

# THE YALE LAW JOURNAL

## COMMENT

### Tort Concepts in Traffic Crimes

Car crashes killed 32,719 Americans in 2013, and injured over 2.3 million more.<sup>1</sup> Traffic is likely the most pervasive form of violence most Americans encounter.<sup>2</sup> Accordingly, the law devotes substantial attention to preventing that bloodshed, allocating losses, and punishing dangerous drivers. After a serious crash, two systems of law play particularly important roles: tort law and criminal law.<sup>3</sup> Both provide a mechanism for sanctioning dangerous drivers and deterring future crashes. Both can apply to the same event—any given crash is potentially criminal, tortious, both, or neither. However, tort and criminal law impose different sanctions according to different standards. After a deadly crash, for example, prosecutors may bring criminal charges under general criminal laws, like criminally negligent homicide, or traffic-specific charges, such as leaving the scene of a crash. Separately, as with any accident, victims may sue in tort for negligence.<sup>4</sup> Legal scholars have long understood

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1. Nat'l Highway Traffic Safety Admin., *Traffic Safety Facts*, U.S. DEP'T TRANSP. 1 (2014), <http://www-nrd.nhtsa.dot.gov/Pubs/812101.pdf> [<http://perma.cc/8AYW-TV7L>].
  2. *See 10 Leading Causes of Injury Deaths by Age Group Highlighting Unintentional Deaths, United States—2013*, CTR. FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/injury/images/lc-charts/leading\\_causes\\_of\\_injury\\_deaths\\_highlighting\\_unintentional\\_injury\\_2013-a.gif](http://www.cdc.gov/injury/images/lc-charts/leading_causes_of_injury_deaths_highlighting_unintentional_injury_2013-a.gif) [<http://perma.cc/BAB7-YG74>] (showing injury deaths from various causes, with motor-vehicle traffic second after unintentional poisonings).
  3. Administrative sanctions, such as the suspension of a driver's license, and contractual sanctions, such as an increase in automobile-insurance premiums, can also arise from a car crash. Of course, both automobiles and roads are pervasively regulated for preventative purposes.
  4. Cf. Kyle Pope, *Dershowitz Family Wins Civil Case*, N.Y. PRESS (Apr. 13, 2015, 4:18 PM), <http://www.nypress.com/local-news/20150413/dershowitz-family-wins-civil-case> [<http://perma.cc/7D2Y-J3T4>] (comparing tort and criminal cases arising out of the same deadly crash).

tort and criminal law as parallel mechanisms for sanctioning private behavior.<sup>5</sup> Most have also sought to keep them separate.<sup>6</sup>

In the context of traffic crime, however, the line between tort and criminal law is blurring, as criminal law takes on significant features of tort doctrine. This Comment, using New York as a case study, identifies three areas in which that state has blurred tort and criminal law. The Comment shows that the border between tort and crime has disintegrated distinctively and dramatically in the traffic-crash context. All three branches of New York government have imported tort concepts into traffic crimes, thus redefining basic criminal-law doctrines throughout the criminal code—reaching even the law of homicide. Finally, this Comment suggests that the consistent application of tort frameworks to traffic crimes shows a shared, if unspoken, consensus that traffic crashes should be understood in the register of tort.

Part I briefly reviews the extensive literature on the distinction between tort and crime, the distinction's importance, and its erosion. Part II, Part III, and Part IV are organized institutionally to underscore how each branch of New York government is complicit in importing tort concepts into criminal law. Specifically, Part II discusses the legislative enactment of a new vehicular crime that replaces criminal law's *mens rea* inquiry with tort's conduct-based conception of negligence. Part II also shows that, in the ongoing debate over this new crime, both sides use tort-based rhetoric to describe how traffic crashes should be punished. Part III demonstrates that the executive branch, specifically police and prosecutors, have created a *de facto* regime of contributory negligence—a doctrine absent in criminal law—for traffic crimes. Part IV turns to the courts. In traffic cases, New York's highest court has redefined criminal negligence to require morally blameworthy conduct, rather than maintaining the emphasis of the Model Penal Code (MPC) on the misperception of risk. This redefinition also threatens to replace legislative specifications of criminal-law duties with a common-law, judicial declaration of proscribed behavior. The Comment concludes by arguing that, in the traffic context, the blurring of tort and crime goes deeper than in other areas of law: it bears the imprimatur of each branch of government and strikes at the heart of criminal law, not its edges. It then explores features of traffic crashes that might explain the turn to tort concepts in this context—crashes' perceived social necessity in an automobile-oriented economy, the moral luck that narrowly divides those who crash and those who do not, and the decades of political activism dedicated to shaping cultural understandings of crashes—and what they reveal about the location of the tort/crime line.

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5. See Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753, 753 (1943).

6. See *infra* Part I.

## I. THE TORT/CRIME LINE

The line between tort and criminal law plays a significant role in our legal system's self-understanding and structure. Legal education, courts, and law offices alike treat civil and criminal law separately.<sup>7</sup> Indeed, "every society sufficiently developed to have a formal legal system," from Rome to the present, "uses the criminal-civil distinction as an organizing principle."<sup>8</sup> Accordingly, scholars have long tried to explain the line between tort and crime, to defend that line, and to identify how it has been blurred. This Comment does not take a side in the normative debate about the value or proper location of the tort/crime line. Its contribution is descriptive, offering new insights into the line's present operation and location. However, scholarly literature provides the necessary context for understanding the potential stakes of those insights.

The doctrinal differences between criminal law and tort are relatively clear: the state, not the victim, initiates criminal proceedings; criminal sanctions include incarceration; criminal sanctions are measured against the defendant's culpability (as opposed to compensation measured against the victim's injuries); and so on.<sup>9</sup> But what justifies those doctrinal differences remains hotly debated. The courts have not created clear, principled distinctions.<sup>10</sup> Scholars have therefore tried to fill this gap. Henry Hart, for example, thought only acts meriting "community condemnation" should be criminal.<sup>11</sup> Guido Calabresi and Douglas Melamed saw tort as a tool for permitting involuntary transfers of entitlements, while criminal law prohibits such transfers.<sup>12</sup>

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7. Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 2 (2005).
  8. Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 202 (1996). Despite the universality of the tort/crime line, the nature of the division differs dramatically across legal systems. In many European countries, for example, victims can bring their civil claims in the same proceeding as the state's criminal action. Matti Joutsen, *Listening to the Victim: The Victim's Role in European Criminal Justice Systems*, 34 WAYNE L. REV. 95, 115 (1987). While the importance of the tort/crime line extends beyond the American context, this Comment's findings are limited to the United States.
  9. See Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 719-25 (2008), for a summary of the differences between tort and criminal law.
  10. See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 240 (1991).
  11. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958).
  12. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1126-27 (1972); see also Guido Calabresi, *A Broader View of the Cathedral: The Significance of the Liability Rule, Correcting a*

The consistent efforts to locate the tort/crime line reflect an underlying scholarly consensus that we ought to maintain it. Legal-process scholars believed that “a basic ‘method’ distinguished the criminal law,” which included a focus on morally culpable mental states and legislatively detailed crimes, and that any “substantial deviation from that ‘method’ threatened the criminal law’s legitimacy.”<sup>13</sup> John Coffee, arguably the tort/crime line’s leading contemporary defender, argued that blurring weakens the criminal law’s unique role in moral education.<sup>14</sup> Tort law, in contrast, is seen as pricing harms rather than prohibiting them outright.<sup>15</sup> Others have argued that criminal law’s harsher punishments as compared to tort’s, such as imprisonment and long-term discrimination, require justification.<sup>16</sup> With notable exceptions,<sup>17</sup> most legal scholars agree that the law should “resist the temptation to mix and match doctrines and functions at will.”<sup>18</sup>

Despite that scholarly consensus, however, many have observed that, in practice, the tort/crime line has been gradually blurred in three ways. First, the use of civil penalties, particularly by public agencies, has created an analogue of criminal law—something punitive and state controlled—without the criminal law’s protections.<sup>19</sup> Second, mass torts play an essential role in vindicating public rights.<sup>20</sup> Third, regulatory crimes have ballooned, creating a vastly increased number of “public welfare offenses” punishable by strict or vicarious liability.<sup>21</sup> Traffic crimes illustrate this blurring, but also exhibit different and deeper forms of porousness in the tort/crime line.

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*Misapprehension*, 77 LAW & CONTEMP. PROBS. 1, 12-13 (2014) (updating his perspective on tort liability).

13. Coffee, *supra* note 10, at 198.

14. *See id.* at 237-39.

15. *Id.* at 194.

16. *See id.* at 224 (describing, though arguing against, this common contention).

17. *See* Thomas H. Koenig, *Crimtorts: A Cure for Hardening of the Categories*, 17 WIDENER L.J. 733, 736 (2008); *cf.* RICHARD A. POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA 54 (1996) (“The conventional legal thinker draws an extremely sharp line between civil law and criminal law and between torts and contract. This tendency is due in part to failing to take a functional approach.”).

18. Simons, *supra* note 9, at 730.

19. *See* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 778-79 (1997); *see also* Fellmeth, *supra* note 7, at 8.

20. Koenig, *supra* note 17, at 736-37; *cf.* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1396 (1993) (“[P]unitive damages . . . constitute the best available means for social control and moral sanction of economically formidable wrongdoers. Moreover, we suggest that if punitive damages are pared back too drastically, civil law may be underenforced.”).

21. Coffee, *supra* note 10, at 202; *see also* Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 538-39 (2012).

## II. SAFETY ADVOCATES AND THE LEGISLATURE: THE RIGHT OF WAY LAW

In 2014, the New York City Council enacted the Right of Way Law, making it a misdemeanor for a driver to injure a pedestrian or cyclist who had the right of way.<sup>22</sup> By design, the statute departs from criminal-law norms. First, it replaces criminal negligence, a mens rea standard, with tort negligence, a conduct standard. Second, it arguably shifts the burden of proof on negligence.<sup>23</sup> The law is typical of the way tort/crime blurring occurs in other areas of law: legislative action responds to perceived inadequacies in criminal law.<sup>24</sup> The Right of Way Law thus offers a good starting point for observing the importation of tort into traffic crime. The ensuing controversy over the Right of Way Law also shows how deeply ingrained tort concepts are when describing traffic crashes: both drafters and opponents of the law employ the rhetoric and framework of tort law.

The Right of Way Law criminally punishes drivers who fail to yield to pedestrians and cyclists.<sup>25</sup> A driver causing injury is guilty of a misdemeanor punishable by up to thirty days in jail.<sup>26</sup> Indeed, the Law's advocates intended to increase the criminal punishment of injury-causing drivers.<sup>27</sup>

Apart from this criminal sanction, however, a Right of Way Law violation resembles a tort. Most importantly, the Right of Way Law introduces strict liability, in which the standard criminal-law requirement of mens rea is eliminated.<sup>28</sup> As a Right of Way Law drafter<sup>29</sup> argued, "Meaningful driver

22. N.Y.C., N.Y., ADMINISTRATIVE CODE § 19-190 (2014).

23. See *infra* text accompanying notes 34-45.

24. See Coffee, *supra* note 10, at 241; Smith, *supra* note 21, at 538-39.

25. N.Y.C., N.Y., ADMINISTRATIVE CODE § 19-190 (2014).

26. *Id.*

27. See Steve Vaccaro, *Why New York Needs Strict Criminal Liability for Traffic Violence*, STREETS BLOG NYC (Mar. 5, 2013), <http://www.streetsblog.org/2013/03/05/why-new-york-needs-strict-criminal-liability-for-traffic-violence> [<http://perma.cc/T6MV-A5VJ>] (advocating "strict criminal liability for striking pedestrians with the right of way").

28. See *People v. Hossain*, 2015 WL 7159583, at \*3 (N.Y. Crim. Ct. Nov. 9, 2015) (stating that the Law "fits squarely in the definition of a strict liability crime"); *ATU Wants Voice at Bicycle and Pedestrian Safety Panels*, ATU LOC. 1512 (July 2, 2015), <http://www.atu1512.org/node/7882> [<http://perma.cc/5R7Y-G6YB>] (describing the bus drivers' union president's notification to members that "under a new law in the City of New York, drivers that hit people in crosswalks are criminally charged under strict liability"); Vaccaro, *supra* note 27. Because the Right of Way Law was passed only recently and has not yet been enforced in a widespread manner, only twenty-two arrests had been made under the law as of March 2015. Jeff Mays, *6 Out of 22 Motorists Arrested Under Vision Zero Were Bus Drivers*, DNAINFO (Mar. 5, 2015, 7:41 AM), <http://www.dnainfo.com/new-york/20150305/bushwick/6>

accountability requires that we move past ‘evil minds.’”<sup>30</sup> Yet most scholars and courts consider strict-liability crimes worrisome, if common, deviations from the norms of criminal law. They argue that criminal punishment demands the moral culpability of a guilty mind; since strict liability does not require any inquiry into a defendant’s mental state or moral status, it does not belong in criminal law.<sup>31</sup> By enacting the Right of Way Law, the legislature created a new tier of criminal punishment for vehicular assaults—and even homicides<sup>32</sup>—for which it eliminated criminal law’s traditional mens rea requirement.<sup>33</sup>

In place of a mens rea inquiry, the Right of Way Law inquires whether the injury was caused by the driver’s “failure to exercise due care.”<sup>34</sup> This is a common definition of tort negligence,<sup>35</sup> and tort negligence is not a mens rea element. Tort negligence and criminal negligence serve different purposes, and the distinction between the two is not merely one of degree. In tort, negligence

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-out-of-22-motorists-arrested-under-vision-zero-were-bus-drivers [http://perma.cc/W24H-BBG3]. Accordingly, no court has authoritatively interpreted the statute.

29. Sarah Ryley, *Queens Councilman Rory Lancman To Introduce Amendment to Right of Way Law*, N.Y. DAILY NEWS (June 9, 2015, 10:00 PM), <http://www.nydailynews.com/news/politics/queens-councilman-introduce-amendment-law-article-1.2252694> [http://perma.cc/ZGH5-ES6R] (identifying Steve Vaccaro as a drafter of the Right of Way Law).
30. Vaccaro, *supra* note 27.
31. See *Morissette v. United States*, 342 U.S. 246, 250, 259-60 (1952); Coffee, *supra* note 10, at 198; Simons, *supra* note 9, at 722-23.
32. Indeed, advocates are *most* interested in applying the Right of Way Law to homicides. See Press Release, Families for Safe Streets, *The Right of Way Law Protects NYC’s Walking Families* (Apr. 30, 2015), [http://transalt.org/sites/default/files/news/releases/2015/04.30.2015\\_FSS\\_WalkingFamilies\\_Release.pdf](http://transalt.org/sites/default/files/news/releases/2015/04.30.2015_FSS_WalkingFamilies_Release.pdf) [http://perma.cc/U79P-TEQD] (focusing on cases in which people were killed in traffic crashes).
33. Arguably, the Right of Way Law may be different from most strict-liability crimes in that it is not a regulatory offense but a crime of violence—for which a mens rea element is even more important. See *Morissette*, 342 U.S. at 259-61. Regardless, the Right of Way Law’s relevance in this Comment is the *direction* in which it pushes New York’s law of traffic crimes—toward strict liability and more tort-like standards—and not whether strict liability is or is not appropriate in this context.
34. N.Y.C., N.Y., ADMINISTRATIVE CODE § 19-190 (2014). A recent settlement between the city bus drivers’ union and the City of New York that purports to provide an interpretation of the Right of Way Law states that this “due care” clause keeps the law from being a strict liability offense. Stipulated Order of Settlement, Withdrawal & Discontinuance at 3, *Transp. Workers Union v. de Blasio*, No. 1:15-cv-02225-BMC (E.D.N.Y. Aug. 31, 2015), <http://www.scribd.com/doc/277448525/Right-of-Way-Law-Settlement> [http://perma.cc/CZ67-3CX9] [hereinafter Stipulated Order of Settlement]. As this paragraph demonstrates, however, requiring tort negligence for criminal liability is not the same as requiring a traditional mens rea element. Even so, the “due-care” clause is clearly meant to *substitute* for a mens rea element.
35. See 57A AM. JUR. 2D *Negligence* § 5 (1989).

creates liability on its own.<sup>36</sup> In criminal law, negligence is a mens rea element, a mental state that must correspond to a proscribed act to prove criminal liability.<sup>37</sup> In other words, tort negligence is about what a defendant does—failing to exercise due care—while criminal negligence is about how he does and perceives it. The statutory definition of criminal negligence clarifies this distinction further. In New York, which follows the MPC, criminal negligence exists when a person “fails to perceive a substantial and unjustifiable risk” and that risk is such that “the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.”<sup>38</sup> Criminal negligence concerns the failure to perceive a particular risk, specified elsewhere in a statute, whereas tort negligence involves acting riskily in general. While this distinction is not absolute—tort negligence includes an inquiry into the foreseeability of harm, which considers perception, for example<sup>39</sup>—it captures the basic difference. As Kenneth Simons has written, tort “understands negligence as unreasonably unsafe conduct,” while criminal law “emphasizes a different, cognitive conception of negligence.”<sup>40</sup> By eliminating the mens rea requirement for failure to yield and replacing it with the element of “failure to exercise due care,” the Right of Way Law thus eliminates the criminal, cognitive conception of negligence and replaces it with tort law’s conduct-based conception.<sup>41</sup>

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36. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 6 cmt. b (AM. LAW INST. 2010) (stating that liability exists where the “elements of a prima facie case for negligence” have been shown: a breached duty, causation, and physical harm).
37. See 1 CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 27 (2015); see also Kenneth W. Simons, *Dimensions of Negligence in Criminal and Tort Law*, 3 THEORETICAL INQUIRIES L. 283, 293 (2002) (comparing tort negligence, which “provides a pervasive standard for behavior subject to legal liability” with criminal negligence, which “is interstitial and derivative” and the significance of which “depends on the substantive criminal law norm to which it attaches”).
38. N.Y. PENAL LAW § 15.05 (McKinney 2015).
39. Still, perception’s role in tort negligence is limited. First, the foreseeability of a harm is an objective inquiry, asking what the reasonable person would foresee. DAN B. DOBBS ET AL., THE LAW OF TORTS § 159 (2d ed. 2015). An individual defendant’s perception is often not at issue. Second, foreseeability has recently been recognized as an imprecise term; instead of using a foreseeability analysis, the *Restatement (Third)* limits a defendant’s liability to those harms that result from the risks that made his conduct tortious. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. j (AM. LAW INST. 2010). Properly understood, foreseeability is about the scope of liability, not about any individual’s perception.
40. Simons, *supra* note 37, at 288 (emphasis omitted).
41. Peter Westen provides another distinction between conduct-based and cognition-based theories of negligence, arguing that “reasonableness” must be individualized to a particular person’s circumstances only for mental states, not conduct. See Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137, 141 (2008).

Finally, advocates who helped draft the Right of Way Law intended it to shift the burden of proof for the key element of the crime and celebrated the law's "presumption of criminality."<sup>42</sup> Under this interpretation of the statute—which has been contested<sup>43</sup>—the prosecution's prima facie case would require showing only that a driver failed to yield and caused injury. Often, these elements are not even disputed. The main subject of debate—whether the driver was tortiously negligent—would be an affirmative defense that the defendant must establish. Thus, the state would not need to prove this essential element of the Right of Way Law beyond a reasonable doubt, as with a paradigmatic crime.<sup>44</sup> Rather, a preponderance of the evidence standard would suffice, as in tort.<sup>45</sup> Even if courts do not ultimately adopt this burden-shifting interpretation, the effort to use it illustrates a comfort with a tort-like regime for right-of-way violations.

Notably, even Right of Way Law *opponents* use tort concepts to argue against the statute, showing how deeply ingrained tort concepts are in the social understanding of traffic crashes. The Right of Way Law expands drivers' criminal liability and has proven controversial, particularly among bus drivers. For example, one city-council member, a former bus driver, attacked the law for "treating [bus drivers] as criminals when such accidents occur."<sup>46</sup> This language, common among the Right of Way Law's opponents, classifies traffic crashes as accidents, a central concept in tort,<sup>47</sup> while further suggesting that accidents cannot be crimes. The opponents are essentially arguing that the

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42. Steve Vaccaro, *A Powerful New Tool To Deter Traffic Violence—if Law Enforcers Use It*, STREETS BLOG NYC (June 3, 2014), <http://www.streetsblog.org/2014/06/03/a-powerful-new-tool-to-deter-traffic-violence-if-law-enforcers-use-it> [<http://perma.cc/9DSS-BPJ2>].

43. In the settlement discussed above, the parties identify failure to exercise due care as an element of the crime, rather than the presence of due care as an affirmative defense. Stipulated Order of Settlement, *supra* note 34, at 3. However, a settlement between a mayor and a private party cannot create an interpretation of a statute that binds the courts in a case brought by a district attorney against a different private party. Nor is such a settlement revealing of legislative intent. The only reported judicial decision interpreting the Right of Way Law expressly reserved the issue of whether due care is an element of the crime or an affirmative defense. *People v. Hossain*, 2015 WL 7159583, at \*3 n.6 (N.Y. Crim. Ct. Nov. 9, 2015).

44. See *In re Winship*, 397 U.S. 358, 361–64 (1970) (discussing the importance of the proof beyond a reasonable doubt requirement).

45. N.Y. PENAL LAW § 25.00 (McKinney 2015).

46. I. Daneek Miller, Opinion, *Bus Drivers Need Support, Not Cuffs: A Former MTA Driver Wants To Exempt Operators from a Tough New Law*, N.Y. DAILY NEWS (Feb. 22, 2015), <http://www.nydailynews.com/daneek-miller-bus-drivers-support-not-cuffs-article-1.2123459> [<http://perma.cc/9AXH-YUKZ>].

47. See GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

Right of Way Law has improperly redrawn the boundary between tort and crime, and that traffic crashes should generally fall on the tort side of the line.

Similarly, bus drivers have sought an exemption from the law because when driving they are “doing their duty.”<sup>48</sup> This argument evokes the doctrine of qualified immunity, which shields public officials from tort damages to ensure that they can provide public services.<sup>49</sup> However, qualified immunity does not protect officers from criminal liability.<sup>50</sup> These duty-based arguments for an exemption thus operate in the framework of tort, not criminal law – even though bus drivers argued against incorporating tort standards into criminal law. Everyone debating this criminal statute seems to speak the language of tort. And, as the next Part demonstrates, certain tort doctrines appear in traffic crimes even where the legislature has not incorporated them.

### III. LAW ENFORCEMENT: CONTRIBUTORY NEGLIGENCE

The executive branch has also conflated tort and crime—and without legislative prompting—by importing something akin to the tort doctrine of contributory negligence into its response to crashes. Here, the effect is to *exonerate* motorists. Thus, it is not merely one political coalition that seeks to treat traffic crashes as torts: both those looking to punish drivers and those looking to protect them draw on tort concepts. In the midst of political conflict over the punishment of dangerous drivers, there exists a deeper consensus that tort provides an appropriate conceptual framework.

In tort, contributory negligence sharply limits a plaintiff’s ability to recover if she herself acted negligently.<sup>51</sup> Though softened by the modern shift to comparative negligence, in which victim fault merely reduces a tortfeasor’s liability, the doctrine continues to require the examination of both parties’ conduct in tort cases. Criminal law has uniformly rejected contributory negligence doctrines.<sup>52</sup> As Judge Posner has written, “Victim fault is not a defense, either partial or complete, to criminal liability.”<sup>53</sup> Notably,

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48. Pete Donohue, *Rep. Charles Rangel Defends Bus Drivers Against Bill de Blasio’s Vision Zero Law*, N.Y. DAILY NEWS (Apr. 21, 2015), <http://www.nydailynews.com/news/politics/rep-charles-rangel-defends-busdrivers-vision-zero-article-1.2193516> [<http://perma.cc/CZ66-KNVD>] (quoting Charles Rangel).

49. See *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982).

50. See Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2209 (2003).

51. RESTATEMENT (SECOND) OF TORTS §§ 463-496 (AM. LAW INST. 1965).

52. Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385, 397 & n.37 (2005).

53. *Beul v. ASSE Int’l, Inc.*, 233 F.3d 441, 451 (7th Cir. 2000).

contributory negligence is not a defense even to crimes of negligence or vehicular cases.<sup>54</sup> This distinction reflects the underlying purposes and structures of criminal and tort law. Tort uses contributory negligence because tort reallocates losses from plaintiffs to defendants; both parties' behavior is at issue. In contrast, criminal punishment is a matter between the state and the defendant; generally only the defendant's behavior is relevant.<sup>55</sup> Meaningfully, victims are not even parties to criminal proceedings.

Even so, the New York Police Department (NYPD) has repeatedly imposed a contributory-negligence regime in its traffic-crime investigations. The NYPD has routinely inquired into victim fault and, whenever such fault is present, has exonerated the drivers.<sup>56</sup> This de facto system resembles not merely modern comparative negligence but the more severe common-law contributory-negligence regime. For example, in 2011, truck driver Leonardo Degianni struck and killed cyclist Mathieu Lefevre, and then fled the scene. In its investigative report, the NYPD noted that Degianni failed to signal before turning into Lefevre.<sup>57</sup> The report added, though, that Lefevre "should not have been passing on the right side."<sup>58</sup> Finding "error" by both parties, the NYPD closed the case.<sup>59</sup> Similar NYPD determinations of victim fault are routinely leaked to the press.<sup>60</sup> For example, the police (incorrectly) blamed Allison Liao, a three-year-old accused of breaking free from her grandmother, and Jean Chambers, accused of talking on her cellphone, for their own deaths.<sup>61</sup>

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54. See Bergelson, *supra* note 52, at 397 n.37 (collecting cases); see also Kenneth W. Simons, *The Relevance of Victim Conduct in Tort and Criminal Law*, 8 BUFF. CRIM. L. REV. 541, 543 (2005) ("[I]n crimes of negligent or reckless risk-creation or causation of harm—such as reckless driving or negligent or reckless homicide—tort law would permit a comparative fault reduction, while criminal law would not.").

55. See Simons, *supra* note 54, at 554-59.

56. See *infra* text accompanying notes 57-61.

57. Brad Aaron, *Bypassing Courts, NYPD Says Video Cleared Lefevre Hit-and-Run Driver*, STREETS BLOG NYC (Mar. 12, 2012), <http://www.streetsblog.org/2012/03/12/bypassing-courts-nypd-says-video-cleared-lefevre-hit-and-run-driver> [<http://perma.cc/ZQA5-B5JF>].

58. *Id.*

59. *Id.*

60. See Brad Aaron, *Marlene Baharlias, 77, Killed by Motorist, Blamed by NYPD and the Post*, STREETS BLOG NYC (Mar. 19, 2014), <http://www.streetsblog.org/2014/03/19/marlene-baharlias-77-killed-by-motorist-blamed-by-nypd-and-the-post> [<http://perma.cc/HK74-BWR7>] ("[A]nonymous NYPD sources are notorious for leaking information that assigns responsibility to deceased pedestrians and cyclists.").

61. Jill Abramson, *The Second Tragedy of Traffic Deaths*, N.Y. PRESS (Dec. 3, 2014, 6:01 AM), <http://www.nypress.com/local-news/20141203/the-tragedy-after> [<http://perma.cc/6QAZ-L5X6>].

The police are the worst offenders in imposing their own contributory-negligence regime, but some prosecutors have done the same. In New York, Brooklyn District Attorney Kenneth Thompson has argued that “there’s a greater role for district attorneys to play in keeping our streets safe,” because “[q]uite often, the victim is blamed for the incident without a real full-blown investigation.”<sup>62</sup> In one infamous case, Manhattan prosecutors negotiated a generous plea bargain with a drunk driver who killed a pedestrian, pointing to the victim’s own intoxication as an explanation.<sup>63</sup>

These examples point to a systematic practice by law enforcement: rather than looking only at whether the driver’s behavior passes the threshold of criminality, prosecutors and police compare the fault of drivers and victims. This is permissible prosecutorial discretion, but it again illustrates the power of tort concepts in the traffic context. This introduction of tort concepts shifts the very subject of the criminal law’s inquiry off of defendants and onto victims. By effectively introducing a new party into criminal proceedings, contributory negligence defies the conception of criminal law as based on the defendant’s moral culpability—after all, two wrongs do not make a right. Practically, it strips the protections of the criminal law from victims who themselves may err. And police and prosecutors apply this *de facto* contributory-negligence regime broadly in traffic crimes—including, as shown in this Part, in the essentially criminal context of homicides. Across the domain of traffic crashes, therefore, contributory negligence is making criminal prosecutions look much more like tort.

#### IV. THE COURTS: NEGLIGENT HOMICIDE

While the courts are, unsurprisingly, generally attentive to the tort/crime line, even the sophisticated New York Court of Appeals has slouched toward tort when deciding traffic crime cases. In the process, it has redefined the entire law of criminal negligence: first, to emphasize conduct over cognition, and

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62. *Traffic Justice: Brooklyn District Attorney Kenneth P. Thompson*, RECLAIM, Nov. 1, 2015, at 12, 12-13; cf. Aaron Bialick, *DA Gascón Erroneously Blames the Victim in Most Pedestrian Fatalities*, STREETS BLOG SF (June 21, 2012), <http://sf.streetsblog.org/2012/06/21/da-gascon-erroneously-blames-the-victim-in-most-pedestrian-fatalities> [http://perma.cc/SMV7-D7V8] (showing this victim blaming in practice in ordinarily bicycle- and pedestrian-friendly San Francisco).
63. See Laura Italiano, *Break for Millionaire DWI Killer*, N.Y. POST (Jan. 8, 2009, 8:04 AM), <http://nypost.com/2009/01/08/break-for-millionaire-dwi-killer> [http://perma.cc/PRD6-UPR7]; Jose Martinez, *Rich Man’s Justice: Millionaire Exec Who Killed Bride-To-Be in DWI Hit-Run Gets Just 15 Days in Jail*, N.Y. DAILY NEWS (Feb. 27, 2009, 11:46 PM), <http://www.nydailynews.com/news/crime/rich-man-justice-millionaire-exec-killed-bride-to-be-dwi-hit-run-15-days-jail-article-1.194709> [http://perma.cc/66GA-C2K5].

second, to empower judges rather than legislatures to determine what conduct is prohibited.

Although New York, following the MPC, grades homicides based on mens rea, the New York high court has introduced into its criminally negligent homicide jurisprudence a new and unusually prominent inquiry into conduct. Criminally negligent homicide is defined in New York as causing the death of another person with the mens rea of criminal negligence.<sup>64</sup> As described in Part II, criminal negligence traditionally emphasizes a defendant's state of mind—it is a mens rea element, defined as the failure to perceive a risk—not her actions. While the MPC definition of criminal negligence also implicitly requires an inquiry into conduct through the requirement that the unperceived risk be “substantial and unjustifiable,” cognitive elements are central, as befits a mens rea element.<sup>65</sup> However, in an area of law made in cases involving traffic crashes,<sup>66</sup> the New York Court of Appeals has repeatedly found conduct, rather than cognition, to be determinative.

The pivotal case was *People v. Boutin*, which involved a truck driver who, on a foggy night, failed to see a parked “police car, with emergency lights flashing,” and a tractor trailer on the highway.<sup>67</sup> The court held that Boutin's failure to perceive the risk of killing someone was not criminal negligence. “[U]nless a defendant has engaged in some blameworthy conduct creating or contributing to a substantial and unjustifiable risk of death, he has not committed the crime of criminally negligent homicide,” wrote the court. “[H]is ‘nonperception’ of a risk, even if death results, is not enough.”<sup>68</sup>

This interpretation of the MPC marked a significant change in New York's criminal law: it deviated from the statutory definition of criminal negligence, which focuses on risk perception, in order to emphasize conduct, the traditional measure of negligence in tort. This shift has appeared in negligent-homicide cases before the New York Court of Appeals, each of which has looked at the driver's conduct, rather than his state of mind, to determine

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64. N.Y. PENAL LAW § 125.10 (McKinney 2015).

65. Simons, *supra* note 37, at 295. Because a justifiable risk cannot give rise to criminal negligence, regardless of whether the defendant adequately perceives that risk, the MPC “implicitly establishes a standard of care with respect to the actor's conduct.” *Id.*

66. Of the fourteen New York Court of Appeals cases applying the criminally negligent homicide statute since 1990, eight involve traffic crashes. See *People v. Maldonado*, 18 N.E.3d 391 (N.Y. 2014); *People v. Asaro*, 998 N.E.2d 810 (N.Y. 2013); *People v. Caban*, 901 N.E.2d 766 (N.Y. 2008); *People v. Cabrera*, 887 N.E.2d 1132 (N.Y. 2008); *People v. Litto*, 872 N.E.2d 848 (N.Y. 2007); *People v. Ladd*, 675 N.E.2d 1211 (N.Y. 1996); *People v. Harris*, 613 N.E.2d 526 (N.Y. 1993); *People v. Maher*, 594 N.E.2d 915 (N.Y. 1992).

67. 555 N.E.2d 253, 253 (N.Y. 1990).

68. *Id.* at 255.

negligence.<sup>69</sup> The shift has also been evident in the lower courts, where prosecutors have identified *Boutin*'s redefinition of criminal negligence as a substantial new obstacle, distinctive to New York, in prosecuting those who kill with their cars.<sup>70</sup>

To be sure, some inquiry into whether the risk-creating conduct was substantial and unjustifiable is required by the statute, but this significant shift toward conduct is not in fact inherent to the MPC's definition of criminal negligence. The Oregon Supreme Court, for example, expressly declined to adopt *Boutin*'s reasoning. It explained that *Boutin* adds requirements not present in the text of the statute and, in particular, "shift[s] attention away from the elements identified in the definition of criminal negligence," including "the lack of awareness of risk."<sup>71</sup> As the Oregon court pointed out, the relevant "blameworthy" conduct, for the legislature, was killing a person; beyond that, only mens rea was required.<sup>72</sup> In *Boutin*, the New York Court of Appeals imposed a judicially created "heightened standard"<sup>73</sup> for criminal negligence, one that elevated tort's conduct-based conception of negligence above the existing criminal definition focused on risk perception.<sup>74</sup>

69. See *People v. McGranham*, 913 N.E.2d 936, 937 (N.Y. 2009); *Cabrera*, 887 N.E.2d at 1136-37; *Harris*, 613 N.E.2d at 527 ("A rational juror could certainly have found that this conduct grossly deviated from the standard of care a reasonable person would have observed in a similar situation."); *Maher*, 594 N.E.2d at 916 ("Viewed in the light most favorable to the People, the evidence here established that defendant engaged in criminal risk-creating culpable conduct."); *People v. Paul V.S.*, 554 N.E.2d 1273, 1274 (N.Y. 1990) ("Unlike [in *Boutin*], there is ample evidence in this case that defendant engaged in 'criminally culpable risk-creating conduct.'").
70. J. David Goodman, *Prosecutors Face Test Proving Serious Crime in a Fatal Crash*, N.Y. TIMES (Mar. 12, 2013), <http://www.nytimes.com/2013/03/13/nyregion/serious-charges-in-fatal-crashes-pose-challenge-for-prosecutors.html> [<http://perma.cc/K7P2-DBUW>] (stating that the New York Court of Appeals has "slowly added new criteria" above the "substantial and unjustifiable risk" requirement, and that "New York appears to have gone further than other states").
71. *State v. Lewis*, 290 P.3d 288, 296 (Or. 2012). *But see* *State v. Littlefield*, 876 A.2d 712, 730 (N.H. 2005) (adopting *Boutin*'s reasoning); *Tello v. State*, 180 S.W.3d 150, 157-58 (Tex. Crim. App. 2005) (same).
72. See *Lewis*, 290 P.3d at 294-96.
73. Jeffrey K. Gurney, *Driving into the Unknown: Examining the Crossroads of Criminal Law and Autonomous Vehicles*, 5 WAKE FOREST J.L. & POL'Y 393, 407 n.92 (2015).
74. In a fascinating development, this heightened standard applies across the criminal code. *Boutin* itself focuses on the traffic context, citing only traffic crash cases for precedential support. See *People v. Boutin*, 555 N.E.2d 253, 254-55 (N.Y. 1990). Before the MPC, this kind of issue-specific jurisprudence was possible. Indeed, common-law courts required less negligence in automobile crashes than in other negligent homicides (perhaps an earlier manifestation of the modern trend described in this Comment toward tort and away from criminal-law standards in the traffic context). See Leslie Yalof Garfield, *A More Principled Approach To Criminalizing Negligence: A Prescription for the Legislature*, 65 TENN. L. REV. 875,

Since *Boutin*, the New York Court of Appeals has blurred the lines between criminal and tort conceptions of negligence further still. In a 2008 case, *People v. Cabrera*, a speeding teenager lost control of his vehicle around a curve, killing three passengers.<sup>75</sup> The New York Court of Appeals continued to emphasize blameworthy conduct as essential to criminal negligence, distinguishing between “noncriminal failure to perceive risk” and “criminal risk creation.”<sup>76</sup> The court then went even further, holding that only specific forms of risk creation are sufficient for criminal negligence. Speeding, according to the court, only gives rise to negligence when combined with other blameworthy acts, such as running a red light.<sup>77</sup> With such parsing of behaviors, *Cabrera* doubled down on a regime in which conduct, not cognition, is made central to criminal negligence.

Additionally, *Cabrera* shifted criminal negligence towards tort in another way: the court held that criminal negligence required not merely blameworthy conduct but “morally blameworthy” conduct.<sup>78</sup> Practically, this addition made proving criminal negligence still more difficult, as it required that the behavior in question be “seriously condemnatory” even beyond the fact that it caused death.<sup>79</sup> In one sense, the “morally blameworthy” requirement likely reflects an attempt to reimpose criminal-law norms: a focus on moral culpability is quintessentially criminal.<sup>80</sup> But in so doing, the “morally blameworthy” requirement simultaneously undoes another of criminal law’s core features:

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897-901 (1998). However, after the MPC, a redefinition of a mens rea term applies across the criminal code. This is exemplified with the *Boutin* definition of criminal negligence, which has since been applied outside the traffic context, such as in a police-shooting case. See *People v. Conway*, 849 N.E.2d 954, 956 (N.Y. 2006).

75. 887 N.E.2d 1132, 1133-35 (N.Y. 2008).

76. *Id.* at 1138.

77. *Id.* at 1136.

78. *Id.* at 1137.

79. *Id.* at 1137-38. Some prosecutors even believe that the “morally blameworthy” requirement requires them to prove that defendants were aware of their dangerous behavior, effectively transforming a negligence standard into a recklessness standard. See, e.g., Bill Sanderson, ‘Epidemic’ of Fatal Crashes: Narrow Legal Standard Means Drivers Are Rarely Charged, WALL ST. J. (Feb. 10, 2014, 4:58 PM), <http://www.wsj.com/articles/SB10001424052702303465004579322441555410428> [<http://perma.cc/7Y9G-ZPUS>].

80. See Coffee, *supra* note 10, at 198; see also Joseph Gentile, *Criminal Risk Creation—a Deterrent to Ambitious Vehicular Prosecutions*, NASSAU COUNTY B. ASS’N (Oct. 2009), <http://www.nassaubar.org/Articles/Archive/Article306.aspx> [<http://perma.cc/XE3H-93WU>] (reporting the assertion of a vehicular-defense lawyer, who argued a related case before the New York Court of Appeals, that the court’s recent decisions reflected a desire “to avoid tragic vehicular accidents being placed in the corridors of felony criminal courts”).

that the legislature, not the courts, specify what wrongful conduct is.<sup>81</sup> The search for morally blameworthy conduct not specified in the statute requires judges to define duties in criminal law, just as they do in tort. Having brought tort concepts into criminal law in *Boutin*, the *Cabrera* court attempted to undo the damage. But because the court did not abandon its emphasis on wrongful conduct—an emphasis traditionally foreign to criminal negligence—it may have only created more problems. Once tort concepts enter criminal law, they cannot easily be cabined.

## CONCLUSION

The repeated appearance of tort concepts in traffic crimes reveals much about the line between torts and crimes. It both demonstrates a blurring more profound than in other areas of law and empirically hints at where the line between tort and crime actually lies. The appearance of torts throughout the law of traffic crimes not only illustrates the scholarly concerns over the erosion of the tort/crime line discussed in Part I, but also shows more profound challenges to the division between tort and criminal law. First, existing scholarship has focused on the border areas between the domains of criminal law and tort law.<sup>82</sup> This Comment, in contrast, has shown how traditional criminal law—up through homicide, the archetypal crime—is transformed in the particular substantive area of car crashes. Those transformations, which include both the reorientation of criminal law away from defendant culpability and toward scrutiny of victim behavior and the redefinition of a concept as fundamental as criminal negligence, then ripple across criminal law. This is change at the very core of criminal law.

Moreover, traffic crime presents a different institutional story than, for example, administrative sanctions. In the conventional telling, legislatures drive criminal law toward tort.<sup>83</sup> Further, courts traditionally see themselves as defenders of the line between civil and criminal law.<sup>84</sup> But with respect to traffic crimes, law enforcement and courts independently erode the tort/crime line, and do so without statutory instruction. Tort concepts are variously used

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81. *United States v. Bass*, 404 U.S. 336, 348 (1971) (“[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.”).

82. See *supra* notes 19–21 and accompanying text.

83. See *Coffee*, *supra* note 10, at 195–97; *Smith*, *supra* note 21, at 538–39.

84. See, e.g., *Morrisette v. United States*, 342 U.S. 246, 250–52 (1952) (describing in soaring language “our philosophy of criminal law” as a limiting factor on Congress’s ability to do away with intentionality requirements).

to expand and contract drivers' legal liability. Each branch, for its own reasons, treats traffic crimes like torts, and does so in diverse ways.

The participation of the courts and the police casts the blurring of the tort/crime line in a different light by showing that an entire area of human activity appears to resist criminalization. It reveals that legal actors in all three branches of government—and those trying to increase or decrease criminal liability for drivers—see car crashes as more naturally compatible with tort than criminal doctrines. Even legal scholars use car crashes as emblematic, “pure” examples of torts.<sup>85</sup> We all turn toward tort techniques and away from the traditional forms of criminal law when addressing traffic crashes, even as we are comfortable with crimes of negligence generally.

At least three hypotheses provide plausible explanations for why car crashes are so commonly understood as tort-like, and they may point to where the underlying line between torts and crimes has been drawn. First, there may be a shared sense that we cannot do more than price the harms from automobiles, which are both inherently risky and socially invaluable.<sup>86</sup> Even leading supporters of sustainable transportation connect driving with economic activity.<sup>87</sup> To the extent that traffic crashes are seen as inevitable costs of a necessary activity, tort's regime of loss allocation is more appropriate than criminal law's prohibitions. Second, the difference between a speeding driver killing a child and that same driver proceeding uneventfully is often nothing more than luck, a few feet, or a few seconds' difference.<sup>88</sup> The criminal law's moral reprobation may therefore fit uncomfortably.<sup>89</sup> While moral luck is a problem across criminal law,<sup>90</sup> the ubiquity of the problem in the driving

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85. See, e.g., Calabresi & Melamed, *supra* note 12, at 1126-27 (asking “why we treat the thief or the rapist differently from the injurer in an auto accident”); George P. Fletcher, *A Transaction Theory of Crime?*, 85 COLUM. L. REV. 921, 925 (1985) (contrasting “deaths on the highways” with “subway robberies” to illustrate the difference between crime and tort).

86. See CALABRESI, *supra* note 47, at 18-20.

87. Angie Schmitt, *The Importance of Driving to the U.S. Economy Started Waning in the 70s*, STREETS BLOG USA (Dec. 18, 2014), <http://usa.streetsblog.org/2014/12/18/the-importance-of-driving-to-the-u-s-economy-started-waning-in-the-70s> [<http://perma.cc/A7R4-Z6ZG>] (quoting Transportation Secretary Anthony Foxx and Mayor Michael Bloomberg).

88. See Tom Baker, *Liability Insurance, Moral Luck, and Auto Accidents*, 9 THEORETICAL INQUIRIES L. 165, 167-70 (2008).

89. See Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1513 n.64 (1974) (arguing that moral luck is less problematic in the tort context, as loss allocation remains an important goal of torts).

90. Although it is a subject of considerable scholarly concern, judges rarely acknowledge the problem of moral luck. For some of the many articles that treat it thoroughly, see, for example, Nir Eisikovits, *Moral Luck and the Criminal Law*, in LAW AND SOCIAL JUSTICE 105

context may make the issue more salient: close calls are part of most drivers' felt experience, and many (including legislators, law-enforcement officers, and judges) would recoil from seeing themselves as nearly criminals.<sup>91</sup> Third, car crashes have long been the subject of concerted cultural campaigns, by groups such as Mothers Against Drunk Driving or the American Automobile Association, to stigmatize and destigmatize unsafe driving.<sup>92</sup> The consistent turn to tort concepts may demonstrate the victory—politically and historically contingent and not tied to inherent features of either driving or the tort/crime line—of those who have sought to normalize the violence brought by the automobile. To the extent that criminal law, and not tort law, is about moral desert, culpability, and punishment, these cultural battles are, effectively, over whether traffic crashes are subjects for criminal sanction; the tort/crime line is, to some extent, culturally constructed rather than economically or legally fixed.<sup>93</sup>

For some combination of these three reasons—and perhaps others as well<sup>94</sup>—car crashes are perceived as tort-like, even by those drafting, interpreting, or enforcing criminal law. Tort concepts consistently, perhaps

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(Joseph Keim Campbell et al. eds., 2005); and Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994).

91. Indeed, scholars looking to explain the concept of moral luck have consistently turned to traffic crashes as a site where moral luck is easily observed. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1125, 1132 (2007).
92. Compare James C. Fell & Robert B. Voas, *Mothers Against Drunk Driving (MADD): The First 25 Years*, 7 TRAFFIC INJ. PREVENTION 195, 197-198 (2006) (demonstrating MADD's effectiveness in reducing instances of and shifting social perceptions of drunk driving by focusing on drivers), with Joseph Stromberg, *The Forgotten History of How Automakers Invented the Crime of "Jaywalking,"* VOX (Jan. 15, 2015, 12:00 PM), <http://www.vox.com/2015/1/15/7551873/jaywalking-history> [<http://perma.cc/QRS4-BKF6>] (summarizing the history of auto industry groups' efforts to restrict pedestrians rather than drivers).
93. See John Petro, *Vision Zero and the Challenge of Culture Change*, STREETS BLOG NYC (Oct. 13, 2014), <http://www.streetsblog.org/2014/10/13/vision-zero-and-the-challenge-of-culture-change> [<http://perma.cc/B8WB-PHJJ>] (connecting cultural change and policy campaigns for traffic safety, including the Right of Way Law campaign).
94. Another possible explanation—more difficult to prove but with some intuitive appeal—is that modern tort law is unable to satisfy the intensity of feeling generated on all sides of what is both an epidemic of violence and, conversely, a crush of potential liability. See *supra* notes 1-2 and accompanying text. Tort law has been described as “suffering from declining expectations,” George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 537 (1972), as “unloved,” John C. P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1503 (2002), and as showing “malaise,” Arthur Ripstein, *Tort Law in a Liberal State*, 1 J. TORT L. 2, 2 (2007). Thus, even where legal actors see tort concepts as fitting, for the reasons identified above, they might view only criminal law (and the threat of incarceration) as matching the stakes they feel. The importation of tort doctrines into criminal law arguably reflects this set of preferences. Revitalizing tort law to reflect victims' emotional needs may be necessary to strengthen the tort/crime line.

inevitably, echo throughout the law of traffic crimes. The underlying subject matter drives all three branches of government to reshape essential features of criminal law in the image of tort. As this Comment has shown, this makes traffic crimes a particularly important site for both contesting and understanding the tort/crime line: one with high stakes for the entirety of criminal law, not to mention for the millions injured in car crashes every year who seek the protection and vindication of the law.

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