Book Review

Just the Facts?

Exploring the Domain of Accident Law: Taking the Facts Seriously. *By* Don Dewees,* David Duff,** and Michael Trebilcock.*** *New York: Oxford University Press*, 1996. Pp. xi, 452. $69.00.

Linda Ross Meyer†

In debates over tort reform, images of cancelled parades, discontinued vaccines, and lawyers in Armani suits hanging over hospital beds compete with images of drunk drivers, crippled children, and bankrupt accident victims. Meanwhile, in the quiet corridors of the ivory tower, tort theorists debate Pareto efficiency versus optimality and the true interpretation of Aristotle.

Into this strange mixture of high emotion and abstraction comes *Exploring the Domain of Accident Law: Taking the Facts Seriously*, a hard-boiled attempt to get to "just the facts, ma'am," as the iconic gumshoe detective might say.[1] The book is indeed a comprehensive review and analysis of the empirical evidence of the effectiveness of tort law, not only from the experience of the United States, but from that of other common law countries. Beyond its obvious value as a reference, the book's central virtue is its sober and balanced look at many of the less sober and less balanced claims for and against the tort system, claims of more influence than substance. Despite the vast scope of materials the book reviews in the course of its 439 pages of text, it is impeccably organized and written with great clarity. Summaries of each section

* Professor of Economics and Law and Vice-Dean, Faculty of Arts and Science, University of Toronto.

** Assistant Professor, Faculty of Law, University of Toronto

*** Professor of Law and Director of the Law and Economics Program, University of Toronto

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1. *Dragnet* (NBC television broadcast, 1952–59, 1967–70)

make the book even more accessible for those whose interests are narrower than those of the authors.

The Sam Spade[2] style, however, should not obscure the fact that this book is not about "just the facts." Its policy arguments and theoretical claims are sweeping, if sometimes understated by the matter-of-fact presentation. Though the authors are admirably terse and clear in laying out the "[p]olicy [i]mplications" of their empirical analyses,[3] the evidence they cite does not always lead inexorably to the conclusions they reach. To bridge those gaps, the authors must rely on unsupported theoretical assumptions—despite their claims that theoretical debates about tort law are "in the abstract . . . largely sterile,"[4] and that "many of the central debates about tort law are less about competing normative values than they are about competing empirical understandings of the world."[5]

Two such assumptions stand out. First, while professing neutrality as to the different "goals" of tort law, the authors clearly discount the relevance of corrective justice theories, demonstrating their own commitment to instrumental theories of law. Second, except where there is very strong empirical evidence to the contrary, the authors take a very optimistic view of the potential of experience-rated insurance schemes[6] to solve many deterrence and compensation problems, without much inquiry into the operation of the insurance industry. Their optimism springs from a more general theoretical faith in economic and market principles.

These two assumptions both guide and limit the authors' analysis of the empirical record. The economic and instrumental assumptions lead the authors to prefer market-based alternatives to tort law whenever the empirical evidence is equivocal, obscuring questions about the normativity of law, the nature of human responsibility, and the possible alternatives to cost-benefit analysis. These assumptions also lead the authors to emphasize quantitative empirical research and econometric studies, an approach that may overlook the style, setting, normative gait, and human quirkiness of various institutions of accident law. Qualitative research approaches to institutional competence or custom (such as case studies or histories and law and society work) are sometimes missing from the otherwise extensive footnotes.[7]

While these points undermine the authors' insistence that they are theory-neutral, the assembly of empirical research and the authors' analysis of it make

2. *See* DASHIELL HAMMETT, THE MALTESE FALCON (1930).

3. *See* DON DEWEES ET AL., EXPLORING THE DOMAIN OF ACCIDENT LAW 427 (1996).

4. *Id.* at 9.

5. *Id.* at 4.

6. For a discussion of experience rating in insurance, see *infra* notes 111–13 and accompanying text.

7. For example, one might have expected the following citations to surface: JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983), or R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983).

the book an essential reference and important contribution to both political and scholarly debate. Though the following summary focuses on the authors' policy conclusions and only briefly discusses the most important part of the book—its meaty review of the empirical literature—that focus reflects the limitations of space here, not the limitations of the authors' efforts. Part I summarizes the book's methodology and policy conclusions, Part II demonstrates how the authors' analysis of the empirical evidence is sometimes affected by theoretical assumptions, and Part III argues that the authors misunderstand and misapply principles of corrective justice.

I. METHOD AND CONCLUSIONS

The authors analyze the effectiveness of tort law by describing how it operates in five "domains": automobile accidents, health care accidents, product-related accidents, environmental/toxic injuries, and workplace accidents. For each of the five areas, the authors evaluate the effectiveness of both tort doctrine ("inputs") and the scientifically measurable effects of legal institutions ("outputs") in meeting three goals of tort law taken from the theoretical literature: deterrence of inefficient accident-causing behavior, victim compensation, and "corrective justice." The authors' preference is that

> wherever feasible we should attempt to internalize accident costs to classes of activities and individual actors through the design of appropriate no-fault insurance arrangements rather than using the tort system. Where such insurance is not feasible, including product liability, environmental injuries, and other areas not covered in this study, we would rely on a combination of the tort system (for corrective justice and some deterrence) and expanded health care and disability insurance (for compensation).[8]

Such an approach is necessary because "tort has expanded far beyond the areas in which it is cost effective."[9]

The authors make conclusions and policy recommendations in five areas. First, *Exploring the Domain of Accident Law* maintains that tort law does not adequately compensate auto accident victims. Automobile accidents should be dealt with through an experience-rated, first-party, no-fault insurance system, not through tort law. Noneconomic damages should not be compensated. The no-fault system ought to be supplemented with vigorous enforcement of seat belt laws, drunk driving laws, and graduated licensing schemes of some sort to keep younger drivers off the roads longer. Tort law should remain (in all

8. DEWEES ET AL., *supra* note 3, at 437.
9. *Id.* at 414.

domains) only for victims of intentional, reckless, or grossly negligent wrongdoing.[10]

Second, tort law is ineffective in compensating medical accident victims. As with automobile accidents, noneconomic damages should not be compensated. No-fault alternatives making health care institutions liable, with insurance premiums experience-rated, would encourage development of more careful hospital procedures and better oversight of medical staff. Regulatory reforms should enhance peer review; lessen the burden of proof on, and expand the range of sanctions available to, professional disciplinary boards; and increase nonphysician representation on such boards.[11]

Third, the authors believe that product liability should be handled through the tort system. Liability should no longer be without fault, however, because strict liability discourages research and development without offsetting gains in victim compensation. Victims should be compensated through a "better mix of private first-party disability coverage and a more complete set of social welfare entitlements."[12] Victims covered by workers' compensation entitlements should not be able to sue product manufacturers in tort. Regulation of products should emphasize consumer information more than standard setting; if standards are to be set, the safety benefits should be balanced against manufacturers' costs.[13]

Fourth, the book's analysis suggests that tort law has not been wholly effective in compensating victims of environmental injuries, due to the difficulties in proving causation and the difficulty in proving significant injuries to specific persons (rather than less serious injuries to the general public). The authors believe government regulation of pollution to be a better option, though the government should set standards after employing cost-benefit analysis and should make greater use of market-oriented strategies, such as marketable pollution permits and effluent charges. Regulations could also be enforced by private attorneys-general, to augment the limited resources of enforcement agencies. Where harm is serious and causation clear and foreseeable, victim compensation should be achievable through the tort system.[14] Other victims should have to seek compensation through general social insurance schemes.[15]

Finally, workplace injuries are well suited to the present system of regulation and no-fault compensation. Product liability suits by injured workers should not be allowed, though perhaps such suits could be brought by the

10. *See id.* at 427–28.
11. *See id.* at 428–29.
12. *Id.* at 430.
13. *See id.* at 429–30.
14. *See id.* at 430–31.
15. *See id.* at 431, 436.

workers' compensation insurer. Workers' compensation premiums should be experience-rated.[16]

Apart from these specific areas of tort law, the authors make several broad policy recommendations. For accidents not covered by a separate compensation scheme, such as environmental or product-related accidents, universal health care insurance and disability insurance should be available. Even for accidents covered by other compensation schemes, universal health care coverage should be available immediately, to be reimbursed by the relevant industry insurer once the claims are processed, ensuring both compensation and internalization of costs.[17]

II. ASSUMPTIONS AND PARADIGMS

In any empirical investigation, value-neutral analysis is a fiction. Hence it is neither surprising nor shameful that the conclusions the authors of *Exploring the Domain of Accident Law* reach are not completely supported by the empirical evidence they cite. It is worthwhile, nonetheless, to articulate the theories and paradigms they draw upon to resolve conflicts in the record and to reach their conclusions. Two such background assumptions stand out in the book: First, the authors do not give much weight to their version of corrective justice; and second, the authors read the evidence in most of the other domains they investigate to favor a workers' compensation paradigm that largely achieves compensatory goals of tort law, but less certainly attains deterrence/efficiency goals.

A. *The Irrelevance of Corrective Justice*

Corrective justice holds that tort law should be designed so that wrongdoers take personal responsibility for recompensing victims of their wrongdoing.[18] This approach, however, makes little difference to the authors' analysis or conclusions. In the automobile context, for example, the authors opt for a no-fault system. Their discussion of corrective justice seems designed to show that their proposal is a *fait accompli*. The authors emphasize the expansion of vicarious liability rules and the elevation of the standard of care,[19] and they assert that evidence and verdicts in automobile cases are particularly unreliable because "not only do litigants deliberately attempt to put their actions in the best light, but lack of attention is often a factor in

16. *See id.* at 431–32.

17. *See id.* at 432–38.

18. See *infra* Part III for a more accurate and extensive discussion of the definition of corrective justice.

19. *See* DEWEES ET AL., *supra* note 3, at 40 (discussing Canadian legal system)

automobile accidents from the very outset."[20] The authors also assert, counterintuitively,[21] that many cases are settled "'without resort to an accurate definition of fault'"[22] because they are settled "without reference to a lawyer."[23] The authors further argue that corrective justice is irrelevant because uninsured drivers often cannot compensate victims, insured drivers do not directly compensate victims, and finally, victims themselves place "little importance" on being compensated by the culpable party except in drunk-driving cases.[24] The authors conclude that it is "empirically questionable to emphasize the 'symbol of corrective justice' to defend the current automobile liability regime."[25] In short, the authors argue that because we have moved away from corrective justice ideals in order to compensate victims, there is no point in retaining the remaining vestiges of corrective justice doctrines.

This argument contrasts sharply with that in the product liability chapter. There, the authors stress the shortcomings of current product liability law from the corrective justice perspective: Liability is strict, not fault-based, and claims are processed so slowly that many victims choose not to pursue them.[26] Yet in the product liability context, unlike the automobile context, the authors argue that this *fait accompli* of strict liability should be undone:

> We do not believe that the performance of strict liability with respect to deterrence and compensation justifies its retention, given its costs. Instead, we believe that product liability should be reintegrated with the negligence regime that still prevails in most other parts of the common law world. This essentially reflects a corrective justice view of tort law.[27]

This inconsistency exemplifies a more pervasive sense that corrective justice

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20. *Id.* at 41. By comparison, when discussing the deterrent effects of tort law in this area, the authors say:

> With respect to findings of liability, the relatively straightforward nature of most automobile accidents seems to suggest considerable precision in their resolution. Indeed, in one study of 352 insurance claims, more than 90% of cases involved uncontroversial evidence of fault. . . .
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> On the other hand, a recent British study reveals that, for litigated claims, redistributive goals play a significant role in actual findings of liability. . . . Assuming (as seems plausible) that these distributive concerns produce more findings of liability than warranted under a strict Learned Hand test, one might anticipate excessive deterrence.

Id. at 18–19. While the authors give a very balanced analysis of accuracy of claims resolution in the section on deterrence, they focus more on the inaccuracy of litigated claims' outcomes in the section on corrective justice. Perhaps it is a matter of tone or emphasis, but my impression is that the statement of facts for corrective justice has a touch of the litigator about it.

21. Corrective justice need not occur within the court system. *See infra* notes 136–38 and accompanying text.

22. DEWEES ET AL., *supra* note 3, at 41 (quoting Bruce Dunlop, *No Fault Automobile Insurance and the Negligence Action: An Expensive Anomaly*, 13 OSGOODE HALL L.J. 439, 445 (1975)).

23. *Id.*

24. *See id.* at 42.

25. *Id.*

26. *See id.* at 213.

27. *Id.* at 429.

analysis is largely irrelevant to the authors' conclusions. The deeper reasons for the incompatibility of corrective justice with the authors' project are explored in Part III, but for present purposes it suffices to note that the authors reject corrective justice theory in practice, albeit not explicitly, and invoke it only as a makeweight to support conclusions they reach on other grounds. The authors' conclusions ultimately rest on either deterrence or compensation rationales. The small role that corrective justice seems to play in these conclusions leaves only deterrence and compensation to explain. As the following Sections argue, compensation holds the most sway in the authors' analysis and accounts for their preference for insurance schemes like workers' compensation.

B. *Workplace Injuries: The Paradigm*

Given my sense that corrective justice considerations have little effect on the authors' conclusions, the compensation and deterrence purposes of tort law provide the main argument of the book. Unsurprisingly, the authors conclude that tort law is an inadequate system of compensation in every area of accident law they examine. Indeed, without even looking at the evidence of court delays and related problems, it seems obvious that if compensation is the only goal of tort law, the cost of adjudicating causation and fault is just grit in the wheels, inefficient by definition. The key question, then, is whether tort law is worth retaining for its deterrent effects. When the empirical evidence on this question is equivocal (as it almost always is), the authors prefer an approach resembling workers' compensation.[28]

Since workers' compensation is the authors' paradigm, it is odd that it is the last accident domain they explore in the book. But last is certainly not least, as the authors emphatically conclude that workers' compensation is more successful than tort law in achieving the goals of both compensation and deterrence, despite the obvious historical difficulties in judging the effectiveness of tort law in the workplace. Although the authors try to extrapolate from turn-of-the-century workplace tort law, the historical evidence is confused by the flux in workplace tort doctrine during its twilight. The authors recognize as much:

> When workers' compensation insurance was first introduced, the tort law applicable to workplace accidents was in a process of rapid evolution. The nineteenth-century doctrines of voluntary assumption of risk, the fellow-servant rule, and contributory negligence—all of which had acted as bars to tort recovery by injured workers—were

28. *See infra* Sections II.C–D.

> being transformed or discarded, and workers were succeeding in an increasing number of cases.[29]

As a result, the two empirical studies that attempted to measure whether the accident rate decreased once tort doctrine expanded and/or workers' compensation schemes began were conflicting: One found a significant reduction in deaths in machinery accidents, the other found higher accident rates in the coal industry.[30] The Federal Employers' Liability Act (FELA)[31] was associated with reduced accidents in the railroad industry, and risk-rated workers' compensation premiums were associated with reduced accidents in the German sugar industry.[32] The authors admit that while efficient accident rules may be industry-specific,[33] it is difficult, if not impossible, to determine whether expansive tort rules or workers' compensation systems are better deterrents. But they conclude that, in view of the uncertainty of the empirical evidence, there is no reason to resurrect tort law.[34]

The authors also conclude that workers' compensation is more effective than regulatory alternatives to the tort system. Due to the burdens of administrative procedure, the Occupational Safety and Health Administration (OSHA) has set few standards, and those standards it has set have been inefficient and peripheral in altering accident rates.[35] Inspections seldom happen, fines are low, and the impact on accident rates is little or none.[36]

On the other hand, the most dramatic of the workers' compensation studies cited by the authors concludes that experience-rated workers' compensation insurance has reduced work-related fatalities by almost forty percent.[37] The authors "accept the evidence that this effect is greater than that created by the tort system or that created by U.S. federal occupational safety and health regulation,"[38] but not uncritically. They recognize that workers' compensation schemes tend to undercompensate victims of occupational disease, again because of the difficulty of determining causation.[39] They also fault the scheme of compensating victims of permanent partial disabilities by means of

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29. DEWEES ET AL., *supra* note 3, at 349 (citations omitted).

30. *See id.* at 352–53.

31. 45 U.S.C. §§ 51–60 (1994). FELA was originally enacted in 1908.

32. *See* DEWEES ET AL., *supra* note 3, at 353–54.

33. *See id.* at 353. One explanation for the different findings in the coal industry was that safety supervision was more expensive there than in factories, so other forms of safety supervision did not replace the lost incentives of workers to supervise each other as they did under the former fellow-servant rule. *See id.*

34. *See id.* at 355, 431–32.

35. *See id.* at 362–78. One glaring problem has been OSHA's failure to reckon with multiple-exposure problems for toxic substances, instead of setting exposure levels one-by-one. *See id.* at 364.

36. *See id.* at 366–77. OSHA's regulation of asbestos, however, did seem to have significant effects. *See id.* at 376–77.

37. *See id.* at 382.

38. *Id.*

39. *See id.* at 391.

a schedule, because disabilities affect workers in different fields differently.[40] One of the authors' major policy suggestions is that workers should no longer be able to sue manufacturers of defective products that cause work-related harms if they receive workers' compensation.[41] This suggestion, however, is not clearly derived from the empirical work, and no argument is made for it apart from the speculation that it would decrease products liability litigation and bring U.S. practice into conformity with that of other common law jurisdictions.[42] This drastic and sparsely argued suggestion rests in part on the authors' general criticisms of product liability law—criticisms that are not strongly supported by the evidence.[43]

C. *Automobile Accidents*

The authors' preference for workers' compensation-type schemes is apparent in their discussion of automobile accidents. For the authors, the data are clear that the tort system is much slower and less certain to compensate victims of traffic accidents than is a no-fault system.[44] The story here is a familiar one. Victims with serious losses are undercompensated because they often choose to settle for less rather than wait for more; victims with minimal losses are overcompensated so defendants can avoid the greater costs of further litigation;[45] a great percentage of the money paid in tort goes to transaction costs.[46]

The question becomes whether a no-fault, first-party insurance program, which would better compensate auto accident victims, would itself create more accidents by eliminating the deterrent effects of tort law. The authors examine several studies that show such an effect, but after a detailed examination, deem them methodologically flawed.[47] They conclude that while there is evidence that no-fault schemes lead to increased accident rates, this evidence comes primarily from jurisdictions (such as Quebec and New Zealand) where no-fault premiums are not risk-rated.[48] Experience rating, they hypothesize, would make up for lost deterrence.[49]

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40. *See id.*
41. *See id.* at 430.
42. *See id.*
43. *See infra* text accompanying notes 88–97.
44. *See* DEWEES ET AL., *supra* note 3, at 55–62.
45. *See id.* at 19.
46. *See id.* at 62.
47. *See id.* at 22–26. The authors subject these data to much more searching scrutiny than most of the other evidence that they cite. *Cf. id.* at 382 (accepting evidence of deterrent powers of workers' compensation).
48. *See id.* at 22–26. The lack of risk-rating means that premiums do not depend on prior accident history or any attributes of the driver positively correlated with increased risk. *See id.* at 25–26
49. *See id.* at 26.

This hypothesis is rather optimistic, as the authors do not address in detail how such no-fault schemes could be financed. They acknowledge the problem of uninsured drivers,[50] but do not discuss how to establish a system of no-fault insurance that is both universal/compulsory and risk-rated. The problem of uninsured drivers, moreover, strains the workers' compensation analogy. If drivers are uninsured, they will not be subject to deterrence incentives from higher premium costs. If uninsured drivers as a group are more reckless than average, first-party insurance will impose the costs of their accidents on parties less at fault, overdeterring this group. Employers, by contrast, are more easily monitored and less likely to remain uninsured. For a workers' compensation-type scheme to be feasible in the automobile context, the authors must explain how insurance payments will be made and how experience rating will occur. They reject a flat-fee payment at licensing as insufficiently risk-rated.[51] Nor do they discuss other options, such as pay-at-the-pump premiums that would link insurance payments to amount of driving (though not to past accident history).

The authors also look to regulatory alternatives to make up for any loss in deterrence, concluding that mandatory seat belt laws work, speed limits may or may not work, suspending the licenses of drunk drivers seems to work, random breath-testing of drivers seems to work, and raising minimum ages for drinking and for driving shows promise.[52] Higher levels of enforcement, they decide, have also proven more important than penalty levels.[53] Though the authors are optimistic about the deterrent effects of these alternatives to the tort system, at bottom the authors are willing to trade off the possibility of loss of deterrence to achieve better compensation. This conclusion, though perfectly reasonable, is not entirely supported by "just the facts."

D. *Medical Accidents*

The authors conclude that experience-rated no-fault insurance is also more effective than tort litigation in the medical sphere. According to the authors, medical accident litigation has an even poorer record for compensation than automobile accident litigation.[54] It is slow, bars many claimants, makes proof of malpractice very difficult, entails high transaction costs, undercompensates the seriously injured, overcompensates the less seriously injured, and gives lower-income people less for their implicit premium than it gives higher-

50. *See id.* at 39.
51. *See id.* at 25.
52. *See id.* at 43–48.
53. *See id.* at 416.
54. *See id.* at 112–17.

income people.[55] Less clear for the authors is whether tort litigation is worth preserving for its deterrent effects.[56]

According to the authors, malpractice liability fails the test of optimal deterrence even from the "input" side of legal doctrine. First, doctors, not hospitals, are held primarily liable for medical malpractice, whereas "standards of care must be optimally defined in order to encourage potential injurers to make efficient (cost-justified) investments in the avoidance of injuries," so that "one might expect a strong emphasis on institutional liability."[57] The authors argue that hospitals are more efficient cost avoiders in this context, because they can control doctor incompetence through personnel policies, as well as develop institutional procedures that may reduce accidents. Because of economies of scale, hospitals can also better afford to keep tabs on current practice standards and avoid exaggerated precautions due to uncertainty.[58] Second, instead of the traditional Learned Hand test of liability, which in theory establishes appropriate incentives for potential defendants to take care,[59] malpractice liability depends on customary practice.[60] Customary standards may underdeter because of "informational asymmetries and provider self-interest," or overdeter because "extensive health insurance coverage" allows patients to avoid the costs of additional precautions.[61] Third, restrictions on pain and suffering damages, abolition of the collateral source rule, and rules limiting compensation for wrongful death prevent damages from reflecting the full social cost of injuries.[62] Finally, difficulties in making accurate judgments about liability in this technical field, perhaps contributing to the "substantial number of nonmeritorious claims" and the "considerable shortfall" in meritorious claims, also make efficient rules difficult to achieve.[63] Current forms of liability insurance contribute to the problem, according to the authors, because malpractice insurance premiums are typically not experience-rated, but instead are based on specialty or geography alone. Insurance therefore removes much of any remaining incentive the liability rules might have established, and increases in liability insurance seem to be passed on to patients.[64]

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55. *See id.* at 117.
56. *See id.* at 103–04.
57. *Id.* at 97.
58. *See id.* at 103.
59. *See id.* at 98.
60. But see *infra* note 206 for a discussion of the role of custom, not just cost-benefit analysis, in the Learned Hand test.
61. DEWEES ET AL., *supra* note 3, at 98 (footnote omitted). The authors add that "[w]hether customary medical practice exceeds or falls short of the efficient level of care depends on which of these two effects dominates." *Id.* (footnote omitted).
62. *See id.* at 98–99.
63. *See id.* at 99.
64. *See id.* at 101–02.

The authors admit that the "output" analysis of the effect of tort claims on medical practice is "limited and inconclusive."[65] One analysis showed a modest reduction in negligent injuries due to malpractice litigation.[66] Two econometric studies found correlations between increases in malpractice premium levels and the frequency of specific diagnostic procedures.[67] Surveys of physicians showed that they attributed increased recordkeeping, increased referrals, increased testing, and other procedures to malpractice liability, though the authors find these surveys too self-selecting to be reliable.[68] The authors conclude that "while the legal standard of customary practice may help perpetuate questionable diagnostic and therapeutic practices, empirical investigation seems to suggest that medical and technological innovation is driven more by profession-specific factors than by changes in the medical-legal environment."[69] The authors do concede that the threat of liability may dissuade physicians who favor a noncustomary form of treatment, may encourage overuse of fancy medical technologies that would "look good" in litigation, and may lead doctors to adopt unjustified precautions out of uncertainty and fear of suit.[70]

Finally, the authors ask whether the changes in medical practice due to tort law resulted in reductions in injury (rather than better documentation for trial). They conclude, based on the limited studies in the area, that "it is reasonable to suppose that the marginal effect of [liability-induced diagnostic procedures] . . . is slight."[71] They do give tort law credit, however, for changing the way doctors talk with patients about the risks of treatment, as well as for spurring hospitals to become involved in risk management programs that decrease both malpractice claims and medical injuries.[72] Although it is impossible to tell whether the tort system is responsible for significant reductions in the accident rate, institutional liability and informed consent requirements have probably had some effects. Despite the inconclusiveness of the empirical evidence, however, the authors opt for another no-fault scheme, financed through risk-rated premiums paid by institutions (or solo practitioners).[73] They recognize that the administrative process will still have to determine causation, which in the medical area is often difficult.[74] But they point to no-fault schemes for medical accident compensation in New Zealand, Finland, and Sweden, concluding optimistically

65. *Id.* at 104.
66. *See id.*
67. *See id.* at 104–05.
68. *See id.* at 105, 156–57 n.106.
69. *Id.* at 105 (footnote omitted).
70. *See id.* at 106–07.
71. *Id.* at 110.
72. *See id.*
73. *See id.* at 428–29.
74. *See id.* at 136–38.

that "despite considerable difficulties in defining the concept of a medical injury and in establishing a causal relationship between medical care and adverse outcomes, appeal decisions in New Zealand and Indemnity Conditions in Sweden and Finland appear to have resolved most of these dilemmas without major controversy."[75] To decrease the costs of such a scheme, the authors propose eliminating damages for pain and suffering and for the first one or two months of lost income.[76] They propose strengthening deterrence through alternative regulatory procedures, such as enhancement of peer review and professional discipline, although they reject direct governmental regulation of medical care as too difficult to administer and too fluid for rigid standards.[77]

Again, the authors decide, despite "inconclusive" evidence, that the tort system does not provide sufficient deterrence to be worth its inefficiencies in compensating victims.[78] Again, they support a system of no-fault insurance financed by actors inside the industry, despite potential difficulties (and inefficiencies) in defining the class of injuries covered.

E. *Product-Related Accidents*

Although they prefer no-fault liability in other areas, the authors do not suggest it in the context of product liability. They reject no-fault compensation schemes in this area on the ground that it is too difficult (and hence too expensive) to distinguish accidents caused by product defects from all accidents "involving products," for which industry-specific compensation would be too expensive and too loosely connected to accident-causing industry conduct.[79] What is not clear, however, is why proving a nexus between a product defect and an injury is any more difficult administratively than proving that a medical injury is the unintended or unexpected result of medical treatment.[80] It would seem that the authors are either too optimistic about medical no-fault systems, as I would suggest, or too pessimistic about product no-fault systems.

Yet despite the unavailability of an alternative compensation scheme, the authors do not applaud current product liability doctrine. Though strict liability for products allows more victims to sue than a negligence regime, the authors suggest that the requirement that plaintiffs prove a product defect cancels much of the victim compensation advantage over negligence doctrine.[81] As to

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75. *Id.* at 141.
76. *See id.* at 428–29.
77. *See id.* at 123, 428–29.
78. *See id.* at 104, 428–29.
79. *See id.* at 244–45.
80. *See id.* at 137.
81. *See id.* at 211.

whether strict liability is an effective and efficient deterrent, the authors find the evidence of effectiveness inconclusive and the arguments for efficiency unpersuasive.[82] They recommend, as a result, a return to negligence principles.[83] First, the authors examine industrial surveys. These results were mixed—some reported that products liability enhanced safety or safety instructions, others that it induced layoffs, caused product lines to be discontinued, stifled innovation, and hampered international competition.[84] Product liability decisions tell a similar story. Some studies concluded that innovations would have been made without pressure from liability suits; others that liability suits were necessary to force safety improvements; others that liability suits had no effect on research and development expenditures; and still others that the mere cost of defending unsuccessful liability suits forced price increases, plant closures, and declines in innovation.[85] Econometric studies indicated that "liability increases safety incentives but beyond a certain threshold provides negative incentives for research and development."[86] The data are also inconclusive as to whether liability has lowered the rates of injuries caused by products, because it is impossible to distinguish accidents involving defective products from accidents connected in some way with nondefective products.[87]

The authors' conclusion that tort law has not created efficient care incentives, however, is ultimately drawn not from the empirical evidence "outputs," but from their analysis of tort doctrine "inputs" in this context. This approach differs markedly from their analysis of other areas of accident law and relies solely on general economic assumptions, not industry-specific data, creating a tension with the methodology of the rest of the book. The authors conclude that evaluating the efficiency of strict liability for products means asking whether consumers underestimate product risks. If so, then a negligence rule would lead consumers to purchase more risky products than would be efficient, since the safety of a product is only partially reflected in its price. Strict liability, which makes the price reflect all the risks, not just those the nonnegligent manufacturer can avoid, is a good way to compensate for informational imperfections in the market for products. Based on some psychological lab experiments that support the view that consumers

82. *See id.* at 204–05.

83. *See id.* at 205.

84. *See id.* at 197–98. The authors note, however, that these surveys involved responses by CEOs of manufacturing corporations and had low response rates, which suggests significant sample bias. *See id.* at 198.

85. *See id.* at 198–201.

86. *Id.* at 201. The studies concluded that such a threshold had been reached in industries manufacturing (among other things) asbestos, tires, bathroom fixtures, safety valves, power tools, saws, food slicers, and laboratory apparatuses. *See id.*

87. *See id.* at 203. For example, the authors cite one study which found a decrease in the auto death rate between 1970 and 1975. However, the study attributed the decrease to higher gas prices and decreases in speed limits. *See id.*

overestimate rather than underestimate risk, or at least are unsystematic in assessing risk, the authors conclude that strict liability for products is not warranted.[88] The authors bolster this conclusion with evidence that products are not less safe in other common law jurisdictions, including Canada, in which regular negligence rules apply to products.[89] Given the homogenizing effect of international markets, however, that safety level could also be the result of higher U.S. standards.

The analysis that makes consumer risk assessment the fulcrum of the rejection of strict liability for products is troubling in several respects. First, the authors overstate the "strictness" of strict liability. Most commentators and the recent draft *Restatement (Third) of Torts: Products Liability* recognize that strict liability applies only to manufacturing defects, not to design or warning defects, which are subject instead to negligence standards.[90] Manufacturing defect cases do not seem to be the authors' primary target, since "this liability test does have the advantage of clarity and ease of application."[91] Second, the

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88. *See id.* at 191, 204–05, 246 nn.28–30 (citing RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 381 (1988)). A more recent review of the literature, not cited by the authors, suggests that consumers tend to underestimate product risks and do not properly understand warnings or product information. *See* Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. REV. 1193, 1233–35 (1994).

89. *See* DEWEES ET AL., *supra* note 3, at 205. Throughout the book, the authors tend to support solutions that accord with Canadian practice. *See, e.g., id.* at 414 ("Canada has already taken some of the steps that we recommend, providing useful experience as to their performance. We believe that our recommendations would provide substantial net benefits for Americans.").

90. In this regard, the authors' citation to *Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539 (N.J. 1982), *see* DEWEES ET AL., *supra* note 3, at 193, for the current state of warning defect law is a bit unfair, since *Beshada* has not been generally followed. Even in its own jurisdiction, it was limited to asbestos cases, *see* Feldman v. Lederle Labs., 479 A.2d 374, 388 (N.J. 1984), and New Jersey still requires plaintiffs to prove that the kind of asbestos at issue was dangerous, *see* Becker v. Baron Bros., 649 A.2d 613, 617 (N.J. 1994). Further, in 1987 the New Jersey legislature provided that the state-of-the-art defense would apply to design defect suits, *see* N.J. STAT. ANN. § 2A:58C-3a(1) (West 1987), and that only reasonable warnings would be required, *see id.* § 2A:58C-4. The courts have construed reasonable warning to include state-of-the-art factors. *See, e.g.*, Fabian v. Minster Mach. Co., 609 A.2d 487, 494 (N.J. Super. Ct. App. Div. 1992). To be fair to the authors, however, though no published decision yet so holds, the *Beshada* doctrine may linger for asbestos cases, since the 1987 products liability law does not apply to environmental torts, *see* N.J. STAT. ANN. § 2A:58C-6, which the courts have construed as including asbestos, *see* Ripa v. Owens-Corning Fiberglass Corp., 660 A.2d 521, 534 (N.J. Super. Ct. App. Div. 1995), *cert. denied*, 665 A.2d 1111 (N.J. 1995); Stevenson v. Keene Corp., 603 A.2d 521, 526 (N.J. Super. Ct. App. Div. 1992), *aff'd*, 620 A.2d 1047 (N.J. 1993) (per curiam).

The new draft *Restatement (Third) of Torts: Products Liability* requires that failure-to-warn liability for harm caused by prescription drugs or medical devices be based on "foreseeable risks." *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 8(d) & cmt. g (Tentative Draft No. 2, 1995); *see also* James A. Henderson, Jr. & Aaron D. Twerski, *Will a New Restatement Help Settle Troubled Waters: Reflections*, 42 AM. U. L. REV. 1257, 1264 (1993) (arguing that new *Restatement* should clarify ambiguity of RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1977) as to whether foreseeability of risk is necessary element of failure-to-warn liability); David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 761–66 (discussing foreseeability and reasonableness principles adopted by draft *Restatement* for failure-to-warn liability). The negligence orientation of products liability is not so recent. *See generally* Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981) (assessing recent changes in law of strict liability according to negligence principles).

91. DEWEES ET AL., *supra* note 3, at 192.

argument against a risk-benefit test for design defects is flawed. The authors contend that *if* consumers are perfectly informed, the demand, price, and hence industry profits for a product will reflect its net utility (its usefulness given its dangers), so that any balancing of this net utility against risks counts the risks twice. The authors cite psychological studies that show that on average, consumers do not underestimate risks, so prices must reflect net utility, and the risk-benefit test is inappropriate.[92] Even assuming that the psychology is right, however, it is a long way from general risk aversion to perfect information, and longer still from perfect information to reflective decisions made upon such information.[93]

The history of products liability belies any perfect information assumption. Firms have not competed on safety features[94]—in a few instances, as in the asbestos industry, companies conspired to keep adverse safety information from the public[95] and governmental regulation was necessary.[96] The manufacturers themselves do not have perfect risk information at the time a product is marketed. Even attempts by government agencies to make risk information public have failed, because it is so difficult to judge by aggregate injury statistics whether a product defect has caused the injury.[97] A general risk aversion on the part of consumers, therefore, is not sufficient to prove that prices will accurately reflect risks. Economic assumptions of perfect competition seem to cloud our detectives' assessment of the facts.[98]

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92. *See id.* at 190–92.

93. Indeed, as the authors point out, if information is perfect and transaction costs are zero, either negligence or strict liability will be efficient, as parties will bargain to the best outcome. *See id.* at 189–90.

94. Product advertising has changed from focusing on information to focusing on image. *See* Ronald K.L. Collins & David M. Skover, *Commerce and Communication*, 71 TEX. L. REV. 697, 700–07 (1993). With a few exceptions (such as luxury cars), manufacturers are reluctant to mention safety information in ads. *See* Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 562 n.15 (1985) (arguing that "producers face disincentives to advertise safety"). Though some authors argue that firms do compete with respect to warranties, they acknowledge that few consumers read them. *See* Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 615 n.170 (1990) ("The seller's advertisement may be the only prepurchase information about safety available to the consumer."); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1346–47 (1981).

95. *See Ripa*, 660 A.2d at 536–37.

96. An interesting empirical study might be made of the effects of regulation on advertising, that is, whether regulatory standards motivate companies to begin competing on safety. Certainly new car buyers might suspect there is such a link. Though the authors discuss the benefits of governmental information policies, they do not discuss the information effect of regulatory policies. They also do not discuss the changes in product advertisement generally, though that might be a fertile ground for finding or evaluating changes in safety competition. *See* Collins & Skover, *supra* note 94, at 706–07 (arguing that current ads usually do not convey information); Note, *Harnessing Madison Avenue: Advertising and Products Liability Law*, 107 HARV. L. REV. 895 (1994) (arguing that insufficient attention has been paid to advertising as mode of conveying safety information).

97. *See* DEWEES ET AL., *supra* note 3, at 215–16.

98. Though I cannot do it justice here, the authors also include a great deal of informative discussion of the relative efficacy of regulatory alternatives to products liability law. They conclude that information disclosure policies are more efficient than minimum quality standards, because most of these standards are set at levels where costs exceed benefits. *See id.* at 232–36.

F. *Environmental Injuries*

In one of the most balanced and exhaustive chapters of the book, the authors suggest that a no-fault compensation scheme is as unworkable for environmental injuries as for products liability. Here, however, the reason for the problem lies in the diffuse nature of environmental injuries. Most environmental accidents affect many people to a limited extent, rendering compensation a less pressing (and perhaps unworkable) goal. In cases where tort law works—that is, those involving large, directly provable losses by a few plaintiffs—the authors conclude that traditional tort law does provide some deterrence.[99] Tort law's usefulness is limited, however, because most often these victims are undercompensated, and defendants are therefore underdeterred.[100]

The authors conclude, however, that tort liability should remain in its limited, traditional form. Where environmental losses are more thinly spread and uncertainly caused, however, and therefore not amenable to traditional forms of environmental tort litigation, the authors contend that regulation is the better source of additional deterrence. The discussion of environmental torts features a great deal of comment on the relative efficacy of regulatory alternatives. The authors believe that command and control forms of regulation do work, although they criticize the way in which standards are set and question whether such regulation passes a cost-benefit test.[101] They also cite evidence approving, with some caveats, the use of disclosure laws, marketable permits, and effluent charges, and questioning the efficacy of subsidies. In the end, however:

> The enormous uncertainty associated with estimates of the benefits of controlling many pollutants necessarily means that the process of selecting a regulatory limit for such pollutants will be highly contentious, with scientific evidence available to support widely divergent limits. The regulatory process does not eliminate the uncertainty that causes tort litigation to be so unsatisfactory. Regulation does reduce the stakes, however, since it imposes costs only for future control, while litigation may impose enormous penalties for *past* discharges. We believe that regulation is better suited to controlling pollution than is tort litigation precisely because

99. *See id.* at 288–89.

100. Tort liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601–75 (1994), comes under special criticism. Strict liability, joint and several liability, and retroactivity do not provide incentives for efficient accident prevention, and the expense of CERCLA suits is 21% to 88% of total outlays for cleanup. *See* DEWEES ET AL., *supra* note 3, at 271.

101. *See* DEWEES ET AL., *supra* note 3, at 320–21

> of the great uncertainty regarding the harm caused by many pollutants.[102]

The difficulties of proving that toxic substances cause injury make tort a poor deterrent and regulation a slightly less poor substitute. Compensation, the authors conclude, must come from general social insurance, not from industry-specific sources, except where causation is clear and tort law can function in traditional ways.[103] Here because uncertainty seems so intractable, the authors resolve their doubts in favor of the existing institutions, rather than in favor of change.

F. *Risk Rating and the Insurance Industry*

Given the authors' overwhelming preference for achieving compensation and deterrence through insurance, and their otherwise exhaustive review of the literature, it is surprising that they do not evaluate the effectiveness of various insurance schemes[104] or of insurance regulation or reform. The authors recognize that risk evaluation and rating by the insurance industry is less than perfect,[105] especially in the area of medical malpractice insurance.[106] Whether these imperfections can be addressed through regulation or deregulation, or whether insurance must be taken over by government administration, is not addressed.

Perhaps because the authors do not analyze the insurance industry, they tend to assume that either governmental insurance schemes or the private insurance market can generate appropriately risk-rated no-fault alternatives. The authors are vague about whether they expect these no-fault alternatives to be available through the private insurance market. They do mention, however, that for general health care insurance, "a private system . . . might be more acceptable in the United States."[107]

There are basically two ways in which insurance policies can reflect risk. First, the insurance company can come up with categories that reflect different risks—called feature rating—and charge higher premiums to those in higher-risk categories.[108] Feature rating may or may not provide incentives for safer

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102. *Id.* at 321.

103. *See id.* at 430–31, 436.

104. They do include sections discussing the nature of available liability insurance for each of the types of injury discussed, but there is little discussion of why the policies are structured as they are, or how that structure may be affected by regulation. *See id.* at 19–20, 101, 191–93, 277–78.

105. *See id.* at 20 ("Nevertheless, the extent to which liability insurers actually employ [experience rating and deductibles] varies from one area of tort law to another, depending on the applicable moral hazards, the costs of implementing such measures, and the structure of the insurance industry involved.").

106. *See id.* at 101.

107. *Id.* at 436.

108. *See* Kenneth S. Abraham, *Efficiency and Fairness in Insurance Risk Classification*, 71 VA. L. REV. 403, 413–14 (1985).

behavior, depending on what features are used. Historically, the expense of acquiring more "individualized" information has led to the use of proxies for risk, like sex or geography, that give insureds little incentive to take precautions and may even lead to forms of redlining.[109] It is not clear, moreover, to what extent insurance companies have the incentive to generate accurately risk-rated policies. Getting more information from insureds is expensive and is often not justified by the ability to locate markets in which competitive premiums can be offered. Because of the cost of information, companies have limited incentives to investigate the efficiency of new classification systems.[110]

The second way to tailor premiums to risk is to base them on past claims experience, a method called "experience rating."[111] The authors prefer this method because it allows the insured to decide how best to lower accident rates and claims, rather than making insurance companies into privatized juries, articulating standards of due care. But where smaller insured institutions or individuals are involved, basing premiums on past claims experience may punish those with bad luck, as well as those with careless practices.[112] The authors address neither how premium cost is or should be affected by claims experience in order to have efficient deterrent effects,[113] nor where those who have poor claims experience can get insurance when the private market refuses to offer it. Finally, the authors do not say whether the market will generate experience rating, whether government insurance regulation should require companies to write experience-rated policies, whether regulatory agencies should monitor or set policy rates, or whether such regulation makes experience rating unprofitable. Without this additional information, the proposals for no-fault auto insurance and no-fault medical accident insurance lack a firm basis in fact and rely almost entirely on theory.

III. INSTRUMENTALISM AND CORRECTIVE JUSTICE

The second, and more encompassing, theoretical perspective the authors take is an instrumental approach to law. Their very approach to the subject

109. *See* Regina Austin, *The Insurance Classification Controversy*, 131 U PA L REV 517, 529–30 (1983); Leah Wortham, *Insurance Classification: Too Important to Be Left to the Actuaries*, 19 U MICH J.L. REFORM 349, 365–66 (1986). "Redlining" is the denial of coverage to classes of applicants based on discriminatory criteria such as race, sex, or neighborhood.

110. *See* KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 96 (1986).

111. *See* Abraham, *supra* note 108, at 413–14.

112. *See* Sugarman, *supra* note 94, at 576–77 (criticizing experience rating as involving too much lag time, too little effect on premiums, and too little connection with carelessness in individual or small institutional settings); *see also id.* at 615–16 (arguing that insurance classification practices defeat goal of cost internalization).

113. *Cf.* Lori L. Darling, Note, *The Applicability of Experience Rating to Medical Malpractice Insurance*, 38 CASE W. RES. L. REV. 255 (1987) (arguing in favor of experience-rated premiums incorporating peer review).

matter—evaluating tort law by evaluating its effects—demonstrates this starting point. The authors identify three goals that tort law is meant to achieve: deterrence, compensation, and corrective justice. They find these goals articulated in the theoretical literature, and instead of joining the debate over which one is the appropriate focus of attention, they simply evaluate each accident domain by each measure of success.[114] While this procedure seems appropriate for the goals of deterrence and compensation,[115] it jars with corrective justice theory, which sees tort law as expressing or embodying, rather than serving or implementing, social norms.[116] Indeed, the authors recognize that "a corrective justice perspective on tort law, unlike both the deterrence and compensation perspectives, is noninstrumental,"[117] and so they "devote less attention in this book to the empirical evidence on the operation of the tort system from a corrective justice perspective."[118] It is remarkable that they believe it possible to "evaluate" tort law as corrective justice by examining empirical effects at all. As I will argue, not only is it impossible to evaluate the effectiveness of tort law in achieving corrective justice along the lines the authors suggest, but an instrumentalist approach to corrective justice also necessarily misunderstands it. Corrective justice theory, at its best, is an attempt to understand the normative basis of our laws. It aims at self-understanding rather than prescribing or measuring law's effects. Just as empirical evaluation of the sort the authors conduct is not meaningful from the perspective of corrective justice, our pursuit of self-knowledge through corrective justice is not comprehensible from an instrumentalist standpoint.

A. *Defining Corrective Justice*

These broad remarks, however, require a broad caveat. "Corrective justice" itself is a many-splintered thing. Theorists who use the term have many different conceptions of what moral or normative principle best expresses the

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114. The authors state that they

> accept that all three of the major normative values identified—deterrence, compensation, and corrective justice—are legitimate normative values and are worthy of vindication, in the case of accidents, in appropriate domains of the legal system. However, the critical question is not which values are more important but which policy instruments are best suited to vindicate which values.

DEWEES ET AL., *supra* note 3, at 9.

115. *See* Nancy A. Weston, *The Metaphysics of Modern Tort Theory*, 28 VAL. U. L. REV. 919, 954 (1994) (arguing that deterrence and compensation theories of tort law are "separated by disagreements which are empirical and contingent" but share view of law as "an expendable instrument with which to administer incentives and implement policy choices").

116. Ernest Weinrib, for example, says:

> Private law, I will claim, is to be grasped only from within and not as the juridical manifestation of a set of extrinsic purposes. If we *must* express this intelligibility in terms of purpose, the only thing to be said is that the purpose of private law is to be private law.

ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 5 (1995).

117. DEWEES ET AL., *supra* note 3, at 12.

118. *Id.*

core of tort law.[119] The four most prominent theories are Richard Epstein's causal theory, George Fletcher's nonreciprocal risk theory, Ernest Weinrib's formalist/rationalist theory, and Jules Coleman's ecumenical theory. Though I briefly explain all four, Weinrib's and Coleman's theories are the best developed and will generally serve as models for the analysis developed in this Part.[120]

Richard Epstein's theory requires envisioning all tort injuries as invasions of a preexisting property interest. As with property generally, any invasion an actor causes to another's material or bodily "property" or "rights" must be compensated. As causation is the only link necessary for liability in most cases, liability is strict, and there is no need for any sort of intent element.[121]

George Fletcher explains the nature of tort liability as liability for harm caused through the imposition of nonreciprocal risk, that is, "a risk greater in degree and different in order from those created by the victim and imposed on the defendant."[122] Strict liability for dangerous activities captures this insight, but Fletcher extends the analogy to negligence: Careless driving in the midst of careful drivers also imposes nonreciprocal risks. The difficulty lies, however, in explaining the connection between the wrong of imposing extra risk on others and the remedy of paying for harms caused thereby.[123]

In Ernest Weinrib's theory, by contrast, the obligation to recompense the victim arises only if the defendant's act is wrongful and is not just the innocent violation of a property right or the creation of a nonreciprocal risk. Liability is negligence-based, not strict. For Weinrib, wrong consists in

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119. For excellent and more extended critical discussions of the main corrective justice theories, see Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 449–96 (1992), and Weston, *supra* note 115, at 957–1000.

120. I do not say as much about Fletcher's view, because it is not as systematic as Weinrib's or Coleman's account and serves at best as an explanation of "due care." It does not address whether tortfeasors should pay their victims directly, nor does it give a complete account of the link between risk creation and liability. I do not say as much about Epstein's view because it is unclear to what extent his is still a "corrective justice" view. *See infra* note 121. In any event, neither Fletcher's nor Epstein's account bears any relation to what the authors of *Exploring the Domain of Accident Law* take to be "corrective justice."

121. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 39–41 (1985); Richard A. Epstein, *Causation—In Context: An Afterword*, 63 CHI.-KENT L. REV. 653, 657–64 (1987). In an earlier series of articles, Epstein emphasized the libertarian aspects of internalizing costs. *See* Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 200–01 (1974); Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 441 (1975); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 203–04 (1973) [hereinafter Epstein, *A Theory of Strict Liability*]. The extent to which Epstein's theory could be considered noninstrumental varies. The earlier Epstein was not receptive to economic theories of tort; the later Epstein is. *See* JULES L. COLEMAN, RISKS AND WRONGS 273 (1992) (arguing that Epstein's early work "was very much antiutilitarian . . . [and] antieconomic analysis," but that "Epstein no longer fears utilitarian or economic analysis").

122. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 542 (1972) [hereinafter Fletcher, *Fairness and Utility*]. *But see* George P. Fletcher, *The Search for Synthesis in Tort Theory*, 2 LAW & PHIL. 63, 81–86 (1983) (arguing that risk analysis cannot reduce currently conflicted ex ante and ex post modes of tort analysis to single framework for analyzing liability).

123. *See* Perry, *supra* note 119, at 469.

infringing upon the autonomy, not the property, of another. With respect to tort liability, wrong means imposing an unreasonable risk.[124] The wrongful act may or may not cause harm; if it does, the actor owes restitution to the victim to reestablish an equality of autonomy between them. Weinrib connects the wrong with its consequent harm by appeal to Kant and (implicitly) Hegel: The harm is the embodiment of the wrong.[125]

Jules Coleman's most recent theory acknowledges the importance of a wrongful act tied to a harm, and the importance of requiring wrongdoers to recompense their victims directly (Weinrib's "relational view"), but also sees that reparation for the wrong may be separated from reparation for the harm: "[R]epairing the wrong itself, the cornerstone of the relational view, is no part of corrective justice at all. The view I want to defend is that the duty of wrongdoers in corrective justice is to repair the wrongful losses for which they are responsible."[126] The tort law duty to repair the harm, then, exists alongside a criminal law duty to repair the wrong (through punishment or apology). It is less clear, however, how wrong and harm come to be connected.[127] Liability for negligence is based on unreasonable risk, but Coleman also allows for strict liability if a victim's right is violated.[128]

In evaluating tort law by corrective justice standards, the authors of *Exploring the Domain of Accident Law* note the diversity of views on the

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124. *See* WEINRIB, *supra* note 116, at 152. Weinrib explains:

> Under the Kantian principle of right, the position of each party must be consistent with the other's being a self-determining agent. Accordingly, the plaintiff cannot demand that the law regard as wrongful the creation of all risk; such a judgment of wrongfulness would render action by the defendant impermissible, thus denying to the defendant the status of agent. Similarly, the defendant cannot claim immunity regarding risks that could have been modulated; that claim would ignore the effect of one's action on other agents and would treat them as nonexistent. When combined, these two considerations constitute a standard of care in which doer and sufferer rank equally as self-determining agents in judgments about the level of permissible risk creation.

Id.

125. Weinrib explains why risk creation alone is not actionable:

> For risk exposure to count as an actionable loss under corrective justice, the prospect of bodily injury, rather than actual bodily injury, would have to constitute the violation of the plaintiff's right. Conversely, the right would have to consist not in actual bodily integrity, but in the absence of the prospect of injury. But the absence of the prospect of injury cannot count as a right under the Kantian gloss of corrective justice. Rights are juridical manifestations of the will's freedom. The absence of the prospect of injury is not in itself a manifestation of the plaintiff's free will. In this respect, risk of bodily injury decisively differs from bodily injury itself: a human being has an immediate right in his or her body because it houses the will and is the organ of its purposes. The prospect of injury is, at most, something that may affect the embodiment of the plaintiff's free will in the future. Therefore, security from this prospect does not rank as a present right.

Id. at 157 (footnote omitted).

126. COLEMAN, *supra* note 121, at 324; *see also* Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 441 (1992).

127. *See* Ernest J. Weinrib, *Non-Relational Relationships: A Note on Coleman's New Theory*, 77 IOWA L. REV. 445, 448 (1992); *see also* Linda Ross Meyer, *Why Me?*, 16 QUINNIPIAC L. REV. (forthcoming Oct. 1997) (arguing that Coleman cannot retain relational account of tort without fuller account of responsibility).

128. *See* COLEMAN, *supra* note 121, at 281–84.

matter, though they cite only Weinrib's approach. Their choice of Weinrib to represent corrective justice may be justified by his systematic account, but the authors simply pick his theory without arguing its merits. Like many other positions they take, their choice reflects unargued theoretical assumptions. They assert that according to the perspective of corrective justice, the "purpose of tort law" is to "oblig[e] a person whose morally culpable behavior has violated another's autonomy to restore the latter as nearly as possible to his or her pre-injury status."[129] Most corrective justice theories, the authors continue, reject strict liability[130] and are skeptical of a large role for punitive damages. The authors also assert that corrective justice theorists stress that the form of tort litigation, in which a victim sues an injurer, cannot be explained by either deterrence or compensation, since neither theory would require direct interaction between these two actors.[131]

B. *Evaluating Corrective Justice*

The authors characterize optimal corrective justice in the following way:

> An input evaluation of this goal focuses on many of the same kinds of factors that are relevant to an input evaluation of the deterrence goal: liability and damage rules should confront wrongdoers with the full costs of injuries attributed to their wrongdoing; victims should have ready access to the legal system; claims should be accurately and promptly resolved; and liability insurance should not insulate wrongdoers from the impact of the tort sanction.
>
> We assess progress toward the corrective justice goal measured by outputs by trying to examine the following: the fraction of wrongfully injured accident victims who actually receive compensation, the frequency with which damages are awarded to those not wrongfully injured or against those not wrongfully causing the injury, and whether the measure of compensation actually received is adequate or excessive.[132]

It is difficult to reconcile these factors with a noninstrumental understanding of corrective justice. First, unlike evaluation of tort law in terms of deterrence, liability and damage rules in a corrective justice paradigm define

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129. DEWEES ET AL., *supra* note 3, at 8.

130. *See id.* This would not apply to Richard Epstein's corrective justice theory, *see* RICHARD A. EPSTEIN, A THEORY OF STRICT LIABILITY (1980), nor to aspects of Coleman's theory, *see* COLEMAN, *supra* note 121, at 281–84.

131. *See* DEWEES ET AL., *supra* note 3, at 8–9. Note that Jules Coleman's previous corrective justice theory of "annulling" wrongful losses did not require interaction between the victim and the wrongdoer *See* Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 426 (1982). Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349 (1992)

132. DEWEES ET AL., *supra* note 3, at 11–12.

what counts as the full costs of injuries. Costs cannot be evaluated on any other scale. Although it may seem that some injuries are not paid for by defendants, to be compensated for proximately caused injuries[133] is to be fully compensated;[134] there is no other scale by which to measure full compensation. Damages are limited by the principle of proximity precisely because corrective justice demands that a relation be established between the defendant's wrong and the plaintiff's harm. Otherwise, there is nowhere to locate the corresponding duty to compensate and right to reparation. As Weinrib puts it, "[t]he concepts of proximate cause and duty of care connect wrongful doing to wrongful suffering by requiring the plaintiff's injury to be the fruition of the unreasonable risk that renders the defendant's action wrongful."[135] Second, corrective justice does not demand that victims be compensated through the legal system. If tort law expresses norms of corrective justice, then ideally parties would follow those same norms voluntarily, without recourse to legal institutions. This conception differs from deterrence or compensation theories, which tend to assume that state control or coercion is required in all cases to ensure the appropriate redistribution of wealth. Instrumentalist theories focus on providing the right incentives to actors. The legal rules themselves carry no normative weight; they are merely means to ends. The ultimate objective is to achieve the right societal balance of risks and costs. If making the victim whole were unnecessary to achieve efficient levels of activity or an appropriate distribution of resources, then it would in fact be a bad idea to compensate victims. Any prelegal obligations of corrective justice would just get in the way, and legal incentives would have to be deployed to coerce actors to violate any such norms.

Corrective justice, by contrast, is not concerned with redistributing wealth from the careless to the careful or from the poor cost spreader to the good cost spreader; it does not see tort law as a response to market failure or as a tool for encouraging efficient decisionmaking. The overall good of society is, in some sense, irrelevant to a court dispensing corrective justice: It simply does justice between the parties before it. Since justice may be done with or without the courts, the frequency with which the courts are used is of little

133. No corrective justice theorist would venture that "proximate cause" states a precise test for limiting damages. Instead, considerations of generality or particularity of risk that underlie determinations of proximate cause merely "indicate the normative framework," WEINRIB, *supra* note 116, at 166, within which judgments must be made about whether the injuries the victim suffered were the sort of injuries a reasonable person "ought to have anticipated and guarded against," *id.* at 167, resulting from the sort of risk that made the defendant's conduct negligent in the first place. *See also* COLEMAN, *supra* note 121, at 346–47 (arguing that compensable loss must fall "within the scope of the risks that make [the defendant's] conduct at fault").

134. Although Professor Weinrib states that "tort law places the defendant under the obligation to restore the plaintiff, so far as possible, to the position the plaintiff would have been in had the wrong not been committed," WEINRIB, *supra* note 116, at 135, this clearly overstates the obligation, because proximate cause analysis limits responsibility to the "sort of consequence that a reasonable person ought to have anticipated and guarded against," *id.* at 167.

135. *Id.* at 164.

significance. From this noninstrumentalist perspective, the courts simply articulate and apply law that people should know (as a matter of practical reason, if not theoretical reason) and follow on their own.[136]

There is a second aspect to the assumption that corrective justice requires access to courts. Looking at law in terms of its deterrent effects takes a "bad man"[137] view of those regulated. That is, it assumes that law is necessary to provide incentives or disincentives, because without law, people would not do what is right according to some further theory of "right."[138] Corrective justice

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136. Interesting empirical work has been done and could be done on the question of whether and to what extent tort law doctrine dovetails with jurors' intuitive understandings of responsibility *See, e g* , Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61 (1995). For accounts of the ways in which norms are used in resolving disputes out of court, see generally ROBERT C. ELLICKSON, ORDER WITHOUT LAW HOW NEIGHBORS SETTLE DISPUTES (1991) (arguing that social norms, not legal norms, predominate, though some social rules such as "let bygones be bygones" have legal analogues such as laches), PAMELA J UTZ, SETTLING THE FACTS (1978) (presenting example of "principled" plea bargaining), Melvin A Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV L REV 637, 639 (1976) ("[O]bservation suggests that [dispute] negotiation consists largely of the invocation, elaboration, and distinction of principles, rules, and precedents."); and Marc Galanter, *Justice in Many Rooms Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981) (arguing that understanding courts requires learning how they interact with other normative orderings that pervade social life)

Advocates of corrective justice differ somewhat as to whether the public institution of courts is necessary, as opposed to mediative solutions, for example. Stephen Perry, among others, seems to suggest that the fundamental conceptions of corrective justice are moral, not autonomously "legal." *See* Perry, *supra* note 119, at 508–12. Ernest Weinrib, however, indicates that legal institutions are necessary

> Although the parties may spontaneously observe the requirements of right either by forbearing from wrong or, once a wrong has occurred, by making or extracting proper amends, these possibilities have no juridical standing since they presuppose in the parties an internal virtue foreign to the externality of legal relations. Therefore, the public significance of wrong can be signaled only by the availability of a coercion that represents the external operation upon the parties of the concept of right.

WEINRIB, *supra* note 116, at 107. Yet legal institutions are necessary, on this view, not because the average person does not know the principles of justice or will not conform to them voluntarily, but because, according to the Kantian/Hegelian conception of law, the state must bring about moral ends by force of will, joining moral necessity with physical necessity to make law actual. This philosophical move reifies law through legal institutions, so that law has the binding character in actuality that it already has in reason as morality, not because courts are the only way victims can receive their due from wrongdoers Weinrib recognizes the external need for state coercion, but he also recognizes the internal obligatoriness of legal norms. *See id.*

Jules Coleman has asserted that the relational view of corrective justice (to which he, like Weinrib, now subscribes) "does not assert that there is only one institutional form through which the debts under corrective justice can be discharged." Coleman, *supra* note 126, at 436; *see also* Jules L Coleman, *The Practice of Corrective Justice*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53, 69 (David G Owen ed., 1995) [hereinafter PHILOSOPHICAL FOUNDATIONS] ("[T]here may be duties of corrective justice even in the absence of political institutions designed to enforce or implement them ")

137. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV 457, 459–63 (1897), *reprinted in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES 391, 392–94 (Sheldon M Novick ed., 1995) (arguing that law should assume need to use threat of sanctions to deter wrongdoing by "bad man"), *see also* Sugarman, *supra* note 94, at 561 ("[T]he general model posited is one in which people, like mice put in a psychologist's maze of electrical shocks, are directed away from conduct that brings the sting of tort liability and toward those channels of activity where the sting is avoided ")

138. This is not to say that deterrence or compensation theories require every case to proceed to trial or even to court. Clearly, disputes are settled "in the shadow of the law," so that as long as the threat of litigation exists in the background, law retains its coercive power. The difference with corrective justice theory is that deterrence and compensation theories leave out the possibility that settling parties will use the law as a norm, not just as a threat, even if courts are unavailable Corrective justice theory explicates

need not make such assumptions. To repeat, empirical evidence of how many plaintiffs are compensated through the tort system may tell us nothing about whether corrective justice is being served. That may be happening *outside* the legal system, as friends, neighbors, or strangers settle disputes on the basis of prelegal norms of corrective justice.

Instrumentalist evaluations of law, by contrast, presume that state coercion is necessary for some social good to be achieved. Usually, this is assumed to be so because without institutions of coercion, the world is a grand prisoner's dilemma in which all incentives support defection from the common good. Goal-focused views of law also reflexively assume that humans themselves are goal-focused: Humans act only to get something they want or need. If action is directed by want, good itself comes to be defined by human will.[139] Hence instrumental views of law go hand in hand with rational actor models of human behavior: What is rational is choosing a means designed to get the most of what I want.[140] The authors' focus throughout on material incentives for action suggests that they have been seduced by this habit of thought. For example, in discussing the reduction in drunk driving accidents, the authors assume the reduction resulted from stiffer penalties. They report that "[e]vidence suggests that anti-drunk driving activist groups such as MADD (Mothers Against Drunk Driving) successfully contribute to deterrence by publicizing the consequences of drunk driving."[141] Never considered is the possibility that MADD may have awakened our consciences rather than our self-interest. Setting this aside, however, from a corrective justice perspective there is no alternative to preserving legal norms that require wrongdoers to compensate their victims. Other compensation schemes that do not preserve the bilateral relation between plaintiff and defendant and do not frame liability in terms of duty, breach of duty, causation, and harm would not be adequate substitutes for the court system. The only conclusion one might draw from institutional inefficiencies would be that we need more courts, not that tort law itself was not working and needed to be replaced or retooled.

Evaluating the "accuracy" of a decision for corrective justice purposes is also problematic. Presumably one must reassess whether the defendant really committed a wrong that proximately caused harm in the correct amount of the plaintiff's damages. The evaluation assumes that the evaluator has at least all the evidence available to the jury and at least as good an understanding of the

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the normative force of the rules themselves, not just the beneficial effects of having them observed in most cases.

139. For an examination of the way modern tort theory expresses a will-centered metaphysics, a Nietzschean will to power, see Weston, *supra* note 115, at 1001–06. *See also* Richard Hyland, *The Spinozist*, 77 IOWA L. REV. 805, 830 (1992) (arguing that "human law is not the product of the autonomous human will," though legal theory assumes it is).

140. Jules Coleman accepts this premise, making his corrective justice theory a hybrid one. *See* COLEMAN, *supra* note 121, at 303–11.

141. DEWEES ET AL., *supra* note 3, at 47.

governing norms. Since noninstrumentalist theories, unlike deterrence theories, have no outside criterion (such as efficiency) by which to evaluate outcomes, evaluating accuracy requires reassessing the same evidence on the same grounds that the jury used.[142] Even if a group of medical experts looking at the medical record disagreed with a jury's decision about whether appropriate procedures had been followed in a malpractice case,[143] corrective justice theorists would not say this necessarily proved the jury's decision was unjust. Perhaps the jury disbelieved the paper record and credited the testimony of a witness or disbelieved a doctor. Perhaps the jury believed that a formerly appropriate medical practice was itself now careless in light of new medical techniques or knowledge. Or perhaps the jury decided the plaintiff had just not proven her case, despite the availability of proof to others. The kind of inquiry into accuracy that would make sense from a corrective justice perspective would merely reiterate the trial and appeal process; it would not measure anything beyond what legal institutions already assess. Given the limits of empirical certainty in any investigation, it is hard to see why empirical investigation would generate better or different kinds of information if it were directed to answering the very same questions posed to judges and juries.

On the other hand, a corrective justice theorist would criticize a jury's or judge's decision that was obviously based on instrumentalist thinking rather than on legal principles.[144] This criticism, however, focuses on the justification for the decision, not its "accuracy." As long as the judge or jury attempts in good faith to judge a case, the corrective justice advocate must be satisfied, since the only alternative is, essentially, a second trial. Hence it would be redundant from the standpoint of corrective justice to investigate whether the assessment of liability or measure of damages in a particular case was inaccurate. Any empirical efforts might be more profitably directed to the still difficult task of discerning whether judges and juries employ law as it is, or decide cases on instrumentalist grounds.[145]

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142. *See* WEINRIB, *supra* note 116, at 222 ("[C]orrective justice does not antecedently determine the uniquely correct result for particular cases."). For Weinrib and Coleman, again, corrective justice is an attempt to articulate the normative core of tort law. Where doctrine and norm are consonant, the law is corrective justice, and there is no need to evaluate accuracy except to the extent of ensuring the law is being followed. However, once the core of tort law is identified, these theorists do find some tort doctrines inconsistent with norms embodied in the core. To this extent, corrective justice has prescriptions to make. The prescriptions are based on internal coherence, not a greater social good, so they neither depend on empirical fact nor provide a yardstick by which to evaluate trial outcomes that is external to legal doctrine itself. *See* COLEMAN, *supra* note 121, at 6–9; WEINRIB, *supra* note 116, at 5.

143. *See* DEWEES ET AL., *supra* note 3, at 120–21 (arguing that differences between expert opinions on complex medical procedures increase likelihood of inaccurate jury verdicts).

144. *See* WEINRIB, *supra* note 116, at 220–21 (contrasting two judicial opinions about proximate cause on this basis).

145. *See, e.g.*, Steven G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1020–27 (1994) (assessing whether or not courts and juries explicitly employ cost-benefit analysis).

Finally, the authors suggest that liability insurance is contrary to corrective justice principles. This argument, however, collapses corrective justice into deterrence. Liability insurance may decrease deterrence by buffering actors from the incentive to reduce risks, but corrective justice is not concerned with incentives for reducing risks. The main issue is whether the defendant has taken responsibility for the results of her wrongful conduct.[146]

Of course, charging the authors with misunderstanding corrective justice theory may be no great criticism. If corrective justice theories are splintered and incoherent in any case, a polite, but failed, attempt to factor these theories into the book's analysis should not be counted against the authors, but against corrective justice theories themselves. Indeed, the authors express (politely) what many tort scholars have said rather more baldly[147]—that corrective justice theory is irrelevant:

> Critics of corrective justice theories of tort law question the barrenness of noninstrumental rationales for tort law on the grounds that they appear to ignore the relevance of the goals of both accident reduction and accident compensation, which are likely to be the chief concerns to most members of the community contemplating the likely impact of an accident on their lives. To claim that tort law is inherently incapable of serving these objectives is to avoid joining the debate over whether tort law is worth preserving.[148]

Yet corrective justice theories are important for what they try to achieve, even if they ultimately fail. First, a corrective justice perspective takes tort law seriously as law, that is, as norms we should respect and aspire to follow, not just as policies designed to prod or coerce us into doing things we do not want to do. Second, corrective justice perspectives recognize that wrongdoing creates a relationship between a wrongdoer and her victim that needs to be recognized, understood, and explained. Third, corrective justice theories search for (though so far seem to miss) an important sense of responsibility that differs from the mens rea approach of criminal law and yet better reflects the human condition. Fourth, corrective justice seeks to understand the nature of the tort law duty of care differently from cost-benefit analysis. As several of the policy suggestions put forward by the authors here illustrate, these four objectives of the corrective justice quest are not even open to question for advocates of instrumental understandings of law.

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146. Insurance can be one way to do so. *See* WEINRIB, *supra* note 116, at 136 n.25 ("Nothing about corrective justice precludes the defendant from anticipating the possibility of liability by investing in liability insurance.").

147. *See* Sugarman, *supra* note 94, at 609 ("[T]he pursuit of corrective justice through ordinary torts cases is an extravagance primarily benefiting lawyers and the insurance industry.").

148. DEWEES ET AL., *supra* note 3, at 9.

1. *Law as Instrument vs. Law as Norm*

H.L.A. Hart distinguishes two standpoints from which one may view positive law. One may either take an "external standpoint," the "bad man" standpoint mentioned by Holmes, or an "internal standpoint," the standpoint of a member of a normative community.[149] The first views law as a set of penalties to be avoided. From this deterrence-based perspective, the law involves no obligations; it is merely a fact about the world to take into account in making one's self-interested decisions. The second understands law as imposing "obligations," that is, providing reasons for taking action, which one accepts as important and virtuous. Hart points out that these "standpoints" exist in the ways we talk about the law: We can meaningfully say that someone "ha[s] an obligation" even if he or she is unlikely to be prosecuted for breaching it.[150] We can even say that someone "ha[s] an obligation" if that person does not see or accept the norm invoked.[151] In other words, we sometimes speak as if the law were an objective, binding norm. When we speak this way, we take the internal standpoint. On the other hand, when we predict whether a course of action will incur a penalty, or when we speak of law as state coercion, we take the external standpoint. Hart believes that the internal standpoint is not adequately captured by John Austin's traditional positive law theory that identifies law with the threats of a sovereign.[152] For law to be different in kind from a gunman's pistol, Hart says, some account must be given of the internal standpoint.

Deterrence-based theories undervalue the internal standpoint. Understanding legal rules to be incentives rather than norms requires taking an Austinian view of law. If one views tort law as a set of incentives, then the concept of "wrong" tends to drop out. Instead, one imposes liability on the agent who can avoid the loss at the least cost, regardless of any responsibility for or connection with the victim. For example, if it turns out that wearing seatbelts is the least costly way to avoid harm, tort law should impose liability on those who do not wear seatbelts, regardless of the recklessness or even intentional wrongdoing of other parties.[153] The only reason for imposing liability on those who engage in intentionally harmful conduct, then, is that it is cheap to avoid, not that it is wrong.

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149. *See* H.L.A. HART, THE CONCEPT OF LAW 89–91 (Joseph Raz & Penelope Bulloch eds., 2d ed 1994) (1961).

150. *See id.* at 83.

151. *See id.* at 56–57 (arguing that existence of rule does not depend on individual psychological feeling of being compelled, but on social "critical reflective attitude to certain patterns of behaviour as a common standard"); *see also id.* at 88 (arguing that psychological feeling of being obliged and existence of obligation are "different though frequently concomitant things").

152. *See id.* at 83–85.

153. *Cf.* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 6.4, at 169 (4th ed 1992) (arguing that if plaintiff victim could have avoided accident at lower cost than defendant injurer, "[t]he efficient solution is to make the plaintiff 'liable' by refusing to allow him to recover damages from the defendant").

If legal rules have no independent moral force, but are coercive means indistinguishable from the coercion employed by a bandit, then the deterrence theorist must further justify this coercion by the end it is to achieve. The end, usually some account of the collective good, must itself be justified. Since we are assumed to be "bad men," the collective good cannot be equated with enhancing human virtue.[154] Instead, law must appeal to considerations that the "bad man" would find convincing, by proving that we get more of what we selfishly desire by using law to curb the excesses of our fellows.[155] This argument ultimately envisions humans as rapacious, selfish beasts, and law as a coercive tool to keep us from destroying each other.[156]

Compensation theories of tort law also see law as a tool, but not for creating inducements to action. Instead, tort law is a tool for distributive justice that ensures that the poor do not fall below subsistence level and that social harms are borne equitably. Here again, wrong drops out of the picture, and liability falls on those best placed to distribute or bear the losses. Institutional compensation schemes seem to be the obvious alternative to merely shifting a loss from one individual to another.

Corrective justice theorists argue that tort law serves goals other than distributive justice. Taking their cue from Aristotle, who understood justice to involve not only distributive justice but also corrective justice,[157] the theorists attempt to justify tort on nondistributive grounds. They shift their focus from social cost, or harm, to wrong.[158] It is a violation of an ethical duty, they argue, to act without care for the safety of others. This duty correlates with the right of the victim to expect compensation for wrongful loss. As opposed to deterrence theories of tort, corrective justice theories emphasize the obligatory force of tort law: It is *wrong* to be careless, violent, or deceitful; it is *right* to compensate those one has wronged. As Kant pointed out long ago, to see human beings as bound by (and hence capable of carrying out) obligations is to see them as capable of free action in accordance with ideals of reason.[159] The good human life involves more than satisfying one's desires or having

154. Of course, "we" theorists may be "good men" trying to make rules for "bad men," in which case virtue could be an end. But that assumes the existence of another standpoint, the internal standpoint, at least for "us." Hence, "we" are not motivated by deterrents.

155. *See, e.g.*, DAVID GAUTHIER, MORALS BY AGREEMENT 8–17 (1986) (summarizing argument that moral principles of cooperation would be adopted by self-interested rational actors).

156. An economist would argue that he is not committed to any view of human nature, but is only making a few assumptions that help predict behavior. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 365–66 (1990). Yet these presumptions run contrary to, and leave no room for, the internal standpoint. To encompass both internal and external standpoints, a further theory is required about *when* economic assumptions are appropriate.

157. *See* THE NICOMACHEAN ETHICS OF ARISTOTLE 114–17 (Sir David Ross trans., 1954).

158. This may be less true of Jules Coleman than of Ernest Weinrib. In Coleman's most recent work, he focuses on the similarities rather than the differences between corrective and distributive justice. *See* Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91 (1995).

159. *See* IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS 79–80 (Thomas K. Abbott trans., 1949) (1785).

sufficient resources to live; it requires living in virtue and honor by keeping faith with one's duties of respect for self and others.

The appeal of the corrective justice theorists' focus on wrong is not lost on the authors. They do suggest that tort law remain for victims of grossly negligent, reckless, or intentional wrongs. Given the authors' unfavorable assessment of tort law from a deterrence perspective, there seems a lingering sense that there is *something* to the idea of corrective justice. Indeed, if deterrence were the only concern, one need not make distinctions in culpability. If we reason from deterrence considerations alone, we may find that it takes a stronger sanction to command our attention and prevent negligence than to deter intentional injuries, even though the latter are considered more "wrongful."[160] If tort is to be preserved for some reason other than deterrence, then the authors must believe that it is important to allow victims to face their wrongdoers and demand redress. They do not explain, however, why these same sentiments of righting a wrong do not apply to the careless as they do to the reckless.

2. *Law as Sustaining Individuals vs. Law as Sustaining Relationships*

Corrective justice theorists also try to understand the nature of the relationship between the wrongdoer and the victim. Traditional tort principles, of course, allow victims to sue their wrongdoers directly for compensation. The drama of the trial allows the wrongdoer to face and explain her actions to the victim and allows the victim to confront the wrongdoer. We retain an intuitive sense that wronging another through carelessness, violence, or fraud establishes a relationship and personal responsibility.[161] Our frequent insistence that our children undergo the torment of personal apologies when they have wronged a neighbor demonstrates this intuition. Not only would the relationship between wrongdoer and victim explain the bilateral nature of tort

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160. *Cf.* Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 184–85 (Ferdinand Schoeman ed., 1987) (arguing that deterrence-based theories of punishment do not explain inclination to punish).

161. Weinrib attempts to explain the relationship created between wrongdoer and victim as a kind of unjust enrichment: The victim's loss is the wrongdoer's gain and supports a restitutionary obligation. *See* WEINRIB, *supra* note 116, at 64–66. He recognizes that, as his critics point out, it is often hard to find that a defendant gained anything corresponding to the victim's loss. *See* Perry, *supra* note 119, at 479–80. But Weinrib insists that "the wrongful injury represents both a normative surplus for the defendant (who has too much in view of the wrong) and a normative shortfall for the plaintiff (who has too little)." WEINRIB, *supra* note 116, at 117–18. The metaphor of normative gains and losses, however, assumes the relationship it is designed to explain. It does not explain why, if the defendant's gain is only a normative one, the defendant must pay monetary damages. As discussed below, the difficulty in correlating a defendant's wrong with a victim's harm remains.

Other theorists invoke causation to explain the relation between plaintiff and defendant. *See, e.g.*, Epstein, *A Theory of Strict Liability*, *supra* note 121, at 166–89 (describing four hypotheticals linking plaintiff and defendant by means of causation). But causation itself is either too broad, since we affect each other all the time in countless ways, or is a code word for other normative considerations that need to be spelled out.

suits, but it would also explain why torts committed within preexisting relationships, especially trust relationships, seem to merit greater damages even though they may cause no greater "harm." Deterrence and compensation theories leave out this element entirely: It does not matter whether the wrongdoer confronts the victim as long as the appropriate movement of social resources is somehow arranged.[162] From this perspective, the authors' suggestion that we move to no-fault compensation schemes supplemented by experience-rated insurance misses this sense of personal responsibility. Likewise, their focus on institutional actors rather than individual actors as the locus of responsibility in the medical malpractice context is disturbing. As the authors point out, institutions will not take cost-unjustified precautions; they will deliver only economically rational medical care. Yet current attempts by insurance companies to dictate treatment to physicians have met with considerable ire from both patients and physicians.[163]

When we are sick, we prefer personal responsiveness to economic rationality. The authors find it a "pronounced" "inaccuracy" that juries award more damages for medical malpractice than for similar injuries from other causes.[164] Yet they forget that juries may believe that when a physician is negligent, she violates a special trust relationship, not just an efficient level of

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162. The lack of this relational element led Jules Coleman to abandon his annulment theory of corrective justice, which did not require wrongdoers to compensate victims directly, for a "relational" view. *See* Coleman, *supra* note 126, at 433–37.

163. *See, e.g.*, George Anders, *Who Pays Cost of Cut-Rate Heart Care?*, WALL ST. J., Oct. 15, 1996, at B1 (reporting that cost cutting by health maintenance organizations [HMOs] leads to inferior heart care); Susan Harrigan, *Worried Sick; Consumer Advocates Say HMO's Aren't Well-Enough Designed to Deal with the Chronically Ill and Disabled*, NEWSDAY, Mar. 12, 1995, at 1 (reporting criticism of clumsiness of HMOs in handling medical problems and referring patients for inapt treatment); Vikram Khanna, Editorial, *The Warts, Flaws of Managed Care*, BALTIMORE SUN, Apr. 23, 1995, at 6J (praising Maryland statute requiring HMOs to pay for nonplan treatment and preventing them from coercing doctors' treatment decisions); Kevin McDermott, *Battle Set on Health Care Control*, ST. LOUIS POST DISPATCH, Feb. 7, 1996, at 1A ("The most common concern is that medical decisions are being dictated by financial issues—as when mothers are released from hospitals too quickly after giving birth because of the strict coverage rules imposed by their managed-care insurance companies."); Frank Reeves, *Longer Hospital Stays for Birth; Pa. Plans Hearings on Bill to Extend Insurance Coverage*, PITTSBURGH POST-GAZETTE, July 16, 1995, at F1 (detailing legislation to force HMOs to pay for longer hospital stay after birth); Jacqueline Shaheen, *Physicians Protest Maternity Insurance*, N.Y. TIMES, Mar. 5, 1995, § 13, at 1 (reporting doctors' criticism of insurance companies' and HMOs' policies of paying for only 24-hour hospital stays after birth). The Pennsylvania legislation discussed by Reeves was enacted, as was similar postpartum length-of-stay legislation in 27 other states. *See Capitol Report; Executive Action; Legislative Action; Maternity Coverage Mandate Signed into Law*, PA. L. WKLY., July 15, 1996, at 9; *NJ Maternity-Stay Law Is Working, but Similar Legislation Is Nixed in CA*, MED. UTILIZATION MGMT., Aug. 22, 1996, *available in* LEXIS, News Library, Curnws File. The Clinton Administration endorsed, and the 104th Congress enacted, similar federal legislation requiring health plans to cover at least 48 hours of hospitalization after birth. *See* Newborns' and Mothers' Health Protection Act of 1996, Pub. L. No. 104-204, §§ 601–06, 110 Stat. 2874; Hillary Rodham Clinton, Editorial, *Congratulations, Mom, but Out You Go; Your Insurance Coverage Has Now Expired*, S.F. EXAMINER, Oct. 2, 1995, at A11 (endorsing legislation); Judy Packer-Tursman, *Women's Values Mold U.S. Agenda, Election*, PITTSBURGH POST-GAZETTE, Sept. 25, 1996, at A1 (reporting passage of legislation); Robert Pear, *Clinton Says Maternity Plans Need to Offer 2 Hospital Days*, N.Y. TIMES, May 12, 1996, § 1, at 27 (reporting President's endorsement of legislation).

164. *See* DEWEES ET AL., *supra* note 3, at 121.

risk prevention. Hence the wrong seems greater than it might for a comparable harm caused through the negligence of a stranger.

Of course, this sense of wrong is irrational from a compensation perspective, because wrong should have nothing to do with measuring economic loss. It is also irrational from a deterrence or efficiency perspective, as it neither considers what incentives are necessary to deter, nor balances the harm against the costs of precautions. From a deterrence perspective, breach of trust should be punished more harshly only if there is some reason to think trust-breachers are harder to deter.[165] As in punishment theory, a focus solely on deterrence does not capture our sense of the seriousness of the wrong,[166] so often an element in tort law. Corrective justice seems to seep back into the analysis.

3. *Responsibility for Harm vs. Responsibility for Wrong*

As is apparent from the above remarks, corrective justice theorists focus on the wrong rather than the harm in elucidating their understanding of tort. The difficulty, however, is explaining why we require compensation according to the extent of the harm rather than the extent of the wrong.[167] In criminal law, by contrast, punishment is usually meted out in accordance with the mens rea and criminal history of the offender, not the extent of harm done to the victim.[168] Exceptions, like the more serious punishment given the murderer than the attempted murderer, provide the counterintuitive legal conundra that keep scholars in business.[169]

Basing responsibility on mens rea or intent is a modern idea, which sees human action as virtuous or vicious only insofar as it is within human control. As good Kantians, we acknowledge that the only thing that can be virtuous or

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165. Some economists have made this argument, on the basis that trust relationships usually involve monitoring difficulties. Hence greater damages must be awarded for detected delicts to make up for the advantages defendants reap when their conduct goes undetected. *See* Robert Cooter & Bradley J Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N YU L REV 1045, 1048–53 (1991). The argument is difficult to apply in the tort context, however, because defendants may reap no advantage from careless activity. And at least in the medical context, physicians are probably risk averse and adopt defensive, non-cost-justified precautions because the standards of care are not always clear. *See* DEWEES ET AL., *supra* note 3, at 106–07.

166. Deterrence lacks this moral dimension unless some measure of moral aversion is factored into the "extent of harm" calculation, a possibility that the authors do not discuss.

167. *See* Coleman, *supra* note 126, at 439–41 (describing relational view and proposing that wrongdoers have duty to repair only wrongful losses that they caused).

168. One might object to this admitted generalization by pointing out that explicitly in the federal sentencing guidelines, and implicitly in other sentencing contexts, the monetary amount of damage increases the punishment. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2F1.1(b)(1) (1995) (setting graduated sentences for fraud based upon amount of monetary loss). However, degree of harm is often a proxy for the extent of culpability.

169. For a very different account of wrong, which argues that only a completed act, not an attempt, constitutes a wrong, but leaves open the question how to distinguish culpably risky acts from morally permissible ones such as building skyscrapers or selling sushi, see Heidi M. Hurd, *What in the World Is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157, 189–208 (1994).

vicious is our will, not the uncontrollable consequences of our conduct.[170] The will with which an act is done, then, is what matters; the external circumstances or collateral harms are irrelevant. By the same token, the extent of harm in the world is, on this account, morally irrelevant. Harm itself is not wrong; natural disasters cannot be laid at the door of any moral agent. From this Kantian perspective, which we all share insofar as the standard account of criminal culpability seems intuitively right, tort law is puzzling. Why should an inattentive driver be liable for millions for hitting a CEO with an eggshell skull, while a drunk and reckless driver may only be liable for a broken fender? If tort law is about righting wrongs, then damages should reflect the wrong, not just the harm.

Deterrence and compensation theories that focus on minimizing or distributing social costs avoid this problem, because the wrongfulness of the defendant's conduct is not at issue; only the harm is important. From the deterrence or compensation perspective, there is no need even to inquire about the special nature of responsibility for consequences beyond one's control; the only issue is who should pay for them. Deterrence theory answers that costs should be placed on those best placed to avoid them; compensation theory answers that costs should be placed on those best placed to spread them. Yet the inquiry into the nature of responsibility is of central importance. Human life, again to invoke Kant, lies at a metaphysical crossroads between omnipotent thought and causal necessity.[171] Our power to reason and our will are within our control, but the world in which we try to act is not. To assess responsibility solely on the basis of intent is to ignore that we are connected to a world outside our minds; to assess responsibility for all consequences is to treat ourselves as omnipotent. Responsibility for proximate harms in tort requires a different account of what responsibility is from that which our traditional or intuitive understanding provides, one that fits the odd circumstances of being a rational mind in a contingent, material body.

So far, no corrective justice theorist has come up with a convincing account of the connection between wrongs and harms, but the investigation itself at least leaves open the possibility.[172] The instrumental theories of tort law close off that discussion, a discussion that might not affect the accident rate but might help us improve our self-understanding.

Particularly indicative of the authors' instrumentalist approach is that they reject noneconomic damages in surprisingly perfunctory fashion. Even though they acknowledge that noneconomic damages comprise sixty percent of all

170. *See* KANT, *supra* note 159, at 17–21 (stating that actions derive moral worth from "principle of the will").

171. *See id.* at 30–31, 40–41, 78–79.

172. One admirable attempt at such an expanded account of responsibility, which argues that the conception of the self should be expanded beyond the notion of free will, is Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959 (1992).

third-party liability compensation for motor vehicle accident injuries,[173] they conclude with only a brief citation that "since monetary recompense can only alleviate the suffering associated with pain and suffering, but not eliminate this type of injury itself, it is questionable whether parties would rationally insure against nonpecuniary losses."[174] Leaving aside the rather puzzling distinction between "alleviating" and "eliminating," it is surprising that the authors reach this conclusion with no discussion, as the battles over tort reform have focused so intensely on pain and suffering damages.[175] It is also surprising that no mention is made of the role of pain and suffering damages in paying plaintiffs' attorneys' fees and court costs,[176] or of their role in helping round out the economic damages that the authors deem often deficient.[177] Nevertheless, the authors maintain throughout the book the rather strained position that although pain and suffering damages are useful for deterrence purposes, because they reflect "the full social costs" of accidents,[178] they are unnecessary for compensation purposes, because a "rational" self-insurer would not insure against such losses. In their ultimate policy proposals, they take the latter position that on sound insurance principles, noneconomic damages are irrational.[179]

As others have pointed out,[180] however, even on its own terms the insurance argument goes only so far. If the injury results in hedonic damages—that is, the impairment of a victim's ability to engage in sports or hobbies that were formerly very important and pleasant to her—she may need money to find substitutes, if substitutes are more expensive. Hence, the victim's marginal utility for money may be greater than it was in her uninjured state. Therefore, it is rational to spend more money on insurance, thereby transferring money from the present, in which it is less valuable, to a possible

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173. *See* DEWEES ET AL., *supra* note 3, at 32.

174. *Id.* at 30 (footnote omitted).

175. *See* Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 776–77 (1995).

176. Perhaps this is because the United States is almost unique among legal systems in allowing contingency fees. However, the authors are primarily discussing the relatively large role played by noneconomic damages in the United States.

177. *See* DEWEES ET AL., *supra* note 3, at 33.

178. *See id.* at 17.

179. *See id.* at 427–36.

180. The marginal utility argument ignores the desire to equalize baseline utility across possible futures. That is, even though I might enjoy opera less from a wheelchair, my need for any enjoyment at all would be greater in such a state, and so I could rationally move resources from the present to such a possible future even if I give up more marginal utility than I might gain. *See* Steven P. Croley & Jon O. Hanson, *The Non-Pecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1815–34 (1995) (arguing that consumers may rationally insure at cost of net utility, if utility-equalizing gains relative to different pre- and post-injury baselines exceed such cost); Geistfeld, *supra* note 175, at 793–95 (arguing that consumers may rationally insure against pain and suffering if it would increase marginal utility of wealth, but not otherwise); Schwartz, *supra* note 88, at 364–66 (arguing that consumers may rationally insure only partially against pain and suffering that would increase marginal utility of wealth, because positive income elasticity of demand for goods means that "poorer" injured person will demand less than full replacement of lost utility of not suffering).

future in which it is more valuable. Theory, then, cannot answer these questions; only facts can. The authors' sources also argue that the unavailability of first-party coverage for pain and suffering in the current insurance market indicates that consumers do not wish to insure against pain and suffering,[181] but evidence cited by other commentators suggests that consumers prefer to insure against some pain and suffering injuries.[182] Although these results would not necessarily justify complete compensation for pain and suffering injuries, they certainly would warrant a closer look before pain and suffering damages are eliminated entirely.[183]

I suspect that behind the uncontested acceptance of the self-insurance argument against noneconomic damages lies another concern: how to make universal no-fault coverage affordable and administratively feasible. Clearly, administration of a no-fault insurance plan would be difficult if claims for pain and suffering had to be adjudicated (though, of course, schedules or some other form of cap could be used), and the compensation costs would rise. One may still ask whether eliminating pain and suffering damages, while at the same time ensuring "a high rate of replacement for income losses to achieve an income level of, for example, 80% of after-tax earnings,"[184] is appropriate. A child, unemployed person, or homemaker who suffers a permanent disfigurement or painful, untreatable, permanent injury will receive less compensation than a high-income earner who suffers a minor injury but loses

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181. *See* Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517, 524 (1984) (cited in DEWEES ET AL., *supra* note 3, at 72 n.149).

182. *See* Croley & Hanson, *supra* note 180, at 1834–44; Geistfeld, *supra* note 175, at 795–96 nn.91–92. Schwartz also argues that the lack of a market for insurance against pain and suffering can be attributed to adverse selection: Because of the insurers' inability to identify average risks, they cannot avoid the situation in which only those who expected their suffering to be especially keen would buy insurance, making such insurance too costly to offer. *See* Schwartz, *supra* note 88, at 364–65. Jules Coleman suggests insurers may fear fraudulent claims. *See* COLEMAN, *supra* note 121, at 421.

Margaret Radin has another explanation for the failure of consumers to demand pain and suffering insurance. She argues that consumers reject the idea that pain and suffering is commensurable with money in the way the insurance argument would suggest. *See* MARGARET JANE RADIN, CONTESTED COMMODITIES 197–99 (1996); Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 77 (1993). She nonetheless does not reject pain and suffering damages, since they represent an affirmation of wrong and a tangible message to the victim that her suffering is taken seriously. *See* RADIN, *supra*, at 201–02 (arguing that rules governing pain and suffering damages should reflect people's commitment to incommensurability). She proposes a "noncommodified conception of compensation":

> I want to call to mind the following possibility. Requiring payment is a way both to bring the wrongdoer to recognize that she has done wrong and to make redress to the victim. Redress is not restitution or rectification. "Redress" instead means showing the victim that her rights are taken seriously. It is accomplished by affirming that some action is required to symbolize public respect for the existence of certain rights and public recognition of the transgressor's fault in failing to respect those rights. In this conception of compensation, neither the harm to the victim nor the victim's right not to be harmed is commensurable with money. Neither is conceptually equated with fungible commodities.

Id. at 188.

183. *See* Schwartz, *supra* note 88, at 366 ("[T]he ideal legal rule regulating accidents causing mental losses that increase people's marginal utility for money would award victims partial damages.").

184. DEWEES ET AL., *supra* note 3, at 427.

a few days of work.[185] Of course, the authors acknowledge that insurance premiums would be adjusted accordingly by income,[186] so that high-income drivers would pay higher premiums for their higher prospective returns. But without the tempering effect of noneconomic damages, there is a danger that the significance of injuries and the persons injured will be seen solely in economic terms. Some members of society will simply be expendable, their injuries insignificant.[187] If it turns out that we are all hard-headed economists, there should be no problem with such a system.

The problem, however, is deeper. Tort law has traditionally allowed damages for something like lost dignity. Assault actions compensate not just for physical harm, but also for affront. Defamation actions compensate for lost reputation, not just economic loss. Privacy actions protect personal freedom and self-presentation. It is only in the world of law and economics that we think of physical injury solely in economic terms. There has traditionally been a "wergeld"[188] aspect to personal injury damages, a sense that a tortfeasor owes compensation not just for medical bills, but for lost dignity, freedom, and self-determination.[189] These harms are now subsumed into "pain and suffering," but this rather demeaning appellation should not obscure the loss of human possibility. A child, for example, may not have a distinguished (or high-paying) profession now, but who knows what might have been? The "equality" of noneconomic damages reflects that unknowable loss of potential that must be attributed to every human being regardless of her present level of achievement. Human life is not static. Ironically, to deny this basic equality of loss is to return to a true "wergeld" system where compensation is accorded on the basis of status: knights and lords worth more than serfs, CEOs and stockbrokers worth more than social workers and school teachers.

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185. To be fair, the authors envision a deductible for short-term income losses, *see id.*, so this precise scenario would not occur. However, the deductible is not meant to address the problem presented here, but rather the authors' concern for "moral hazard," i.e., false claims of injury made in order to have a nice, paid vacation from work.

186. *See id.* at 38.

187. I assume that the authors would respond that any such "message" goes not to the compensation concern, but to the deterrence concern, and it would be countered by regulatory enforcement and the residual role left for intentional, reckless, or grossly negligent tort litigation. Or perhaps they would respond that I am guilty of making unwarranted empirical assumptions about how people will understand the law.

188. Wergeld was an Anglo-Saxon schedule of tort/crime penalties to be paid to the victim of a wrong, or to the family of a decedent. The extent of the wergeld owed depended upon the status of the victim. *See* James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B U L REV 29, 53 (1996); *see also* Seffert v. Los Angeles Transit Lines, 364 P2d 337, 345 (Cal 1961) (Traynor, J., dissenting) ("Such [noneconomic] damages originated under primitive law as a means of punishing wrongdoers and assuaging the feelings of those who had been wronged.") (citations omitted).

189. I use the term "compensation" in the text loosely. As Radin has pointed out, noneconomic injuries are not commensurable with money. *See* RADIN, *supra* note 182, at 201–02; Radin, *supra* note 182, at 77. We pay pain and suffering damages, indeed, as a kind of "wergeld" to show remorse and respect, not to wipe out the injury. Radin's conception, however, makes it difficult to distinguish pain and suffering damages from punitive damages. The conceptual tightrope exercise required is to focus on the loss, not the wrong, even though the loss is not "compensated" but only "acknowledged" by money damages.

Corrective justice theorists might conclude that the "harm" to be compensated by tort damages is not just economic harm, but lost human possibility.[190] If human beings are at the metaphysical crossroads between omnipotence and necessity, then harm in human terms is not just what results from a collision of molecules, but what happens to the soul or spirit. Harm done in this sense may even correspond to the intent with which it was inflicted. As Justice Holmes said, "even a dog distinguishes between being stumbled over and being kicked."[191] Pain itself is a social construct, to some extent. The discomfort experienced by a marathon runner or a mother in labor is different in kind, though perhaps not in degree, from that of an accident victim. Traditional tort doctrine allowing nominal recoveries for intentional wrongs but not for negligent wrongs reflects this truth,[192] as does allowing juries to compensate victims for humiliation and embarrassment as well as for physical harms.[193] Conversely, the traditional rule barring tort compensation for purely economic harm may be understood as a recognition of the immaterial nature of the loss tort law is meant to redress.[194] "Pain and suffering" damages, then, may be an appropriate counterpart to the wrong and therefore suitable as compensation, allowing a jury to compensate for indignity, not just indisposition. Hence, the distance between wrongs and harms may be bridged a bit: Like wrongs, harms are features of human experience, not objective facts, and are measured by lost human possibility and moral pain, both of which increase with the extent of the wrong, not only with the extent of physical damage.

4. *Cost-Benefit Analysis vs. The Duty of Care*

Finally, corrective justice theories treat carefulness as a duty, not just a calculation of advantage.[195] They try, in other words, to set forth a deontological account of tort law, just as other theorists have tried to articulate deontological theories of contract or criminal law.[196]

As other authors have pointed out, however, tort law presents a special challenge in this regard, because it is necessarily concerned with tough trade-

190. *But see* Bruce Chapman, *Wrongdoing, Welfare, and Damages: Recovery for Non-Pecuniary Loss in Corrective Justice*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 136, at 409 (arguing that corrective justice theory would prohibit award of noneconomic damages because plaintiff could use them only for goods unrelated to loss).

191. OLIVER WENDELL HOLMES, THE COMMON LAW 3 (Boston, Little, Brown, & Co. 1881), *reprinted in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 137, at 109, 116.

192. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 37 & n.29 (W. Page Keeton ed., 5th ed. 1984); *id.* § 12, at 57; *id.* § 54, at 361.

193. For example, the *Second Restatement of Torts* allows recovery of damages for invasion of privacy, including "emotional distress or personal humiliation." RESTATEMENT (SECOND) OF TORTS § 652H cmt. b (1977).

194. *See* KEETON ET AL., *supra* note 192, § 92, at 657.

195. This is connected to the discussion of the "internal standpoint." *See supra* Subsection III.B.1.

196. *See* CHARLES FRIED, CONTRACT AS PROMISE (1981); Moore, *supra* note 160.

offs and requires consequentialist reasoning. Heidi Hurd has argued, for example, that corrective justice theories cannot be based on a purely deontological account of negligence.[197] In part, her conclusion is based on a definition of deontology that requires general rules, not context-based judgments. Because the duty of care cannot be reduced to a list of do's and don'ts,[198] but must be decided on the basis of an assessment of the possible consequences of different courses of action, Hurd concludes that negligence liability necessarily turns on consequentialist considerations:[199] "In many circumstances one's decisions appear exempt from the application of deontological norms, so that the right decision to make is the decision that maximizes good consequences."[200]

Though much of this debate turns on what counts as "deontological,"[201] corrective justice theorists face a serious difficulty in trying to articulate a duty of care that does not dissolve into cost-benefit analysis. If we simply have a duty to engage in cost-benefit analysis, then corrective justice adds little to the instrumentalist conception of tort. The only difference between a deterrence theorist and a corrective justice theorist on this account would be that the deterrence theorist would not use the language of duty, but would instead establish legal standards to ensure that it was in the actors' interest to take into account all the relevant costs of their conduct. As many deterrence theorists have argued, negligence law (if negligence law is understood to require cost-benefit analysis) already does so. There would be no difference in legal standards; the difference would be rhetorical only. Sorely needed, then, is an

197. *See* Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 251, 272 (1996).

198. For an example of this problem, see the famous exchange between Oliver Wendell Holmes, attempting to lay down a workable rule of due care for crossing railroad tracks in *Baltimore & Ohio Railroad v. Goodman*, 275 U.S. 66, 69–70 (1927), and Benjamin Cardozo's response in *Pokora v. Wabash Railway*, 292 U.S. 98, 101–06 (1934), that no valid general formulation of the rule was possible. Although Cardozo's opinion purported not to overrule Holmes's categorical statement of the rule, it is understood to have done so. *See* Justice v. CSX Transp., Inc., 908 F.2d 119, 123 (7th Cir. 1990).

199. *See* Hurd, *supra* note 197, at 251, 272.

200. *Id.* at 253.

201. *See, e.g.*, Kenneth W. Simons, *Deontology, Negligence, Tort, and Crime*, 76 B.U. L. REV. 273, 285–95 (1996) (taking issue with Hurd, especially as to whether deontology requires categorical prohibitions). Indeed, some of the comments Hurd makes sound utilitarian, not deontological. Because one only pays damages when harm occurs, "if negligence is to be given deontological content, its essential nature must be thought to lie in the materialization of risks, and not in risks themselves." Hurd, *supra* note 197, at 265. If "negligence" in this sentence means carelessness, she is simply identifying carelessness with causing harm, as would a strict liability theory. This is certainly more consistent with utilitarianism, which evaluates the goodness or badness of human action solely by the consequences it causes, than with deontology, which would evaluate the actor's conduct ex ante.

Also odd is Hurd's argument that deontology does not mandate a duty not to be negligent. *See id.* at 253. Is it not a violation of a categorical prohibition to refuse to consider how one's actions affect others? At the least, one would expect a deontologist to assert that there is a deontological obligation to consider such consequences—a duty, if you will, to employ consequentialist reasoning. The obligation would be met if the agent made the most prudent decision possible, given the information he or she had. Hence, the duty would not be determined ex post by whether or not he or she turned out to be right (the consequences), but by the nature of the actor's action.

account of the corrective justice duty of prudence and care that shows some difference from standard cost-benefit analysis.[202]

The limitations apparent in the authors' discussion of cost-benefit analysis may suggest some possibilities. Though the authors consistently call for more cost-benefit analysis, especially in the context of government regulation, they acknowledge the difficulty of evaluating the benefits of more costly precautions. The benefit calculation depends on how much value is assigned to life and limb, as well as difficulties in predicting the effects of the precautions; benefits may continue for a long time, but costs are incurred immediately. Sometimes the authors conclude that benefits receive too much emphasis,[203] while at other times they seem to suggest that benefits are slighted.[204] Similarly, the authors do not even try to suggest an appropriate value for a life, though they argue that "more systematic application of cost-benefit methodology, even employing relatively high values of life and physical integrity, is likely to substantially enhance regulatory performance."[205]

But we know that even one's valuation of one's own life can fluctuate madly, depending on how one values one's riskier pleasures or assesses one's importance to others. For example, I loved skydiving when I was younger, but I gave it up after I was married and had a child. Does that mean that my life was less valuable then, or simply that I value the lives of others close to me more now? On the other hand, if my child needed to eat, I would take a risky job to feed her. Does that mean my life would become less valuable? Assessing the value of life from the perspective of value to others is also frightening. Am I more valuable if I make more money? If I have dependents?

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202. Weinrib, for example, argues that the duty of care should consider only the possible harm, not the cost of precautions, so that it is not taken for granted that the activity in which defendant is engaged ought to continue ("activity level" in economic parlance). *See* WEINRIB, *supra* note 116, at 147–52. However, this argument seems inconsistent with his assertion that "doer and sufferer rank equally as self-determining agents in judgments about the level of permissible risk creation." *Id.* at 152. If they are equal, then should the defendant's costs of precaution (including the value of defendant's activity) not be balanced against the benefits of those precautions to the plaintiff (including the value of plaintiff's activity)?

Epstein's early theory would establish a duty of compensation whenever defendant causes plaintiff's right to be violated, regardless of the cost to defendant. *See* Epstein, *A Theory of Strict Liability*, *supra* note 121, at 168. The decision about when a defendant is a cause, however, may itself be based on an analysis of costs. *See* Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291, 1320–35 (1992).

George Fletcher's theory would establish a duty of compensation whenever a defendant imposes a nonreciprocal risk, regardless of cost. *See* Fletcher, *Fairness and Utility*, *supra* note 122, at 542. The idea of reciprocity, however, seems to refer back to underlying customs about what kinds of risks are acceptable, common, and therefore reciprocal. These customs themselves make tradeoffs between risks and benefits, but they are so habitual and backgrounded that we usually do not reopen the balancing question. *See infra* notes 206–07 and accompanying text.

203. *See* DEWEES ET AL., *supra* note 3, at 239 ("[B]enefits [of safety regulations for products] are realized over an extended period and must be discounted accordingly . . . .").

204. *See id.* at 321 ("[B]enefit estimates generally focus on short-term effects [of pollution remediation], ignoring the long run.").

205. *Id.* at 239.

If I do "socially beneficial" work? If I am the world's greatest basketball player or the world's greatest brain surgeon? In short, as myriad commentators have pointed out, there is no "neutral" way to value a life, and the authors do not suggest one. Yet they insist on cost-benefit analysis as an appropriate way to evaluate regulatory decisions.

Tort law traditionally has ducked these problems by focusing on customary or "reasonable" standards of care, rather than trying to evaluate anew the cost of precautions vis-à-vis risks.[206] Behind this "custom," however, lurks a notion of what constitutes a human life worth leading. Even custom agrees that we must risk our lives to some extent in order to live them fully. We must make these tragic choices.[207]

What cost-benefit analysis misses, however, is that in evaluating "life," a focus on human freedom, not money, might be more appropriate.[208] What human activities and possibilities and ideals are made possible by taking a particular risk, and how many lives must be jeopardized for those possibilities to be realized? Some risks are necessary in order that human life can merely continue—for example, we must grow food, and producing food exposes agricultural workers to many dangers.[209] Other risks are necessary to enhance the quality or excellence of human life. Here we trade quantity for quality. Among other benefits, building a new highway (which requires risking human injury) creates the opportunity for workers to commute from longer distances, giving them more choices about where to live. Behind every evaluation of the costs and benefits of a particular course lie normative evaluations about quality of life and tragic trade-offs.

Economics-inspired risk assessment seeks to avoid making such normative evaluations precisely because they are so bitterly contested. Instead, it looks to market mechanisms to find how "we" actually evaluate the trade-offs. These

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206. *See* Gilles, *supra* note 145, at 1015–19 (commenting that juries receive "reasonable person" instructions rather than cost-benefit balancing instructions). Indeed, even in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), in which Learned Hand articulates his famous risk-benefit standard of negligence, custom wins out over cost-benefit analysis. The issue in the case is whether the owner of a barge is careless in failing to have a bargee present on a ship to guard against the ship's slipping its moorings and damaging others' property. Hand nowhere in the opinion evaluates the costs versus benefits of having a bargee present on the ship at all times (or of having shifts of bargees rotate their guard duty), but assumes that the bargee must only be on the barge "during working hours," unless he has some excuse for being absent. *See id.* at 173. Hand does no accounting to determine his standard of care, but assumes the reasonableness (and cost-effectiveness) of having (one) bargee present during usual working hours. *See* Epstein, *A Theory of Strict Liability*, *supra* note 121, at 154–55 (discussing Hand's acceptance of custom and excuse).

207. *See* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 65–68 (1985) (exploring how reasonable person standard is used to make trade-offs between fundamental ideals, not just to promote efficiency); GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 167–91 (1978) (examining different issues in different societies to demonstrate role of culture in resolution of choices between moral, economic, and other values).

208. *See* WEINRIB, *supra* note 116, at 151–52; *see also supra* note 124.

209. A higher proportion of workers is killed or disabled on the job in agriculture (including forestry and fishing) than in mining and quarrying or in construction. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES 1995, at 440 tbl.688 (115th ed. 1995)

market mechanisms are faulty, of course. Even the relatively unproblematic assessment of how much a particular safety measure will cost a company (in lower profits, for example) makes many assumptions. The "cost" of a safety measure does not usually reflect its social cost (the loss of utility of the product "as is," including perhaps its availability at a lower price), but the cost to the company. If the cost to the company is too high, and it cannot turn a profit after installing the safety device, then it or its product line will not survive. There is, however, the possibility that the society as a whole would be better off if the product were not produced at all, even though there may be consumer demand. For example, it may be very lucrative to market a dangerous children's toy, but that profit does not reflect the actual benefit of the product to society. When courts do "cost-benefit" analysis, they do not look to the costs to the company of the safety measures, but at least in part to "[t]he usefulness and desirability of the product—its utility to the user and to the public as a whole."[210] To assume that the costs to the company are the same as the costs to society is to assume a perfect market in which the utility of a product is reflected in its price. Though the authors believe consumers make such rational choices, the facts (and our own irrational purchases) do not bear this out.[211] Price and cost figures cannot substitute for normative evaluations. Our reflexive consumer preferences constantly change and may be greatly influenced by advertising. Nor do reflexive preferences, like the sudden craving for a Big Mac, necessarily reflect our reflective ideals—the preferences we aspire to have. Similarly, attempts to project what prices might be like in a perfectly competitive world are simply normative decisions about relative worth in disguise.[212]

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210. O'Brien v. Muskin Corp., 463 A.2d 298, 304 (N.J. 1983). *O'Brien* was overturned by N.J. STAT. ANN. § 2A:58C-3a(2) (West, 1987) insofar as the case endorsed the application of risk-utility analysis when a plaintiff failed to establish a product defect under the "consumer expectations" test, i.e., that an ordinary consumer would not have recognized the danger as an inherent characteristic of the product. *See* Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1252–53 (N.J. 1990).

211. *Cf.* OSCAR WILDE, AN IDEAL HUSBAND, act 2, lines 152–53 (A & C Black 1993) (1895) ("[W]hen the gods wish to punish us they answer our prayers . . . .").

212. These points have been made again and again, and more eloquently, by critics of cost-benefit and general economic analysis. *See, e.g.*, Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (criticizing "liberal" law and economics school of thought and arguing that use of efficiency criterion to generate complete system of private law rules is incoherent); Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (criticizing cost-benefit analysis by means of market-inalienability theory neglected by Law and Economics scholarship); Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1410–11 (1981) (criticizing cost-benefit analysis as unable to measure merits of given belief because of tendency to confuse categories of wants); Mark Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205, 225 (1974) (criticizing cost-benefit analysis in that "[a]s long as policies are intended to maximize the general satisfaction, they will be no better . . . than the interests they serve"); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548–49 (1988) (noting that in republican theory, existing preferences and entitlements should not be assumed to be static); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986) (criticizing notion that existing private preferences should be accepted as basis for governmental decisionmaking); James B. White, *Economics and Law: Two Cultures in Tension*, 54 TENN. L. REV. 161, 164 (1986) (arguing that there is "a deep conflict" between economic analysis and "the intellectual and social practices that have characterized American law from the beginning"); *see also* JANE

Hence the common law's reliance on "custom" as a proxy for reasonableness takes on a new significance. "Custom" includes the normative ideals many take for granted in everyday life. In everyday activities such as walking, driving, fixing our houses, etc., we have fairly well-established ideas about what risks are worth taking. When we consider activities that are not so common, our intuitions of "reasonableness" fail us, so that the standards for pollution, dangerous chemicals, etc., are not already worked out in the background habits of life. Instead, we must make the normative trade-offs explicit. Cost-benefit analysis is touted as a way to make those trade-offs explicit, but only by reducing all normative value to a common coin. A million dollars is obviously too great a cost to save three hundred thousand dollars. But it is much harder to say that a cheaper car that will make driving and different housing or job opportunities affordable to thousands more people is worth the lives of fifty who will die for lack of expensive safety equipment. Due care is never a single scale maximization of a single good. It is a complex normative decision often involving irreconcilable conflicts between important values. We should not forget that we stand with Agamemnon, who had to choose between failing in his oath to his brother and his duty to his country, and sacrificing his daughter.[213] To mask the tragedy of such a choice in a balance sheet is to lose ourselves.

C. *The Domain of Corrective Justice*

Given that corrective justice theory may serve an important role in providing an account of tort law that unearths its normative basis, what follows? Is the authors' analysis of the beneficial or deleterious effects of tort law beside the point? Not at all. It is still useful to evaluate the expense and collateral effects of a system of law. Certainly, we can look to other ways to buffer ourselves against losses and to decrease the costs of accidents. The most corrective justice theorists might say (and some, like Weinrib, do not go even that far) is that tort law should be preserved because it rights wrongs, even if other institutions take on the roles of compensation and accident prevention.[214] Indeed, part of the point of corrective justice theory is that the

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SMILEY, MOO 31–33, 65–69 (1995) (satirizing economics professor devoted to cost-benefit analysis in every aspect of life).

213. *See* EURIPIDES, *Iphigenia at Aulis*, *in* THE WAR PLAYS 1, 9–10, 57 (Don Taylor trans., 1990)

214. Indeed, although the authors struggle to evaluate corrective justice from an instrumental standpoint throughout the book, they recognize its noninstrumental value, though they limit its scope to more egregious forms of wrongdoing: "[T]he tort system in the reduced domains that we leave to it would serve principally to vindicate traditional corrective justice values, unencumbered by other values that it cannot simultaneously or effectively advance." DEWEES ET AL., *supra* note 3, at 437. Richard Wright would go so far as to say that tort law should be preserved to right wrongs even if other institutions assume the functions of deterrence and compensation, and he criticizes Weinrib and Coleman for not opposing the elimination of tort in favor of alternative compensation schemes. *See* Richard W Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 628 (1992).

tort system is not really about compensation or accident prevention; these benefits are at best collateral. Taking some of the pressure off tort law by providing alternative insurance schemes, for example, might help keep tort doctrine from being torqued to serve goals, like deterrence and compensation, that are inherently in tension.

IV. CONCLUSION: JUST THE FACTS?

Although *Exploring the Domain of Accident Law* does not eliminate the need for theorizing about tort law, as its authors ambitiously claim, it is a very important collation and analysis of much of the quantitative and econometric work comparing tort law's ability to compensate and deter to that of other systems of regulation. It would be a great mistake, however, to read this account of tort law as resting on nothing but the facts. The book has two central theoretical premises. First, corrective justice values make little difference to the authors' policy conclusions, which amount to an implicit (though not explicit) rejection of corrective justice. This rejection precludes discussing the merits of pain and suffering damages, of proceedings in which plaintiffs recover directly from defendants, and of normative accounts of tort law and its standard of care. Second, the authors tend to resolve uncertainties in the empirical record in favor of approaches that resemble, as much as possible, workers' compensation law. Unlike many who hypothesize a perfect market, and perhaps because of their Canadian experience, these authors do not fear centralized solutions to compensation, such as national health insurance, or centralized solutions to deterrence, such as government regulation. But they prefer market-based approaches: regulations that encourage information flow to consumers and that allow industry actors to decide for themselves what the most efficient form of risk management will be. Consequently, the authors look to experience-rated, industry-specific insurance to provide both compensation and deterrence in a single blow, wherever such insurance is feasible.

Given this strong theoretical preference, derived from the authors' economic bent, there are inexplicable omissions—they never investigate the insurance industry itself to see under what circumstances insurance companies accurately price policies to reflect claims experience; they never examine how experience rating will affect smaller entities more likely to be at the mercy of bad luck than carelessness; and they never inspect how the regulation of insurance affects its availability and risk allocation. Alas, even the best detective must use hypothesis as well as induction.