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The Compatibility of Forward-Looking and Backward-Looking Accounts of Tort Law

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The Compatibility of Forward-Looking and Backward-Looking Accounts of Tort Law

MICHAEL PRESSMAN*

ABSTRACT

This Article is the first to argue that forward-looking and backward-looking accounts of tort law are intrinsically compatible with one another. This theoretical point is of great importance and will bring about a paradigm shift in tort theory—and, more generally, in legal theory. This is because the long-standing debate between corrective justice theorists and economic theorists about the purpose of tort law (with active participants including Posner, Calabresi, Coleman, Weinrib, Rawls, and countless others) is based on the universal assumption that forward-looking and backward-looking accounts of tort law are incompatible. This assumption, however, is false, and this Article explains why it is false and how so many other authors have gone wrong.

The contribution of this Article, however, is not limited to this theoretical point—it also makes important contributions in the practical domain. The practical implications of the theoretical point are great and threefold: First, removing the forward-looking / backward-looking non-issue from the table will allow us to refocus our efforts on the all-important and complex question of what the substantive legal standard of behavior should be. Second, recognition of the reason for the compatibility between the forward-looking and backward-looking aspects of tort law itself provides us with newfound insight into which factors are relevant to our determination of the best substantive legal standard. Third, this recognition of the reason for compatibility not only aids us in the determination of the best substantive legal standard now, but it provides us with an understanding of what practical changes we can make to improve society's welfare going forward.

In sum, in addition to this Article providing groundbreaking theoretical conclusions, it also offers practical guidance and positive proposals, both of

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which are capable of having a tangible—and substantial—impact on society’s welfare.

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INTRODUCTION

When a judge decides a case in tort law, the results can be twofold: First, the dispute between the litigants is resolved, and second, a change may be made to the law of torts that will affect all future behavior of individuals who live their lives in the shadow of the law.¹ While sometimes this change may be dramatic, in the vast majority of cases, this change may appear trifling or insignificant—a minor clarification here, added support for an already well-entrenched principle there. Indeed, even when *no* change is made, that itself can be significant. All of these cases constitute additions to the ever-growing ball of wax that is the common law.

Tort law adjudication is not unique with regard to its dual effects. In all common law disciplines,² the judiciary knows that what it says will simultaneously have backward-looking and forward-looking results. This much is clear. What is less clear is how judges do decide and should decide tort cases, in light of the dual effects that will result, and this question is the subject of heated academic debate.

Two main camps have historically dominated this debate, and while there have been some new variations to arrive on the scene recently,³ the debate remains largely polarized between these two camps—corrective

¹ Oliver Wendell Holmes Jr. was among the first to write about this concept. According to Holmes, despite the differences between a good man and “the bad man,” we all bargain in the shadow of the law. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897).

² This Article will argue, in Part VI, that—despite popular belief to the contrary—this phenomenon in fact is *not* unique to common law disciplines.

³ See e.g., Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67 (2010); Gregory Keating, *The Priority of Respect Over Repair*, 18 LEGAL THEORY 293 (2012); Benjamin Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L. J. 695 (2003). For critical commentary on Zipursky’s civil recourse theory, see generally Richard Posner, *Instrumental and Noninstrumental Theories of Tort Law*, 88 IND. L. J. 469 (2013); Christopher J. Robinette, *Why Civil Recourse Theory Is Incomplete*, 78 TENN. L. REV. 431 (2011); Michael Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433 (2011).

justice theorists and economic theorists. Ostensibly at issue in this debate is the question of what is the “fundamental” principle⁴ or sovereign principle⁵ of tort law, what tort law at its “core” seeks to do,⁶ or what tort law is “really about.”⁷ On the one hand, economic theorists of tort law think that tort law is and should be forward-looking, and that it aims to maximize economic efficiency. On the other hand, the corrective justice theorists think that tort law is and should be backward-looking and that its goal is to repair wrongful losses.

This Article will argue that this long-standing debate between corrective justice theorists and economic theorists is rife with confusion and is based on a false assumption. This assumption—which *both* camps mistakenly make—is that forward-looking and backward-looking accounts of tort law are not compatible with one another. Forward-looking and backward-looking accounts of tort law *are* compatible with one another, however, and the first main goal of this Article will be to explain why we should believe this theoretical claim. Doing so will, in part, involve explaining how so many other authors have gone wrong.

The second main goal of this Article will then be to explore the implications of accepting this theoretical point. The implications are great, and at least threefold: First, the debate about the forward-looking and backward-looking aspects of tort law has partially obscured the all-important and complex question of what the substantive legal standard of behavior should be. Removing the forward-looking / backward-looking non-issue from the table will allow us to refocus our efforts on this important and challenging topic. Second, recognition of the *reason* for the compatibility between the forward-looking and backward-looking aspects of tort law *itself* provides us with newfound insight into which factors are relevant to our determination of the best substantive legal standard. Third, this recognition of the reason for compatibility not only aids us in the determination of the best substantive legal standard now, but it provides us with an understanding of what practical changes we can make to improve society’s welfare going forward.

Thus, this Article makes important contributions in both the theoretical and practical domains: First, it makes theoretical points that will bring about a paradigm shift in tort theory—and, more generally, in legal theory. Second, it offers practical guidance and positive proposals, both of which are capable of having a tangible—and substantial—impact on society’s welfare.

Part I begins by describing the economists’ view and the corrective justice theorists’ view and it explains where precisely the tensions between

⁴ Jules Coleman, *The Practice of Corrective Justice*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53 (David G. Owen ed., 1995).

⁵ *Id.* at 62.

⁶ JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* 9, 36 (2001).

⁷ Zipursky, *supra* note 3, at 724.

the two views lie. It also explains how the two camps argue against one another and what they find unpalatable about the other view. Interestingly, however, what is unpalatable about one camp's view to the other, and vice versa, is not so much an intrinsic feature of the other view, but rather, the fact that following the other view would at least sometimes lead one to not adhere to the prescriptions of one's own view. Further, it seems that in cases where the two theories yield the same prescription, many proponents of one theory would likely at least find the goal of the other theory to be a collateral benefit of deciding the case in accordance with one's favored theory. In light of this, one clear assumption made by both camps is that there *would in fact be at least some cases* where following the prescriptions of one theory is incompatible with following the prescriptions of the other. Part I identifies this assumption and calls into question its truth. Further, it provides some preliminary reasons to think that the assumption is in fact false. Thus, Part I suggests that there is reason to think that—due to a key, and almost universal, misstep—the debate between the two camps is misguided, and that corrective justice theory is in fact compatible with the economic theory of tort law. As such, Part I presents a hypothesis that merits further and more in-depth exploration.

While in the literature on tort it is a forgone conclusion that forward-looking and backward-looking accounts of tort are incompatible, this is a generalization, and, as just stated, this potential misstep is only *almost* universal. Two exceptions do exist: Richard Posner and John Rawls. Posner and Rawls both think that forward-looking and backward-looking accounts can in fact be compatible—for related, but different reasons. Part II describes and analyzes the positions that Posner and Rawls offer, but concludes that neither one provides an account that satisfactorily shows that forward-looking and backward-looking accounts of tort are compatible.

According to Posner, it is plausible to maintain that forward-looking and backward-looking accounts of tort law are compatible, but according to Posner, the backward-looking aspect of tort law is *merely instrumentally* valuable.⁸ It merely is part of the machinery that enables us to achieve, through incentive effects on future behavior, what is of intrinsic value—efficient results for the future. Rawls offers a different account, but one which similarly holds that the reason for having law and for deciding what in fact should be a law is *only* that the system of law in general, and any specific law in particular, is of intrinsic value in the forward-looking sense.⁹ According to corrective justice theorists, however, the backward-looking aspect of tort law is of intrinsic value and is a (or *the*) reason for having the system of tort law and for having a particular action be tortious. Thus, Part II argues that, though both Posner and Rawls *attempt* to describe accounts that would render forward-looking and backward-looking accounts of the

⁸ See *infra* Part II.A.

⁹ See *infra* Part II.B.

law compatible and satisfy both camps, they both fail in this attempt. Corrective justice theorists would not be willing to sign onto either Posner's or Rawls's accounts.

Part III argues that, despite Posner's and Rawls's failed attempts, and despite the rest of the literature's failure to even *make* an attempt, forward-looking and backward-looking accounts of tort law are in fact compatible. It proceeds as follows: Part III begins by clarifying and analyzing the very meaning of the terms "forward-looking" and "backward-looking." In order to assess the truth of the compatibility claim, we must first be sure that we understand precisely what we mean when we say that the forward-looking aspect of tort law is of intrinsic value or that the backward-looking aspect is of intrinsic value. As it happens, neither term is as straightforward as it seems, and there has been much confusion on this score. Next, Part III flags a way in which many (if not most) authors have gone astray in debating the compatibility of forward-looking and backward-looking accounts of tort law. In attempts to show the incompatibility of the forward-looking and backward-looking aspects of *the law itself*, many authors have, instead, mistakenly pointed to cases of potential divergence between forward-looking and backward-looking aspects of *a government or legal system on the whole*. This is a mistake because it is orthogonal to the question of compatibility between the two accounts of the law itself. Part III will illustrate this fallacy by describing and analyzing scapegoating—the example most commonly used in these mistaken arguments.

Having laid this groundwork, Part III then delves into the core of the issue. It argues that the relevant question is whether the forward-looking and backward-looking accounts would be compatible if we *hold fixed* substantive notions of wrongful conduct *within* the two accounts respectively. In other words, suppose that behavior that an individual thinks is wrongful and meriting backward-looking redress in tort is also the type of behavior the avoidance of which he thinks should constitute societal goals going forward. Part III argues that, whatever our substantive notion of wrongful conduct might be, holding people liable for this conduct (and thus bringing about backward-looking intrinsic value) would also be the way to best deter future wrongful conduct (and thus bring about forward-looking intrinsic value).

Nevertheless, even if this theoretical compatibility claim is true, it could be the case, as a practical matter, that people—be they self-proclaimed corrective justice theorists, economists, or others—do not, as a matter of fact, subscribe to the same substantive views for both the forward-looking and backward-looking aspects of tort law. If this were the case, and an individual had two different substantive views for the two different aspects of tort, this would suggest that tort law would not simultaneously be able to fully coincide with such an individual's forward-looking and backward-looking views. For such a person, then, it *would* seem as though a question would arise as to whether tort law should be an institution that seeks to

further forward-looking value or backward-looking value, or some mix of the two. Part IV thus examines the most plausible candidate substantive views and explores whether it is plausible to maintain either of them as the substantive notion for both components of one's forward-looking / backward-looking view pair. Part IV concludes that it does not currently seem to be plausible to hold any of the substantive notions for *both* one's forward-looking and backward-looking view.

With these quasi-descriptive conclusions in hand, and after showing that the practical divergence in fact is much smaller than we might think, Part V shifts gears and confronts normative questions: Is it good that this is the way things are? And if the current state of affairs is not ideal, what—if anything—might we be able to do to improve the situation? It argues that the answer to the former is that while the status quo is not bad, we would be better off if our substantive notion of wrongfulness were brought into even closer alignment with our substantive notion of societal goals. It then considers various approaches that can be taken to eliminate the divergence and bring about not only theoretical compatibility but also practical compatibility between forward-looking and backward-looking accounts of tort. Part V argues that this *is* in fact a possibility and it offers practical proposals for how to carry out a transformation project of this sort.

Part VI argues that, despite the fact that the forward-looking / backward-looking debate ostensibly arises in the context of tort, and, more generally, the common law, it is a mistake—on reflection—for one to hold this view. Thus, it argues that the issues arising in the statutory context and the common law context are, contrary to popular belief, very similar and almost identical. Lastly, the Conclusion offers some parting thoughts.

An important final note before proceeding: The theoretical compatibility claim *itself* thus turns out to be of both instrumental and intrinsic value.¹⁰ The instrumental importance: If it weren't for its truth, the possibility of bringing about the practical convergence that the Article proposes would not even exist. This convergence would be valuable—and thus the theoretical claim is of instrumental value. The intrinsic importance: Even if the above-mentioned practical convergence were *not* possible, it is an important revelation that the forward-looking and backward-looking aspects of tort are theoretically compatible, because it shows that authors have been grossly mistaken both about what precisely is at issue in the debate and about where the action lies in tort law theory. As such, this discovery will bring about substantially greater clarity and, hopefully, reorient tort scholarship on the whole to ensure that it is *looking*—so to speak—in fruitful directions.

¹⁰ Strictly speaking, both of these points relate to instrumental value, but one is considerably more direct, and thus can loosely be described as having intrinsic value.

I. THE DEBATE BETWEEN ECONOMISTS AND CORRECTIVE JUSTICE
THEORISTSA. *The Economic Theory*

According to the traditional economic view, tort is a forward-looking institution whose only goal is to provide the correct incentives to bring about maximally efficient behavior by people in society in the future.¹¹ Thus, economists generally do not think of tort law in terms of obligations or in terms of responsibility for harm, but rather, in terms of the minimization of future costs. As Guido Calabresi famously said, “I take it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents.”¹² More specifically, economists generally think that the way to reduce these costs is by placing liability on the “cheapest cost-avoider”—the party best equipped to take the appropriate precautionary measures.¹³ Thus, economists think that tort plaintiffs should recover when they can show that a judgment for the plaintiff would promote the social interest going forward. Further, economists think that there should be no judgment for a plaintiff *unless* a judgment will minimize accident costs going forward, because the cost of the accident in a case being litigated is now sunk, and simply holding the defendant responsible to the plaintiff for that cost will not minimize that cost.¹⁴ Thus, notwithstanding the fact that courts ostensibly make their decisions in language of “duty,” “breach,” and “proximate cause,” economists think that courts often are—and most certainly should always be—deciding cases by engaging in a forward-looking cost-benefit analysis.

In sum, there are two key components of the traditional economic view, and each component consists of both a normative and a descriptive portion: First, the law *should* be forward-looking and the law *is* forward-looking.¹⁵ Second, in looking forward, what we *should* seek to do is maximize economic efficiency, and, in looking forward, what we *do* do is maximize economic efficiency.¹⁶

Interestingly, however, Posner himself has changed his view over the years, and, instead of espousing a forward-looking view that seeks to maximize economic efficiency (i.e., maximize wealth), he now espouses a forward-looking view that seeks to maximize happiness.¹⁷ Furthermore,

¹¹ See generally GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).

¹² *Id.* at 26.

¹³ *Id.*

¹⁴ *Id.* at 27.

¹⁵ See generally *id.*

¹⁶ See generally *id.*

¹⁷ See generally Richard Posner, *Wealth Maximization and Tort Law: a Philosophical Inquiry*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David G.

Posner was not alone in making this shift, and the forward-looking happiness-based view is the typical view shared by the law and economics movement today.¹⁸ In many cases, wealth is still used instrumentally as a stand-in for happiness, be it as a proxy or for one of various other reasons why it might be a good intermediate aim. Despite this theoretical change, however, the practical differences between the traditional view and the current view are not quite as great as one might think. This is because the economists in most cases see the cheapest-unhappiness-avoider as being the party that is the cheapest cost-avoider. Furthermore, the shift in the economists' view has not really brought about a change in the debate between economists and corrective justice theorists—and this is *not* due to the fact that the economists' shift has not brought about a large practical shift to their view, because even if it had, the new view would still diverge from the corrective justice view in the same respects in which the traditional view did. Both economic views disagree with corrective justice views on the forward-looking / backward-looking issue and on the substantive question of what our societal goals should be.

In the remainder of this Article, the position that will be attributed to the economist is the happiness-based view—both because it is the most up-to-date version of the economists' view and because it is a more plausible version. The term “efficiency,” however, is often used by authors both to refer to economic efficiency and to happiness-based efficiency, and thus this term could create confusion. So as to avoid this, this Article will—from hereon out—use the term “efficiency” to refer to happiness-based efficiency, unless explicitly stated otherwise.

B. *The Corrective Justice Theory*

The “corrective justice” approach to tort law is the other main lens through which tort law is viewed. Corrective justice does not refer to a single approach, but rather to a family of similar views.¹⁹ Among others, proponents of corrective justice accounts of tort law include George Fletcher, Richard Epstein, John Borgo, Jules Coleman, and Ernest Weinrib, with Coleman and Weinrib being the most-often cited.²⁰ Despite there being differences between their accounts, the convergences are more plentiful than the divergences, and their views all share the central tenet of the corrective justice theory: “[T]ort law is best explained by corrective justice” because “at its core tort law seeks to repair wrongful losses.”²¹ On this view, tort law is backward-looking and it involves the claims that one person has against

Owen ed., 1995).

¹⁸ *Id.*

¹⁹ Keating, *supra* note 3, at 298.

²⁰ *Id.* at 298–99 n.11

²¹ COLEMAN, *supra* note 6.

another person for the rights violations that were the result of the defendant's wrongful conduct. Thus, tort law aims to return the parties to the equilibrium that was disturbed by the wrongful conduct. Whether this equilibrium to which corrective justice seeks to return the parties is itself just, is an important question, but this is a question for distributive justice. In order to endorse the importance of corrective justice, one must think that there is an account of distributive justice that explains the value of a particular equilibrium point, but the question of corrective justice is nevertheless independent from the question of distributive justice. Corrective justice theorists can share the belief that corrective justice is important, yet hold conflicting theories of distributive justice. What corrective justice theories of tort law hold in common, though, is the belief that tort law is a backward-looking institution that aims to repair wrongful losses.²²

While economic theorists of torts have argued unrelentingly that corrective justice theorists are utterly mistaken and that tort law is only concerned with maximizing efficiency to society going forward, modern corrective justice theorists have been *even more adamant* in denying the plausibility of the economic theory of tort law.²³ The idea of assessing liability between two litigants at bar solely by considering the costs and benefits for future members of society going forward strikes corrective justice theorists as unfair and barbaric.²⁴ Characterizing the corrective justice theorists' concerns, Gregory Keating writes: "[Deterring] cheapest cost-avoiders from committing future harms is no more imposing justified liability in tort than hanging the innocent to deter future crimes is imposing justified criminal punishment."²⁵ For corrective justice theorists, forward-looking concerns simply are (or should be) off the table in tort adjudication.²⁶ While different varieties of this argument from fairness are offered, what they hold in common is the position that sacrificing the current litigants for the benefits of future individuals is inappropriate.

In addition to arguing that a forward-looking approach to tort law would be unfair, corrective justice theorists also argue that the economic account simply does not square with the facts of what occurs in the tort system. According to Coleman, if tort were a forward-looking institution, we would not necessarily create incentives for future members of society by holding those who commit the tortious wrongs liable.²⁷ This would be an "oddly

²² For an illuminating discussion about the relationship between distributive justice and corrective justice, see John Gardner, *What is Tort Law For? Part 2. The Place of Distributive Justice*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW (John Oberdiek ed., Oxford Univ. Press 2014).

²³ See COLEMAN, *supra* note 6.

²⁴ *Id.*

²⁵ Keating, *supra* note 3, at 303.

²⁶ *Id.*

²⁷ See COLEMAN, *supra* note 6.

indirect way of inducing other people to behave appropriately in the future,” and there would be more direct routes available to accomplish this regulatory goal.²⁸ Said another way, a concern is that “[e]conomic analysis . . . cannot offer an equally elegant and persuasive explanation of tort’s adjudicative structure.”²⁹ Another concern that corrective justice theorists raise for economic accounts is the fact that tort law adjudication uses concepts that are essentially backward-looking. Coleman writes: “The relations among the central concepts of tort law—wrong, duty, responsibility, and repair—are best understood as expressing the fundamental normative significance of the victim-injurer relationship as it is expressed in the principle of corrective justice.”³⁰

Thus, as was the case for the economists’ claims, the corrective justice theorists’ view is comprised of two key components, and each component consists of both a normative and descriptive portion: First, the law *should not be* and *is not* forward-looking (but rather, *should be* and *is* backward-looking).³¹ Second, in looking backward, what we *should* seek to do and what we *do* seek to do is repair wrongful losses.³²

C. Preliminary Reasons for Thinking that the Two Theories Are Compatible

Prima facie, corrective justice theory and the traditional economic view seem to be theories of tort that are conceptually distinct and that might prescribe different assignments of liability in some, if not many, tort suits. Nevertheless, both theories might be somewhat attractive in their own right. Further, in cases where the two theories yield the same prescription, many proponents of one theory would likely at least find the goal of the other theory to be a collateral benefit of deciding the case in accordance with one’s favored theory.³³ In other words, a corrective justice theorist, for example, might consider it to be a happy result of bringing about corrective justice in case X v. Y, that society’s future behavior will, as a result, lead to a more efficient allocation of resources. Thus, given that there might be some attractive aspects to each theory, a question naturally arises: Despite their apparent differences, is corrective justice theory compatible with the traditional economic theory of tort law? The common answer has been that they are not compatible, but this Article will argue that they are.

As discussed, there are two main ways in which the economic theory of tort is different from the corrective justice theory of tort. First, the economic theory is forward-looking whereas corrective justice is backward-looking.

²⁸ Keating, *supra* note 3, at 303.

²⁹ *Id.* at 305.

³⁰ COLEMAN, *supra* note 6, at 23.

³¹ See Posner, *supra* note 17, at 99–100.

³² See *id.*

³³ There might be some outliers, and Coleman might be one.

Second, the economic theory explicitly adopts efficiency as a societal goal, and actions in violation of this goal are what trigger liability (or, according to Posner, they are what constitute the substantive notion of “wrongful conduct”).³⁴ Corrective justice theorists, on the other hand, deny that actions in violation of economic efficiency constitute wrongful conduct, although they do not provide a clear proposal of what precisely should constitute wrongful conduct.³⁵

What is striking about the arguments made by corrective justice theorists is that they often do not carefully distinguish between these two components of the economic theory of tort law.³⁶ They frequently consider three different arguments to all be arguments against the economic theory of tort, and they treat the arguments interchangeably, often equivocating on the term “economic theory of tort law.” The first set of these arguments is comprised of arguments against there being a forward-looking aspect of tort law.³⁷ The second set of these arguments is comprised of arguments against efficiency as a societal goal (and against the notion of inefficient behavior constituting a potential substantive notion of “wrongful conduct”).³⁸ Third, there are arguments against the full economic position—i.e., arguments against the view of tort that is forward-looking *and* appeals to efficiency as a societal goal.³⁹ As a result of this lack of clarity, corrective justice theorists are not as successful as they think they are in arguing against economists.

Despite making arguments of all three types listed above, corrective justice theorists seem to be most committed to showing tort to be a backward-looking institution.⁴⁰ When they decry forward-looking accounts of tort law, however, they generally cite the alleged absurdities entailed by the entire economic position—i.e., the absurdities that they think would result if tort law were forward-looking *and* society’s goal were to maximize economic efficiency.⁴¹ While a successful identification of unattractive aspects of the full economic position would certainly give reason to doubt the full economic account, identifying these unattractive aspects would not necessarily give reason to doubt a forward-looking account of tort law that is not encumbered by a notion of efficiency.

³⁴ See generally Posner, *supra* note 17.

³⁵ See, e.g., COLEMAN, *supra* note 6.

³⁶ See, e.g., *id.*; Keating, *supra* note 3.

³⁷ See, e.g., COLEMAN, *supra* note 6; Keating, *supra* note 3.

³⁸ See, e.g., COLEMAN, *supra* note 6; Keating, *supra* note 3.

³⁹ See, e.g., COLEMAN, *supra* note 6; Keating, *supra* note 3.

⁴⁰ There is much evidence for this, but also indicative of this judgment is the fact that corrective justice theorists never articulate a positive account of “wrongful conduct.” Rather, when addressing “wrongful conduct,” they simply gesture at an account while directing most of their efforts toward showing the faults of the economists’ position. See, e.g., COLEMAN, *supra* note 6, at 36.

⁴¹ See, e.g., *id.*; Keating, *supra* note 3.

As discussed above, one of the main concerns articulated by corrective justice theorists is that a forward-looking tort law would prescribe unattractive results—for example, the sacrifice of the rights or welfare of a litigant for the benefit of future members of society.⁴² This, of course, assumes that a forward-looking tort law *would* prescribe different results. Perhaps there might be cases where the full economic account would prescribe different results than would the backward-looking and non-efficiency-based notion of corrective justice, but it is not clear that the forward-looking and backward-looking natures of the two accounts are contributing at all to the diverging prescriptions. If we hold the substantive notion of “wrongful conduct” constant—be it an efficiency notion or a more murky corrective justice notion—it is far from clear that forward-looking and backward-looking accounts would *ever* yield different prescriptions in tort suits.

In light of these suspicions, this Article will now explore the question of whether the forward-looking and backward-looking accounts of tort law are in fact compatible.

II. POSNER’S AND RAWLS’S COMPATIBILITY CLAIMS

As mentioned in Part I, in the vast majority of the literature on tort, it is a forgone conclusion that forward-looking and backward-looking accounts of tort are incompatible.⁴³ Two exceptions exist, however: Posner and Rawls. Posner and Rawls both think that forward-looking and backward-looking accounts can in fact be compatible—for related, but different reasons.⁴⁴ This Part will describe and analyze the positions that Posner and Rawls offer, and it will conclude that neither one provides an account that satisfactorily shows that forward-looking and backward-looking accounts of tort are compatible.

A. Posner’s Compatibility Claim

According to Posner, the connection between corrective justice and the economic theory of tort law is a deep one. He writes: “Once the concept of corrective justice is given its correct Aristotelian meaning, it becomes possible to show that it is not only compatible with, but required by, the economic theory of law.”⁴⁵ To support this point, Posner sets out to interpret Aristotle’s pioneering discussion of corrective justice in Book V, Chapter 4 of the *Nicomachean Ethics*.⁴⁶ In doing so, he finds much that lies in common

⁴² See, e.g., COLEMAN, *supra* note 6, at 36; Keating, *supra* note 3.

⁴³ See *supra* Part I.

⁴⁴ See *infra* Parts II.A and II.B.

⁴⁵ Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 201 (1981).

⁴⁶ ARISTOTLE, *THE NICOMACHEAN ETHICS* (David Ross trans., rev. ed. 1980).

between Aristotelian corrective justice and its descendants—current corrective justice theories.⁴⁷ Posner’s research into Aristotelian notions of corrective justice, however, reveals one key feature of corrective justice that is emphasized in the Aristotelian account, but which Posner considers to be largely overlooked by current accounts: “[C]orrective justice is a procedural principle: the meaning of wrongful conduct must be sought elsewhere.”⁴⁸ For Aristotle, seeking to carry out corrective justice would not in and of itself determine what should be done.⁴⁹ In order to know what corrective justice calls for, one would have to appeal to a notion of “wrongful conduct,” and determining what constitutes “wrongful conduct” is an inquiry to be carried out independently. Thus, according to Posner, the Aristotelian notion of corrective justice can be filled in with any notion of “wrongful conduct,” and thus it is compatible with any account of what constitutes “wrongful conduct.”⁵⁰ As Posner notes, Aristotle does delineate an account of “wrongful conduct” in Chapter 8 of Book V of the *Nicomachean Ethics*, but Aristotle makes clear that corrective justice would be compatible with other accounts.⁵¹ Further, Aristotle’s own account of “wrongful conduct” is not broad enough to include negligent behavior, and thus even current corrective justice theorists—who do want to think of negligence as potentially wrongful conduct—supply their own non-Aristotelian concept of “wrongful conduct.”⁵²

Given this analysis of Aristotle, Posner believes that corrective justice is both compatible with and required by the economic theory of tort law.⁵³ It is compatible with the economic theory, according to Posner, because economics simply provides a substantive notion of wrongful conduct that can fill in the void provided by Aristotle’s procedural principle.⁵⁴ According to Posner, the substantive notion of wrongful conduct imported by economics is “justice as efficiency.”⁵⁵ On this account, any action that does not maximize efficiency is wrongful: “If A fails to take precautions that would cost⁵⁶ less than their expected benefits in accident avoidance, thus causing an accident in which B is injured . . . the concept of justice as efficiency will be

⁴⁷ Posner, *supra* note 45.

⁴⁸ *Id.* at 203.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 201; ARISTOTLE, *supra* note 46.

⁵² Posner, *supra* note 45, at 201; ARISTOTLE, *supra* note 46.

⁵³ Posner, *supra* note 45.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ One can understand the word “cost” here either in terms of happiness, or in terms of financial costs—but where financial costs are a proxy for happiness.

violated.”⁵⁷ Thus, the forward-looking economic account can be understood as an account that is compatible with corrective justice.

Posner also argues that corrective justice is required by the economic theory of tort. As Posner says, “justice as efficiency” cannot be brought about unless incentives are created to ensure that people act in accordance with this principle.⁵⁸ This, Posner says, requires that we administer corrective justice in cases where parties violate the principle.⁵⁹ Thus, unless the wrongs are rectified, the economic theory of law is unable to function.

Anticipating criticism, Posner considers an important objection at the end of his article. As he says, one might think that corrective justice and economic theory are in fact incompatible, because while they both result in the similar forms of redress, “they do so for different reasons.”⁶⁰ One might think that the economic theorist carries out corrective justice merely in order to maximize efficiency going forward, while the Aristotelian carries out corrective justice in order to promote some notion of backward-looking justice.⁶¹ As Posner argues, though, this comparison is mistaken.⁶² In the *Nicomachean Ethics*, Aristotle does not explain the rationale of carrying out corrective justice or explain the end goal, but, rather, he merely explains what corrective justice is, and that there is a duty to carry out corrective justice.⁶³ Thus, Posner concludes that it is perfectly coherent to understand corrective justice as an instrumental good—a good that is important because of the future benefits it will bring about.⁶⁴ For Posner, corrective justice is a good because it is an instrument used to affect incentives influencing future behavior, thus bringing about the incentives that will be most efficient.⁶⁵ The resulting maximization of happiness, Posner says, is the “ultimate objective of the just state.”⁶⁶

While perhaps Posner accomplishes the goal of his paper (demonstrating the compatibility of the economic theory of tort and the Aristotelian notion of corrective justice), the conclusion is not as satisfying as we might hope. He does not demonstrate the compatibility of the economic theory of tort and *current* notions of corrective justice—*notions that, unlike Aristotle’s, do articulate a rationale for corrective justice: the intrinsic value of backward-looking justice.* Posner concedes as much, saying that he has “limited discussion to *Aristotle’s* concept of corrective justice and other concepts

⁵⁷ Posner, *supra* note 45.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 206.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

might lead to other results, perhaps inconsistent with the economic approach.”⁶⁷ Nevertheless, Posner takes himself to have accomplished two important tasks. First, he has shown that corrective justice, in its original form, is compatible with economic theory, and second, he believes he has shifted the burden to current corrective justice theorists to “explain and justify their unorthodox usage” of the term “corrective justice.”⁶⁸ Posner thinks that once modern corrective justice theorists attempt to explain and justify their usage, they will realize that they do subscribe to the Aristotelian view, and to the extent that this is the case, they will realize that corrective justice is compatible with the economic theory of tort law.⁶⁹

The problem for Posner, however, is that it’s far from obvious that he has succeeded in shifting the burden to modern corrective justice theorists. Or, if he has, it’s not obvious that modern corrective justice theorists have been unable to meet the challenge. Strong reasons have been provided for thinking that corrective justice is intrinsically valuable, or at least that the backward-looking equilibrium that it seeks to restore is intrinsically valuable. Further, it’s not clear what hangs on modern corrective justice theorists justifying “their unorthodox usage” of the term “corrective justice.”⁷⁰ Whatever it is that the current corrective justice theorists want to call their position, it seems clear that a tenet of this position is that corrective justice is intrinsically valuable. To the extent that this is the case, Posner’s view seems to be that modern corrective justice theory and the economic theory of tort are incompatible. He thinks that corrective justice is *merely* an instrument for affecting incentives that influence future behavior, and, more specifically, for bringing about the incentives that will be most efficient.⁷¹

B. Rawls’s Compatibility Claim

In his seminal article, *Two Concepts of Rules*, John Rawls takes up the question of the relationship between forward-looking and backward-looking aspects of the law—as well as the backward-looking and forward-looking aspects of other practices, such as promising.⁷² Rawls’s discussion of the law focuses on the context of the criminal law and not tort law, but his points apply analogously to the context of tort law if the appropriate substitutions are made (e.g., substitute corrective justice for retributivism).⁷³ While there are some differences between the two contexts, Rawls takes his points to

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² John Rawls, *Two Concepts of Rules*, 64 THE PHIL. REV. 3 (1955).

⁷³ *Id.*

apply broadly enough to encompass the backward-looking and forward-looking debate in the context of tort law.

Framing the debate, Rawls writes:

For our purposes we may say that there are two justifications of punishment. What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of his act. The state of affairs where wrongdoer suffers punishment is morally better than the state of affairs where he does not . . .

What we may call the utilitarian view holds that on the principle that bygones are bygones and that only future consequences are material to present decisions, punishment is justifiable only by reference to the probable consequences of maintaining it as one of the devices of the social order. Wrongs committed in the past are, as such, not relevant considerations for deciding what to do. If punishment can be shown to promote effectively the interest of society it is justifiable, otherwise it is not.

I have stated these two competing views very roughly to make one feel the conflict between them: one feels the force of *both* arguments and one wonders how they can be reconciled.⁷⁴

Having posed the challenge of reconciling the two conflicting, yet independently forceful, arguments, Rawls famously offers the following solution, which merits a lengthy quotation:

One can say . . . that the judge and the legislator stand in different positions and looking different directions: one to the past, the other to the future. The justification of what the judge does, *qua* judge, sounds like the retributive view; the justification of what the (ideal) legislator does, *qua* legislator, sounds like the utilitarian view The answer, then, to the confusion engendered by the two views of punishment is quite simple: one distinguishes two offices, that of the judge and that of the legislator, and one

⁷⁴ *Id.* at 4–5.

distinguishes their different stations with respect to the system of rules which make up the law; and then one notes that the different sorts of considerations which would usually be offered as reasons for what is done under the cover of these offices can be paired off with the competing justifications of punishment. One reconciles the two views by the time-honored device of making them apply to different situations.

But can it really be this simple? Well, this answer allows for the apparent intent of each side. Does a person who advocates the retributive view necessarily advocate, as an *institution*, legal machinery whose essential purpose is to set up and preserve correspondence between turpitude and suffering? Surely not. What retributionists have rightly insisted upon is that no man can be punished unless he is guilty, that is, unless he has broken the law. Their fundamental criticism of the utilitarian account is that, as they interpret it, it sanctions an innocent person's being punished (if one may call it that) for the benefit of society.

On the other hand, utilitarians agree that punishment is to be inflicted only for the violation of law. They regard this much as understood from the concept of punishment itself. The point of the utilitarian account concerns the institution as a system of rules: utilitarianism seeks to limit its use by declaring it justifiable only if it can be shown to foster effectively the good of society. Historically it is a protest against the indiscriminate and ineffective use of the criminal law. It seeks to dissuade us from assigning to penal institutions the improper, if not sacrilegious, task of matching suffering with moral turpitude. Like others, utilitarians want penal institutions designed so that, as far as humanly possible, only those who break the law run afoul of it. They hold that no official should have discretionary power to inflict penalties whenever he thinks it for the benefit of society; for on utilitarian grounds an institution granting such power could not be justified.⁷⁵

In many ways, what Rawls says is similar to what Posner says. Both authors think that the legal institution itself is justified by forward-looking concerns—as Rawls says, the “institution as a system of rules” is justified by

⁷⁵ *Id.* at 6–8. Thirteen years later, H.L.A. Hart offers a very similar account to the one that Rawls gives us here. See generally H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (Oxford Univ. Press 1968).

utilitarianism, which holds “the principle that by-gones are by-gones and that only future consequences are material to present decisions.”⁷⁶ Further, both think that the backward-looking aspect of the law is necessary in order to carry out the institution’s forward-looking goals, and both think that this is the only reason why there is a backward-looking aspect of the law.⁷⁷ Their views about the backward-looking aspect of the law do seem to differ somewhat, however. For Posner, the backward-looking aspect of tort law has no intrinsic value—it is merely valuable instrumentally.⁷⁸ Rawls, however, offers a more nuanced account. He thinks that the reason we have a backward-looking aspect of the law is merely that it enables the institution—justified by forward-looking considerations—to function,⁷⁹ but he seems to think that, once we have the law, it creates intrinsic backward-looking value, to which a retributivist would rightfully appeal.⁸⁰ In other words, Rawls seems to think that the existence of the law brings into existence intrinsic backward-looking values, and, in light of the existence of the legal system, the law now has backward-looking and forward-looking aspects that are both of intrinsic value. This account certainly seems to be closer than Posner’s to an account that truly exhibits full compatibility between the intrinsically forward-looking and the intrinsically backward-looking aspects of tort, but it still seems to fall short.

Rawls thinks that this account will appease both self-proclaimed utilitarians and self-proclaimed retributivists, but this seems doubtful, and especially with respect to the retributivist. In the passage quoted above, Rawls writes: “Does a person who advocates the retributive view necessarily advocate, as an *institution*, legal machinery whose essential purpose is to set up and preserve correspondence between turpitude and suffering? Surely not.”⁸¹ This seems to be mistaken. As has been discussed (in the context of tort law, but the same points apply here), corrective justice theorists think that the very purpose of tort law, as an institution is to carry out corrective justice⁸²—in other words, return society to the equilibrium at which it rested before having been disturbed by the wrongful conduct. Furthermore, it seems implausible to suggest that moral norm of corrective justice is solely a function of the existence of a legal norm of corrective justice.⁸³ Even

⁷⁶ Rawls, *supra* note 72, at 4–5.

⁷⁷ *Id.*; Posner, *supra* note 45.

⁷⁸ Posner, *supra* note 45.

⁷⁹ Rawls, *supra* note 72.

⁸⁰ *Id.*

⁸¹ *Id.* at 6–8.

⁸² See COLEMAN, *supra* note 6.

⁸³ See John Gardner, *What Is Tort Law For? Part 1. The Place of Corrective Justice*, 30 LAW AND PHIL. 1, 21 (2011). See generally John Gardner, *Backward and Forward with Tort Law*, in LAW AND SOCIAL JUSTICE (Joseph K. Campbell et al.

without a legal system carrying out corrective justice, it seems that we would have moral intuitions about the appropriateness of redress for wrongful inflictions of harm. To a certain extent, however, Rawls does seem to be onto something when he suggests that backward-looking legal norms could bring about backward-looking moral norms: It does seem possible that people's sense of morality is at least somewhat a function of the law. In other words, people tend to think to some degree that breaking the law is a form of free riding and, as a default, it seems to be that one might think that breaking the law is immoral. Thus, it does seem as though Rawls is right in identifying the phenomenon that the law affects people's moral intuitions.⁸⁴ This is an illuminating point, and also hard to deny. This notwithstanding, however, it also seems implausible to deny what Rawls himself denies: that our moral intuitions regarding corrective justice and retribution exist independently of the law, and part of the reason that we have the law is because of the fact that we have these backward-looking intrinsic values.⁸⁵

In his article, Rawls does not go as far as to state explicitly that it would be incompatible for the law's purpose to be intrinsically backward-looking and also intrinsically forward-looking, but we can infer as much from what he does say. He sets out to reconcile the forward-looking and backward-looking justifications for the law, and he concludes that one can do so if one employs "the time-honored device of making them apply to different situations."⁸⁶ This does not say explicitly that we need to use this "time-honored device," but it would certainly be a much simpler and much more straightforward reconciliation to simply show that the two justifications simultaneously apply in all of the same situations. Thus, if Rawls thought he could show that the justifications applied in the same situations, he would not resort to the "time-honored device." Furthermore, Rawls does explicitly say that, upon reflection, a retributivist would concede that he does not believe that the backward-looking values that he espouses apply to the legal system as a whole.⁸⁷

Having just discussed Rawls's account of retributivism and the backward-looking aspect of the law, we see that Rawls is *not* espousing an account of the law on which the backward-looking aspect of the law is truly of intrinsic value—and thus he is *not* espousing an account of the law on which forward-looking *and* backward-looking aspects of the law are each truly of intrinsic value. Thus, Rawls is *not* arguing that forward-looking and backward-looking accounts of the law are wholly compatible in the way that

eds., MIT Press 2005); John Gardner, *Corrective Justice, Corrected*, 12 DIRITTO & QUESTIONI PUBBLICHE 9 (2012).

⁸⁴ Rawls, *supra* note 72.

⁸⁵ *Id.*

⁸⁶ *Id.* at 6–8.

⁸⁷ Rawls, *supra* note 72.

this Article will argue (in Part III) that they are.⁸⁸ Having thus already determined the answer to the question of whether Rawls offers a satisfactory explanation of how forward-looking and backward-looking accounts of the law can be compatible, we need not investigate whether Rawls's account of the utilitarian position is plausible in order to arrive at an answer to the compatibility question. This notwithstanding, it is worth briefly considering the plausibility of Rawls's account of the utilitarian position, because the points raised and discussed here will lay the foundations for discussions in Part III.B and Part V.

Would a utilitarian be satisfied with Rawls's so-called reconciliation, or would he be dissatisfied just as the retributivist would be? A utilitarian would agree with Rawls that the justification of the institution as a whole (and, more specifically, the decisions made by the legislator himself) is, and should be, justified by forward-looking considerations. The question that arises for the utilitarian is whether he would sign on to Rawls's claim that when it comes to the role of the judge, *qua* judge, forward-looking considerations should not apply, and that this is the realm merely of backward-looking considerations. In other words, would someone who thinks that the purpose of tort law is to bring about the best result for society going forward think that Rawls's system stays true to, and accomplishes, this goal? Or would he think that Rawls's seeming concession means that his account is sacrificing at least some forward-looking benefits and thus straying somewhat from the position that tort should bring about the best results for society going forward?

At first, it might seem that a utilitarian would want not only that there be an efficiency analysis carried out at the level of creating the legal institution and at the level of legislation, but also at the level of the judge. The forward-looking thinker seemingly would want all decisions to be made based on forward-looking considerations. Rawls, however, points out that a system that allowed all decisions throughout the system to be made according to efficiency analyses would be self-defeating—it would lead to a less efficient result overall.⁸⁹ As an example, he asks that we imagine an institution called “telishment . . . which is such that the officials set up by it have authority to arrange a trial for the condemnation of an innocent man whenever they are of the opinion that doing so would be in the best interest of society.”⁹⁰ This would be an institution where officers at all levels, and not merely the legislators, are carrying out efficiency analyses. According to Rawls, as a practical matter, there are numerous reasons for why this would be an

⁸⁸ This Article thus has argued and will argue that Rawls is mistaken in his beliefs that forward-looking and backward-looking aspects of tort are not both of intrinsic value and thus that forward-looking accounts and backward-looking accounts are not wholly compatible.

⁸⁹ Rawls, *supra* note 72.

⁹⁰ *Id.* at 11.

inefficient system on utilitarian terms.⁹¹ To name two: First, people would constantly be in fear of being telished even if they had not committed a crime, and second, people wouldn't know what their attitudes should be towards people who have been telished, because they wouldn't know whether these people were people who committed the crimes and thus would be punished under an institution of punishment or whether they were innocent and while appropriately telished, would not be appropriately punished.⁹² Interestingly, this reasonable conclusion that Rawls draws seemingly relies for support in part (though certainly not in full) on what Rawls denies—that we have pre-legal notions and intuitions regarding the backward-looking view of corrective justice and retribution.⁹³

Thus, Rawls thinks that even a utilitarian, in designing an institution, while designing it to be as efficient in utilitarian terms as possible, would thus not design a system in which a utility calculus would be carried out by all offices.⁹⁴ As such, given these practical considerations, it seems that a utilitarian would choose to design his system in a *rule utilitarian* manner—by creating rules that would not be mere rules of thumb, but which would exist to be followed without exception, because the system in which this occurs would be the one that would be best on the whole.⁹⁵ These rules

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Though it is apt to describe this as being a system designed in a “rule utilitarian manner,” the system described here is importantly different from rule utilitarianism itself, and thus the system here is immune to the main objections that cripple rule utilitarianism itself. According to rule utilitarianism, each agent follows rules because the belief is that this is moral thing to do—even if one has reason to think that the current case is one where the rules is not utility-maximizing. This gives rise to the objection that rule utilitarianism either amounts to rule worship (if one follows the rule in cases of this sort), or it collapses into act utilitarianism (if one adopts a more precise and accurate rule to correctly address the case in question). As such, rule utilitarianism is generally thought to be an unstable compromise between act utilitarianism and other rule-based theories, e.g. of the deontological sort. In Rawls's system, however, the party applying the rule—i.e. the judge—is not a thinker who is trying to do the right thing or make the best decision on utilitarian terms. Thus, the instability objections do not arise here. Explaining this is precisely part of Rawls's point when he explains the distinction between the two different concepts of rules that he discusses. This notwithstanding, a question similar to the rule utilitarian instability question arises when the higher-order question of whether this is the best institution is asked. At that point, it might seem that a utilitarian would be in an unstable position, akin to that of the rule utilitarian, in espousing the current view. This, however does not seem to be unstable in the same way, because here the rule of thumb isn't something to constrain the calculation abilities of the agent in question (here, the judge), but rather, the benefit of the strict rule is brought about because of the bad effects on society that would result from having a system

would take the form of laws as well as other administrative policies and regulations regarding prosecutions, investigations, and other administrative tasks of officers of the state.

One might ask, however, whether this type of a system is really the system that would maximize utility. Perhaps, one might say, a system of telishment would be inefficient because of all the disvalue resulting from the fact that people know that it is the policy that is in effect, and thus an ideal system would be one in which utility calculations do occur by all officers of the state, but in which the general population does not know that this is the case.⁹⁶ Suppose, for example, that the government from time to time takes part in scapegoating, where the government frames an innocent individual of a crime so as to avert a riot that would have caused an enormous amount of harm. If carried out successfully, this would seemingly be efficient. While Rawls concedes this, he thinks that practical factors (such as how to successfully keep the truth private) will prevent such a non-transparent regime from being feasible and remaining non-transparent, and thus successful.⁹⁷ In light of these considerations, and in light of the disutility associated with a system of telishment, Rawls seems to be right that a forward-looking theorist would likely be satisfied with Rawls's "reconciliation."⁹⁸

III. THE COMPATIBILITY OF FORWARD-LOOKING AND BACKWARD-LOOKING ACCOUNTS OF TORT LAW

A. *The Meaning of the Terms "Forward-Looking" and "Backward-Looking"*

According to Posner, it was plausible to maintain that forward-looking and backward-looking accounts of tort law are compatible, but the backward-looking aspect of tort law is merely instrumentally valuable.⁹⁹ It merely is part of the machinery that enables us to achieve, through incentive effects on future behavior, what is of intrinsic value—efficient results for the future. Rawls offers a different account, but one which similarly holds that the reason for having law and for deciding what in fact should be a law is *only*

where the court carried out forward-looking efficiency analyses. Thus, it seems that the current system, though it raise issues commonly raised in the context of rule utilitarianism, will be able to be defended with a cogent explanation of why it is not unstable in the way that rule utilitarianism is.

⁹⁶ For a pioneering and insightful discussion regarding the interesting question of whether morality should be "esoteric," see HENRY SIDGWICK, *THE METHODS OF ETHICS* 489–90 (7th ed. 1907) (1874).

⁹⁷ Rawls, *supra* note 72.

⁹⁸ *Id.*

⁹⁹ Posner, *supra* note 45.

that the system of law in general, and any specific law in particular, is of intrinsic value in the forward-looking sense.¹⁰⁰ According to corrective justice theorists, however, the backward-looking aspect of tort law is of intrinsic value and is a (or *the*) reason for having the system of tort law and for having a particular action be tortious. This Article so far has suggested that it could be the case that tort law can simultaneously be intrinsically forward-looking and intrinsically backward-looking. In other words, these two claims might be compatible.

In order to assess the truth of this possibility, we must first be sure that we understand precisely what we mean when we say that the forward-looking aspect of tort law is of intrinsic value or that the backward-looking aspect is of intrinsic value. As it happens, though, neither term is as straightforward as it seems. Further, the former seemingly is much more straightforward than the latter. To say that the forward-looking aspect of tort law is of intrinsic value is simply to say that it is good in and of itself to bring about good results going forward—with the term “good results” being left to be filled in with one’s preferred substantive notion of societal good.

It is less clear what one might mean if one says that the backward-looking aspect of tort law is of intrinsic value. Why is this unclear? First off, the term itself is somewhat confusing: Despite the fact that it’s called “backward-looking,” clearly whatever value is brought about by the disposition in the tort case will not affect the past. The past has passed us by. Thus it’s important to be clear that the theory is merely backward-*looking*—as opposed to backward-*affecting* or something of this sort. While this much might seem obvious, the immediate implication of this might not be. Since whatever backward-looking value is brought about by the case’s disposition will occur at or after the time of the conclusion of the case, this value—whatever it turns out to be and to whomever it turns out to accrue—will have to be included in the forward-looking account’s calculus as well. As such, at this early stage of the analysis, there already seems to be some evidence that the backward-looking and forward-looking views might not be related quite in the way that it has been thought they are.

One could deny that a court’s judgment in favor of a tort plaintiff would affect the events of the past while still maintaining that the value of the judgment in some sense is in the past or attaches to past events or states of affairs. This is not *incoherent*—and in fact some writers do seem to articulate a view along these lines¹⁰¹—but it seems much more plausible to suggest that the value of the court’s judgment accrues at or after the time of the judgment. Further, if a decision is bringing about value at or after the time of the judgment, it seems that this value must be experienced by particular people, as a function of the improved experience, on net, of these individuals. This too could be denied, and thus there might be people who

¹⁰⁰ Rawls, *supra* note 72.

¹⁰¹ See COLEMAN, *supra* note 6.

would hold that the backward-looking value does occur at or after the judgment, but that it is a value that applies to society on the whole, and not to individual people. Thus, there are at least three views one might hold about what the backward-looking value actually is, but it seems that the most plausible version is the version that describes overall value as a function of the value added to particular lives—after all, it seems that everything that is valuable to us is valuable to us because of its effect on lives. At the very least, however, even if one did espouse one of the two views that appear to be less plausible, it seems that these other views could be characterized as merely an additional way of *describing* the very same set of facts as those on which the value accrues to particular individuals in the present and future. In light of these points, it seems reasonable to proceed within a framework in which backward-looking value must be experienced by particular people as a function of the improved experience, on net, of these individuals.

The question then becomes: To whom does this backward-looking value accrue? The clearest answer here is that the plaintiff—who was wronged and who has now recovered his losses—is the one who gets this value. Cases will vary, but it is also likely that individuals who are unrelated to the case but who have heard about the wrong that was inflicted on (or befell) the plaintiff will get value from hearing of the judgment in the plaintiff's favor and against the defendant. In some cases this value gotten by third parties might take the form not of greater well-being, but rather, the form of averting the negative feelings they might have had if they had become aware of a decision in favor of the defendant.

At this point it is important to make a few general points. First, this backward-looking value of a tort judgment, importantly, is an intrinsic value. According to Posner, the backward-looking aspect of a tort case was valuable only for instrumental reasons—in particular, tort judgments against tortious defendants would bring about the appropriate incentives to maximize efficiency going forward.¹⁰² The backward-looking value discussed here, though, is intrinsic. It is valuable in and of itself. Second, in light of the fact that both backward-looking and forward-looking intrinsic values occur after the tort judgment, it is important to make clear what the distinction is between the two. A backward-looking intrinsic value, according to the analysis here, is a value that accrues to individuals after the court's decision, but which is a function either of a plaintiff's financial gain or of an individual's—be it the plaintiff's or a third party's—sentiments regarding the fairness, appropriateness, or general fittingness of the court's judgment, in light of the wrongness of the events that gave rise to the lawsuit. This is what it means for the value to be backward-looking.

A forward-looking intrinsic value, on the other hand, can now be understood in two different ways—seemingly both of which had been

¹⁰² See Posner, *supra* note 45.

assumed beforehand to be equal. First, we can understand the forward-looking intrinsic value to be the value brought about to society going forward that is due to the incentives and actions brought about as a result of the expectations that liability will in the future be applied as it was in this case. In other words, this is the value brought about by how people will act in the shadow of the recent addition to (or entrenchment, or clarification, or specification of, or zero change at all to) the law. On the other hand, we can understand the forward-looking intrinsic value to be the value brought about for society going forward in total, regardless of the value's mechanism or the form it takes. The difference between these two forward-looking measures of intrinsic value is that the first one does not include the backward-looking intrinsic value, whereas the second one does.

Which of these two forward-looking intrinsic value measures, then, will be the one that is relevant for the inquiry into whether the forward-looking and backward-looking aspects of tort law can each simultaneously be of intrinsic value? Both measures could be relevant in different ways, as will become clear in Part V, but, for the time being, we need not choose, and this is for the following reason: Even if the relevant comparison were only between the backward-looking account and the more inclusive of the two forward-looking accounts, unless the backward-looking intrinsic value of a judgment outweighed the value of the narrower of the two forward-looking accounts *in every single case where the backward-looking and the inclusive forward-looking views allegedly cut in opposite directions* (assuming, *arguendo*, what this article denies, that any cases of divergence exist), there wouldn't be full compatibility between the backward-looking intrinsic value and the inclusive forward-looking intrinsic value. Further, if there are or were cases of divergence between the backward-looking value and the narrow forward-looking value, there is no reason to think that, *in every single case*, the narrow forward-looking value would be moot because it would be outweighed by the backward-looking value. None of the writers who argue that forward-looking and backward-looking aspects of tort can diverge think that the narrow forward-looking value would be outweighed by the backward-looking value in every possible case.¹⁰³

Thus, if the claim that the backward-looking intrinsic value is compatible with the forward-looking intrinsic value is true, then the backward-looking intrinsic value will have to be compatible with both versions of the forward-looking intrinsic value claim. This, recall, is because the compatibility claim is not a claim that forward-looking intrinsic value and backward-looking intrinsic value accounts of tort law can be compatible in a tort case (i.e., that there is a possible case in which both would have intrinsic value), but, rather, that they go hand in hand—that in any case where one has intrinsic value, the other one does as well.

¹⁰³ See COLEMAN, *supra* note 6.

B. *The Distinction Between “The Law Itself” and “The Legal System on the Whole”*

Despite the fact that both Posner’s and Rawls’s discussions are about the possibility of there being compatibility between forward-looking and backward-looking accounts, it’s interesting to note that there is a very important way in which the subject matter they address is distinct. Posner addresses the question of whether there is compatibility between forward-looking and backward-looking accounts *of the law itself*, whereas Rawls addresses the question of whether there is compatibility between forward-looking and backward-looking accounts *of the whole legal system*. Both of these questions are interesting, important, and worthy of investigation and discussion in their own right, but it is crucial to distinguish between them. Though neither Posner nor Rawls necessarily is guilty of claiming to discuss one while in fact discussing or drawing conclusions about the other, neither author distinguishes their question from the related one that they are not addressing. Rawls does make the distinction between justifying an institution and justifying a particular execution of a rule, but, surprisingly, he does not distinguish his inquiry from an inquiry into the backward-looking and forward-looking aspects *of the law itself*.¹⁰⁴ As such, since the justification of the *execution* of a particular rule is a question under the umbrella of justifying the institution as a whole, questions regarding the backward-looking and forward-looking aspects *of the law itself* go untouched. As a result of Posner’s and Rawls’s failure to distinguish their question from the question they are not addressing, the distinction has gone somewhat unnoticed, and many future authors have muddied the waters by mistakenly treating the two questions interchangeably, and thus, unsurprisingly, have come to unwarranted conclusions.¹⁰⁵ In light of this, some further clarification will be helpful.

In what follows, this section will address various points that, though not discussed by Posner and Rawls, relate to the material that they do discuss, and are natural issues given rise to by Rawls’s distinction between justifying an institution and justifying a particular execution of a rule. The section will argue that we need to be clear and explicit about the distinction between claims about the forward-looking and backward-looking aspects of a government or legal regime on the whole (and compatibility between the two) and claims about the forward-looking and backward-looking aspects (and compatibility between the two) of *the law* (or even more specifically, a particular law). The law is one of many aspects of a government or legal regime. Among the extremely numerous other tasks a government has are

¹⁰⁴ See Rawls, *supra* note 72.

¹⁰⁵ See, e.g., COLEMAN, *supra* note 6; Keating, *supra* note 3.

the following three: prosecutions, investigations, and behavior by law enforcement and administrative officers.

In creating a governmental institution, it seems that people will want to create the best possible institution, defined according to some metric of goodness. In what follows, this section will take maximizing happiness as the maximandum, but analogous accounts can be described. Thus, for our purposes, suppose that someone justifying a governmental institution will want to maximize happiness. As described in Part III.A, this can be understood as the more inclusive version (or the all-things-considered version) of the forward-looking view. This inclusive forward-looking view of the institution will be similar to the inclusive forward-looking view of the law, in the sense that it will be made up of a backward-looking component and also a narrow forward-looking component. As was the case with the backward-looking account of the law itself, the backward-looking account of the legal institution on the whole will be the intrinsic value or disvalue brought about due to the sentiments regarding fairness to the litigants in the case at bar. The narrow forward-looking component in the context of value of the legal institution as a whole, however, will be different from the narrow forward-looking component in the context of the law itself. The latter was defined as benefits being brought about due to how people would act due to incentive effects of the law. The narrow forward-looking component in the context of the value of the legal institution as a whole, however, is not focused on changes in incentives brought about by a new law, since there might not be a new law, but rather, more broadly, on *all effects* of a decision. In the case of scapegoating, for example, there is no difference in the law that is brought about that affects one behavior. Rather, people's behavior is affected by their factual beliefs being different than they otherwise would be, and thus their emotions and motivations being different than they would be, but the changes in these beliefs and emotions are not precipitated by a change in the law itself.

Thus, consider once again Rawls's scapegoating case.¹⁰⁶ If scapegoating (or something that is similar in relevant respects) were carried out successfully in the hypothetical cases that corrective justice theorists are concerned about, this would seemingly maximize forward-looking results in the inclusive sense. It would have a bad backward-looking result for he who knew the truth (i.e., the victim of the scapegoating), but, as stipulated, it would bring about narrow forward-looking benefits that outweigh this backward-looking disvalue, and thus the inclusive forward-looking result would be positive. Thus, since in this type of a case the government on the whole's actions have a positive narrow forward-looking effect but a negative backward-looking effect, this is a clear example of a case that illustrates the possibility of a divergence between the forward-looking and backward-

¹⁰⁶ See Rawls, *supra* note 72.

looking aspects of a government's actions. At the very least, there will not *always* be compatibility between forward-looking and backward-looking aspects of the actions of a government or legal regime on the whole.

While perhaps a scapegoating case here and there would be likely to be feasible, however, it seems that a system that includes a greater amount of something like scapegoating (or even more extremely, a system that institutes Rawls's telishment) will bring about great anxiety and on the whole will not maximize happiness. This is an empirical question, but Rawls's point to this effect seems plausible. It seems quite possible that a society that maximizes happiness will be one that is transparent and that has law and that holds people liable if and only if they have violated laws.¹⁰⁷

Thus, though there might be potential divergences between backward-looking and (narrow) forward-looking accounts of a government, it seems possible that it might be the case that a government that in fact will be desirable according to either the backward-looking or (narrow) forward-looking account might always be desirable according to both. In other words, perhaps it might be the case that there *is* full compatibility between (narrow) forward-looking and backward-looking accounts of a government in governments that are desirable—i.e., where the inclusive forward-looking result is positive. Thus, the question now is whether this would in fact be the case.

This, then, is what brings us to the question of whether there is compatibility between the forward-looking and backward-looking aspects *of the law itself*. What ultimately matters to proponents of the forward-looking account and proponents of the backward-looking account is whether the society we live in has a government whose effect, on the whole, is consistent with the forward-looking or backward-looking account, respectively. Thus, if it is in fact the case that the types of societies discussed above—that are not transparent, governed by law, and holding people liable if and only if they have violated laws—are not desirable, we need not concern ourselves with these. The question then becomes whether societies that do meet these constraints have complete compatibility between the forward-looking and backward-looking aspects, and this will thus depend on the question of whether forward-looking and backward-looking accounts *of the law itself* are compatible. Thus, the question now is: Are the backward-looking and forward-looking accounts of the law (or, more specifically, tort law) compatible?

This foregoing discussion shows us two things. First, it explains the relationship between the compatibility question, as it pertains to the legal regime on the whole, and the compatibility question, as it pertains to the content of the law itself. This explains why the latter question is important, since, in practice, answering it is a means to answering the former question—

¹⁰⁷ *Id.*

and the former question is the broader and deeper one. Thus, we see the importance of the debate about the compatibility of forward-looking and backward-looking accounts of the law itself. Secondly, and perhaps even more importantly for this Article's purposes, this discussion flags a way in which many (if not most) authors have gone astray in debating the compatibility of forward-looking and backward-looking accounts of the law itself—and this, specifically, is the debate in the literature that this Article has taken as its focus. In their attempts to show the incompatibility of the forward-looking and backward-looking aspects of *the law itself*, authors have mistakenly pointed to cases of potential divergence between forward-looking and backward-looking aspects of *a government or legal system on the whole*.¹⁰⁸ This is a mistake, and this does not in any way speak to the question of compatibility between forward-looking and backward-looking accounts of the law itself. The paradigmatic example that illustrates this mistake is the way in which authors use the scapegoating case to draw inferences about the compatibility of the forward-looking and backward-looking accounts of the law itself.¹⁰⁹

Thus, going forward, if we are able to identify these mistakes and avoid making them, this will allow us to approach the compatibility question regarding the *law itself* with a much clearer lens. Now armed with this clearer lens, we turn to an unobstructed exploration of this question.

C. *The Compatibility Claim*

Having clarified what we mean by the intrinsic value of the backward-looking aspect of tort and the intrinsic value of the forward-looking aspect of tort, and having distinguished the compatibility question regarding the law itself from the compatibility question regarding the government or legal system on the whole, we are now able to delve into the meat of the issue. The question now becomes whether the forward-looking and backward-looking accounts would be compatible if we hold fixed a substantive notion of wrongful conduct for the two accounts. In other words, suppose that behavior that we think is wrongful and meriting backward-looking redress in tort is also the type of behavior the avoidance of which we think should constitute societal goals going forward. Whether this supposition is a practical one will be addressed in greater detail in Part IV, but, for the time being, we will assume that it is and ask whether there would ever be a divergence between the forward-looking and backward-looking accounts if this were the case.

Let's begin by considering two (of many) possible frameworks for how a society might define the substantive notion of wrongful conduct and the corresponding substantive notion of what should constitute societal goals

¹⁰⁸ See, e.g., COLEMAN, *supra* note 6; Keating, *supra* note 3.

¹⁰⁹ See, e.g., COLEMAN, *supra* note 6; Keating, *supra* note 3.

going forward. One such framework is one in which society's goal is maximizing efficiency.¹¹⁰ Another such framework is one in which society aims to minimize instances of wrongful conduct of a more murky sort that is commonly alluded to by corrective justice theorists.

1. The efficiency-based substantive account

First, let's consider the efficiency framework, where Posner's article has already done most of the work. As Posner discusses, if tort law is to be forward-looking and also aim to maximize efficiency, tort law will aim to make people internalize the externalities they impose on others.¹¹¹ This will be accomplished by holding people liable in tort for the costs they impose on others when their conduct violates the principle of justice-as-efficiency—when the total costs of their conduct outweigh the total benefits of their conduct. This way, assuming that behavior of this sort is detectable enough, tort law will provide people with the incentives necessary to maximize efficiency—at least in broad strokes. Furthermore, if the substantive notion of wrongful conduct adhered to by the society is that wrongful behavior is behavior that violates justice-as-efficiency, then it is precisely in the cases where liability will be needed to bring about good incentives that people will feel that there is a wrong that, for moral reasons, deserves redress. In other words, the very cases where liability will be prescribed by the forward-looking account of intrinsic value will be the same cases where liability will be prescribed by a backward-looking account of intrinsic value.

Furthermore, at least at first glance, this convergence between the forward-looking and backward-looking accounts seems to make some sense. It doesn't immediately seem implausible that if society's goal were to maximize efficiency, then it would be precisely these actions (in violation of justice-as-efficiency) that we might, as a matter of psychological fact, think are wrongful. Acts of this sort, we might say, are acts that are selfish, and acts where the agent does not show sufficient regard for the interests of others. Further, it seems possible that there might simply be one thought or intuition that lies behind, causes, and manifests itself in both the forward-looking view and the backward-looking efficiency views. They might be different manifestations of the same view. It's important to note, again, that unlike with Posner's account,¹¹² the backward-looking value in this account is of intrinsic value. Thus, by placing liability on parties that act "selfishly," tort law would simultaneously be intrinsically backward-looking and forward-looking.

¹¹⁰ In what follows, this section will describe the efficiency account where efficiency means maximizing happiness, but one could similarly plug in bare economic efficiency if one were so inclined.

¹¹¹ See Posner, *supra* note 45.

¹¹² *Id.*

It is also important to note the following brief clarification regarding the efficiency account: At first glance it might seem as though a judge trying to determine whether a litigant has violated justice-as-efficiency (and thus has acted tortiously) is carrying out the same process that a judge would have carried out if his job were to bring about the best result according to the forward-looking aspect of the *government or legal system as a whole*—discussed at length in Part III.B. Despite the similarity between these two potential tasks for a judge, however, they are importantly distinct. While both tasks involve efficiency analyses, these analyses are of a different nature. In the case in question in this section, where a judge is determining whether a litigant has violated justice-as-efficiency, the analysis is simply an investigation into whether or not the defendant acted efficiently by performing (or failing to perform) the act in question. The other analysis—where the judge’s task is to further the forward-looking aspect not of the law itself, but of the government or legal system as a whole—would involve the judge asking simply whether *holding the defendant in the case at bar liable would be an efficient action*. Part of this analysis might be a function of the analysis of whether the defendant acted efficiently, but this need not necessarily be the case, and even if this were relevant, there might be many other questions, inquiries, and factors that would be relevant to the decision of whether the action of the court holding the defendant liable would be an efficient one.

Clarification aside, and now returning to the justice-as-efficiency account itself, the following is an objection that might be raised to the alleged convergence between the forward-looking and backward-looking aspects of tort law in the context of efficiency: One might say that while perhaps party X is the cheapest cost-avoider in a particular instance, and X should be liable on a forward-looking account, if X is complying with the law, then X would not be liable on a backward-looking account. This objection fails, though, because on the efficiency account, the fact that X is the cheapest cost-avoider means that X is in violation of justice-as-efficiency, and thus, X has engaged in wrongful conduct. While this objection does not point to a difficulty with the backward-looking / forward-looking convergence, what it does show is that there might be reasons why we (and even some self-proclaimed advocates of justice-as-efficiency) perhaps should not endorse efficiency violations as the substantive notion of wrongful conduct. This issue will be discussed at length in Part IV.B.

2. The murky corrective-justice-based substantive account

An analogous account seemingly can be given of the convergence of forward-looking and backward-looking tort law in a framework where society’s goal is to minimize the amount of some other notion of “wrongful conduct” that a corrective justice theorist might endorse. Whatever our

substantive notion of wrongful conduct might be, it seems as though holding people liable for conduct of this sort (and thus, bringing about backward-looking intrinsic value) would also be the way to best deter future wrongful conduct (and thus, bring about forward-looking intrinsic value).

One might think, however, that there would be a divergence between the forward-looking and backward-looking approaches to the extent that holding people liable also for conduct that is only marginally *non-wrongful* would result in fewer wrongful acts going forward (because people would take extra care not to act wrongfully). The thought here would be that there would be some types of conduct that are barely on the non-wrongful side of the divide that should not result in liability on a backward-looking account, but that should on a forward-looking account. This, however, is mistaken, and for the following reason: The more accurate way to describe the backward-looking goal here is not merely to bring about redress for wrongful harms, but rather, to bring about redress for wrongful harms *and to not bring about redress for conduct that does not constitute a wrongful harm*. Thus, similarly, the forward-looking goal here would be not merely to deter wrongful harms, but both to deter wrongful harms *and to not deter conduct that does not constitute a wrongful harm*. Thus, in light of this clarification¹¹³, it seems as though tailoring the liability-non-liability point to the wrongful-non-wrongful point would not only best achieve the two components of the backward-looking goal, but it would also seem to best achieve the two components of the forward-looking goal.

As was the case with the efficiency framework, it seems as though this more murky “wrongful conduct” framework is not immediately implausible. As was the case with the efficiency framework, it seems that whatever the overarching value adhered to by the individuals in this framework is, it likely is the cause of both the corresponding forward-looking intuition and the corresponding backward-looking intuition. Furthermore, though this section has just canvassed two possible frameworks, it seems that the reasoning here could be expanded to other substantive notions of wrongful conduct and substantive notions of society’s forward-looking goals. Thus, there is reason to think that if we hold fixed the substantive notion of wrongness and societal goals, the forward-looking and backward-looking accounts would yield the same prescriptions of liability and non-liability in all possible cases.

¹¹³ If avoiding the deterrence of non-wrongful conduct were not important, then the best way to ensure that people do not engage in wrongful conduct would likely be to have liability for a vastly over-inclusive set of types of conduct.

D. Implications

1. The “fundamental principle” debate

If it is in fact the case that, holding an account of wrongful conduct constant, a forward-looking account’s prescriptions will be coextensive with the prescriptions of a backward-looking account, this is an important revelation. Further, it’s important to realize that this claim is very different from Posner’s claim, discussed in Part II. Posner only attempts to show that the economic theory of tort law is compatible with the *Aristotelian* notion of corrective justice.¹¹⁴ Posner makes it very clear that the reason why the economic theory of tort is compatible with Aristotle’s account of corrective justice is that Aristotle does not give a rationale for the duty of corrective justice—the Aristotelian account is non-committal about whether corrective justice is an intrinsic good or a mere instrumental good.¹¹⁵ This opens up room for Posner’s claim, because Posner thinks that corrective justice is merely good to the extent that it maximizes economic efficiency going forward.¹¹⁶ Not only is Posner only claiming that the economic theory of tort is compatible with the Aristotelian notion of corrective justice, but he is explicitly pessimistic about the economic theory of tort being compatible with what he takes to be the current corrective justice theorists’ positions.¹¹⁷ Posner could and should have gone further. There is no reason why tort cannot be intrinsically backward-looking and intrinsically forward-looking. It could well be, however, that corrective justice theorists and economic theorists would still diverge in their views about what constitutes wrongful conduct. Nevertheless, Posner still stops a step too short, because on the most hotly contested issue in the debate, the two views are in fact compatible.

If it were not the case that forward-looking and backward-looking accounts of tort were coextensive, debates about the “fundamental,” “core,” or “sovereign”¹¹⁸ principles of tort law would have great interest. Furthermore, the fact that forward-looking and backward-looking accounts would have some overlapping prescriptions would explain why terms such as “fundamental” are used. For example, a corrective justice theorist might acknowledge that in some cases his theory would have the collateral benefit of bringing about good forward-looking results, yet still be able to say that corrective justice or a backward-looking principle is the fundamental principle of tort law. In other words, he would be saying that when there is a

¹¹⁴ See Posner, *supra* note 45.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Coleman, *supra* note 4; COLEMAN, *supra* note 6.

conflict between theories, we know that it is corrective justice's prescription that is the one we should follow.

Even if the convergence thesis is true, though, this does not mean that there is no logical space for a debate about the "fundamental" principle of tort law to continue. The camps might continue to argue that it is their principle that is fundamental, and that it is a contingent fact that the two accounts provide coextensive prescriptions. (Interestingly, it seems as though much of the current debate about the "fundamental" principle might fit into the category of this paragraph. Current use of the term "fundamental principle" is frequently aimed at cases of obvious convergence.¹¹⁹ It might even be the minority of cases where the term is employed to point to the appropriate principle to guide prescriptions in cases of divergence.) It seems as though this type of a debate is and would be misguided, however. It's not clear what it would even *mean*, in this context, to say that corrective justice, for example, is the fundamental principle of tort law. Perhaps one way to understand the claim would be as a claim about the intention of the framers of tort law. If so, this inquiry would be akin to, and would be confronted with many of the difficulties associated with, statutory interpretation. Tort law has gradually been formed by numerous judicial decisions and it would be impossible to attribute a single intention to the numerous contributors.¹²⁰ Furthermore, even in particular cases, panels of judges often reach a majority despite there being no consensus as to the rationale for the decision. Thus, it seems fruitless to attack the issue in this way. Alternatively, one might think that the fundamental principle of tort law would mean "the most important aspect of tort law," or something to this effect. But we already know there is no shortage of debate about this. Thus, while we could still debate what constitutes the fundamental principle of tort law even if the various principles converge in what they prescribe, for a debate of this sort to be fruitful, the first step should involve explaining precisely what is meant by "fundamental." Without requiring a clear understanding of this, various camps are likely to talk past one another.

2. Summary

While this Article has argued that a forward-looking account of tort is compatible with a backward-looking account of tort, what this means for the debate between corrective justice theorists and economic theorists depends on a few things. For one, it depends on how they describe their positions. If the economic account is understood as holding that "the *only* intrinsic goal of tort law is forward-looking" and the corrective justice account is understood as holding that "the *only* intrinsic goal of tort law is backward-looking," then it seems that both accounts are false. If, however the economic account is

¹¹⁹ *Id.*

¹²⁰ For a similar opinion on this topic, see Posner, *supra* note 3.

understood as holding that “tort law always has an intrinsic forward-looking goal” and the corrective justice account is understood as holding “tort law always has an intrinsic backward-looking goal,” then it seems that both accounts are correct, and that they are compatible.

Even if this is the case, there might still be disagreement between economists and corrective justice theorists (if we still want to use these labels) about what is or should be the substantive notion of wrongfulness or the substantive notion of society’s forward-looking goals. As is, economists argue for an efficiency-based notion, whereas corrective justice theorists espouse something less precisely defined, but something that is, at least *prima facie*, distinct from efficiency. Determining what this substantive notion is or should be is no simple question, and it is this all-important question that has been partially obscured by the debate about whether tort law’s fundamental principle is forward-looking or backward-looking.

While perhaps there would still be vigorous debate between what we might still refer to as economists and corrective justice theorists, the disagreement within the two camps might be just as great as the disagreement between the camps. While Posner originally articulated a purely economic account, he has since espoused a more broadly welfare-based approach.¹²¹ Further, welfare-based approaches can be cashed out in numerous ways. Corrective justice theorists, on the other hand, are also capable of articulating a number of extremely different accounts of what wrongful behavior consists in. Not only might the disagreement within camps be as great as the disagreement between them, but it is likely that in some cases, some so-called economic views will resemble some so-called corrective justice views more than they resemble other views under the economic umbrella.

Thus, going forward, it is important that we not let ourselves get drawn in to the debate between corrective justice theorists and economic theorists about whether tort law is forward-looking or backward-looking. Instead of being led astray in this way, we must keep our focus on the real question—how we should understand the substantive notion of wrongful conduct and the substantive notion of society’s forward-looking goals.¹²² Hopefully, now

¹²¹ See Posner, *supra* note 17.

¹²² While this question has been partially obscured by the focus on the forward-looking / backward-looking debate, it is certainly not the case that the question of the substantive notion of wrongful conduct and or the substantive notion of societal goals has not been distinguished from other issues and addressed explicitly on its own. For example, Dworkin famously challenges Posner regarding his original view that tort law’s goal is to maximize wealth: Dworkin argues that, *even if one thinks that tort law is in the business of maximizing something*, it’s crazy to think that wealth maximization, as distinct from happiness or something else that has clear value, should be what tort law is about. See Ronald Dworkin, *Is Wealth a Value?*, 9 J. OF LEGAL STUD. 191 (1980).

armed with greater clarity, we will be better equipped to make progress on this important issue.

IV. IDENTIFYING A PLAUSIBLE SUBSTANTIVE ACCOUNT

If the above reasoning is correct and the backward-looking and forward-looking accounts would be coextensive in their prescriptions if the substantive notion of wrongness and societal goals were held fixed, what this shows is that backward-looking and forward-looking accounts of tort are theoretically compatible. This has widely been denied in the literature, and thus constitutes an important realization in and of itself. Nevertheless, even if this theoretical compatibility claim is true, it could be the case, as a practical matter, that people—be they self-proclaimed corrective justice theorists, economists, or others—do not, as a matter of fact, subscribe to the same substantive views for both the forward-looking and backward-looking aspects of tort law. If this were the case, and an individual had two different substantive views for the two different aspects of tort, this would suggest that tort law would not simultaneously be able to fully coincide with such an individual's forward-looking and backward-looking views.¹²³ For such a person, then, it *would* seem as though a question would arise as to whether tort law should be an institution that seeks to further forward-looking value or backward-looking value, or some mix of the two. Thus, the question that confronts us at this point is whether, as a practical fact, our substantive notion of wrongfulness lines up with our substantive notion of societal goals.

This Part will consider in further depth the two most salient and plausible candidates for the substantive notions—the murky rights-based corrective justice notion and the efficiency notion—and it will explore whether it is plausible to maintain either of them as the substantive notion for both components of one's forward-looking / backward-looking view pair. It will consider various interesting sub-issues, but the conclusion will be that it currently does not seem to be plausible to hold either of the two substantive notions for both one's forward-looking and backward-looking view. The murky corrective justice substantive notion does not provide a plausible forward-looking view, yet the efficiency substantive notion does not provide a plausible backward-looking view.

Given this finding, Part V will proceed by showing that this practical divergence turns out to be much smaller than one might think, and it is thus still the case that we do have almost complete practical convergence. This notwithstanding, it discusses what the implications of the divergences that *do* exist are for the well-being of our society. It then considers approaches that

¹²³ Unless, by some very odd coincidence, the liability regime prescribed by the person's backward-looking account would actually be the regime that would best maximize his account of our societal goals—despite the difference between the two substantive notions themselves.

can be taken to eliminate the divergence and bring about not only theoretical compatibility but also practical compatibility between forward-looking and backward-looking accounts of tort. The Article will argue that this is in fact a possibility and it will offer some practical proposals for how to carry out a transformation project of this sort.

A last note before proceeding: The theoretical compatibility claim itself thus turns out to be of both instrumental and intrinsic value. The instrumental importance: If it weren't for its truth, the possibility of bringing about the practical convergence that the Article proposes wouldn't even exist. This convergence would be valuable—and thus it is of instrumental value. The intrinsic importance: Even if the above-mentioned practical convergence were not possible, it is an important revelation that the forward-looking and backward-looking aspects of tort are theoretically compatible, because it shows that authors have been mistaken about what precisely is at issue in the debate and that authors have been mistaken about where the action lies in tort law and about what underlies different views. As such, this discovery will bring about substantially greater clarity.

And now we turn to the exploration of whether it is plausible to maintain an efficiency or a murky corrective justice substantive notion for both components of one's forward-looking / backward-looking view pair.

A. The Murky Corrective-Justice-Based Substantive Account

Ultimately, this section will argue that it is not plausible to hold (and that we do not hold) the murky corrective justice substantive notion for both the forward-looking and backward-looking accounts of tort law. First, however, this Part will consider and reject a common reason—offered by non-consequentialists—for believing that we do not hold this substantive forward-looking / backward-looking pair. After explaining the non-consequentialist's claim, it will argue that it is mistaken for two reasons: First, it is based on a contradictory and implausible account of value. Second, even if the non-consequentialist account were plausible, it still wouldn't show that it's incoherent, problematic, or implausible to hold the murky corrective justice substantive notion for both the forward-looking and backward-looking accounts of tort law. After showing why the non-consequentialist's argument fails, the Article will then provide its own, different, explanation for why it is not plausible to hold the murky corrective justice substantive notion for both the forward-looking and backward-looking accounts of tort.

1. The first difficulty for non-consequentialist arguments

Let's consider one position often articulated by corrective justice theorists. Suppose one's backward-looking substantive view of wrongful

conduct is the murky, somewhat undefined, but allegedly intuitively understood notion of wrongful conduct articulated by many corrective justice theorists. Taking this as the substantive notion of wrongful conduct, the complementary substantive notion of societal goals, as discussed above, would seemingly be to minimize the number of (and severity of) occurrences of wrongful conduct (and maximize the occurrence of non-wrongful conduct) in the future. Theorists who maintain the backward-looking view just mentioned, however, will often deny this complementary forward-looking view, and they do this for the following reason: It is often objected to their view that if, in fact, corrective justice is valuable, this is because of the fact that it is bad for there to be wrongs that go without redress, and, if this were the case, it certainly would be the case that it would be good to actively choose to not carry out corrective justice for a person whose right has been violated if this will have the forward-looking effect of preventing, say, five future rights violations of the same type.¹²⁴ This, however, is not something that these corrective justice theorists want to accept. In support of their intuition that it would not be acceptable to sacrifice one person's rights in order to prevent more numerous future rights violations, the corrective justice theorist will offer a scapegoating example of the sort described above, in Parts II.B and III.B.

According to corrective justice theorists in this camp, this forward-looking view that is allegedly the complement of their backward-looking view is not acceptable because, they say, it would erode their backward-looking view of rights and corrective justice.¹²⁵ The result of maintaining the forward-looking view of minimizing rights violations would give rise to, in the words of Robert Nozick, a "utilitarianism of rights."¹²⁶ In other words, one person's rights could be traded off against the rights of others, and these utilitarian-style tradeoffs and aggregations would defeat the very purpose of a right and render rights non-existent—or at least render the notion of rights self-contradictory. Some authors have argued that possible theories consistent with this account—one of which is Amartya Sen's theory of "goal rights"¹²⁷—would be a plausible middle ground between utilitarian theories and traditional rights theories, but, as many theorists have argued, and successfully so, the prospects for articulating plausible foundations for accounts of this sort are doubtful at best.

¹²⁴ There are a variety of similar views, some of which are more nuanced than others. For further discussion of these issues, and views of this sort, see for example F.M. Kamm, *Harming Some to Save Others*, 57 PHIL. STUD.: AN INT'L J. FOR PHIL. IN THE ANALYTIC TRADITION 227–60 (1989); Judith J. Thomson, *The Trolley Problem*, 94 YALE L.J. 1395–1415 (1985).

¹²⁵ See, e.g., COLEMAN, *supra* note 6.

¹²⁶ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28 (1974).

¹²⁷ Amartya Sen, *Rights and Agency*, 11 PHIL. AND PUB. AFFAIRS. 3 (1982).

Thus, these corrective justice theorists who are committed to redressing rights violations and who deny the forward-looking complement to their view will be proponents of non-consequentialist moral theories—theories for which factors related to consequences of an action might be relevant to the permissibility of an action but for which factors unrelated to consequences can be relevant as well. A non-consequentialist seemingly would have two options. First, he might adopt the “side-constraint”¹²⁸ view, according to which one should strive to bring about the best results, but one’s permissible actions are limited by side-constraints—among them, for example, the constraint that one not violate a person’s right, even if doing so would lead to fewer rights violations of the same type in the future. Despite the fact that this view has many adherents, it is rife with difficulties in handling objections, and thus it is difficult to take this type of view seriously. For example, what could possibly ground a non-consequentialist’s belief that it is valuable to redress one instance of a rights violation that is unopposed, but not think that it is good to violate one person’s right to prevent five, one hundred, or two million rights violations that would otherwise occur? Side constraints on action are not plausible absent instrumental benefits that they bring about, but if there are instrumental benefits, then the justification of the side constraints resides elsewhere and something else is doing the moral work.

A second option for the non-consequentialist is to not adopt side constraints, but rather to adopt the more extreme view that consequences are not just one factor among many relevant to assessing the goodness of an act, but rather, that they are *not at all* relevant to determining the goodness of an act. This view is even more implausible, though, both because of the difficulty in denying consequences any value at all and because of the difficulty in explaining, in a framework of this sort, how we do know which actions are good, and what it is that makes these actions good if not their consequences.

Furthermore, despite the serious contradictions and objections that plague non-consequentialist accounts in the moral sphere, they are *even less* plausible in the legal sphere—including in tort law—where policies are more easily seen in terms merely of their consequences and where the actor in question is not an individual agent, but, rather, the state. The law exists, in large part, because we are unable to rely on agents to always do what is moral or what will lead to the best result, and thus, the law is an institution that uses its machinery to bring about certain results. Further, the law has to balance various practical concerns, and there is good reason, for example, and despite Seana Shiffrin’s pleas to the contrary, for specific performance

¹²⁸ See NOZICK, *supra* note 126.

not to be the default remedy for contract breach, and for other alleged divergences law and morality.¹²⁹

Ultimately, there will be parties who staunchly cling to their non-consequentialist views and there will be an impasse that arises in the debate. The non-consequentialist will continue to deny the forward-looking view that corresponds to his backward-looking view, and thus he will likely not get on board with the bulk of the claims made in this Article. Little more can be said here and it will be left for the reader to judge. The points made here, however, aim to show that the non-consequentialist does not have a coherent account of what has intrinsic value.

2. The second difficulty for non-consequentialist arguments

As mentioned above, the non-consequentialist corrective justice theorist rejects the forward-looking substantive complement to his backward-looking view (in part) on the basis that it is inconsistent with his backward-looking notion of rights. Importantly, however, this forward-looking view will only be inconsistent with this theorist's backward-looking rights view if there are cases where the two diverge. What this theorist is concerned about is the possibility that the forward-looking view would prescribe a decision violating one person's right in order to prevent more numerous future rights violations. This, however, would not be a problem if it were the case that there *never were any cases where the backward-looking view and its forward-looking complement had different prescriptions*. Furthermore, this is precisely what this Article has argued *is* the case. As argued in the prior section, why should we believe that there would in fact be any cases where the backward-looking view's prescription would bring about anything but the incentives associated with minimizing rights violations in the future as well? The common example given to support this point is the scapegoat example, which, to repeat, states: "Deterring cheapest cost-avoiders from committing future harms is no more imposing justified liability in tort than hanging the innocent to deter future crimes is imposing justified criminal punishment."¹³⁰

As discussed in Part III.B, despite its vividness in conveying the unattractiveness of scapegoating, the example of an innocent man being hanged to deter future crime¹³¹ is not an instance of divergence between the law's backward-looking prescriptions and its forward-looking prescriptions. The scapegoating example addresses a related, but different, question:

¹²⁹ See Seana Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007). *Contra* Barbara Fried, *What's Morality Got to Do With It?*, 120 HARV. L. REV. 53 (2007) (offering a direct response in this reply piece to Shiffrin's article).

¹³⁰ Keating, *supra* note 3, at 10.

¹³¹ This example is attributable to Keating, Rawls, and countless others. See *supra* Part I.B.

Should the *judicial system's actions on the whole* be forward-looking? The scapegoating case is not an instance of the criminal law adhering to forward-looking prescriptions. The judicial system is not declaring that an act is illegal if it leads to worse welfare for future members of society. In fact, the judicial system in the scapegoating case is not declaring anything at all that the scapegoat has done to be illegal. The system is merely making people believe that a particular act—that was and is illegal—was in fact committed. While this question of whether a judicial system's actions on the whole should be forward-looking is related to the question of whether the law itself should be forward-looking, as discussed in Part III.B, the two are importantly distinct. Thus, the key point here is that it is not obvious that there would be any cases where the law itself would further the backward-looking murky corrective justice notion of wrongful conduct while not also furthering its forward-looking complement—of minimizing future occurrences of wrongful conduct—and vice versa. Further, as already discussed,¹³² there are positive reasons to believe that the two might always either both obtain or both not obtain but never be the case that one obtains while the other does not.

If these points are correct, this corrective justice theorist with non-consequentialist leanings or allegiances might still maintain that it is only the backward-looking aspect of tort law that has intrinsic value. He might maintain that tort still is not intrinsically forward-looking, either because the forward-looking result is a mere collateral benefit, or because it is irrelevant to tort, and thus not even a benefit at all. If this is the position taken, it seems that we can at least hang our hat on the fact that the forward-looking aspect of tort would be coextensive with the backward-looking aspect, even if it is denied that the forward-looking aspect is of intrinsic value. Further, as discussed in the prior section, there are reasons to have strong doubts about whether this theorist could coherently and plausibly maintain the backward-looking value that he posits without finding this forward-looking result to be intrinsically valuable.

3. Why the murky corrective-justice-based account nevertheless fails

It has been argued, here in Part IV.A, that the non-consequentialist arguments given above do not successfully give us reason to doubt the claim that the forward-looking and backward-looking accounts of tort law are both of intrinsic value and that the substantive account of each is the murky corrective justice notion. This notwithstanding, a different reason can be given for why this backward-looking / forward-looking pair of substantive views is not plausible—and this is the case even if one leaves aside the consequentialist / non-consequentialist debate. The reason is as follows:

¹³² See *supra* Part III.B.

Although the murky corrective justice notion of wrongful conduct might be plausible, it seems that the murky corrective justice notion does *not* provide a plausible substantive notion of forward-looking societal goals.

It seems that our substantive notion of forward-looking value must either be happiness or some complex good of which happiness is an important component. Despite the importance of minimizing rights violations, this does not seem to be something that has intrinsic value for us. All else equal, it certainly seems to be a good thing to minimize rights violations (however we want to specify this term's meaning), but it seems to be only one component of good state of affairs in the future—and thus, one that could be outweighed by combinations of various other factors, including but not limited to happiness, or perhaps equality, or some broader scale values.¹³³ It isn't difficult to think of possible pairs of future states of affairs, one of which is comprised of people who are miserable but includes no rights violations, and the other which is a much happier state of affairs—even a pareto improvement,¹³⁴ and perhaps there is also greater equality between welfare and resources of different individuals in society—but where there are some, if not many, “rights violations.” In such a case we would surely prefer the second society despite it giving rise to rights violations. As such, it cannot be that minimizing rights violations is a plausible substantive account of our forward-looking societal goals. Interestingly, this same concern will arise below, in Part V, with regard to other attempts to articulate substantive accounts of a forward goal that are anything other than the maximization of happiness—even if they are described in utilitarian-based or efficiency-based terms.

One might, however, object to the idea that the rights-based substantive notion of wrongful conduct / societal goals actually is plausible, even if all of the above comments are correct. How could this be? One might say that this is because the forward-looking rights based societal goal, as a matter of fact, would perfectly track, say, the forward-looking happiness-based efficiency goal, and if these two did not diverge from one another, then the current account would in fact be plausible. This is a reasonable point to make, but, as the next section explains, the forward-looking happiness goal and the forward-looking rights minimization goal would not in fact be coextensive.

¹³³ Various accounts of “broader scale values” have been articulated in the literature. One such example would be the value that prioritarianism places on improving the plight of the worst off. See, e.g., Richard Arneson, *Luck Egalitarianism and Prioritarianism*, 110 ETHICS 339 (2000); Michael Otsuka & Alex Voorhoeve, *Why It Matters that Some Are Worse Off than Others: An Argument against the Priority View*, 37 PHIL. & PUB. AFF. 171 (2009); Derek Parfit, *Equality and Priority*, 1 RATIO 202 (1997).

¹³⁴ A state of affairs, s1, constitutes a pareto improvement over a different state of affairs, s2, if at least one person is better off in s1 than they are in s2, and if not a single person is worse off in s1 than in s2.

B. *The Efficiency-Based Substantive Account*

It has been argued that, if we hold the substantive notions of wrongful conduct / societal goals fixed, forward-looking and backward-looking accounts would be coextensive. The next question was whether, in light of this, there were in fact any substantive notions for which the forward-looking / backward-looking pair would accurately depict our actual views, and whether the pair would be generally plausible. It was argued above¹³⁵ that the murky corrective justice notion of substantive wrongful conduct would not fit the bill, because, while it might accurately characterize our backward-looking value, it does not accurately characterize our forward-looking value or a forward-looking value that we might plausibly or reasonably endorse. The question now is whether a happiness-based efficiency view would be a substantive notion that could be plausible for both the forward-looking and backward-looking aspects. This section argues that this substantive notion does not fit the bill either, because while it might accurately characterize our forward-looking value, it does not accurately characterize our backward-looking value.

1. What an efficiency-based substantive account would look like

As argued in the prior section, in explaining the murky corrective justice substantive notion's failure to satisfactorily depict our forward-looking view, it seems that what a forward-looking view of tort law should take as a societal goal is happiness-based efficiency—i.e., striving to maximize future happiness. Of course, this can be quantified in various ways and there might be both factual and various types of theoretical disagreement about how to further this goal. This notwithstanding, it seems hard to argue with the claim that the law's forward-looking goal should be to maximize happiness.

What would a law that strives to maximize happiness going forward look like? As discussed earlier, it would take an approach analogous to the approach that the murky corrective justice theory's substantive notion would take.¹³⁶ It would pin liability on parties for taking actions that violate the substantive notion of wrongful conduct, and in this case that will mean liability will be pinned on individuals who "act selfishly" by not taking the interest of others sufficiently into account, or more precisely, it will be pinned on individuals who take actions that lead to net disutility. The thought is this will force parties to internalize the externalities that they would otherwise impose, and thus incentivize them to act efficiently.¹³⁷

¹³⁵ See *supra* Part IV.A.

¹³⁶ *Id.*

¹³⁷ As such, a legal standard of this sort would thus bear great resemblance to Learned Hand's famous formula ("The Hand Theorem"). See *United States v.*

But what, precisely, will be the letter of the law? In the case of the murky corrective justice notion of wrongs, the idea seemed to be that liability would exist for the violation of certain “rights.” These rights could be written into the law (be it in statutes or even in common law opinions) in various ways and with the possibility of varying levels of abstractions. Rights could be as specific as “It is one’s right to not have one’s car vandalized in one’s driveway” or as broad as “It is one’s right to not have one’s property interfered with.” In the case of the happiness-based efficiency standard, though, there simply is no rule other than “Do what is most efficient.” People certainly might adopt rules of thumb in determining how to act—e.g., “Torturing someone generally is an inefficient activity”—just as act utilitarian’s¹³⁸ will often have rules of thumb that they use (be it consciously or unconsciously) in determining whether an action is right or wrong.¹³⁹ Similarly, courts might have rules of thumb that they use to aid their decisions in particular cases. As a result of this, the efficiency-based law might appear to resemble a rights-based law. This notwithstanding, however, the difference is great: On the rights-based law, the rights are not mere rules of thumb, but they are determinative. On the efficiency-based law, however, the law still remains “Do what is most efficient,” and thus a full analysis of what was most efficient is required—i.e., the rules of thumb are *merely* rules of thumb and are only meant to aid the analysis.¹⁴⁰

Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). The Hand Theorem, however, unlike the current standard, was generally formulated in monetary terms. While the Hand Theorem is not used particularly frequently, it does show its face—at least implicitly—from time to time.

¹³⁸ An act utilitarian is one who holds that the goodness of every single act is determined by the amount of happiness it brings about, and the best act is the one that brings about the most happiness.

¹³⁹ For a discussion of different approaches a utilitarian might take to “rules of thumb,” see JOHN STUART MILL, UTILITARIANISM (1861).

¹⁴⁰ It’s important to recall, throughout this discussion, the clarification made in Part III.C: Even though judges in the system being described are performing efficiency analyses, the analysis here is different from the analysis that would be carried about by a judge whose job was to further the forward-looking aspect of the *government or legal system on the whole*—as opposed to the judge’s job here in the case being discussed, which is to hold a party liable for violating justice-as-efficiency. In the case here, the judge’s inquiry is an efficiency analysis, but an analysis into the efficiency of the defendant’s act in question. If the judge’s task were to further the forward-looking aspect of the *government or legal system on the whole*, the analysis would still be an efficiency analysis, but an analysis into whether it would be an efficient act *for the court to hold the defendant liable*. This analysis might involve, as a component, the analysis into the efficiency of the defendant’s act, but it need not necessarily involve this. Further, even if it did involve this, many other components might be involved as well.

2. Objections to the forward-looking efficiency account

Various objections can be raised against the forward-looking aspect of the efficiency account (before getting to the more serious objections that afflict the backward-looking aspect of the efficiency account). For one, one might worry that in some tort suits neither party has violated justice-as-efficiency, and it is a third-party that is the cheapest cost-avoider (be it in happiness terms, or, more tangibly in economic terms, where economic terms are ultimately proxies for happiness). Perhaps a motorcycle manufacturer is actually the cheapest cost-avoider of an accident, resulting in a suit between the drivers of two vehicles that have collided. If so, this does not pose a serious threat to the justice-as-efficiency account, because this third party could have been sued. Further, even if a third party is the most egregious violator of justice-as-efficiency, this does not mean that neither of the two drivers has also violated justice-as-efficiency. This party who is a mild violator could then choose to join the manufacturer to the suit.

Other interesting questions and potential objections to the justice-as-efficiency account arise in the context of collective action problems. Consider, for example, a typical case of a collective action problem: overfishing in the commons. Suppose that a society will be better off if the commons is not overfished because this will allow the fish species (in the relevant location) to reproduce enough to prevent the species from dying out, and this in turn will benefit the society by enabling them to continue to enjoy the fish for years to come. This notwithstanding, suppose that the choice of any one fisherman to go fishing on a particular day to provide his family and friends¹⁴¹ with fish will be an efficient one, because it will bring about great benefit to them and this action alone will not have large enough consequences to have any effect on whether the species dies out. The concern here is that, if the facts are as stipulated, justice-as-efficiency will hold that there should be no liability triggered by the fisherman going fishing, and further, it would be tortious for him not to go fishing. This might be concerning because the most efficient result would actually be brought about if no one goes fishing (or at least for the time-being, while the fish population is regrown), and a component of this course of action is this fisherman not going fishing. In other words, he would be held liable for carrying out a necessary component of the most efficient outcome and he would be non-labile if he fails to do so.

Though seemingly problematic, however, justice-as-efficiency gets the right results. Nothing in the justice-as-efficiency account is incompatible with there also being other laws—be they statutory or non-statutory—that

¹⁴¹ To simplify this example, we are supposing that the beneficiary of his fishing trip will be his friends and family, but not himself. This simplifies matters because cases where a party acts inefficiently, but where the harm caused is solely to oneself, raise additional issues.

govern behavior. Thus, what is required in the case of collective action problems often is a blanket rule that does not leave room for weighing costs and benefits on a case-by-case basis. It's true that a (non-tort) law that outlaws the relevant amount of fishing will likely not change the fact that it would be efficient in the above cases to fish, but it could be that this statute would preempt tort law in matters it governs. Regardless of how these details are worked out, however, the important point here is that issues raised by collective action problems are broad and wide-ranging, and they do not uniquely pose difficulties and interesting issues for the justice-as-efficiency account. Similar issues afflict other accounts, and thus, the collective action issue is somewhat orthogonal to that of justice-as-efficiency. This notwithstanding, it is an important topic that merits considerable further exploration.

Although numerous details regarding the forward-looking aspect of the efficiency account still need to be worked out, the general framework seems to make some sense. The difficulties arise when we look at the plausibility of the backward-looking account that takes the substantive notion of wrongful behavior to be behavior that is inefficient with respect to happiness. It seems as though the backward-looking aspect of justice-as-efficiency, in many ways, does not accurately depict our moral intuitions. And, to clarify, if the backward-looking aspect of wrongful conduct does not match our intuitions about wrongful conduct, this shows that a tort law regime of this sort would have backward-looking disvalue. In other words, the net result in happiness for society as a whole (including the litigants and third parties) *that is derived not from incentive effects brought about by the decision, but rather by sentiments regarding the appropriateness of the judgment in the case at hand* would be negative.

3. An objection to the backward-looking efficiency account

It is worth first mentioning one concern that one might have, but which is not as problematic as it appears. One might say that the backward-looking aspect of justice-as-efficiency fails to match our moral intuition about what constitutes wrongful conduct for the following reason: The justice-as-efficiency standard would render a party liable for bringing about a suboptimal *result* in terms of happiness, but our moral intuitions regarding wrongfulness and blame generally incorporate a mental state requirement of some sort—be it intent, knowledge, recklessness, or negligence, depending on the facts, and possibly a sliding scale consisting of each of these states to different degrees. If so, one might thus think that the divergence between one's moral intuition and justice-as-efficiency tort liability would occur both when one has reason to think that one's action (or omission) has expected harm but where no harm results, and, similarly, when one has reason to think

that one's action (or omission) has no expected harm, but where harm does in fact result.

Despite its appearances, however, this objection is easily handled. First, in describing the forward-looking aspect of justice-as-efficiency, it was ambiguous to refer to liability-triggering actions as ones that are inefficient. More precisely, an inefficient action, for our purposes, should be defined not as one that leads to a suboptimal result, but one for which the *expected results*, given the party's knowledge, were suboptimal. In fact, in most cases, it is this definition—and not the one regarding *actual results*—that will be what actually operates on people's incentives and affects their actions in the shadow of the law, thus effectively carrying out the forward-looking societal goal. Thus, this takes care of the second of the two alleged types of cases of divergence. The case where an agent acts with the belief that there is expected harm, but where he gets lucky and no harm results is a more complicated case, and here there does seem to be a divergence. It is a fact about tort law, however, as opposed to criminal law, that a case requires actual harm on the part of the plaintiff, and thus tort law is about the losses to plaintiffs rather than gains to tortfeasors (defined in one way or another, including acting in a risky manner and thus avoiding the cost of precautions). Whether this aspect of tort law is defensible and desirable is an important question, but one that is a topic for another article and which need not (and, cannot, in light of space limitations) concern us here. It need not concern us here because this issue does not uniquely affect this discussion regarding tort law. All discussions of the backward-looking aspect of tort law focus on cases where a party suffers harm.

The first prong of the two general concerns above was that a backward-looking justice-as-efficiency account, if it has any hope of matching our intuitions, must have a mental-state requirement of some sort, and it seemed as though the forward-looking aspect might not. This objection was handled by pointing out that the forward-looking account would include a mental-state requirement and focus on expected results. This also handles a specific instance of this general objection that is worth mentioning—both because it raises interesting issues and because it could have been raised as a concern not only about the compatibility of forward-looking and backward-looking accounts, but about the plausibility and workability of a forward-looking justice-as-efficiency account even on its own, leaving aside compatibility concerns. The concern is as follows: If the forward-looking aspect focused only on results and not on expected results, it isn't clear what would qualify as the optimal result, because it wouldn't be clear what the relevant options to assess would be. There are an infinite number of possible actions that could be taken at any point, and with an infinite number of (unpredictable and remote) results.¹⁴² It would be unclear how the relevant possible actions

¹⁴² For an extremely provocative discussion on this topic, and for an argument that these and related issues are reason to *abandon* consequentialist moral theories,

and results could be constrained. In most cases we would not want to hold a party liable for failing to think of a better idea. We wouldn't think a motorcycle manufacturer should be held liable for failing to invent a tire that doesn't skid, or—even more extreme—for discovering a new truth about quantum mechanics that would have enabled him to design such a tire. Further, there is no such thing as one best idea; one could always conceive of one that would yield even better results. Without some sort of mental state requirement, it's unclear that a non-arbitrary constraint of the relevant options, actions, and results could be articulated.

Thus, by including a mental state-requirement and focusing on *expected* results, we avoid the above concerns about a forward-looking efficiency-based account (problems that would exist even leaving aside compatibility concerns). And, more generally, we at least give the efficiency-based substantive account a fighting chance of compatibility, because not only is the forward-looking account now workable, but it matches the backward-looking account by including a mental-state requirement, and thus avoids one potential divergence. As a practical matter, however, a forward-looking expected value efficiency-based account would give rise to some potential concerns. For one, there would be many tricky evidentiary issues regarding the proof of an alleged tortfeasor's mental state—proving both what he took to be the different possible actions available to him, and also what he took the expected values of the different actions to be. These issues, however, while interesting, do not really appear to be different in type from issues that arise elsewhere in the law. Further, these issues might not differ in degree of complexity or intractability either. As such, though these practical concerns are important to note, they do not appear to be overly problematic.

As will be discussed below, however, we are still far from showing that there is a plausible account of tort that takes happiness-based efficiency as its substantive notion of wrongful conduct / societal goals for both the forward-looking and backward-looking aspects.

4. Why the efficiency-based account fails

The real problem with the happiness-based efficiency account of tort law, however, is that its backward-looking aspect does not seem to sufficiently track our intuitions regarding wrongful conduct—even if it might do so to some extent. The divergence here between general moral intuitions and the backward-looking efficiency account corresponds directly to a cluster of related objections that have famously been leveled against utilitarian moral theorists. This should come as no surprise in light of the fact that utilitarianism states that an agent is acting wrongfully if he does not do what he believes will maximize happiness, and this is precisely what the

see James Lenman, *Consequentialism and Cluelessness*, 29 PHIL. & PUB. AFF. 342 (2000).

backward-looking happiness-based efficiency account of tort law is stating as well.¹⁴³

The most famous of these objections is known as the “over-demandingness” objection, and it was introduced by Bernard Williams in *Utilitarianism: For and Against*.¹⁴⁴ According to this objection, utilitarianism does not provide a plausible account of morality because it requires too much of us.¹⁴⁵ If every single dollar we have could bring more happiness to the world if donated to charity than if we spent it on ourselves, utilitarianism would say that it is immoral to spend a single dollar on oneself. This, say the proponents of the objection, is far too demanding of a moral standard.¹⁴⁶ This is the crux of the objection, but it can be further described and elaborated upon in at least two (related) ways: by appealing to negative responsibility and by appealing to alienation.

According to Williams, part of what is problematic about the over-demandingness of utilitarianism is the fact that it imposes “negative responsibility” on agents.¹⁴⁷ According to Williams, utilitarianism goes wrong by failing to take into account the consideration that “each of us is specially responsible for what *he* does, rather than for what other people do.”¹⁴⁸ It would be the implication of utilitarianism that not only must one behave appropriately generally within one’s own sphere, but that one must do what one can to either prevent others from acting badly or to mitigate the effects of the bad actions of others.¹⁴⁹ This constitutes “negative responsibility” because it is about preventing or minimizing the bad effects of others’ actions as opposed to merely requiring that a person simply make sure that he does not do something wrongly. This, Williams thinks, is too intrusive, and it results in boundless obligation being imposed on agents.¹⁵⁰

Secondly, and relatedly, the negative responsibility that utilitarianism imposes on an agent is an attack on *integrity*, because it “alienate[s] him in a real sense from his actions and the source of his action in his own convictions.”¹⁵¹ Williams thinks it is “absurd to demand” of a man that he leave his own projects behind and that he do what a utilitarian calculus requires: having one’s actions largely determined by the projects of others.¹⁵² According to Williams, this makes him simply a “janitor” of a system of

¹⁴³ See, e.g., MILL, *supra* note 139.

¹⁴⁴ See generally J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973).

¹⁴⁵ *Id.* at 99.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 95.

¹⁴⁸ *Id.* at 99.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 116.

¹⁵² *Id.*

values, and prevents him from basing his actions on his own decisions, projects, and attitudes—in other words, utilitarianism alienates people from themselves.¹⁵³

There is also another problem that is raised for utilitarianism that is an offshoot of the over-demandingness objection (though one that merits its own mention): utilitarianism's alleged inability to accommodate our commonsense notion of supererogation. In his 1958 article, *Saints and Heroes*, J.O. Urmson called our attention to the fact that the traditional threefold classification of actions—duties, wrongs, and the permissible but not morally required—is “totally inadequate to the facts of morality” because of its inability to accommodate supererogatory acts.¹⁵⁴ According to Urmson, supererogatory acts are acts that go beyond what duty requires.¹⁵⁵ As such, they are morally optional and it is not blameworthy to fail to perform the act, yet at the same time, the performance of the act has moral worth.¹⁵⁶ According to Urmson, moral theories must be amended to allow for the possibility of supererogatory acts.¹⁵⁷ The problem, however, is that utilitarianism (as compared to other moral theories) seems to have particular difficulty accommodating supererogation.¹⁵⁸ The difficulty that utilitarianism has in accommodating supererogatory intuitions stems from the same feature of utilitarianism that gives rise to the over-demandingness objection to utilitarianism. According to classical utilitarianism, one is acting wrongly unless one brings about the best possible result in utilitarian terms.¹⁵⁹ As such, if the duty utilitarianism imposes on agents is to bring about the best possible result in utilitarian terms, it seems as though there is no room for supererogatory actions—actions that go above and beyond duty. The bar has already been set at the top. This, it seems, is problematic, because people generally have the intuition that a class of supererogatory actions does exist.

¹⁵³ *Id.* at 118. For thought-provoking replies to Williams's arguments, see, e.g., Frank Jackson, *Decision-Theoretic Consequentialism and the Nearest and Dearest Objection*, 101 *ETHICS* 461 (1991); Peter Railton, *Alienation, Consequentialism, and the Demands of Morality*, 13 *PHIL. & PUB. AFFAIRS* 134 (1984).

¹⁵⁴ J.O. Urmson, *Saints and Heroes*, in *ESSAYS IN MORAL PHILOSOPHY*, 198–99 (A. I. Melden, ed., 1958).

¹⁵⁵ *See id.* at 201.

¹⁵⁶ *See id.* at 202–03.

¹⁵⁷ *Id.* at 205.

¹⁵⁸ Other authors, however, think that utilitarianism is not alone in having this difficulty and think that this problem afflicts some if not all other moral theories as well. *See, e.g.,* Susan Wolf, *Moral Saints*, 79 *THE J. OF PHIL.* 419 (1982). For a discussion of other authors still, including the author of this Article, who believe that there might be hope for utilitarianism in accommodating supererogation, see *infra* Part IV.C.1.

¹⁵⁹ *See, e.g.,* MILL, *supra* note 139.

Lastly, and related to but somewhat distinct from the various concerns above, another concern that one might have about the ability of the backward-looking justice-as-efficiency account to track our intuitions of wrongful conduct is the fact that one might find legal or moral intervention in certain areas of one's life to be overly intrusive and inappropriate. In other words, one might not only find it to be inappropriate for the law to meddle in certain personal matters (even if one's actions or one's family or friends' actions are inefficient), but one might even find it to be the case that there are some domains where one does not think that morality should provide judgments either.

Related to this, a concern that might arise is that there simply would be too many tort claims if the legal standard were justice-as-efficiency. Almost every single thing that one would do could likely be found tortious because there would exist better alternatives that are available yet forgone. Some of these alternatives could be significantly better than the chosen option, but in the majority of cases there will be very little hedonic difference between one's action and the action that one inefficiently forwent. For example, we wouldn't want there to be a tort claim if a person eats a piece of candy rather than offering it to his colleague or spouse who would derive more pleasure from it than he would. These concerns, however, would not prove fatal to a justice-as-efficiency legal standard. For one, it could be handled by the equivalent of an "amount-in-controversy" requirement for suits to be brought. Further, this likely would not even be necessary, because just as does happen in our legal system today, people only go forward with litigation if the expected benefit exceeds the expected attorneys fees and court fees that one would incur if one brought a case to court. Thus, while interesting questions would arise in connection with these issues,¹⁶⁰ they do not amount to serious problems for the justice-as-efficiency account—unlike the various difficulties described earlier in this section, which most certainly do.

In sum, the problem with the justice-as-efficiency substantive account is that its account of backward-looking value—i.e., wrongfulness equal to violations of justice-as-efficiency—in general does not fully track our intuitions. We generally think that there is a realm in which we are allowed to act with our own best interests in mind even if other actions would bring about greater happiness for the world on the whole. We do not think it is

¹⁶⁰ Perhaps one of the most important practical questions that confronts a happiness-based legal standard is what the remedies would like. Presumably the most efficient form of remedy would be damages—though perhaps various equitable remedies might work well too. With respect to damages, there would be important questions that would need to be addressed about how to translate inefficient behavior in terms of happiness into monetary sums. This also subsumes questions about how to quantify hedonic values. Neither of these questions is a stranger to our legal system, though, as monetary sums are awarded for non-financial loss such as emotional distress and pain and suffering.

wrongful to allow ourselves to pursue our own goals with greater fervency and give our own welfare—and that of our nearest and dearest—special attention. Even an economist is likely to think that there is some realm of “selfishness” that is not wrongful.

5. A different description of the efficiency account’s problem

There is one additional point worth discussing here with regard to the backward-looking notion of justice-as-efficiency. As discussed at various places earlier in this article, the backward-looking value is the value of corrective justice.¹⁶¹ This backward-looking value is the value that is brought about to litigants or to third parties due to sentiments regarding the fairness or appropriateness of the court’s decision. This, in turn, is due to the value that people attribute to averting a disturbance of—and, likewise, bringing about a return to—the equilibrium dictated by distributive justice. As discussed in Part I.B, the notion of corrective justice doesn’t necessitate any particular theory of distributive justice, but it does rely on the fact that there is a notion of distributive justice that renders the return to this equilibrium, brought about by corrective justice, valuable.

When discussing the murkier intuitive substantive notion of corrective justice, it didn’t seem particularly necessary to question what this pre-disturbance and post-redress distributive justice equilibrium amounted to, because it seemed reasonable to assume that a plausible account of some sort could be articulated if need be. Here, in the context of justice-as-efficiency as the backward-looking substantive account, it seems to be more important to indicate what such an equilibrium would amount to, because justice-as-efficiency seems to suggest that the distributive justice equilibrium would have to be quite different from typical accounts of distributive justice.

According to the justice-as-efficiency account, corrective justice is required when a person does not do what he perceives to be the maximally efficient action. Thus, it seems that the equilibrium that corrective justice returns us to is not one where parties to the action are returned to a particular level of resources or happiness where they were before the wrongful action occurred. In many cases there seemingly would be a windfall gain for the party upon whom some benefit could have been efficiently conferred, and a windfall loss for the party that could have conferred the benefit. Furthermore, it wouldn’t necessarily be the case that these unexpected gains and losses would even out due to being “repeat players” in these situations of life. It could well be the case that a particular individual would continue to find himself in situations where he could, at large cost to himself, confer efficient benefits on others, and similarly there could be another individual who, by the luck of the draw, might repeatedly find himself in situations

¹⁶¹ See *supra* Part III.

where he could efficiently have a benefit conferred upon him by someone else. As such, one might say that this notion of corrective justice could *add great disturbances* to an equilibrium defined in terms of resources or happiness.

As a practical matter, though, these types of situations could potentially be avoided, or at least minimized, by tweaking the way these suits work. Perhaps it could be that a suit of this sort would not necessarily result in a defendant losing the sum equivalent to the benefit that could have been conferred on the other party, and perhaps the defendant wouldn't even lose the (lower) sum that he would have been required to expend to bring about the efficient sacrifice. Perhaps some even lower sum could be the norm, though this would seemingly fail to bring about the full internalization of externalities—i.e., the appropriate forward-looking incentive effects. Regardless of what the practical details would be, when conditions permit, there would likely be considerable negotiation and contracting between potential conferrers and conferees of benefits brought about by potentially efficient sacrifices.¹⁶²

These potential practical patches notwithstanding, the question still remains what to make of the notion of the distributive justice equilibrium that must lie beneath the justice-as-efficiency notion of corrective justice. This will not be fleshed out in detail here, but it seems that the answer is that the equilibrium would be one in which everyone is a steward of society's best interests on the whole, and that the more frequently and severely one fails to carry out efficient actions, the greater one strays from one's duties and the further one departs from the equilibrium. This equilibrium is one in which one simply carries out one's stewardship and gets the luck of the draw in terms of how many resources and how much happiness one accrues during one's lifetime. Though this notion of a distributive justice equilibrium is not of the type one might tend to have in mind when thinking of a distributive justice equilibrium in the background of corrective justice, it is not an incoherent notion, and is not in and of itself a reason to reject justice-as-efficiency. This notwithstanding, it might very well be that the fact that it might strike many as counterintuitive is a direct result of the fact that justice-as-efficiency doesn't track our notion of wrongful conduct—or, perhaps, vice versa. If so, perhaps this inquiry into the distributive justice equilibrium is a different, but equally good, way of addressing the question of whether justice-as-efficiency tracks our intuitions about backward-looking value.

C. *A Third Attempt to Identify a Plausible Substantive Account*

As discussed, our backward-looking substantive notion of wrongful conduct seems to be largely a murky corrective-justice-based substantive

¹⁶² For further discussion of appropriate quantities for remedies and the appropriate severity of punishments, see *infra* note 190 and accompanying text.

account whereas our forward-looking substantive account seems to be largely efficiency-based.¹⁶³ In our attempt to reconcile this apparent divergence, a question naturally arises: Is it really not possible for utilitarianism to make room for and accommodate supererogation? Despite the apparent difficulty, due to the concerns raised in conjunction with the over-demandingness objection to utilitarianism, perhaps utilitarianism can give an account of supererogation.¹⁶⁴ Further, one might think that perhaps an account of this sort would be able to provide a single substantive account that we might be able to adopt both as our backward-looking and forward-looking substantive accounts. In what follows, this section will argue that utilitarianism can in fact accommodate supererogation. It will argue, however, that this will *not* rescue the current divergence between our substantive forward-looking view and our substantive backward-looking view. This is because the utilitarian account of supererogation, while either a decent description of the murky backward-looking view in utilitarian terms, or while perhaps a description of a related backward-looking view we might take, will not be able to capture our intuitions as a plausible forward-looking view. Furthermore, this section will argue that this is the case for the same reason that the murky backward-looking view fails to provide a plausible forward-looking view—it would take its goal as aiming to minimize “wrong actions” and this would often come at the expense of maximizing happiness, which is what would be a more plausible forward-looking societal goal. This notwithstanding, however, the utilitarian account of supererogation offered here is both instructive in and of itself and in its failure to unite the two different substantive views. Further, it will lay the foundations for the analysis in Part V.

1. How utilitarianism might be able to accommodate supererogation

Recall that the challenge for utilitarianism in trying to accommodate supererogation is that the bar has been already set at the top.¹⁶⁵ According to classical utilitarianism, one is acting wrongly unless one brings about the best possible result in utilitarian terms.¹⁶⁶ As such, it seems as though there is no room for supererogatory actions—actions that go above and beyond duty.

Despite the seeming incompatibility between utilitarianism and supererogation, many philosophers do not want to give up either of the two positions, and they thus seek ways in which to reconcile the two. At least five proposals along these lines have been offered, which will be mentioned

¹⁶³ See *supra* Parts III and IV.

¹⁶⁴ See *supra* Part IV.B.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

but not addressed in depth here: (1) Ties at the top,¹⁶⁷ (2) Satisficing,¹⁶⁸ (3) Egoistically-adjusted utilitarianism,¹⁶⁹ (4) Self-other utilitarianism,¹⁷⁰ and (5) Egoistic-adjustment self-other utilitarianism.¹⁷¹ While these proposals have their merits, they are afflicted by two difficulties: First, and most importantly, they exhibit great confusion regarding supererogation's relation to the notion of acting to maximize total utility of all (i.e., total utility of everyone in the world), and its relation to the notion of acting to maximize utility-for-others (i.e., total utility of all other than the agent).¹⁷² They indicate that the notion of supererogation is a function of both, but they do not offer plausible accounts of how these two inputs interact and why they both are relevant to supererogation.¹⁷³ (In other words, the question here is as follows: Should a supererogatory act be defined in terms of how much goodness it brings to the world, or in terms of how much goodness it brings to individuals other than the agent, or in terms of some combination of the two? There appear to be examples that provide intuitive support in favor and against each of these three options.) Second, these views have difficulties in defending the notion of a duty threshold—both in defending a particular non-arbitrary threshold and in defending the fact that there even exists such a threshold.¹⁷⁴ Thus, although these theories do contain important insights, a new approach is needed if utilitarianism is to successfully accommodate supererogation.¹⁷⁵

Although the question of the duty threshold is not minor, the more pressing problem is coming up with a coherent notion of the relationship between supererogation and total utility and or utility-for-others. Once sufficient progress is made here, the question of the duty threshold becomes much easier to solve. Supererogation, however, seems to be based on the notion of going beyond a particular threshold, and thus it might seem as though it cannot be analyzed without the threshold already fixed. This approach sketched here, however, proceeds in reverse, and begins by analyzing what seems to be more basic than (and, in fact, one of the building

¹⁶⁷ See generally, e.g., MICHAEL SLOTE, *BEYOND OPTIMIZING: A STUDY OF RATIONAL CHOICE* (1989).

¹⁶⁸ See, e.g., Wolf, *supra* note 158 at 428–35.

¹⁶⁹ See generally, e.g., SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS OF UNDERLYING RIVAL MORAL CONSIDERATIONS* (1994).

¹⁷⁰ See Ted Sider, *Asymmetry and Self-Sacrifice*, 70 *PHIL. STUD.* 117, 117 (1993).

¹⁷¹ See Jean-Paul Vessel, *Supererogation for Utilitarianism*, 47 *AM. PHIL. Q.* 299, 300 (2010).

¹⁷² See, e.g., SLOTE, *supra* note 167.

¹⁷³ *Id.*

¹⁷⁴ See, e.g., SCHEFFLER, *supra* note 169; Sider, *supra* note 170.

¹⁷⁵ For a much more in depth discussion and explanation of the points and issues briefly described in this paragraph, see this author's *Utilitarianism and Supererogation* (unpublished manuscript) (on file with author).

blocks of) the notion of supererogation: moral praise and blame. In order to avoid prejudging questions regarding duty thresholds, analysis of moral praise and blame should take place within the framework of a scalar version of utilitarianism that doesn't specify any duties, but rather, merely compares actions based on the goodness of the results they bring about.¹⁷⁶

This analysis of praise and blame serves two purposes. First, it is a novel theory of moral praise and blame that might be appealing to a utilitarian. This, itself, will be an important achievement. Second, this analysis of moral praise and blame will pave the way for a new account of supererogation.

According to the account of moral praise (and blame) introduced here, we feel moral praise toward an agent neither *because* of the fact that he brings about the best result, nor *because* of the fact that he performs an act that he believes will bring about the best result. Our feelings of moral praise have something to do with the notion of utility-for-others, but we don't even feel moral praise *because* of the fact that an agent does something he believes will maximize utility-for-others. Rather, we feel moral praise toward an agent when he performs an act that has a high value of utility-for-others, yet also has a low value of utility for the agent himself, thus evidencing the fact that the agent placed high weight on the outcome for those other than himself. More specifically, what seems to be relevant is the percent weight one mentally attributes to the expected results for oneself and the percent weight one attributes to the expected results for others. The greater the percent weight an agent attributes to the expected results for others, the more positive (and less negative) the moral feeling is toward an agent for his act. Thus, given an amount of suffering that an agent undergoes to bring about a benefit to others, although it is commonly believed that the greater the benefit (or expected benefit) that the agent brings about for others, the more the agent is praised for his act, the theory offered here states the opposite, and this seems to be a point in its favor.

Having suggested that the percent an agent weights the expected utility-for-others is the only relevant value when it comes to moral assessment of action, one option is for us to remain in a scalar framework and merely avail ourselves of comparative claims when it comes to moral praise. While this would not be a bad option, it seems that this approach would still not account for our supererogatory intuitions. The question then becomes: Armed with this single value, where should the duty threshold lie? A number of the above accounts have suggested that if we opt against the merely scalar

¹⁷⁶ In other words, a scalar utilitarianism will compare the goodness of actions to each other, saying e.g., "X is a better action than Y," but, unlike classical utilitarianism, it does not hold that acts are wrong if the goodness they bring about is below a certain threshold—a threshold at or above which an action is right, and below which an action is wrong. See Alastair Norcross, *The Scalar Approach to Utilitarianism*, in *THE BLACKWELL GUIDE TO MILL'S UTILITARIANISM* 217–32 (Henry R. West ed., 2006).

framework and seek a duty threshold, then it must be a fixed threshold on the spectrum of the value(s) in question.¹⁷⁷ However, any attempt made to justify a particular point as a duty threshold is an utter failure, because no non-arbitrary reasons are able to be provided for why this point is chosen. These authors have mistakenly assumed that we have a choice merely between the extremes of no duty threshold and a single fixed duty threshold. More options exist: First of all, *there is no need* to precisely articulate a particular threshold. Second, and perhaps almost more importantly, it seems that in different contexts in life we might have different intuitions about where the threshold lies. Thus, it could be that there is not a single threshold that captures all realms of our lives, and thus, by attempting to generalize and identify a single threshold, we are failing to take note of the fact that certain domains of our lives do in fact have thresholds that we might be able to identify if we narrow our focus. Even a threshold of this sort might not be precise, but it need not be. Though it would be nice if there were in fact a single threshold and a precise threshold, in locating a threshold what we are doing is describing our intuitions, and it should not be a surprise that our intuitions on matters of this sort might vary dramatically between contexts as different as civic air pollution and giving a meal to a homeless man on the street. In sum, then, it seems that prior theorists have mistakenly assumed that we must have either one (precise) duty threshold or no duty threshold at all.¹⁷⁸

This certainly has only been a bare-bones sketch of this theory here, but the thought is that this utilitarian account of supererogation, informed by the prior account of moral praise and blame, avoids *both* sets of difficulties that afflict the other accommodation attempts. The account of moral praise and blame provides a single metric for assessing actions and thus avoids the dualism of value that afflicted other accounts. Additionally, the approach to the duty threshold described here, though far from complete, seems to constitute a promising approach that might make sense of our supererogatory intuitions. As such, if a utilitarian is to accommodate supererogation, it seems that the account briefly sketched here describes how he should attempt to do so.

2. The failure of the third attempt

Even if the account sketched above is a plausible account of how a utilitarian can accommodate supererogation, this will not rescue the current divergence between our substantive forward-looking view and our substantive backward-looking view. What the account *does* do is one of two things: First, it might be that it provides a decent account, in utilitarian terms, of the murky backward-looking view—thus providing a more systematic

¹⁷⁷ See, e.g., SCHEFFLER, *supra* note 169; Sider, *supra* note 170.

¹⁷⁸ See, e.g., SCHEFFLER, *supra* note 169; Sider, *supra* note 170.

explanation of our notion of wrongful conduct. Second, and alternatively, even if not quite an accurate description of the murky backward-looking view of wrongful conduct, it might be that it describes a plausible backward-looking view that a utilitarian—or anyone else, for that matter—might adopt. The problem, however, is that this substantive account still does not bring about compatibility between forward-looking and backward-looking accounts (though it will be argued in Part V that it does constitute progress in this direction). It fails to bring about compatibility because while it might constitute a plausible backward-looking account of wrongful conduct, it does not constitute a plausible forward-looking account. This is so for the same reason that the murky backward-looking view does not provide us with a plausible forward-looking account. A forward-looking account associated with the utilitarian account of supererogation would suggest that the forward-looking societal goal would be to minimize the occurrence of actions that fall below the threshold that is appropriate in the context—i.e., actions that were deemed wrongful. But, as discussed above in Part IV.A, this is not a plausible forward-looking goal unless the threshold is at the very top—requiring maximally efficient actions. While it would generally be a good thing, to minimize the occurrence of actions falling below the appropriate threshold, what we truly want to further for society is the maximization of happiness, and there will be cases where happiness maximization and the minimization of wrongful conduct (as defined by this account of wrongful conduct) do not point in the same direction. In these cases of divergence, the more plausible goal would be the maximization of happiness.

D. Summary

Thus, to conclude this Part, it seems that if we were to hold a particular substantive account of wrongful conduct / societal goals fixed, a forward-looking and backward-looking account would be compatible. However, it turns out that, as a matter of fact, we do not subscribe to the same substantive views for both the forward-looking and backward-looking aspects of tort law. The substantive account we employ for societal goals is largely an efficiency-based account, whereas our substantive account of wrongful conduct is largely a murky corrective-justice-based substantive account that leaves room for some inefficient behavior to be non-wrongful. Furthermore, the utilitarian account that arguably accommodates supererogation that was offered in Part IV.C might successfully describe and systematize our backward-looking view, but it seems to do no better at capturing our forward-looking view than does the murky corrective-justice-based substantive account.

With these quasi-descriptive conclusions in hand, we now shift gears and confront normative questions: Is it good that this is the way things are? And

if the current state of affairs is not ideal, what—if anything—might we be able to do to improve the situation? Part V addresses these questions.

V. FORMULATING THE IDEAL LEGAL STANDARD: IN THE PRESENT AND IN THE FUTURE

At this point it should be clear that our forward-looking and backward-looking substantive accounts are not the same. It is important to note, though, that although there certainly is a divergence between the two substantive accounts, the divergence might not be quite as big as one might think. Further, this is the case regardless of whether one adopts the murky backward-looking view or if one adopts the backward-looking view given by the utilitarian attempting to accommodate supererogation—which is either coextensive with or slightly different from the murky backward-looking view.

The following is what seems to be the case: The things that we consider to be wrongful, and thus, for which there would be liability on our account of wrongfulness, will be both intrinsically backward-looking and intrinsically forward-looking. What's lacking is that we generally think that there should be *additional* forward-looking goals that are furthered by the law, but we don't think that some or all of these things would bring about intrinsic backward-looking liability. Thus, the substantive view that we seem to adhere to for forward-looking concerns and the one that we seem to adhere to for backward-looking concerns are not as far apart as they might seem. In other words, rights violations that we think are wrongful are in almost all cases things that lower overall utility and should thus, on the forward-looking account, be deemed liability-triggering so as to avoid actions of this type in the future. While we can certainly imagine some cases that are exceptions to this rule, such as cases where one has the opportunity to kill one in order to save five, in the vast majority of cases, providing liability for cases where we believe a wrong has occurred—and thus bringing about a positive backward-looking value—will also have positive forward-looking results. Thus, the real difference between our substantive backward-looking view and our substantive forward-looking view—the difference that is keeping them from being coextensive—is that the forward-looking view requires efficient sacrifices, the omission of which the backward-looking view does not deem wrongful. In other words, the forward-looking substantive view we have would require greater civic-mindedness. This notwithstanding, it is important to note that aside from this difference, our substantive forward-looking and backward-looking views are otherwise very much aligned, so the difference between the two is not as great as one might have thought.¹⁷⁹

¹⁷⁹ This does of course depend on just how numerous the cases of potential efficient sacrifices in fact are.

A. *An Assessment of the Status Quo*

The question now becomes whether it would be preferable for us to have the same substantive account for forward-looking and backward-looking aspects of tort. As discussed in Part III.A, it seems that the goal for any society ultimately is and should be to maximize happiness in the *inclusive* forward-looking sense. In other words, a society should strive to maximize the sum of backward-looking value and forward-looking value of the law. Further, the most plausible forward-looking account would be to maximize happiness *even if* citizens believed otherwise. Thus, if there is no backward-looking value at all (or if it were an efficiency-based account), having a narrow forward-looking system that seeks to maximize happiness will be what best furthers the inclusive forward-looking—or overall—goal. This, however, is not the case for us. Thus, the legal standard that will be best overall for us will be the one that strays from the forward-looking efficiency goal just enough to appease the non-completely-efficiency-based backward-looking value.

In other words, the further our legal standard strays from a purely efficiency-based account and toward a murky corrective-justice-based substantive notion, the more the narrow forward-looking value will decrease, but the more the backward-looking value will increase. What we, as a society, want to maximize, however, is the sum of these two values, and thus the account we will use legally should be at the point between these two extremes that maximizes the sum of the two values. While a curve modeling these values could conceivably take different shapes, it seems reasonable to assume that as we start to move away from the pure efficiency standard, the gains to the backward-looking value will be greater than the losses to the forward-looking value. Further, it seems that as we get closer to a pure murky corrective justice substantive account, the gains to backward-looking value might be less than the losses to the forward-looking value. If this is the case, the optimal point—where the marginal benefit and marginal cost of moving further in one direction are equal—will be somewhere between these two pure accounts. In short, we should stray from the efficiency-based legal standard to the extent—and *only to the extent*—that it is efficient to do so. Thus, this presumably describes where we have come to as a society. Though it could be that shifts in one direction or the other would constitute a welfare-maximizing shift, and thus an improvement, some theories suggest that we might currently be at the optimal point.¹⁸⁰

What, then, does this mean for whether it would be good to have the same substantive account for the backward-looking and narrow forward-

¹⁸⁰ See, e.g., Paul H. Rubin, *Unenforceable Contracts: Penalty Clauses and Specific Performance*, 10 J. LEGAL STUD. 237 (1981) (arguing that common law doctrine evolves to become more and more efficient over time, thus giving rise to the presumption that long-standing doctrines are, cumulatively, quite efficient).

looking aspects? In short, the answer is “not necessarily.” It would be worse for society to shift the forward-looking aim anywhere away from maximizing happiness. The overall happiness of a society will be able to best achieved, however, the closer its backward-looking substantive notion is to this forward-looking efficiency based notion. This, as should now be apparent, is because the closer a society’s backward-looking substantive notion is to a pure efficiency-based notion, then the narrower the gap between the two accounts, and thus the less the actual legal standard—in seeking to maximize the sum of the backward-looking and forward-looking values—will have to stray from the pure efficiency standard.

Thus, though having the same substantive backward-looking and forward-looking notion is not something we should strive for in and of itself, it would be beneficial to strive, as much as possible to have our backward-looking notion approach—and ideally match—our forward-looking efficiency-based notion. As is, our society’s overall welfare is hampered by the fact that our notion of wrongfulness is not an efficiency-based one, because our law must cater to these views so as to avoid too much backward-looking disutility. The implication of this is somewhat unsurprising. We would collectively be better off if we all adopted a more civic-minded morality than we currently do—one which would both motivate us to make more “efficient sacrifices,” and one which would prevent us from feeling so much backward-looking disutility if a law or court decision were to hold a party liable for failing to make an “efficient sacrifice.”

B. *How We Can Improve Social Welfare*

While it might be the case that we are being constrained and held back by our moral intuitions about what is wrongful conduct, it might seem as though there isn’t much we can do about this. After all, we do not seem to *choose* our moral intuitions. However, while it does seem to be true that we do not choose them, it does not seem to be true that there is nothing that we might be able to do to influence these intuitions—be it on the level of the individual himself, the family, the community, or on the level of society on the whole, through laws or other policies. While various approaches of these sorts might be possible, what follows will address the possibility of influencing our moral intuitions by changing the law—be it common law or statutory law (or corresponding administrative regulations).

How could changes to the law bring about a change of this sort to our moral intuitions regarding wrongful conduct? The relationship between law and morality is a complex one, a detailed analysis of which is beyond the scope of this Article, but a few observations are in order. It seems that the law and our collective moral intuitions both have an effect on each other.¹⁸¹

¹⁸¹ See, e.g., Fried, *supra* note 129; Shiffrin, *supra* note 129.

On the one hand, the law is to a large extent a function of society's moral views. Of course, this is not true across the board: Various moral beliefs don't make it into the law, and many laws aim to solve collective action problems, solve coordination problems, and codify social conventions. These exceptions notwithstanding, the law is in large part a function of morality. On the other hand, it is also the case that our moral intuitions are to some extent a function of the law. Influence in this direction can occur in at least two different ways, corresponding to the distinction (made in criminal law, though equally applicable in areas of civil law, including tort) between crimes that are *mala prohibita* (crimes that would not be wrongful if not for having been criminalized) and crimes that are *mala in se* (crimes that would be wrong independent of the law criminalizing them). Thus, firstly (and following by definition), it might be that something is deemed wrongful merely because it is criminalized. Secondly, it might be that a person's moral intuitions are affected by the criminalization of a particular act, not because the person finds it wrongful to break the law, but because the change in the law makes one reflect further and determine that the act would be wrongful even if not for the law (though not but for the further reflection that it happened to bring about).

Thus, it seems that we can aim to shift society's morals further in the direction of civic-mindedness by harnessing the power of the law to affect morality—in both of the ways discussed above. The *mala prohibita* mechanism for the shift might reside largely in bringing about guilt associated with the fact that not complying with laws would in many cases (if not caught) result in benefitting by free riding. The *mala in se* prong mechanism would likely reside in a person reflecting after a law is passed and thinking, at a more abstract level, perhaps, that it simply is abhorrent to not make efficient sacrifices in certain types of contexts and that the doing-allowing distinction is misguided.

Importantly, however, the goal here will not only be to change people's moral intuitions, but also to change people's views about *which immoral actions* rise to the threshold of badness meriting the intrusion by the state into what would otherwise be merely one's personal affairs. The fact that the law has an effect on this—and thus that a change in the law might bring about a change in views on this—is good for the project of change being discussed, not only because it is a second way in which the desired changes can be brought about, but because it seems that people's views about norms about intrusiveness of the law into one's life are even more likely to be easily affected by a change in the law than would be a person's moral intuitions themselves.

As for how the changes might be brought about, for one, it seems that changes would likely (though not necessarily) be best done in a gradual manner. Secondly, there would have to be strategic choices made about which domains of life or which types of changes would best lend themselves

toward being changed first. Different methods to this end could be taken. One possible approach would be to take advantage of the framework this Article offered as a utilitarian account of supererogation, and thus as an account of our notion of moral praise and blame. For example, if it seems to be the case that—in the context of a particular type of human interaction—we currently blame people for weighting their own welfare more than, say, fifty percent of the overall population, perhaps we decide not to jump straight to having laws holding parties liable for weighting their welfare more than the percentage that is equal to their percentage of the world population, but, rather, perhaps we institute laws that would have the effect of holding people liable for weighting themselves more than, say, twenty percent of the overall population. In other words, we could begin by continuing to allow people to act “selfishly,” but by allowing them to be less “selfish” than they otherwise could have been before the change. As for which types of cases would even fall in the domain of cases for which there would be newfound liability, there would be many types of cases, but a common and particularly salient one—because of the great disparity between high gains resulting from the sacrifice and low costs of carrying out the sacrifice—might be the typical good Samaritan cases such as saving a drowning child at little cost or risk to oneself.

Thus, not only is the gap between our backward-looking and forward-looking views not enormous, but it seems as though there is reason to think that we might be able to make progress in closing the gap if we harness the power of the law to affect morality. The closer we can bring our substantive backward-looking view into alignment with a forward-looking efficiency-based substantive view, the greater our society’s potential overall welfare will be. This is because the legal standard will then be able to stray less from the pure efficiency account in seeking to maximize the sum of the backward-looking and forward-looking values.

C. *Other Factors to Consider*

As discussed in Part III.B, the ultimate goal is to have a society be as well-off as possible, and the question prior to that of “What would be the best laws?” is the question of “What would be the best government or legal regime on the whole?”¹⁸² It was suggested there that, due to considerations similar to those that Rawls makes,¹⁸³ the best society would likely be one where the government operated transparently, operated with laws, and where people would be held liable if and only if they violated laws. In light of this, but all the while keeping the broader goal in mind, we shifted our analysis to the question of what would be the best laws. In other words, we have been looking into the question of which laws would have the best inclusive

¹⁸² See *supra* Part III.B.

¹⁸³ See Rawls, *supra* note 72.

forward-looking results, and the inclusive forward-looking value is the sum of the backward-looking value and the narrow forward-looking value (i.e., the value brought about by the incentives created by the law). The inclusive forward-looking results of the law itself, however, while perhaps the main component of the forward-looking results of the government or legal regime on the whole, is not the only component. Also relevant to quantifying the results of a government or legal regime on the whole are the effects brought about by the law through means other than the incentive effects of the law itself. These effects could be positive or negative, and could be manifested in many forms. As such, factors of this sort must be taken into consideration if we wish to attempt to assess a legal regime on the whole—as opposed to a particular law.

One important effect that can be brought about by the law that is not due to its incentive effects is the effect on people's happiness that certain levels of government intrusion will have. While this could be a positive thing, a high level of intrusion might be particularly likely to bring about negative results in the form of people being dissatisfied that their life is overly governed by the law. Another important effect of different types of laws, however, is the effect that the certainty (or uncertainty) of what precisely the law allows or forbids will have on people. This will now be discussed in more detail.

Up until now, various possible substantive accounts of tort law have been considered. On one end of the spectrum, we have considered possible tort laws that say merely "One will be held liable in tort if one does not act efficiently (i.e., in a manner that maximizes society's happiness)." We have also considered the possibility of the law being defined in terms of efficiency, but allowing parties a realm of selfishness that does not trigger liability—defined either in terms of the domain or type of action, or perhaps in terms of the percent above one's percentage of the world population that one is allowed to weight one's own welfare.¹⁸⁴ We have also considered murky corrective justice notions of wrongful behavior as potential standards of liability, and these laws could be stated at a high level of generality or also with great precision and specificity.¹⁸⁵

There can be great benefits to laws that are vague standards such as "One will be held liable in tort if one does not act efficiently," as opposed to precise rules such as "One will be held liable in tort if one steals the property of another person." For one, if the vague law is stated to track what we do intrinsically care about—e.g. people's happiness—it will be more tailored to what we care about than more precise statements of the law that serve as mere proxies for what we do care about (as in the case of the law against theft, which on the whole—but not in every instance—will be a happiness

¹⁸⁴ See *supra* Parts IV and V.

¹⁸⁵ *Id.*

maximizing law to have). Thus, there is a benefit to laws that take the form of vague standards.

This notwithstanding, there can also be high costs associated with laws taking the form of vague standards. There will often be uncertainty about what precisely will be found to conform with the law and what will be found to violate it. Different factors are present in different cases, but the uncertainty can exist for various reasons. For one, there can be uncertainty about what a judge or jury's findings will be. This factor itself can be broken into more than one factor: First, one might not know what the findings of fact will be. This will often depend on what evidence is available and admissible. Second, there can be uncertainty about what a judge or jury's findings will be with respect to more subjective matters such as what assumptions, inferences, or predictions are or were reasonable given the circumstances.

Another factor contributing to potential uncertainty is not uncertainty about what will happen in court, but rather, uncertainty regarding the actual facts of particular situations when one acts (e.g., would it be a happiness maximizing event to drive to the store now to buy what I desire, despite the weather conditions and some concerns about my car's brakes?). Uncertainty about what the law is will (in almost all conceivable cases) be inefficient. It will lead to stress, anxiety, and unhappiness, and the lack of a clear rule will often chill investments or other commercial behavior that seeks predictable conditions and results.

Thus, in light of potential benefits and costs of having the law be comprised more of precise rules and more of vague standards, the question is what the optimal law would look like. Empirical questions abound regarding which areas of the law would be best handled with rules or with standards. This notwithstanding, however, there is reason to think that our current tort system might be at a fairly happy medium. The letter of the law itself uses vague terms,¹⁸⁶ but, at least in most areas of the law, there is robust precedent that makes it so that we, by and large, have great certainty regarding what is tortious and what is not.¹⁸⁷

It is important to note, though, that although the paradigm case of a vague law that has been discussed has been "You will be held liable if you do not do what is efficient,"¹⁸⁸ and the paradigm case of a precise rule has been "You will be held liable if you vandalize a person's car in his or her driveway,"¹⁸⁹ it is not the case that the efficiency standard necessarily correlates with vagueness or that a murky corrective justice substantive notion correlates with precise rules. These two concerns are orthogonal to one another, and it should not be inferred that they are related. The

¹⁸⁶ Consider, for example, the "reasonable person" standard.

¹⁸⁷ Consider, for example, all cases that determine whether a particular action is one that would have been carried out by a "reasonable person."

¹⁸⁸ See *supra* Parts III, IV, and V.

¹⁸⁹ *Id.*

efficiency standard could be formulated with precise rules and the rights-based notion could be formulated with vague standards.

The point here is simply that in addition to assessing the backward-looking aspects of the law, and the forward-looking aspects of the law that are due to incentive effects, it is also important to take into consideration the forward-looking effects of the law that are not due to incentive effects. Uncertainty is one of a number of factors of this sort that must be included in the calculus assessing a government or legal system on the whole. It is a highly salient one, though, and one that must not be underestimated.

VI. THE SIMILARITY OF COMMON LAW AND STATUTORY LAW

A question might arise, at this point, as to whether the fact that tort law is part of the common law (i.e., judge-made law), as opposed to statutory law, is of any relevance to the debate about the compatibility between its forward-looking and backward-looking aspects, and if so, what the relevance is. After all, *prima facie*, there seems to be a relevant difference: In a statutory system, the legislator and the judge are two separate offices, but in common law areas—such as tort—there is no separate office for a legislator. Rather, it seems that a judge plays both roles. Furthermore, it seems that the debate about forward-looking and backward-looking aspects of tort law gets off the ground *precisely because* when a common law judge takes one action (i.e., makes a decision), the action has two types of effects—forward-looking effects and backward-looking effects. This phenomenon seems to be what gives rise to the questions, at issue in this Article, of what the judge's role is and should be in a tort case.

Despite the fact that the forward-looking / backward-looking debate ostensibly arises in the context of the common law, it is a mistake, on reflection, for one to hold this view. To begin with, at the stage of legislation, similar questions arise in the case of statutory law. The legislator is confronted with the question of whether the law that will bring about the best forward-looking results (due to incentive effects) is also the law that will bring about backward-looking value, and, if one thinks that they diverge, whether it is more important to pass the law that furthers forward-looking value or the one that furthers backward-looking value. Further, it seems that the considerations in this context are akin to those this Article discussed when it argued, in Part III, that given a fixed substantive notion, forward-looking and backward-looking accounts are coextensive. Similarly the case here: It seems that laws passed will be both intrinsically forward-looking and intrinsically backward-looking and simultaneously further both goals.¹⁹⁰

¹⁹⁰ It might occur to the reader that perhaps a counterexample to this coextensiveness claim in the context of statutory legislation might be laws similar in structure to the Rockefeller drug laws (a system of drug laws with extremely severe penalties). Although there was no shortage of debate about the pros and cons of

How about at the stage of a judge applying statutory law to the facts of the case and litigants before him? If the law is clear, then his task is merely to apply the clear law to the facts of the case. If, however, the law is unclear or not completely determinate, then the judge will not only need to apply the law to the facts, but he will also need to interpret the law to determine what it should be understood to say about the facts of the current case. Statutory interpretation is a complex topic of legal theory on its own, and there are various theories about how a judge does, could, or should interpret statutes when they don't apply clearly to the facts of a case. One of the most common interpretive strategies, however, is to attempt to determine the intent of the legislator, or, more specifically, to determine what the legislator would have said regarding the facts of this particular case if he had had the time to specifically address these facts, or the foresight to even conceive of these facts. While different theories of statutory interpretation have different features, most of them arguably can be boiled down to a similar inquiry into what the legislator would say or would have said about these facts. But, as described in the prior paragraph, it seems that when a legislator passes a law, he is simultaneously furthering both intrinsically forward-looking and the corresponding intrinsically backward-looking values. Even if he only is conscious of one of these two aims, the other goal is simultaneously being

these laws, a common thought was that they had good forward-looking value (through increased deterrence) but that they had backward-looking disvalue because the quantity of punishment was far in excess of the badness of the crime. So far, this Article has primarily addressed the question of liability and cabined the question of the size of the remedy or punishment. This raises a number of more complex issues, but none, it seems, which truly casts doubt on the coextensiveness claim.

It certainly does seem to be the case, though, that a coextensiveness (or compatibility) claim is unable to ignore this quantity of liability issue, and it needs to be able to provide an account that handles it. Forward-looking value is obviously hugely affected by the quantity of expected liability, and it is all-important for an assessment of backward-looking value as well. How precisely to provide an account of the backward-looking value of different quantities of liability or punishment is notoriously difficult, however. In tort, this is less of a problem than in criminal law, because in tort there is a non-arbitrary quantity that is dictated by the loss to the plaintiff. In criminal cases this is generally not the case, and even if it were, any rate of exchange between these losses and prison time for the defendant seem arbitrary.

The questions here regarding the coextensiveness claim in the context of statutory legislation and regarding the coextensiveness claim regarding quantities of punishment are important and require considerable further treatment. Suffice it to say here, though, that the reason that Rockefeller laws (and similar laws) don't seem to be a counterexample is that there is strong reason to doubt that the forward-looking value is at all what their proponents thought they were. Further, many further considerations arise here regarding the anxiety that people might have about living in a society with these laws. These considerations relate to those that arose in Parts II.B and III.B in the context of Rawls's discussion. Additionally, it is far from clear exactly what our backward-looking views are in cases of this sort.

furthered. Thus, the judge's inquiry in the case at bar is parasitic on this, and thus both forward-looking and backward-looking inquiries would be relevant to deciding this case where there is statutory law, but where it is not completely determinative.

Further, although the inquiry is into what the *legislator* might have seen to be of forward-looking or backward-looking value, this question can most easily be approached by a judge asking himself what *he* would have thought if in the legislator's shoes, and relatedly, what he himself—the judge—thinks would be of forward-looking or backward-looking value. As such, the judge's views on what has forward-looking or backward-looking value necessarily enter into the inquiry.

This seems to be an accurate description of statutory legislation and adjudication, and of what tort law would be like if it were a statutory—and not a common law—regime. How, if at all, though, do these cases of statutory legislation and adjudication differ from cases of common law “legislation” and adjudication? Very little. In the common law domain, as with statutory law, there will be cases for which it is clear how the law applies to the facts in the case at bar, and there will be cases where the law is not determinate about the facts of the case at bar. In the cases where the law is clear—i.e., where the common law precedent is clear—the judge will be bound by *stare decisis* and will not have the discretion to do anything other than apply this law to the current facts. This is precisely what the judge does in the case of statutory law that is clear and determinate in a particular case.

In common law areas, such as tort, there will also be cases that arise where the law is not clear or determinate regarding a particular set of facts. Here, the judge will follow a procedure that is very similar to that which he would follow in the above-described case where a statute governs but is either not clear or is otherwise non-determinate in a particular case. He will ask how those who articulated the (non-determinative) rule would have further described the details of the rule and its application in the context of the current facts—if they had had time to articulate these specifics, or if they had had the foresight to conceive of these facts. Unlike the case of statutory law, however, the controlling (but non-determinate) common law rule will not necessarily have been enacted at any one time by any single body, but will perhaps have gradually been articulated and filled out by countless judges over time. Just as in the statutory case, however, the articulation of the rule over time will have had simultaneous forward-looking and backward-looking aspects, and also, just as in the statutory case, the current judge's investigation into these views of those who articulated the rule will take as its starting point what the current judge's views would have been if in the shoes of the others, and similarly, what the current judge's current view is. Though this process in common law is very similar to the process in statutory law, the goal of arriving at the intent of those who articulated the rule in the common law context will likely be more challenging than the

same task in the case of statutory law, and this of course is due to the fact that the common law rule will have been articulated by numerous bodies over time as opposed to by one legislative act. The difference in the task confronting the current judge in common law, as opposed to in statutory law is, however, not a difference in type, but a difference in degree. It seems likely that due to the differences just listed, the current views of the common law judge might often play a somewhat larger role in the filling of the indeterminacy than would be the case in the statutory inquiry—the latter of which would have fewer moving parts and thus might be more of a constrained inquiry.

Thus, it seems that the issues arising in the statutory context and the common law context are, contrary to popular belief, very similar and almost identical. Furthermore, it seems that the very slight differences that do arise present themselves in the context of cases where the law is non-determinate, and while these cases certainly do exist, these constitute the vast minority of cases that are filed. As such, the divergence (with respect to the subject matter of our discussion) between statutory law and common law, which was already slight, is diminished even further.

One final clarification is in order: Not only does it seem to be thought that forward-looking aspects of laws both can and do diverge from backward-looking aspects, but it also seems to be thought that decisions made in favor of forward-looking concerns (allegedly) at the expense of backward-looking values are not only bringing about a morally unfair result for the litigants, but also a legally unfair result for the litigants. If this were the case, this would perhaps add even more unfairness to the already unfair result that the litigants are undergoing. As has been argued throughout this Article, these divergences do not seem to exist. Even if they did, though, and thus stipulating that litigants might have a morally unfair result imposed on them, it *still* would not be the case that this litigant “whose rights have been sacrificed for the social good” would have failed to get protection from a law that covered his case.¹⁹¹ Rather, these alleged cases of backward-looking injustice are cases where a precedent is found to be non-determinate when applied to the facts of the case at bar. Thus, a decision that goes against this litigant would not be a decision to change a law that covered and protected the litigant, but rather, an interpretation and clarification of the law to show that, despite what the litigant might have thought, it does not cover his case. Thus, contrary to the alleged appearance of such a case, the law is being clarified and interpreted, and, strictly speaking, it is not being changed.

Of course, there could be cases, and there likely are cases, here and there where a judge’s argument in support of a particular claim is pretextual, and sometimes obviously so. How prevalent this is is an empirical question, and even empirical work here seems unlikely to get at the truth (due to judges

¹⁹¹ See, e.g., Part I.B, *supra*.

failing to admit their true rationales, or perhaps due to judges not even knowing their true operative rationales themselves). If this phenomenon is prevalent in the common law—and especially if, due either to the differences between common law and statutory law described above, or due to chance, this phenomenon is *more* prevalent in common law than in statutory law—this could explain the perception that people have regarding the common law and the alleged divergence between forward-looking and backward-looking views. Even if this is in fact the case, though, this is not a function of the law itself, but rather, it is a function of the practical problem of judges failing to do their jobs.

CONCLUSION

This Article has argued that the long-standing debate between corrective justice theorists and economic theorists is filled with confusion and is based on a false assumption. This assumption—which *both* camps mistakenly make—is that forward-looking and backward-looking accounts of tort law are not compatible with one another. Forward-looking and backward-looking accounts of tort law *are*, however, compatible with one another, and this Article has attempted to explain why this is the case. This, in part, involved explaining how so many other authors have gone wrong.

Despite there being compatibility between forward-looking and backward-looking accounts, it was argued that, as a practical matter, people do not subscribe to the same substantive views for both the forward-looking and backward-looking aspects of tort law. This suggests that tort law would not simultaneously be able to fully coincide with people's forward-looking and backward-looking views. Thus, there *would* seem to be a question of whether tort should be an institution that seeks to further forward-looking value or backward-looking value, or some mix of the two. This notwithstanding, it was argued that the practical divergence in fact would be much smaller than one might think.

In light of these quasi-descriptive conclusions, the Article then undertook an exploration of normative questions, addressing issues such as whether or not it is good that this is the way things are, and what we might be able to do to improve the situation if the current state of affairs is not ideal. Though the status quo is not bad, the Article argued that we would be better off if our substantive notion of wrongfulness were brought into even closer alignment with our substantive notion of societal goals. Further, it was argued that it *is in fact* a possibility to reduce and perhaps even eliminate this divergence—thus bringing about not only theoretical, but also practical compatibility between forward-looking and backward-looking accounts of tort—and practical proposals for how to carry out this transformation project were offered.

In light of this, the theoretical compatibility claim *itself* thus turns out to be of both instrumental and intrinsic value. The instrumental importance: If it weren't for its truth, the possibility of bringing about the practical convergence that the Article proposes would not even exist. This convergence would be valuable—and thus the theoretical claim is of instrumental value. The intrinsic importance: Even if the above-mentioned practical convergence were *not* possible, it is an important revelation that the forward-looking and backward-looking aspects of tort are theoretically compatible, because it shows that authors have been grossly mistaken both about what precisely is at issue in the debate and about where the action lies in tort law theory.

Thus, now armed with substantially greater clarity, hopefully we can reorient our theoretical and practical inquiries so that they are aimed in more fruitful directions.