

DOING AWAY WITH TORT LAW

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I. INTRODUCTION

Guido Calabresi famously argues that tort law occupies the normative space between contract law on the one hand and criminal law on the other.¹ It shares attributes of both but provides us with a practical and normative avenue of exchange that neither alone is capable of.

Both contract and tort regulate the transfer of resources. Contract law, however, regulates free exchange, whereas tort law regulates forced exchanges. The criminal law imposes mandatory norms that it enforces by punishments. The norms of tort law are not mandatory. They are optional in the sense that tort law provides agents with a menu of prices one has to pay for noncompliance with the relevant norms.² Contract law facilitates the exercise of liberty, and criminal law restricts the scope of individual liberty. Tort law, in contrast, neither prohibits nor encourages the exercise of liberty; instead, it prices its exercise.

A legal order without tort law would lack a mechanism for giving legal effect to forced, but nevertheless desirable transfers of resources. Just as long as there are good reasons for such transfers in a liberal society, there will be an essential role for tort law to play.

The picture of tort law that Calabresi paints is even more prominent in what is perhaps his most important essay, *Property Rules, Liability Rules, and Inalienability: One View of the*

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1. See Guido Calabresi, *Torts—The Law of the Mixed Society*, 56 TEX. L. REV. 519, 521 (1977) [hereinafter Calabresi, *Mixed Society*].

2. In addition, the burden of “prosecuting” failures to comply with tort law falls to particular victims.

Cathedral.³ There, Calabresi and his co-author, Douglas Melamed, draw a distinction between the grounds for allocating rights and the grounds and means for protecting them.⁴ Once allocated, rights or entitlements can be secured by property, liability or inalienability rules.⁵ Liability rules are distinctive to torts, and they protect entitlements, not by providing right holders with the legal power to block transfers against their will, but instead by providing them with compensation for the loss in value they experience when others others “take the right” without consent.⁶

For all the influence it has had, the Calabresi-Melamed framework is fundamentally confused. The central idea is that property, liability and inalienability rules are mechanisms for protecting rights, but liability rules, for example, may be no such thing.⁷ A liability rule does not confer any primary or basic normative powers on those who have entitlements. Quite the contrary in fact: a liability rule in the Calabresi-Melamed sense confers a normative power on those without rights to infringe, invade or take what others have a right to on the condition that in doing so they pay compensation for the losses, if any, the right holder experiences. In a phrase, then, a liability rule confers a “conditional power” on those without rights and grants no normative powers to those with rights.⁸

To be sure, the interests of right holders are partially secured by liability rules, but a right is a way of protecting those interests by conferring powers on the right holder, not by conferring powers on others. So we might say in the famous case of *Vincent v. Lake Erie Transportation Co.*,⁹ for example, that in the normal course of events

3. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) [hereinafter Calabresi, *One View*].

4. *Id.* at 1092.

5. *Id.*

6. The loss in value is determined by third parties—usually, but not necessarily, juries.

7. I am *not* claiming that liability rules cannot protect rights. I *am* claiming that liability rules as Calabresi and Melamed conceive of them do not and cannot protect *rights*. They can secure the *interests* protected by rights, but not by protecting them through recognition of rights.

8. This is not quite right. A liability rule in the Calabresi-Melamed sense confers a power on rights-invaders to invade rights on the condition that they are prepared to compensate those whose rights they invade; and confers an *option* on those whose rights are invaded to demand the payment due them.

9. 124 N.W. 221 (1910).

the dock owner has a right to exclude the boat from mooring itself to the dock in the absence of the dock holder's consenting to his doing so.¹⁰ The power to exclude, then, is one of the ways in which the right protects the relevant interest. And this power allows us to understand the role of necessity—as created by the impending storm—in altering the structure of the normative relationship between dock and boat. For what necessity does is preempt one aspect of the normative powers associated with owning the dock; namely, the normative power to exclude.

Necessity, in other words, limits or constrains the normative powers that are part of the right. So, built into the right is the normative power; and we recognize circumstances under which the exercise of those powers would be unjustified, or circumstances under which the powers are extinguished—whether in part or whole, temporarily or permanently. Necessity is one such special circumstance. The problem in the notion of a liability rule, as Calabresi-Melamed understand it, is that every circumstance is one in which the non-right holder has the normative powers that we would normally associate with the right holder. If one takes rights seriously, it simply cannot be the case that rules protecting rights do so by conferring powers to compel transfers against the will of right holders.

In both of these important papers, Calabresi means to identify an irreducible or ineliminable role for tort law and for the notion of a liability rule that he takes to be central to it. But he can do so only by misunderstanding the relationship between liability and rights—or so I have argued. This misunderstanding suggests, perhaps, that Calabresi's heart is elsewhere, that liability in torts is more tenuous and less central to our legal practices than the arguments in these essays imply.

It should not be surprising, therefore, that Calabresi has also produced the most compelling work suggesting that tort law is anything but essential to liberal legal regime: *The Costs of Accidents*.¹¹ Calabresi's book is best known for the thought that tort law has three independent, if related, goals: primary, secondary and

10. *Id.* at 222.

11. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) [hereinafter CALABRESI, *THE COSTS OF ACCIDENTS*].

tertiary cost reduction. Optimal deterrence (primary cost reduction) is accomplished by preventing those accidents worth preventing (i.e., those in which the costs of prevention are less than the costs of the accident discounted by the probability of its occurrence). Risk-spreading (secondary cost reduction) is achieved by optimally reducing the impact of the costs of accidents that ought not be prevented by spreading the costs maximally over persons and time. Finally, tertiary cost reduction is produced by optimizing primary and secondary cost reduction at the lowest possible administrative cost.¹² As the famous expression goes: the goal of accident law is to minimize the sum of the costs of accidents and the costs of avoiding them.¹³

To be sure, Calabresi notes that there are compensatory aims of tort law and that the system itself must conform to the demands of fairness. His *One View* essay countenances that both entitlement allocation and protection decisions must be responsive to “fairness” and “other justice considerations.”¹⁴ That said, there is no denying that *The Costs of Accidents* is best known for the distinctions Calabresi draws among various forms of cost avoidance and the relationship of tort law to the optimal reduction in accident costs.¹⁵

Nevertheless, I want to focus on three parts of the Calabresi framework that are at once more basic and less obvious. The first is the emphasis on the “accident” as the paradigmatic tort. The second is the shift from a private action in which a court asks whose responsibility the accident is to the social context in which the question is: what is to be done about accidents—taken as a whole? Third, the normatively important feature of accidents is their costs.

It is nearly impossible to overstate the significance of each of these three building blocks of *The Costs of Accidents*. In effect, what Calabresi does is turn tort law into the law of *accidents*: accidents are a *social problem*, and the goal of tort law is to minimize and fairly or justly distribute their *costs*. Tort law is then a technology: a way of solving a social problem—the problem of accidents and their costs.¹⁶

12. *Id.* at 26–31.

13. *Id.* at 26.

14. *See id.* at 301; Calabresi, *One View*, *supra* note 3.

15. CALABRESI, *THE COSTS OF ACCIDENTS*, *supra* note 11, at 26–31, 37–38.

16. My claim is not that all of these ideas originated with Calabresi. Arguably, much of the legal realist tradition in the law predates and informs Calabresi’s book. By the same token, there

If tort law is the law of accidents and if accidents and their costs present a social problem, then we should want to know how good a job tort law does at solving the problem—especially when compared with a range of plausible alternatives. If tort law is an effective technology, we should be happy to keep it around; if not, we should consider abandoning it in favor of a better alternative. Indeed, in many ways, that is precisely the question Calabresi takes himself to be asking.

It should be obvious that this way of thinking about tort law is very much at odds with the argument in the *Mixed Society* and *One View* essays. In those essays, tort law is presented as an ineliminable component of a liberal legal regime.¹⁷ In *The Costs of Accidents*, however, tort law is a mere technology whose value rests on its ability to help solve a social problem, and not on how it adds shape to the normative structure of our relationships with one another.¹⁸

This conflict in Calabresi's thinking about tort law has gone largely, if not entirely, unnoticed. That is surprising because at least on the surface, the views are incompatible. According to the *One View* and *Mixed Society* essays, tort law is normatively and practically ineliminable; according to *The Costs of Accidents*, it is anything but. However, once one appreciates the notion of liability rule with which Calabresi has been operating, taking much of tort theory along with him in so doing, much of the surface contrast disappears. The Calabresian framework has little to do with rights as constraints on conduct, it is reformist to the core and sees tort law as a technology—whether to authorize forced transfers or to reduce costs by doing so.

II. TORTS, CRIMES AND CONTRACTS

Should we do away with tort law? This strikes me as the wrong question. There are three better questions we might ask instead. First, is it easier to imagine doing away with tort law than it is (or

is no denying that the move towards worker's compensation schemes signaled a similar trend in the law long before *The Costs of Accidents*. Nevertheless, those who emphasize that the book has its historical roots in theory and in practice are not merely uncharitable interpreters, they miss altogether the galvanizing and transformative impact the book has had on the law and on the manner in which we teach the subject in our courses.

17. See generally Calabresi, *Mixed Society*, *supra* note 1; Calabresi, *One View*, *supra* note 3.

18. See generally CALABRESI, *THE COSTS OF ACCIDENTS*, *supra* note 11.

would be) to imagine doing away with the criminal law or contracts, for example? Second, if so, why would that be? Third, what would be lost, if anything, were we to do away with tort law?

Here is a plausible argument that suggests it would be very difficult to do without a criminal law. There is some conduct that is wrong, and those who engage in it (under certain conditions) deserve to be punished. There is some conduct, one might say, for which the responses of indignation and resentment are altogether fitting. Those responses are given expression publicly through punishment, and were we to do without a criminal law we would lack, one could argue, the appropriate way in which to express collectively the moral sentiments such conduct evokes.

To be sure, there was a time when it was fashionable to conceive of criminals as “sick” and deserving not of punishment but of treatment. Herbert Morris may not have been the first, but he may well have been the most eloquent critic of this view, noting that punishment, not treatment, is implicated in the very idea of responsible human agency.¹⁹ To treat someone as responsible for what he has done is to recognize that (under certain conditions) what he has done grounds an appropriate response in him (guilt, shame, remorse) and in others (indignation, disappropriation, resentment), and that these responses are misrepresented, if they are expressed at all, in our treating wrongdoers as sick and in need of health care. Punishment, whose content varies with prevailing practices—historically and culturally—nevertheless has remained a particularly apt way of giving expression to the ways in which the concepts of wrong, responsible agency and the reactive attitudes are interwoven in our self understanding and in our normative lives.

Arguably, the capacity for human agency entails the ability both to act for reasons and to be a source of reasons for action as well. Practices in which we join efforts with others for mutual advantage are paradigmatic, if not essential, ways of expressing our capacity for agency and our ability to be sources of reasons for our own actions. Promising and contracting, for example, are basic forms of social organization. To contract with another is in some sense not merely to bind oneself to the will of another but to bind oneself moreover to

19. See generally HERBERT MORRIS, *ON GUILT AND INNOCENCE* (1976); Herbert Morris, *Some Further Reflections on Guilt and Punishment*, 18 *LAW & PHIL.* 363 (1999).

a joint plan. As Michael Bratman and others have pointed out, our status as planning agents is more central to our self-understanding than is our understanding of ourselves as social agents.²⁰ And so, too, it is difficult to imagine doing away with contract law as we know it.

On the other hand, not only can we imagine doing away with tort law, serious theorists have proposed doing precisely that.²¹ And if that were not enough, an entire country has been engaged in doing away with large parts of it in favor of a social insurance scheme.²² It may be difficult if not altogether impossible to imagine doing away with contract or the criminal law; doing away with tort law, in contrast, is apparently anything but unthinkable.

One reason we are so comfortable imagining doing away with tort law is that we are operating with a conception of tort law we have inherited from Calabresi, one in which tort law is a mere technology—a potential solution to a social problem and not a body of law rooted either in fundamental features of our agency or one that otherwise maps onto our moral lives or which reflects the normative structure of our relationships with one another. It is this, the conventional wisdom, however, and not the law of torts, that leads us astray.

III. WRONGS AND LIABILITY

In *Risks and Wrongs*,²³ I draw distinctions among three ways in which wrongs, wrongdoing and compensation are related: (1) *X wrongs Y* and *Y is harmed* as a result of the wrong. *X* incurs a *duty of repair* to *Y*. The *ground* of the duty is the fact that *X* wrongfully breached his duty to *Y* and his doing so is responsible for the harm that *Y* suffers. (2) *X harms Y* but does *Y no wrong* provided he compensates him. The *ground of the duty to compensate* is that it is necessary to right, justify or make permissible what would *otherwise*

20. See MICHAEL E. BRATMAN, *FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY* (1999). There may be a number of different ways of understanding the importance of contract law and its social value and moral significance, but no one—as far as I can see—seriously entertains the thought of doing away with contract law.

21. See generally STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS AND BUSINESS* (1989).

22. See generally Craig Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CAL. L. REV. 976 (1985).

23. JULES L. COLEMAN, *RISKS AND WRONGS* 291–92 (1992).

be a wrong to *Y*. (3) *X* wrongs *Y* but he is *justified* in doing so. If compensation is owed, it is not because *X* has acted wrongfully, nor does compensation right what would otherwise be a wrong. *X*'s conduct is permissible whether or not he compensates *Y*; yet he owes *Y* compensation.

The paradigm tort is represented by (1), which is to say that the paradigm tort is an unjustified and unexcused wrong. Liability in such a case protects the underlying right but does not legitimate a forced transfer.

The problem with the Calabresian view of liability rules is that it does not distinguish among these three cases. If anything, it treats them all as instances of (2), whereas (2), in fact, represents a small subset of the cases in which liability is imposed on torts.²⁴

We need an alternative conception of tort law, one that will better illuminate the relationships among the concepts central to it—especially that between wrong and liability—and which will explain what values and ideals are expressed by and embodied in it. I propose that we replace the three building blocks of the conventional view—accidents, costs and liability rules—with three others: wrongs, responsibility and repair.

A. *Wrongs and Relations*

To be sure, accidents constitute the greatest number of torts. But “accident” covers a broad range of cases, and its use obscures rather than reveals what is essentially tortious about them. The accidents that are torts are, like other torts, by and large wrongs. It is the fact that they are wrongs, not the fact that they are accidents, that brings them within the ambit of the law.

I have elsewhere emphasized the distinction between *wrongdoing* and *wrong*, both of which imply the notion of a norm. Wrongdoing is a failure to comply with a norm of good behavior. “Be careful, prudent and thoughtful,” and “attend adequately to the interests of others.” These express norms of good behavior. We might admire those who comply with them, and be disappointed in or

24. Many commentators treat the famous case of *Vincent v. Lake Erie Transportation Co.* in roughly the same way. 124 N.W. 221 (1910). It would be wrong for the boat to dock unless the ship's owner (captain) is prepared to compensate the dock for any damages the ship might cause the dock. Compensation then rights what would otherwise be the wrong of docking without the owner's consent.

even fear those who do not. But unless there is a norm that imposes a duty on others to be careful, prudent and thoughtful, one wrongs no one for one's failures of care, prudence or thoughtfulness. One can be careless with the interests of those to whom one owes a duty of care, and one can be careless with regard to those one owes no such duty. A thoughtful person would be attentive to the interests of all those whom one's conduct may impact, but only those who have a right to one's attention and care can be wronged by the thoughtlessness. Parents owe duties to their children, for example, that they do not owe to others' children. Though it may mark a shortcoming in one's parents that they show too little regard for the well-being of children everywhere, the failure to do so may be a wrong to no one. If, however, they were to demonstrate a similar lack of concern for their children's well-being, it would constitute a breach of duty and a wrong to them. This scenario illustrates the important point that even though any failure to be adequately concerned with the interests of others may mark a shortcoming in someone, it does not constitute a wrong to another in the absence one's owing a duty of concern and care to the aggrieved party.

We can capture the distinction by saying that wrongs are *relational*: they are breaches of duty one owes to another. Wrongdoing, in contrast, is not relational in the same way. It consists of a failure to comply with a norm of good behavior.

We can point to another difference between the two norms. Not only can one act badly without wronging another, one can wrong another without acting badly. If I owe you a duty not to trespass on your property, then I wrong you if I do, even if I do so for very good reasons. If I promise to meet you for lunch, I owe you a duty to do so. I may have good reasons for breaking the promise, acting on which would display the goodness of my character; yet if I fail to show up then—provided that you have not released me from my obligation—I have wronged you. And so on.

The domain of tort law is *wrongs*, not *wrongdoing*. And wrongs are relational. Though one may have a specific duty in torts to a particular agent—as servants to masters or innkeepers to patrons—most of the relational duties in torts are more broadly characterized. In negligence, for example, the duty is to take adequately into

account the security of those who fall within the ambit of foreseeable risk associated with one's conduct.²⁵

Both Cardozo and Andrews agree in *Palsgraf* that the question is whether the Long Island Railroad ("LIRR") breached a duty that it owed the plaintiff, Mrs. Palsgraf.²⁶ In Andrews's view, the duty to Mrs. Palsgraf derives from the norm requiring that we exercise due care.²⁷ In contrast, Cardozo's view is that the general norm of due care is not enough to establish the existence of a specific duty to Mrs. Palsgraf.²⁸ There must be a relation between the railroad and Mrs. Palsgraf sufficient to impose on the railroad a duty of care to her in particular.²⁹ Cardozo's claim is that we cannot derive such a duty from a general norm exhorting us to behave carefully.

There is a way of reading Andrews, however, that narrows the difference between Cardozo and him. On this reading, it is not just that there is a norm of a general sort endorsing or commanding due care. The norm should be understood instead as imposing a requirement or duty of due care—a duty we owe one another, through which each of us can hold the rest accountable to comply. Failure to exercise care to *anyone* is a breach of the duty of care that each and every one of us can be upset, even indignant, about. Understood in this way, Andrews and Cardozo agree that a tort requires a wrong and that a wrong consists in the breach of a specific duty of care. They differ with respect to the *scope* of the duty of care one has to others; more specifically, they disagree about the scope of the duty that is necessary to support a claim in torts.

This reading of Andrews supports the view that a defendant who breaches the duty of care to one person but who in doing so injures or harms another has committed a wrong, a breach which may ground the injured party's claim in torts, provided the victim can establish the right kind of "responsibility relationship" between the wrong and the harm she suffers. Cardozo's point is that unless the wrong is a *wrong to her* (and not just a duty to someone)—which

25. See generally *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (1928).

26. See *id.* at 100, 102.

27. See *id.* at 102–03 (Andrews, J., dissenting).

28. See *id.* at 99–100.

29. See *id.* One can disagree with Cardozo that falling within the ambit of (foreseeable) risk is the best way to ground the requisite relationship that would impose the relational duty to the plaintiff on the defendant, but the general idea is clear enough. It is not enough that there be a norm of due care that we owe one another, and thus *a fortiori* that LIRR owes Mrs. Palsgraf.

must rely on a preexisting duty to her—tort law offers her no mode of recourse. And so for Cardozo, it does no good to treat the norm requiring care as a duty-imposing norm, for without a specific duty to Mrs. Palsgraf, there is no basis of liability to her because there is no wrong to her.³⁰

Whatever their differences, both Cardozo and Andrews share the view that the core of a tort is a wrong—a breach of duty. They differ not just about the scope of the duty, but also about what wrongs can support a claim to repair or the standing to seek recourse in torts.

Though central both to torts and to my account of it, the notion of duty is in fact problematic in the economic analysis, for the duty requirement is a limitation on the scope of liability and (at least on the surface of things) means that some of the costs of one's mischievous conduct will be externalized. Efficiency requires internalizing externalities, and the duty requirement allows some of the costs of mischief to be externalized inefficiently.

In addition, whereas the notion of a duty and its breach reminds us that tort law has an essential relational dimension, the conventional view emphasizes an entirely different relationship: that between *each* litigant and the goal of optimal deterrence. Instead of asking whether the injurer has breached a duty to the victim, the fundamental question is whether the injurer or the victim is in a better position to reduce accidents and at what cost. So there is the relationship of the injurer to the goals of deterrence and the relationship of the victim to the goals of deterrence, and there is some interest perhaps in the relationship between the two insofar as coordination between their accident prevention measures may be necessary to achieve optimal deterrence. But the picture of tort law we have inherited from Calabresi attaches no normative significance to the relationship between injurer and victim as such. It has no place for the duty requirement and no conception of a relational wrong. Without either, it cannot hope to capture the distinctiveness of tort law.

30. Cardozo offers us a formulation of one such norm: roughly, each of us owes a duty of care to everyone who falls within the ambit of foreseeable risk. *See id.* at 100. That norm specifies the content of the duty and the conditions under which it arises. It is not a norm requiring us to behave carefully; it is a norm specifying conditions under which certain duties arise and to whom we have them.

B. Persons as Constraints

Surely a defender of the conventional view will object that it has a concept of wrong. A wrong is a failure to take cost-justified precautions. But the Learned Hand formula is not a concept of a *wrong*. It is merely an account of adequate care: a person acts badly when he fails to exercise adequate care, and the care that is adequate is that which is economically efficient. A person who fails to take cost-justified precautions behaves badly. The notion of a wrong relies on the concept of a duty, and the question is not what is required of us to discharge the duties we have, but to whom do we have duties and why do we have the duties we have? The Learned Hand formula does not address those questions; it presupposes that they have already been answered.

My worries about the conventional view go deeper in two ways. First, even if a defender of the conventional view could introduce the concepts of wrong and duty, my concern is that these concepts do no independent work in the analysis or explanation of torts. The concepts are treated as “empty vessels” lacking content. That content is filled in by the concept of efficiency, thereby reducing “wrong” to “inefficiency.” The concepts are introduced merely to be eliminated by reduction. All the explanatory and normative work is being done by efficiency.

My second worry is more substantive than methodological. In the conventional view, the normative significance of persons is captured in the idea that we are all locations or sites of welfare. This idea is what makes the Learned Hand formula even remotely plausible; what counts are the relative costs of harm and precaution—not where they reside. To the extent there are other concerns that bear on what the state can do to us in the name of minimizing costs or maximizing welfare, they are matters of equity or redistribution. The notions of breach, duty, right and wrong derive the content that they have within the conventional view, in part because the conventional view identifies the normatively significant property of persons as their being sites and potential producers (or destroyers) of welfare.

In the alternative view, we are each committed to recognizing the normative significance of one another, and what is normatively significant about each of us is that we are independent constraints on the behavior of the rest of us. In my actions, I must treat you as a

constraint on what I am able to do if I am to act in a way that is respectful of you.

Each of us has a capacity for agency, which is an ability not merely to wish but to act, and to act to further our ends as we conceive them. If we recognize this fact about us and we recognize as well that each of us is constrained by the rest of us, then we are committed to living by norms that make each of us accountable to the rest of us. This idea can itself be spelled out in a number of ways. Some have thought that the norms that guide us must be ones that no one to whom they apply could reasonably reject.³¹

In a previous essay, *Mischief and Misfortune*,³² I argued that the view that each of us is a constraint on the rest of us implies a principle of fairness such that no one of us can unilaterally determine the terms of interactions between us. In torts this means, for example, that you cannot decide for both of us what the distribution of risk between us shall be.³³ Such a norm would rule out a wide range of potential liability rules. Suppose, for example, that the injurer would be liable to the victim only for the harms that he *intends* to inflict. In effect, such a rule allows the injurer to determine the distribution of the risks between injurer and victim because a fact about the injurer alone—the content of his intentions—controls the distribution of risk between the parties (in violation of fairness).

C. Causation and Responsibility

The second key building block of a tort is the notion of responsibility. It is not enough that the injurer breach a duty of care to the plaintiff and that the plaintiff suffer harm: the harm must be attributable to the injurer as his doing; that is, his responsibility. Without that, there is wrong and harm but no grounds for attributing the harm to the injurer as something for which he must answer.

The defendant/injurer is held to answer for the plaintiff/victim's misfortune only if he is responsible for it. In torts, the notion of responsibility is expressed in causal concepts—the conjunction of “cause-in-fact” and “proximate cause.” The conventional view,

31. See THOMAS SCANLON, *WHAT WE OWE TO EACH OTHER* (1999).

32. See Jules Coleman & Arthur Ripstein, *Mischief and Misfortune* (*Annual McGill Lecture in Jurisprudence and Public Policy*), 41 MCGILL L.J. 91 (1995).

33. See *id.* at 96.

influenced as it is by its economic roots, is quite ambivalent about the concept of causation. On one hand, causation is inescapable since the fundamental claim of the traditional view is that efficiency requires that agents internalize the social costs of their activities. Externalities are the causal upshot of one's doings. So causation as a transitive, robust, and coherent notion is an inescapable commitment of the conventional view. The entire view makes no sense at all if expressions like "*A causes B*" make no sense. Without that, we have no concept of an externality.

On the other hand, the classic text, Ronald Coase's *The Problem of Social Cost*,³⁴ argues for what seems to be the contradictory position, that causal relations are reciprocal and not transitive. For when cows trample corn, Coase's view is that we can no more claim that the cows cause the damage to the corn than we can say that the corn caused the damage by being there.³⁵

As I read the conventional view, then, it does not offer a concept of *responsibility* beyond that which is presumably implicated in the notion of causation. The problem is that the conventional view is itself of two minds when it comes to causation. Worse, the two views are incompatible with each other. Worse still, neither view is plausible on its own terms.

As Arthur Ripstein and I have argued in *Mischief and Misfortune*, the basic mistake is treating externalities as a naturalistic, rather than a normative, concept.³⁶ The naturalistic notion of an externality is that of a *causal upshot*. And it is this notion of causation that economists appear to rely on. The problem is that the concept of an externality is a *normative*, not a naturalistic, notion. Whether certain costs are costs of my activity (and thus externalities) or yours (and thus *not*) is not a matter of causation, but depends instead on what we owe one another in regards to the distribution of risk between us. Externalities are derivative of the concept of a duty of care, and the duties we have to one another are themselves regulated by the principle of fairness, which I articulated in the previous section. This is what is meant by claiming that the notion of an externality is normative, not naturalistic; it relies on

34. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

35. See *id.* at 2–8.

36. Coleman & Ripstein, *supra* note 32.

fairness in the distribution of risk, as expressed in the duties of care we owe to one another and not on the causal upshots of what we do to one another.

Ironically, this is not only the correct view, but it is one implicit in Coase's own argument—at least important aspects of it are. The correct interpretation of Coase is that we cannot determine whether the damage caused to corn by trampling cows is a cost of ranching or farming until we know whether the rancher owes a duty of care to the farmer or vice versa.

Coase makes a mess of this insight when he expresses the causal relationship as reciprocal, a very different point. The causal relationship is not reciprocal. Cows trample the corn and cause damage in doing so. But it does not follow that the cows should pay. Whether they should pay depends on what “cows” owe “corn,” which is a normative matter—one regulated by fairness—not a naturalistic one.

Where did Coase go wrong? The answer is really quite revealing. He begins with the idea that if *A* damages *B*—that is, if the costs *B* suffers are *A*'s doing—then *A* should be liable to *B*. But he notes that there are many reasons why on some occasions if *A* damages *B*, it is *B*, not *A*, who should bear the costs.³⁷ How can he block the inference that seems so natural, namely, if *A* causes *B* damage, *A* should pay? He has two options. One is to say that the inference is invalid. The second is to say that the inference is valid, but we cannot really make sense of the idea that *A* damages *B* because the causal relationship is reciprocal. If causation is reciprocal, we have as much reason for thinking that *B* should pay as we do for thinking that *A* should.

I do not have enough time in this Article or in whatever remains of my academic life to detail all the mistakes and confusions in this view. Fortunately, there is no need to do so. My aim is ultimately to help Coase, not hang him out to dry. What he really should say is what he really meant to say: the fact that cows trample corn does not settle the question of who should pay for the damage. The problem is not that causation is reciprocal, rather it is that the inference from causation to liability is not valid. Once we adopt this strategy,

37. For example, even if *A* damages *B*, *B* may be the cheaper cost-avoider, and therefore should bear the loss which would invert her proper incentive to reduce the risk.

however, we cannot analyze the notion of responsibility in terms of causation: not because causation is reciprocal, but because responsibility is a normative notion in a way in which causation, as Coase and others understand it, is not.

Once we understand Coase in this way, we get a deeper understanding of the Coase Theorem.³⁸ If the standard for determining the correct distribution of risk between the parties is efficiency, then it is irrelevant what the initial duties of care between the parties are. The idea is that as long as the parties are able to negotiate and the barriers to their doing so are sufficiently low, all that any liability rule can do is determine who has to pay whom (or to use Calabresi's phrase, "who has to bribe whom"). The optimal level of costs will be achieved through negotiation regardless of the legal or other imposition of liability. But to say that causation is irrelevant to efficiency is a far cry from saying that causation is reciprocal.

The traditional view is doubly problematic. First, it reduces responsibility to causation, and then it eliminates causation as central to torts. But responsibility is at the heart of a tort, and the view we have inherited from the economists has virtually no place for it. So once again, we have to start afresh.

There are two notions of responsibility in the law: responsibility for acts and responsibility for outcomes. Suppose that two individuals, Smith and Jones, act in precisely the same way and that in doing so their actions reveal the very same defect of will or character, thus rendering them both equally to blame for their actions. Imagine that they are both driving recklessly. It happens, however, that Smith is driving down a street populated entirely by Olympic athletes, each of whom is able to escape the risks that Smith's recklessness imposes upon them. Jones is not nearly so lucky. None of those he puts at risk, each the resident of an assisted-living community out on a day trip, is able to avoid the risks he imposes on them. As a result, each of them is injured by Jones's mischief.

A familiar line of argument claims that from a moral responsibility point of view there is no difference between Smith and

38. Roughly defined, the Coase Theorem contends that in the absence of transaction costs, parties will bargain to an efficient result, regardless of the underlying legal rule. Coase, *supra* note 34, at 2-15.

Jones; all that distinguishes them from one another is luck—good luck in Smith’s case, bad luck in Jones’s. Luck and not responsibility is the difference between the two of them. There is only one notion of responsibility, and that is responsibility for actions, not outcomes. The causal upshots of what one does—unlike what one should do—is beyond one’s control.

There is, however, a genuine and distinct notion of responsibility, that of responsibility for outcomes. This notion figures in the full range of our practices of debiting and crediting. It is also central to our self-understanding—our capacity to pick out our achievements and failures, as well as the marks we make in the world: the differences our lives have made in and to the world. There is, after all, a difference between the question of whether our hearts and character are pure and the question of whether we have made any difference in the world: how the world is different, if at all, for what we have contributed to it.

There are two questions we need to ask about this conception of responsibility: one analytic, the other normative. First, what are the conditions of outcome responsibility? Specifically, what must be true of a person, an outcome (event or state of affairs) and the relationship between them for the agent to be outcome responsible for the state of affairs? The second question is whether the notion of outcome responsibility provides a morally sound basis for imposing liability or, as I prefer, whether it grounds liability to a duty of repair.

We do not have to settle on the correct account of the conditions of outcome responsibility to recognize that some such notion is necessary to connect the injurer’s breach with the victim’s harm if we are to hold the injurer accountable for it.³⁹ When it comes to the normative question of whether imposing liability in torts on the basis of outcome responsibility is morally appropriate, however, we cannot content ourselves quite so easily.⁴⁰

39. Though the idea of outcome responsibility as a basic moral notion is linked to the groundbreaking work of Tony Honore, the best account of the conditions of outcome responsibility is given by Stephen Perry. Compare Tony Honore, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 *Law Q. Rev.* 530 (1988) with Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *Iowa L. Rev.* 449, 489–514 (1992). In Perry’s account, an agent is outcome responsible for a state of affairs provided he has the capacity both to have foreseen and avoided it. See Perry, *supra*.

40. I am allowing myself some liberties here. It is clearly true that whether imposing liability to repair in torts based on a notion of outcome responsibility is fair or morally appropriate must depend to some extent on the analysis of outcome responsibility. Still, I am

Take the case in which Smith and Jones both drive recklessly; Smith escapes damaging anyone, whereas Jones is less fortunate and injures those he puts at risk. There may be no difference between the two of them with regards to their culpability or blameworthiness. That does not imply that there are no moral differences between them at all. Those who are the victims of Jones's recklessness have perfectly sound moral claims to repair against Jones, which no one, not even they, have against Smith. After all, there is nothing that Smith has done to them, nothing he need apologize to them for and no outcome that he must answer for. The same is not true of Jones. The victim's misfortune is connected to Jones's mischief in ways that ground their claim to repair against him and that give him something he has to answer for. Their claim against him is not merely a convenience but something that has a sound moral basis, and part of that basis is the fact that Jones is "outcome responsible" for the mess in which they now find themselves.

D. *The Duty of Repair*

The final building block of my account—at least the last I will discuss in this Article—is that of a duty of repair. If an injurer is outcome responsible to the victim for a harm that he ought to have foreseen and which he should have avoided (which is to say that he was under a duty to avoid), then the harm is his doing, and he has to answer for it. The key feature of tort law is that it makes injurers accountable by imposing upon them a *duty of repair* that they owe to those they have wronged. Some, like John Goldberg and Ben Zipursky, offer a somewhat different account of this key feature of tort law, and it is worth noting the difference between their account and mine.⁴¹ Goldberg and Zipursky urge that what is distinctive about tort law is not just that the injurer incurs a duty of repair for the damage his wrong has occasioned.⁴² Rather, it is that tort law confers

assuming that some analysis in the neighborhood of Perry's is correct, and will work with that assumption in hand.

41. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hort on Legal Duties*, 75 Fordham L. Rev. 1563 (2006); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. Pa. L. Rev. 1733 (1996); John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Good Luck*, 92 CORNELL L. REV. 1123 (2007); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002) [hereinafter Goldberg & Zipursky, *Unrealized Torts*].

42. See, e.g., Goldberg & Zipursky, *Unrealized Torts*, *supra* note 41 at 1709–10.

a right or option on the victim to impose the duty of repair on the injurer.⁴³

Neither Goldberg and Zipursky nor I deny that the injurer has incurred a duty of repair in torts. Their point is that the feature an account of tort law must explain is not the duty of repair but the grounds of the right to impose that duty—which is available to the victim (or those with the legal authority to act on his behalf) and not others.

The duty of repair is the conclusion of a practical inference whose premises include the duty of care, its breach, a compensable harm and the relationship of outcome responsibility between the breach and the harm. When those conditions are satisfied, a practical conclusion is warranted: namely, that the injurer owes the victim repair. The duty of repair is central to torts.

Liability in torts is not, as the conventional view would have it, a distribution of costs. The liability question in torts is not who should bear the costs of this accident or of accidents more generally. Rather, it is *liability to a duty of repair*; or if Goldberg and Zipursky are right, and they may well be, the defendant found liable is liable to the plaintiff's having the option of imposing the duty of repair upon him.⁴⁴

IV. TWO OBJECTIONS

In the Calabresian picture, tort law has goals: primarily those of accident cost avoidance and fairness in the distribution of accident costs. Tort law is a technology for achieving those goals. The key concepts within this picture of tort law are accidents, costs and liability as a distributional notion. If tort law is not an effective tool for achieving its goals, we should consider the possibility that we would do well to jettison it in favor of some other scheme that would better reduce accident costs or more fairly distribute them.

My account is very different. We may study, teach and write about tort cases from the standpoint of the law's failures. That makes perfect sense in many ways, but we have to avoid the

43. *See id.*

44. The notion of a liability rule invites the view of torts as a distributive or allocative institution: what is being allocated are the costs created by certain kinds of mischievous conduct. The question is, who is liable for those costs? But this is an entirely mistaken picture—though one I was under the grip of for a very long time.

temptation to let this distort our understanding of tort law. Like other areas of the law, the aim is to govern behavior and regulate affairs by specifying norms. The norms of tort law are not expressions of what is to count as good or bad behavior with regard to care. Nor are they prohibitions or proscriptions as in the criminal law. The norms of tort law specify relational duties: their grounds and content.

A tort is a wrong in two ways. It is a failure to comply with one of these norms and is a wrong in that sense. It is also the breach of a particular duty to the person whom one owes a specific duty of care under the general norm. The failure to comply with the general norm gives everyone a reason to be indignant; but it is the breach of the duty to the victim that gives her and her alone a reason to resent (if there is such a reason in the particular case).

A wrong—even two wrongs—does not a tort make. There must be harm and the right sort of “responsibility relationship”—what I have, employing the common parlance, referred to as “outcome responsibility”—between the breach and the harm. With that comes the duty to repair and the option conferred on the victim to impose it (and to call upon the state to enforce it). Instead of the concepts of accidents, costs and liability, we have the concepts of wrongs, responsibility and repair. If we want to do away with tort law, we need to appreciate what values will be lost, not what technology will be abandoned. We will get a handle on those values only if we come to understand the significance of ordering our affairs with one another in the ways that are expressed by the central notions of a tort: wrongs, responsibility and repair.

Before I say something about that, I want to ward off two related objections to the approach I am taking.⁴⁵ Some take me to be suggesting that tort law serves no goals or that it cannot be assessed by how well it achieves its goals. The second objection is that the tort law I am describing exists only in my mind.

After all, there is no denying that modern negligence law is focused on accidents or that it emerges during a period when social reformers are quite open to the possibility that alternative institutional mechanisms might also address accidents. Any account

45. These objections are familiar to me, and I do not find them in the slightest persuasive, but others apparently do—why else would they continue to offer them?

of the normative foundations of tort law must be an account of accident law that is consistent with a decision to have dealt with accidents in some way other than tort law.

Neither of these objections is persuasive. Those who advance the first objection are obviously confusing me with somebody else. It would surely count against tort law if it resulted in far more wrongs being committed or if the costs of administering it were too high. We can surely evaluate our social institutions by their consequences. We can attribute goals to our institutions and assess them accordingly, but analyzing the concepts that figure prominently in the practice in terms of those goals is something else altogether.

I have made this point elsewhere by reporting on an experience I had with my former colleague, Burke Marshall. I had received an invitation to a dinner that was a tribute in his honor, and when I ran into Burke soon after receiving the invitation, I congratulated him on receiving the honor of the tribute. Burke responded sardonically that it was a mere fundraiser. It may well be that the goal—even the function—of the tribute was to raise money. But the event in question was a *tribute*, and if we analyze what tributes are in terms of the goals we sometimes (often or even always) have in feting one another, we will surely miss something about what tributes are.

I do not deny that tort law serves a range of human interests and goals, but it does so in a particular way; and if we want to understand what tort law is, we need to know something about the distinctive way in which tort law functions to serve the ends and goals we associate with it. The account I offer is an explanation of the central organizing concepts of tort law and their relationships to one another.

With this in mind, it is easy to see why I find the second objection equally unpersuasive. Of course I am aware that modern tort law focuses primarily on accidents and that we could have dealt with accidents in any number of ways. But why would it follow that all of those ways must be normatively continuous with one another? I would have thought that quite the contrary is true. In dealing with a class of accidents through tort law, we are suggesting that what is important about at least some of them is *not* their costs, but the fact that they are wrongs. Even the accidents that do not result from wrongs impose costs, and were costs all we cared about, we might well deal with all accidents very differently than we do. Regarding the view under consideration, we are to suppose that all accidents are

alike and the reasons we have for reducing them are roughly the same; we just choose different instruments for doing so for practical or technological reasons. But that is just what I am denying. I am arguing that what is different among the instrumentalities for reducing accidents is precisely the norms that are expressed or embodied in the institutions that seem apt for some categories of accidents and not for others.

V. CONCLUSION

Now what? Nothing I have said implies that we ought not do away with tort law. Indeed, nothing I have said implies that we should not make this decision on the basis of tort law's relative capacity to reduce accident costs effectively. My point is that we would not know what we are losing in the event we do away with tort law until we understand what tort law really is. If we are to understand the values at risk, we cannot allow ourselves the conceit that the conventional view gives us a plausible account of what tort law is.⁴⁶

46. My view is that the values expressed in tort law are the values of corrective justice. In the next article in this series, *The Values of Corrective Justice*, I offer an account of the full range of values that are expressed by the principle of corrective justice. Jules L. Coleman, *The Values of Corrective Justice* (forthcoming).