When we started, it seemed that the answer to the question whether we should take Potter up on his offer was obviously yes. However, it turns out that the question is more complicated than it seems. Potter offers to enhance tort's primary benefit and eliminate its administrative costs. However, there are other costs and benefits to consider. We cannot know for sure whether we should prefer Potter's spell to tort law until we have a full accounting of the costs and benefits of both.

* * *

At the start, I said that Harry Potter would show us that the dominant tort theories are radically incomplete. Now he has put us in a position to see what is wrong with the economic account. *The efficiency of any set of tort doctrines is a function of all of the costs and benefits it would generate if implemented. Yet, economists focus their analyses almost exclusively on accident costs and administrative costs, overlooking tort's collateral costs and benefits.* Consider, for example, William Landes and Richard Posner's seminal work, *The Economic Structure of Tort Law*, famous for its defense of the claim that "much of tort law can be explained on the simple hypothesis that it is indeed a system for bringing about an efficient allocation of resources to safety."¹⁶ Throughout the book, Landes and Posner cite administrative costs as they attempt to show that various tort doctrines are efficient.¹⁷ Nowhere, however, do they discuss tort's collateral benefits. The situation is much the same in Steven Shavell's *Economic Analysis of Accident Law*.¹⁸ Shavell's project is normative, rather than de-

16. LANDES & POSNER, *supra* note 1, at 28. Here, Landes and Posner use "efficient" to mean wealth maximizing. *See id.* at 16 ("The positive economic theory of tort law holds that tort rules are efficient in the sense of wealth maximizing."). However, as Jules Coleman has explained, wealth maximization is not an efficiency criterion. Wealth, like welfare or utility, is a characteristic of states of affairs that allows them to be ranked by efficiency criteria. *See* Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 523 (1980). Most economic analyses of law employ the Kaldor-Hicks criterion of efficiency, though Pareto superiority is sometimes used as well. The objection I present in this Article has the same force regardless of which efficiency criterion one uses. Thus, I speak only of "efficiency," notwithstanding the fact that the term is ambiguous between several related notions. The objection also holds regardless of whether one is ranking states of affairs in terms of wealth or welfare, though details of the argument might play out differently depending on which approach one adopts. When it matters, I assume that economists studying tort are interested in promoting welfare, not wealth, as nowadays nearly no one thinks wealth maximization is an attractive ethical principle, except perhaps as a proxy. *See* RONALD DWORKIN, *A MATTER OF PRINCIPLE* 237-68 (1985) (arguing that wealth is not a value); Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 99, 101 (David G. Owen ed., 1995) (conceding to Dworkin that wealth does not have any "intrinsic, non-instrumental, plausibly 'ultimate' value," but nevertheless defending wealth maximization on pragmatic grounds).

17. *See, e.g.*, LANDES & POSNER, *supra* note 1, at 48, 122, 129, 166, 245, 295.

18. SHAVELL, *supra* note 15.

scriptive; he sets out to describe the optimal tort law. Most of the book is given over to a discussion of which liability rules would minimize accident and accident avoidance costs. Shavell also dedicates a chapter to administrative costs, breaking down the factors that determine their magnitude. However, there is no corresponding discussion of the collateral benefits that would flow from implementing a system of accident law, nor does Shavell catalogue tort's collateral costs.

Tort's collateral benefits do make cameo appearances in the literature. Indeed, they briefly figure in Guido Calabresi's classic, *The Costs of Accidents*. As Calabresi sets forth his famous claim that "the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents," he adds, parenthetically: "Such incidental benefits as providing a respectable livelihood for a large number of judges, lawyers, and insurance agents are at best beneficent side effects."¹⁹ Calabresi is probably right to dismiss the riches tort bestows on those that work in the system as irrelevant to an analysis of tort law, as they are a cost as much as they are a benefit of the institution.²⁰ Yet many of tort's collateral benefits do not come out in the wash, and Calabresi does not address the prospect that implementing a system of accident law will generate benefits beyond a reduction in accident costs. Notwithstanding Calabresi's snide aside, tort's "beneficent side effects" must factor in an economic analysis of the institution.

Collateral costs and benefits have a more substantial role in Louis Kaplow and Steven Shavell's extended defense of economic analysis, *Fairness Versus Welfare*.²¹ They discuss the possibility that people "may have a taste for fairness, in the sense that they may feel better off or worse off depending on whether their conception of fairness is reflected in legal rules or in the actual operation of the legal system."²² As Kaplow and Shavell point out, "any factor that influences individuals' well-being is relevant under welfare economics, and a taste for fairness is no different in this respect from a taste for a tangible good or for anything else."²³ The prospect that individuals may get satisfaction from seeing that the tort system matches their sense of fairness or justice is, as we shall see shortly, a potential collateral benefit (or, in the opposite case, a collateral cost) that has serious implications for the economic analysis of tort. Kaplow and Shavell deserve credit for noticing it. However, they fail to appreciate the full extent of tort's collateral benefits and their import for an economic analysis of the institution. That much is clear from this hypothetical, which kicks off the book:

19. CALABRESI, *supra* note 4, at 26.

20. One way to put it is that the private benefit is not a social benefit, as someone must pay the salaries of judges, lawyers, and insurance agents.

21. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002).

22. *Id.* at 11.

23. *Id.* at 11-12.

[C]onsider a proposal to replace tort liability for automobile accidents with a regime of insurance supplemented by heightened enforcement of traffic laws. Suppose that investigation showed that everyone would expect to be better off under the proposal because it would improve the comprehensiveness of victim compensation and reduce overall administrative costs, without increasing the number of accidents. Under the welfare-based normative approach, the proposal would be deemed socially desirable.²⁴

Whether everyone would be better off under a regime of insurance and enforcement depends, as Harry Potter helped us see, on much beyond accident costs, administrative costs, and compensation rates. Just as before, to know whether we should prefer insurance and enforcement to tort we need a full accounting of the collateral costs and benefits of both. Among other things, we need to know whether insurance tamps down violent revenge as well as tort, how much people value the information each system disseminates, and whether people find telling an insurance adjuster their story as satisfying as they find sharing it with a judge or jury in public. I am sure that Kaplow and Shavell would agree, but they are silent on such matters when they explain tort law's influence on individuals' well-being.²⁵

I could go on, but extending the survey would not add much. The textbook economic analysis ignores tort's collateral consequences.²⁶ On occasion, tort's

24. *Id.* at 3 (footnote omitted). I took this quote from the introduction to *Fairness Versus Welfare*, and that might seem unfair, given the premium on a pithy introduction. However, the quote reflects the discussion of tort law in the rest of the book. Kaplow and Shavell do not investigate tort's collateral costs and benefits.

25. Kaplow and Shavell list four ways tort influences welfare: by providing incentives to take care, by allocating the risk of accident costs, through expenditures on administrative costs, and through distributional effects. *See id.* at 86. They acknowledge that this list is incomplete, pointing out again that tort law may impact welfare if it satisfies or frustrates tastes for fairness and through its influence on social norms. *See id.* at 86 n.3. However, they do not address further ways in which tort affects well-being.

26. I mean this quite literally. The crystallization of conventional wisdom displayed in the best-known law and economics textbooks does not address tort's collateral costs and benefits. Take, for example, Robert Cooter and Thomas Ulen's *Law and Economics*. Cooter and Ulen first examine a simple model, in which the "goal of the tort liability system is to minimize the sum of the costs of precaution and the harm caused by accidents." ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 359 (5th ed. 2008). They then proceed to analyze a "more complex model" that includes administrative costs. *Id.* at 359-61. Cooter and Ulen do not, however, go on to develop a model of tort that takes account of its collateral costs and benefits. Their chapter on the legal process does not fill the gap. *See id.* at 414-84. There, they assume "that the economic objective of procedural law is to minimize the sum of administrative costs and error costs." *Id.* at 417 (emphasis omitted). The implicit view is that the only benefits generated by the legal process that must be factored into an economic analysis are those that flow from accurate implementation of substantive legal rules.

Cooter and Ulen's textbook is not an outlier. Posner's *Economic Analysis of Law* also neglects tort's collateral costs and benefits. The chapter on tort law does not mention them, POSNER, *supra* note 7, at 167-210, and the chapter on procedure echoes Cooter and Ulen, reporting that the "objective of a procedural system, viewed economically, is to minimize the sum of [error and operating costs]," *id.* at 593. A. Mitchell Polinsky's *An Introduction to*

collateral consequences appear in the scholarly literature, but somewhat haphazardly.²⁷ Though there is a constant barrage of ever more sophisticated economic models of tort, so far as I am aware no one has undertaken a systemic effort to catalogue or quantify tort's collateral consequences, nor has anyone suggested such an effort is warranted.²⁸ The result is that we know drastically less about tort's collateral consequences than we do about its primary benefits and administrative costs.

* * *

The failure of economists to grapple with tort's collateral costs and benefits is not a small problem. In fact, it means that we must approach every assertion economists make about the efficiency of tort doctrine with a healthy skepticism, as any or all of them might be wrong. That is a bold claim, and it warrants illustration. However, I should say up front that I cannot demonstrate that any particular bit of received wisdom about the efficiency of tort doctrine is wrong, much less that all or even most of it is. Instead, what I can offer are possibility proofs that the standard economic analysis might be wrong depending on how

Law and Economics does not fare better on this score. Polinsky says that “[i]n determining [the optimal level of liability], it is necessary to include not only the direct benefits and costs of the parties (such as the driver’s benefit from driving and the pedestrian’s expected accident cost), but also their litigation costs.” A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 145 (3d ed. 2003). That is true, but it is far from the whole picture, and tort’s collateral costs and benefits never come on the scene.

27. See, e.g., A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437 (2010). In arguing for a skeptical attitude toward product liability, Polinsky and Shavell discuss a collateral cost—price distortions—and two collateral benefits—price-signaling and the dissemination of information about dangerous products to consumers and regulators. See *id.* at 1454-55, 1459, 1470. They fail, however, to address other potentially significant collateral consequences of products liability law, among them the satisfaction that victims might get from having an opportunity to hold the manufacturer of a defective product accountable, and the security and satisfaction that others might get from seeing manufacturers held liable. To know whether there is a strong welfare-based case for products liability, we would need to know the magnitude of these benefits, and much else beyond.

28. From time to time, the more sophisticated economic approaches touch on collateral costs and benefits of tort law. For example, Mark Geistfeld has argued that a welfare economics approach to tort might accommodate a “compensatory norm” that prioritizes security over liberty interests, even though such a norm would justify tort rules that are allocatively inefficient. See Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort Law*, 91 GEO. L.J. 585, 632 (2003). One might read Geistfeld to posit a potential benefit to tort law beyond minimizing accident costs that affects our identification of the optimal tort rules. To the extent that Geistfeld and other scholars complicate the standard economic analyses of tort by factoring in an occasional collateral cost or benefit, that represents an improvement, but a marginal one. As will become clear, piecemeal efforts to account for this or that collateral cost or benefit will not remedy the problem that the standard economic analysis faces. Uncertainty about the conclusions economists reach will persist so long as there are potentially significant collateral costs and benefits left out of their analyses.

the collateral costs and benefits line up. That is, of course, less satisfying than a demonstration that some deeply held part of economic dogma is false, but the point I want to underscore is that we lack the information to know which tort doctrines are efficient. We should not presume that economists are right unless I can show them wrong. Rather we should acknowledge that their analyses are incomplete in ways that might make a difference.

As a first pass, recall the lesson Potter's professor gave him when he cast the first version of his spell. Administrative costs shape tort doctrine, she told him. Absent search costs, it would be best to hold cheapest cost avoiders liable, but finding them is often expensive. The rules that pick out proper defendants in tort suits are a second-best approximation. That is the official story about why we do not always hold cheapest cost avoiders liable, but try this story on for size: victims want to hold their injurers responsible for wrongdoing, and they would not get the same satisfaction from suing someone else, even if that person could have avoided the accident more cheaply. Or this one: victims are less likely to resort to violence if they have a civil avenue of recourse against the person they hold responsible for their injury. If either (or both) of these stories are true, perhaps we accept higher accident costs not because search costs are high, but because the loss from failing to hold cheapest cost avoiders liable is outweighed by the collateral benefits of the current system.²⁹

Which story offers the best economic explanation of the fact that we sue injurers rather than cheapest cost avoiders? Probably the standard story, but we do not have the evidence to decide. Here, that is not too worrisome, as the explanations reinforce one another. All point in the direction of the doctrine we have, rather than the doctrine that would have been best absent administrative costs and collateral benefits. That is not to say, however, that collateral benefits do not affect the economic perspective on who should be liable for accident costs. If it turns out that search costs are low, traditional economic theory tells us that plaintiffs should sue cheapest cost avoiders, rather than injurers. Now we can see that if the collateral benefits from holding injurers liable are substantial enough, it is possible that, notwithstanding low search costs, it remains better to continue with present practice.

In other areas, administrative costs and collateral benefits work at cross-purposes. Discovery is expensive. If we focused only on its cost, we would want to ensure that the sums expended would be less than the expected reduction in accident costs from holding the defendant liable. Indeed, Posner argues

29. It is possible, of course, that if victims were routinely told who the cheapest cost avoiders of their injuries were, they would judge the cheapest cost avoiders responsible in addition to or instead of the people we conventionally identify as injurers. That is an empirical question, about which we have little information. However, one suspects that the mere fact that a person is the cheapest cost avoider would not, in many cases, lead victims to judge that person responsible. For example, car manufacturers may be the cheapest cost avoiders of many accidents not because there is a defect in the car's design, but because they are in the best position to lobby for safer roads. See Coleman, *supra* note 6, at 1242 n.24.

that “[t]he search [for evidence] should be carried to the point at which the last bit of evidence obtained yields a reduction in error costs equal to the cost of obtaining it,”³⁰ showing once again that economists take the benefits of the legal process to be limited to those that flow directly from reaching the right result. However, as we noted before, many plaintiffs sue to get answers, and the public benefits from access to information generated by tort suits as well.³¹ That means that to know how much discovery is cost-justified, we need to know how much plaintiffs and the public value the information disseminated, not just the likelihood that error costs (and hence accident costs) will be reduced if information is shared.³²

Those examples might seem like small potatoes, but we can ratchet up the pressure considerably. In many jurisdictions, plaintiffs may recover damages intended to compensate for lost enjoyment of life, sometimes known as hedonic damages.³³ That makes sense on the traditional view that “optimal ex ante deterrence is best served by requiring injurers who are held liable to pay the actual costs they have imposed.”³⁴ However, Sam Bagenstos and Margo Schlanger argue that “courts should not award hedonic damages for disabling injuries.”³⁵ Hedonic damages, they say, reinforce the view that disability is a tragedy. That, in turn, encourages people to think that the proper response to a disabling injury is “rehabilitation or charity” rather than “eliminating the physical, social, and attitudinal barriers that make some physical and mental impairments disabling.”³⁶ If Bagenstos and Schlanger are right, hedonic damages have a collateral cost—they make the disabled worse off because they make it more challenging to overcome the “social choices that create most of the disadvantage attached to disability.”³⁷ Moreover, the availability of hedonic damages may diminish a collateral benefit of tort law. As Bagenstos and Schlanger point out, “[a] plaintiff may feel that standing up to the party who wronged her, and recovering damages for that wrong, is empowering. But the process of obtaining hedonic damages can undercut that sense of empowerment,” because it

30. POSNER, *supra* note 7, at 642.

31. *See supra* pp. 72-74.

32. Many will think this a point about procedure or evidence, not about tort, but that is precisely the attitude I want to push back against. That this is a point about procedure does not preclude it from being a point about tort, for the institution of tort law encompasses both substantive rules and the procedures through which they are implemented.

33. *See* Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 748-49 & nn.13-17 (2007) (citing representative cases and secondary sources categorizing jurisdictions by the way in which they make hedonic damages available).

34. *Id.* at 789 (emphasis omitted) (citing STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 236-37 (2004)).

35. *Id.* at 797.

36. *Id.* at 780.

37. *Id.*

requires a plaintiff “to testify that the injury has made her life less enjoyable.”³⁸ Indeed, they worry that such testimony may become a “self-fulfilling prophecy.”³⁹

The question how hedonic damages should be measured was controversial even before Bagenstos and Schlanger argued that they should not be awarded at all.⁴⁰ This is because it is not obvious whether the actual harm done by a defendant should “be measured by what the plaintiff would have demanded as compensation for hedonic loss prior to the injury,” or whether it should “be measured by what the plaintiff, after the injury, would pay to be ‘made whole’ for hedonic loss.”⁴¹ There is reason to think that these valuations come apart, as people without disabilities “tend to believe that disability inevitably has a very negative effect on the enjoyment and quality of one’s life,”⁴² while “people who acquire disabilities do not find that their enjoyment of life is impaired—perhaps not at all, and at least not substantially.”⁴³ Still, the question whether courts should award hedonic damages looks much different in light of the collateral costs and benefits Bagenstos and Schlanger point out. It may be optimal for the tort system to provide less deterrence than would have seemed optimal were those costs and benefits left out of the calculus.⁴⁴ This demonstrates that what counts as optimal deterrence is a function of collateral costs and benefits, in addition to accident costs, costs of care, and administrative costs.

That is troubling. Without Bagenstos and Schlanger, we would have little inkling that there is a substantial gap in the standard economic analysis of tort damage awards. Still, the problem cuts deeper. Indeed, collateral costs and benefits may affect core parts of the economic analysis of tort. The linchpin is, of course, the Hand Formula, which tells us that it is unreasonable to fail to take a precaution if its cost is less than the expected loss from not taking it (or, in algebraic form, if $B < pL$, where B is the cost of a precaution, p is the probability of loss, and L is the magnitude of loss).⁴⁵ The Hand Formula is not the only in-

38. *Id.* at 785 (emphasis omitted).

39. *Id.*

40. See Edward J. McCaffery, Daniel J. Kahneman & Matthew L. Spitzer, *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341, 1388-403 (1995).

41. Bagenstos & Schlanger, *supra* note 33, at 790.

42. *Id.* at 769.

43. *Id.*

44. While Bagenstos and Schlanger would not award hedonic damages, they propose “award[ing] compensatory damages fully sufficient to enable tort plaintiffs with disabling injuries to fund often costly accommodations to enable their participation in the community.” *Id.* at 751. Thus total damages might be higher under their proposal. Even so, their argument shows that collateral costs and benefits affect the optimal level of deterrence.

45. See LANDES & POSNER, *supra* note 1, at 229-30 (describing the Hand Formula “as an algorithm for deciding tort questions”). Of course, the variables in the Hand Formula should be understood to refer to marginal costs and benefits, rather than total costs and benefits. See *id.* at 87.

interpretation of tort's negligence standard. An intriguing competitor is found in Lord Reid's opinion in *Bolton v. Stone*.⁴⁶ There (and in a subsequent opinion glossing *Bolton*),⁴⁷ Reid articulates a three-prong approach. If the risk of harm is "fantastic or far-fetched,"⁴⁸ a reasonable person pays no attention to it. If the risk of harm is real but small, a reasonable person takes those precautions necessary to prevent it, unless the expense of the precautions is disproportionate to the expected loss.⁴⁹ Finally, if the risk of harm is substantial, a reasonable person takes the precautions necessary to prevent it, regardless of expense.⁵⁰

Economists follow Hand, presumably because the Hand Formula judges it reasonable to take a precaution only if it enhances social welfare,⁵¹ whereas Reid would sometimes require precautions that diminish social welfare. This is true even though the standard economic view is that employing Reid's interpretation of reasonableness instead of Hand's should not induce potential defendants to exercise greater care. The idea is that a potential defendant who would be judged negligent for failing to pay \$125 to prevent a \$100 injury would rather pay the tort judgment than take the more expensive precaution. This reasoning is suspect,⁵² but even if we accept it, economists still have reason to prefer Hand to Reid: Reid's standard might lead potential defendants to restrict their activity to avoid liability. Employing the Hand Formula allows the negligence standard to influence defendants' care levels without affecting their activity levels, and economists tell us it is desirable to have such a rule in tort's kit.⁵³ Thus, economists are apt to conclude that adopting Reid's interpretation

46. [1951] A.C. 850 (H.L.) 864-68 (Lord Reid) (appeal taken from Eng.) (U.K.).

47. *Overseas Tankship (U.K.) Ltd. v. Miller S.S. Co. (Wagon Mound No. 2)*, [1967] 1 A.C. 617 (P.C.) 641 (appeal taken from N.S.W.) (U.K.).

48. *Id.*

49. *Id.* at 642; see also JOHN C.P. GOLDBERG ET AL., *TORT LAW: RESPONSIBILITIES AND REDRESS* 202-03 (2d ed. 2008) (reconstructing Reid's test for reasonableness).

50. *Bolton*, [1951] A.C. at 867 ("[I]t would be right to take into account not only how remote is the chance that a person might be struck but also how serious the consequences are likely to be if a person is struck; but I do not think that it would be right to take into account the difficulty of remedial measures. If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all.").

51. Though this is the standard view, it turns out that the Hand Formula may not provide incentive to take efficient precautions in some contexts. See Allan M. Feldman & Jeonghyun Kim, *The Hand Rule and United States v. Carroll Towing Co. Reconsidered*, 7 AM. L. & ECON. REV. 523 (2005). The worry stems from ambiguity in the way the Hand Formula should be interpreted when more than one party might take precautions. I shall not address this complication here, as it does not affect the argument that follows.

52. It assumes that potential defendants: 1) are rational in the narrow economic sense; 2) know the magnitude of their potential liability (which requires knowing the law, the facts, and the likelihood that a court will apply the law to the facts correctly); and 3) care only about the magnitude of liability, and not, say, the reputational costs or feelings of shame they might incur if a public judgment is entered against them. The first two assumptions are, of course, standard fare in economic analysis despite the fact that they are implausible. The third is an instance of the mistake that Harry Potter highlights.

53. See Giuseppe Dari-Mattiacci, *Negative Liability*, 38 J. LEGAL STUD. 21, 26, 33-38

of reasonableness should lead to suboptimal accident reduction.

Tort's collateral benefits throw a monkey wrench into this analysis. Suppose that our moral sensibilities tend to match Reid's interpretation of reasonableness, rather than Hand's. That is, suppose that when the risk of harm is substantial, we judge others responsible for our injuries even if the costs of the precautions they might have taken exceeded our expected loss. If that is the case, then assessing negligence according to the Reid test might increase satisfaction with the tort system, assuming we have a taste for seeing what we regard as justice done through tort law. When you take account of collateral benefits, the question whether it is better to follow Reid over Hand depends on whether any losses due to suboptimal accident reduction are outweighed by an increase in satisfaction with the outcomes of tort suits. That is a question on which we have essentially no information, and it would be very difficult to get.

You might think this example is fanciful because people do not have tastes as to matters as fine-grained as whether tort follows Hand or Reid in assessing negligence. Stated that way, of course, most people do not have preferences. However, the collateral benefit I am positing—people's satisfaction at seeing justice done through the tort system—does not depend on their having views about the best tort doctrines. Rather, it depends on their having views about what justice requires. Not only do I suspect that most people have such views, I would hazard that many people's moral sensibilities more closely track Reid than Hand. (We have some evidence in defendants' aversion to disclosing that they engaged in cost-benefit analysis, and the juror disgust they hope to avoid.)⁵⁴ I am far less confident that the collateral benefits from applying Reid's test would outweigh the costs of suboptimal accident reduction. For all I know, they would not, and we should cast our lot with Hand.⁵⁵ That, however, is a startling thought. The Hand Formula stands at the center of the economic analysis of tort law. Whether it belongs there is a question whose answer is contingent on the relative magnitude of costs and benefits we know little to

(2009) (suggesting that the difference in scope between liability rules that govern negative and positive externalities is in part explained by the fact that in the case of negative externalities negligence rules allow control of care without influencing activity levels).

54. There is no refuge in the thought that rationality really does require cost-benefit analysis and jurors are just too squeamish to accept that. Whatever the fact of the matter, people's satisfaction with the tort system is partly a function of the degree to which it tracks their moral sentiments, and it is their satisfaction that matters for the argument. A more promising thought is that people's views about justice are neither stable, nor formed independently of the way the tort system works. That is probably true, and it might suggest that we could lead people to prefer Hand to Reid by adopting practices that applied Hand's rule. If so, the cost to following Hand would be transient.

55. Or maybe we should just keep doing what we actually do, which is to cast our lot with juries, rather than Reid or Hand. Recall that Hand offered his formula in an admiralty case. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). Jurors in tort suits are generally asked whether the defendant took ordinary or reasonable care, and they are not given any algebra to aid their judgment. *See Stephen G. Gilles, The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1015-19 (1994).

nothing about.⁵⁶

I could multiply examples, but the bottom line is this. The calculus necessary to determine how to minimize the sum of the costs of accidents and the costs of accident prevention is rather more complicated than it first appears. Economists have long appreciated that administrative costs are part of the equation. Collateral costs and benefits are too. Because economists have not factored them in, we must approach every assertion they make about the efficiency of tort doctrine skeptically. Of course, I have no idea how much of what economists say is wrong, but they equally well have no idea how much of what they say is right. All we can say for sure is that, at present, the economic analysis of tort law is radically incomplete.

* * *

I must confess that the argument thus far strikes me as obvious. I do not see how an economist could deny that the efficiency of any set of tort doctrines is a function of all of the costs and benefits it would generate if implemented, not just accident costs and accident avoidance costs. And once you recognize that, it is clear that all the equations and arguments economists have built up over the years do not prove what they purport to. So we are left to wonder why economists have failed to factor tort's collateral costs and benefits into their analyses.

One possibility is that economists have simply missed entries on the ledger. This sort of error is common enough. Consider the mistake people make when they pronounce lottery tickets an irrational purchase on the ground that their cost exceeds the expected payout. Whether the purchase is rational depends on much else, including the enjoyment one gets from daydreaming about winning. Or consider the Scrooges who argue that it is inefficient to give anything other than cash as a Christmas present.⁵⁷ To be sure, most people who give you gifts do not know as well as you what you want. Yet, there is a point to exchanging gifts that cannot be captured in the value recipients place on the items transferred. Gifts build relationships and encourage people to spend time thinking about one another.⁵⁸

56. The point of this example is not to suggest that we can squeeze concerns about justice into a cost-benefit analysis, carried out, say, in terms of utility. I doubt such a thing is possible, even in principle. Rather, the point is that we cannot segregate people's feelings about justice from a cost-benefit analysis of an institution that is taken by many to be centrally concerned with doing justice, for their satisfaction with the institution may depend on the degree to which it does what, in their view, justice requires.

57. See, e.g., Joel Waldfoegel, *The Deadweight Loss of Christmas*, 83 AM. ECON. REV. 1328 (1993).

58. See Nancy Folbre, *What You Got for Christmas*, N.Y. TIMES ECONOMIX BLOG (Dec. 28, 2009, 6:52 AM), <http://economix.blogs.nytimes.com/2009/12/28/what-you-got-for-christmas>.

In failing to account for tort's collateral benefits, economists may have made just the sort of error that killjoys make about lotteries and Christmas. Indeed, I suspect this is in part what has happened, and the oversight is not surprising. To see many of tort's collateral costs and benefits, you need to attend to the institution, rather than its rules. Yet, as we said at the start, economists (like other tort scholars) confuse the institution of tort law with the rules that are distinctive of it. Even so, mere oversight cannot be the full explanation for economists' failure to account for tort's collateral costs and benefits. Several are simply too well known to have escaped their notice. Everyone, for example, knows that litigation breeds aggravation, and it is not uncommon for judges to suggest that tort suits may substitute for violent reprisals.⁵⁹ For one reason or another, economists have decided that they need not factor tort's collateral consequences into their analyses.

Our challenge is to figure out why they have made that decision, given the doubt it casts on the conclusions they reach. It should be clear by now that tort's collateral costs and benefits cannot be ignored on the ground that they are incidental to the primary benefits tort seeks (i.e., on the ground that they are collateral). Tort's administrative costs are incidental in just the same way. We do not have tort law so that we can pay judges or heat courthouses. Yet these costs cannot be ignored. Tort's collateral costs and benefits stand on the same footing as its administrative costs. An economic analysis of the institution must account for tort's costs and benefits, collateral or not.⁶⁰

Why else might economists ignore tort's collateral costs and benefits? The most sympathetic explanation is that they have done so to keep their models of tort tractable. Economists face a problem. It is not possible to account for all of tort's costs and benefits; the informational demands are simply too high. Indeed, the challenge is even more daunting than it may seem, as among tort's collateral costs are opportunity costs—options we forego because we spend money on tort law. Tort's opportunity costs might include better schools, more healthcare, or faster innovation, to name just a few of the countless possibilities. Obviously, we cannot expect an economic analysis of tort to exclude the possibility that all or part of the money we spend on tort would be better spent elsewhere, at least not if the project has any prospect of success. Yet, the answer to the question what are the optimal tort rules inescapably depends on tort's opportunity costs, along with all its other collateral costs and benefits. It

59. See, e.g., *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (Posner, J.) (“[A]n age-old purpose of the law of torts is to provide a substitute for violent retaliation against wrongful injury . . .”).

60. Indeed, the distinctions between primary and collateral benefits and administrative and collateral costs are merely heuristics for helping us to see the costs and benefits that economists ignore. From an economic perspective, tort has costs and benefits full stop. The fact that some costs and benefits are more directly related to the aim economists posit for tort law is irrelevant when assessing the institution, as the question whether any set of tort doctrines is efficient is a function of all its costs and benefits, not a restricted class of them.

may be that no tort law is optimal, as we would get more bang for our buck elsewhere. Or it may be that a different tort law is optimal than we would otherwise suppose.

No economist, I take it, would disagree with any of this. Yet, the consequence is that economists cannot tell us whether the tort law we have is efficient, nor what an efficient tort law would look like. Faced with this problem, we might simply wash our hands of economic analysis. That is the reaction many have to utilitarian moral theories, which face more or less the same problem.⁶¹ However, I do not think we need to go that far, as it may be that economic analysis can illuminate tort, even though our epistemic limitations entail that any conclusions we reach will be qualified and tentative. If we learned, for example, that products liability law secured only modest gains, we might guess that we would be better off investing in something else, even if we did not yet know what (if anything) would produce a better return.⁶² The question is not whether economists should limit the costs and benefits they consider—as a practical matter they must. Rather, the question is what costs and benefits they should take into account.⁶³ The line economists have drawn lets in the costs of accidents and the costs of avoiding accidents, but excludes tort's collateral costs and benefits. The problem is that there is no plausible justification for drawing that line.

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There are, however, tempting justifications, and it is worth exploring why they go awry. The most tempting starts from the premise that tort's collateral

61. *See, e.g.*, DON HERZOG, WITHOUT FOUNDATIONS: JUSTIFICATION IN POLITICAL THEORY 123-32 (1985); *id.* at 131 (“As far as I know, no one has ever attempted even a sketch of [the kind of] decision [utilitarianism demands] for any actual problem. . . . For good reason, too: we would need to know unfathomably more about consequences and individuals than we do or can know. Attempting even a sketch would discredit the entire project.”).

62. *See* Polinsky & Shavell, *supra* note 27. *But see* John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919 (2010) (cataloguing benefits of products liability Polinsky and Shavell neglect).

63. One might think that the issue here is whether an economic analysis of tort should involve what economists call a partial equilibrium analysis, or a general one. A partial equilibrium analysis studies a single market, ignoring any impact on markets for goods that are complements or substitutes. A general equilibrium analysis considers all markets simultaneously. I do not think this distinction helps us frame the question what costs and benefits count, as it is not clear how the relevant markets would be defined. But if one approaches the problem through this lens, the interesting question is not whether economists should do a partial or general equilibrium analysis. A general analysis is a nonstarter, precisely because the informational demands are so great. The question is which partial analysis economists should do. On the distinction between partial and general equilibrium analysis and its relationship to the economic analysis of law, see Mario J. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641 (1980).

costs and benefits are unlikely to make a difference, or at least not enough of a difference to worry about. If that were true, models that exclude tort's collateral consequences would nevertheless be good enough to rely on in much the same way that meteorological models can provide a decent answer to the question whether one should carry an umbrella, even if they fail to incorporate many factors that may influence weather.⁶⁴ The strategy here is not to deny that the efficiency of any set of tort doctrines is in part a function of their collateral costs and benefits, but rather to concede that while at the same time maintaining that the payoff from gathering information about tort's collateral consequences would not sufficiently reward the effort.

To accept the suggestion that it is safe to ignore tort's collateral consequences, we would either have to believe they are too rare or small to make a difference, or that they commonly offset one another. The hypothesis that tort rarely has collateral costs and benefits is almost certainly false. So far we have seen that discovery practices, damages rules, and the negligence standard may all have collateral consequences. Indeed, one suspects that it is the rare aspect of tort that will influence only accident costs and accident avoidance costs. We can also set aside the possibility that tort's collateral costs and benefits offset one another, such that both can be ignored. It is simply fanciful to suppose that all (or even nearly all) of tort's collateral benefits are matched by a collateral cost of roughly the same magnitude.

That leaves the possibility that tort's collateral costs and benefits are too small to trifle over. That may seem plausible, especially if the question on the table involves an overall cost-benefit analysis of tort law. Tort has staggering administrative costs, and it is difficult to imagine that its collateral benefits exceed them, or even make up the lion's share. Factoring in collateral costs would only make the situation worse. Still, that does not mean that we can safely ignore tort's collateral benefits. If we are getting even a little more bang for our buck than we might have thought, that would be helpful to know. On a relative basis, tort's collateral benefits do not have to be all that large to impact our assessment of the institution. It would be worth our spending \$1 to get 90¢ of accident reduction if we also got 15¢ in other benefits.

Perhaps more important, we do not have good reason to assume that tort's collateral benefits are small, either in absolute or in relative terms. In fact, I suspect they are quite large. It is nice to live in a place that has fewer accidents, but it is also nice (maybe just as nice, maybe more) to live in a place where people settle disputes peacefully. And it is plausible that the fact that we do is a collateral benefit of our tort system, at least in part. Of course the same benefit might be generated another way, perhaps even in a cheaper way. One does not hear stories of violent vengeance in New Zealand, which no longer has tort law. (Criminal law probably does a lot of heavy lifting both here and there.) A comparative cost-benefit analysis may well recommend New Zealand's accident

64. I benefitted here from discussion with Richard Primus.

compensation scheme over tort. However, an accurate appraisal of the system we have must give credit where it is due, and I suspect tort deserves a fair bit. Indeed, one possibility we ought to take seriously is that the security from living in a society that resolves disputes peacefully is (or perhaps once was) tort's primary benefit, and a reduction in accident costs the collateral one.⁶⁵ If that is a surprising thought, note that the evidence on the extent to which tort liability reduces accident costs is rather disheartening.⁶⁶

The suggestion that reduced accident costs may be a collateral benefit of tort law is a bit tongue-in-cheek, but just a bit. For all the ink spilled on the cost-effectiveness of the tort system, we know little about its cost and benefits. If we are going to put a price on tort law, we must consider its collateral costs in addition to its administrative costs. And if we are going to ask what we purchase at that price, it is not enough to measure the reduction in accident costs. We must also quantify tort's collateral benefits. Perhaps collateral costs and benefits will turn out to be a trivial part of the picture, but perhaps not.

In the end, however, the possibility that tort's collateral costs and benefits might be negligible line items when we ask whether tort as a whole is cost-justified is beside the point. To be sure, economists sometimes worry about whether tort law is worth its cost. However, that is not the question that animates most economic analyses of tort. Rather, economists aim to describe the optimal tort law, or to show that our actual tort law is best understood as an institution that aims to promote an efficient allocation of resources to safety. You cannot be confident that you have done either task well if you ignore tort's collateral costs or benefits. Even if they are not of sufficient magnitude to tip the question whether tort is cost-justified, they may have an impact on which tort doctrines are efficient. A collateral benefit that is trivial from the perspective of an overall cost-benefit analysis may nonetheless influence the choice of rules that identify proper defendants, or establish which losses are compensable, or even what behavior is actionable.

Of course, it is possible that tort's collateral costs and benefits are consistently so small that they rarely make a difference to the sorts of questions that occupy economists studying tort. But we have no grounds to assume that is so, and indeed it would be incredible if it was. It is more plausible to suppose that there are particular collateral costs and benefits that are too small to make a difference. (I nominate the entertainment that tort suits provide courtroom watchers.) However, economists do not selectively ignore tort's collateral consequences, carefully distinguishing those that may make a difference from those that are too small to trifle over. With limited exceptions they ignore them all.

65. This is, more or less, the civil recourse view of the institution, though not for reasons of relative magnitude of benefits. *See infra* note 105.

66. *See generally* DON DEWEES, DAVID DUFF & MICHAEL TREBILCOCK, *EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY* 413 (1996) (reviewing evidence and concluding that "[t]he tort system performs unevenly in deterring the causes of personal injuries").

Yet there is no reason to think they are as a class too small to make a difference.

The analogy between economists and meteorologists is superficially appealing, but ultimately misleading. Meteorologists do not have to quantify the influence of all the factors that may impact the weather to give us confidence that models that exclude some of them are nevertheless reliable. This is because we do not need their models to tell us whether, for example, it is raining. The fact that we can judge whether it is raining independent of their models allows us to judge whether their predictions are good enough for our purposes. In contrast, we have no idea how well models that exclude tort's collateral costs and benefits identify which tort doctrines are efficient because we cannot independently observe which tort doctrines are efficient. The only way we could gain confidence in those models is for economists to demonstrate that they are good enough. To do that, they must gather information about the collateral costs and benefits they have neglected.

* * *

Unless, of course, there is another justification for ignoring tort's collateral consequences, one which does not rest on the claim that they do not matter. Any justification of this sort would necessarily be an argument for a partial economic analysis, one that does not aim to tell us which tort doctrines are efficient full stop. What would an argument for a partial economic analysis look like? One promising candidate starts with the observation that tort law is (for the most part) judge-made. An account of tort law, one might think, should be sensitive to this fact. It should rest its explanations of tort's rules on facts that are available to judges, both in the sense that judges know about them, but also in the sense that it is appropriate for judges to act on them. Judges do not have a roving mandate to maximize welfare. Not only do they not know whether the money spent on tort would be better spent on healthcare, it is not their place to decide. Therefore, it would not be surprising if the economic analysis that explained tort law ignored that opportunity cost and others like it.

I think this is a promising strategy for deciding which costs and benefits are included in an economic analysis of tort. In effect one bootstraps into a limited (and hopefully more manageable) economic analysis by taking advantage of the institutional role of the judge. However, it does not even come close to justifying an economic analysis that ignores all or even most of tort's collateral costs and benefits, as judges are apt to know about most of the collateral consequences we have discussed. For example, judges know that tort law lets victims discover information about their injuries, that tort may substitute for violent reprisal, that litigation causes aggravation, and so on. Not only are these facts available to judges in the prosaic sense, they are available in the sense that they are permissible grounds for decision. Indeed, these are precisely the sorts of issues we expect judges to consider when deciding cases. Thus, even if we accept

that an economic analysis should be cabined by the role of the judge, economists have a lot more work to do.

However, it is not clear that the work is worth the effort. Even if fully developed, a partial economic analysis of this sort would face two severe limitations. First, it could not be the source of any normative recommendations, not even for judges. If judges have a restricted range of factors available for decision, we may be better off if they do not aim to maximize welfare within their limited domain, but instead act on other grounds. This is because what seems efficient from their limited perspective may be inefficient when factors that are not available to judges are considered. This problem—an instance of what economists call the theory of the second best⁶⁷—will afflict any argument in favor of a partial economic analysis.⁶⁸ To concede that one is leaving out costs and benefits that matter is to cede the possibility of making a normative claim.⁶⁹

The second problem with a partial economic analysis keyed to the role of judges is that it cannot explain all of tort law. At best, it can explain the rules that judges adopt. But, as we said at the start, there is much more to the institution than that. Indeed, from an economic perspective, one of the most curious facts about tort is that it allocates accident costs incident by incident through private lawsuits, even though other mechanisms seem better suited to minimize the costs of accidents and the costs of avoiding accidents. If an economic analysis takes tort's structure for granted, it cuts itself off from the resources necessary to explain why the institution has the shape it does, and perhaps even why it exists at all. That means that, at best, a partial economic analysis will give us a partial explanation of tort. But the problem may be worse than that. In addition to being partial, the explanation may be misleading because some other explanation of tort's rules may turn out more attractive once the structure of the institution is taken into account. This is, in fact, precisely the reason philoso-

67. See Rizzo, *supra* note 63, at 647 (“[T]he theory of second best tells us that efficiency improvements in one sector might make us worse off overall. In fact, unless we can acquire a great deal of information about interrelations between markets, we cannot know if such improvements bring us closer or farther from optimality.”).

68. Except, of course, an argument in favor of an analysis that is partial only in the sense that the factors left out would not likely make a difference. The conclusions of an analysis that is partial in that sense would be tentative, but not subject to an objection grounded in the theory of the second best.

69. To be clear, it is to cede the possibility of making a normative claim grounded in a welfarist view, which is the framework we are assuming here. A partial economic analysis may well underwrite normative claims that are not grounded in exclusively welfarist views, as such views need not regard an analysis that ignores significant determinants of welfare as defective. This is somewhat ironic. The analyses that economists are capable of doing are far more likely to be of use to people who do not think that we ought to maximize welfare to the exclusion of other goals than they are to people who do. This is another reason we should not wash our hands of economic analysis. However, this point is unlikely to redeem the economic analysis we have, as it is difficult to imagine the normative theory according to which tort's collateral costs and benefits are as a class irrelevant.

phers have long objected to the economists' view of tort.⁷⁰

* * *

There is one more justification economists might offer for a partial analysis that excludes tort's collateral consequences. If it is not the most compelling rationale, it is certainly the most elegant: the theory works. Landes and Posner propose a stripped-down model of tort that encompasses only accident costs, costs of care, and administrative costs, and that model predicts actual tort doctrine, or at least a lot of it. The moral of the story, an economist might suggest, is that an economic analysis that excludes tort's collateral costs and benefits is useful, as it explains the way judges decide cases.⁷¹

I do not want to join the debate over whether Landes and Posner (or their descendants) succeed in predicting tort doctrine, nor do I want to quibble over whether the ability to predict implies that one can explain, though there are grounds for doubt on both counts.⁷² I want instead to note several implications of this "nothing succeeds like success" approach. First, as we saw with the last argument for a partial economic analysis, no normative recommendations may issue from a model of tort that excludes significant determinants of welfare. If judges have decided cases in accord with a model that excludes tort's collateral

70. For development of the claim that economists are not able to explain the bilateral structure of tort law in which a victim sues her injurer, see JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 12-24 (2001), and ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 46-48 (1995).

71. This approach is hinted at in Rizzo, *supra* note 63, at 643 ("One possibility is to use that notion [of wealth] which is most successful in explaining the law.")

72. On the difference between prediction and explanation, consider presidential elections. It turns out that in the age of television you can do a pretty good job predicting who will be president simply by asking which candidate is taller. See Open N.Y., Op-Chart, *The Measure of a President*, N.Y. TIMES, Oct. 6, 2008, <http://www.nytimes.com/interactive/2008/10/06/opinion/06opchart.html> (showing that since 1960, the taller candidate has won eight of the twelve elections in which there was a height differential). And you may do an even better job by learning a few macroeconomic facts about the months leading up to an election. But it simply does not follow that Ronald Regan's height advantage explains why he beat Jimmy Carter, nor that George W. Bush's defeat of John Kerry was a function of the economic climate that preceded the election. The point here is not that spurious correlations may sometimes yield accurate predictions. It is quite likely that both candidate height and macroeconomic factors are causally related to the outcomes of presidential elections. Rather the point is that what suffices to predict does not necessarily suffice to explain, as they are different activities with different criteria of success.

On the question whether economists' models predict tort doctrine, see Lewis A. Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591, 624-26 (1980) (observing that more sophisticated, second-generation "models of accident law do not predict the efficiency of legal rules" to nearly the extent that more informal, first-generation models do). For a good illustration, see Feldman & Kim, *supra* note 51 (arguing that the Hand formula may not provide efficient incentives in the very sort of case in which it was proposed).

consequences, we may be worse off for it, and we should not persist in the error. Second, we should recognize that economists' success in predicting tort doctrine is achieved only by gerrymandering every aspect of the problem. A restricted notion of efficiency is used to explain a limited aspect of tort. Here again, the strategy is to take for granted the institutional structure of tort and offer an account of what judges do within it. That leaves open the possibility that the account will turn out misleading when the full institution of tort comes into view. As I noted before, philosophers have long argued as much, but perhaps more interestingly, many economists tacitly concede as much when they enthusiastically endorse plans to replace or radically restructure tort. It is hard to fathom why we would do either if the rules of tort are the rules we would have if we were trying to promote an efficient allocation of resources to safety.

That brings us to the real problem with the "nothing succeeds like success" view: if this is what economists have been up to, they have oversold their results. Suppose that Landes and Posner's simple model explains tort doctrine. Does that mean they make good on their claim that "the common law of torts is best explained as if the judges who created the law . . . were trying to promote efficient resource allocation"?⁷³ No. In fact, quite the opposite. If Landes and Posner have succeeded in showing anything, it is almost certainly that the common law of tort is best explained as if the judges who created the law were pursuing a peculiar form of *inefficiency*. *That* is an interesting conclusion, but it is not the one we were promised.⁷⁴

73. LANDES & POSNER, *supra* note 1, at 1.

74. Oddly, I think Landes and Posner know that they cannot deliver on the claim that efficiency explains tort law. At the end of their book, they revise their hypothesis. They write:

Our objective in this book has been to expound and test the hypothesis that the rules of the Anglo-American common law of torts are best explained as if designed to promote efficiency *in the sense of minimizing the sum of expected damages and costs of care*; or, stated differently, that the structure of the common law of torts is economic in character.

Id. at 312 (emphasis added). This is a dramatic departure from the way the hypothesis is framed at the start of the book, where "efficiency" is not qualified: "This book explores the hypothesis that the common law of torts is best explained as if the judges who created the law . . . were trying to promote efficient resource allocation." *Id.* at 1. And again at the end of the first chapter: "[W]hat is surprising is not that judges sometimes fail to achieve efficient rules but how much of tort law can be explained on the simple hypothesis that it is indeed a system for bringing about an efficient allocation of resources to safety." *Id.* at 28. I would say that Landes and Posner are careful at the end of the book in describing what they have shown, but they are not careful enough even there, as their restricted notion of efficiency would exclude administrative costs from consideration, and yet they made recourse to them several times. *See supra* note 17 and accompanying text. Still, the bigger problem is that the unqualified claim—the claim on page one—is the famous claim, even though the book provides little support for it. The fact that tort promotes a form of "efficiency" that ignores collateral costs and benefits gives us little inkling whether tort promotes efficiency without the scare quotes, which is the normatively significant concept, the one we would like to know something about.

* * *

There is an odd irony here: economists have been engaged in a version of the Harry Potter thought experiment all along. With Potter, we briefly wondered what the optimal tort law would be if there were no administrative costs. The leading texts on the economic analysis of tort are filled with answers to a question equally fanciful—in effect, they ask what the optimal tort law would be if there were no collateral costs and benefits. The problem is that real law impacts the world in all sorts of ways, some good, some bad, some intended, some not. If the goal is to pick out the most efficient legal regime, one cannot reason in the abstract, supposing that rules are magically carried into effect. Nor can one consider only the costs of administering the law. Rather, one must take into account all of the law's costs and benefits.

Of course economists cannot do that. They have to cut the project back somehow. Yet there is no plausible ground for excluding tort's collateral costs and benefits from the analysis, at least not as such. The result is that economists have a lot of work to do. If they want to place the economic analysis of tort on firmer footing, they have to gather information about tort's collateral consequences. That will be hard, but the difficulty is not sufficient reason to carry on ignoring them. The cost of doing that is that economic analysis has little more relevance to the real world than Harry Potter's spell. It is a fun game, but it tells us neither whether the tort law we have is efficient, nor what an efficient tort law would look like. I will return to practical difficulties with fixing the economic account in Part III. The time has come to turn our attention to corrective justice.

II. HARRY POTTER AND THE DUTY OF REPAIR

Imagine again that Harry Potter leaves Hogwarts and heads to law school. This time, Potter takes torts from a professor who has a corrective justice theorist's view of the institution. She tells Potter that tort law enforces a moral requirement⁷⁵ that those who infringe the rights of others repair the wrongful losses they cause.⁷⁶ Once again, Potter is taken with his professor's account of the institution, but he is struck by the thought that tort law is awfully expensive and slow. "Surely," he muses, "there must be a cheaper, faster way of doing justice between wrongdoers and their victims." Then, remembering that he is the world's most powerful wizard, Potter raises his wand. He casts a spell that

75. For ease of exposition, Potter's professor has a full-blown commitment to the principle of corrective justice, but one can think tort law is best understood as embodying that principle without taking a view on whether wrongdoers really do have a moral obligation to repair wrongful losses. See COLEMAN, *supra* note 70, at 5 ("The defensibility of corrective justice as a moral ideal is . . . independent of its role in explaining tort law . . .").

76. In formulating the principle of corrective justice, Potter's professor follows Jules Coleman's approach in *Risks and Wrongs*. See COLEMAN, *supra* note 2, at 325.

works like this: every time a person causes a loss compensable by the tort system (say, by carelessly cracking someone else's crystal ball), the spell transfers the precise sum of money necessary to repair the loss from the bank account of the injurer to the account of the victim.

Potter's professor will be impressed, but she may suggest that Potter tweak his spell. Corrective justice is the animating principle of tort law, she will tell Potter, but it is also true that, on occasion, tort allows plaintiffs to recover from people who have not wronged them.⁷⁷ Potter's professor will not insist that Potter change his spell, as her economically oriented counterpart did with the economically enamored Potter. The fact that a transfer from defendant to plaintiff is not demanded by corrective justice does not mean that the transfer is unjust. Thus, Potter may leave tort law as it is without undermining its efforts to implement corrective justice. But, if Potter is a purist, he may jettison several tort doctrines.

Potter's professor may agitate more strongly for a different revision to his spell. Many wrongs, she will point out, fly below the radar of tort law. For example, one can unjustifiably humiliate another without incurring liability for intentional infliction of emotional distress.⁷⁸ One can also fail to rescue a person in need without incurring liability, even if the rescue could be accomplished with little cost or risk to oneself.⁷⁹ On plausible constructions of our moral obligations, these are wrongs that should generate duties of repair. Thus, Potter's professor may urge him to revise his spell to enforce all duties of repair, not simply those that tort law implements.

Still, the professor will not insist that Potter make this revision. Corrective justice theorists do not take the view that tort law seeks to maximize the amount of justice done. It does not follow from the fact that tort law redresses some wrongs that it must aim to redress all of them. In fact, it may be inappropriate for the state to play a role in redressing some wrongs. Once one notices this, it becomes apparent that the principle of corrective justice Potter's professor puts forth is, at best, only a partial explanation of tort law. Tort implements some moral duties of repair, but not others, and one cannot derive from the principle of corrective justice limitations that explain tort law's boundaries. Thus, the principle of corrective justice must be supplemented with a principle

77. Corrective justice theorists differ over which tort doctrines the theory has trouble explaining. Leading candidates include the market-share liability cases, most prominently *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989), and necessity cases, like *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910).

78. See RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) ("Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.").

79. See *id.* § 314 cmt. c ("The rule [that there is no affirmative duty to rescue] is applicable irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection.").

of political morality that tells us what duties of corrective justice the state should enforce. To decide whether to take on his professor's suggestion to expand the ambit of his spell, Potter would need to do some political philosophy.

* * *

Once again, I want to set aside the question what form Potter's spell should take. Our question is this: if Potter stood before us offering to cast the spell that would best implement the demands of corrective justice (as his professor explained them), should we have any reservations about accepting his offer? It is tempting to think that the answer must be no. Potter's spell is better at enforcing duties of repair (it never misses an opportunity, and it never makes a mistake), and it is fast and free. However, the answer is again yes.

We might put the point the same way we did before: tort generates collateral benefits—though here, of course, the benefits are collateral to a different aim (i.e., repairing wrongs rather than reducing accident costs). In fact, a corrective justice theorist might resist Potter's spell for the very same reason an economist might. Though there are welfare gains associated with the spell, there are also welfare losses in the form of foregone collateral benefits. Corrective justice theorists are not indifferent to welfare, so if Potter's spell leaves people less well-off than tort, a corrective justice theorist might regard that as a reason to resist it.⁸⁰

The possibility that one committed to the corrective justice view might evaluate Potter's offer in light of its impact on welfare, however, is not particularly interesting for our purposes. (If that is a surprising thought, note that there is nothing inconsistent in thinking that tort dispenses corrective justice but we should get rid of it because it is too expensive.) The more interesting question is whether we might have reasons to reject Potter's spell that sound in justice, rather than welfare. Here again, the answer is yes. *Though it is an open question whether Potter's spell would do more justice than tort, tort does justice in ways that Potter's spell does not.*

To make out that claim, I need to show two things: first, that corrective justice requires more than the repair of wrongful losses, and second, that the duties of corrective justice that tort enforces are not limited to duties of repair. To get started on the first task, I propose we take a step back from tort to consider the ways in which we expect one another to respond to wrongdoing apart from the law. Imagine that Smith and Jones have agreed to meet for breakfast. Smith forgets to set his alarm and sleeps straight through the appointment. When he wakes up well past the appointed hour, what ought Smith to do? Well, it is too late for Smith to do what he promised—have breakfast with Jones at the

80. I say "might" because the question how one should trade justice off against welfare is complicated and controversial, and it raises difficult questions about the commensurability of values.

agreed-upon time. And it is probably too late for Smith to have breakfast with Jones at all, at least that day. But that does not mean that Smith should simply roll over and go back to sleep. Even though he cannot keep his commitment to Jones, it still makes demands on him. Once Smith realizes what he has done, he ought to call Jones, explain that he overslept, and apologize for missing breakfast. Jones, for her part, would be within her rights to demand an explanation and apology should she reach Smith first.

Explanation and apology are the first order of business, but they may just be the start. Depending on their relationship and the purpose of their meeting, it might be appropriate for Smith to offer Jones a chance to reschedule. Rescheduling might go some way toward repairing the harm Smith caused. Jones will not get her time back, of course. However, if she had hoped for the chance to seek Smith's advice, breakfast another day might substitute just as well. We can even imagine odd circumstances in which it would be appropriate for Smith to offer Jones monetary compensation—perhaps if Jones travelled at great expense to meet Smith. Yet it is just as easy to imagine situations in which offering compensation but not an explanation or an apology would be offensive. The message might be that Smith was entitled to purchase Jones's time.

Smith's infraction is trivial, but explanation and apology are commonly part of making amends for more serious transgressions, and centrally so. Indeed, one reason to offer compensation is to signal that proffered explanations and apologies are genuine. William Ian Miller relays the following story from a thirteenth century Icelandic saga:

X accidentally hits Y with a pole in a game in which poles were used to goad horses to fight each other, not to whack people. X immediately calls timeout and says, "I am sorry, I didn't mean to hit you." Here is the crucial addendum. "I will prove to you that it was an accident. *I will pay you sixty sheep* so that you will not blame me and will understand that I did not mean it."⁸¹

Notice what happens here: first apology, then explanation, and only then compensation. The sincerity of the first two is demonstrated at a high price, worth paying, one assumes, because there would be hell to pay if the apology and explanation were not accepted. Which is not to say that compensation is never warranted independent of the credence it lends an apology. In fact, an offer of compensation helps to establish the sincerity of an apology because it shows that the wrongdoer is willing to make all the amends warranted by his action, not just those that come cheaply or are faked easily.

These examples serve as a reminder of something that lawyers forget easily: apart from law, explanation and apology are at least as central to our practice of making amends as monetary compensation is. The question we need to answer, however, is whether explanation and apology are also matters of corrective justice. If we listened to Potter's professor, the answer would seem to be no. She said that corrective justice requires wrongdoers to repair the wrongful

81. WILLIAM IAN MILLER, *FAKING IT* 85 (2003).

losses they cause; she made no mention of explanation or apology. In that, she has good company. Neither figures much in contemporary accounts of corrective justice. Jules Coleman specifically disavows any connection between corrective justice and apology.⁸² And there is little in the literature that contradicts his view.⁸³

In my view, Coleman and most other contemporary scholars have too cramped a view of corrective justice, one that may be due in part to thinking about corrective justice in the context of tort law (though I will ultimately suggest they also have too cramped a view of tort). I am inclined to follow Tony Honoré, who offers a wider conception of corrective justice, on which it “requires those who have without justification harmed others by their conduct to put the matter right.”⁸⁴ Honoré says that “[p]utting the matter right” may require compensation, but it also may require apology, and other remedies, too (like repairing a damaged object, or restoring an item taken).⁸⁵ The reason I prefer Honoré’s capacious view to the more common one is that I see no reason to think that when one person harms another, the only matter of justice at issue between them is the loss. Indeed, as we know from tort, there are many wrongs that involve negligible losses, or even no loss at all. One can harm another by

82. He says: “The particular duty [corrective justice] imposes is to repair the loss. There may be other agent-relative reasons for acting that arise as a consequence of wrongfully injuring another, for example, the duty to apologize or to forbear from future harming, but these are not derived from corrective justice.” COLEMAN, *supra* note 2, at 329.

83. Ernie Weinrib does not suggest that corrective justice calls for explanation or apology in his classic *The Idea of Private Law*. See WEINRIB, *supra* note 70. Stephen Perry raises the possibility that an agent who wrongs another ought to express regret. See Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 494 (1992). However, it is not clear whether he thinks this a requirement of corrective justice, as opposed to an independent moral requirement, and expressions of regret are importantly different from apologies. In *Equality, Responsibility, and the Law*, Arthur Ripstein discusses apologies mainly in objecting to Perry’s outcome-responsibility account of tort liability, and he does not leave the impression that he thinks corrective justice calls for apology, much less explanation. See ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 100-03 (2001). Prue Vines is a notable exception. See Prue Vines, *The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena?*, 1 PUB. SPACE: J.L. & SOC. JUST., art. 5, 2007, at 20 (suggesting that “the best way to think about apology in the civil liability arena is as a form of corrective justice”).

84. Tony Honoré, *The Morality of Tort Law—Questions and Answers*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 16, at 73, 78-79. I would make a minor revision in Honoré’s formulation. Where he says “without justification,” I would substitute “wrongfully,” as I think one may wrong another even when one acts with justification. That is, I think there are justified wrongings. That is a fine point of moral theory, however, that we need not take up here.

85. *Id.* at 79. I have some hesitation in ascribing this wider conception of corrective justice to Honoré, as he does not explicitly contrast his view with narrower conceptions. However, he uses broader language to describe the demands of corrective justice than is typical, and he clearly thinks that “the claim to put things right” that “lies against the harm-doer” may sometimes “include[] an apology.” *Id.* Therefore, I credit the wider conception to him, even though I am unsure whether he would endorse it.

setting back dignitary interests just as well as material ones. It would be odd if justice had nothing to say about such harms simply because they are not connected to a loss. If justice does have something to say about dignitary harms, presumably it would require the actions that would remedy them. Experience suggests that often that will include explanation and apology.⁸⁶

There is, of course, a tradition of treating dignitary harms as involving a kind of loss—a loss of social standing or respect. If you think of them that way, then it seems all the more obvious that the actions that remedy dignitary harms are matters of justice, for it would be passing strange if corrective justice did not call for the actions that would remedy losses within its ambit. I am not sure there is a need to shoehorn dignitary harms into the concept of loss in order to view them as matters of justice; the metaphor seems more apt for some dignitary harms than others.⁸⁷ However, whether or not you are attracted to the vision of a scale on which respect and social standing go up and down, there is good reason to think that justice is concerned with explanation and apology as potential remedies for wrongs, not just compensation.⁸⁸ They are ways of putting matters right when one person wrongs another.⁸⁹

We are now halfway to seeing why we might have reservations about Potter's offer to cast his spell. We know that corrective justice may require more than repairing wrongful losses; it might require explanation and apology, in addition or instead. It should come as no surprise, then, that the next step of the argument is to show that tort offers victims explanations and apologies, or substitutes for them. We can start with explanation. Recall that more than half the participants in the study of medical malpractice plaintiffs cited above said

86. It is an interesting question just how explanation and apology work to remedy wrongs. The philosophical literature on the question is oddly sparse. See Vines, *supra* note 83, at 7 n.22 (collecting citations to philosophical discussions of apology). Incidentally, we also do not have a clear picture of how compensation remedies a wrong. The standard lines—that damages make the victim whole or return her to her preinjury state—are often false, and sometimes cruelly so. Both issues are too complicated to delve into here. Our discussion can proceed on the basis that explanation, apology, and compensation are familiar remedies, even if we are uncertain how they do their remedial work.

87. Here are two troublesome sorts of cases: In the first, the person who is disrespected never had the respect to which she was entitled, so it is not apt to say that a wrong reflecting that lack of respect involves a loss. In the second type of case, the wrongdoer's respect for her victim remains undiminished, notwithstanding the fact that she transiently acts in a way that is disrespectful.

88. Miller's view is that apologies are compensatory, which makes sense if one is attracted to the metaphor of the scale for dignitary harms. See MILLER, *supra* note 81, at 88 ("Apology is a ritual, pure and simple, of humiliation. The humiliation is the true compensation."). However, it is worth preserving the nonmetaphorical distinction between apology and compensation, in part because we make fine-grained distinctions about the situations in which apologies are called for but compensation is not, and vice versa.

89. I do not mean to suggest that apologies are only called for in cases that involve dignitary harm. Dignitary harms are just helpful for framing the issue, since it is not obvious that they involve a loss that can be compensated.

they filed suit to get “answers.”⁹⁰ Answers are, of course, not a remedy in the formal legal sense. One does not pray for them alongside damages and equitable relief at the end of a complaint. But in a practical sense, tort litigation has the potential to remedy a defendant’s failure to explain herself, or to do so satisfactorily. We saw before that if you want to know why you awoke from surgery partially paralyzed and your doctor will not tell you, your best option may be to file a suit alleging malpractice. If you state a claim on which relief can be granted (i.e., allege a wrong the court has the power to remedy), the doctor must answer your complaint. And then she must submit to reasonable demands for testimony and evidence that shed light on your injury. The upshot of these procedures is that tort empowers victims to demand explanations, as well as information that will aid in verifying them.

Apologies are not a remedy available in a tort suit, and tort litigation itself does not remedy the failure of a defendant to apologize, as it does failure to explain. This is not surprising, for any apology secured through litigation would be severely compromised. The sibling of a child forced to apologize by a parent knows that the apology is not genuine, and that diminishes its value.⁹¹ A court-mandated apology would suffer the same defect, and on top of that, it would come awfully late in the day. Apologies are time-sensitive.⁹² Still, apologies may play an important role in tort practice. Indeed, there is a growing body of research that suggests that when potential defendants apologize, victims may look more favorably on settlement.⁹³ Apologies are clearly an important form of redress, just not one that tort law is well suited to provide.

Tort does, however, offer plaintiffs something we might regard as a second-best substitute for an apology. Many plaintiffs appear to file suit because they want someone to take responsibility for their injuries.⁹⁴ Indeed, one suspects that the reason apologies facilitate settlement is that sincere apologies acknowledge responsibility.⁹⁵ While courts are not well positioned to satisfy a victim’s desire for a sincere apology, they can act to remedy a defendant’s fail-

90. See *supra* note 11 and accompanying text.

91. Which is not to say it has no value. See MILLER, *supra* note 81, at 87-90 (arguing that forced apologies are valuable to recipients because of the pain and humiliation felt in giving them).

92. See Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180, 186 (2000) (discussing the temporal dimension of apologies).

93. For a review of the relevant evidence, see Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 358-63 (2008).

94. See Relis, *supra* note 11, at 723 fig.4; see also Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1612 tbl.5 (1994) (finding that some plaintiffs thought litigation would have been prevented if they were given an explanation and an apology). I am indebted to Robbennolt, *supra* note 93, at 359 n.33, for this reference.

95. See Robbennolt, *supra* note 93, at 352 (“Apologies can be distinguished from other forms of accounting in that they acknowledge responsibility for the conduct that caused the harm.”).

ure to offer one. A plaintiff's verdict *assigns* responsibility to the defendant for the plaintiff's injury, giving the defendant what she has improperly refused to accept on her own.

We are now in a position to see why the answer to the question we started with is yes, we should have reservations about Potter's offer, even if we restrict our attention to matters of justice. Tort does more to respond to wrongdoing than enforce duties of repair. It empowers victims to demand explanations, and it offers them second-best substitutes for apologies. Potter's spell would do neither.⁹⁶ As before, to say that we should have reservations about Potter's offer is not to say that we have sufficient reason to decline it. Whether we do depends on how we ought to value the various remedies tort offers victims—explanation, assignment of responsibility, compensation, and so on. However, that is not a question we need to take up here. It is more important that we appreciate what we would miss if we moved to Potter's spell than that we put a relative value on it.

* * *

For all the tension between the economic and corrective justice accounts of tort law, they share something deep in common: both aim to explain tort's substantive rules, rather than the institution that implements them.⁹⁷ We saw the consequences of this approach for the economic account. We must approach every assertion economists make about the efficiency of tort doctrine skeptically, as their failure to factor tort's collateral costs and benefits into the analysis means that any or all them might be wrong. Without information about tort's collateral costs and benefits, we cannot judge whether the economic theory of tort has the explanatory power its proponents claim for it. The consequences for the corrective justice account are less dire, but no less interesting. Harry Potter's spell does not call into question the core claim that philosophers have made about tort—that it dispenses corrective justice by enforcing duties to repair wrongful losses. However, the spell reveals that the philosophers' account is incomplete. Moreover, if we pay attention to the features of tort that corrective justice theorists have overlooked, we may end up with a markedly different picture of the institution than the one they paint.

96. Again, you could imagine tweaking Potter's spell to do justice in all the ways that tort law does, but the possibility that Potter could cast a different spell is beside the point. His spell is constructed to do just what corrective justice theorists tell us tort aims at.

97. Philosophers have a wider conception of tort's substantive rules. As noted before, they criticize economists for failing to explain tort's bilateral structure. *See supra* note 70 and accompanying text. Still, the corrective justice account leaves many features of tort unexplained, including the procedures by which claims are processed and the diversity of remedies on offer. On the difficulty corrective justice has explaining the full run of tort remedies, see Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 710-13 (2003).

Let me give you an example. Above, we saw that tort empowers victims to demand explanations, and that, in doing so, it enforces a duty imposed by corrective justice. That, however, is not the whole story. As a formal matter, tort does not empower *victims* to demand explanations, for there is no guarantee that someone who has filed a tort claim is in fact a victim of a wrong. Rather, tort empowers *anyone* who believes in good faith that she has suffered a wrong to demand an answer. This is one of the most striking aspects of tort law, yet it figures not at all in the corrective justice account. We are not long past the days when society was stratified, such that people in superior classes had no obligation to answer to those inferior.⁹⁸ Now we allow plaintiffs to demand answers of virtually anyone, merely upon notice pleading. We see vestiges of the old days in tort doctrine: the state enjoys sovereign immunity; judges and prosecutors, absolute immunity; and other government officials, qualified immunity. These are immunities from suit, not simply from liability.⁹⁹ Bearers of these immunities are entitled to have a plaintiff's complaint dismissed without answering its allegations. Whether one thinks these immunities are justified, what is remarkable about twenty-first century tort law is that so few people enjoy them.¹⁰⁰ The rest of us must answer a well-pleaded complaint, no matter who filed it.

Our mutual answerability in tort is under attack.¹⁰¹ Plaintiffs are increasingly required to meet higher thresholds to get lawsuits off the ground. Much of the commentary on this shift reflects the view that what is at stake is the efficiency with which we sort good claims from bad.¹⁰² But something more is at issue. When we say that a medical malpractice plaintiff, for example, must at-

98. See Don Herzog, Comment on Jeremy Waldron's Tanner Lecture 2-3 (April 22, 2009) (unpublished manuscript) (on file with author).

99. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 766 (2002) ("Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit."); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (explaining that qualified immunity "is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial").

100. There are also several sorts of non-official immunity, among them charitable immunity and interspousal immunity. These raise a slightly different set of issues, as they are typically immunities from liability, not suit, but they are also relatively rare.

101. In federal courts, the Supreme Court's recent decisions in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), cast doubt on the viability of notice pleading. They do not, of course, single out tort plaintiffs for special treatment, but they affect the practice of tort law in federal courts. In state courts, plaintiffs in tort suits face many different sorts of hurdles, ranging from special pleading requirements to screening panels that review cases. See *infra* notes 103-04.

102. For a representative example, see Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 910-35 (2009). Bone briefly considers fairness issues associated with pleading standards, *id.* at 900-10, but he frames his discussion of *Twombly* by saying that it raises "a general problem of institutional design: how best to prevent undesirable lawsuits from entering the court system." *Id.* at 876.

tach special affidavits to her complaint,¹⁰³ or have her claim screened by medical professionals before filing suit,¹⁰⁴ we are not merely adjusting the sieve through which we sort claims. We are limiting patients' authority to demand answers from doctors. I do not have a settled view on whether or not we should do that, but the question depends on a great deal more than knowing how many good claims are likely to be weeded out with the bad. It depends on what we make of the ideal that we are mutually answerable to one another, regardless of station. Perhaps some classes of plaintiffs have so abused the privilege to demand answers that it ought to be cut back, but we should be clear about what doing so says about our social relations.

I expect many will think that questions about what one needs to plead to survive a motion to dismiss are questions that civil procedure scholars should take up, rather than tort theorists. But if we hope to understand the role that tort plays in our lives, we cannot leave the subject to procedure professors. That is what we have done so far, and it has led to a raft of scholarship that views tort as a system for imposing liability. That leads naturally to the observation that you can impose liability in other ways, through regulation, or if you are Harry Potter, by magical spell. When you remove the blinkers, however, and consider the institution rather than just its substantive rules, you can see that neither regulation nor spell is a genuine substitute for tort law. Tort imposes liability in a particular way: it gives ordinary folks the right to hale virtually anyone into court, where they can seek explanations and evidence, an ascription of responsibility, and, yes, compensation too.¹⁰⁵

103. See, e.g., GA. CODE ANN. § 9-11-9.1 (2010).

104. See, e.g., 24 ME. REV. STAT. ANN. tit. 24, §§ 2851-2859 (2010).

105. At this point, those tuned in to the tort literature may wonder about civil recourse theory, an alternative to both the efficiency and corrective justice accounts of tort. According to civil recourse theorists, tort law is not about what wrongdoers owe their victims. Rather, it is about what the state owes victims of legal wrongs—a civil avenue of redress. See John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1643 (2002) ("The reason the court system makes available rights of action in tort cases is that the system is built on the idea that those who have been wronged are entitled to some avenue of recourse against the wrongdoer. But, in a civil society, private violence is not permitted, even where there has been a legal wrong. The state therefore ordinarily must make some avenue of recourse available to the victim. It does this through the courts, via the tort system."); Zipursky, *supra* note 97, at 752 ("[T]he law steadfastly insists that the state may not take its own initiative in seeing that corrective justice is done, and therefore casts doubt on the claim that doing corrective justice is what tort law is all about."). Civil recourse theory is attractive in no small part because its proponents emphasize structural features of tort that corrective justice theorists tend to overlook, not least the fact that tort empowers victims to hold wrongdoers accountable. See Jason Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1791, 1805-11 (2009) (highlighting the fact that defendants are "answerable" to plaintiffs in tort suits).

I have focused my attention on the efficiency and corrective justice accounts of tort in part because they are the best developed and most influential. But I have left civil recourse theory offstage for another reason: I have doubts as to whether it is a freestanding theory of tort law. That is, I have doubts as to whether the principle of civil recourse is capable of ac-

Philosophers overlook all but the last part. They treat lawsuits as instruments for determining whether the defendant committed a wrong for which she must compensate the plaintiff. If Potter could enforce duties of repair with a wave of his wand, so much the better.¹⁰⁶ The problem is that there is more in the way of justice at stake in a tort suit. That tort makes all of us answerable to one another for wrongdoing is a remarkable fact about the institution. It tells us something about the kind of system of justice that tort law is. But it is an invisible fact from the perspective of traditional corrective justice theory, which takes as its subject tort's substantive rules, rather than the institution that implements them.

Philosophers' failure to engage the procedural dimension of tort renders the corrective justice account less successful than it might otherwise be. We seek explanatory theories of tort law in part because understanding how tort contributes to our lives sharpens our sense of what is at stake when we ask how tort could be made better, or whether we would be better off without it. The questions whether to implement liability caps or preempt tort suits in favor of safety regulation look rather different if one takes tort to be a system for dispensing corrective justice than they do if one understands it as a system for reducing accident costs. In failing to observe that the procedures through which tort claims are resolved are themselves a way of doing justice (and of structuring relationships of accountability around claims of justice), philosophers have missed important contributions that tort makes to our lives. The consequence is that their theories are less successful than they could be, both as explanations and as guides to action.

* * *

Getting a firmer grasp on the contributions tort law makes to our lives is reason enough to want to fill in the gaps in the standard corrective justice account. However, there is another worry we might have about the philosophers' picture of tort: in addition to being incomplete, it may be distorted. Consider, for example, the stories that corrective justice theorists are apt to tell about punitive damages. One way of assimilating punitive damages into a corrective justice model of tort is to argue that they are actually a form of compensatory damages. (Perhaps they compensate plaintiffs for dignitary harms that would otherwise go uncompensated.)¹⁰⁷ However, this approach is unsatisfying both

counting for tort's substantive rules, even as it sheds light on its structure. For reasons that are too complicated to take up here, I am inclined to think that civil recourse will be a component of the best corrective justice account, not a competitor to it. I expect to explore the relationship between civil recourse and corrective justice in future work.

106. See, e.g., COLEMAN, *supra* note 2, at 395 (stating that tort's administrative rules "are defensible because they provide the best chance of practically implementing corrective justice under less than ideal circumstances").

107. See Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105,

because punitive damages are commonly designated extracompensatory¹⁰⁸ and because they have long been thought to involve just what the name suggests—punishment.¹⁰⁹ Alternatively, a corrective justice theorist might regard punitive damages as a graft from criminal law onto tort¹¹⁰ or as something intermediate to the two.¹¹¹ That strategy, however, amounts to a concession that corrective justice does not explain the full run of tort remedies.

I do not want to wade into the debate over the best interpretation of punitive damages, but it is worth observing that there is a third possibility open to a corrective justice theorist who adopts Honoré's more capacious understanding of the concept. If corrective justice calls for whatever is necessary to put matters right between wrongdoer and victim, it is possible it sometimes calls for the victim to punish the wrongdoer by taking damages beyond what is necessary to compensate for the harm done. Perhaps punishment of this sort is appropriate on expressive grounds. It may counter the message sent by the wrongdoer's wanton or willful disregard of the victim's rights. Whether that is so is a complicated question we need not take up here. The important point for our purposes is that punitive damages may be extracompensatory without being alien to corrective justice.

Of course, to endorse this possibility, one must endorse Honoré's broader view of corrective justice. One must think that corrective justice calls for putting matters right, whatever that entails, not just repairing wrongful losses. Thus, if I am right to suggest that corrective justice theorists offer a distorted view of punitive damages, it is because they have built their theory of tort on a mistaken view of corrective justice. These things are not unrelated, as tort law informs our understanding of corrective justice at the same time it is explained by it. That is, we understand what corrective justice calls for in part by looking to what tort law does. Of course, we cannot just look to tort to fill in the concept of corrective justice, or we would end up in a vicious circle. However, if we take tort to be one among many practices of corrective justice, tort will inevitably influence our understanding of it.

The upshot is that philosophers' blinkered view of tort may cause distortions in their theories of corrective justice, which in turn cause distortions in their portrayal of tort. To the extent that philosophers take tort to be comprised of its distinctive substantive rules, they may be inclined to develop theories of

136 & n.169 (2005) ("Properly understood and administered, punitive damages in tort law also compensate for discrete private injuries." (quoting Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1431 (2003))).

108. See 2 DAN B. DOBBS, *THE LAW OF TORTS* § 381, at 1062 (2001).

109. See Zipursky, *supra* note 107, at 137 & n.172 ("Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as proof of the detestation of the jury to the action itself." (quoting *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (K.B.) 498-99)).

110. See *id.* at 136.

111. See, e.g., RIPSTEIN, *supra* note 83, at 150.

corrective justice that emphasize the dominant tort remedy—compensation—and overlook other ways of responding to wrongdoing. And that may lead them to recast or dismiss aspects of tort that do not neatly fit the compensation model. This is, I think, the dialectic that has played out with punitive damages. If philosophers started with a broader view of tort, they would attend to the fact that tort responds to wrongdoing in a variety of ways—by empowering victims to demand explanations, assigning responsibility, and offering monetary and injunctive relief. Noticing that might lead them to a broader view of corrective justice, which would in turn allow them to make better sense of the full run of tort remedies, rather than reinterpreting or dismissing some of them.

These remarks are merely suggestive. More work would be needed to bear out the claim that philosophers offer a distorted account of punitive damages; likewise, the claim that philosophers' distorted accounts of corrective justice are influenced by their unduly narrow views of tort law. Whether I am right or wrong about all that, the important point is that the incompleteness of the philosophers' account of tort does not just give them reason to fill in gaps. They must also consider whether their blinkered view has led them to distort aspects of tort about which they have already made claims. At a minimum corrective justice theorists ought to revisit the stories they have told about punitive damages. However, the distortions may not end there. The corrective justice approach to tort is ripe for reconsideration; to put it on firm footing, philosophers must think through all the ways tort works to put matters right when one person wrongs another.

III. HARRY POTTER AND THE NATURE OF TORT LAW

To this point we have explored reasons to think that the economic and corrective justice accounts are deficient on their own terms. However, I promised a few words about the relative merits of the theories, and now that Harry Potter has helped us see the problems with both, we can turn our attention to the choice between them. The conversation above sheds new light on old debates, though as I said at the start, it will not end them.

We are sometimes told that one reason to prefer the economists' view is that it offers analytic rigor and determinate results that the corrective justice approach cannot match.¹¹² This point is made about both theory and practice. That is, the fact that economists can check to see whether tort law fits their predictions about optimal liability rules is put forward as a reason to prefer their view to the philosophers'.¹¹³ And the fact that judges can deploy economic in-

112. See, e.g., Posner, *supra* note 16, at 108-09 (arguing that wealth maximization explains tort doctrine better than corrective justice because the latter suffers from a "general lack of detail in the theory").

113. See LANDES & POSNER, *supra* note 1, at 8 ("[T]he noneconomic literature does not provide an alternative *positive* theory of tort law to the economic theory expounded in this book.").

terpretations of tort's key concepts to reach determinate answers about whether, say, a defendant unreasonably failed to take a precaution is offered as a reason for the practice to take on an economic orientation, implicitly, if not explicitly.¹¹⁴

This has always been a strange critique, in part because it misunderstands the corrective justice account. The corrective justice claim is that tort is an institution that, in the narrow view, enforces duties of repair, or in the broader view, works to put matters right between a wrongdoer and her victim. That much you can read off from large-scale features of the institution. However, corrective justice theorists do not purport to provide a theory that explains the fine-grained features of tort doctrine, let alone one that should drive results in particular cases.¹¹⁵ Corrective justice theorists do not aim to tell us, for example, why an attorney is subject to malpractice liability for failing to file her client's legal claim on time, but not for declining to raise a particular argument in a brief. The fact that failure to file timely constitutes a legal wrong is to be explained by the factors that judges and juries rely on when they decide who owes what duties to whom, and they have available to them the full range of values that determine how we ought to behave toward one another, not just justice (or, for that matter, welfare). Likewise, the question what it takes to remedy a particular wrong will be influenced by all sorts of factors, not least of which are the rituals a society has developed for putting matters right.¹¹⁶ The legitimacy of the decisions judges and juries make in particular cases (when they are legitimate) is in part a function of the adequacy of the reasons they give, but also, in circumstances where the reasons might run out, a function of the process by which they are made. This may be a messier picture than the economist offers, but it is hardly a criticism of the corrective justice account that it fails to do something it does not aspire to do.¹¹⁷

114. See Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 303-10 (2007); *id.* at 304 (“[D]eontic theories have long been embarrassed by the gap between their explanations of judicial reasoning and the outcomes of adjudication. . . . [I]f deontic theories appear to have a leg up on economic theories of the common law because they enjoy a more natural fit with its language and structure, economic theories appear to have the edge on deontic theories because their explanations of judicial decisions systematically yield more determinate results, at least in principle.”). Kraus’s argument is directed at theorists’ explanations of judicial decisions in the first instance, but the reasons he gives for reading judges as using economic concepts to decide cases would also support judges actually using them.

115. See COLEMAN, *supra* note 70, at 34-35 (“[M]uch of the content of the first-order duties that are protected in tort law is created and formed piecemeal in the course of our manifold social and economic interactions. . . . If I am right about this, then it seems unlikely that we could ever have a general theory from which we might derive the first-order duties protected by tort law.”).

116. Though corrective justice may constrain the ways in which a wrong may be put right, it is implausible that it fully determines them, as what counts as putting matters right must be in part a function of what people accept as putting matters right.

117. You might think that the relative simplicity of the economic account is a reason to

Set that aside, however, and the claim that the economic account leads to more determinate results than the corrective justice view is still odd because it is false. Though in principle the theory may recommend determinate results in particular cases (B is either greater than pL , or it is not), it is extraordinarily rare that judges or juries have enough information to put the theory into practice.¹¹⁸ They are left to guess, or at least they would be were they trying to apply the Hand Formula. You can say that what you care about is whether $B < pL$, but if you cannot quantify B or pL then the algebra does not make the result determinate or your reasoning rigorous. In the hands of judges, economic analysis provides a patina of rigor, but rarely more.¹¹⁹

The part of the economic account that always seemed safe from this charge was the effort to specify optimal liability rules. Even if we cannot know what B and pL are in a given case, it seemed safe to conclude that we should judge people negligent when $B < pL$, and not otherwise (assuming, of course, we are concerned only with welfare). What Harry Potter helps us to see is that even judgments about what liability rules are optimal depend on facts that are not available to theoretical economists. Whether negligence should be judged in accord with the Hand Formula depends in part on the collateral costs and benefits of that rule and alternatives. We do not have any better grasp on the collateral costs and benefits of the Hand Formula than judges do on the variables that comprise it.

It may be that economists could put their analyses of tort on firmer footing by gathering information about the collateral costs and benefits of different liability rules. The prospects, however, are grim. I will not walk through the challenges that await any empiricist daring enough to, say, try to put a dollar figure on the loss in welfare that might be attributable to the availability of hedonic damages, or to ascertain the impact different hedonic damage regimes would have on accident costs. I will say only that I am doubtful that even the most sophisticated empirical research techniques could quantify the collateral costs and benefits of different liability regimes with sufficient precision to allow us to conclude that we know which maximizes social welfare.

I am not saying that economists should not try. If they think that what matters are costs and benefits, they should gather as much information as they can

prefer it, but it is important to remember that the theoretical virtues of an account must be judged holistically, rather than issue by issue. There are many places where economists must add epicycles to account for the data. The best effort to explain, for example, why judges speak the language of morality rather than efficiency, *see* Kraus, *supra* note 114, is terribly complicated when laid against the corrective justice theorists' claim that judges use moral language because they are in fact invoking moral notions.

118. *See id.* at 304 n.37 (acknowledging that the economic approach is determinate in principle, but perhaps not in practice).

119. One of the most inadvertently amusing lines in the whole body of the common law is Judge Posner's lament in *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554, 1557 (7th Cir. 1987): "For many years to come juries may be forced to make rough judgments of reasonableness, intuiting rather than measuring the factors in the Hand Formula . . ."

and hope that what they do not know does not tip the balance. However, they should not trumpet the rigor of their approach as a reason to prefer it to the philosophers'. When "determinate" results rest on untested and often untestable assumptions in empirical research models, or leave out some factors entirely because they are too hard to measure, it is hardly clear that they are a sounder basis for decision than a political process that aims to confer legitimacy on judges and juries as arbiters of what we owe one another. Indeed, they may be worse. Bernard Williams put the worry this way:

A well-known argument of utilitarianism . . . is that we can agree that everything is imperfect—only roughly discovering preferences and aggregating them, . . . giving strongest emphasis to those preferences which we are theoretically in the best position to handle, . . . and so on: but that, all the same, half a loaf is better than no bread, and it is better to do what we can with what we can, rather than relapse into unquantifiable intuition and unsystematic decision. This argument contains an illusion. For to exercise utilitarian methods on things which at least seem to respond to them is not merely to provide a benefit in some areas which one cannot provide in all. It is, at least very often, to provide those things with prestige, to give them an unjustifiably large role in the decision, and to dismiss to a greater distance those things which do not respond to the same methods. . . . To regard this as a matter of half a loaf, is to presuppose both that the selective application of those techniques to some elements in the situation does not in itself bias the result, and also that to take in a wider set of considerations will necessarily, in the long run, be a matter of more of the same; and often both those presuppositions are false.¹²⁰

I admire a great deal of law and economics scholarship, both theoretical and empirical. We ought to think hard about the incentives legal rules create, and we should learn what we can about their impact on the world. However, we should not imagine that these sorts of studies might be inputs to a complex calculus that will tell us just what legal regime will maximize welfare. We will never get there, and the intimation that we might be close enough, or might someday get close enough, is a pernicious illusion. Once and for all, we should put to rest the notion that we should prefer the efficiency account of tort because economists offer rigorous methods that yield determinate results. With Harry Potter's help, perhaps, but in the real world, they do not, and they will not, because they cannot.

* * *

The empirical challenges facing economists are daunting enough, but lurking in the Harry Potter story is another serious worry about the economic turn in tort scholarship. Many years ago, Peter Strawson raised an objection to ar-

120. Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 75, 148 (1973). Both presuppositions are on display in KAPLOW & SHAVELL, *supra* note 21, at 454. Max Etchemendy suggested these references.

guments that aim to justify punishment solely in light of its “efficacy . . . in regulating behaviour in socially desirable ways.”¹²¹ I want to briefly recount Strawson’s argument, because together he and Harry Potter have something to teach us about tort.

Strawson starts by drawing a distinction between two frames of mind in which we interact with others. In normal human relationships, we experience a wide range of reactive attitudes and feelings, such as blame, gratitude, forgiveness, anger, and resentment.¹²² What these attitudes have in common is that they presuppose that the person they are directed toward is responsible for her actions, that she has moral agency. The alternative to engaging people as moral agents is to adopt an objective stance, on which such attitudes have no place. Strawson explains:

To adopt the objective attitude to another human being is to see him, perhaps, as an object of social policy; as a subject for what, in a wide range of sense, might be called treatment; as something certainly to be taken account, perhaps precautionary account, of; to be managed or handled or cured or trained The objective attitude may be emotionally toned in many ways, but not in all ways: it may include repulsion or fear But it cannot include the range of reactive feelings and attitudes which belong to involvement or participation with others in inter-personal human relationships; it cannot include resentment, gratitude, forgiveness, [or] anger¹²³

You can appreciate the difference between these ways of engaging people if you think about our attitudes toward children. When children are very young, we take Strawson’s objective stance toward them almost exclusively. Though we may sometimes feel resentment toward a crying infant, in our calmer moments, we recognize that the attitude is not fitting. There is nothing a newborn can do that would warrant resentment, for babies lack the capacities that comprise moral agency. Over time, and in fits and starts, most children develop the relevant skills, and we engage them as moral agents more and more, until they reach a point where it would be inappropriately infantilizing to treat them as objects to be managed or handled. As Strawson acknowledges, the objective stance and the attitudes associated with normal human interaction are “not altogether *exclusive* of each other,” even though “they are, profoundly, *opposed* to each other.”¹²⁴ We can adopt the objective stance toward a normal adult to take “refuge, say, from the strains of involvement; or as an aid to policy; or simply out of intellectual curiosity.”¹²⁵ However, “[b]eing human,” Strawson says, “we cannot . . . do this for long, or altogether.”¹²⁶

121. P.F. STRAWSON, *FREEDOM AND RESENTMENT AND OTHER ESSAYS* 22 (Routledge 2008) (1974).

122. *Id.* at 10.

123. *Id.* at 9-10.

124. *Id.* at 9.

125. *Id.* at 10.

126. *Id.*

Strawson complains that attempts to justify punishment solely on the ground that it helps regulate behavior “leave out something vital in our conception” of punishment.¹²⁷ “The only operative notions invoked in this picture,” he says, are “those of policy, treatment, control. But a thoroughgoing objectivity of attitude, excluding as it does the moral reactive attitudes, excludes at the same time essential elements in the concepts of *moral* condemnation and *moral* responsibility.”¹²⁸ To be sure, we can take the objective stance toward criminals, just as we do toward misbehaving children. We can ask what sanctions would lead them (and others like them) to behave in desirable ways. However, if we do just that, and we do it as to all offenders, not just those we deem insane or deranged, we miss out on the moral dimension of punishment, and we cut it loose from the reactive attitudes commonly associated with it, like blame and resentment.

Strawson writes of “conceptual shock” at the idea of punishment detached from moral condemnation, but he is equally worried about an “emotional shock” that follows.¹²⁹ The objective stance is hard to contain: “If to all offenders,” Strawson worries, “then to all mankind.”¹³⁰ Strawson’s concern, it turns out, is not misplaced, for the economic project in tort (and, indeed, the economic project in law more generally) adopts the objective stance, and it does so as to everyone, not just children and criminals. To the economist, we are all objects, subject to policy, treatment, and control.

In taking the objective stance, economists obscure something vital about tort. In the wake of *The Costs of Accidents*, it has become fashionable to think of tort law as a substitute for regulation, or even as a kind of regulatory regime.¹³¹ However, tort relies on a richer conception of humanity than regulation does. Through tort law, we address each other as moral agents. We press claims and proffer defenses, offer justifications, and assert privileges. In the end, we may be held liable, but before that, we are held answerable. Tort treats us as people with rights and responsibilities, not simply as entities to be managed, handled, or “incentivized.”

Harry Potter helps us see what it means to take the economists’ objective stance to its logical conclusion. When we appreciate the full range of collateral costs and benefits that exert influence on which tort doctrines are efficient, we see how far the economic view takes us from the moral notions that tort seems

127. *Id.* at 24.

128. *Id.* at 22.

129. *Id.*

130. *Id.* at 23.

131. See Kyle D. Logue, *Coordinating Sanctions in Tort 2* (Univ. of Mich. Law & Econ., Olin Working Paper No. 09-014, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1430596 (“Viewed [from the perspective of cost minimization], tort law is just another regulatory tool, akin to Pigovian taxes or command-and-control regulations, which policymakers can deploy to help manage the problem of negative externalities.”).

to invoke. In the extreme, we might end up choosing liability rules because people find disputes held under them entertaining. However, long before we arrive at that improbable point, the objective stance perverts the nature of the institution. Economists treat tort as if it is just another policy tool. For them, it is possible that Harry Potter's spell might serve the same purposes. But that is only because the objective stance obscures from their view essential elements of tort's character.

I do not mean to say that there is something wrong with regulation,¹³² or even that there is something wrong with attending to the way tort law shapes incentives. As Strawson readily admits, there are occasions for policy and control, and we would not punish if we did not have "some belief in the utility of [the] practice[]." ¹³³ The same is true with tort. However, if we adopt an objective stance exclusively, so that the only question on the table is how best to regulate, we run the risk of losing one of tort's distinctive virtues. We do not have many public institutions through which we engage one another as moral agents. Tort law is one, and we would do well not to lose sight of that.

* * *

Or maybe I am too optimistic about tort. At the start, I criticized economists and philosophers for mistaking tort's substantive rules for the institution of tort law. I then argued that if they took into account the procedures by which tort's substantive rules are implemented, both would paint rather different pictures of the institution. However, it might seem that the Strawsonian picture I just sketched is subject to a similar worry. Suppose we scope out again and take into view the practices tort law is embedded in. Then the Strawsonian story may look no less a fiction than the economists' world in which tort has no collateral costs or benefits.¹³⁴

Tort is not an institution in which victim and wrongdoer engage one other as moral agents, one might worry, because they do not really engage each other at all. The dialogue that one might see in the procedures—complaints followed by answers, claims rebutted by justifications—is rarely carried to its conclusion and is always mediated by attorneys in language laypeople struggle to understand. Plaintiffs' attorneys typically work on contingency, so they will be interested in money, even if their clients care more about explanations or apologies. Moreover, insurance companies are usually interposed between plaintiff and defendant. Indeed, tort suits are often battles between an insurer that has subro-

132. Far from it—safety regulations protect people in ways that tort cannot. The point is not that we should have tort and no regulation. Rather, the point is that tort engages and respects an aspect of our moral agency that most regulatory schemes do not. Greg Keating pressed this point.

133. STRAWSON, *supra* note 121, at 24.

134. This objection was put to me most forcefully by Scott Shapiro and John Witt.

gated the plaintiff's claim and an insurer that that has issued a liability policy to the defendant. Whatever the caption on the case says, victim and injurer may be on the scene only because they have evidence about other people's monetary dispute. Take all this together and the Strawsonian picture seems anachronistic at best.

Having criticized economists and philosophers for their blinkered views of tort, I am in no position to defend one of my own. If there is an overarching point to this Article, it is that tort scholars should engage tort law as it is realized in the world, not as it looks in the pages of the *Restatement*. As we develop theories of tort, we must account for the roles that lawyers and insurers play. Perhaps the reality of modern tort practice is so far from the Strawsonian picture that economists are right to treat tort as nothing more than a cumbersome regulatory scheme.¹³⁵ The question whether that is so is simply too large to take on here. However, I do want to flag two reasons for holding on to the Strawsonian picture.

First, we have evidence that one reason many victims file suit is that they want to hold their injurers responsible.¹³⁶ To the extent that we give credence to that evidence (and I concede there are grounds to be suspicious of it),¹³⁷ it tells us that many plaintiffs start litigation with the expectation that it will involve a Strawsonian dialogue, at least to some degree. Perhaps they are wrong because they fail to understand the ways that lawyers and insurance companies muck things up. But it is also possible that they are right, that notwithstanding the involvement of lawyers and insurance companies a lawsuit does more or less what these plaintiffs expect. That is, lawsuits might structure a dialogue about whether and how a defendant is responsible for an injury, even if that dialogue is likely to be stilted, abstruse, and end prematurely if a satisfactory settlement is reached. I am reluctant to conclude that most plaintiffs are misguided about what lawsuits offer, but if they are, and if we find the Strawsonian picture attractive, we may conclude that we should reshape tort to be more responsive to their aspirations. If the Strawsonian picture does not capture tort law as it is, it may still provide an appealing vision of what tort law could be.

A second reason to resist a rush to judgment that the modern realities of tort litigation render the Strawsonian picture of tort fanciful is that those realities may not all cut against that picture. Take, for example, the role of insurers. One might think that the prevalence of liability insurance renders implausible the idea that tort damage awards are a way of doing justice between victim and wrongdoer. The thought might be that if justice required compensation, it would require that the wrongdoer pay, not an insurer. The fact that we allow liability insurance, then, would be reason to conclude that whatever the tort sys-

135. Even if they are right to treat tort as a regulatory scheme, their failure to take account of its collateral costs and benefits undermines the claims they make about that scheme.

136. See *supra* notes 11, 94, and accompanying text.

137. See *supra* note 12.

tem aims at, justice is not among its goals. However, there is another story we might tell, one in which large compensatory damage awards are demanded by justice only because the people who might be subject to them have the opportunity to purchase liability insurance in advance. On this story, in the absence of liability insurance, justice would not require people who are momentarily careless (e.g., by looking away from the road for a split second to read a billboard) to pay “make whole” damages to someone they severely injure, because the remedy would be utterly out of proportion to the infraction. With liability insurance, however, justice might well demand such damages, if we are of the view that responsible people prepare in advance to make good any injuries their negligence might inflict on others.¹³⁸ In other words, the availability of liability insurance might make it more plausible that tort damage awards are a Strawsonian response to wrongdoing, not less.

I am inclined to think there is much truth in the Strawsonian picture of tort law, even as things stand now. However, I concede that it may be more compelling as an account of what tort could be (or once was) than as an account of what it is. It would take more work to establish that the Strawsonian picture is more than an anachronism or fantasy, but the possibility that it is or might be provides an important counterweight to the trend toward seeing tort as just another policy tool.

IV. HARRY POTTER AND THE TROUBLE WITH LEGAL THEORY

To this point we have considered only tort, but Harry Potter will take many other courses during his time in law school. Each time he studies a new subject, he may find himself thinking that the process for adjudicating claims is expensive and slow, and pondering whether he might cast a spell that would improve the situation. Thus, one might wonder whether the arguments of this Article apply beyond tort. The answer is yes and no.

To the extent that economists overlook collateral costs and benefits in their analysis of other areas of law, the consequence will be the same as for tort. Without information about the collateral costs and benefits of different contract regimes, for example, we cannot know which contract rules are efficient. Of course, the extent to which collateral costs and benefits will upset the standard economic analysis of different areas of legal doctrine will vary depending on what the collateral costs and benefits associated with each are. Until we have that information, however, we have reason to approach all claims about the efficiency of legal doctrine skeptically.

Whether the concerns raised about the corrective justice approach to tort have application to other areas of law is more complicated. In the hands of

138. See Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, *supra* note 16, at 387, 388 (noting the possibility that liability insurance transforms an otherwise unjust system into a just one).

most philosophers, corrective justice is a theory about tort, not a theory about private law more generally, and certainly not a theory of law full stop. To the extent that other areas of law are concerned with righting wrongs, the arguments in this Article may have wider application. Some philosophers, for example, think that contract law reflects the morality of promising. If so, perhaps the formal remedies on offer in a contract suit do not exhaust the ways that contract law works to put matters right when one person wrongs another by breaking a promise. If contract law is up to something else, however, the argument about corrective justice may have no application.

Even though the conclusions this Article reached about tort may not be generalizable to other areas of law, the approach it adopted is. The mistake that economists and philosophers make in thinking about tort is endemic to legal theory. We commonly confuse the substantive rules that are distinctive of a body of law with the institution that implements those rules. As we saw with tort, that can lead us to misconstrue the impact those institutions have on our lives. We would do well to follow Harry Potter through the law school curriculum; he may have a lot to teach us.

CONCLUSION

The charm of Harry Potter's spell is that it does tort law without lawsuits; but lawsuits, it turns out, are part of the charm of tort law. The failure of economists and philosophers to appreciate that has led both to offer theories of tort that are radically incomplete. Economists have ignored tort's collateral costs and benefits, and because of the oversight we must approach every assertion they make about the efficiency of tort doctrine with a healthy skepticism. Philosophers have missed the fact that tort does more to respond to wrongdoing than enforce duties of repair, and as a consequence, they have given us impoverished theories of both corrective justice and tort. That is the bad news. The good news is that now that Potter has helped us see the trouble with tort theory, we can set about fixing it.