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The Metaphysics of Modern Tort Theory

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THE METAPHYSICS OF MODERN TORT THEORY

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This Article explores the justifications offered by the three leading schools of tort theory for tort liability or for its replacement by systems of social compensation. None of these competing scholarly theories is seen, outside of its circle of adherents, as offering a generally satisfactory account of that justification, and the disagreements between and within these schools are deep, as they concern different conceptions of the fundamental principles and aims of tort law.

Considering this dispute on a different plane than do those engaged in it, the Article undertakes to peel away these starting conceptions and justificatory arguments to their foundations to show that here is where the problem lies. These foundations are metaphysical; that is, they arise from our understanding of the world as a whole. This understanding is ubiquitous but is for that very reason virtually imperceptible. It is, moreover, "bigger" than the concepts drawn from it and the disputes over tort theory that take place within it.

Seen as arising from this metaphysical ground, the impasse in tort theory is not susceptible to being resolved by "fixing" or adjusting its arguments, nor by inventing new ones; it may, however, be fruitfully studied for what it reveals about modern thought. The rival efforts at tort theory, taken together to this end, can help to bring into view our modernist metaphysics, the understanding from which we begin in thinking about the world, and so about the nature of action and harm within such a world. This dominant understanding yields, in turn, not only these theoretical efforts to justify and rationalize tort law, but also our prevailing conceptions of law and social relations, conceptions that turn on force and separateness.

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I. INTRODUCTION: TORT LAW IN FERMENT

Tort law, that branch of our law concerned with interpersonal harms, is today a field in remarkable disarray. Proposals for the partial or complete abolition of tort law appear in serious scholarship, as do fundamental defenses. In the popular and political arenas, too, attention is roused to the need of tort law for reform or defense; for more than a decade it has been reported that the practical administration of tort law, in particular the insurance mechanisms that undergird it, is in a state of crisis. The economic analysis of tort law plays a prominent role in this controversy, appearing at both the political and scholarly levels of concern and, at times, on both sides of the debate. Most striking of all, the conflict is waged on a remarkably fundamental plane: In the proposals to abolish or radically restructure the field, on the one hand, or to construct an ambitious defense, on the other, the justification and very existence of the field of law itself are at issue. What is occurring in tort law that we should see such turmoil, such deep dissension concerning its purposes and justification?[1]

This debate, moreover, suggests other, deeper puzzles: What is tort law about, that these challenges should occur there and the debate take the shape that it does? How does tort law offer, not merely a means of resolving legal disputes arising from accidents and interpersonal harms, but a way of thinking about what these events are, how they come about, and how we ought to respond to them? What does our way of thinking about the events at issue in tort law reveal about how we understand ourselves and the world more generally? How are these understandings manifested in tort law and scholarship, and how do they undergo stress, change, and reappear in the challenges to tort law and in its defenses? What, in sum, can understanding the character of tort law and the shape of its career tell us about how we think about action and responsibility and about who we understand ourselves to be?

This Article describes the current state of scholarship in tort theory toward the end of opening up these further avenues of inquiry. It seeks to map the principal current theories and provide an account of their content, in a way that uncovers premises and ways of reasoning that such accounts usually leave undisturbed. In addition, it points toward the philosophical questions raised by the presuppositions and implications of these modes of thinking.

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1. *Cf., e.g.*, PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); Izhak Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 27 (1980); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987); Michael J. Trebilcock, *The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis*, 24 SAN DIEGO L. REV. 929, 933-35 (1987).

In order to avoid the conflation of these distinct levels of analysis, the presentation is divided so that the overview of tort theory and thinking occupies the text, while, until the end of each section, the running philosophical commentary appears principally in footnotes. Accordingly, the footnotes speak to issues on a different plane than those raised in the body of the text, and possess a greater weight than is customary for footnotes: They concern the foundation—the footing, as it were—of the more familiar theories discussed in the text. Despite this heuristic separation, and through its means, the Article aims ultimately to illuminate the *connection* between these levels, the pervasiveness and import of the metaphysical assumptions on which the various theories of tort justification can all be seen to rest.

I consider three schools of contemporary tort theory: Coasian economic tort theory, compensation theory, and moral tort theory.[2] These names are only partly informative, as the first two types of theory are each influenced by aspects of economic thinking, and writers in the last group are intermittently diffident about labeling their theories "moral" (and economic thinking, too, is allied with a school of moral theory). Nevertheless, the divisions are clear enough in that, for the most part, members of each division share the understanding I describe there, and the approach within each division is

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2. A potential fourth school of writings on tort theory, from the Critical Legal Studies (CLS) movement, has not been accorded a separate section, though references to it appear at points in the notes. The few CLS writings on torts tend to combine elements which I show below to be implicit in the approaches of the other three schools and treat there. These elements include: (1) an understanding of the incidence or remedy of "accidents" which, though phrased in terms of class analysis imported from Marxism, is will-centered like that of the Coasian economists, *cf. infra* text accompanying notes 27-34; (2) opposition to utilitarian justification, as for the moral tort theorists, *cf. infra* text accompanying notes 66-68; and (3) a political program, resting on a claim to the "radical contingency" of law, that denies the reality of law apart from politics and so adopts a metaphysical realism similar to that of the compensation theorists, with whom the Critical Legal Studies scholars share a common ancestor in American Legal Realism, *see* Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669 (1982), *cf. infra* text accompanying note 47. *See, e.g.*, Richard L. Abel, *A Critique of Torts*, 37 U.C.L.A. L. REV. 785 (1990); Richard L. Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695 (1982) [hereinafter Abel, *Socialist Approach*]; Richard L. Abel, *Torts*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1982) [hereinafter Abel, *Torts*].

Similarly, I do not treat here recent feminist writings on torts, concerned to expose the gender-biased assumptions of various aspects of tort doctrine much as the critical theory writings are addressed to class bias. *See, e.g.*, Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848 (1990). Like the critical theory pieces, these tend to rely upon conceptions (such as the will-based genesis of accidents or their remedy, expressed in the understanding of tort law as, like all else, a matter of "power") that appear more systematically in the other schools and are treated there. Moreover, both the CLS and feminist theorists are engaged in critique of the tort system, in whole or in part, rather than an attempt at rationalization or justification. As the questions I pursue go ultimately to the nature of the justificatory enterprise as directed at tort law, I have concentrated instead on those theories that make an attempt at affirmative theoretical justification.

distinguishable from the others. The first two schools—Coasian economic tort theory, concerned with deterrence and with bargaining over the costs of tortious action, and compensation theory, concerned with the systematic redistribution of those costs—share an approach to torts that centers on their cost, and thus begin from a way of looking at torts that is ultimately economic. This common origin allows the two to be treated sequentially, with their divergent rationales and recommendations traced to divergent strands in economic thinking about torts, and for comparisons and contrasts between the two schools to be drawn thereafter. The moral tort theories present an attempt to break from this economic origin, by a variety of means; this variety within moral tort theory requires separate attention to four distinct theories of the moral basis of tort law. Yet the premises of these attempts at moral justification prove, ultimately, to resonate with the same themes first seen in the economic accounts, allowing for a final section exploring the implications of tort theorizing as a whole.

I do not look to join or to settle the controversy over tort law, which already engages many economic theorists, programmatic reformers, moral philosophers, and political advocates on both the left and the right. Rather, I wish to illuminate the field on which these disputants are arrayed. Accordingly, their positions are of interest here not for their possible validity but because the positions originate from points that, together, describe that terrain. Similarly, in undertaking to bring to light the central strands of the mode of thought distinctive to each major school of tort theory, I do not pursue in detail variations on group themes and disagreements internal to a school's overarching understanding; such attention can too easily obscure the common field on which such jousting takes place and which it is my principal aim to disclose. By attending to the understanding of action revealed in our tort law and its administrative alternatives, and the moral and economic debates surrounding these, I hope to bring to light certain deep-seated ways of thinking about ourselves and the world that inform these legal manifestations.[3]

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3. The reader may wonder who "we" and "our" are intended to embrace. My concern is with the ways of thinking that appear across the spectrum of modern tort theory; it is hoped that we who read, write about, and fashion the characteristic doctrines and strategies of tort law will recognize these ways of thinking as our own. In addition, however, I suggest that the "tort thinking" discussed here is a manifestation of a larger, technological way of thinking that is ubiquitous in the modern West, as it embodies our metaphysics, or understanding of the world as a whole. *See* MARTIN HEIDEGGER, *The Question Concerning Technology*, *in* THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS 3 (David F. Krell trans. & ed., Garland 1977) (1954). That implies a very large "we" indeed—though limited to those dwelling, as we are, in modern, Western times; no claim is made to a timeless human nature.

In both cases, the only "test" of such a thesis is its capacity to evoke thoughtful recognition. Yet because the ways of thinking at issue, precisely in their ubiquity, have become invisible to us, such a thesis also remains vulnerable to quick dismissal—a vulnerability that is not necessarily inconsistent with its being true.

These ways of thinking pervade much of modern thought. They are, in fact, so pervasive as to be virtually invisible. Accordingly, I have found it necessary to retrace the outlines of the tort theories afresh, in order to allow the ways of thinking at issue and the philosophical questions raised by such ways of thinking to come to light. As I turn to that task, it may be necessary, in this field grown polemic, to add an express caveat: I would be altogether misunderstood if taken to be engaged principally in finding fault with the theories I explore, whether in raising questions as to their internal coherence, or in addressing their philosophical implications. Rather, my exploration of the difficulties of each of these theories is intended to suggest difficulties that follow on the generally prevailing way of thinking that they share. Our persistence in that way of thinking, regardless of those difficulties, is taken to suggest its deep hold on our self-understanding. Accordingly, I could hardly recommend that current tort theory, which embodies such thinking, simply be discarded as "wrong." In addition, because the interpretation presented in this essay is not conventional doctrinal-theoretical exegesis, it does not claim to match or exhaust the theorists' self-understandings, their acknowledged concerns, or the finer details of their theories, and still less to provide an alternative to be preferred to those they present. The aim, rather, is to uncover a way of thinking, prevalent in modern thought generally, of which these theories can be seen to partake.

II. THE ECONOMIC ANALYSIS OF TORT LAW: COMMON ORIGINS OF THE COASIAN AND CALABRESIAN SCHOOLS OF TORT THEORY

Two of the leading schools of thought concerning the purpose and justification of tort law share at their origin a concern, not with torts as such, but with their costs, an approach to torts that is ultimately economic. These schools of thought are distinguished below as the Coasian economic theory of torts, and the Calabresian or social compensation theory. Although these schools present striking differences in their approaches to rationalizing torts, their joint origin in economic thinking accounts for certain deep resemblances to be noted below, even as it heightens the contrast between them. And, as will be seen, the economic way of thinking they share imbues not only these two schools of tort rationalization, but much of modern thought as a whole.

The economic analysis of tort law, like the economic understanding of law generally, starts from the premise that the matter with which tort law is concerned[4] is accessible to economic thought and methods. In the case of tort,

4. Or, with which it ought to be concerned: While some proponents of the economic understanding of tort law maintain that the theory is "only" positive (that is, descriptive of what the law actually either aims at or accomplishes "intuitively"), *see, e.g.*, Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 19-28 (1960); WILLIAM M. LANDES & RICHARD A. POSNER,

that matter is understood to be the cost of accidents; the incidence of accidents is relevant only insofar as it affects these costs. Accidents, understood as a problem of social cost, are seen as an "externality," that is, as a cost of an activity which is not charged to the activity ("internalized") in the absence of affirmative legal requirements, much as with pollution, the classic example of an externality. The activity is undertaken without regard to this unrecognized cost, and so without reflecting the actual cost of the activity and its use of social resources; the activity will therefore be over-engaged in, and, in the case of a productive enterprise, its products underpriced and over-purchased, as compared to the state of affairs that would prevail were costs accurately accounted for. This inaccuracy skews the market's results away from that alternative state of affairs and is therefore inefficient.[5] In sum, accidents are problematic only

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THE ECONOMIC STRUCTURE OF TORT LAW 7 (1987), others affirm that it is normative (that is, prescriptive of reform), *see* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); *cf.* Ernest J. Weinrib, *Utilitarianism, Economics, and Legal Theory*, 30 U. TORONTO L.J. 307 (1980). The distinction, which is usually invoked to deflect normative criticism of the economic standpoint, *see, e.g.*, LANDES & POSNER, *supra*, at 9, relies on a clear and firm distinction between fact and value (and, in turn, between subject and object) that is widely questioned by philosophers of social science. *See generally* INTERPRETIVE SOCIAL SCIENCE: A SECOND LOOK (Paul Rabinow & William M. Sullivan eds., 1987).

At the same time, however, it seems that the very impossibility of maintaining these distinctions operates subtly to bestow on the positive economic position a normative credibility which, according to the distinctions maintained by the economic theorists themselves, is unearned. That credibility arises because the seeming omnipresence of the efficiency dynamic at work—at least, once that becomes what is looked for—suggests inevitability and "naturalness." This reassurance is not the product of willful invention, nor of any quirk of economic thinking; rather, as the phenomenon of attributing certainty to the realm of objects confronting a subject, it arises from the dominance of subjectivism in modern thought, of which economic thinking is only a prominent embodiment. *See infra* text accompanying notes 124, 156-61, 169-71; *infra* part V.

5. The result is inefficient in the Kaldor-Hicks sense, generally understood to be the applicable standard of efficiency for the economic analysis of tort law. *See* Jules L. Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 532-40 (1980), *reprinted in* JULES L. COLEMAN, MARKETS, MORALS AND THE LAW 95 (1988); LANDES & POSNER, *supra* note 4, at 16. The alternative state of affairs is said to be efficient in this sense if the "gainers" in that state (those who would stand to gain by the move to that state) could compensate the "losers" (those who would stand thereby to lose), which is only possible if this second state of affairs provides an overall gain. *See* Coleman, *supra*; Jeremy Waldron, *Criticizing the Economic Analysis of Law*, 99 YALE L.J. 1441 (1990) (book review). Because what is required is not actual compensation but only the ability to achieve it, the requirement amounts to a comparison and hypothetical off-setting of individuals' changes in holdings; that is, it amounts to the aggregative test of utilitarianism. For this reason, it is subject to all the objections raised to the latter on grounds of its failure to respect individuals and rights and its sacrificial implications. *See, e.g.*, Weinrib, *supra* note 4. And Professor Coleman denies that the Kaldor-Hicks criterion has even the defensibility of utilitarianism, *see* Coleman, *supra*.

Alternative understandings of efficiency, known as Pareto-superiority and Pareto-optimality, require that any move to an alternative state of affairs actually make every person no worse off than under the prior state (or than under any other available state, for Pareto-optimality). In other words, they require the transfer of utils or resources that Kaldor-Hicks leaves as an unfulfilled possibility.

because and to the extent that they are inefficient, and they are inefficient not as a result of their occurrence but as a result of their cost not being properly included in the information concerning costs and benefits that, as an axiom of economic thinking, governs action.

Subject to ongoing efforts to refine and formalize it, this is the basic understanding common to economic thinkers regarding torts. Starting from this understanding, the field has developed a vast literature in which the existing structure of tort law, its ideal variants, and its programmatic alternatives are examined for their ability to internalize, allocate and minimize total accident costs. Two aspects of that development can be distinguished, both stemming from seminal work done in the early 1960s. These are the schools of tort thinking associated with the work of Ronald Coase on social cost, and with that of Guido Calabresi on mixed systems for the rationalization of the costs of accidents. The Calabresian account provides the theoretical foundation for the proposals to replace tort law with programmatic compensation systems, treated below as a separate school of tort thinking. Accordingly, the discussion of Calabresi's work is deferred until that school is introduced. It is preceded, now, by the exploration of the Coasian theory, which seeks to account for the existing system of tort law in economic terms, and of its implications.

A. The Coasian Account of Tort Law

1. The Theoretical Background: Coase and the Problem of Social Cost

The traditional economic prescription for internalizing the externalities posed by accident costs is to tax them to the activities in question, or to assess liability in the amount of the harm caused; these legal exactions are understood by economists as equivalent because both are simply costs. This conception thus begins with an asymmetrical, common-sense understanding of the parties' relation, such that one party is seen to cause, and the other to suffer, the imposition of the externality prior to legal intervention, and the legal exaction reverses these positions so as to restore the connection between cause and cost from which the externality was a departure.

The Coasian school of economic tort theory challenges this conception at

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Pareto efficiency is therefore easier to justify under a political or moral theory concerned with welfare, *see, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE (1971)—although, significantly, such theories often are concerned to justify an initial distribution of resources that economists, in contrast, usually take as given. For all these reasons, failure to specify the relevant conception of efficiency, and defend it, or movement *sub silentio* among the various conceptions, expropriating the justification of one to the other, can lend unearned justificatory appeal to aspects of the economic analysis of tort law.

its foundations. Professor Ronald Coase argued in 1960 that, instead, it is essential that we understand the "tortfeasor" (this is, the defendant engaged in the activity in question) and the "victim" (that is, the plaintiff suing for harm) as *equivalent*, in that a decision on liability in favor of either will hurt (cost) one party, and benefit (increase the wealth of) the other. The problem, Coase insisted, is "reciprocal in nature."[6]

This crucial move allows the ensuing line of argument: Because of this posited equivalence, the costs and financial benefits[7] of the activity of each can be compared, and efficiency can be enhanced through that combination of activities and payments that will result in the greatest overall net gain. Indeed, Professor Coase argued that; assuming costless transactions, the parties will bargain to such an adjustment in any event, regardless of any judicial award of legal entitlement such as damages or injunction. Thus, a harm-generating enterprise will pay the costs of harm assessed to it rather than shut down so as to prevent that harm, so long as it remains profitable to do so; and, Coase stressed, these payments can make it more efficient for "victims" to *incur* the harm rather than engage in their own harm-avoiding behavior. This will be the case so long as the "victims" either get some benefit from their harmed activity apart from these payments, or they divide with the enterprise some of its profits in excess of the cost of the harm. If, on the other hand, the "victim's" harm-avoiding behavior could be undertaken at less than the cost to the enterprise of the damage payments to the "victim," the enterprise will pay the "victim" to undertake it.

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6. Coase, *supra* note 4, at 2.

7. It is standard for economists to restrict their analysis and conclusions to matters cognizable as, or subject to translation into, wealth—that is, money equivalents—rather than any broader base such as utility, welfare, or happiness, owing to the supposed impossibility of interpersonal comparisons of utility. (The question of the possibility of such comparisons echoes, in economic form, the philosophical questions of how we can know others, and of how speech is possible. It also reflects the axiomatic liberal rejection of the Aristotelian project of knowing the good for man.) This restriction, premised on subjectivism, grounds the claim of economic analysis to distinction from, and superiority over, utilitarianism (*see* Posner, *supra* note 4), although that claim is questionable in both respects (*see supra* note 5; Weinrib, *supra* note 4).

In all events, the supposed impossibility of interpersonal comparisons of utility is not understood to call into question the scope or meaningfulness of economic analysis; instead, it leads to the substitution of money (the essence of which is comparability) for the troublesome utility, so that the analysis may proceed unimpeded. This substitution provides a common denominator—cost—into which all problems are translated, and a guiding aim—efficiency, or lesser relative cost—for all law and policy, seen now as the set of alternative solutions to such cost problems. Other conceptions of law, such as its moral basis, are subsumed into this framework. Thus, for example, Judge Posner opines that the moral foundation of tort law, which most moral theorists of tort law trace to Aristotle, may itself be only a social reaction against the waste that accidents bring—against, that is, their inefficiency. *See* LANDES & POSNER, *supra* note 4, at 14. Of course, not all accidents are inefficient; those for which the social benefits exceed social costs would presumably escape Aristotle's, and our, moral concern.

Quite apart from questions of its empirical accuracy as a model of behavior,[8] this position is remarkable for its formalism: In its abstraction of the parties from the context of accidents they lose their character as *tortfeasor* or *victim*—roles that, on this model, are interchangeable and so without their ordinary content. That content, as reflected in traditional conceptions of tort law, has to do with the perceived direction of causation of the accident, with the parties' relative activity and passivity in bringing it about, or with other differentia in the parties' concrete relation to the occurrence of the accident. Disregarding this relation, the Coasian model posits a formal equivalence, just as in the theory of the market, which the tort model consciously emulates.

That move has here a deeper significance, however, than just the theoretical advantage of allowing market-irrelevant considerations such as inequalities of bargaining power or wealth to be excluded from the analysis. Rather, this formal equality of the parties also reflects a puzzling but important shift in the idea of *causation*. No longer are crop-trampling cattle, for example, understood as the cause of the damage to the crops underfoot; now both cattle and crops—by virtue of their sheer, incompatible co-existence—are understood as "causing" the damage: "[I]t is true that there would be no crop damage without the cattle. It is equally true that there would be no crop damage without the crops. . . . If we are to discuss the problem in terms of causation, both parties cause the damage."[9] This evenhandedness conforms to the understanding of the parties as bargainers, and thus equivalent; yet it sounds strange. It seems to violate the ordinary sense of causation as an asymmetrical relation, the dependency of one event, the effect, upon another, the cause.

But causation does not here evaporate from the analysis, as is sometimes thought; on the contrary, the prevalence of causation *grows*, as causes themselves are seen to multiply. The event of the crop damage remains a dependent effect, but this harm is now seen to be "caused," not by one party's action but by the co-existence of both parties—"equally," since without both the event of their collision would not exist. Accordingly, on this view it will always be the case that colliding or conflicting parties will equally "cause" the harm that either suffers. This view is not acausal, or "causally agnostic," but rather pancausal.[10]

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8. *See, e.g.*, Mark F. Grady, *Why Are People Negligent: Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 293 (1988); Mark Kelman, *Consumption Theory, Production Theory and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979).

9. Coase, *supra* note 4, at 13.

10. Professor Coase's theory is sometimes described as one of "causal agnosticism," *see, e.g.*, Peter Passell, *For a Common Sense Economist, A Nobel and an Impact in the Law*, N.Y. TIMES, Oct. 20, 1991, § 4, at 2 (quoting Dean Calabresi); *cf.* Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 58 (1979) (referring to

This understanding of causation is no idiosyncratic invention on Coase's part, but rather echoes straightforwardly the familiar tort concept of "but-for" causation.[11] (Throughout its treatment of torts, the economic view highlights, but does not invent, our modern understanding.) That this conception of causation is familiar does not mean it is unproblematic, however.[12]

Coase's theory as one of "causal nihilism"). Yet the theory does *not* conclude that the cause of harm is unknown or unknowable, *cf.* Summers v. Tice, 199 P.2d 1 (Cal. 1948), as agnosticism signifies, but rather that the question of cause fails to determine liability, precisely because it *does* yield an answer—but one which is always plural. Economic analysis, in contrast, will always yield a determinate solution, because it deals in units that are inherently susceptible to summing and maximizing, owing to their commonness across parties. It is the search for a determinate solution that drives the resort to the economic framework.

Causation is passed over because it is ineffective in yielding up a single liable party. Effectiveness—that is, the ability to produce certain determinate effects—is thus the measure of causation's worth as a legal concept. But, as this is the standard given by causation itself, using effectiveness to rid the analysis of causation cannot achieve its purpose. Moreover, the economic considerations that "displace" causation in the analysis—such as looking to the cheapest cost-avoider, and other doctrines concerned with cost incentives—are themselves causal. *See infra* note 39. Effectiveness thus prevails as a general way of understanding the world even when "causation," as a ground of tort liability, appears to be discarded.

11. According to that concept, something is "ruled in" as a cause, and so as a candidate for tort liability, if its existence is a precondition of the existence of the harmful event. This is determined by looking, counterfactually, to the effect of the hypothetical absence of the putative "cause" on the existence of the harmful event. In short, it is asked (where x is the putative cause and y the harmful event): But for x, would y exist? *See, e.g.*, 2 F.V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS 1110 (1956).

12. Notoriously, this counterfactual "test" is vastly overinclusive: But for the birth of the plaintiff, too, his coming to harm many years later would not have happened. Looked at through the lens of the but-for "test," every prior tangential event becomes equally a "cause" of everything subsequent. As under economic analysis, the diffusion of causation on this account appears tantamount to its evaporation; with "cause" found everywhere, the concept seems too vacuous to be of use in determining liability. Because of this disutility, "cause in fact," as determined by the "but-for" test, is regarded as only a first step in determining legal liability, in need of subsequent, limiting steps such as resort to the concept of "proximate" causation, *see* Palsgraf v. Long Island R.R., 162 N.E. 99, 101 (N.Y. 1928) (Andrews, J., dissenting), and to examining the scope of the tortfeasor's duty, *see id.* at 99 (Cardozo, J.).

Less widely noted are the metaphysical issues attending this conception: In order to understand the (now damaged) crops as a cause of the damage, we must, with Coase, understand the crops as separate from the damage—which nevertheless is *of the crops*. This separation of substance and attribute (essence and accident), and reification of the latter, is traditionally the business of metaphysics; so too here, though this heritage is unacknowledged. Moreover, it is the crops' *existence* that Coase understands as "causing" the crop damage, just as does the cattle's existence, in both cases because the harm in question (the crop damage) would not exist if they, its grounds, did not. Existence and its grounds—again, traditional concerns of metaphysics—thus lie at the heart of this account. Finally, in trying to hold the world constant except for the deletion of the cause at issue, the but-for model assumes that such a world, without that prior event or person, would nevertheless be "the same," and so that the world is made up of discrete, substitutable parts. This, too, raises questions of metaphysics, going to what and how the world is thought to be, and we in it. In sum, although economists and other moderns try to dismiss reliance on causation as "metaphysical," *see, e.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND

Indeed, causation, in all its variant conceptions, remains an exceedingly vexing problem of philosophy. It is nevertheless a central organizing principle of tort theory. Whether out of explicit recognition of the difficulties attending the concept of causation or vague unease over its metaphysical slipperiness, economic writers on torts are generally loath to employ it.[13] As will be seen, however, the economic analysis is unable to dispense with causation but is, on the contrary, centrally dependent upon it.

2. Application of Coase's Theory to Tort Law

The structural elements of Professor Coase's analysis—reciprocally situated parties, bargaining in the absence of transaction costs to an efficient distribution of activities and payments—have been used by subsequent scholars to serve as a model for tort law in general. (This adoption has proceeded notwithstanding Coase's application of his analysis only to such cases as those presented by two businesses having incompatible environmental needs, where the understanding of the parties' positions as "reciprocal" fits more readily.) Thus Coasian *ex ante* bargaining is viewed as the ideal means for dealing with accidents; since, however, it is foreclosed in practice by transaction costs, the role of the court is to approximate, through its liability rules, the bargain that those parties would have reached.[14]

That bargain would reflect the benefits and costs of the parties' activities and their alternatives, including forgoing the activities or undertaking them with

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ECONOMIC ANALYSIS 6-7 n.8 (1970), metaphysics is not so easily banished.

13. Thus Professor Coase ventures into the discussion under consideration with the diffident remark, "If we are to discuss the problem in terms of causation, ..." Coase, *supra* note 4, at 13, and thereafter generally avoids the term, speaking instead of costs and opportunities for reducing or distributing them. *See id., passim*. *See also* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 343 (1988); CALABRESI, *supra* note 12, at 6-7 n.8 ("I do not propose to consider the question of what, if anything, we mean when we say that specific activities 'cause,' in some metaphysical sense, a given accident . . . ."); Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975); LANDES & POSNER, *supra* note 4, at 229 ("[T]he idea of causation can largely be dispensed with in an economic analysis of torts."); *but see infra* note 39.

14. This "would" reflects not only the hypothetical nature of the bargaining but also a predictive certainty as to its outcome, born of the economic axiom that parties act to maximize their utility and of the assumption that the parties are situated so as to make such bargaining appropriate; only transaction costs are understood to prevent this bargaining from actually taking place.

Thus transaction costs present both an explanation as to why this bargaining is not taking place in fact, and a justification for simulating its supposed results. As Professor Weinrib points out, however, the very distinction between actual bargaining and such hypothetical bargaining is the absence, in the latter, of *bargaining*. *See* Weinrib, supra note 4. Thus it is hard to see how the ideal of bargaining, resort to which is justified by its promotion of autonomous self-determination, provides any support to the process of replacing such self-determination by its opposite, a court-inferred result.

certain precautions. Following the dictates of economic rationality, a party would undertake or agree to undertake only those accident-causing activities and those accident-avoiding activities that are cost-justified, that is, the costs of which are exceeded by the benefits they bring. Because this is precisely the result aimed at by a tort law founded on considerations of efficiency, this is the point, according to the Coasian economic theory of tort law, at which liability should attach, encouraging and reinforcing the decision dictated by economic rationality.

Accordingly, the paramount doctrine of tort law, in the view of Coasian economic theorists such as Judge Posner, is negligence liability, understood as economically formulated: Liability is to be assessed only for harms resulting from those actions for which the social costs exceed the social benefits. This promise of liability is understood to inform the actor of the costs that will be charged him in the event of harm, so that he is able to assess these, discounted by the probability of their eventuation, against the cost of precautions to be taken against them.[15] As every first-year law student knows, a version of this standard was articulated by Judge Learned Hand in the 1947 case *United States v. Carroll Towing*,[16] where it was phrased to impose negligence liability for accidents the cost of which (L), discounted by the probability of their occurrence (P), exceeded the burden of avoiding them (that is, the cost of effective precaution against them, B): Negligence is found where $B < P \times L$. This case is, accordingly, a cornerstone of the Coasian economists' positive claim that tort law strives to achieve economic efficiency.[17]

Yet the implications of Professor Coase's work are not exhausted by thus arriving at a standard of tort liability that tracks efficiency considerations; rather,

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15. Here the theory echoes Professor Coase's position that liability rules, like any other rule of law, represent not an order but an option coupled with a cost. Although this orientation is critical to the theory, and Coase's article is correctly regarded as seminal, in part for stressing this understanding of the law as optional, *see, e.g.*, LANDES & POSNER, *supra* note 4, at 7, the position has earlier roots, as it presents an essentially Holmesian understanding of law as without fundamental obligatoriness: Holmes's famous proposal to understand law from the position of the "bad man" follows this reasoning, as does his treatment of contract as presenting an option to perform or to breach and pay. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458-59, 462 (1897). In tort law, Holmes is regarded as an early prophet by economic theorists because he thought the idea of fault liability, as a moral conception, outmoded and rightly replaced by rules allowing prediction and adjustment of conduct so as to avoid penalty. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 64-65, 76-78 (1881). This understanding of law as a matter of costs to be calculated and minimized, and so as optional and negotiable rather than obligatory, remains fundamental to the economic analysis of law, including tort law.

16. 159 F.2d 169 (2d Cir. 1947).

17. *See supra* note 4. The Posner casebook on torts opens with an account of the case and a portrait of Judge Hand. RICHARD A. POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS at xxviii, 1 (1982).

those implications go far to undermine the significance of *any* such standard. For, following Coase, the economic theorists of tort law point out that, regardless of the legal standard of liability, a party will only undertake accident-causing or accident-avoiding activity up to the point at which its costs begin to exceed its benefits. Thus a party charged with greater-than-efficient liability (for example, for all accidents regardless of their cost-efficiency, as might obtain under certain forms of "strict" liability) will in fact only spend on precautions and avoidance up to the same cost-efficient level as when that level is made the legal standard. Thereafter, it will be cheaper for the actor to refrain from precautions, and incur the accidents and their costs. And this, the theory predicts, he will therefore do.

To be sure, economists stress differences remaining between the standards of strict liability and negligence. In particular, they note that the Coasian model explicitly restricts their equivalence to situations lacking transaction costs, including information costs. (Such a "frictionless" world is understood as ideal but unattainable, a noumenal economic realm.) Thus the court's setting of the standard below which conduct will be assessed liability as negligent will be efficient only if its information as to the costs and benefits of action and precautions is accurate; similarly, the defendant's action, including the taking and refraining from precautions, will be efficient only if his information as to those costs and benefits is accurate. It is a hotly debated but ultimately empirical question as to which has the better information. Another wrinkle is that strict liability, but not negligence, is thought to be able to influence not simply the decision to act or not, but the quantity of a particular activity, because under strict liability such decisions are undertaken by the defendant enterprise.[18] Finally, other disputes concern the accuracy of the theory's behavioral assumptions[19] or the completeness of the economic effects surveyed by the theory.[20] Yet these empirical matters affecting the practical application of the theory do not alter the force of the fundamental Coasian conclusion: that, on a consistent economic view, the law, *qua* law, is a matter of indifference; it exists only as another cost, to be calculated, bargained over, and rationalized, thereby to be overcome.[21]

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18. *See* COOTER & ULEN, *supra* note 13, at 368-69; Steven Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

19. *See, e.g.*, Mario J. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641 (1980); Grady, supra note 8; *cf.* Kelman, *supra* note 8.

20. *See, e.g.*, Priest, *supra* note 1; HUBER, *supra* note 1.

21. Indeed, it does not even have this much reality: Insofar as the legal standard replicates the incentive demands of economic rationality, the law is superfluous; insofar as it ignores these, it is nugatory. Being thus without economic effects, the law is not accorded reality on the economic view, which takes account of, and regards as real, only such effects.

One aspect of this calculative regard for law does, however, condition the preference of some economic legal scholars as between these liability rules of strict liability and negligence. A central tenet of Professor Coase's argument was that the parties were "reciprocally" situated, in that each faced a choice among actions and their costs and benefits that affected the other, and each was able, through that choice, to affect the overall costs of accidents and thus to bargain over their distribution. Armed with this tenet, Coase-influenced scholars such as Judge Posner conclude that a liability rule such as strict liability will be less able than a rule such as negligence liability to take account of plaintiff's opportunities for cost-effective accident avoidance.[22] To reach this conclusion, such scholars reconstrue these liability standards in line with the fundamental Coasian orientation concerning the parties' equivalence. Thus, "strict liability" is understood as liability assessed without regard not only to defendant's actual knowledge and alternative courses of action, but to plaintiff's as well, and negligence is economically defined and symmetrically construed to reach plaintiff's contributory or comparative negligence.

The issue here, while appearing to turn on the content of the liability standard, in fact concerns the formal constitution of that standard: It must be (1) susceptible to negotiation aimed at maximizing resources, rather than imposed absolutely, that is, nonnegotiably; and (2) symmetrical, rather than asymmetrical in character. These formal characteristics are demanded not by consideration of, for example, the nature of tortious wrongs, or principles of justice thought to determine how such wrongs should be dealt with at law, but rather in order that the economic analysis may work; these features endow the "standard" with a fluidity that allows the economic manipulation to take place.

The first requirement, negotiability, is a central tenet of the economic model, as seen in Coase's showing that any legal imposition, even one as seemingly absolute as a specific injunction, is, on the economic view, merely a bargaining chip in the hands of its holder, and subject to negotiation instead of to obedience. This reflects the evaporation of obligatoriness that prevails under this view;[23] indeed, because it is seen only as a cost, devoid of moral implications of responsibility that cannot be captured in the form of cost, "liability" becomes inherently, *necessarily* negotiable, subject to being passed on in a firm's prices or otherwise producing effects down the economic line. The second requirement, of symmetrical application, is captured in Coase's fundamental claim as to the parties' equivalence; they are seen as indifferently situated with respect to the question of who is to bear the liability. Just as, before, with respect to the question of causation, here liability is an indifferent

22. *See* Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973); LANDES & POSNER, *supra* note 4, at 69-70.

23. *See supra* note 15.

matter to be determined only by considerations of cost.

With these standards of liability wholly reconceived in this way, Posner finally allows "strict" (that is, now, negotiable) liability, but insists that it be amended by allowing a defense of contributory negligence.[24] Even Judge Hand's admired prescience is considered compromised by his omission of such an account of plaintiff's conduct, and his formula is amended accordingly.[25] And those economic theorists of another stripe who, as will be seen below, stress the loss-distribution effects of tort law as embodied in rules of strict liability or in systems of social insurance, arouse the scorn or bewilderment of these Coase-influenced theorists, who see that approach as sanctioning, and therefore inviting, negligent plaintiff behavior, a problem that bears the intriguing name of moral hazard.[26]

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24. *See* LANDES & POSNER, *supra* note 4, at 69. Only in this way can Judge Posner redeem strict liability, otherwise a potential embarrassment to his positive claim that tort law tracks economic considerations, *see supra* note 4, as well as a potential source of inflexibility foreign to the economic model. Newly conceived as negotiable and symmetrical, however, "strict" liability no longer presents a problem for the economic account of tort law.

Yet whatever its claims to being an economic desideratum, the resulting hybrid is a legal oxymoron, a conceptual amalgamation that is only possible once we, with the economists, understand these "standards" as standards of conduct no more, but rather as tools for dealing with matters of cost, a common denominator that allows their efficiency to be compared, combined and maximized. Standards of liability—literally and originally, that which stands, in regard to the tie of responsibility, *see* WALTER W. SKEAT, A CONCISE ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 292, 515 (1882)—undergo an inversion of meaning, and are now understood as fluid, susceptible to being pressed into new combinations and assigned freely among various potential bearers. *Cf.* Jules L. Coleman, *The Morality of Strict Tort Liability*, 18 WM. & MARY L. REV. 259, 272-83 (1976) (referring to cases where the defendant is without liability as instances of "absolute victim liability"). This fluidity echoes the shift in the understanding of causal responsibility, see *supra* text accompanying notes 10-13. Both are converted from autonomous concepts into vessels of policy. Yet whereas, as we have seen, causality remains on the scene, in the form of that effectiveness which is the end of policy, standards of liability, understood as principles of conduct, do not survive the shift. Again, this reflects the evaporation of obligatoriness that prevails on this view. *See supra* note 15 & text accompanying note 23.

25. LANDES & POSNER, *supra* note 4, at 87-88.

26. This problem, a matter of plaintiffs' presumed responsiveness to the cost incentives that Coasian economists perceive to arise under compensation systems, is built on more than just psychological or moral assumptions with which compensation theorists or others might take issue. *See, e.g.*, Rizzo, *supra* note 19; Grady, *supra* note 8; Kelman, *supra* note 8. It rests, further, on the way of thinking, centered on effectiveness, that pervades economics (but is by no means confined there): The dispensing of compensation, even for bona fide harm suffered without the plaintiff's negligence, *appears tantamount to* payment for the plaintiff's "action" in having found himself in the injured circumstances, and thus to inducement to replicate those circumstances. This is how Coase understands the situation of the trampled crops, for instance. *See supra* text accompanying notes 7-9.

That appearance, of compensation and inducement as indistinguishable, arises from our viewing the payment (that is, any giving of funds) *on the basis of* its supposed effect. A payment is understood only *as* having incentive effects, *as* offering inducements to action; a "payment"

3. The Conception of Tortious Events Underlying the Coasian Account of Tort Law

We can now highlight some of the distinctive elements of this Coasian strand of the economic analysis of tort law. These elements will provide a starting point for later thinking about the underlying aims and characteristics of tort theorizing, and a point of contrast with the compensation theory to be considered next.

In treating the parties to a tort as equivalently situated, Coase made explicit a cardinal requirement of the economic account of tort law that follows his thinking. That account views liability as properly assigned based on efficiency considerations, and so requires that the parties be equally available for that assignment. Any consideration that would impede or prescribe that assignment on grounds other than efficiency, such as differential causal responsibility or asymmetrical liability standards, cannot be justified under the efficiency rationale, and so ceases to be a part of the account.

This view of the parties as unencumbered by their actual particularity, and so available for theoretical deployment, also appears in the understanding of them as contractors—that is, as free and equal parties, unbound but for the contract that reflects their negotiation and assent. In this understanding, the economists employ a will theory of contract, which holds that the parties' obligations are dependent on their will; on this account, will is both the source of obligation and its limit. These tort contractors, free to and ideally able to negotiate the costs and liabilities they provisionally incur, are prevented only by the contingent fact of transaction costs from striking this bargain on their own, and so turn to tort law to effectuate that hypothetical bargain in actuality.[27] The ideal of negotiability, even if frustrated in fact by transaction costs, thus lies at the heart of the Coasian economic account. And that ideal, again, views the negotiating parties as free contracting agents, unencumbered by pre-existing obligations or legal standards, by the particularity of their causal relation to the tortious event or other circumstances, or by limitations of bargaining power or

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somehow without such effects is a waste, a drop into a void that is outside our world, and no real payment. In sum, *to be*—here, a payment—is *to be effective*. *See infra* note 60; *cf.* MARTIN HEIDEGGER, THE METAPHYSICAL FOUNDATIONS OF LOGIC 82-94 (Martin Heim trans., 1984) (1978) (Leibniz's interpretation of being as drive toward change, of its nature productive). Accordingly, the plaintiff too must be understood as "acting"—that is, as effective—in bringing about his injury. Again, then, effectiveness frames our understanding, not only of the genesis of the tortious harm, *see supra* note 10, but also of its remedy.

27. *See supra* text accompanying notes 14, 17-21.

foresight.[28] In short, it views the parties atomistically, as free-floating centers of will; their "equivalence" lies in this consistent abstraction from all particularity and embeddedness.[29]

Moreover, the ideal of negotiability also relies on a distinctive view of the events at issue in tort law as subject to the parties' ability to affect them, for this is what the parties promise in exchange for the payment or other inducement offered.[30] According to that ideal, the negotiating parties promise the redistribution of the costs and liabilities that arise from tortious events, and they control their exposure to these costs and liabilities by controlling the tortious events that give rise to them. Thus in understanding these costs and liabilities as ideally negotiable, the theory regards them, and the events which give rise to them, as ideally within the parties' control. (That this control, like the contracting it allows, *is* ideal and may be frustrated in actuality does not diminish its role as the ground of the theory.[31]) Coase makes this assumption

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28. To forestall confusion, I should stress that this is not an empirical claim that the parties to a tort or contract actually possess perfect foresight and control, nor that Coasian economic theory assumes or requires that they do. *See infra* note 31. Rather, that theory treats the parties *as though* they do, and any actual shortfall of foresight or control is simply charged to them as a cost of training. In this way these shortfalls either reinforce the deterrence rationale or, insofar as they are thought to be randomly distributed, disappear into the average with which the economic analysis deals. In either case, they are marginalized, and fail to disturb the dominant focus on will and control.

29. In this, as in much else, the "economic" view instances and makes explicit generally prevailing understandings. This abstraction of the parties from their particularity and embeddedness, for example, will appear again in theories of tort law, such as those of Epstein and Weinrib, that purport to eschew the economic account, *see infra* text accompanying notes 110-13, 146-47, and 162-65. This is no inconsistency on the part of such theorists, but rather reflects the "size" of the so-called economic way of thinking, which has become our dominant mode of understanding and outstrips the confines of any single discipline. The basis of this claim will become clearer following the exploration of the various forms of tort theorizing, and discussion of their implications. *See infra* parts IV, V.

30. In contrast, promising *without* the expectation of affecting the events at issue produces another kind of contract, based on divergent predictions of their eventuation. This is the basis of a betting contract, or a contract of insurance. As will be seen when the discussion turns to those theories of tort that rely explicitly on insurance as the model for dealing with torts, that model too is premised on control, though in ways different than for the Coasian economists. *See infra* text accompanying notes 57-62.

31. Throughout, the control that I suggest lies at the basis of the Coasian economic model is not to be understood as necessarily complete or actual, but rather as modeled and ideal. Yet in this very idealism concerning human action is revealed a distinctive aspect of the way of thinking about the world as a whole that is at issue here.

This prevailing understanding of action as ideally a matter of control, visible in the economic model but not confined there, is of a piece with our understanding of the world at large; that is, it is part of our metaphysics. In the case of the current, "economic" view, as in other historically prominent forms, the metaphysics in question is a variety of Platonism, the metaphysical doctrine which views the ideal, supra-sensible model as the real, and the actual as the imperfect copy. We see this doctrine at work, for instance, in the economic conception of the ideal tort and contract

plain as well, when he contemplates the tort parties negotiating over the enjoined tortious conduct, dividing the benefits and liabilities of the conduct so that they may arrange for it to recur, but to the parties' mutual advantage.[32] This supposed control over tortious events, inherent in the ideal of their negotiability, is another instance of the prevailing thought that those events are properly subjected to the will.

The ideal subjection of tortious events to will and control also appears in still another aspect of the theory, its reliance on deterrence. The Coasian economic model conceives of the purpose and justification of tort law as lying in its capacity to deter certain actions—specifically, those for which the harmful effects, or "social costs," discounted in advance by the probability of their occurrence, exceed the beneficial effects, or gains. In charging the social cost of accidents to the tortious activity, tort law employs the incentive effects of these costs to elicit an efficient rate of accident-causing behavior.[33] In order for *deterrence* to serve as the central purpose and justification on this account of tort law, however, the actions and events with which it deals must be regarded as *deterrable*, as ideally capable of being influenced by rewards or penalties—in short, as choices rather than fortuities. Action, on the economic account, is regarded as deliberative, as involving selection from a schedule of alternative actions matched with their concomitant costs and benefits; tortious action is regarded no differently. Only on the basis of such an ideally available selection can deterrence—the deliberate manipulation of costs and incentives so as to affect the choice of action—make any sense as a rationale for tort law. And this model of action as calculative choice again presents an ideal of control, in the ability to make selections from among the array that conform with the preferences of the actor,[34] and in the sheer assumed ability to select actions, with their consequences, and so to control the eventuation of those

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parties as free-floating and disembedded, properly abstracted from their messy, actual, particular lives and limitations, and in the treatment of transaction costs (the burden of actually dealing with each other) as an impurity, excised from the ideal theory which they are seen to impede. The court's role in approximating the contract that the parties would have reached but for these costs reflects the theory's reference to that purer state in which they are absent as the ideal model. All of these are aspects of Platonism. (It should be noted that it is Platon*ism* which we see at work here, not necessarily to be identified with Plato and his writings.) *See* 1 MARTIN HEIDEGGER, NIETZSCHE: THE WILL TO POWER AS ART, 151, 204-05 (David F. Krell trans., 1979) (1961).

It is the ideal that matters as "real" on any Platonist account. And so, here, it is the ideal of control, not its actuality, that matters to the theory and provides its ground.

32. *See* Coase, *supra* note 4, at 7; *supra* text accompanying notes 6-7, 14.

33. *See supra* text accompanying notes 7 and 15.

34. Indeed, this conformity of the choice of action with the actor's preferences is widely thought to constitute his "freedom" and "autonomy," *see, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962). *But see* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 108-12 (H.J. Paton trans., 3d ed. 1964) (1785) (governance by the objects of one's desires constitutes not autonomy but heteronomy). *Cf. infra* note 76.

consequences. In imagining torts as actions ideally selectable through deliberation in just this way, the deterrence model implicitly views tortious events as ideally subject to the actor's will and control.

In sum, the Coasian model of tort law can be seen to rely on ideal premises of will and control, appearing in at least three ways: (1) in the conception of the parties to a tort as free-floating centers of will, unbound and unencumbered; (2) in the understanding of the tort situation as a matter for negotiation, in which is implicit a promise of control of costs which can only be made rationally on the basis of an expectation of control of the events that produce them; and (3) in the offering of deterrence as the ground and justification of tort law. This foundation in will of the Coasian economic account of tort law will reappear, in very different form, at the basis of the compensation theories of tort law to be considered next, and will provide a way into thinking about the enterprise of tort theorizing as a whole after its varieties have been explored.

B. Theory and Programs of Tort Compensation

As noted earlier, there exists an alternative set of theories and programs for the rationalization of tort law that have an ultimately economic foundation but do not rely upon the Coasian account just considered. These programs begin from the understanding that the purpose of tort law lies in its ability to provide compensation for loss, rather than in the deterrence of tortious action. Perceiving inefficiency, inconsistency and arbitrariness in the practical operation of the tort system understood as a system of compensation, writers in this group argue for that system's reform or, failing that, for its replacement by alternative systems of compensation. For the most part, the writings in this group are explicitly driven by practical concerns, rather than by acknowledged theory. For the theoretical background of these programs, then, it is necessary to turn to the strand of the economic treatment of tort law mentioned earlier as alternative to the Coasian, one that finds the source and justification of tort law to reside not (or not only) in deterrence, but in compensation for losses, achieved through their social distribution.

1. The Calabresian Account of Tort Law

This alternative strand of economic thinking about torts can be traced to another seminal article from the early 1960s, Guido Calabresi's *Some Thoughts on Risk Distribution and the Law of Torts*,[35] more fully developed in his 1970 book, *The Costs of Accidents*.[36] As for Coase, Calabresi's approach starts

35. Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L. J. 499 (1961).

36. CALABRESI, *supra* note 12.

from the understanding of the purpose of tort law as the minimization of accident costs, yet it differs from the Coasian, bargaining-focused account in that, from the outset, it separates conceptually those costs susceptible to such bargaining approaches from those more efficiently dealt with by spreading, as in a system of social insurance. Dean Calabresi calls the former—the costs of avoiding accidents—matters of primary accident cost avoidance; it is these that exhaust the concerns of tort law, according to the Coase-influenced scholars such as Judge Posner. The latter—the economic costs of social dislocation occasioned by accidents—Calabresi terms matters of secondary accident cost avoidance. Calabresi identifies a third type of cost as the "administrative costs" of either or any system of cost minimization or distribution; Professor Coase's transaction, or bargaining, costs are of this type. Administrative costs affect the choice between the systems of dealing with accident costs, both primary and secondary. Calabresi understands the proper end of tort law to be a joint minimum of the three types of costs, an end best satisfied by a mixed system in which the goals of deterrence and of compensation, and their corresponding mechanisms, are each employed only within appropriate, that is, efficient contexts.

As on the Coasian model, Calabresi's first category of accident costs is dealt with through a market approach[37] that assigns accident costs to the activity that generated them, which is then able to engage in bargaining, pricing, or prevention as costs and benefits dictate. This system for minimizing the social costs of accidents thus imposes a financial link, and presupposes a causal link, between those activities and the accident costs charged to them—though not, Calabresi recognizes, between these charges and the victims; fines are equivalent to tort damages in achieving deterrence. In contrast, Calabresi's second approach is concerned only with spreading those costs that, *ex hypothesi*, cannot efficiently be so deterred or internalized; it therefore requires no such link. Rather, the payor can be anyone (as, for example, a manufacturer or distributor in the case of "freak" or unforeseeable accidents), everyone (as with a governmental system of social insurance), a group at large (as with conventional insurance), or the wealthy (the "deep pocket" approach). The

37. Although Calabresi is at pains to distinguish and compare a pure market method (which he calls "general deterrence"), which charges the costs of accidents and allows for their bargained rationalization, from a collective prohibition (which he calls "specific deterrence"), he understands that, unless drastically and completely enforced—an empirical and political improbability—the latter tends to become the former. *See* CALABRESI, *supra* note 12, chs. 6, 8. He does not address the deeper reasons for this collapse, which reflects the impossibility of understanding prohibitions as obligatory, rather than as matters for bargaining or calculation, on the economic view. *See supra* note 15 and *supra* text accompanying note 23; *cf.* F.S.C. Northrup, *The Epistemology of Legal Judgments*, 58 NW. U. L. REV. 732 (1964) (suggesting that the view of law as subject to bargaining is grounded in an epistemology, called "radical empirical," which cannot support the existence of obligatory principles).

choice of payor, Calabresi stresses, is a *policy* question; its resolution rests on a variety of considerations, including political concerns and administrative costs, as well as questions of "justice."[38]

Although it appears that Dean Calabresi never envisioned this area of secondary accident cost distribution to be primary—still less exclusive—his views on loss-spreading have been highly influential, and can be seen to have traveled beyond this secondary role and to constitute a primary rationale of such developments in tort scholarship as strict and enterprise liability theory and blanket compensation proposals. Like the theorists of these related developments, Calabresi understands loss-spreading to be a matter of social welfare from which deterrence considerations are absent, and the choice of loss-bearer to be a policy question to be answered by looking to, *inter alia*, the administrative costs of various possible choices. And, like them, he understands the central mechanism of this aspect of tort law to be the distribution of losses accomplished by insurance, especially broad public programs of social insurance. In contrast, those adhering to the Coasian bargain as the model for tort law see insurance as simply another instance of contract, in which premiums are tailored closely to risk lest deterrence be undermined, rather than as an undertaking *fundamentally* concerned with pooling and spreading losses, in which contract may be useful but is not the source and limit of the insurance idea.

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38. Within Calabresi's system the claims of justice amount to a kind of limiting factor preventing a move to otherwise desirable cost-spreading or minimizing mechanisms, rather than a matter integral to systems of tort law and their justification. CALABRESI, *supra* note 12, at 25. Thus claims of justice advanced in favor of the existing fault system of tort law appear as residual and irrational sentiment, interfering with the rationalization of the tort system Calabresi proposes. *See id.*, ch. 16. And when they are not thus marginalized, the claims of justice are converted into the compensation view's own terms, by the equation of justice with consistency across categories of wrongs or harms dealt with by the law. *See, e.g., id.* at 306. In seeing them thus we are already operating from within the aggregative framework that is native to the economic view, and indispensable to the rationalization scheme Calabresi details, but which is generally rejected by the moral tort theorists who would defend the tort system from such reform. *See infra* text accompanying notes 66-68. Moreover, on this approach we are already treating law, and systems of law, as tools to be preferred or not depending on their efficacy in delivering us to our policy goals. *See* CALABRESI, *supra* note 12, at 14-15 (arguing "the need for a theoretical foundation of accident law" and immediately identifying this with "what we want a system of accident law to accomplish" with respect to various of "our goals").

The point is not that justice and law cannot be interpreted thus, but, on the contrary, that these interpretations follow from the framework of understanding within which Calabresi works (as do most modern legal scholars, as it belongs to modern thought generally), and that it excludes alternative understandings. This totalizing quality—the tendency and ability to see all doctrine, phenomena, and concerns in terms assimilable to the framework—as well as the concomitant exclusion of whatever is not thus assimilable, are marks not of the "power" of the conceptual framework understood as our tool, but rather of its metaphysical nature. *See* HEIDEGGER, *supra* note 3, at 24-25. *See infra* part V.

Moreover, in Calabresi can already be seen the recognition that a regime of loss-spreading renders superfluous not only the financial link between accident-generating activities and accident costs, but also the causal link on which that liability is traditionally grounded.[39] Theorists of strict and enterprise liability and blanket compensation schemes also implicitly recognize that, insofar as their concern is the distribution of costs, their theories do not turn on determining the physical cause of the accident.[40] Rather, insofar as they regard causal responsibility as unknowable or unimportant, these compensation programs treat the losses at issue like adventitious mishaps, subject not to deterrence but to relief. These later theorists can be seen to totalize Calabresi's analysis of loss-spreading, understanding the spreading of the economic dislocations arising from accidents as the overarching purpose of the legal response to accidents, whereas to Calabresi this remains secondary to deterrence, accident avoidance, and internalization of costs.

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39. Indeed, Calabresi professes to be agnostic about causation in general, *see* CALABRESI, *supra* note 12, at 6-7 n.8; Calabresi, *supra* note 13—that is, in connection with primary accident cost avoidance as well—apparently perceiving that the economic view of tort law can dispense with an understanding of physical causation in connection with accidents, because it is not the occurrence of accidents that that view is concerned with in any event, but rather their cost. *See* CALABRESI, *supra* note 12, at 23. The cheapest cost-avoider or loss-spreader, in other words, may or may not be the party best able to avoid or otherwise affect the occurrence of the accident itself; the coincidence of these parties is an empirical contingency.

Throughout the economic undertaking, then, causation is unseated in favor of cost analysis. Yet it remains, unquestioned, at the heart of that analysis, in the understanding of costs as affecting action, and of action as affecting costs. This is no small remainder: The whole economic theoretical enterprise is built on a view of behavior as the effect of economic causes. At other, more peripheral points in the theory the dismissal of causation is seen as giving the theory greater elegance and sophistication. *See, e.g.*, COOTER & ULEN, *supra* note 13, at 343 (quoting Bertrand Russell on the progressive displacement of causation by mathematics); *cf.* MARTIN HEIDEGGER, SCHELLING'S TREATISE ON THE ESSENCE OF HUMAN FREEDOM 30-31 (Joan Stambaugh trans., 1985) (1971). Yet the causal faith that is *foundational* to economic theory is seldom admitted to serious reflection by economic legal theorists. *See, e.g.*, LANDES & POSNER, *supra* note 4, at 230 (dismissing the question of this central causal faith as "unproblematic, uncontroversial . . . and requir[ing] no explicit consideration").

As already suggested, *see supra* note 10, this stopping-short of considering the underlying place of causation within economic thinking arises not from its supposed absence, but rather from its pervasiveness. From where we stand, we see no need to invoke doctrines of causation in particular instances, and so confidently dismiss them as "metaphysical." Yet we stand firmly upon the rock of effectiveness in doing so, dismissing what we cannot prove to exist—that is, what we cannot produce as an effect of the laws of physics and of logic, and thereby compel assent to. Subjecting truth to the criterion of effectiveness in this way, our metaphysics of efficacy renders other metaphysical notions expendable and itself invisible.

40. *See, e.g.*, STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS AND BUSINESS 127-52 (1989) (extending coverage to all misfortune out of a sense of arbitrariness at its limitation by cause). *See infra* text accompanying notes 49-55.

In sum, one totalizing view, that of the hypothetical Coasian bargain arranging in advance for the distribution of gains and losses, including accident losses, is exchanged for another, seemingly diametric view of accidents as adventitious mishaps, the costs of which are to be spread after the fact.[41] Calabresi is the bridge between these views: Perceiving each extreme to be empirically false—that is, perceiving that the problem of accident costs cannot be managed wholly by deterrence nor wholly by spreading (or rather, efficiently so, which on the economic view is what matters[42])—Calabresi attempted to combine into a mixed system the legal approaches associated with each view of accidents (to Calabresi, each a "type" of accident cost). Such a mixture is inherently unstable, however, because it is in the nature of each of the divergent ways of understanding accidents that each, once adopted, tends to consume the field; their empirical falseness is in each case overcome by their apparent theoretical power, and that power in turn depends on and promotes their mutual exclusivity. The reasons for this, having to do with our deep-seated understandings of will and action, will be explored in later discussion, after the programmatic solutions and the varieties of tort theory have been laid out. For now, it is enough to note that the programs of pure compensation (as well as strict and enterprise liability when these are understood as achieving compensation rather than internalization) find theoretical expression in the Calabresian analysis of loss-spreading, and to turn to consider those programs directly.

2. Administrative Programs for Compensation of Tort Losses

Spurred both by empirical doubts as to the deterrability of accidents on the Coasian model of tort law, and by concerns about its high administrative costs in practice, a group of tort theorists has moved in recent years to supplant the tort system, in part or in whole, with systems of pure compensation. Although the scope, substantive target, and practical details of the proposed programs vary, these theorists (who include, most prominently, Jeffrey O'Connell[43] and

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41. The first of these views of tortious events was explored in the previous section, with an eye toward bringing out the character of its understanding of tortious action, which centers on calculation and control. *See supra* text accompanying notes 28-34. The latter view, which partakes of the opposite character, will be explored in greater depth at the end of this section. *See infra* text accompanying notes 53-55. Although the opposition of these views is real, they are both grounded, ultimately, in a single way of understanding law, legal justification, and events in the world. *See infra* text accompanying notes 57-65.

42. *See, e.g.*, CALABRESI, *supra* note 12, at 27-30, 37, 95-113, 134.

43. *See, e.g.*, ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965); INSTITUTE OF CONTINUING LEGAL EDUCATION, PROTECTION FOR THE TRAFFIC VICTIM: THE KEETON-O'CONNELL PLAN AND ITS CRITICS (1967).

Stephen Sugarman[44]) share two commitments: a pragmatic concern with the costs, efficacy, and equity of the existing tort system and, implicitly, a view of law and legal institutions that accommodates the administrative alternatives they propose.

Such systems dispense with the adjudication of tort liability based on fault (and so are sometimes called "no-fault"), in favor of the administrative disbursement of funds to pay for the damage suffered. They thus resemble existing systems of loss administration such as workers' compensation and those portions of the social security program in which payments are triggered by losses such as the incurring of a disability. Like those systems, the proposed compensation systems address principally such determinable out-of-pocket losses as medical expenses and lost earnings. Like them, the proposed programs treat compensation as a matter of social welfare, for which the appropriate mechanism is a system of social insurance. And like them, the proposed programs do not depend on causal fault or will to trigger their operations.

Within current tort doctrine, too, there exists a developmental strand that does not depend on fault or control to trigger liability; what is therefore named "strict liability" can in this way be seen as a precursor to the compensation proposals. Strict liability, in its prominent modern form in which the cost of injuries arising from defective manufactured goods is recoverable despite the manufacturer's precautionary measures, is justified expressly on the ground of policy. The defendant manufacturer is no longer charged with liability by virtue of his actions, as it is manifest that he did not will the harm his actions caused; rather, he is assigned liability simply because he is its useful conduit, as he is in a position to spread the losses arising from the use of his product among its users in the form of increased costs.[45]

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44. *See, e.g.*, Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV 559 (1985) [hereinafter Sugarman, *Doing Away with Tort Law*]; Stephen D. Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795 (1987); SUGARMAN, *supra* note 40.

45. Though this rationale drives the seminal cases in strict liability, *see, e.g.*, Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring), it has proven volatile, as judicial attention has come to be paid as well to the possibility of defendant's avoiding the harm, as in the "state-of-the-art" defense and the requirement of a product defect, *cf.* Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981). It seems that, as the courts took up a doctrine that found liability without regard to control, questions regarding its justifiability reasserted themselves. The same apprehensions appear in criticism of strict liability as "unfair," as having excessive deterrence effects, *see, e.g.*, HUBER, *supra* note 1, or as in need of limitation (though economic theory holds that, at least under certain information conditions, strict liability and negligence will meet with precisely the same efficiency limitations), as well as in judicial and legislative developments that respond to these apprehensions. That such concern with willed action should reappear within a doctrine expressly originating from the opposite concerns—the fortuity of misfortune, and the distribution of its costs—reflects a conceptual oscillation between the two ways of thinking about accidents, an oscillation that is driven, finally,

Because this understanding of liability is divorced from responsibility grounded in will and control, it is but a short step from achieving a rationalized distribution of the costs of injury through a system of strict liability, to establishing such an administrative system directly, bypassing tort law and its concern with adjudicating the facts of causation and the parties' responsibility. Recognizing that such facts are superfluous to a goal of administering payment for misfortune, the compensation theorists have proposed precisely that route; for the most thoroughgoing and consistent of these, the origin of the misfortune is not relevant to eligibility for payment. Despite claims to the contrary, such systems do not present a radical break with principles of tort law but only a consistent extension of those forming the original rationale of strict liability, in which the defendant's will and the possibility of his having acted otherwise are similarly peripheral concerns. Indeed, on that rationale even the physical genesis of the injury from the use of a given product is less a central inquiry than simply an administrative hook, a means of sorting injured plaintiffs with the companies that will process the costs of their injuries.[46] Once, as under the original theory of strict liability, efficient administration of payment for injuries is seen as the object of tort law, rather than fault-finding or deterrence, it follows as a matter of course that tort law should come to be thought a cumbersome and archaic means of reaching that object, and that proposals should surface arguing for its replacement with purely administrative payment systems such as the compensation theorists propose.

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by their unified metaphysical origin and by the justificatory problem that they are called upon to answer. *See supra* note 41; *infra* text accompanying notes 131-32; *infra* part V.

Despite the intermingling of these rationales in practice, these ways of thinking remain distinct: On the Coasian economic account, "strict liability" is a name for the legal standard that, though prescribed by the court, in effect leaves to the defendant the calculation to determine the effective level of care. *See supra* text accompanying notes 17-18. As discussed, this understanding transforms the strict liability standard of care such that it is no longer strict, but negotiable; no longer concerns liability (that is, being bound) but rather cost; and no longer prescribes a standard of conduct, but rather a means for minimizing exposure. *See supra* notes 15, 23-24 and accompanying text. The compensation view retains the economic account of liability (strict or otherwise) as the morally indifferent disposition of a cost to be rationalized. But it departs from the Coasian account in stressing the independence of the compensatory rationale of strict liability from determinations of, and implicitly from the exercise of, causal fault and will. This independence does not appear in the Coasian account because that account views all torts, and all actions, on the calculative model in which preference, and so will, are central. *See supra* text accompanying notes 28-34.

46. This sorting function can be seen at work in the *Sindell* case, in which, although individual causation could not be reliably determined among them, defendant pharmaceutical companies were held liable for damages arising from the use of the prescription drug DES in proportion to their market share. Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980). Though a controversial result, its rationale, excusing plaintiffs from the need to prove individual causation, is merely an extension of ways of thinking latent in the compensatory rationale for strict liability itself. *See infra* text accompanying notes 49-50.

The proponents of such systems are heirs of the Legal Realists, and of the administrative and regulatory state that Realism helped to justify through its understanding of law as a means of promoting social utility. ("Realism," that metaphysical doctrine which denies the reality of ideas, here operated against the idea of law as an end in itself independent of utility.) Like the Realists and their New Deal political counterparts, the modern proponents of accident compensation systems are self-styled "pragmatic reformers" who seek to ameliorate social conditions by replacing existing law and legal structures with administrative mechanisms for managing those conditions directly. Or, rather, they understand existing law and legal structures as *already* constituting administrative mechanisms imperfectly aimed at social utility, and so in need of and susceptible to the streamlining "correction" they propose.[47] Thus a system of compensation appears to be an adequate, indeed superior replacement for tort law; no residuum, inaccessible to such rationalization, appears—as it could not, consistent with the premise that law is a matter of social utility and therefore available to such rationalization.

This apparent accessibility of all of law to the rationalizing urge, to streamlining in the name of cost savings, knows only the limits imposed by costs themselves. We can see this in Coase's treatment of transaction costs as a limit on otherwise limitless negotiability, and in Calabresi's determination to mix modes of rationalization based on their relative efficiency and administrative costs. This "limitation" is, then, no limit at all on the underlying rationale: the idea that cost considerations govern all law and all action, and that nothing—that is, nothing real—impedes or is unassimilable to this model. Thus, for example, on Calabresi's account, justice is seen either as archaic and irrational in impeding resort to an otherwise efficient reform, and therefore as illusory and destined to evaporate; or it is seen as itself a matter of goals to be met and of consistency across categories viewed as equivalent, and thus as yet another venue for policy determinations, assessments of efficacy, and practical strategy.

Despite this seemingly limitless power of rationalization to reach all of law and action, or perhaps because its very limitlessness is vaguely sensed as troubling, segmentation is a recurring theme in the compensation literature. Pockets of liability—only automobile collision cases, for example, or only

47. They are not alone in this understanding, as it is the dominant view within modern legal thought. To the extent that the mechanisms of management employed are those by which incentives are manipulated, the Coasians, too, are in accord. Indeed, in a variation on Nixon's famous remark about Keynesianism, it has been suggested that "We are all realists now," *see* John H. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience,* 28 BUFF. L. REV. 459, 460 (1979). The deeper truth of this observation lies in the pervasiveness of the distinctive modern view of law and action as a matter of the manipulation of mechanisms as a means to achieving goals, *see infra* text accompanying notes 64-66—a view which appears, *inter alia*, in Legal Realism.

medical malpractice cases—are proposed to be removed from the tort system and subjected to the compensation regime.[48] Similarly, Calabresi offered the compensatory model as only a partial solution to the problem of accident costs.

Yet the justification for such segmentation is elusive. Given the program's justificatory foundation in pragmatic utility, any such division is inherently contingent and temporary, itself dependent on empirically variable assessments of utility. Moreover, as can be seen from the case of workers' compensation—the original segmented compensatory program—segmentation creates instability, for reasons transparent to economists: Because the amounts awarded under workers' compensation, as under the recent compensation proposals, are less than damages awardable under the tort litigation system, there is an incentive to evade workers' compensation and sue in tort whenever possible, as when a claim can be made for strict products liability in connection with a workplace injury. This evasion, though lamented by commentators, is an inevitable byproduct of a system that is both segmented and understood to be driven by cost (incentive) considerations, and is "resolved" only by an expansionary dynamic that is hostile to segmentation.[49] And, as noted, insofar as the segmentation of tort law is itself driven by cost concerns, it reflects, rather than challenges or limits, the underlying theory that *all* of law is available and properly employed to the end of minimizing and managing costs; the law is dissected and rearranged not out of any sense of the theory's limitations but, to the contrary, out of its dominance.

The theory of the compensatory programs provides no grounds, then, for limiting their reach. On the contrary, it provides a built-in dynamic toward expansion, not only in order to limit opportunities for evasion and other sources of inefficiency, but also because the compensatory rationale itself calls into question as arbitrary any limitations on the range of covered events. Hence the issue arises—inevitably, given the premises of the programs—as to how it can be justified to limit compensation to victims of only certain kinds of accidents, or indeed to accidents at all, that is, to those events seen to arise from discernible human causes such as faulty products and now subject to the tort law. Rather, it is asked, should not all misfortune be entitled to compensation on the same grounds? Such arguments bring into question distinctions of

48. *See, e.g.*, KEETON & O'CONNELL, *supra* note 43.

49. Because these incentive effects are seen to attach to every payment, *see supra* note 26, and every positive or negative condition of suit under one program or the other, they are eliminable only by rendering the two programs identical, collapsing the distinction between them. There is thus an inherent dynamic of expansion that belongs not to one or the other program (as it does not matter which program is assimilated to the other, each being expendable in the name of rationalization), but to rationalization itself and to the way of thinking that views all law and action as a matter of costs and incentives.

compensatory entitlement drawn, for example, between congenital or mysterious deformities, and those traceable to negligent drug testing.[50] The compensatory rationale, triggered as it is by the fact of harm rather than by the way the harm arose, provides no grounds for distinguishing such cases. Accordingly, the most thoroughly worked-out of the compensation proposals—titled, significantly, *Doing Away With Personal Injury Law* and *Doing Away With Tort Law*[51]—are the most sweeping.

Yet the idea of universal compensation, though it avoids the inconsistency presented by segmentation, raises other problems. As the grounds for distinguishing among misfortunes to be compensated are seen to evaporate, so too does the sense in which the contemplated payments constitute *compensation*, as distinct from social welfare maintenance in general. Since any misfortune would confer an entitlement to payment under a universal system, "misfortune" itself comes to appear as simply any shortfall from some posited baseline of well-being, such as minimum income, the baseline already widely employed by other social welfare programs. The distinctiveness of tortious injury as a ground of compensation—its connection to the action of a tortfeasor—is lost on this view and, as reasonless, appears dispensable, an antique superstition. Finally, tort law itself appears superfluous to the compensation orientation, and so it is proposed that we "do away with" it. In this way the dynamic of the idea of compensation for tortious injury (understood as misfortune) can be seen to overcome its original object and boundaries.

3. The Conception of Tortious Events Underlying the Theory and Programs of Tort Compensation

We are now in a position to highlight some of the distinctive elements of the compensation view of torts, and to compare them with those of the Coasian economic account offered in the previous section. As before, these elements are implicit understandings of action and events that appear in the theoretical and programmatic treatment and allow it to take the shape that it does, rather than explicit tenets voiced by the theorists in question.

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50. *See, e.g.*, SUGARMAN, *supra* note 40; Trebilcock, *supra* note 1, at 994 (asking "can one ethically defend a system that creates a 'privileged' class of victims of one source of misfortune (accidents) and treats victims of other sources of misfortune (for example, illness, congenital disabilities, or desertion) *that generate similar income deficiencies* much *less generously*?") (emphasis added). Trebilcock's phrasing makes plain that it is from the perspective of economic loss and payment—from, that is, the understanding of all in terms of cost, *see supra* notes 7, 26, 38—that such cases indeed appear indistinguishable.

51. Sugarman, *Doing Away with Tort Law*, *supra* note 44; SUGARMAN, *supra* note 40.

In treating tort losses on the model of losses or shortfalls addressed by existing social welfare programs, the proponents of the compensation proposals treat tort losses as like the misfortunes dealt with by existing programs. Like those other misfortunes, tort losses appear on this model as adventitious mishaps to be spread, rather than willful wrongs to be deterred. The programs' concern is triggered by the fact of loss, not by the nature of its genesis, which is seen as largely arbitrary and unimportant. Accordingly, such programs commonly dispense with the determination of fault, and this abandonment of a traditionally central concern of tort law is the hallmark of the compensation proposals offered to replace it.[52] In this, and in these programs' emphasis on relief rather than on control or deterrence, tortious loss is treated not as the product of a controllable cause that it is worthwhile to pursue, but instead as though its genesis were random.[53]

In this treatment of tortious loss as random, there appears a sense of the events at issue in tort law that is strikingly diametric to that of the Coasian economic account: Whereas on the latter view torts are treated as like any other economic action, that is, as though they were the product of rational choice, a conception importing the promise of ideal control,[54] on the compensation account torts are treated, in contrast, as though they arose from any or no cause, as random, hence as fortuitous, as befalling without the prospect of control. In

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52. Because, however, the lodestar of the compensation programs is effectiveness, rather than theoretical consistency, *see infra* text accompanying notes 57-60, they can and do sometimes appear with an admixture of elements aimed at deterrence or control, such as experience rating for insurance premiums or direct regulation. *See, e.g.*, SUGARMAN, *supra* note 40, at 153-66. *Cf.* Trebilcock, *supra* note 1 (arguing against such a mixture as theoretically indefensible); *infra* text accompanying notes 114-23 (discussing the work of Jules Coleman, which mixes proposals for social payment systems with moral justification for tortfeasor liability). The particular elements of such a program are a matter of indifference, and readily substituted, based on their effectiveness in delivering the perceived end of optimal rationalization. In this sense Calabresi can be seen as a prototype of the compensation programmer, rather than a transitional figure. Nevertheless, as suggested earlier, *see supra* text accompanying notes 47-50, the theoretical foundation of the compensation programs contains an inherent dynamic toward expansiveness and ultimate totalization, as is shown in part by the very accessibility of all of law and theory to the rationalizing drive, rendering them instrumental and so fungible and expendable. Such instrumental substitution and combination of program parts is, then, no counterinstance of this totalizing dynamic, but its further instantiation.

53. As with the Coasian economists' treatment of tortious events as though the product of rational choice, *see supra* note 28, this is not an empirical claim that tortious events "are" random, but rather an observation that on the compensation model they are treated *as though* random, or arising from any or no cause, by virtue of the fact that we become indifferent to their cause. It is not seen to matter any longer who caused the harm, or even (as on the Coasian view) who is able most efficiently to avoid the harm, with its attendant cost. Rather, the only important inquiry now is who or what system is able most effectively to relieve the cost of the harm after the fact, an inquiry that, to an even greater degree than the Coasian search for the cheapest cost-avoider, leaves behind causation of the harm itself as of no moment.

54. *See supra* text accompanying notes 26-34.

a word, the Coasian account presents tortious events as though they were like a deliberate punch in the nose, the compensation account as though they were like lightning, falling from the sky upon its victims.[55]

To the extent that this view of tortious harm as random contributes to the decision to spread tort losses, the objection of the Coasian economists that such spreading will encourage carelessness—the moral hazard objection—is wide of the mark, as it fails to grapple with this sense of randomness but denies it outright.[56] In the face of this apparent randomness, a failure to spread the cost of tort losses would appear to be arbitrary, and inexplicably acquiescent given the Realist understanding that the development of administrative regimes is the proper goal and use of law and the centralized provision of financial supplements the appropriate remedy for loss.

And yet this sense of randomness in connection with the genesis of tortious harms is strikingly transformed when these theories turn to the means of dealing with those harms. Those means—the administrative regimes that figure centrally in the compensation theorists' plans for dealing with tort losses—are not at all random, in the sense of capricious or erratic, but on the contrary highly systematic. By processing large numbers of claims for losses viewed in terms of scheduled dollar amounts and so as similar, these regimes are expected to provide a streamlined way of administering compensation for tort losses, much as for other losses such as unemployment or disability under existing programs. This streamlined administration regularizes and routinizes tort losses such that, owing to the large numbers of claims processed and the methods of rationalization brought to bear upon them, they are rendered patterned and

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55. To be sure, these polar conceptions appear extreme, and as obviously inadequate to capture the experience of accidental torts, which seem to reside "in the middle," neither wholly within our control nor occurring without our participation. Indeed, this quality of accidents, and the consequent failure of either of these polar conceptions to fit them, constitutes the underlying problem for tort theory. *See infra* part V. It is nevertheless these competing and reciprocally inadequate conceptions that emerge from the premises of the respective theories, as revealed in the means they offer for dealing with tortious harm: Deterring it, or treating it as the subject of a bargain, on the one hand, or, seeing its cause as arbitrary and irrelevant, relieving it as an exercise of social welfare on the other. The polar quality of these conceptions, their availability and attractiveness as theoretical starting-points, and their experiential inadequacy are all traceable to the underlying way of thinking which tort law embodies. *See infra* part V.

56. *See supra* note 26 and accompanying text. Significantly, Calabresi's influential work was titled *The Costs of Accidents*, *supra* note 12, whereas Coase, in contrast, wrote of *The Problem of Social Cost*. *See supra* note 4. On the Coasian account there is no room for *accidents*, but only for mistaken calculations. *See* Priest, *supra* note 1; LANDES & POSNER, *supra* note 4, at 295-97 ("unavoidable accidents" are those that it is cost-effective to incur), 72-73 (the economically puzzling persistence of negligence is "explained" by marginal adjustments and errors in calculation).

manageable.[57] In this way, such programs offer the prospect of managing the fortuity of tortious loss—that is, *mastering* it, negating its very fortuitousness. To this end, they promise the security of payment apart from the vagaries of proof of fault, and regularize that payment, and thereby the fortuity of loss, across the relevant population. In this way the apparent randomness or will-lessness of tortious events is tamed and negated, through the systematic exercise of will in the construction and operation of the social compensation mechanism.

Thus control and will are not, finally, absent from the compensation model, as first appears, but are instead "writ large," displaced to the level of social structure and the rationalization of the field of tort as a whole rather than operating at the level of individual rational actors.[58] This shift, from "micro" to "macro" control of torts, is accompanied by a shift in the time frame for the control of torts from *ex ante* to *ex post*: Whereas the Coasian economic model looks to enforce the bargain that the parties would have reached in advance of the tort but for transaction costs, the compensation model looks to rationalize the costs of the tort after the fact. And both of these shifts arise from the deeper dynamic that belongs to the way of thinking that compensation theory embodies.

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57. Thus the programs for handling tortious losses characteristically employ the mechanism of subjecting them to rationalization by statistical methods, which depend upon randomness within actuarial classes, in accordance with the Calabresian idea of insurance. *See supra* text accompanying notes 38-39. Significantly, however, this randomness is stochastic (and so patterned and calculable), which allows the events at issue to be subjected to actuarial rationalization and routinized administration.

"Random" in this actuarial sense is thus very different from its original sense, describing the impetuous rush of a brimming river, *see* SKEAT, *supra* note 24, at 431, and so suggesting that which is overwhelming, beyond pattern and prediction—an occasion for wonder, perhaps, but not for calculation. This is not to deny that, for example, modern chaos theory may well be able to predict the movements of water molecules in a "random" stream, but rather to suggest that our sense of the random is strikingly inverted when it amounts exclusively to such calculability. The same taming occurs in the conversion of uncertainty to probability, as when the indeterminacy of tortious harm is concretized in the numerical probability assigned to its eventuation. *See supra* text accompanying notes 15-17. In fact, however, this apparently greater certainty is only apparent, as it rests on the fallacy of misplaced concreteness that commonly accrues to quantification. Moreover, it achieves this illusory certainty only by eliding the necessary and the possible, which imperils not only free will but our understanding of human being as distinctive from the being of material objects generally. *See* HANNAH ARENDT, THE HUMAN CONDITION 40-45 (1958).

58. As with the apparent evaporation of causation, then, *see supra* text accompanying notes 9-13 & *supra* notes 10 & 39, the search for fault does not truly vanish but is transformed from the search for the responsible party into the search for the responsible structure, the systematic program that will have the desired effect, now understood to be the efficient administration of payment for losses. Once again, effectiveness prevails as the ground of the theory, though not in the form original to tort law. *Cf. supra* notes 10 & 26. This protean character of the theory and aims of tort law arises from the deeper constancy of the guiding demands of effectiveness.

That way of thinking is one increasingly concerned with effects, and it is in tracing the theory's concern with effects that we can glimpse the underlying dynamic: The doctrinal impetus toward the adoption of compensation programs in place of tort law emerges from the understanding of compensation as the aim of tort law and the perception that the compensation programs offer greater efficiency in delivering on that aim—in short, from seeing compensation and efficiency as the twin desiderata of any system for dealing with tort losses. These are, moreover, closely related: Efficiency is the virtue of a means for achieving an end which minimizes costs relative to other available means. Since costs are economic effects of actions,[59] efficiency is a concern with second-order effects, that is, with the economic effects of the means used to reach the end, or effect, ultimately sought. As that end, compensation is itself a concern with effects, namely, with the relief of the costs, or economic effects, of the tort. Those costs, while falling where they will (this is the "random" element of the compensation theory, absent from the Coasian economic account), are not to be permitted to remain, but are to be relieved—that is, undone *as* effects.

There is, then, a progressive, triple displacement of the object of tort law away from the tortious action itself toward its effects. The path of tort theorizing—its movement from concern with fault, to concern with deterrence, bargaining, and internalization of the costs of torts, to concern with compensation for those costs—can be seen as moving ever further along a dimension of concern with effects: First, tort law's concern with fault is a concern with the cause of the harm, which is thus the effect of the fault. The Coasian economic account, the next stage in tort theorizing, is concerned with the cost of the harm (its effect, and so the effect of an effect), and seeks to control it by looking to the effect of that cost on action, which is presumed to be determined by such cost effects. Compensation theory, the third stage of this progression, is concerned with the effect—*as* effect, that is, as remaining in effect—of the cost (effect) of the harm, and seeks to relieve that cost and so to deprive it of effect. Predictably, the final point of interest for the compensation theorists is overall efficiency, the cost of the systems they propose—that is, the effect of the system they devise for undoing the effect of the effect (that is, the cost) of the harm, itself the effect of the tortious action. Plainly, it is the

59. Seen as determinative of action, costs are also causes. Action and its costs are thus seen as mutually causal, alternating the roles of cause and effect along a causal spiral. Again, it is the ongoing demand of effectiveness that yields this view of action as, like all else, a matter of cause and effect—although, properly speaking, "action" viewed thus is not action but behavior, *see* ARENDT, *supra* note 57, at 41-45. That behavior comes in this way to dominate the understanding of action is of a piece with the expansionary dynamic endemic to the metaphysics such a conception of action embodies. *See supra* text accompanying notes 47-52, *infra* part V.

ongoing demand of effectiveness that is driving this theoretical movement.[60]

In sum, the compensation model undertakes to exercise control over the effects of tortious events in a way that can be seen as more complete and more radical—but not fundamentally different—than on the Coasian economic model. Despite the apparent abandonment of causal thinking in the dropping of the search for fault, the compensation model actually presents a renewed focus on effect, and on the undoing of effect, that intensifies rather than relaxes the search for effectiveness, the index of cause. In addition, the model substitutes the causal efficacy of the social programs it proposes, and finally of the body politic in instituting them, for that of individual tortfeasors, and so presents a more systematic and thoroughgoing exercise of control brought to bear upon the effects of tortious events.

Moreover, in endeavoring to provide compensation for the economic loss arising from torts, the compensation model seeks to relieve the effect of that loss, to lift it from remaining in effect as a loss. Because, on this account, it is having effects that matter, that count as real, to "undo" the effect of the loss is to deprive the loss of reality.[61] To "undo" the loss in this way is to seek to

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60. Effectiveness, which frames the inquiry for tort law, can thus be seen to propel the theoretical developments within it as well. This overriding concern with effectiveness is the mark of our underlying metaphysics, which revolves around will: Effectiveness can become the exclusive concern of a theoretical system, or of the generally prevailing ways of thinking of which it is a part, only when being (the "truly real") is seen to consist in the causing of effects. The power to bring into being is the creative power of the will; as effectiveness itself, it is will that thus becomes the standard for what counts as in being. This understanding of will as the real is familiar from Nietzsche, whose name for it, will to power—that is, will *as* effective, *as* constituting the world—captures its metaphysical nature.

Although effects are, then, merely the manifestations of will, and so dependent upon it for their existence, they are peculiarly necessary nevertheless as evidencing the will, for in the controlling of effects lies the prospect of assurance that the will that does so is effective, and so itself in being. The endless chasing-down of effects as in tort theory is a result.

This too-abbreviated account of the metaphysics of will will be explored at greater length following the elaboration of the various tort theories in which it appears. *See infra* part V. Here, the aim is merely to point to the deeper source of the otherwise puzzling persistence of effectiveness in driving tort theory.

61. Indeed, some theorists speak of "annulling" tort losses—that is, bringing them to nothing, to not-being. *See* Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 429, 435, 440-42, *passim* (1992) [hereinafter Coleman, *Mixed Conception*]. (A version of this article appears as Chapter 16 of JULES L. COLEMAN, RISKS AND WRONGS (1992) [hereinafter COLEMAN, RISKS AND WRONGS]). Within a metaphysics of will, to deprive a putative being of effect is indeed to deprive it of being. *See supra* note 60; *infra* text accompanying notes 117-23, 175-78.

While, on the Coasian economic view, the aim appears similar—to provide "perfect" compensation, or compensation that would render a party's circumstances financially equivalent to those preceding the injury, and in theory leaving him indifferent between receiving compensation and forgoing the injury—this is still phrased in terms of the party's preference for either of two

render it as never having happened, and so to assert control over time as well as harm. Thus the movement from the *ex ante* standpoint of the deterrence model to the *ex post* compensation model represents no relinquishment of control, but rather an attempt to exert control over the past rather than only the future.[62]

C. *The Fundamental Affinity of the Coasian and Calabresian Accounts of Tort Law*

These two schools of tort theorizing are, finally, very closely allied. Both understand the purpose of tort law to lie in its management of the costs of accidents. Both reflect the desire to master tortious harms by rationalizing them; only the means of that rationalization differ, as it is in the nature of means to do. Both, accordingly, share a number of the tools of rationalization, including treating liability as a cost and aggregating the occurrence of tortious events so as to subject them to probabilistic methods that obscure their adventitious quality. And both, aiming to rationalize tortious harms, find that their theories have no need or place for explicit concern with the harm's causation, historically a principal focus of inquiry under the law of torts. The "evaporation" of causation within each is, however, only apparent: Causation, as a mode of relatedness, actually grows to such importance and scope that it becomes the "normal case," the exclusive understanding of the relations among ourselves and between ourselves and things.[63] This general understanding of cause becomes so dominant that it disappears; against it, only the special case appears salient, and dispensable. As with water turning to mist, however, what evaporates continues to surround us, imperceptibly, and all the more thoroughly.

Moreover, both theoretical schools understand the justification of tort law in the same way, though they draw discrepant conclusions as to whether that justification is met. The divergent policy recommendations of these schools of theory stem from an empirical dispute: whether the deterrence thought to be provided by tort law operates as the Coasian economists surmise, or whether this effect has been overestimated to the detriment of rational administration of the costs of injury, as the compensation theorists hold. The compensation theorists are willing to abolish tort law in part because they doubt its deterrent

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states, not yet theoretically conflated.

62. As Nietzsche reveals, the pastness of the past presents the ultimate frustration for the will, and so to subject the past to the will—by undoing it (willing it undone) or, for Nietzsche, by willing it done—is the will's ultimate aim and revenge. *See* FRIEDRICH NIETZSCHE, THUS SPOKE ZARATHUSTRA 161-62 (R.J. Hollingdale trans., 1961) (1892); FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 68 (Walter Kaufmann trans., 1966) (1886) [hereinafter NIETZSCHE, BEYOND GOOD AND EVIL].

63. *See supra* note 10 and accompanying text; *cf. supra* notes 15, 21, 26, 59, & 60.

effect.[64] In making this empirical claim they implicitly agree with the Coasian economists that such an effect would be justificatory, should it exist; since it does not, tort law, lacking justification, is fit for abolition. Their affirmative claim is that the social compensation systems they propose provide a superior means of rationalizing the cost of tortious harms. In resisting this claim by raising the moral hazard objection, the Coasian economists, similarly, dispute the empirical efficacy of these proposals but not their justificatory basis in rationalization; rather, they simply claim that that rationalization would be overbalanced in fact by an increase in undeterred tortious conduct. In sum, whether phrased in terms of deterrence and bargaining, or of social insurance, the agreed aim is the rationalization of the cost of accidents.

These two schools, separated by disagreements which are empirical and contingent, are thus fundamentally allied with respect to the rationalizing aim of tort law. This unity in turn reflects a shared, unarticulated view of law and of tortious events, according to which such events are the effects, whether intended or fortuitous, of action. Seen as intended, these effects are to be internalized, bargained over, or deterred; seen as fortuitous, they are to be relieved and distributed. All are dealt with by our aiming to control these effects and subject them to our will, whether *ex ante* through deterrence or *ex post* through rationalizing their cost. In treating them under these legal regimes, we thus bring our will to bear upon these events, creating another layer of effects with respect to them—the reduction of tortious harm to efficient levels, or the annulment, through compensation, of its losses.

In doing so, we understand law to be available for our use in achieving these effects, and thus to be—like the actions and structure of torts on which it is brought to bear—subject to our devising. Thus our understandings of law, and of the actions and events we wish to control through its use, reflect the same instrumental orientation. As both the Coasian and the compensation accounts reveal, on this understanding, tort and all law is seen as properly manipulable in response to cost concerns and other empirical effects, an expendable instrument with which to administer incentives and implement policy choices. That law is ours to "do away with," as compensation theorists recommend, becomes the unexceptionable conclusion to the rationalizing drive. The Coasian economists, too, are amenable in principle to this annihilation of law, since their preservation of the tort system relies on a ground that is empirical, and so contingent, and which understands the law's continued existence to depend upon its instrumental satisfaction of the goal of efficiency. Indeed, in regarding law in this way, these schools already understand the law as nothing other than such

64. *See* SUGARMAN, *supra* note 40, at 4-34 (doubting empirical effectiveness of tort law in achieving safety through deterrence); *cf. id.* at 153-66 (endorsing direct safety regulation though questioning its deterrent efficacy); Englard, *supra* note 1, at 69.

an expendable instrument, and so, in any sense other than this, as already annihilated.

Significantly, both these theories "of tort law" actually leave tort law behind in their efforts to explain or rationalize it. On the Coasian view, where tort law is seen as a matter of and for bargaining, causation loses its sense and specificity, and the tort standards of conduct, emptied of content, are no longer either distinctive (as they no longer appear distinct from each other, or from economic rationality) or meaningful, *as* standards of conduct, as obligatory. On the compensation view, where tort law is seen as a mechanism for the spreading of losses, the tort system comes to appear quaint and outmoded, fit to be fragmented or abolished in order to further the rationalization of the costs of accidents.

This evaporation of tort law—its appearance as obsolete, and so fit for abolition—and the evaporation of the obligatoriness of law, are not simply odd phenomena that happen to accompany these doctrinal developments, but are of the essence of those developments, which are founded upon the drive to rationalize tortious harms. The rationalizing drive displaces the traditional relations and concerns of tort law because it seeks a different end, one in the light of which they are expendable. The "end" of rationalization is, however, a peculiar one in that it presents no goal or state to be finally attained, but rather is inherently provisional and insatiable, as it is the unceasing search, always, for what is more, or better, or more efficient. Accordingly, all systems proposed in its name, and all law seen as furthering it, are necessarily contingent and expendable.

In sum, the rationalizing drive undergirds and pervades modern tort law and affords a provocative way of understanding its career as well as its difficulties; it does not, however, preserve it—the claims of the Coasian economists notwithstanding. Rather, it is precisely this resort to the "economic" idea of rationalization (the idea, that is, that we properly deal with tortious harms by subjecting their cost either before or after the fact to our calculative reason) that not only allows the development of modern tort law from its stage of concern with fault to that of concern with efficiency, but, when given straightforward extension by the architects of strict liability and then of the compensation programs, consumes tort law and leads to calls for its abolition. Despite appearances, this latter development presents no theoretical apostasy, but is

instead simply the doctrinal course along which our reliance on rationalization leads.[65]

Neither the Coasian nor the compensation theory can account for the basic structure of tort law—with a tortfeasor paying compensatory damages to a tort victim for harm caused by his action—as an enduring, necessary, or fitting part of tort law, but only as the residue of political inertia or self-interest, or as making a contingent contribution to the rationalizing end. The deterrence rationale offers no ground for the connection of tort damages with the victim; the compensatory rationale, none for the connection of compensation to the tortfeasor. And neither retains the distinctiveness of the occasion for tort law as residing in tortious action resulting in harm, but collapses it into general inefficiency, where no harm need transpire, or general misfortune, where no action need bring it about. Faced with these mirror-image deficiencies, a third group of tort theorists tries to preserve, or at least to explain, the connections that these two variants of economic tort theory cannot. To do so, they turn from economic analysis to moral theory. Their theories are the subject of the next section.

III. MORAL THEORIES OF TORT LAW

Both the bargaining model of tort law and the compensation model are derived ultimately from economic premises that include a commitment to a variant of utilitarianism.[66] Accordingly, those theorists who find these models inadequate and seek alternative ways to understand tort law start, for the most

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65. More fundamentally, this is the course of our metaphysical path of thinking, over which will reigns: Will *wills*. It is not a mere "concept" that we employ within limits, discarding it when those limits are surpassed; rather, will, as metaphysical, is essentially antagonistic to limits (and "discarding," and "employing," too, are but further exercises of will). Limits required for the preservation of legal doctrine enjoy no special immunity from the dominance of will; from within this metaphysics, on the contrary, law is understood from the outset as an instrument and so expendable.

When faced with an apparent denial or limitation, will (understood metaphysically) simply finds another way to will, as in the emergence of strict liability doctrine and then compensation theory, overcoming the limitations on control of torts presented by the accidental nature of tortious harms. As Nietzsche reminds us, "will . . . will rather will *nothingness* than *not* will," FRIEDRICH NIETZSCHE, *On the Genealogy of Morals*, *in* ON THE GENEALOGY OF MORALS AND ECCE HOMO 97, 163 (Walter Kaufmann & R.J. Hollingdale trans., Vintage Books 1969) (1887); hence will, as it appears in tort thinking, would rather abolish tort law than give up the field. To speak of will in this way seems strangely anthropomorphic, yet will thinking extends to us as well: We understand human action, and human being, to be a matter of causing effects in the world. *See supra* notes 15, 21, 26, 59-60. Hence it is not the case that we assimilate will to us (as anthropomorphism charges), but the reverse: Everything, including human action, is assimilated to will. The pervasiveness of this assimilation is the mark of the metaphysics of will. *See infra* part V.

66. *See supra* notes 5, 7; *cf. supra* text accompanying notes 64-65.

part, from an expressly non-utilitarian outlook. The resulting theories invoke deontological considerations, and are often styled "moral" theories of tort law, although utilitarianism, too, is a widely held moral theory.[67] The claim of this group of theorists to present the "moral" theory of tort law is not, then, a claim that they alone are concerned with moral issues but rather a claim about the nature of tort law. Implicitly denying the strict separation of positive and moral law maintained by the utilitarian economists, these theorists seek to uncover the moral judgments conveyed by the structure of tort law, and resist the view that separates and subordinates the structure and principles of that law to utility. In short, they endeavor to show how tort law is itself moral, and reflects moral judgments—rather than how it is, or may be made, useful. In dismissing utility as a candidate for the relevant moral criterion, however, this effort also implicitly disputes the adequacy of utilitarianism as a moral theory.[68]

This much these theories largely share; thereafter, they diverge. They present a less consonant group, and, some contend, less coherent theory, than do the bargaining and compensation schools. This greater variety of theoretical approaches and lesser success in gaining adherents are not, however, signs of scholarly disarray or sloppiness; on the contrary, the moral tort theorists can be seen as making a greater effort than do their economic and compensation colleagues to stay "within" tort law itself in their search for its justification, rather than turning to policy justifications that lie in some sense outside its confines. The difficulty of finding a justification therein is genuine, and it is this that accounts for the lesser "success" of these theorists. A variety of theoretical paths have been traveled in an effort to meet this difficulty, though its source and nature have gone largely unremarked. Because of this variety, it is necessary to look to each of the four principal theories of the last two decades—those of Fletcher, Epstein, Coleman, and Weinrib—*seriatim*, before

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67. Philosopher Samuel Scheffler, in an introduction to his book collecting critiques of consequentialism (that school of moral theory of which utilitarianism is the most prominent version), suggests that none offers a satisfactory alternative to it. *See* Samuel Scheffler, *Introduction* to CONSEQUENTIALISM AND ITS CRITICS 1, 8-13 (Samuel Scheffler ed., 1988). In tort law too, the non-utilitarian moral theorists are faced with an uphill path and a generally skeptical reception, and are not seen to offer a satisfactory alternative to the dominant economic (utilitarian) theories of tort law they criticize.

68. In thus rejecting moral consequentialism in the form of utilitarianism as a justification for tort law, these theorists generate a generally unrecognized tension with the structure of tort law itself, which is fundamentally consequentialist: Tort law is concerned with attaching liability to actors for, as, and in the amount of, the consequences of their actions. Doctrines and theories differ only as to which kinds of actions (such as negligent, intentional, or ultrahazardous) and which kinds of consequences (such as remote, foreseeable, or "within the risk") fall within the consequentialist framework of liability, which is itself unquestioned. Nor do those tort theories that focus on effecting relief from the harm or its cost after it has arisen present an alternative to this framework: As the last section detailed, such theories are still concerned with prescribing the bringing about of effects as the right-making characteristic of the post-injury activity.

turning to consider the underlying premises these theories reveal and their implications for understanding the enterprise of tort theorizing.

A. Fletcher's Theory of Reciprocity

The first of these theories was proposed by Professor George Fletcher in a single, widely noted article that appeared in the *Harvard Law Review* in 1972. Titled *Fairness and Utility in Tort Theory*,[69] it begins by distinguishing two "paradigms," or models, of tort thinking. One of these, which Fletcher labels "reasonableness," encompasses not only the economic formulation of the fault standard, but all tort decisionmaking based on deterrence or other social welfare considerations. It is this model that Fletcher finds to be dominant in tort law, and to be lacking in moral justification because it bases legal sanctions upon considerations extraneous to the actions and capacities of the tort litigants themselves. In short, Fletcher objects to the potential for sacrifice of the individual to the social good implicit in every utilitarianism.

The alternative "paradigm," which Professor Fletcher labels "reciprocity," looks to impose liability whenever a defendant has, without excuse, engaged in a "nonreciprocal" risk, one "greater in degree and different in order" than those risks created by the plaintiff, a formulation which critics have seized upon as vague. In cases of strict liability, reciprocity "is analyzed relative to the background of innocuous risks in the community," whereas for negligence it "is measured against the background of risk generated in specific activities like motoring and skiing." (This distinction, too, has been found problematic by Professor Fletcher's critics.) Both the reciprocity and reasonableness models, then, are methods of determining in which areas of social life liability for risky activity will not lie: Those in which the risk-creating activity in question, on balance, enhances social welfare, or those in which the activity is a common one, engaged in by both parties, who are thereby understood to have agreed in some sense to suffer the risk from the other.

Fletcher's reciprocity idea constitutes his affirmative theory, a proposed alternative to utilitarian tort theory. While this is, I believe, the source of the considerable interest his article aroused, the breadth and mixed nature of the

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69. George P. Flecher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). Commentary on this article appears, *inter alia*, in: Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L. J. 1055 (1972); Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982), *reprinted in* JULES L. COLEMAN, MARKETS, MORALS AND THE LAW 184 (1988); Jules L. Coleman, *Justice and Reciprocity in Tort Theory*, 14 W. ONT. L. REV. 105 (1975) [hereinafter Coleman, *Justice and Reciprocity*]; Englard, *supra* note 1; Posner, *supra* note 22; Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981); and Schwartz, *supra* note 45.

claims he made for the theory seem to have condemned its reception. Thus, for example, although the idea is (so far as appears) original with him, Professor Fletcher claims for the reciprocity idea both a historical pedigree and expression in a variety of current doctrines and cases. Thus he argues not only that the reciprocity "paradigm" is morally preferable to that of reasonableness, but also that, as a matter of historical fact, it preceded the rise of the latter in the nineteenth century, and further, that it continues to operate in tort law.[70] He thereby conflates his positive and normative claims (as well as his historical and contemporary claims), and his critics take advantage of the equivocation to avoid the force of the idea itself. Thus, for example, Posner faults Fletcher for ignoring the actual presence of efficiency considerations in tort doctrine,[71] and Calabresi and Hirschoff do the same for distributive considerations.[72] None of these critics adequately confronts the normative claim against these utilitarian

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70. In this he appears to conflate two senses of "paradigm" which it is vital to distinguish. In its dominant sense, "paradigm" is the name for historically successive ways of understanding the world, widely shared among members of a community (in Fletcher's case, the community of legal scholars and judges). *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970). Though sequential, paradigms are discrete, noncumulative, and often contradictory—much like a Foucaultian episteme, *cf.* MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (Pantheon Books 1971) (1966). Because paradigms belong to their time, evidence of one (such as Fletcher's reciprocity) that is contemporaneous with another, later paradigm (such as reasonableness) can only reflect aberrant, residual echoes of the earlier paradigm, not an equally available alternative. Moreover, the claim of such a paradigm is not to "correctness" but to coherence in constituting a nearly complete world view, to which one is converted (or not)—not merely persuaded. *See* KUHN, *supra,* at 204. Accordingly, paradigms cannot be compared and argued for as "better" (as with Fletcher's normative claim for reciprocity), as they are fundamentally incommensurate.

However, a paradigm in this sense yields in turn what Kuhn, confusingly enough, also calls a "paradigm," by which he means the model puzzle-solutions that serve as such precisely because they reflect the judgments of relevant similarity that the (larger) paradigm already prescribes. (As a response to this confusion, Kuhn later amended his terms to "disciplinary matrix" and "exemplar," respectively—though "paradigm" had by then, as he notes, taken on "a life of its own," *id.* at 187.) In treating his "paradigms" as both historical and currently available, and offering his theory as both historically and normatively justified, Fletcher (like others who adopt this usage) blurs these distinct senses. In doing so, such writers slight the source of the smaller "paradigms" and the power of the larger ones.

It undermines the point of Kuhn's influential theory to lose sight of the dependence of the smaller "paradigms"—that is, the available patterned solutions—on the presence of the larger paradigm, or framework of understanding. The issue here is being faithful, not to Kuhn's terminology, but rather to the important idea he conveyed: That, at any historical moment, we live within a distinctive framework of understanding, which both yields ways of thinking about particular issues and hides others which depend on other, superseded frameworks. This insight extends much further than the scientific arena in which Kuhn first described it. Ironically, precisely in missing this—in seeing all solutions as available—Fletcher reveals our own modernist framework of understanding, which takes the world as transparent and as consisting of available resources to be used in reaching ends given by policy and preference. *See* HEIDEGGER, *supra* note 3.

71. *See* Posner, *supra* note 22, at 215-17.

72. *See* Calabresi & Hirschoff, *supra* note 69, at 1079-83.

considerations, except to reassert their propriety.

Similarly, the critics treat harshly Professor Fletcher's claims that his reciprocity paradigm is descriptively accurate, disputing both its historical validity and its presence as the rationale for particular cases and doctrines.[73] Yet for a normative theory Fletcher need make neither of these claims, but only one going to the adequacy of the theory as an account of our pre-theoretical moral understandings and their justifiability.[74] In this regard, he might have continued to follow Rawls,[75] from whose theory he otherwise profits.

It is, in fact, in the Rawlsian elements of Fletcher's theory that the outlines of the theory and its strengths and weaknesses emerge most clearly. Like Rawls, Fletcher is concerned to present an alternative to dominant utilitarian moral theory. Like Rawls, Fletcher argues that his alternative is morally preferable to utilitarianism because it preserves individual autonomy, understood

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73. *See e.g.*, Englard, *supra* note 1, at 64-65; Schwartz, *supra* note 45, at 978-90.

74. Such an interpretive enterprise appears to be regarded by many legal scholars as inadequate or inappropriate; it seems to be considered insufficient to offer a theory of the law—a way of understanding its underlying shape—that is (or may be) illuminating of our condition, aspirations, and obligations, without also claiming that it accurately tracks all or nearly all the innumerable, historically discrete decisions, statutes, and other legal materials on the subject. *Cf.* Englard, *supra* note 1, at 30, 64. In this, legal scholarship resembles the activity of those social scientists who, given a scattering of data points, undertake to find a mathematical curve that fits them (the modern equivalent of constellation-mapping, perhaps).

All such enterprises rest on assumptions concerning the meaningful coherence of the phenomena in question: The constellation mappers possessed a faith that the array of the universe, like the other aspects of their culture, reflected the actions of gods and heroes; the social scientists possess a tacit faith that observed phenomena can be understood by looking to the measurable efficacy of causal forces. In the case of legal scholars, however, the underlying faith in meaningful coherence necessary for the mapping enterprise raises a question as to the nature of law, and in particular as to the adequacy of legal positivism (the dominant modern view of the nature of law) to accommodate that faith. The idea, that is, that these legal items are indeed "data"—given—and possess an overarching coherence, seems inconsistent with the positivist understanding of law as the embodiment of will and of laws as discrete impulses reflective of shifting political alliances and temporary majorities of aggregated preferences, as well as with the Realist understanding of judicial decisions as the products of politics or whim. These positivist views appear too thin to support the faith in coherence implicit in the mapping enterprise.

Yet the apparent need to regard those data as given, as "out there" in the world, as more than human artifacts, also reveals the terror of groundlessness that lies at the end of the positivist road. The reification and valorization of decisions and statutes, and their words, within legal scholarship and adjudication (as in *stare decisis*) may, then, be understood as an attempt to resist that nihilistic conclusion. Similarly, the apparent discomfort raised by an interpretive account of the law that does not also claim positive accuracy in tracking all the legal data may reflect fears that the rule of law would be undermined were law thus regarded as "merely" a matter of interpretation. This suggests a confusion of the authoritativeness of an account of law, understood as its accuracy in mapping these materials, with the authority of law, the source of which positivism renders both elusive and necessary.

75. RAWLS, *supra* note 5.

as freedom of choice. In Rawls's theory, that choice is a hypothetical one, and concerns the principles that govern political liberty and the distribution of social and material resources. In Fletcher's, the choice is an actual one, and concerns the level of risk one will impose and to which one thereby agrees to be subject. For both, the solution is contractual and proceduralist: Whatever political arrangements the parties would agree to in the original position, as whatever risks they both engage in and are thereby understood to agree to, are *ipso facto* legitimate.

This last point suggests the source of some of the dissatisfaction with such theories, as well as of some of the specific points raised by Professor Fletcher's critics. Proceduralism is, by design, contentless, and so declines to prescribe the distributions, standards of conduct, or other outcomes which the procedure is itself supposed to yield and thereby sanction. This diffidence with respect to prescription is an odd posture for a theory of moral or political obligation. Yet it is made to appear a virtue, in that the theory seems thereby to accord respect to individual autonomy, understood as freedom of choice.[76]

At the same time, however, the authors want to argue for specific prescriptions—for a redistributive modern Western liberalism, in Rawls's case, and for the actual doctrines of tort law, in Fletcher's. To do so, Rawls exploits the self-interest of the parties in the original position: Made substantially ignorant of who their "self" is (so that they may not simply favor their own characteristics in the rules they choose for distributing social resources), they choose a distribution according to equality, revisable according to the "maximin" rule, because that happens also to be the way to maximize their expected share, given the information constraints Rawls imposes. In contrast, Fletcher at this point drops out of the theoretical justificatory enterprise in which

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76. On this view, "autonomy" is no longer understood as making the law one's own, but as making one's own law—that is, creating it. Far from a constraint upon the will, the law is now seen as its creature and tool, serving the unquestioned desideratum of maximally unfettered will. The position is thus not Kantian (citations notwithstanding, *see, e.g.*, RAWLS, *supra* note 5, at 251-57), but Millian. *Cf. supra* note 34.

How such license of the will can be understood as *law* is a mystery. As an attempt to create the needed obligatoriness, the social contractarian tradition on which Rawls draws posits a solemnly binding initial agreement. Yet how and why such agreement is binding, given that it is understood to precede society and its practices (including promise-keeping), is, famously, another puzzle. Traditionally, this objection was answered by reliance on "the fixed and enduring framework" provided by natural law—that is, by preexisting obligation, not of human invention—a path not seen as open to contemporary theorists. *See* Peter Laslett, *Social Contract*, *in* 7 THE ENCYCLOPEDIA OF PHILOSOPHY 466-67 (1967). Today, the usual rejoinder is to stress the contract's hypothetical nature. *See, e.g.*, RAWLS, *supra* note 5; Laslett, *supra*, at 466. Yet the objection is directed not to the historical accuracy of the contract as an actual event, but to the possibility of understanding the source and nature of law given the theory's aim to rest justification on consent. That this consent is hypothetical does not affect the issue.

Rawls is engaged; that is, Fletcher does not argue that certain liability rules would be chosen under a hypothetical decision procedure. Instead, he opts for an ongoing, actual proceduralism: The risk-creating activities that are actually common as between litigants are those for which liability does not lie.

Thus, whereas a critic of Rawls may complain of the "trick" aspect of his theory, where the manipulation of information and self-interest, rather than moral argument, yields an ostensibly egalitarian outcome, Professor Fletcher's problem is the reverse: He carries the prescriptive reticence of proceduralism further than Rawls does, with the result that his theory is criticized for failing to yield *any* particular, reliably determinate level of risk-imposition, still less one that matches those reflected in the existing case law. And although Fletcher's scheme is actual, rather than hypothetical, it still works, as does Rawls's, through the operation of self-interested rationality: The level of risk that the community is to regard as morally appropriate is to be set by mutual threat, with each party assured of not suffering non-reciprocal risks as the price of forgoing the activities that generate them, and each finding in the arrangement a way to maximize the joint package of his protection from others' risk imposition and the satisfaction of his own activity preferences.

Though criticized, Fletcher's theory has been found "undeniably imposing,"[77] and has received considerable attention. It seems that Professor Fletcher struck a responsive chord when he identified the idea of reciprocity in the imposition of risk as providing a way of understanding certain otherwise inconsistent or fragmented areas of tort law, and as according with certain pre-theoretical judgments about which harms should and which should not be compensable under the law of torts. Setting aside, then, the issues stressed by his critics—questions of the theory's accuracy as an account of the law or of history, or its feasibility as an actual legal standard—what are the reasons for the attraction to Fletcher, and to the Rawlsian idea he applies to tort law?

Like Rawls, Fletcher understands the moral quality of political and social arrangements as chiefly found in their accordance with claims of fairness, and finds this virtue met by evenness in distribution. What Fletcher calls "reciprocity" is the equivalence, across parties, of the risks their activities impose; when operating within the "paradigm of reciprocity," tort law is concerned to enforce this equivalence by providing compensation for its violation. Treating risk as a negative social good, Fletcher thus draws upon the idea of fairness as distributional equivalence that is a strong theme in liberal theory generally and was especially prevalent when Fletcher wrote, as Rawls's highly influential *A Theory of Justice*, which stressed the same theme in

77. Schwartz, *supra* note 45, at 989.

connection with the distribution of liberty and social resources, had appeared the year before. The level at which those goods are to be distributed is governed, in the case of Rawls's resources, by their empirical scarcity or abundance, which yields opportunities for maximization or equalization that are pursued in accordance with the rules previously agreed to; for Fletcher, in contrast, the level at which risk is to be equivalently distributed is itself to be determined by ongoing agreement: One is free from (compensated for) the unexcused imposition of greater risk than one imposes, and that imposition is construed as agreement to equivalent imposition (a questionable leap, aided perhaps by an equivocation on "agreement"[78]).

Fletcher's account touches on three themes that carry positive resonances within modern liberal political theory: (1) evenness or equivalence as a political desideratum; (2) the raising of distributional questions (and the assumption of distributability on which they rest); and (3) agreement as the touchstone for legitimacy in reaching political solutions. These three themes are tightly interwoven: Evenness is of concern in connection with distribution, and it is distributional questions, among others, that are to be answered by reaching agreement. Moreover, the requirement of agreement itself goes far to ensuring equivalence as the distributional solution, because of the equivalent distribution of the power of agreement. (Herein lies the crux of Rawls's system.) Less obviously, the assumption of distributability, entailing decision and political choice, is closely related to the resort to agreement—assent of the will—as legitimating the solution. These themes are further conjoined under the rubric for such theories, "fairness": Equivalence in distribution is called substantive fairness, the provision for agreement procedural fairness.

The attractions of these themes are also related. As suggested, the assumption of distributability and the understanding of agreement as the necessary and appropriate means of legitimation rest on a shared foundation of will: Political right is made to depend on the assent of the will, and material conditions are seen as the effect of its exertions. Equivalence, too, can be understood as contributing to this project of control through the will, in this case control of others through the mutual enforcement of equivalence. (Seen thus, equivalence as a political desideratum has its roots, not in fellow-feeling or the

78. Two senses of "agreement" appear to be conflated in Professor Fletcher's analysis: (1) coincidence or factual congruence (as angles, or the number of subject and predicate, may "agree"); and (2) the expression of concurring wills manifested in assent. That the amount or kind of risk attaching to the activities of two parties may be "reciprocal" in fact (that is, matching—"in agreement" in the first sense) does not entail any conclusion as to the parties' concurrence or assent to suffer such risk, unless it is part of Fletcher's plan to impute the latter from the former. In that case, however, his system would show as little regard for the "autonomy" of the parties as does the similar move by Coasian economic tort theory in enforcing the hypothetical bargain inferred from the parties' economic activities. *See supra* note 14.

bonds of solidarity, but in atomistic envy and self-interest. Rawls's system, where equivalence is chosen because under the circumstances it is the way to maximize one's own gain, makes this aspect transparent.) It is thus the prospect of control that constitutes a chief attraction of these three themes. In addition, each embraces an implicit atomism which also contributes to the prospect of control, in suggesting both its possibility and its necessity.

In connection with risk, Professor Fletcher's specific application of this general theory, the idea of control is highly attractive, but also revealingly paradoxical. The theory of reciprocal risk assumes a firmness to the idea of risk—a sense of it as knowable and measurable such that it can be distributed and equalized—that approaches that of economic theory, which quantifies risk as probability.[79] When risk is imagined thus, as within our knowledge and control, it loses its character as mysterious, unknown, dangerous—as *risky*—and undergoes a transformation into its opposite (much as happens in the compensation treatment of tortious events, seen as random, through systematic rationalization[80]). In seeking to control risk, we seek to master it—and thus to deny it—by turning it into something solid and certain. Evidence of this effort, and of our success in it, appears in the way the original sense of risk as danger has been overrun by the sense of risk as calculated odds.[81] Professor Fletcher's efforts can be seen to fall squarely within this project. His theory provides for the subjection of risk to our willful assent through enforcing schemes of distributional equivalence; but there is no room in the way of thinking that such a theory embodies for the idea that risk, *qua* risk, may lie beyond the reach of such efforts.

Professor Fletcher's theory remains important as an early attempt to examine the utilitarian view of tort law critically and provide an alternative to it, though one finally beset by difficulties. Significantly, those difficulties are not attributable to the limitations that any single article may be thought to face, but inhere as well in a thoroughly worked out theory of the same sort, as the repeated references to Rawls are intended to show. These references also underscore, and take seriously, the claims made for the moral tort theories that tort law embodies moral judgments, grounded in a variety of moral theory concerned with the justification for attributions of responsibility for harm. As amplified by Rawls, Fletcher's theory can be placed within the spectrum of moral theory, and questioned accordingly.

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79. *See supra* text accompanying notes 15-17, 57.
80. *See supra* text accompanying notes 51-60.
81. *See* 13 OXFORD ENGLISH DICTIONARY 987-88 (2d ed. 1991); *cf. supra* note 57.

Professor Fletcher rejects utilitarianism because it views the doctrines and standards of tort law as only a byproduct of efficiency, or its synonym, rather than as presenting an independent claim of right. Yet under Fletcher's Rawlsian theory, where distribution is at issue and assent the touchstone, those same doctrines and standards appear instead as the byproduct, or synonym, of rational self-interest. One might be skeptical of the claim that such a theory offers a more attractive moral ground for tort law than does utilitarianism; indeed, at bottom, they have much in common.[82] The moral theorists' search for a robust alternative to the utilitarian economic theories of tort law does not, then, appear to be satisfied by looking to Fletcher and Rawls.

B. Epstein's Theory of Strict Causal Liability

A second theory of the moral justification of tort law appears in a series of articles on torts written by Professor Richard Epstein. In the first three of these he undertakes to construct a theory of tort law around a principle of strict liability grounded in causation and divorced from the "reasonableness" criteria of both moral and economic standards of negligence.[83] Like the other moral

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82. Rawls allows evenness—equality—to be modified, in the case of the distribution of material resources, by an unequal distribution that is to the benefit of the worst-off in the society. For him, then, equality serves as only a prima facie solution, as it can be traded in this way for enhanced welfare. (Fletcher speaks, somewhat obscurely, of allowing the "waiver" of one's right to equality of risk, possibly a similar device.) This bow to the utilitarians, who question the sense of a system that declines, on grounds of equality, to maximize its resources, brings Rawls remarkably near to their position; the theories remain distinct only by virtue of Rawls's proviso specifying how this trade may be made, and his earlier reservation of liberty from such a trade-off—"at least . . . once a certain level of wealth has been attained," RAWLS, *supra* note 5, at 542.

Indeed, there are further similarities: Rawls understands his theory to be preferable to utilitarianism because it proscribes the averaging of utility that can result in the sacrifice of individuals for the greater summed welfare. ("Utilitarianism does not take seriously the distinction between persons." *Id.* at 27.) Yet, far from preserving this distinction, Rawls himself does away with all individuality in the specification of the original position, in which principles of justice are to be chosen by designedly faceless, featureless—*fungible*—members. The "equality" that results arises from the selfsameness of the deliberators. In this way, Rawls's construction, too, works "by conflating all persons into one." *Id.* Both, in addition, exalt "the satisfaction of rational desire," *id.* at 25—utilitarianism in the deriving of utility schedules on which the social calculus is performed, Rawls in the selection of principles of justice in such a way as to ensure their compatibility with self-interest. To be sure, both the rationality and the self-interest of the Rawlsian deliberators are impeded by their ignorance and lack of "self"; so constrained, self-interested rationality is nevertheless the effective mechanism for grounding and achieving the social arrangements at issue, just as with utilitarianism. Both theories, then, can be seen to view action as effectuating self-interest, and to regard a theory of moral obligation or social relatedness as dependent upon a showing as to how such arrangements can further its desires.

83. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) [hereinafter Epstein, *Strict Liability*]; Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974) [hereinafter Epstein, *Subsequent Pleas*]; Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975) [hereinafter Epstein, *Intentional Harms*]. The first

tort theorists, he seeks to derive legal responsibility from the relation between the defendant's act and the plaintiff's harm, and generally refuses to allow liability to be governed by utilitarian considerations extraneous to that relation. His theory is novel in that it resorts to a standard of strict liability, which at least since Holmes has been stigmatized as unjust because it does not make liability determinations turn upon the defendant's intention, care, or ability to foresee or avoid the harm in question, matters thought germane to judgments of the moral quality of action. As will be seen, Epstein avoids this problem in part by moderating the strict liability conclusion, treating it as only prima facie, and in part by recourse to a moral atomism that allows him to regard such defensive matters as the defendant's "own problem," from which the plaintiff is and should be insulated.

The general outlines of Professor Epstein's theory reflect an understanding that tort liability is a straightforward expression of the responsibility that ordinary moral judgment assigns to causal force: *A* hit *B*; therefore, *A* is liable for the resulting harm to *B*. Under his theory, then, a prima facie case of liability exists whenever a party injures another in accordance with any of four "paradigms" of causation.[84] The simplest of these, "*A* hit *B*," is the theme; the others—"*A* frightened *B*," "*A* compelled *B* to hit *C*," and "*A* created a dangerous condition that resulted in harm to *B*"—are conceived as variations on that theme. These latter three "paradigms" are more attenuated and complicated than the first, and these complications, as well as conflicts among the paradigms, provide much of the matériel with which Professor Epstein's critics take aim.[85]

The "prima facie" character of the case for liability on causal grounds is crucial to Professor Epstein's system. Its establishment is the opening, not the conclusion of the case, for Epstein relies upon a tightly structured sequence of pleadings to allow certain defenses and limitations upon recovery to enter in their turn. Thus, defenses (from which Epstein excludes utilitarian or "defendant-based" defenses such as private necessity) enter into the defendant's response once the plaintiff's prima facie case has been made. Intention is reserved for a third round of pleadings by the plaintiff, and is conceived as overcoming a defense, such as assumption of risk, introduced in the second. A

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two of these essays are collected in RICHARD A. EPSTEIN, A THEORY OF STRICT LIABILITY (1980) [hereinafter EPSTEIN, A THEORY OF STRICT LIABILITY].

84. Professor Epstein's "paradigms" are exemplars, or available patterned solutions; he thus employs the term in Kuhn's narrower, secondary sense. *See supra* note 70.

85. *See, e.g.*, John Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419 (1979); Englard, *supra* note 1; Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CANADIAN J. OF L. & JURISPRUDENCE 147 (1988); Richard A. Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEGAL STUD. 457 (1979).

potential fourth round deals with claims of excuse or justification for the intentional harm, and, in theory, subsequent rounds are available as well. In this way some matters usually excluded by strict liability eventually make their way into the determination of liability, and Professor Epstein's "strict" liability system can deflect traditional criticisms of their omission.

This basic structure—strict liability grounded in causation, understood in a simple physical way as the application of force, generating a prima facie case to be developed by means of alternating opportunities to plead—suggests an orderly, appealingly straightforward system for determining liability. Indeed, its simplicity and clarity constitute its chief virtue, as Professor Epstein explains, for example, in his defense against Judge Posner: "*The great advantage* of the corrective justice theory [that is, Professor Epstein's theory] *is that it yields clear and unambiguous results* in an area in which the economic theory, rigorously applied, can never come to determinate solutions."[86] That such certainty—rather than its superior capacity to accord with our sense of justice, or experience of events of harm, or policy goals thought to be served by tort law—is indeed the theory's principal attraction and guiding desideratum helps to explain a number of its otherwise puzzling aspects.

Thus, for example, the reliance on a strictly sequential pleading ritual seems oddly atavistic in an age of notice pleading, and calls to mind the ills and pitfalls for untimely claimants thought to be associated with the old forms of action. Yet, however harsh their implementation may be in practice, such pleading rules undeniably afford clear and unambiguous results. While it is not clear whether Professor Epstein contemplates such drastic preclusion under his proposed system, its amelioration, such as through liberal access to amendment, would threaten the very advantages of clarity and certainty that he understands his system to offer.

Those advantages surface also in Epstein's exchange with John Borgo, who criticizes the acontextuality of Epstein's causal determinations,[87] reached by looking only to whether one of the four causal "paradigms" is matched rather than to the entirety of circumstances surrounding the event in question. Professor Epstein's reply—"I did, and do, want to *structure* and *discipline* contextual judgments" by means of the proposed system[88]—suggests, again, that it is the certainty and rigor of the system that constitutes its appeal, rather than the system's ability to reflect our experience of tortious events and judgments of responsibility in their contextual complexity. Moreover, to the

86. Richard A. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477, 495 (1979) (emphasis added).

87. Borgo, *supra* note 85.

88. Epstein, *supra* note 86, at 482.

extent that the strict sequencing of pleadings nevertheless *allows* relevant claims and defenses to enter the case in subsequent pleadings (Epstein's other reply to Borgo here[89]) it suggests that it is indeed the "structure and discipline" of claims, rather than their final inclusion or exclusion, that matters; that the sequencing exists in some measure for its own sake, its ritual formalism contributing a "taming" influence upon the proceedings that is its own justification.[90]

This theme of order and certainty can also help to illuminate the theory's rejection of the negligence standard in favor of strict liability. From the point of view that the virtue of a theory of tort law is its capacity to supply "clear and unambiguous results" in tort cases, strict liability is the obvious choice for a liability standard; negligence determinations—requiring the court to ascertain either what conduct is "reasonable" in light of all the circumstances of the case, or, on the economic view, what the costs and benefits of action are so as to enable their comparison—are simply too messy, incapable of supplying the desired orderliness and clarity. A rule of strict liability is doubtless clearer and easier to apply than a rule of negligence. For this quality to constitute an argument in favor of the standard requires, however, an implicit valorization of such ease of application.

That virtue evokes the kind of technical efficiency valued by economic theory. And, as it happens, one of Epstein's supporters, in an introduction to Epstein's book of collected articles setting forth his theory, praises its promotion of "institutional efficiency," that is, the efficiency gained for adjudicative institutions from easily applied rules such as strict liability.[91] To the degree

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89. *Id.*

90. As with all the theories I explore, I look to Professor Epstein's theory in an effort to uncover its embodiment of themes and attractions recurring in modern tort theory that reflect widely shared ways of thinking about the world as a whole. Whether the themes and attractions I identify in fact hold power for him personally is no part of my claim, and is, at bottom, irrelevant to it. Insofar as *we* understand his theory and find it plausible and attractive, it is these themes, I suggest, to which we are responding.

91. Mario J. Rizzo, *Foreword* to EPSTEIN, A THEORY OF STRICT LIABILITY, *supra* note 83, at ix, xv. In this connection, Epstein cites to Ross's account of insurance claims settlement practices, H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT (1970), as indicative of the benefits his own system would produce. Epstein, *Strict Liability, supra* note 83, at 188-89; Epstein, *supra* note 86, at 494 & n.60. Ross found that insurance adjusters employ rules of thumb, such as looking to the presence of statutory violations, as presumptive determinants of "liability"—that is, of the choice of which party's insurer would bear the cost of settlement. Professor Epstein apparently regards the gains in efficiency of such a system as those also to be sought and expected under his own system of strict liability. Yet while it may be the job of insurance adjusters to come to an efficient settlement, rather than a just one, courts cannot be regarded as having only equivalent responsibilities—unless, as under some economic legal theories, justice is to be equated with efficiency.

that the virtue of Professor Epstein's system, like that of the economists', is seen to lie in its promotion of certainty and efficiency, it attests to the spread of such "economic" goals throughout this, as other, areas of law and legal theory, infusing not merely self-described economic theory but also theory meant to oppose the utilitarianism associated with economic legal theory.

The institutional efficiency fostered by Professor Epstein's system is of a different order than the efficiency sought under most economic theories, however. The gains in efficiency under Epstein's system, accruing to the operation of adjudicative institutions, are to be reached by means of rules that yield a greater certainty in the determination of liability after the harm has occurred. The Coasian economic account, in contrast, looks to individual actions, rather than to institutions, to achieve an efficiency of resources devoted to either the prevention or redress of tortious loss. The certainty that will promote this kind of efficiency is not the certainty of determining liability *after* the fact of harm, but a "certainty" born of the predictability of consequences *before* the action is taken, so that these consequences, understood as costs and benefits, can affect the individual actor's deliberation and choice of action.

Strict liability rules cannot provide such certainty to the actor because they operate without regard to the actor's knowledge, intention, or ability to control the event of harm; they thereby defeat the predictability he requires—at least, until they are transformed from standards of liability into costs. Regarding standards thus, as costs—the starting-point of economic thinking—enables the actor to calculate the probability of incurring that cost and to set off the loss discounted by the probability against the costs of precaution, affording the "certainty" needed to make his rational choice of action. Strict liability is thereby collapsed into the negligence standard—or, rather, both are reconceived as presenting only a question of cost, and so as indifferently calculable on that basis.[92] Under Epstein's theory, however, strict liability rules are seen not as an *impediment* to certainty and efficiency (and so not as in need of such transformation), but as a *means* to them, albeit at the institutional level.

This difference in "kinds" of efficiency, and ways to achieve it, actually points to a deeper, more fundamental disagreement between Professor Epstein and economic theorists such as Judge Posner, a disagreement which is potentially puzzling because they claim to esteem much the same things: autonomy, efficiency, and individual freedom. Once again, however, the theme of certainty helps to illuminate the sense of these terms in Epstein's system and their divergence from the economic understanding. Thus Posner faults Epstein for "inconsistency" in valorizing individual autonomy and freedom, and yet

92. *See supra* text accompanying notes 15-21 & *supra* note 24. *Cf. supra* notes 15, 21.

rejecting the contractual model of tort law favored by economists, as well as their regard for preferences (for example, in the event of a community's unanimous preference for a negligence system over Epstein's system of strict liability[93]). For Posner, "freedom" is freedom *of contract*, and respect for "autonomy" *consists in* the according of weight to preferences; Epstein's position, accordingly, appears inconsistent to Posner.

To make sense of this confrontation it is necessary to see that Epstein's position imports a set of "firm edges" that is foreign to Posner. Whereas Posner understands autonomy and liberty to be means to the end of wealth maximization, Epstein understands them to be ends in themselves, and to consist in a kind of inviolability that is not found in the world inhabited by Posner's transacting parties, where boundaries are permeable, everything is negotiable, and what law there is exists to facilitate, or mimic, that negotiation. In Epstein's world, in contrast, law exists to preserve the individual, inviolate, in his possession of liberties and wealth; these make up a "'natural' set of entitlements . . . deserving of absolute protection and vindication."[94] Autonomy and freedom are here not virtues of action, found where action is unrestrained, but virtues of possession, found where possession is made secure. It is of a piece with their overall theories that Judge Posner understands tort law to be in the service of, and to substitute for, contract law, while Professor Epstein understands tort law to depend upon, and to serve to enforce, property law. And, of course, Epstein declines Posner's invitation to understand property itself as economic wealth, that is, as a bundle of negotiable potentialities.

Inviolability—security of possession within one's "borders"—also emerges as central to Professor Epstein's account of causation. As noted, that account is conveyed in Professor Epstein's description of four "paradigms"; these descriptions serve not only as exemplars for the decision of specific cases, but also as the affirmative analysis of their justificatory role in the theory.

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93. Posner, *supra* note 85, at 462-64.

94. Epstein, *supra* note 86, at 488. (Epstein notes that such inviolability may in certain cases be infeasible, and there would provide for compensation. *Id.*)

Professor Epstein calls this set of entitlements "the original position," by which he means not a consensual Rawlsian distribution but some more "natural" distribution of liberties and wealth, apparently on the Lockean model. The difficulty with such models is explaining just how they are "original," and so justified as the state toward which the law lends its enforcement. Professor Epstein does not address this difficulty, though he offers a citation to Robert Nozick, "whose entire historical theory of justice is consistent with" Epstein's theory of tort law. Epstein, *Intentional Harms, supra* note 83, at 441 n.129. Yet while Nozick, the most prominent modern defender of this model, defends the principle of "justice in acquisition" as theoretically necessary, he does not, finally, maintain that it is demonstrably true. *See* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 150-53, 174-82 (1974). *Cf.* Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1238 (1979) (arguing for the "necessity" of such a rule if boundaries are to be preserved, and for its lesser inadequacy to this task as compared with the alternative of common ownership).

Professor Epstein devotes little attention to the meaning of causation, the linchpin of his system, beyond criticizing its utilitarian formulation, apparently relying on his "paradigms" to reveal its content in a self-evident and unproblematic way. (Borgo voices a similar comment,[95] to which Epstein replies that the leanness of his account at this point serves the virtue of avoiding "overgeneralization."[96])

As with the choice of strict liability over negligence, however, Professor Epstein's rejection of alternative views of causation helps to clarify the content and attractions of his own. Epstein rejects the conventional "but-for" test of causation as counterintuitive and unhelpful to adjudication in that it yields a limitless array of "causes" that meet the subjunctive, counterfactual test. Such an inclusive conception of causation requires limitation and selection, and thus opens the door to policy determinations of liability on utilitarian or other redistributive grounds, which are anathema to Epstein. (Such limiting doctrines as "proximate cause" and "duty of care" analysis are interpreted in this way, as covert policy exercises.[97]) Similarly, Epstein rejects the equation of caused harm with incurred cost, as in the analyses of Coase and Calabresi; that equation allows multiple factors and parties to be treated as equivalent and thus threatens to overlook "cause" (in Epstein's direct, physical sense) in favor of policy determinations of liability.

The tenor and strength of Professor Epstein's opposition to such policy determinations of liability can be gauged by looking again to his exchange with Professor Borgo.[98] While generally faulting Epstein's theory, Borgo praises his adoption of a view of cause as single, rather than as multiple, as under the alternative views Epstein rejects.[99] This is not, however, an endorsement Epstein welcomes, inasmuch as Borgo also understands the question of cause to be context-specific, in particular to vary with the relative novelty of contributing circumstances and with the kind of answer sought by the questioner.[100] Borgo

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95. Borgo, *supra* note 85, at 427.

96. Epstein, *supra* note 86, at 478.

97. *See* Epstein, *Strict Liability*, *supra* note 83, at 161-63 & nn.27 & 35.

98. Borgo, *supra* note 85.

99. *Id.* at 431-32.

100. Thus, for example, Borgo suggests that the answer to the question, "What caused this fire?" will be, variously, a spark (in the event a physical cause is sought), oxygen (in the event that its presence is unusual, such as where a flammable manufacturing process is ordinarily kept oxygen-free), or a human agent (where the search for such an agent is the point of the inquiry—as in tort law). *See id.* at 432-40.

As Borgo notes, the question of cause is linked to our reasons for asking the question, and these implicate the nature of our concerns in tort law. Accordingly, as Borgo concludes, causes will vary with the effects sought to be explained and affected. Yet, as puzzling as this variation within causal explanation may be, still more arresting and perplexing is the overriding constancy of causation as the explanation of any and every entity or event, all of which are thereby transformed

makes no claim that the answer to the question of causation is "up for grabs," a matter for political choice only, or a response to an independent decision about which among several candidates we "want" to hold liable (for example, for redistributive reasons); rather, he suggests only that it is a conclusion responsive to the framing of the question, which implies what *sort* of causal agent—human, physical, social—is looked for. Unlike the economists or other policy-driven analysts Epstein opposes, Borgo maintains that in each case the question of cause yields only one answer, albeit one that follows upon our judgment of responsibility. Epstein rejects this account, insisting on a separation of conclusions of causation and judgments of responsibility, apparently equating such judgment, too, with policy choice and the threat of redistribution.[101] The impression grows stronger that it is the impulse to certainty, immune not only from politics but from all causal context and judgment, that conditions the development of Professor Epstein's theory and contributes its rationale.

Accordingly, Professor Epstein takes his conception of causation from mechanical physics, a realm seen as independent not only of political pressures but also of judgmental context. As the "paradigms" illustrating Epstein's theory suggest, causation is explicitly viewed as a matter of force and energy; the initial causal paradigm, for example, is identified with "the application of force,"[102] and the creation of a dangerous condition is conceived as setting out "a store of energy" that is later unleashed as force.[103] And he suggests that the physics formulae for using mass and velocity to measure the release of energy be employed as a means of apportioning responsibility in collision cases now subject to comparative negligence.[104] As Borgo points out, however, nothing in the determination of relative *force* brought to bear (for example, as between cars of different weights) speaks to the determination of relative *responsibility* as between their drivers.[105] Nevertheless, the effort is again revealing, suggesting that economic legal theory is not alone in its susceptibility to the attractions of certainty that, owing to the fallacy of misplaced concreteness, inhere in mathematical operations applied to human events.

As Borgo's point shows, the physics model deals only with the measurable presence of physical forces, not with any human contribution to their presence,

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into "effects." The intelligibility of this "explanation," and its implications for our understanding of action and responsibility, are explored at *infra* text accompanying notes 168-73.

101. *See* Epstein, *supra* note 86, at 482. To conclude that, in the absence of a firm, unitary, and stable conception of causality, only political contention remains, would, however, be to misapprehend the necessity of universals and the nihilistic implications of their absence. *See infra* note 151.

102. Epstein, *Strict Liability*, *supra* note 83, at 166.

103. *Id.* at 177-84.

104. Epstein, *Subsequent Pleas*, *supra* note 83, at 180.

105. *See* Borgo, *supra* note 85, at 450-51.

impact, or relevance. In adopting that model, and in centering his account of causality on the presence of force, it appears that Professor Epstein is able to supplant *will*, the seat of human action and morality,[106] with *force*, on our modern view its physical correlate. This allows Epstein to dispense with explicit attention to will in his formulation of the standard of liability, so that he sees no impediment to adopting strict liability, imposed without regard to the actor's intention, control, knowledge, or possibilities for foreseeing or avoiding the harm in question.[107] Yet while Professor Epstein's theory thus appears to be "will-less," he has actually taken up "will" under the name of "force"; it remains human actors—seats of will—with which he, as a theorist *of torts*, is concerned.[108] Moreover, will continues to pervade the theory in the form of the drive to certainty and control to which I have been pointing.

That drive is perhaps most strikingly seen in the theory's central yet unexamined concept of causation. Causation is not merely an essential part of Epstein's theory for determining liability but, because of the priorities established through the pleading system, the chief and indispensable element of that liability. The strict sequencing of pleadings operates to insulate that initial determination of liability, based on causation, from dilution through the illegitimate introduction of redistributive concerns, and thus both to erect it as determinative and protect it as secure. That foundational conception of causation is underdeveloped, however. For, beyond locating causation at the center of his theory, and identifying it with force, Professor Epstein does not explore what causation might be or why it is central. Yet that too can be seen as necessary to the security which, I suggest, is the aim of the entire structure: Causation is

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106. *See* KANT, *supra* note 34, at 64-69; *cf. infra* text accompanying notes 172-174; *infra* part V.

107. Epstein does note, immediately following his equation of causation with the application of force, that the prima facie case for liability demands, in addition to force, the finding of "volition." However, he means by this only that the defendant *acted*, rather than was, for example, bodily carried. Epstein, *Strict Liability*, *supra* note 83, at 166-67. The questions that go to whether that action, though inadvertent, unforeseeable or unavoidable, should ground liability—the traditional puzzle for tort theory—remain excluded from Epstein's account.

108. Far from dispensing with will, substituting "force" for "will" names its essence: On our modern understanding, will is effectiveness, or the power to cause effects in the world. *See supra* note 60. Force, too, names the power to affect entities from without, to exert control over them, causing change in them; such effects are the mark of force, or effectiveness. The entities affected are thereby understood as themselves seats of more or less resistant force, and as fundamentally *other*, separate from the power directed against them. *Cf.* HEIDEGGER, *supra* note 26, at 81 (power to become as distinct from power to accomplish). The understanding of action as force is thus inherently atomic, and one that calls forth and views as in being only other forces. Still another name for this way of relating is coercion.

The implications of this understanding of action will be explored following discussion of the variants of moral tort theory. *See infra* text accompanying notes 170-73.

a notoriously thorny subject for philosophy.[109] To examine it too closely would threaten to expose the degree to which we fail to comprehend it and nevertheless depend upon it—and thus to imperil the ability of any legal structure relying on it to give "clear and unambiguous results." Accordingly, it appears that causation may function in Professor Epstein's system as a "black box" which, if opened, would yield only further questions, but which, if left sealed, can determine liability with clarity and finality. The priority of causation as well as its undisturbed obscurity can be seen, then, to follow not from the sense or moral cogency of the concept, but from its contribution to certainty. As will be seen, such central reliance on causation is by no means unique to Professor Epstein (and no error to be corrected), but is rather evidence of our understanding of human action in the world, from which we start in thinking about torts and tort law.

In its use by Professor Epstein as a firm delineator of liability, causation serves to replicate and secure the sanctity of boundaries between individuals, which are breached by tortious force. And it is, finally, with such boundaries that Epstein's theory is most fundamentally concerned: "[T]he first task of the law of torts is to define the boundaries of individual liberty."[110] As on the classic liberal account, those boundaries are the walls within which each individual lives and enjoys his freedoms and property. Thus, for Epstein, the archetypal tort case is not negligent collision, but trespass, a literal breaching of those walls, which serves as the model as well as the historic precursor of modern tort law (and which, not incidentally, developed on the basis of strict liability).

The comparison is suggestive: Both trespass and Epstein's conception of tortious harm consist in the breaching of borders, those between plots of land in trespass, and those between persons in the case of interpersonal torts. But while, in the case of land, boundaries can be established through means regarded as unarguable, such as recorded deeds or mathematically precise surveying, the boundaries between human beings are only those posited by atomism, that is, the assumption of separateness itself. Physics, though often invoked to support the claims of atomism, can ultimately speak only to and of bodies, not of persons. And modern physics, after Heisenberg, Einstein, and quantum theory, resists its use even to this degree; it is our scientism, not physics, that persists in understanding physical phenomena as firm and certain.

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109. *See, e.g.*, DAVID HUME, AN INQUIRY CONCERNING HUMAN UNDERSTANDING, 40-89 (Bobbs-Merrill Educational Pub. 1955) (1748); IMMANUEL KANT, CRITIQUE OF PURE REASON, A190-215/B233-262, A444-451/B472-479 (Norman Kemp Smith trans., 1929) (1781); *see generally* Richard Taylor, *Causation*, *in* 2 THE ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 76, at 56.

110. Epstein, *Strict Liability*, *supra* note 83, at 203.

Accordingly, the reality of the boundaries between persons needs confirmation, which it finds to a degree in the treatment of persons *as though* separate—as in strict liability, where the violations of those supposed borders are dealt with cleanly. The strict liability claim can be understood to voice the demand that the defendant stay outside the plaintiff's borders, and to reject his proffered reasons, needs, or weakness in crossing them as of no concern. In defending the assumed physical separateness between people, it thus asserts a social separateness as well. Such an enforced disconnection depends for its justification on the clarity of the separation it assumes—on the "fact" that, in Epstein's phrase, such needs or weaknesses are indeed the defendant's "own problem."[111]

Under Epstein's interpretation, strict liability in tort reinforces property rights and is driven by a resistance to utilitarian demands that would dilute those rights; the claim of strict liability is imbued with the demand that what is one's own be preserved intact against claims by others. The theory thus adopts unquestioned a view of property as dominion and as carrying an absolute right to exclude. This absolutist view of property is not merely the analogue but the literal model for Epstein's understanding of social relations as revealed in his tort theory. It is as though Epstein sought reinforcement for his conception of the parties' relations in tort by assimilating it to a conception of property as separate, unambiguous and absolute. Yet not only that assimilation, but both his property and his tort theories, are premised on the atomism, or separateness, that they are invoked to defend.

The theory reasserts this fundamental atomism at each point of possible breach: Requiring the erection and maintenance of firm borders and the security of possession within them, the theory resists as violative all claims upon the free exercise of will within those borders, including the claims of political obligation, reasoned judgment, and contextual contingency. These would impinge upon the

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111. Epstein's elaboration makes this dependence plain, as it reiterates his contention as to the parties' separateness without further grounding it:

> Prima facie, one man should not be allowed to solve his own problems at the expense of physical harm to another. . . . [T]he defendant's problems stem . . . from the defects of his own personal condition. . . . Once it is accepted that the plaintiff is not to be held accountable for (say) the defendant's insanity, in the sense that he is in no way obliged to look after him and provide for his general support, it follows that he should not be required to assume in effect the burdens of guardianship to the extent that the defendant has harmed him.

Epstein, *Subsequent Pleas, supra* note 83, at 169-70 (footnote omitted).

In the footnote Epstein cites to Cooley's 1879 *Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract*. In its atomistic premises, however, a theory of tort such as Epstein's (or, presumably, Cooley's) is not at all independent from the will theory of contract to which it is said to be an alternative. *See infra* note 112.

individual's freedom, understood as independence from context, embeddedness, judgment, politics, and human connectedness. Hence it is, finally, the certainty of isolation that the system is engaged in securing, even as it purports to seek after the justification of the tie that is liability.

Yet the repeated invocation of atomism cannot give its proponents the security they seek, but rather imperils it. Like any sanctity, that of boundaries cannot be made, willed, posited—or, if it is, it is to that degree made vulnerable to the claims of will that produced it, rather than standing, as sacred, beyond them. Misperceiving the threat to the sanctity of boundaries as coming from external invasion, regimes such as Epstein's resist this vulnerability by fending off others' claims as alien, arising from an Other with no claim on or connection to the isolated Self. To this end, the theories of such regimes reassert that matters between individuals—such as tort liability—are certain and delimited, and the borders between individuals clear.

The clarity of such borders is necessary to the rationalization of responsibility that is the overall project of tort theory, though other theories achieve the possibility of rationalization through different clarifying assumptions. Rationalization requires calculability, and the assumed detachment of persons allows for calculability on the basis of segmentation, or the separation of people into units. Utilitarianism is not the only form this rationalization takes; calculating interaction as force, as on Epstein's theory, similarly requires the stripping away of all that is not thus cognizable as the force of uniformly separate bodies. But the rationalization itself—that is, the project of justifying responsibility, of giving grounds for the obligation to respond to the harm brought to others—is necessitated by the underlying assumption of separateness, of the *absence* of such a connection and obligation at the outset, such that responsibility in tort is regarded as without a justification, and in need of one. Only on the basis of an assumption of atomism, in short, does the obligation manifested in tort liability appear unfounded. Providing that foundation, though without questioning the assumptions that render it both necessary and absent, then becomes the perennially puzzling task of tort theory.[112]

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112. Thus tort theory is often described as concerned with "stranger cases," *see, e.g.*, Epstein, *supra* note 86, at 481-82, and is seen as the residual alternative to contract—to cases, that is, where the parties are already "connected," though this is understood as arising through the operation of their freely consenting wills. The understanding of the parties as unconnected, except through such an act of the will, is thus the same in each field. *See supra* note 111. This is why the economic view can so easily transpose situations of tort into hypothetical contract, *see supra* text accompanying note 14, and why matters of intention and control (with foreseeability as a proxy for these) are so central to the analysis of tort liability.

This underlying tenet of atomism is no isolated theoretical assumption that can readily be exchanged for another, but rather bespeaks a fundamental understanding of the world as a whole, as consisting only of the aggregation of separate entities. *See infra* text accompanying notes 161-65.

Professor Epstein summarizes his theory of tort law by stating that its point is "to insure that a single conception . . . governs the entire body of tort law": "that the *antecedent conduct (promises, acts)* by one party towards another is the *sole source of their relative rights and duties.*"[113] Such radical atomism demands vigorous efforts in both the erection of theory and its constant defense against those who would invade or deny the posited boundaries between persons. Ironically, given this theorist's defense of individual autonomy and of the dependence of duties upon assent, those efforts lead to a regime of strict liability, a standard which appears to ignore the will and control as a determinant of liability. Yet the system based on that standard promotes another kind of control, consisting in the individual's certainty, not of his potential exposure to liability, but of his inviolability—that is, of his unbridgeable separateness. The drive to certainty appearing in Epstein's theory is rooted in the demands of atomism; the certainty demanded is of the posited boundaries themselves.

The themes of control and order manifested in Professor Epstein's theory will continue to appear in the various tort theories, as they pervade our understanding of the events at issue in tort law. In addition, the twin premises that have emerged as central to Professor Epstein's account—a central, and yet mysterious reliance on causation, and a deep-seated, implicit atomism—will also be seen, finally, as going to the very heart of the way of thinking that is tort law.

C. Coleman's "Mixed" Theory of Corrective Justice

A third principal theorist, Professor Jules Coleman, undertakes to employ the economic analysis of tort law as well as to subject it to critique. Thus, for example, he explores the distinctions among the various conceptions of efficiency as they are used in the economic analysis of tort law, assessing their distinct claims to justifiability.[114] Similarly, he is generally receptive to the arguments for "no-fault" or compensatory systems, usually defended only on Calabresian economic grounds,[115] and has long sought to produce a justificatory structure for tort law that would not preclude their adoption.

Professor Coleman's articles on the moral grounds of tort law[116] reflect

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113. Epstein, *supra* note 10, at 69 (emphasis added).

114. Coleman, *supra* note 5; *cf. supra* note 5.

115. *See supra* text accompanying notes 35-51.

116. Jules L. Coleman, *Justice and the Argument for No-Fault*, 3 SOC. THEORY & PRAC. 161 (1974); Jules L. Coleman, *On the Moral Argument for the Fault System*, 71 J. PHIL. 473 (1974) [hereinafter Coleman, *On the Moral Argument*]; Jules L. Coleman, *The Morality of Strict Tort Liability*, 18 WM. & MARY L. REV. 259 (1976), *reprinted in* JULES L. COLEMAN, MARKETS,

an ongoing project; they show him tracing a series of positions, articulating and refining them, addressing objections, considering implications, and modifying the conception accordingly. His overall project, insofar as such development allows a single characterization, has been to examine critically the moral bases offered for tort law, in particular as these have been invoked in support of the fault system and against its replacement by a compensation regime. More recently, he has also sought to develop his own affirmative theory of what a defensible model of tort law might require. His method has principally been one of drawing distinctions, as is the general practice in the analytic philosophical tradition, in contrast, for example, to the holism and continental philosophical sources invoked in Weinrib's theory, discussed below. Accordingly, his theory is still in progress, as it is understood as capable of being further "filled in" and altered, rather than as cohering in such a fashion that such blanks or substitutions are fatal.

As for the social compensation programs he implicitly defends, there is an inherent pragmatism to the style of reasoning Coleman employs, which accounts for the provisional quality of his conclusions. And, as with those programs, the details of his theoretical turnings accordingly matter less than the way of thinking that generates and then discards those details. The theory is repeatedly revised and portions discarded, driven by the search for a theory that "works," that is, one that is effective in meeting the objections and counterexamples thrown up to it, but whose serviceability in this regard is always provisional, contingent on meeting the next such challenge, failing which it too is discarded.

Viewed as a whole, Professor Coleman's work suggests a theory always in motion, continually pursuing a justification for the structure of tort law, which is conceived as consisting in a right to recover for "wrongful losses," belonging to the victim, and a duty of reparation, of debatable ownership. The relation, if any, between these is a principal focus of Coleman's body of work. In particular, he is concerned with the justification, or lack of justification, for the linkage of these two elements; though the existence, nature, and adequacy of that justification shift repeatedly throughout Coleman's work, its pursuit is constant. A few points in the development of the theory will suggest the path

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MORALS AND THE LAW 166 (1988); Coleman, *supra* note 5; Coleman, *Justice and Reciprocity*, *supra* note 69; Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits* (pt. 1), 1 LAW & PHIL. 371 (1982); Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits* (pt. 2), 2 LAW & PHIL. 5 (1983) [hereinafter Coleman, *Moral Theories of Torts, part 2*]; Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986); Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233 (1988) (book review); Jules L. Coleman, *Mixed Conception*, *supra* note 61; COLEMAN, RISKS AND WRONGS, *supra* note 61. *See also* Coleman, *Justice and Reciprocity*, *supra* note 69; JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 164-89 (1990).

traced in this pursuit, as well as the underlying tensions that call for the theory to move along that path.

Originally, Professor Coleman understood "corrective justice"—that is, the set of moral requirements that ground and justify tort law—to require the "annulment" of wrongful gains and losses.[117] But he found this conception to be problematic, because, however applicable to cases of unjust enrichment or restitution, in most instances of *tort* there is no gain (in the ordinary sense) to the tortfeasor. And if, following the economists, one sees "gain" in every precaution untaken by a negligent actor, then the gain to be disgorged would accrue to every such actor, and not merely to those whose negligence eventuates in harm; yet tort law is concerned only with the latter. Finally, even in cases involving both wrongful gains and wrongful losses, there is no necessary correspondence between the size of these such that the tortfeasor's obligation to compensate the tort victim for the amount of his damages (his loss) should have any but a random relation to the amount of the defendant's gain; slight instances of negligence, or slight savings in precautions, can result in disastrously costly harms. This lack of correspondence has led Professor Coleman, among others, to question whether the model of gains and losses is adequate as a description

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117. *See* Coleman, *Mixed Conception*, *supra* note 61, at 427, 429-30, 433.

"Corrective justice" is the term used by each of the moral tort theorists to describe his own theory. (Professor Fletcher alone resorts to a different label, "fairness," reflecting his theory's Rawlsian roots—though he too offers a citation to Aristotle, whose discussion of "corrective justice" each regards as the source of moral tort theory, *but cf. infra* note 146.) Accordingly, just as these theorists diverge in the substance of their theories, so they come to no agreement as to what "corrective justice" means or requires as a model of legal principle. Thus, Professor Coleman undertakes to construct an analytic account of the elements of a defensible model; Professor Weinrib looks to Aristotle, with contributions from Kant and Hegel, for a theory he understands to be already implicit in the structure of tort law; and Professor Epstein uses the term to refer to his own, causation-driven theory of strict liability, in distinction from the economic view. Judge Posner also mentions the term, suggesting that corrective justice actually is, or might be, nothing other than the moral expression of a concern with efficiency. *See* LANDES & POSNER, *supra* note 4, at 14.

As such a protean stand-in for each substantive theory, the term lacks a content sufficiently determinate to arbitrate among the various theories claiming to embody "corrective justice." Some minimum content can be gleaned from its use across these theories, however. As used to denominate a theory of tort, it appears that—apart from Posner's novel interpretation—the term is generally meant: (1) to focus attention on the legal relations between tortfeasor and victim, as opposed to those among members of a community in general; (2) as a corollary, and reflecting Aristotle's separate treatment, as dealing with matters distinct from those properly the concern of distributive justice; (3) as looking for normative significance to the tortfeasor's action and the victim's loss (thought to be prefigured in Aristotle's discussion of "gain" and "loss"), and to the causal connection perceived between these; and (4) as requiring the victim's loss to be "annulled" or "rectified" (hence, "corrective" justice) through reparation, usually by the tortfeasor, though Coleman reserves the question of whose duty this is.

of the corrective justice appropriate to tort law.[118]

Accordingly, Coleman next abandoned the focus on wrongful *gains*, as not present in most instances of tort, but retained the focus on wrongful *losses*; it is these, he now held, that corrective justice demands be annulled. This severance of the gains-and-losses knot that was thought to lie at the heart of tort law meant that the relation between the victim's right of recovery and the tortfeasor's duty to provide it—always the puzzle for Coleman's theory—now appeared unfounded.[119] That the victim has a right to compensation, he concluded, does not entail that he has a right to compensation from the tortfeasor; and that the tortfeasor may be under a duty of reparation entails neither that the duty is his alone, nor that it cannot be discharged by others. Coleman labels this distinction, which he has continued to maintain throughout his writings, a distinction between the "grounds of rectification" (the reasons given by moral theory for the victim's right to recover for his loss) and the "mode of rectification" (the institutional means such as tort law or social compensation systems by which that rectification may be carried out). So separated, the "grounds of rectification" are to be given by principles of

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118. Coleman, *Wrongful Gain*, *supra* note 116, at 423-25. This rejection, based on a perception of inadequacy between the size of actual damages, on the one hand, and that of actual gains from tortious activity, on the other, arises from the view of "corrective justice" as concerned with *quantitative*—that is, numerical—equivalence. While this view may be thought to be encouraged by Aristotle's discussion of "gains" and "losses" and his use of an arithmetic analogy, it is not dictated by them, as Weinrib shows. *See infra* text accompanying notes 145-46. On the contrary, it is the understanding of tort law as appropriately concerned with the justified transfer of quantified compensation, from which we begin, that yields the ready conclusion that Aristotle, too, "must have" seen it as such.

In this quantified approach, we already think from within the arena of comparison and set-off, where economics and utilitarianism find their natural soil. Again, then, those moral theorists who oppose the utilitarian justification of tort law fail to leave its pull behind insofar as they begin with such thinking. They are not alone in this. We are so accustomed to this understanding that "quantified compensation" seems redundant; we hear in "compensation" only the transfer of money, and not its roots in a weighing-together, here of victim and tortfeasor, nor the sense of weighing as not a measuring operation, but a pondering, as in "pensive" thought. *See* SKEAT, *supra* note 24, at 102-03, 382, 401-02. The resort to quantification, as in the use of money to "cost out" the duties and relations prescribed by tort law, has come to dominate our understanding of duties and relations throughout the law. Yet its allure for us, though undeniable, should not be confused with its necessity. *See* HEIDEGGER, *supra* note 39, at 30-31.

119. More precisely, in seeing the relation between the position of victim and tortfeasor *as* puzzling, as in need of justification, from the outset and throughout the theory—and it is this that drives the theory's movement—the theory, at its foundation, *already* viewed the victim and the tortfeasor as separate; it is this understanding, which survives all of the theory's shifts, that here enabled Coleman to jettison the focus on the tortfeasor's gains.

corrective justice; its "mode"—tort law or its replacements—by policy considerations.[120]

On Professor Coleman's amended view, corrective justice was said to require "that wrongful losses be annulled," though not how or by whom such obligation was to be carried out. It can be surmised that this agent anonymity, abetted by the passive voice, was an effort to preserve the possibility of substituting compensation systems for tort liability. But this formulation left the obligation without a specified agent whose duty that obligation was; rather, that duty, so formulated, appeared to be general, or "agent-neutral." This, Coleman has recently concluded, renders this general duty of rectification indistinguishable from obligations imposed by principles of *distributive* justice,[121] which are also agent-neutral and which also concern relief from

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120. *See, e.g.*, Coleman, *Wrongful Gain*, *supra* note 116, at 422-23; Coleman, *Mixed Conception*, *supra* note 61, at 429-30, 443-44; COLEMAN, RISKS AND WRONGS, *supra* note 61, at 281-88, 326-28. In maintaining this distinction between the end of rectification, understood as given by moral theory, and its means, a matter for tort law or its replacements to fulfill, Professor Coleman implicitly operates within a distinctive understanding of law, one that conditions the development of his theory. Law, on this account, is an institutional human artifact, in need of justification by reference to its satisfactoriness in fulfilling aims not to be found within it but drawn from social policy or moral theory and, failing that justification, fit to be changed or abolished. This instrumentalist understanding of law—the same as that implicit in compensation theory and its Realist foundations, *see supra* text accompanying note 47—enables the compensation theorists to propose, and Coleman to defend, the supplantation of tort law by social compensation programs.

Because Coleman begins with this understanding of law as separate from, and available to, the demands of either moral theory or social policy, he presents the problem for tort law as lying in the relation of tort law, policy, and morals. Yet the separation itself prejudges that relation to be, finally, itself one of instrumental policy, because law is understood from the outset as just such a matter of instrumental satisfactoriness. Thus law is conflated with instrumental policy, and only the relation of law and morality remains problematic. Yet the problem he perceives in the *relation* between these domains itself arises from the *separation* he assumes at the outset; it is in the understanding of these *as* separate that their relation, denied by that assumption, indeed appears as problematic.

This problematization extends not only to the relation between the victim's right and the tortfeasor's duty, but also to that between the demands of justice or morality, on the one hand, and the law in general, on the other, again because these are understood from the outset as separate. (Coleman is not alone in this understanding of separateness, though his explicit instrumentalism makes the problem more transparent.) Thus in the resort by the moral tort theorists to "corrective justice" to supply the moral grounds for critique of existing tort law, they raise fundamental issues of the relation between law and principles of morality, or justice, understood as existing beyond law and yet supplying its justification. The source, status, and content of such extra-legal standards of right are highly problematic in our age; having dispensed with natural law, we lack an understanding of how this "other" can qualify law as a separate and prior criterion of right—the very difficulty that legal positivism was thought to avoid but which instead it makes more urgent and more intractable.

121. *See* Coleman, *Mixed Conception*, *supra* note 61, at 433-35, 438. In rejecting the agent-neutral conception on this ground Coleman implicitly requires that corrective justice yield a determinate (single) obligor, much as with the rejection of "causality" as a determinant of liability in favor of the cheapest cost avoider notion under economic theory, *see supra* note 10. Once again,

material hardship. Accordingly, Coleman's most recent revision to his conception of corrective justice reintroduces a relational aspect, wherein the theory seeks to isolate the grounds on which the tortfeasor alone has reasons for acting to annul the loss that are not reasons for action across the general community. He looks for this relational aspect to the work of Stephen Perry,[122] among others.

Purely relational theories of corrective justice, Coleman explains, are not concerned with the annulment of wrongful gains and losses, but rather with the existence of a normative relation between tortfeasor and victim such that the tortfeasor's wrongdoing is the ground for his obligation to the victim. Professor Coleman seeks to adopt this relational idea, in order to particularize the obligation as the tortfeasor's, and to combine it with a concern to annul wrongful *losses*, retained from his original "annulment thesis"; annulling such losses is the obligation the tortfeasor incurs. (It is in this sense that Coleman describes his most recent thesis as "mixed.") Annulling *wrongs*, which Coleman views as the alternative understanding of the tortfeasor's obligation open to a relational theorist, he rejects as properly the concern of retributive, rather than corrective justice; the "bulk of cases in which claims in corrective justice are valid do not involve wrongs" in a "genuine," or morally culpable sense, as would call for annulment.[123]

This observation that tortious action is generally not morally culpable is worth dwelling on, as it spurs Coleman to further adjustments, which in turn

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the demand is for a theoretical conception that "works," that is effective in delivering such a usable answer. Coleman, always concerned to preserve resort to social compensation systems, clouds the visibility of this aim at determinacy by suggesting that the agent-relative duty of reparation may nevertheless be satisfied by such systems, as a debt may be discharged by someone other than the debtor. Even this reservation can be seen, however, as aimed at preserving the workable solution that such systems, and the availability of insurance generally, provide to the practical problems of delivering tort compensation, rather than as a moral desideratum determined apart from such considerations of efficacy.

Because of this ongoing demand for an effective solution, for a justification of determinate liability, the perceived agent-neutrality is not seen to throw into question the search for such a determinate ground of liability, but rather to reinvigorate that search. In terms of the dynamic traced here throughout Coleman's writings, it has elicited another theoretical turn, such that the parties, originally together under the gains-and-losses conception, then sundered by the jettisoning of the "gains" idea, are again seen as joined. It is the persistent puzzle surrounding that joinder that powers this oscillation. And, in all its versions, the solution is seen to hinge on the tortfeasor's agency as providing grounds (now seen as sufficient, now insufficient) for his liability. *See infra* text accompanying notes 125-32; *infra* part V.

122. *See* Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992) [hereinafter Perry, *Moral Foundations*]; *see also* Stephen R. Perry, *The Mixed Conception of Corrective Justice*, 15 HARV. J. L. & PUB. POL'Y 917 (1992) [hereinafter Perry, *Mixed Conception*].

123. Coleman, *Mixed Conception*, *supra* note 61, at 441-44; *see also* Perry, *Moral Foundations*, *supra* note 122, at 509.

reveal deeper complications. Professor Coleman views ordinary negligence, for example, as insufficient grounds for moral blame, in part because he understands such blame as "subjective," and therefore not triggered by mere breach of the "objective" standard of care[124]; in the case of necessitous tortfeasors, such as where property rights are infringed to save lives, the tortious action may even be the right thing to do, or is at least justifiable.[125]

Coleman reasons from such cases that culpability cannot be necessary to tortious liability understood as embodying the demands of corrective justice. Implicit in this conclusion is the idea that culpability requires the effective ability to have acted otherwise, as when the "objective" standard of care is "subjectively" present to mind, or necessity does not present practical urgencies that prevent adhering to such a standard. Lacking such effective control over the eventuation of harm, the tortfeasor is not seen as culpable for that harm, though it results from his actions. Coleman therefore proposes to understand corrective justice as concerned with two classes of cases, either of which will ground liability, and to neither of which culpability necessarily attaches.

The terms Professor Coleman uses to designate the two classes of tortious action are "wrongs" and "wrongdoings." A "wrongdoing," it appears, is illegitimate harming, that is, harm done in violation of a norm, understood to be "objective"; a "wrong" is the invasion of a right, and may be "praiseworthy or . . . permissible."[126] Tort liability will lie for action within either of these categories, and, for either, culpability may be absent. Coleman concludes from this that culpability is not necessary to justify liability. Yet it is a puzzle how far any such actions may be understood as *wrong*, as Coleman's names for them would seem to require, in view of the fact that he wishes to disengage these tortious actions from any necessary foundation in culpability—and why, if they are not "wrong" in a "genuine" sense, it is nevertheless felt to be necessary to resort to the word "wrong" to describe them.

Despite Professor Coleman's efforts to restrict it, it appears that the word "wrong" retains here an ambiguous, double sense. Though Coleman employs it to describe tortious action expressly understood to be non-culpable, it is ordinarily understood, as he notes, to refer to action which is culpable. (As will be seen, the usage is extended to a third term, "wrongful losses," used to refer

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124. Coleman, *On the Moral Argument, supra* note 116, at 478-81; *see also* Coleman, *Mixed Conception, supra* note 61, at 441-42. *But cf.* Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1 (1927).

125. Coleman, *Moral Theories of Torts, part 2, supra* note 116, at 18-24; Coleman, *Mixed Conception, supra* note 61, at 441-42.

126. *See* COLEMAN, RISKS AND WRONGS, *supra* note 61, at 331-35; *see generally id.* at 329-360 (ch. 17, "Wrongfulness").

to the ground of the victim's right to recover, and also exempted from connotations of the tortfeasor's culpability.) Coleman stresses that he intends the word "wrong" in only a narrow sense in which culpability may be absent. Yet it is nevertheless striking that he invokes a word that resonates with overtones of culpability in its dominant, ordinary-language sense, and repeats it in designating all three of his terms. The necessity for this ambiguity does not arise from any fault or error of scholarship on Professor Coleman's part, however, but rather goes to the nature of tort law and its antinomies, to which Coleman has been more faithful than those who avoid such difficulties, rather than less. It appears that the theory both needs and profits from those overtones of culpability, and yet must disavow them. In this there can be glimpsed an unspoken underlying tension that pervades tort law and theory.

This tension, manifested in the simultaneous need for and avoidance of the moral overtones of the word "wrong," appears perhaps most strikingly in Professor Coleman's third term, designating those losses with which tort law is to be concerned, where the word "wrongful" again appears. Whereas the relevant tortfeasor's action necessary to ground liability has been specified to be (non-culpable) "wrongs" and "wrongdoings," the relevant harm to the victim is now declared to be "wrongful losses." "Wrongful" here describes not the tortfeasor's actions, but those resulting losses which are compensable. And, here, the "wrongful" designation is divorced not only from the tortfeasor's culpability, but from his action as well: "The gist of my suggestion is that the wrongfulness of the loss is an independent aspect of corrective justice, independent of the wrong or wrongdoing itself."[127] Thus "wrongful" is detached from action, and applied to loss; it thereby seems to deliver the normative quality necessary to the theory, without charging it to the actor, as seems unwarrantable under the cases. As if to underscore this detachment, it proceeds on two fronts: "Wrongfulness" is detached both from the actor ("the fault or wrong is in the doing, not in the doer"[128]) and from his act ("the wrongfulness of the loss is . . . independent of the wrong or wrongdoing itself"[129]).

The "wrongfulness" of the loss, a matter "independent" of both actor and act, is thus twice removed from the tortfeasor, as comports with Coleman's recognition that the matters at issue in tort law are not "genuine" wrongs.[130] But this detachment does not merely allow Coleman to separate the "grounds of rectification" in corrective justice from its "mode" in tort law or a social compensation system; rather, it leaves the law, understood as a system in which

127. Coleman, *Mixed Conception, supra* note 61, at 441.
128. *Id.*
129. *Id.*
130. *See id.* at 441-43 (article section entitled "A Wrong is not Always Wrong").

responsibility must be justified, with no good reason—*no* "grounds"—for attaching liability to the tortfeasor in the first place, rather than simply moving directly to social compensation for loss. Such a conclusion, Coleman recognizes, would give no weight to the moral relation of the tortfeasor to the victim, yet that relation resists being couched in our usual moral terms turning on culpability. This may explain why Coleman's theory, at the same moment that its substantive provisions insist on the double detachment of the tortfeasor from the "wrongful" loss, by its terms repeatedly invokes the morally powerful word "wrong" to describe precisely those actions, and those losses, at issue in tort law.[131]

The path taken by Coleman's theory can be seen to trace a response to an unspoken dilemma that it may be thought to face: Either the tortfeasor's action is *wrongful* in a sufficiently rich sense to ground his obligations toward his victim (which Coleman believes would leave us unable to account for, *inter alia*, negligence and necessitous tortfeasor liability), or it is not, and Coleman's arguments justify not a theory of tort, but only a theory of general compensation. This is not a false perception of the demands placed by justification upon a theory of tort liability.

The justificatory demand that is given to tort theory is: How can we justify holding the tortfeasor responsible, through the assessment of liability, for tortious harms? Because Professor Coleman is attentive to the nature of those harms, in particular their arising from "non-culpable" action (that is, action undertaken without the effective ability to act otherwise), he finds that justification elusive. This is because justification within traditional legal and moral theory looks to some aspect of the agent's control over or choice of the action in question; we can see this resort, for example, in the use of a contract model to justify liability, as in certain retributive theories of punishment or the economic account of tort law, or in Fletcher's reliance on a Rawlsian scheme of "agreement" to risk imposition. But such choice and control are precisely what tortious actions—especially negligent actions, the typical subject of modern

131. The two senses of "wrong" at issue here might be called the moral and the legalistic. The latter sense, which Coleman identifies as his usage, refers to the violation of a specified right or standard. Because the actor's knowledge, intent, and effective possibility of acting otherwise are expressly excluded from the determination of a violation, that determination is technical, looking only to the right infringed or the standard breached. The specification of these rights and standards, and the determination of their breach, are creatures of the positive law, as comports with the separation of legal and moral spheres on which Coleman implicitly relies. But the use of the word *wrong* (rather than, say, "technical violation") in all three of the theory's terms serves *sub silentio* to invest the theory with the moral weight perceived as necessary to ground liability, even while Coleman stresses the divorce of these terms from the tortfeasor's culpability. And this investment is precisely what legal positivism, and Coleman's own segregation of culpability from liability, seem to preclude.

tort law[132]—characteristically lack, and it is this perception that prevents Coleman from taking such an easy route to justification, though none other appears satisfactory.

Tort theory, in short, is faced with a dilemma, arising from the fact that we attribute effects to human will as the normal ground of both our judgments of responsibility and their justification, and that this ground is inapt in connection with torts, especially negligent torts, the prototypical modern case. The equivocations of Coleman's theory, then, reflect no lapse in the theory or misconception in its execution, but rather suggest an inchoate effort to respond to this dilemma, which is inherent in tort law. It is true, as Coleman notes, that many tortious actions lack culpability, whether because the standard of care is "objective" (as in negligence), or because liability is otherwise imposed without regard to the actor's ability to avoid the harm (as in strict liability), or because his action was justified though still creating liability (as in the necessity cases)—or because the typical tort situation is one of accident, or surprise, and not of control. That such actions are nevertheless seen as giving rise to a normative relation of liability is the puzzle for tort law, a puzzle which is made more salient by Coleman's ongoing efforts to design a solution.

D. Weinrib's Theory of Formal Corrective Justice

In a fourth moral tort theory, Professor Ernest Weinrib, looking to Hegel and Kant as well as to Aristotle, describes the formal structure of tort law and argues that it is in this structure that the justification of tort law lies. The most striking characteristic of this elegant theory is its holism—that is, its claim to coherence, understood as expressing a unity in all its parts such that none is intelligible on its own. This is not an incidental or additional characteristic of the theory; rather, Weinrib claims, this is required of any legal theory as such. He calls this quality "coherence"; accordingly, any legal theory lacking this quality is, in a direct sense, "incoherent." He thus lays claim to a particular theory of law as "valuing" and "tending toward" such unity: "the sophistication

132. It is true, of course, that negligent action is often understood to involve a *culpable* failure of control, and so to justifiably ground liability. The question remains, however, wherein this culpability lies. Such a conception merely displaces by one step the inquiry into, and expectation of, control: In the "you ought to have" implicit in the rebuke of negligence liability lies, on our ordinary moral understandings, an implicit "you might have"—the assumption that it was possible, within one's control, not to have lost control or acted without forethought; it is this assumption that the experience of accidents brings into question, as can be seen in the perplexity it occasions for those theorists who refrain from immediately assimilating accidents to intentional harms. But attempting to do without this assumption simply re-presents the central question for tort theory: If such control was not to be had, how is liability justified? This conception of negligence as culpable thus presents either a reiteration of the question for tort law and theory or its evasion, but not its solution.

of . . . a [legal] system consists in its tendency toward coherence."[133] He thereby also invokes a particular theory of knowledge as cognitive and rationalist, such that it locates intelligibility in that unity.[134]

These claims as to the nature of law, and of knowledge, converge in Professor Weinrib's embrace of legal formalism, which "postulates that law is intelligible as an internally coherent phenomenon."[135] He restricts his claims of knowledge to this legal sphere, possibly out of unease with the Platonic overtones of reliance on form for intelligibility in the general case; "whatever else can or cannot be understood in this [internal, formal] way, law at least can."[136] To reach this conclusion, Weinrib must conceive of law as wholly conceptual:

> For the formalist, law is *constituted* by thought: Its content is made up of the concepts (e.g., cause, remoteness, duty, consideration, offer and acceptance) that inform juridical relationships. Law is identical to the ideas of which it is comprised, and the intelligibility of law lies in grasping the order and connection of these ideas.[137]

On this view a legal system resembles a system of logic: The product of rationality, it must yield, and yield up to, rationality. It remains a question, however, how far law can be so understood.

This distinctive understanding of law sets Weinrib's theory of torts apart from others dealing with the same subject matter, and governs the development of the rest of his theory. As part of the formalist understanding of law as both unified and conceptually accessible, Professor Weinrib understands law to possess an immanent intelligibility which it is the job of the formalist legal scholar to discern. That intelligibility is an internal one, constituted by the structure and interrelationships of the legal concepts in issue. Accordingly, "external" explanations of legal phenomena, such as those based in economics, history, or politics, cannot reach this inner understanding, and so fail to comprehend legal phenomena in their essence as legal, which is to say as part of the immanently intelligible conceptual structure that is law.[138]

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133. Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L. J. 949, 966 & n.42 (1988).

134. *Id.* at 956-57.

135. *Id.* at 951.

136. *Id.* at 957.

137. *Id.* at 962 (footnote omitted).

138. As against critics' charges of circularity at such a point, Weinrib denies the circle's viciousness; the "circle" they fault is just the coherence, or holism, that the theory aims to show. This wholeness, or circularity, belongs to system as such, understood as a totality of thinking. The drive to system characterizes not only Weinrib's work (and that of Kant and Hegel, to whom

As applied to tort law, this framework of understanding entails that the customary economic explanations of tort law, such as its promotion of efficient deterrence, or of loss-spreading, are excluded. Professor Weinrib does not deny that such goals may be the aim of efficiency regimes (as where fines are imposed for "negligence") or of compensation systems; he simply denies that they are the goals of tort law. Instrumentalism itself—goal-promotion of any sort—is excluded from law, on the formalist understanding, as inherently extrinsic.[139] This is the sense in which Weinrib can claim that tort law has no purpose, understood as an instrumental goal; "the only purpose it can coherently have," rather, is "to be tort law."[140]

Accordingly, tort law is to be understood as possessed of an immanent intelligibility to be discerned from attending to the structure and interrelationship of the features and concepts that make it up. Two such features are foundational to tort law, Weinrib suggests: its bipolar procedure, and causation. These, again, are not independent features, but interdependent. The causal structure of the injury is itself bipolar, such that the bipolar procedure of the parties' lawsuit, and the bipolar remedy of paying damages which are received as compensation, are its legal correlative. The "normative unit" that lies at the center of tort law is "the doing and suffering of harm," capturing both these causal and bipolar aspects.

In contrast, an external explanation of tort law, as is provided by either the deterrence or loss-spreading rationales, cannot explain the connection between the parties, or the significance of causation. Deterrence is a matter of the defendant's choice of action and his incentive structure, not of the plaintiff's harm, except incidentally; and compensatory or loss-spreading programs lack connection to the defendant's obligation to pay damages, and to his causation of the injury, such that such programs lack a coherent justification for limiting their domain to tortious injuries. This theoretical inability ("incoherence" in the

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Weinrib looks for the content of his theory), but modern thought generally. *See* HEIDEGGER, *supra* note 39, at 27-32. Nor, then, are Weinrib's critics, speaking out of the perspectives of modern thought that emerge as Coasian, compensation, or moral theory, themselves without system, though they may not articulate it as Professor Weinrib does. Indeed, it is system as a unified understanding of beings—that is, as metaphysics—that underlies and unites these perspectives with Weinrib's. *See infra* part V.

The problem for system is its compatibility with freedom. *See* HEIDEGGER, *supra* note 39, at 21. The difficulties shown here to attend each of the proposed systems for the rationalization of responsibility for accidents in tort law suggest the incompatibility of such rationalization with accidents, which occur despite, and so beyond, rationalization. *See infra* part V. The problem for tort law thus can be seen to replicate the philosophical problem of freedom and system at the level of practical action.

139. Weinrib, *supra* note 133, at 964.

140. Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 526 (1989).

ordinary, loose sense) follows as a matter of course, Weinrib intimates, from the extrinsicality of the rationales offered ("incoherence" in Weinrib's literal sense). Such explanations do not begin with the "normative unit" of bipolar causation, but "look past" it to their respective external rationales, and thus lose the sense that tort law, understood as a unity, already presents.

The doctrines of tort law speak to the nature of this fundamental link between the doing and the suffering of harm. In the case of intentional torts, the link is intention.[141] In the case of negligent torts, the matter is "more complex and problematic": the "organizing concepts of negligence law"—"act, misfeasance, reasonable care, duty, proximate cause, and factual cause"—each understood in terms of the whole, together "trace a moral sequence originating in the actor's doing and completed in the victim's injury."[142] Professor Weinrib undertakes to show that tracing in some detail for each of these concepts; again, the overriding point is their contribution to the whole understanding he has formulated, their inextricability each from the other, and their incoherence if taken as independent or as explained by external factors. The resulting structure accounts for each of these elements, in a normative and physical whole that is the unity of the doing and suffering of harm.[143]

Weinrib turns to Aristotle for further explanation of the normative structure of tort law and for support of his claims for its insulation from distributive considerations.[144] Although modern doctrines of tort law, including the concepts that make up negligence law, were of course unknown to Aristotle, Professor Weinrib draws upon Aristotle's brief discussion of two forms of justice in Book 5 of the *Nichomachean Ethics* to support his argument that the formal structure of tort law—as well as of all private law and of public law concerned with distribution—was there comprehended.

The Aristotelian forms of justice in question are the form of corrective justice and the form of distributive justice. Both concern justice toward others in connection with holdings rather than virtue, and both express a kind of equality—as such justice is fundamentally concerned with equality[145]—but in distinctive ways. Distributive justice concerns the distribution of benefits or burdens in a polity, and its principle is proportionality: That which is to be distributed should be so distributed in proportion to the merit of the individuals among whom it is to be distributed. (Aristotle does not specify that principle

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141. *Id.* at 514.

142. *Id.* at 515.

143. *Id.* at 524.

144. Weinrib, *supra* note 133; Weinrib, *supra* note 140; Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992).

145. Weinrib, *supra* note 144, at 406-07.

of merit, noting that it is a matter of controversy and will vary with the matter to be distributed—the distribution of flutes, for example, determined by merit in flute playing, rather than by merit in overall virtue or noble birth.) This form of justice is thus mediate, as the principle of merit mediates between individuals and their holdings, and among individuals and their respective holdings in justice. For any such principle, however, the relevant holdings of individuals, when adhering to the form of distributive justice, will bear that proportion to others' holdings as that person's merit (along the relevant dimension) bears to others' merit. Aristotle expresses this kind of equality as geometric proportionality.

Corrective justice contrasts with distributive justice at each of these points. Rather than concerning holdings across a polity, corrective justice pertains only to two people; in Professor Weinrib's terms, it is "bipolar." It concerns these parties' holdings only as they have been affected by the wrongful action of one of them, and its sole concern is with rectifying the resulting imbalance—not with the fairness of that *status quo ante*, a question of distributive justice. It is therefore immediate, unmediated by the principle of merit that determines justice in distribution of the parties' holdings. Indeed, corrective justice (again, unlike distributive justice) is wholly unconcerned with the merit, position, or virtue of the parties. As Aristotle notes:

> It makes no difference whether a decent man has defrauded a bad man or vice versa, or whether it was a decent or a bad man who committed adultery. The only difference the law considers is that brought about by the damage: it treats the parties as equals and asks only whether one has done and the other has suffered wrong, and whether one has done and the other has suffered damage.[146]

The kind of equality to which corrective justice restores the parties is thus an abstract one, as the parties are abstracted from their particular features that are relevant in claims of distributive justice. In restoring the prior state of holdings, corrective justice achieves an equality, not of the parties' holdings (which, like their virtue or merit, may well be unequal in fact), but of their

146. ARISTOTLE, NICHOMACHEAN ETHICS 1132a (Martin Ostwald trans., 1962). Aristotle's examples suggest that he is speaking only of what we would call intentional torts—not negligence, which Weinrib elsewhere acknowledges to be integral to the moral structure of tort law, *cf.* Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37 (1983) (offering an account of the negligence standard as embodying corrective justice and arguing for its superiority over Epstein's account of strict liability). Professor David Daube has argued that the concept of negligence is absent in Aristotle, which would seem to preclude the effort to mine Aristotle for his support of modern tort law. *See* DAVID DAUBE, *Dolus, Culpa, and Casus, in* ROMAN LAW 131-56 (1979). As discussed shortly in the text, whether or not Aristotle shared our concept of negligence, it is significant that we look for him to do so.

abstraction, consisting precisely in the irrelevance of these differences to the harm and remedy in question. Aristotle expresses this kind of equality as arithmetic: The quantity taken, and the quantity restored, are equal, and the resultant holdings are equal—in the sense, Weinrib urges, of abstract equality, not actual quantity of holdings. (Here we see again the difficulty with understanding torts as involving "gains," as the Aristotelian model seems to require; Professor Weinrib interprets Aristotle's acknowledgement of this difficulty as strong evidence of its failure to imperil his own theory's claim to Aristotelian support.)

From the differences between these two forms of justice and from Aristotle's separate treatment of them, Professor Weinrib concludes that they are distinct, each irreducible to the other and commingled only at the cost of violence to the form. This Weinrib takes to support his claim to the insulation of tort law, understood as a matter of corrective justice, from concerns properly a matter of distributive justice.

Yet Weinrib stresses that Aristotle, concerned with these forms of justice *as forms*, does not undertake to prescribe the principle of distributional merit in the case of distributive justice nor, in the case of corrective justice, the grounds for recovery, the cognizable claim or cause of action. Nor does he prescribe the cases where each should apply:

> From the standpoint of Aristotle's analysis nothing about a personal injury as such consigns it to the domain of a particular form of justice. The differentiation between the corrective and distributive [forms of] justice lies not in the different subject matters to which they apply, but in the differently structured operation that each performs on a subject matter available to both.[147]

Thus it is *we* who, in understanding torts as presenting a question of justice arising from bipolar causation, thereby bring them within the framework provided by the form of corrective justice. Aristotle's contribution appears, then, to be limited to supporting a proscription on admixing distributive considerations into this form once we have opted for its corrective structure.[148]

That we should treat torts—especially negligent torts, the prototypical modern case—as matters for corrective justice is, then, not anything to which Aristotle speaks. Rather, Weinrib seems to be saying, *if* we are to understand torts as matters for justice, and to understand them as arising from bipolar

147. Weinrib, *supra* note 144, at 415.

148. *Id.* at 417-18. This proscription, again, is an argument from "coherence" and the intelligibility of a legal theory which it is claimed to govern. *Id.*

causation—as we do—then Aristotle's corrective justice provides the model for the treatment of torts under the law; and, further, that if, with Weinrib, we understand the intelligibility of a legal system to lie in its adherence to unadulterated form, then Aristotle also supports the exclusion of distributive considerations from that treatment. Everything turns, however, on our adoption of the bipolar, causal model.

The contingency of our understanding torts in this way is by no means a matter of arbitrariness, whim, or indifference—nor of selection—as to which model of torts "would be" ours.[149] And yet that understanding of action and harm and world is nothing unconditioned, abstracted from us as we are. It is not timeless. Rather, it is *ours*—so much ours that we do not see its singularity, precisely because we are so at home in it, because it *is* our understanding.[150]

Weinrib distinguishes between empirical and conceptual inquiry, and rightly notes that Aristotle's classification is not to be taken as empirical.[151] The question raised here, however, is neither empirical (as our understanding of the world precedes empiricism, and makes it possible) nor conceptual, but rather metaphysical, as it goes to our understanding of the world as a whole within which the concepts of tort theory find their ground: How must we understand the world, and the nature of human action within it, *such that* this bipolar, causal model of torts occurs to us, and appeals to us as appropriate, as fitting that prior understanding of the world? The question raised here concerning Aristotle and torts is not, then, a question of historical fact, of what Aristotle himself actually thought about those actions we call torts, though much remains to be puzzled over in that regard;[152] rather, it is a question of how *we*

149. Thus I do not at all suggest that our understanding of torts is "up for grabs," open to any interpretation including one dominated by distributional or political considerations, still less that it already is subjected to such an interpretation, though "disguised" as nonpolitical corrective justice. (Some of the attention that Critical Legal Studies writers have paid to tort law has this flavor. *See* Abel, *Socialist Approach*, *supra* note 2; Abel, *Torts*, *supra* note 2.) No such conclusion need follow from the suggestion that law is not timeless, but is of a people and their time, unless one assumes that the universality of law—which the critical school generally denies exists—is nevertheless necessary to its legitimacy.

150. *That we think it should be* timeless is not inconsistent with the kind of thinking inherent in tort law, however. Thus Professor Weinrib's explication of the model of bipolar causation—our model of torts—and his use of timeless forms and abstraction as an expression of the justice appropriate to that model, are completely consonant. That the kind of thinking that appears in tort law is both distinctive and lays claim to timelessness, or unchanging universality, suggests that its roots lie in metaphysics. *See infra* part V.

151. Weinrib, *supra* note 144, at 413-14.

152. Such questions include: What does Aristotle's apparent inclusion of all but bodily-thrown cases under "voluntary" action imply for our understanding of negligence, and its distinction from intentional tort? And what does the recognition that right action (*praxis*, as distinct from *poiēsis*) is its own end portend for the consequentialism that inheres in tort law (*see supra* note 68)? While

understand them, of how they fit within our overall understanding of the world, such that we find him to speak to our concerns. What is tort law—and the way of thinking about events, action, and human relations that it embodies—to us, that we look for, and find, corroboration of its themes at such remove? This puzzle, concerning our involvement with the way of thinking that appears in tort law, lingers as we turn to the next piece of Professor Weinrib's theory.

Following his location of the roots of tort theory in the form of corrective justice described by Aristotle, Weinrib turns to post-Enlightenment philosophy for further support as to its content, specifically to Kant and Hegel. Treating them for the most part as one, Weinrib looks to their understanding of abstract will and natural right to give content to Aristotle's brief statement as to the parties' equality. Professor Weinrib concludes that the Aristotelian form of corrective justice, in which the parties are abstracted from their situations of wealth and virtue, and the account of agency and abstract right that he takes from Kant and Hegel, describe the same fundamental legal relation.

Three interrelated ideas are central to this account of Kant and Hegel: agency, understood as the abstract capacity for willing; the abstraction from particularity that constitutes the will's freedom from determination by circumstance or desire; and equality, which Weinrib, again, understands to consist in corrective justice's abstraction of the parties, here from their circumstances or purposes in acting.[153]

Professor Weinrib's isolation of will as the central element of his Kantian/Hegelian account of action and duty in tort law is highly significant. Will is understood as the source both of action and of law.[154] Kant and Hegel, Weinrib tells us,

> are concerned to show that corrective justice is a necessary implication of free will. They accordingly attempt to demonstrate how corrective justice arises from the structure of willing. Their argument moves from free will as the ground of right to corrective justice as a consequence of that ground.[155]

Aristotle's actual understanding of what we call torts (if such a thing existed, and is intelligible to us) may be less germane to understanding modern tort law than is ours, there is doubtless very much to be learned about action and responsibility from Aristotle.

153. Weinrib, *supra* note 144, at 422-24.

154. *Id.* at 422-25. "Right," which Weinrib uses here, is the cognate of "Recht," German for law as such (as distinct from what we would call positive law, "Gesetz").

155. *Id.* at 424.

And what is will, the ground of law and action? "Willing is the process by which the agent translates an inward purpose into an external reality."[156] It serves to connect internal, mental events with external consequences in the world. This conception of will is thus part of the fundamental understanding according to which the world is seen as divided into internal (subjective) and external (objective) realms. More precisely, the world itself belongs to the external, objective realm, apart from the self. Will is seen to bridge—and so it grants and sustains—the separation of mind and body, subject and object, intention and consequences, self and world.[157] As will be seen, this separation carries especially significant implications for tort theory and for law as a whole: Understanding self and world as so divided, only force appears able to bridge the divide. As a result, our conception of tortious action is modeled, often explicitly, on force, as are our dominant conceptions of language, politics, and law.

How this fundamental separation contributes to tort thinking can be suggested by turning to an elaboration Weinrib offers of the objective standard of conduct in negligence law, where he indicates that the standard's abstraction is necessary to avoid a kind of advantage-taking by the clumsy or otherwise sub-normal defendant over the plaintiff:

> A defendant who could successfully plead that he acted to the best of his poor abilities would unilaterally set the terms for the whole relationship. The plaintiff would be confined to the normative space left unoccupied by the operation of the defendant's subjective capacities.[158]

Professor Weinrib thus seems to suggest that it is normatively necessary that the plaintiff not be burdened with the defendant's particularity. (Professor Epstein makes a similar claim, based, as we have seen, on his radical atomism.)

Weinrib finds a correlative limitation on the plaintiff in the idea of "substantial" risk going to the reasonableness of defendant's conduct, another aspect of the objective standard of care. By its means, the tort law prohibits not all actual or potential harm-causing—which is to say, all action—but only that exceeding reasonableness by raising a substantial risk of harm.[159] Strict

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156. *Id.* at 422.

157. How such a bridging should be possible, given the chasm that is assumed from the outset, is not made clear; at all events, the name of this bridge is "will." As will be seen, causation occupies a similar position in our metaphysics, for reasons having to do with causation's fundamental affinity to will. *See infra* text accompanying notes 165-74; *infra* part V.

158. Weinrib, *supra* note 140, at 519 (footnote omitted).

159. *Id.* at 518-19.

liability is unjustifiable because it fails to adopt this limit, and thus "denies the legitimacy of action" respected in the reasonableness standard.[160] This standard provides a limitation on the plaintiff's ability to curtail the defendant's freedom of action correlative to that imposed on the defendant by the objectivity of the standard of care.[161]

It thus appears that Professor Weinrib sees the law as constrained to choose between the "objective" standard, which disregards the defendant's actual ability to know or avoid the harm, and the tyranny he sees as inherent in looking instead to the defendant's "subjective" capacities, the actual circumstances in which the defendant finds himself. Similarly, the idea that conduct should be reasonable, rather than risk-avoiding, is understood as providing a limit to the reach of a plaintiff's demands that action cease. In looking, in this way, to provability and external checks rather than to right action, this account suggests an undercurrent of distrust, such as litigating parties may be thought to entertain but which seems out of place in a theory of the moral ground of the law. Such distrust connotes an antagonism and fundamental separateness which, I suggest, reflect the theory's metaphysical underpinnings. For ultimately Weinrib's theory, like Epstein's, can be seen to rely on a view of the parties and of human relations as radically atomistic and will-centered. In this Weinrib accurately captures the understanding of the world expressed in the doctrines and theory of tort law.

This atomism, and the force necessary to overcome it, are erected as the governing principles of Professor Weinrib's system, in the form of bipolarity and causation, respectively. These elements are the central features of both tortious action and tort law: As Weinrib suggests, tort law is concerned with recognizing, and mirroring in remedy, the existence of a "normative unit" consisting in the "doing and suffering of harm"—that is, its causation, as understood from the separate perspectives of tortfeasor and victim, respectively.

The causal, bipolar features that Weinrib identifies at the center of the structure of tort law manifest underlying premises of atomism and force which can be seen to pervade tort law and theory. Accordingly, Professor Weinrib's isolation of bipolarity and causation at the center of tort law, and his efforts to discern its justification in them, can serve as a vehicle for examining the foundations and implications of not only Weinrib's theory, and moral tort theory more generally, but tort theory as a whole, which implicitly shares the same premises even when it purports to eschew them as justificatory.

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160. *Id.* at 519-20.
161. *Id.*

IV. PREMISES OF TORT THEORIZING: ATOMISM AND CAUSATION

Professor Weinrib is concerned with tort law's structure, rather than with its utility in meeting social goals. Yet the aspects he isolates as central to that structure—causation on the model of physical force, understood as arising between atomistic parties—prove central to tort thinking as a whole, that is, to tort law understood either as a means to effecting social or economic policy or as articulating moral principles.

Weinrib's account reveals that the tort parties are understood in a way that is fundamentally atomistic. Their relationship is "inherently external,"[162] consisting only in the tort itself: "Corrective justice joins the parties directly, through the harm that one of them inflicts on the other."[163] Weinrib refers to this relation of the tort parties as "bipolar," and to the law's concern with these parties and this relation as its "bipolar" structure.[164] In seeing this relation as the exclusive one between the parties, Weinrib, and the law, understand them to be otherwise unconnected. "Bipolarity" suggests, moreover, not just any relation, but a diametric one, in which the parties remain, separate and opposed, at their respective poles. This original and ongoing separateness, or atomism, appears as well in Fletcher's theory of risk creation as a threat to be mutually enforced; in Epstein's concern with maintaining the inviolability of separateness; and in Coleman's understanding of the victim and tortfeasor as separate, evidenced in the separation of the right and duty of reparation. The same fundamentally atomistic orientation also appears in the Coasian economic view of the parties' tort obligations as ideally dealt with by contract (that is, as created by assent between otherwise unrelated parties), and in the Calabresian aggregation of particular sufferings of harm, abstracted from the circumstances and involvements of their occurrence and from the tortfeasor's participation.

The "normative unit" that the parties form—as they are understood to be originally unrelated—consists, in Weinrib's words, in "the correlativity of the doing and the suffering of harm," "the active and the passive aspects that together comprise a single unit of juridical significance."[165] The *distinction* between the parties as active and passive (a reiteration of the underlying distinction between subject and object) is thus erected as their *joinder* in a "normative unit." This forcible "joinder" of active subject and passive object—a relation of fundamental inequality—can, however, be no more than the juxtaposition of still separate parties.

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162. Weinrib, *supra* note 144, at 414.
163. *Id.* at 415.
164. Weinrib, *supra* note 140, at 494, 511-14.
165. Weinrib, *supra* note 144, at 417; Weinrib, *supra* note 140, *passim*.

The parties' "joinder" is thought to be accomplished by causation, on Weinrib's account one of the two most fundamental aspects of tort law. This central causal connection appears as well in each of the tort theories, though with varying degrees of explicitness. It is most readily seen in the case of Epstein, for whom causation is the express linchpin of the theory. Coleman, too, can be seen to rely on causation-based liability in isolating the tortfeasor's action as the grounds of recovery but detaching it from the act or actor's wrongfulness. And Fletcher's theory, addressed to the creation of risk, can be understood as concerned with causation in an inchoate state.

Though less manifest, causation is equally central to those tort theories that seek the justification of tort law in policy rather than in morals: The Coasian economic account, which purportedly dispenses with causation, nevertheless depends upon it for its most fundamental assumptions concerning incentives,[166] while it is the interest in efficacy—again, causation—that drives the justification and implementation of the compensation programs.[167] As with atomism ("bipolarity"), then, Weinrib's account of the centrality of causation reflects the understanding that, more tacitly, informs the other tort theories as well.

Although, again, causation is notoriously one of the most intractable of philosophical problems,[168] and its explanatory and justificatory power remain enigmatic, all tort theories, even one as philosophically sophisticated as Weinrib's, must assume causation to be a clear and uncontroversial matter. As will be seen, this necessity arises from the nature both of torts and of theorizing, as well as from the premise of atomism. The opacity of causation is especially problematic for tort law, where causation is understood as the link between the parties; failing the ability of causation to explain the parties' connection, they are left unconnected. Yet, because of its opacity, causation fails to illuminate what is ascribed to it, even as it supplants any other understanding of the parties' relatedness.

As a mode of understanding, causation is the assumption that appearances are to be understood as "effects," determined by something else (the "cause"), and so "explained" by their subsumption to this something else, and displaced

166. *See supra* text accompanying notes 9-13 and note 39.

167. *See supra* text accompanying notes 57-60.

168. *See supra* note 109. For a sample of contemporary philosophical discussion, see, e.g., DOROTHY EMMET, THE EFFECTIVENESS OF CAUSES (1984); J.L. MACKIE, THE CEMENT OF THE UNIVERSE: A STUDY OF CAUSATION (1974); GEORGE HENRIK VON WRIGHT, CAUSALITY AND DETERMINISM (1974); *see generally* CAUSATION AND CONDITIONALS (Ernest Sosa ed., 1975). Notable legal treatments include H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW (1959); *Symposium on Causation in the Law of Torts*, 63 CHI.-KENT L. REV. 397 (1987); Richard W. Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435 (1985).

from view in its favor.[169] What is selected as the cause is thus privileged with respect to the phenomenon originally to be understood but now passed over as "mere" effect in favor of its causal ground, a reiteration of the inequality between active subject and passive object. Ironically, then, the equality of the parties that, as Weinrib relates, corrective justice labors so hard to restore, is denied originally—and beyond its powers to force a rectification—by that theory's own metaphysical premises.

The invocation of causation ascribes to the "cause" responsibility for the "effects," which are to that degree deprived of their own reality (their standing on their own as a *res*, or thing). In the case of human actors—the causes at issue in tort law—this means that harms are only recognized (accorded reality) insofar as they can be traced to such a human cause. As Weinrib puts it: "Doing is significant inasmuch as someone suffers thereby, and suffering is significant inasmuch as someone has inflicted it."[170] Understood as causal, action is cognizable only from its effects, suffering from its cause. To be effective or effected, respectively—to be in a causal relation—is the criterion of the reality of either.

Moreover, not only does the causal relation in this way become exclusive, but it is itself a "relation" of separateness and force; as such it is an understanding of atomism, not relatedness. As the bringing-into-being of an effect, causation can be directed towards only what is other than the cause, which is already in being. This operation is one of force in that it creates or changes the other from without, from the cause driving across the gulf of non-being thought to separate the cause from the affected object, and wresting the effect into being. In tort law, the force at the basis of the causal relation can also be seen in the conception of the parties as active and passive, and in tort law's preoccupation with physical harms and with the images and even the formulae of mechanical physics (though these efforts to subject the force of human action to the more tractable images of physics inevitably prove inadequate).

Yet the need for this resort to force to supply the connection between human beings, isolated from each other and from the world, *itself arises from that assumption of radical isolation*. Atomism and causation, the twin premises of tort law, are thus deeply intertwined. Starting from the understanding of radical separateness that is atomism, only force appears able to bridge the posited chasm. In tort law, the needed force takes the form of causation: The parties, seen as originally unrelated, are "joined" by the exercise of causal force

169. *See* HANNAH ARENDT, THE LIFE OF THE MIND 25 (1978).
170. Weinrib, *supra* note 140, at 512.

emanating from the actor, spanning the supposed void between the parties, and coming to rest as harmful effect upon the victim.

In the case of "normal" action—that is, non-accidental action—this unleashing of causal force is understood to be intentional, under the control of the will. The efficacy of the will is understood as a matter of force, of bringing into being (intended) effects in the world. This understanding of "normal" action governed by will also provides the model for tort law, though tort law is typically concerned with negligent rather than intentional harms. In fact, it is the prior understanding of the will as efficacious that provides the exemplar for the resort to causation—the alternative ground of liability when will (intention) is unavailable—rather than the other way around.

On this understanding, again, the force of will is seen as necessary to overcome the distance posited by atomism. This overcoming by the will is understood to be the essence of action. Thus Weinrib writes:

> In acting, actors strive to bring a world external to them into conformity with their inwardly determined purposes. Acts thus involve the possibility of extending oneself out into the space beyond oneself and imprinting one's purposes there. Since this space can be populated by other actors, an act is a doing that involves the possibility of someone else's suffering.[171]

Here, Professor Weinrib reveals the internal/external divide posited by subjectivism, as well as its concomitant understanding of action in the world as the imposition of our will upon it, as we "extend" and "imprint" and "strive to bring [it] into conformity." Yet it is only by understanding the world ("out . . . there") and the self ("inwardly determined") as radically distinct that such a striving can be understood as possible—and as necessary. "Suffering" appears accordingly as the arising of an impediment in the path of what would otherwise be free action, an unfortunate external limitation on its reach. There is no connection between the acting and the suffering such as Professor Weinrib suggests, because there is no connection between the human beings whose acting and suffering it is: The possibility of suffering is just the *possibility* of the existence of others (the world "can be populated by other actors"—by others, that is, who are cognizable only as actors, as centers of will)—but nothing about the existence of myself, as an actor, is thought to require such a world and such others.

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171. *Id.* at 516.

As a result, the possibility of normativity can only be added on, an afterthought, itself imposed through force of will. Professor Weinrib suggests that agency, understood as the isolated action of an actor abstracted from his circumstances, from others, and from the world, by itself introduces normativity, in particular the normativity appropriate to interpersonal harms.[172] Yet the abstractness from which Weinrib begins removes the actor from his involvements with others, rendering them incidental possibilities rather than essential to human being. To the extent that normativity can be found in such isolation, it cannot be the normativity of relatedness but only of absolute will. It remains a puzzle, bedeviling modern moral theory, how normativity—obligation toward others—can arise from such a starting point.[173]

Starting from the premise of atomism, once again only force appears available to overcome the posited separateness—not only force in the form of the causal "link" posited between actor and victim, but the sheer force of will acting to develop, rationalize, justify, and enforce moral theory. Moral tort theory, as other moral theory, exemplifies this general need for rationalizing and enforcing its constructs. Indeed, the power of rationalization is such that tort law is seen to be imperiled to the degree that it fails to reveal such a rationalized structure. Hence the readiness of tort theorists of every theoretical stripe to jettison those aspects of tort law that fail to measure up. Thus, for example, Weinrib's theory "of tort law" cannot account for, and so excludes, strict liability, while Epstein's accounts for only that. Similarly, Coasian economic theorists purport to dispense with causation in their accounts "of tort law," and compensation programs with a need for a finding of wrongfulness. The regard for law that allows this strategic rationalization and expedient discard plays a major role in the development of tort law; indeed it is of a piece with "tort thinking" itself, understood as the bringing to bear of theoretical, doctrinal, and political will upon accidents in order to render them amenable to rationalization. The "justification" in which we thereby engage is a *making* "just," a manipulating and conforming,[174] rather than an understanding of the justice that already obligates us. To understand that obligation as dependent upon our rationalizations, as upon our consent, is in either case to fail to understand ourselves as *obligated*, as *under* law.

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172. *See* Weinrib, *supra* note 144, at 422-25.

173. In any event, as the will in question is concerned with effectiveness, it is not Kant's conception of will, the moral worth of which is expressly divorced from its effects in the world, but Nietzsche's. *See* KANT, *supra* note 34, at 61-62; *cf.* NIETZSCHE, BEYOND GOOD AND EVIL, *supra* note 62, at 48.

174. *See* 3 MARTIN HEIDEGGER, NIETZSCHE: THE WILL TO POWER AS KNOWLEDGE AND AS METAPHYSICS, 137-49, 235-51 (David F. Krell ed. & Joan Stambaugh et al. trans, 1987) (1961).

In sum, moral tort theory, no less than that tort theory concerned with deterring inefficiency or with compensation and loss-spreading, can be seen to partake of an understanding of human beings as isolated and of human action as a matter of the will's effectiveness. That understanding is perfectly expressed in Weinrib's own articulation of the foundation of tort law as consisting in bipolarity (that is, the irreducible separateness and opposition of the parties) and causation (that is, force). Beginning with these mutually entailed assumptions—*as we do*, in rationalizing human action and "relations" as in tort law—we can only emerge in the "whole" that Professor Weinrib so well describes. As with economic and compensation theory, however, that whole belongs to the underlying metaphysics with which we begin.

V. CONCLUSION: TORT THEORY AND THE METAPHYSICS OF WILL

As Heidegger has shown, metaphysical understandings are neither cumulative nor indifferently available, but rather are historical and belong each to its epoch, for which it constitutes the truth of being, the ground and essence of everything that is.[175] In our case (that is, for the modern West), this ground is found in a metaphysics centered on will, described most fully by Nietzsche.[176] For us, then, it is will, constituting the world through its effectiveness, that serves as the ground of what is as such.

Because this way of thinking, as a metaphysics, is found in all modern fields of thought, legal thought too is conditioned by it. Among other manifestations, it can be seen in the reduction of law to policy, and in the rise and present dominance of economic thinking in numerous areas of doctrine. This metaphysics takes as nothing everything that is not our will, including law, truth, and responsibility; these are all interpreted now as but the projection and effects of our will.

In tort law, manifestations of this understanding are evident from the outset: Torts are seen as the doing of an agent, who is then seen as warranting liability insofar as he can be found to have acted from intent or from a culpable lapse of control of events by the will. Absent evidence of such control by the will, the justification of tortious liability is seen as in doubt, and it is proposed that liability be replaced by social programs of compensation which rationalize the costs of harm. Control by the will over the effects of actions in the world is

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175. *See generally* MARTIN HEIDEGGER, AN INTRODUCTION TO METAPHYSICS (R. Manheim trans., 1953).

176. Although Nietzsche claimed this understanding of will was no metaphysics but the way the world essentially *is*, *see, e.g.*, NIETZSCHE, BEYOND GOOD AND EVIL, *supra* note 62, at 48, 203-04, that claim is itself the mark of metaphysics. *See* HEIDEGGER, *supra* note 175, at 17-24; 3 HEIDEGGER, *supra* note 174, at 3-9.

taken as the foundation both of liability and of policy solutions for the rationalization of torts apart from liability. This understanding reflects our underlying metaphysics, or way of understanding the world as a whole, as constituted by will and consisting of will's effects.

As a metaphysics, or hierarchy of the real, this understanding of the world grounded in will works to exclude from recognition as real that for which it cannot account. We can see this conferring and withholding of reality at work in tort law, where the damages remedy, the legal correlative and "remedial embodiment" of bipolar causation,[177] is regularly said to "annul" the wrong or the loss, that is, to render it as nothing. This nullifying is seen as achieved by the payment of money, the visible exercise of will.[178] Accordingly, nothing of that loss that cannot be thus annulled—not even its happening, its place in time—is understood to exist, to remain over for concern. This recognition as legally real of only that which can be effectively undone is indeed the counterpart of the understanding that only suffering traceable to human will receives the law's attention in the first place. As money, the embodiment of effectiveness and fungibility, the damages remedy and its "annulling" powers perfectly replicates the parties' abstractness, their unconnectedness except through the force of will's means and effects that constitute the original tort.

The conception of will as ground, appearing in the understanding of tortious harm, its remedy, and its policy replacements alike, provides the starting point for tort theorizing as a whole. That theorizing begins either from an assumption that control by the will over the harmful effects of action generally prevails, or from the problematic perception that it does not. Though this dilemma goes unremarked, it provokes the succession of responses that constitute tort theory. Thus tortious harms are seen as the simple product of will and so dealt with as a matter of bargaining and trade-offs, as by the Coasian economists; or, they are seen as arising independently of will, and so dealt with not by the assessment of liability—which is implicitly regarded as unjustified—but by systems of social rationalization, themselves exercises of social will, as by the compensation theorists. Which of these dual paths of remedy the theorist pursues depends upon his assessment of the actual efficacy of will in bringing about the harm. But in either case, will is understood to be the ground of liability, and so to be

177. *See* Weinrib, *supra* note 140, at 513; *supra* notes 60-61 and accompanying text.

178. That the spending of money serves, in its efficaciousness, as the visible exercise of will can be seen in the use made of it in economic theory, where it is taken as the evidence of preference, or the desire of the will. Moreover, that theory often assumes that, as in an imaginary Monopoly game, all participants begin with ample money with which to realize their preferences (that is, to make them effective, and so real), subsequent shortfalls being seen as the product of earlier preferences that have been effectuated; to recognize limitations at the outset would be inconsistent with the "freedom" of will that money embodies—that is, with will's capacity as ground, and so as prior to the world which it brings into being, rather than as limited by it.

necessary to its justification. And in both cases, not only the judgment as to whether liability is justified, but also the choice of means for its rationalization—whether through deterrence or bargaining, on the one hand, or through administrative mechanisms of social insurance, on the other—all follow from the initial conception of tortious harms in relation to the will.

The problem for tort theory revolves around its isolation of the tortfeasor's will and control in connection with the eventuation of the harm as the ground of his liability. This isolation appears both indispensable to justification of that liability, and yet unwarranted in view of the characteristic nature of tortious harms as accidental, or escaping our control. The tort theories offered by the Coasian economists and the compensation theorists can be seen as attempts to resolve this dilemma by, in each case, adopting one of its horns to the exclusion of the other: Torts are conceived as the unproblematic product of will and control, or as random misfortune for which liability is unjustified.[179] On either of these approaches, the task of justifying liability for accidental harms remains unassayed. Both approaches leave behind the problem for tort theory, which is reconciling both horns of the dilemma, and both as a result have an easier time in producing a rationale—though not for tort law, but for intentional tort liability, on the one hand, or for the social rationalization of misfortune, on the other.

The moral tort theorists attempt to avoid these paths as false. They seek a justification for liability in the tortfeasor's action, and generally resist the abandonment of that search in favor of compensation systems, but strive also to remain true to the phenomena of torts by avoiding their conflation with either intentional harms or random misfortune. Yet the dilemma for tort theory as a whole is replicated within moral tort theory, where it centers around the

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179. Though the compensation approach rejects the Coasian account of tortious harms as willed, the account of such harms as random misfortune which it adopts implicitly in its stead presents only a mirror-image distortion of the phenomena of accidents: Whereas will is fully in control, on the Coasian economic account, it is wholly uninvolved, on the compensation alternative. (As a result, the theory has no place for attention to the tortfeasor's action, and no ability to distinguish tortious harms from illness or general misfortune.) Accidents are not, however, identical with "acts of God," or strikes of lightning, in which human action plays no part; on the contrary, it is our very involvement—but not our control—in situations of accident that makes the task of grounding responsibility for accidents so intractable.

In adopting an account of tortious harms seemingly diametric to that of Coasian economic theory, the compensation account nevertheless stays within the metaphysical framework given by will: No longer fully in control, will is now understood to be conspicuously absent, and this absence is seen to require the removal of tortious harms from the law's concern. Such harms are now *nothing* to the law, *because* they are not the doing of will. These positions are the same in that they assert that everything is the effect of will, or that nothing is; they are both *about* only will. It is will that sets out the poles and drives their antinomy. It is will, alone, that is real. The two schools thus present no alternative to that metaphysics that holds the will as ground, but merely a "flip," an oscillation between the valences of will, its negative and positive ways of occupying the world.

culpability of the tortfeasor's action. Culpability, or justified blameworthiness, is seen as dependent upon the tortfeasor's effective capacity to have acted otherwise—that is, his control of the effects of his action, and their presence to mind when he acted.[180] Some moral tort theorists strive to preserve a conception of tortious action that remains at, or near, this "culpable" pole.[181] Other moral tort theorists may, like the compensation theorists, reveal an inchoate perception that tortious action typically lacks such control. Some of these, like Coleman, may accordingly be moved toward programs of compensation, implicitly finding the tortfeasor's liability (or at least his exclusive liability) to be without justification.[182] Alternatively, the theorist may seek to justify responsibility without culpability—that is, responsibility following on causation alone, apart from the tortfeasor's control or effective ability to have avoided the harm. That route, which Epstein pursues, preserves the possibility of tortfeasor liability despite his lack of control, by resort to a version of strict liability.[183] Yet the question why causation affords sufficient justification for tort liability remains, precisely because causation alone is insufficiently under the control of the will.[184]

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180. *See supra* text accompanying notes 124-26.

181. *See, e.g.*, Perry, *Mixed Conception*, *supra* note 122, at 929 (arguing that tortfeasor's action can be understood as "*fault-like*, if not exactly faulty" or as involving "a fault-in-the-doing" even if "not . . . in . . . the doer"). *Cf. supra* text accompanying notes 126-31 (discussion of overtones of culpability appearing in Coleman's terminology).

182. *See supra* notes 115, 120-21 and accompanying text (discussing Coleman's provision for systems of compensation); *cf. supra* text accompanying notes 35-65 (discussing justification offered for compensation programs).

183. *See supra* text accompanying notes 83-113 (discussing Epstein's theory of strict causal liability). *Cf. supra* text accompanying notes 140-43, 165-70 (relating Weinrib's account of causation as joining the parties, constituting the matter for tort law). *But see infra* note 184. Coleman, too, can be seen to partake of this "solution" when he grounds the tortfeasor's liability in his innocent violation of a positive standard. *See supra* text accompanying notes 130-32 & *supra* note 131.

To be sure, Coleman and Weinrib both maintain that their theories require wrongdoing as well as causation to ground liability. *See supra* text accompanying notes 126-31, *infra* note 184. Yet specifying the content of that wrongdoing—and *how* it is wrong within our usual moral framework, given that the harms in question are typically negligent, or "non-culpable"—remains the central difficulty for moral tort theory. It is the source and nature of this difficulty, against which each of the theories can be seen to contend, that I have been concerned to uncover by exploring them. *See supra* text accompanying notes 126-29, 170-173. *Cf. supra* note 132.

184. In *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987), Professor Weinrib argues that causation alone is insufficient to particularize the tortfeasor from among those causally implicated in the harm; for that, the tortfeasor's wrongdoing is necessary as well. Similarly, wrongdoing alone fails to particularize the victim from among those put at risk, requiring for this causation, or actualized harm. Both wrongdoing and causation are here understood as unrealized potentialities pending their alighting upon the opposite party. Despite the claim that these belong together, the conception presented suggests separate target-seeking missions, inherently independent and only contingently eventuating in mutual collision. This echoes the understanding of the parties as originally—and so irretrievably—unconnected, which I have argued renders their connection in

Despite this difficulty, in one respect the isolation of causation as the ground of liability captures precisely the role of will in the underlying metaphysical structure: Causation is understood as the power, residing in the subject (though not necessarily in his control), to bring effects into being in the world. It therefore replicates the power of will, which on our modern understanding constitutes the world, that is, brings it into being. It is in constituting the world—thus, as effective—that will is understood metaphysically. Effectiveness, the mark of causation, is the standard given by the will itself, understood as constitutive of the world. Causation is thus the model we are offered by our metaphysics for understanding the being of the world as a whole and of the entities and events within it. It yields, in tort law and elsewhere, an overriding concern with causes and their control, extending to the understanding of moral and legal justification as a matter of consequences—that is, effects—and to the fundamental consequentialism of tort law itself.

Accordingly, responsibility, too, is understood as dependent upon the effects of will, and so responsibility in tort, where control by the will fails, presents a seemingly intractable conundrum. The "solutions" that appear are all given by this dominant conception, as they adopt a model of torts either as produced by individual will; or as random, but tamed by social will; or, failing these, as produced by sheer causation, providing a doubtful justification of liability because it presents effectiveness escaped from control by subjective intent—yet one still modeled on will.

The initial understanding of will as the ground of responsibility gives rise to the problem for tort law, the puzzle as to how non-culpable failures of

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the event of harm and its remedy as problematic, and so as in need of the justification that tort theory labors to provide.

In order to fail in the way Weinrib describes here, causation must be viewed as only the impact of a trajectory set in motion by a cause—that is, as effect, divorced somehow from its cause—rather than as that trajectory itself. Causation, as the jointure of cause and effect, already "particularizes" both the tortfeasor and victim, and names the link of force between them that Weinrib is concerned to preserve, as he elsewhere recognizes. *See, e.g., supra* text accompanying notes 140-43. Here, Professor Weinrib rules out this understanding of causation in favor of that according to which everything prior to a given result is equally its "cause." *See* Weinrib, *supra*, at 417-18. The conception that yields this illimitable pool of "causes" amounts to the "but-for" test for causation already seen to be the source of considerable confusion in tort law, raising all the problems of reasoning by counter-factuals and the metaphysics of possible worlds that plague that test. *See supra* note 12. Such a conception arises only from theorizing about cause; in practice we no more regard all antecedent events as equally causes than we regard sounds as frequencies of sound waves (another substitution of theory for experience, *see* MARTIN HEIDEGGER, *The Origin of the Work of Art*, *in* POETRY, LANGUAGE, THOUGHT 26 (Albert Hofstadter trans., 1971) (1960)). Nevertheless, Weinrib's effort here to limit the reach of causation as the ground of liability is significant, as it implicitly recognizes the inadequacy of causation alone as a justification of liability, within the understanding of control as necessary to that justification.

control—accidents, or negligence (understood other than as an intentional calculation)—can yield justified liability. On such an understanding, liability apart from will *is* puzzling, as is the happening of events, such as accidents, apart from control by the will. Such a conception cannot be accommodated within the prevailing, unseen metaphysics, which denies the being of anything apart from the will and its effects.

That all of the theories offered for the justification of tort law can be seen to embody the same metaphysical presuppositions is, of course, not at all to say that they or their proponents are "mistaken," but only to say how they—we—*are*. In showing that this *is* the way we think, across what seems to be a wide gamut of theoretical positions on tort law, I have begun, I hope, to shown both the grip of this way of thinking and its distinctiveness.

That way of thinking has significant implications for our understanding of law and of legal and moral theory. Tort law presents a revealing instance of our general way of understanding human action and responsibility, and its present impasse shows some of the difficulties that way of understanding brings in its train. Those difficulties are much more than academic, a matter for scholarly parsing. Rather, our will-centered metaphysics threatens to rob us of the possibility of understanding law as obligatory; instead, it offers only itself—that is to say, only ourselves, understood as centers of will.

Our will-centered metaphysics appears in tort law in the understanding of law as a matter of exploiting the individual exercise of subjective preference (economic deterrence); or as a matter of political aggregation and rationalized management (compensation programs); or as a matter of sheer effectiveness, the antagonism of atomized abstract actors (moral tort theory). The apparent ubiquity and protean capacities of this understanding are owed, however, not to the power of the conception as a matter of "truth"—witness the disarray of tort theory—but to its "size," its being a way of understanding, its working as a metaphysics to exclude from our awareness and comprehension, with almost total success, what it cannot reach. In tort law as in other law, what is thus excluded includes an understanding of relatedness and obligation. But as tort law is concerned fundamentally with accidents—with, that is, the stubbornly recurrent *denial* of control and will-centeredness—tort law and its disarray also offer us the possibility of glimpsing this way that we think, through the tear in the curtain of will that accidents present.