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### Coercive Insurance and the Soul of Tort Law

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#### Publication Information

Alexander B. Lemann, Coercive Insurance and the Soul of Tort Law, 105 Geo. L.J. 55 (2016)

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#### Repository Citation

Lemann, Alexander, "Coercive Insurance and the Soul of Tort Law" (2016). *Faculty Publications*. 686.  
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# Coercive Insurance and the Soul of Tort Law

ALEXANDER B. LEMANN\*

*Scholars have long accepted the idea that there are alternatives to the tort system, particularly insurance, that are better at compensating victims than tort law. Tort law remains necessary, it has been assumed, because insurance lacks the ability to deter conduct that causes harm, and indeed it sometimes creates a moral hazard that increases incentives to engage in risky conduct. Scholars of insurance law, however, have observed that insurance has at its disposal a variety of tools that can help deter risky conduct. Recent technological developments lend dramatic support to this account. New telematics devices being used in automobiles can track acceleration, braking, and even whether a car is exceeding the speed limit on a particular road, allowing insurance companies to identify and penalize individual acts of negligent driving in real time. Insurance can now, in many cases, deter risky conduct more effectively than tort law. And yet tort law incorporates values that insurance cannot.*

*Although much attention has been paid to the implications of these developments for insurance law, the implications for tort theory have been largely ignored. This Article fills that gap. Where insurance coverage is mandatory and premiums are adjusted based on individual acts by individual customers, “coercive insurance” can be understood as a liability rule just like tort law. Comparing the mechanisms by which these systems deter risky conduct, I argue that coercive insurance’s abandonment of certain features central to tort law makes it inherently more efficient in dealing with certain risks. Coercive insurance thus helps resolve the ongoing debate between efficiency and rights-based theories of tort law, undermining the claim that tort law is best understood as a system for achieving efficient deterrence and lending support to the idea that concepts like corrective justice and civil recourse theory are necessary to explain tort law’s purpose and structure.*

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INTRODUCTION

A modern telematics device is a plastic cartridge roughly the size of your palm. It plugs into a diagnostic port called an OBD port, which can be found underneath the dashboard of every car manufactured in America after 1996.<sup>1</sup> Once installed, the device collects data for wireless transmission to an insurance company, including how fast your car is moving, when, for how long, and in some cases where you drive, and the g-forces your car experiences as it accelerates, brakes, or maneuvers around turns.<sup>2</sup> The Progressive Corporation, an insurance company that has been a leader in developing and implementing this technology, uses this data to adjust the premiums it charges its customers. Behaviors that are correlated with accidents, like slamming on the brakes or driving in the dead of night, are penalized, while drivers who avoid risky behavior receive discounts. Progressive’s device even beeps audibly when you brake too hard, providing “instant feedback” that, the company reports, “can help you improve your driving.”<sup>3</sup>

With technologies like telematics devices, insurance companies are increasingly able to establish standards of behavior and penalize deviations from those standards. When insurance coverage is mandatory, these standards become

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1. DIMITRIS KARAPIPERIS ET AL., CTR. FOR INS. POLICY & RESEARCH, USAGE-BASED INSURANCE AND VEHICLE TELEMATICS: INSURANCE MARKET AND REGULATORY IMPLICATIONS 9 & n.15 (2015), [http://www.naic.org/documents/cipr\\_study\\_150324\\_usage\\_based\\_insurance\\_and\\_vehicle\\_telematics\\_study\\_series.pdf](http://www.naic.org/documents/cipr_study_150324_usage_based_insurance_and_vehicle_telematics_study_series.pdf) [<https://perma.cc/64X8-MLR7>].

2. *Snapshot Common Questions*, PROGRESSIVE, <https://www.progressive.com/auto/snapshot-common-questions/> [<https://perma.cc/874V-C4BW>].

3. *Id.*

applicable to broad swaths of activity, like driving a car. These forms of insurance, which I refer to as “coercive insurance,” can thus serve what are often claimed to be the two goals of tort law: compensating victims for the losses they suffer in accidents and deterring the behavior that causes accidents in the first place. Coercive insurance is, or at least has the potential to be, a liability rule. Like tort law, it sets non-negotiable prices for shifting entitlements.

Although tort scholars have always recognized that insurance regimes can be more effective than tort law at compensating victims for their injuries, it was long assumed that insurance lacked tort law’s ability to deter conduct by imposing costs on risky behavior.<sup>4</sup> Scholars of insurance law have pushed back on this view, noting that insurance companies have various tools at their disposal to combat the moral hazard that might be created by insurance coverage. As proponents of the “insurance as governance” view have noted, insurance can often perform a quasi-regulatory function.<sup>5</sup> By contrast, comparatively little attention has been paid to the implications these new forms of insurance have for tort theory, particularly the ongoing debate<sup>6</sup> between efficiency and rights-based<sup>7</sup> theories of tort law.

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4. See, e.g., Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 239 (1996); Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645, 653 (1985) (“Individuals with insurance against certain types of losses are more likely to engage in risky conduct than those who do not have that insurance.”); John G. Fleming, *The Role of Negligence in Modern Tort Law*, 53 VA. L. REV. 815, 823, 826 (1967) (arguing that “[t]he deterrent function of the law of torts was severely, perhaps fatally, undermined by the advent of liability insurance” and noting that the Soviet Union outlawed liability insurance for this reason); Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 338 (1990) (noting that an “insurance policy can release the insured from cost constraints in a way that affects how he arranges his conduct”).

5. See, e.g., RICHARD V. ERICSON ET AL., *INSURANCE AS GOVERNANCE* 4 (2003); Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 683–86 (2013); Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1412 (2013); Kyle D. Logue, *Encouraging Insurers to Regulate: The Role (If Any) for Tort Law*, 5 U.C. IRVINE L. REV. 1355, 1355 (2015); Steven Shavell, *On Liability and Insurance*, 13 BELL J. ECON. 120 (1982); Steven Shavell, *On the Social Function and the Regulation of Liability Insurance*, 25 GENEVA PAPERS ON RISK & INS. 166, 177 (2000). Insurance law scholars who have developed the view that insurance can function as a kind of governance are primarily concerned with what implications that insight has for insurance itself, chiefly the way insurance policies are interpreted and the way insurance as a business is regulated. See, e.g., Abraham, *supra*, at 686; Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489, 1489 (2010).

6. See George P. Fletcher, *Remembering Gary—And Tort Theory*, 50 UCLA L. REV. 279, 283–98 (2002) (describing competing theories of tort law); John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 514 (2003) (same). An important exception is the tort theory scholarship that considers the example of New Zealand, which in 1974 abolished its tort system and replaced it with a national compensation fund. See, e.g., Craig Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CAL. L. REV. 976, 979 (1985) (citing Accident Compensation Act of 1972 (N.Z.), replaced by Accident Compensation Act of 2001 (N.Z.)); see also David Enoch, *Tort Liability and Taking Responsibility*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 250–71 (John Oberdiek ed., 2014). This work will be discussed in more detail below.

7. Following Stephen Perry, I use the term “rights-based” to encompass both corrective justice and civil recourse theories, as distinguished from economic efficiency theories. See Stephen Perry, *Torts, Rights, and Risk*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS, *supra* note 6, at 38, 38–39.

When it comes to efficiency, coercive insurance has a number of built-in advantages over tort law. First, coercive insurance severs the connection between tortfeasor and victim. This allows the cost imposed on the tortfeasor to be set at the level that produces efficient deterrence rather than the level necessary to compensate the victim for harms caused by a particular accident. Second, coercive insurance allows costs to be imposed on risky conduct regardless of whether that conduct actually results in an injury in any particular case, doing away with tort law's notorious problem with "moral luck."<sup>8</sup> Third, the deterrent effect of coercive insurance is shifted forward in time as compared with the imposition of liability in the tort system. In coercive insurance, a driver who departs from the standard of care must pay for that departure immediately (or at least on his next bill). The tort system, by contrast, is capable of imposing costs on tortfeasors only after they cause injury, are sued, and have judgment entered against them. Insights from behavioral economics suggest that all three of these features are likely to make coercive insurance a more effective tool for deterring certain types of conduct than the tort system.<sup>9</sup> Finally, insurance as an institution is structured differently than the tort system and is inherently more capable of promoting efficient deterrence at lower cost and without many of the constraints within which our justice system operates.

Examining the strengths and weaknesses of tort law and coercive insurance side by side helps resolve the debate over how best to describe the tort system. Coercive insurance undermines the instrumentalist accounts of tort law that characterize it as a system for the efficient allocation of accident costs.<sup>10</sup> Those who see tort law as being about economic efficiency do not have persuasive explanations for why tort law relies on a connection between tortfeasor and victim or why it operates on a strictly *ex post* basis.<sup>11</sup> If comparing tort law with coercive insurance shows why instrumentalists' attempts to reconcile these features with their efficiency theories are unpersuasive, it also shows how irreducibly characteristic these features are of tort law. A truly satisfying descriptive account of tort law must account for these features, and not by treating them as accidents.

The leading rights-based theories of tort law, corrective justice,<sup>12</sup> and civil recourse<sup>13</sup> help provide accounts of tort law that assign importance to its key

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8. Moral luck refers to the problem of imposing different penalties on two individuals who engage in equally blameworthy behavior simply because their behavior fortuitously leads to different outcomes. See *infra* notes 72–75 and accompanying text.

9. See *infra* notes 84–87 and accompanying text.

10. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 26–31 (1970).

11. See Goldberg, *supra* note 6, at 554–55.

12. Broadly speaking, corrective justice theory sees torts as involving wrongful disruptions of a preexisting normative equilibrium. Tort law "corrects" these disruptions by enforcing a tortfeasor's duty to make his victim whole to the extent possible, usually by paying the victim damages. See *infra* Section III.B.1.

13. Civil recourse theory sees tort law not as enforcing tortfeasors' moral duties to correct, but as assigning victims rights of recourse against those who have legally wronged them. See *infra* Section III.B.2.

features. To rights-based theorists, tort law's *ex post* adjudication of disputes between defendant and plaintiff is central to its core purpose and has normative value, allowing tort law to establish norms, guide conduct, and express opprobrium in ways that mere liability rules cannot. Corrective justice theory, however, is ultimately less incompatible with coercive insurance than it might at first blush seem; only civil recourse theory provides an account of tort law that completely distinguishes it from insurance-based compensation schemes, thereby providing the most convincing account of what makes tort law unique.

This Article proceeds as follows. Part I introduces the idea that coercive insurance can, like tort law, function as a liability rule. There are, however, certain key ways in which coercive insurance necessarily functions differently than tort law in shifting costs to promote efficient deterrence. Part II compares coercive insurance and tort law and, drawing on insights from behavioral economics, argues that coercive insurance is inherently more effective than tort law at deterring conduct. Part III suggests that these insights undermine the efficient deterrence theory of tort law and support rights-based theories, lending particular support to civil recourse theory.

### I. INSURANCE AS A LIABILITY RULE

It has long been accepted that insurance is better at compensating victims than tort law.<sup>14</sup> Insurance payments arrive much faster and more predictably than do tort judgments.<sup>15</sup> Pursuing a claim in tort requires hiring a lawyer and enduring what can amount to years of litigation. From the victim's perspective, the cost of the system begins with the lawyer's commission, typically one-third of any recovery.<sup>16</sup> From a broader societal perspective, the defense lawyer's fees and the time of the judiciary, witnesses, and juries must be considered. An insurance company's check bears much less cost. By one estimate, only 46% of tort expenditures end up in the hands of victims, whereas nontort compensation systems like insurance pay a much higher portion, in some cases more than 90%.<sup>17</sup>

The weakness seen in insurance and other alternative compensation systems as compared with tort law was their inability to deter tortious conduct. Insurance, it has been argued, does not force tortfeasors to internalize the costs that their tortious activities create. Rather, it insulates them from those costs. Not

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14. See Don Dewees & Michael Trebilcock, *The Efficacy of the Tort System and Its Alternatives: A Review of Empirical Evidence*, 30 OSGOODE HALL L.J. 57, 77–78 (1992); Nora Freeman Engstrom, *Exit, Adversarialism, and the Stubborn Persistence of Tort*, 6 J. TORT L. 75, 76 & n.6 (2013).

15. Dewees & Trebilcock, *supra* note 14, at 69–73.

16. See W. Kip Viscusi, *Toward a Diminished Role for Tort Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Safety*, 6 YALE J. ON REG. 65, 93–98 (1989) (discussing ways in which the tort system falls short of providing full compensation for injuries).

17. KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11*, at 10 (2008) (citing Kenneth S. Abraham, *Twenty-First Century Insurance and Loss Distribution in Tort Law*, in *EXPLORING TORT LAW* 86–91 (M. Stuart Madden ed., 2005)).

only would an insurance payment to a victim have no effect on a tortfeasor, a tortfeasor would be more likely to engage in risky behavior if he or she carried insurance.<sup>18</sup> If tortfeasors' payments to tort victims are covered by insurance premiums, the thinking goes, tort judgments no longer serve to deter tortious conduct.<sup>19</sup>

This view has been sharply criticized, with many observers noting that insurance premiums that are adjusted based on risk can function as a "Pigouvian tax," a way of forcing individuals to bear the costs of their negative externalities.<sup>20</sup> Scholars of insurance law have similarly noted that there are various ways in which insurance performs a regulatory function.<sup>21</sup> First, insurers can enact threshold requirements for becoming a policyholder. In areas where insurance coverage is required before engaging in certain conduct, like driving a car or operating a ski resort, such requirements allow insurers to perform a licensing function not unlike that of regulators.<sup>22</sup> Second, insurers often work to educate their policyholders to help them mitigate risks and adopt best practices to help avoid liability. In the realm of legal malpractice insurance, for instance, insurers provide ethics hotlines that are staffed around the clock to provide advice to policyholders on conflicts questions.<sup>23</sup> Third, insurers structure their coverage so that the insured shares some of the burden of losses. This can be accomplished using policy limits, deductibles, and coinsurance.<sup>24</sup> Fourth, insurers conduct research on and advocate for the adoption of new technologies that can help reduce losses.<sup>25</sup> Fifth, policy exclusions deter risky conduct because individuals and entities know that engaging in certain behavior will void their

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18. See *supra* note 4.

19. *Id.*; see also Jennifer H. Arlen, *Compensation Systems and Efficient Deterrence*, 52 MD. L. REV. 1093, 1093–94 (1993) (noting that alternative compensation systems provide compensation to victims more efficiently but risk increasing the overall costs of accidents by underdetering risky conduct).

20. See Logue, *supra* note 5, at 1357.

21. See *supra* note 5.

22. Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 209 (2012). Ben-Shahar and Logue note that insurers perform inspections of ski lifts both before writing policies and periodically after resorts become customers, thus making their standards de facto regulatory requirements for operation. *Id.* Another example is Underwriters Laboratories, which tests electrical appliances and certifies their safety. In many jurisdictions, this certification is required before a product can be marketed. Stempel, *supra* note 5, at 1504.

23. Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95, 112 (2008). Baker and Swedloff note that although professionals like accountants and lawyers frequently provide advice on how their clients can avoid losses, only the insurance industry "bond[s]" its advice, meaning that it agrees to pay for the losses its clients experience regardless of whether its advice was good. Baker & Swedloff, *supra* note 5, at 1422.

24. Baker & Swedloff, *supra* note 5, at 1420.

25. Ben-Shahar & Logue, *supra* note 22, at 212. The car insurance industry, for instance, operates a research facility that tests and rates the crashworthiness of automobiles. *Id.* The industry has also been credited with the adoption of air bags, antilock brakes, and seat belts, as well as the promotion of laws that mandate their use. Stempel, *supra* note 5, at 1504; see also ERICSON ET AL., *supra* note 5, at 268–76 (discussing the insurance industry's contributions to automobile safety).



coverage and expose them to liability.<sup>26</sup> Finally, and most importantly for purposes of this Article, insurers can adjust premium prices based on policyholders' behavior.

Premium adjustments can be accomplished in two ways: "feature rating" involves adjusting premiums based on behaviors that affect risk, like safety precautions, whereas "experience rating" involves adjusting premiums based on the insured's loss experience during the policy period.<sup>27</sup> Both practices effectively create economic incentives for policyholders to abide by standards of care established by insurers. Of the two, feature rating is more effective in deterring conduct because it imposes costs before policyholders cause accidents.<sup>28</sup> Experience rating, by contrast, is triggered only after a loss and is justified on the theory that, by suffering a loss, the insured has provided the insurer with additional information about how risky his conduct is likely to be in the future.<sup>29</sup>

Recent technological innovations have created new possibilities for insurance to deter individual risky behaviors using feature rating. The area experiencing the most change is automobile insurance.<sup>30</sup> Several large car insurance companies offer their customers potential discounts on premiums in exchange for voluntarily using telematics devices and, in some cases, their own smartphones to monitor their driving behavior in real time and send the resulting data to the insurer.<sup>31</sup> Although these programs are, for the time being, strictly voluntary and are primarily marketed as offering discounts, they effectively penalize those who decline to participate or whose behavior does not earn them any reductions on their bills.<sup>32</sup> The details of the technologies used, the data collected, and the ways those data are used to influence behavior vary from program to program, and technological developments suggest new avenues that have yet to be implemented by insurers.

26. Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 3 (2005); Ben-Shahar & Logue, *supra* note 22, at 215.

27. Ben-Shahar & Logue, *supra* note 22, at 206–07.

28. See *infra* Section II.B.

29. ABRAHAM, *supra* note 17, at 81.

30. Car insurance, although the focus of this Article, is not the only example of insurers using data and pricing to influence the behavior of their policyholders. Health insurers, for instance, have started offering customers incentives to wear devices that track their activity levels and reward healthy behavior. See Krishnadev Calamur, *John Hancock Hopes You'll Trade Activity Data for Insurance Discounts*, NPR (Apr. 8, 2015, 11:33 AM), <http://www.npr.org/sections/thetwo-way/2015/04/08/398306430/john-hancock-hopes-youll-trade-activity-data-for-insurance-discounts> [<https://perma.cc/WY9C-7RXV>]; Tara Siegel Bernard, *Giving Out Private Data for Discount in Insurance*, N.Y. TIMES (Apr. 8, 2015), [http://www.nytimes.com/2015/04/08/your-money/giving-out-private-data-for-discount-in-insurance.html?\\_r=0](http://www.nytimes.com/2015/04/08/your-money/giving-out-private-data-for-discount-in-insurance.html?_r=0) [<https://perma.cc/7D8G-6NH4>].

31. Smartphones cost nothing for insurers and are usually more technologically sophisticated than dedicated telematics devices, but the data on driving behavior from the phones' accelerometers is generally thought to be less reliable. KARAPIPERIS ET AL., *supra* note 1, at 10–11.

32. See Max N. Helveston, *Consumer Protection in the Age of Big Data*, 93 WASH. U. L. REV. 859, 879–80 (2016) (noting that information from telematics devices "could just as easily be used to increase the premiums for high-risk drivers or as grounds for refusing to renew a customer's policy").



Progressive's "Snapshot" device tracks a vehicle's acceleration and speed, as well as commute time and distance traveled.<sup>33</sup> Under the program, drivers can use the device for thirty days before becoming a Progressive customer.<sup>34</sup> At the end of the thirty-day trial period, potential customers receive a personalized rate quote and then continue to use the device as a customer for six months to ensure the accuracy of the initial measurements.<sup>35</sup> Some Snapshot devices also contain GPS functionality that records location information, but Progressive claims that this information is currently being used only "for research and development purposes."<sup>36</sup> Allstate's "Drivewise" program, by contrast, relies primarily on customers' smartphones.<sup>37</sup> Drivewise measures vehicle speed, commute time, and the force experienced when braking. To provide a rough sense of how far the technology has evolved, Progressive's first telematics device, which was released in 1998, was the size of a car stereo and had to be professionally installed.<sup>38</sup> Its most recent iteration, released in 2010, is roughly the size of a deck of cards, is merely plugged into the car by customers, and communicates with Progressive wirelessly.<sup>39</sup>

Progressive and Allstate use the data those devices collect in slightly different ways. Whereas Progressive takes a "snapshot" of its customers' behavior and then offers a personalized rate based on what it has observed, Allstate does not use the data it collects to set rates; instead, it offers cash back "performance rewards" every six months based on how safely customers drive during that time. Regardless of how rates are adjusted, the effect is the same: customers who use the technology and drive safely pay less for car insurance than customers who drive unsafely or who refuse to use the technology altogether.<sup>40</sup> Both companies also present the data they collect to their customers in easily accessible ways, either online or through smartphone apps. Progressive's Snapshot device even beeps audibly when a driver brakes too hard, providing an

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33. KARAPIPERIS ET AL., *supra* note 1, at 11.

34. *Snapshot Common Questions*, *supra* note 2.

35. *Id.*

36. *Id.* The potential value of the GPS data presumably lies in the different riskiness of different roads. Progressive could at some point offer discounts to those who, for instance, avoid certain highways at certain hours, or avoid particularly dangerous intersections. GPS functionality could also be combined with the car's telematics data to tell the insurance company whenever a customer is exceeding the speed limit on a particular road. See Leslie Scism, *Car Insurers Find Tracking Devices Are a Tough Sell*, WALL ST. J. (Jan. 10, 2016, 8:45 PM), <http://www.wsj.com/articles/car-insurers-find-tracking-devices-are-a-tough-sell-1452476714> [<https://perma.cc/K58E-ASN4>].

37. *Get Rewarded with Drivewise*, ALLSTATE, <https://www.allstate.com/drive-wise.aspx> [<https://perma.cc/P3G5-JDFR>]. The company offers telematics devices to those who do not have smartphones. *Id.*

38. Clint Boulton, *Auto Insurers Bank on Big Data to Drive New Business*, WALL ST. J. (Feb. 20, 2013, 5:03 PM), <http://blogs.wsj.com/cio/2013/02/20/auto-insurers-bank-on-big-data-to-drive-new-business/> [<https://perma.cc/68DF-BAES>].

39. *Id.*

40. Even these divisions are beginning to break down. In 2014, Progressive began imposing penalties of up to 10% on drivers in certain states who opted into the Snapshot program and were then found to be risky based on their driving data. Scism, *supra* note 36.

immediate nudge toward safer behavior.<sup>41</sup> Esurance’s “DriveSafe” program is another standout in this regard. It allows parents to install an app on their teens’ smartphones that will disable the driver’s phone while the car is being operated.<sup>42</sup> An accompanying telematics device sends parents an alert whenever the teen is speeding, accelerating too quickly, or driving past curfew.<sup>43</sup>

While insurance companies have endeavored to gather more and better data about their customers’ driving habits, car manufacturers have similarly worked to develop technologies that help drivers avoid accidents. Various manufacturers now offer cars that can detect drowsy driving. When these cars do detect drowsy driving, they sound an alarm and suggest a rest stop.<sup>44</sup> Similarly, some cars are able to detect lane lines on a highway and can sound an alarm or even forcibly correct the steering if the car drifts out of its lane.<sup>45</sup> The 2014 version of Tesla’s model S is equipped with so much road-reading technology that it can be placed in full driverless mode with only a software update.<sup>46</sup> It is not hard to imagine these two trends converging. Insurance companies will presumably begin offering lower premiums to customers whose cars are able to help them

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41. *Snapshot Common Questions*, *supra* note 2. Progressive also sends customers who drive safely a “celebratory, just-for-fun badge you can share with your social networks.” *Progressive—Snapshot*, BARROOD AGENCY, INC., <http://barrood.com/newsletter/test-drive-snapshot/> [<https://perma.cc/58FK-HS63>].

42. *Esurance DriveSafe: Help Your Teen Become a Safe and Responsible Driver*, ESURANCE, <https://www.esurance.com/drivesafe> [<https://perma.cc/NA5F-EKE6>]. The app allows parents to create a list of acceptable phone numbers so that young drivers always have an emergency contact. *Id.*

43. *Id.*

44. Randall Stross, *Trying to Nudge Drowsy Drivers*, N.Y. TIMES (Jan. 21, 2012), <http://mobile.nytimes.com/2012/01/22/business/lane-keeping-systems-aim-to-nudge-drowsy-drivers.html> [<https://perma.cc/T4F6-Q9MW>]. Lincoln’s system displays an image of a coffee cup when it thinks the driver is sleepy. Tori Tellem, *More Power and New Noses Define Lincoln MKS and MKT*, N.Y. TIMES (Nov. 17, 2011, 6:24 PM), <http://wheels.blogs.nytimes.com/2011/11/17/more-power-and-new-noses-define-lincoln-mks-and-mkt/> [<https://perma.cc/RX5L-P88S>]. These systems are currently based on the car’s analysis of its own position in the lane and its ability to sense that it is drifting. The next step of development appears to be a system that watches the driver’s face and is capable of sensing when he is falling asleep. Tim Moran, *Keeping Tired Drivers Alert, with No Snooze Button*, N.Y. TIMES (Mar. 11, 2007), <http://www.nytimes.com/2007/03/11/automobiles/11WAKE.html> [<https://perma.cc/ZND6-9T9D>] (describing experimental systems that read eye blinks and facial expressions and that sound a buzzer, vibrate the steering wheel, and blow air on the back of a driver’s neck).

45. Moran, *supra* note 44; John R. Quain, *Lane Departure Warning Systems for the Rest of Us*, N.Y. TIMES (Apr. 13, 2010, 3:09 PM), <http://wheels.blogs.nytimes.com/2010/04/13/lane-departure-warning-systems-for-the-rest-of-us/> [<https://perma.cc/WZ2G-TGM5>] (describing Mobileye technology’s availability as an aftermarket product, in addition to its incorporation into cars from Volvo, General Motors, and BMW); Stross, *supra* note 44.

46. Aaron M. Kessler, *Tesla Adds High-Speed Autonomous Driving to its Bag of Tricks*, N.Y. TIMES (Oct. 15, 2015), <http://www.nytimes.com/2015/10/16/automobiles/tesla-adds-high-speed-autonomous-driving-to-its-bag-of-tricks.html> [<https://perma.cc/YTZ7-BRRN>]; Alice Truong, *Tesla Just Transformed the Model S into a Nearly Driverless Car*, QUARTZ (Oct. 14, 2015), <http://qz.com/524400/tesla-just-transformed-the-model-s-into-a-nearly-driverless-car/> [<https://perma.cc/TF73-ECNL>]. Tesla was arguably too hasty in releasing and promoting this technology. In May 2016, a driver in Florida was killed when his Tesla, operating in driverless mode, slammed into a truck at full speed. Bill Vlasic & Neal E. Boudette, *Self-Driving Tesla Was Involved in Fatal Crash, U.S. Says*, N.Y. TIMES (June 30, 2016), <http://www.nytimes.com/2016/07/01/business/self-driving-tesla-fatal-crash-investigation.html> [<https://perma.cc/3XLY-YFYE>].

avoid accidents. They could also penalize drivers for each sleepy moment behind the wheel or for each time they distractedly veer into oncoming traffic. Indeed, Allstate was recently issued a patent for sensors and cameras that would record “potential sources of driver distraction within the vehicle,” such as “pets, phone usage, [and] unsecured objects.”<sup>47</sup> The patent also included sensors that will be able to “detect the content of alcohol in the air” as well as loud music or other noise.<sup>48</sup> In ten years, measuring nothing more than speed and acceleration may seem quaint.<sup>49</sup>

In addition to increasing the incentive value of risk classifications by offering more effective forms of feature rating, these technological innovations are being developed and adopted by the insurance industry because they help address several age-old challenges of managing risk pools, particularly separation and reliability. Separation refers to the degree to which different risk classes have different expected losses. Car insurance companies, for example, traditionally charge higher premiums to young male drivers than to older drivers, because as a group they experience a higher rate of loss. Tools like telematics devices allow insurers to measure the actual behavior of individuals, presumably leading to more precise separation than what can be expected from statistical shorthands like age and sex.<sup>50</sup> Reliability, which refers to the reliability of the data used to make a classification, has similarly provided something of a limit on risk classification. Mileage is a good example: the more miles you drive, the more likely you are to get in an accident, and yet insurers felt that mileage would not make a reliable risk classification, because of how difficult it is to verify.<sup>51</sup> By giving insurers the ability to directly measure mileage driven, new technologies are rapidly eliminating the reliability concern. Still, the insurance industry itself recognizes that even behaviors like hard braking can be a crude measure of risk, as they might be perfectly safe or unreasonably dangerous depending on the context.<sup>52</sup> By collecting more data and analyzing it in increasingly sophisticated ways, the industry hopes to arrive at even more nuanced ways of understanding the riskiness of its customers.<sup>53</sup>

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47. Scism, *supra* note 36.

48. *Id.*

49. Of course, much of this technology raises privacy concerns, which are outside the scope of this Article. For a thoughtful discussion of these concerns, see generally Helveston, *supra* note 32. It is worth noting that although many people instinctively recoil at the idea of their insurance companies observing their behavior on a near-constant basis, telematics programs continue to be popular among consumers. See *infra* note 121.

50. See Rick Swedloff, *Risk Classification's Big Data (R)evolution*, 21 CONN. INS. L.J. 339, 342–43 (2014) (describing how data collection allows insurers to “price auto insurance to better reflect the risks posed by the drivers”).

51. KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 71 (1986).

52. KARAPIPERIS ET AL., *supra* note 1, at 13.

53. *Id.* at 13, 24–25 (noting that “an effective analytics platform should be able to differentiate, for example, between types of braking events and how and where they took place in order to assess their true overall contribution to risk”).

This range of new technologies has thus strengthened the ability of insurance companies to impose costs on individual behaviors. Where insurance coverage is mandatory and premiums are modulated to account for individual behavior, insurance becomes a liability rule, in the sense that term has been used by Guido Calabresi and others to describe tort law.<sup>54</sup> In Calabresi's framework, the liability rule of tort law occupies a middle ground between criminal law and contract law, forming a hybrid of the features that define each pole. A criminal or regulatory rule shifts entitlements by collective fiat, outlawing certain behavior outright. On the other hand, contract rules allow entitlements to be shifted by mutual consent and at a price determined by private parties. This leaves liability rules in the middle, where society allows "entitlements [to] be shifted, not solely by private agreement, nor solely by collective fiat, but by *private decisions* in which the *price of the shift is collectively set*."<sup>55</sup> Although this particular articulation of the concept owes itself to Calabresi, many economic efficiency theorists share this basic vision of tort law as consisting of liability rules.<sup>56</sup>

The same could be said of insurance. Where insurance is purely voluntary, it is traditionally seen as a form of contract,<sup>57</sup> but when insurance coverage is mandatory, and where premiums are variably priced to reflect varying degrees of risk, insurance begins to look like a liability rule. Like tort law, mandatory, risk-rated insurance provides compensation for victims when risks are realized and forces those who create risks to pay a collectively set price for engaging in certain behaviors, deterring risky conduct. Coercive insurance can thus be seen as a parallel category of liability rules, existing alongside, and to varying degrees usurping, traditional tort doctrines. Coercive insurance is not just a system for spreading risk, but a system for assigning costs to behaviors while providing compensation to those who are injured by those behaviors. Like liability rules, coercive insurance allows for the kind of cost-benefit balancing envisioned by the Hand formula.<sup>58</sup> A driver may well decide, for instance, that it

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54. See Guido Calabresi, *A Broader View of the Cathedral: The Significance of the Liability Rule, Correcting a Misapprehension*, 77 LAW & CONTEMP. PROBS. 1 (2014) [hereinafter Calabresi, *Broader View*]; Guido Calabresi, *Torts—The Law of the Mixed Society*, 56 TEX. L. REV. 519 (1978) [hereinafter Calabresi, *Mixed Society*]; Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

55. Calabresi, *Broader View*, *supra* note 54, at 4.

56. See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1097–1102 (2001); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Benjamin C. Zipursky, *Rights, Wrongs and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 42–44 (1998) (tracing this view back to Holmes).

57. See JEFFREY W. STEMPEL, PETER N. SWISHER & ERIK S. KNUTSEN, *PRINCIPLES OF INSURANCE LAW* § 2.01 (4th ed. 2011) (referring to "the primary characterization of insurance as contract" as "well-entrenched"); Abraham, *supra* note 5, at 657–58 ("The traditional and dominant conception of insurance is that it is a contract transferring a risk of loss to a party whose business is selling such contracts . . .").

58. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) ("[I]f the probability [of an accident] be called P; the injury, L; and the burden [of adequate precautions] B; liability depends upon whether B is less than L multiplied by P: i.e., whether  $B < PL$ .").

is worth speeding (and thus taking a hit on the monthly car insurance bill) in the interest of getting a spouse who is in labor to the hospital as quickly as possible.

Several qualifications are in order at this point. It should be noted that the market for insurance that covers harms to third parties only exists because of the background tort law that creates the prospect of liability to third parties in the first place. If privity of contract still served to block products liability claims, for instance, manufacturers would have no reason to buy insurance that covers harms caused by their defective products. Similarly, car insurance companies would have no reason to deter the behaviors of their customers that tend to cause harms to third parties if they did not face the prospect of being liable for those harms, a prospect created by tort law. So deeply entwined are insurance and tort law that they have been famously analogized to “two suns, each in orbit around the other[,] . . . [n]either [of which] could remain where it is, or as it is, without the other.”<sup>59</sup> In arguing that coercive insurance functions as a liability rule much like tort law, I do not mean to suggest that coercive insurance as it currently exists could have developed independently of tort law.

As a theoretical matter, though, there is no reason to think that coercive insurance could not be made to supplant tort law as the primary, or even exclusive, way in which the costs of automobile accidents are allocated, much as workers’ compensation schemes were set up to override and supplant the “unholy trinity” of restrictive tort doctrines that prevented workers from recovering for accidents suffered in the workplace in the late nineteenth and early twentieth centuries.<sup>60</sup> Indeed, to some extent this has already occurred: virtually all car accidents (95.8%) currently result in settlements between insurance companies,<sup>61</sup> with tort law providing the background standard of care that informs the companies’ negotiations.<sup>62</sup>

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59. ABRAHAM, *supra* note 17, at 1; *see also* Baker & Swedloff, *supra* note 5, at 1414–15; Adam F. Scales, *The Chicken and the Egg: Kenneth S. Abraham’s “The Liability Century,”* 94 VA. L. REV. 1259 (2008) (book review); Shauhin Talesh, *A New Institutional Theory of Insurance*, 5 U.C. IRVINE L. REV. 617 (2015); Stephen C. Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183, 186 (2001); *see generally* Baker, *supra* note 26.

60. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 526–27 (4th ed. 1971); *see also* JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 43–70 (2004); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 470–85 (2d ed. 1985).

61. Jason M. Solomon, *What is Civil Justice?*, 44 LOY. L.A. L. REV. 317, 330 & n.56 (2010). Despite the high settlement rate, car accidents make up an enormous portion of the tort system’s caseload. Data from a study in 1996 showed that car accidents made up nearly half of all tort trials conducted in the country’s seventy-five largest counties. Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 CAL. L. REV. 2403, 2427 (2000) (citing BRIAN J. OSTROM & NEAL B. KAUDER, *EXAMINING THE WORK OF STATE COURTS, 1998: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT* 96 (1999)).

62. The standardization of this process has been a project of insurance companies for almost as long as the car has been used for transportation. *See* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1602–18 (2004). In handling claims, insurers often distill tort concepts into shorthand rules of thumb that can be used in determining fault. Insurers have long assumed, for instance, that the rear car in a rear-end collision is at fault, at least when the damage is not large enough to warrant abandoning

This discussion raises the related question of whether coercive insurance is capable of defining a standard of conduct without the help of tort law. Consider the paradigmatic car crash: *A*'s negligent driving injures *B*. Both have insurance. If they have the same insurance company, the company experiences *B*'s injuries as a loss and thus has an incentive to deter *A*'s negligent driving by imposing additional costs on *A* for behaviors that it identifies as tending to cause injury to others. These are the behaviors the insurance company defines as negligent.

Assuming they are not customers of the same insurance company, *A*'s insurer has no incentive to deter *A*'s negligent driving unless *A*'s insurer is somehow forced to bear the cost of *B*'s injuries. There are various ways in which this could be accomplished without the background threat of the tort system. For instance, tort's common law standard of care could be codified by statute, or the insurance industry could form a joint body to set standards for driver liability based not on traditional tort doctrine but on its own determinations of which behaviors statistically cause risk.<sup>63</sup> No-fault schemes could accomplish the same thing, provided that insurers were required to charge risk-rated premiums that reflected the full risk of harm to third parties. Interestingly, severing the link between coercive insurance and tort law would allow coercive insurance to drift away from tort law in defining a standard of care. For instance, some insurance companies impose penalties on drivers for driving between the hours of midnight and 4 a.m., when doing so creates a disproportionate risk of accident.<sup>64</sup> That simply driving late at night is not normally considered to be negligent—a breach of the duty of care we owe to others while driving—would not matter in a world in which the tort system is replaced by one that simply shifts accident costs. The potential to transform the standard of care points to other fundamental, structural differences in the way coercive insurance and tort law operate to deter risky behavior and compensate victims.

## II. COERCIVE INSURANCE VS. TORT LAW

If coercive insurance functions as a liability rule in the sense that term is used to describe tort law, it is clear that the mechanism by which it functions is

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this rule of thumb. See H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 98–99 (1970).

63. The insurance industry jointly operates numerous bodies that develop and advocate for new safety standards. See *supra* note 25. For instance, on September 11, 2015, the Insurance Institute for Highway Safety, a nonprofit group sponsored by insurance companies, and Transportation Secretary Anthony Foxx jointly announced that ten car manufacturers had agreed to install automatic braking systems as standard equipment in new vehicles. The announcement was made at the dedication ceremony of the institute's new research and testing facility. Bill Vlasic, *Automakers Will Make Automatic Braking Systems Standard in New Cars*, N.Y. TIMES (Sept. 11, 2015), <http://www.nytimes.com/2015/09/12/business/automakers-will-make-automatic-braking-systems-standard-in-new-cars.html> [<https://perma.cc/VD47-6GYX>].

64. See *Snapshot FAQs*, PROGRESSIVE, <https://www.progressive.com/snapshot/tdx/FAQGeneral/FAQ> [<https://perma.cc/E3B8-BDZE>]; see also Scism, *supra* note 36 (reporting that “a mile driven at 2 a.m. was in general four or five times riskier than one driven at 7 a.m.”).



different. Even an insurance regime set up to track as closely as possible the deterrent and compensatory effects of tort law will differ in some interesting and conceptually important ways. First, and most crucially, coercive insurance necessarily severs the link between risk creators (or tortfeasors) and victims. Second, coercive insurance is inherently forward-looking, whereas tort liability is inherently backward-looking. Third, coercive insurance and tort law are operated by different institutions with different institutional competencies. If tort law is a system that uses liability rules to minimize the net costs of accidents to society, these features of coercive insurance inevitably make it a far more efficient (and therefore more desirable) system.<sup>65</sup> What is necessarily missing from coercive insurance, and from the economic efficiency account of tort law, is any connection between tortfeasor and victim. Appreciating this gap supports the idea that tort law cannot properly be understood and explained without turning to corrective justice or civil recourse theory.

#### A. SEPARATING TORTFEASOR AND VICTIM

The most notable difference between an insurance scheme and the tort system is the former's indifference to the connection between a tortfeasor and her victim. The tort system is fundamentally built on this connection, and it manifests itself to varying degrees in a variety of doctrines. Tort cases do not happen without plaintiffs, who under standing doctrine must necessarily have suffered some harm as a result of some wrong attributable to a defendant.<sup>66</sup> The requirement of factual causation similarly bars suits against defendants whose actions have not resulted in an injury to the plaintiff.<sup>67</sup> Even the scope and nature of the obligations of care owed by defendants are inherently linked to the identity of the plaintiff. A defendant who acted wrongfully as to one party may have behaved blamelessly as to another, even if both were injured by the defendant's behavior.<sup>68</sup> Where a wrong has resulted in an injury and a victim has brought suit against a tortfeasor, the measure of damages to which the victim is entitled is linked to the harm the victim has suffered, even where punitive damages are imposed.<sup>69</sup> Doctrines like the eggshell skull rule illustrate

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65. In *The Costs of Accidents*, Calabresi described tort law as having three interlocking goals: primary cost reduction (preventing accidents that are worth preventing, in the sense that it is economically efficient to do so), secondary cost reduction (spreading the risk of the accidents that do occur to reduce their impacts), and tertiary cost reduction (achieving the first two goals at the lowest possible administrative costs). CALABRESI, *supra* note 10, at 26–31.

66. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

67. See RESTATEMENT (SECOND) OF TORTS § 430 (AM. LAW INST. 1965).

68. See *id.*; *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 101 (N.Y. 1928); see also Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES L. 333 (2002). Hurd and Moore argue against this relational view of negligence, suggesting that it is conceptually incoherent and normatively undesirable to limit a tortfeasor's liability only to those harms that are "within the risk" of the tortfeasor's negligence. Hurd & Moore, *supra*, at 333.

69. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–83 (1996) (rejecting punitive damages award that was 500 times plaintiff's actual damages and explaining that this ratio was one of three "guideposts" for evaluating punitive damages awards).



how strongly the tortfeasor's deterrent is bound to the victim's compensation.<sup>70</sup> Broadly speaking, tort scholars have these features of tort law in mind when they talk about the wrongs tort law concerns itself with as being relational or as being wrongs rather than mere wrongdoing.<sup>71</sup>

Consider two reckless drivers, each speeding around town with equal abandon. In a purely tort-based system, one driver might plow into a hedge fund manager and owe millions whereas another might arrive home safely and owe nothing, even though the conduct of each should be deterred to an equal degree.<sup>72</sup> Tort scholars refer to this as "moral luck" and have identified two key forms of luck that are illustrated in the example used above.<sup>73</sup> First, the two drivers are subject to "fortuity as to realization," meaning that even though they engaged in the same risky conduct, one unluckily happened to cause injury and the other did not.<sup>74</sup> Second, they are subject to "fortuity as to extent of loss," meaning that even where they both happen to cause injury, the injuries they cause may vary greatly in gravity even given the same risky conduct.<sup>75</sup>

Coercive insurance eliminates both forms of moral luck. As to realization, coercive insurance imposes costs on all drivers who engage in certain behavior, regardless of whether that behavior results in injury. The same holds for luck as to extent of loss because the price imposed on behaviors is tied to their general statistical link to the harms they cause rather than the particular harm that happens to befall any individual. Coercive insurance thus treats the behavior of the two drivers as equally blameworthy. To the extent that coercive insurance retains tort law's causation requirement, it is focused entirely on causation from the perspective of the victim rather than the tortfeasor, implementing a form of what Calabresi might call "causal linkage."<sup>76</sup> In other words, although coercive insurance imposes deterrent costs on those who engage in behavior that is statistically associated with injury to others (regardless of whether they actually do cause injury to others in any given case), it still requires victims to have suffered an actual harm that was caused by a behavior within the scope of the

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70. The eggshell skull rule holds defendants liable for the full extent of plaintiffs' losses, even when their magnitude is unforeseeable. See Steve P. Calandrillo & Dustin E. Buehler, *Eggshell Economics: A Revolutionary Approach to the Eggshell Plaintiff Rule*, 74 OHIO ST. L.J. 375, 377–79 (2013) (providing a historical overview of the eggshell skull rule and arguing that it distorts economic incentives).

71. See Perry, *supra* note 7, at 40 n.8 (collecting sources).

72. Jules Coleman uses the example of two streets, one populated with Olympic athletes and the other with elderly invalids. One group is more successful at dodging the reckless driver. Jules L. Coleman, *Doing Away with Tort Law*, 41 LOY. L.A. L. REV. 1149, 1164 (2008).

73. See John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1132, 1140 (2007). For Goldberg and Zipursky, both of these forms of moral luck fall under the umbrella of "causal luck." In *Tort Law and Moral Luck*, they also explore what they call "compliance luck," which refers to luck in the ability to comply with a standard of conduct. See *id.* at 1143–45. Here, they are thinking of situations like *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490 (C.P.), in which individuals are unlucky enough to be incapable of adhering to an objective standard of care.

74. See Goldberg & Zipursky, *supra* note 73, at 1132.

75. See *id.* at 1140.

76. Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 72 (1975).

policy (for example, a car accident) before it provides compensation. Technically speaking, coercive insurance would require a victim to show that the insured's behavior was the but-for cause of his injury, but would not allow an insured to defeat "liability" by showing that his behavior was not the but-for cause of anyone's injury.<sup>77</sup>

From the perspective of deterrence, this makes it a better system. Although tort law ignores the risky behavior that does not result in an injury, coercive insurance applies an equal deterrent to equally risky activities, allowing it to modulate the degree of deterrent applied to match the risk involved.<sup>78</sup> Tort law is messy in this regard. If one's tortious behavior causes a victim's injuries, one is required to compensate the victim based on the cost of his or her injuries, not based on how negligent one's behavior was. In the realm of negligence, one need only have breached a duty of care and thereby caused an injury to be liable for the cost of that injury. The egregiousness or mildness of the breach typically does not affect the amount of the judgment, with punitive damages being an often clumsy attempt to compensate for this weakness.<sup>79</sup> The problem works in both directions. A mild breach may trigger massive liability if it meets an eggshell skull, whereas a massive breach may trigger mild liability if it meets an iron skull. Because tort law requires a connection between tortfeasor and victim, it sacrifices efficient deterrence in these cases in the interest of compensation. The problem is that, on an individual level, there is no necessary connection between the riskiness of a particular activity and the amount of the tort judgment that will be imposed.<sup>80</sup>

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77. Coercive insurance thus provides an interesting answer to the "exposure to risk" cases, in which plaintiffs sought damages for being exposed to risks of harm that had not yet ripened into actual injuries. See *infra* note 165 and accompanying text. Coercive insurance would not provide compensation to the plaintiffs (with the possible exception of medical monitoring expenses that would help reduce plaintiffs' ultimate injuries, such as catching cancers when they are operable), but presumably it would penalize defendants who engaged in the conduct at issue because it was statistically linked with the harms plaintiffs feared would eventually be realized and thus should be deterred by the manager of a risk pool seeking to minimize losses.

78. I acknowledge that this analysis is based on an idealized version of risk-rated third-party insurance that in many ways diverges from the way such insurance currently works. For instance, as discussed above, Progressive uses the data collected by its telematics devices as merely one factor among many in setting premiums. See *supra* notes 33–39 and accompanying text. Other factors may well be tied less to the risk a driver poses to others and more to the risk that a driver will file a claim. For example, insurers commonly charge higher premiums to drivers from zip codes with higher crime rates, see *infra* note 175, and to drivers with lower credit scores. See Darcy Steeg Morris, Daniel Schwarcz & Joshua C. Teitelbaum, *Do Credit-Based Insurance Scores Proxy for Income in Predicting Auto Claim Risk?*, 13 J. EMPIRICAL LEGAL STUD. (forthcoming 2016). My argument here is directed toward the system's theoretical potential and its ramifications for theories of tort law.

79. For instance, under Supreme Court precedent, the "degree of reprehensibility" of the defendant's conduct is only one of three "guideposts" to be used in determining the validity of a punitive damages award. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996). Due process also requires considering the ratio between the plaintiff's injuries and the award and the difference between the award and civil penalties imposed in comparable cases. See *id.*

80. See Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 501 (1989) ("[F]or an instrumentalist account of tort law to succeed, the transfer of a single amount must simultaneously

The tort system relies on the idea that these two numbers will match up in the aggregate, and perhaps in some circumstances this is true. From the perspective of deterrence, however, it is problematic that there is often a disconnect between the riskiness of an activity and an individual defendant's tort liability.<sup>81</sup> Even when risky behavior does result in an injury, tort law's sanction is not automatic. Instead of imposing a fine on the behavior at issue, as coercive insurance does, tort law merely grants the victim the option to file suit. In the majority of cases, victims simply choose not to sue.<sup>82</sup> Tort law has no doctrinal mechanism for curing the underdeterrence caused by victims' decisions not to participate by suing.<sup>83</sup>

Behavioral economics suggests that the lack of precision in individual cases impedes the system's ability to deter conduct on an individual level, which, after all, is where the cost-benefit calculations embodied in the Hand formula are supposed to take place. How big a problem this is depends, to some degree, on how infrequently the risks are likely to be realized. We might imagine that risky driving is likely to catch up with an individual at some point over the course of his life, that the odds of certain behaviors leading to an accident make it unlikely that a terrible driver will live eighty years without hurting someone. Even if this is true, individuals are notoriously bad at accounting for infrequent, costly risks in a purely rational manner.<sup>84</sup> We do poorly in estimating how likely risks are to be realized, overestimating the likelihood of events that have recently occurred or are easily called to mind and underestimating the likelihood of less memorable, less recent events.<sup>85</sup> We also tend to be quite unsuccessful

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effect many separate goals. Such a coincidence seems implausible even in a single case; it would be miraculous if it occurred across the board.”).

81. See Goldberg & Zipursky, *supra* note 73, at 1140 (“What is generally taken to be the basic principle of tort damages . . . often entails a disjunction between the sanction that a tortfeasor ‘deserves’ for his misconduct, or the sanction that would appropriately deter, and how much he must actually pay.”).

82. See DEBORAH R. HENSLEY ET AL., INST. FOR CIVIL JUSTICE, COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 110 (1991) (reporting that “about half of all those injured in motor vehicle accidents make some informal or formal attempt to collect from another party to the accident”). Notably, the rate at which victims sue is extremely low if car and workplace accidents are excluded. *Id.* (finding that “in nonwork, non-motor-vehicle accidents, only three injuries out of 100 lead to liability claims”).

83. If there happen to be other victims of the same misconduct who do sue, they may be able to get punitive damages based on harms to others not in court, but this option only arises in these circumstances and is subject to various doctrinal limitations of its own. Judge Posner has treated punitive damages as one way of addressing the problem of underlitigation. See *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676–77 (7th Cir. 2003) (“If a tortfeasor is ‘caught’ only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.”).

84. See Brian Galle, *In Praise of Ex Ante Regulation*, 68 VAND. L. REV. 1715, 1735 & n.74 (2015) (noting “extensive evidence” that “humans tend to be excessively inattentive to future events”).

85. See Robert J. Meyer, *Why We Under-Prepare for Hazards*, in ON RISK AND DISASTER: LESSONS FROM HURRICANE KATRINA 153, 158–59 (Ronald J. Daniels et al. eds., 2006). For example, the risk of violent crime, which is routinely covered on the evening news, is often overestimated. *Id.* (citing Jennifer S. Lerner et al., *Effects of Fear and Anger on Perceived Risks of Terrorism: A National Field Experiment*, 14 J. PSYCHOL. SCI. 144 (2003) (This study asked a sample of 973 Americans what they

ful at making rational decisions to account for risks, such as when we should incur costs to avoid risks. As a general matter, humans overvalue immediate, certain costs, and undervalue long-term, uncertain benefits.<sup>86</sup> The result is that penalties that are more immediate and certain are likely to be more effective in deterring conduct than those that are more delayed or uncertain, even if the delayed, uncertain penalties are much heavier.<sup>87</sup> The tort system is bad at imposing immediate, certain penalties.

Nor are businesses necessarily immune to these problems. It is tempting to see entities like corporations as economically rational actors, capable of dispassionately evaluating the elements of the Hand formula and making the decision to invest in additional safety measures because the expected tort liability outweighs the cost of doing so. The feedback loop between tort judgments and corporate behavior, however, does not necessarily function so smoothly. The less predictable and inevitable tort judgments are, the less neatly they translate into costs that can be weighed when making economically rational decisions. It may also be incorrect to assume that firms function in a way that is capable of processing the judgments imposed in tort cases as economic inputs.<sup>88</sup> For example, the connection between the legal and product-design teams of a large corporation may not be close enough to engender the kind of cost-benefit analysis envisioned by the Hand formula.<sup>89</sup> Corporate managers may also

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thought was the probability that they would be harmed by violent crime in the coming year. The mean answer was 43%, just under the mean estimate of how likely they were to contract the flu, 47%.)).

86. See Ted O'Donoghue & Matthew Rabin, *Doing it Now or Later*, 89 AM. ECON. REV. 103, 103 (1999) (examining the “human tendency to grab immediate rewards and to avoid immediate costs”). Moreover, our investments in avoiding risk may have a built-in, self-defeating cognitive bias. By successfully avoiding risk, we immediately discount the quantity of risk we faced, leading to reduced investments in avoiding the same risks in the future. See Meyer, *supra* note 85, at 156; see also Robert J. Meyer, *Failing to Learn from Experience About Catastrophes: The Case of Hurricane Preparedness*, 45 J. RISK & UNCERTAINTY 25, 26–27 (2012) (reporting experimental findings demonstrating that “the tendency to reduce investments in protection given the *absence* of past losses is observed regardless of whether the reason for this absence was the lack of a storm event or the presence of past mitigation”).

87. For instance, scientific analyses of the deterrent effects of criminal punishment have long shown that “punishment risk outweighs punishment costs in a general deterrence heuristic,” meaning that it may well be more effective to ensure that a higher percentage of criminals are caught than that they are given extremely hefty punishments. Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 273 (2006) (citing Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1 (1998)).

88. See John A. Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1820, 1822 (1987) (noting that a study of corporate responses to the tort system showed that it “produced only an ‘indistinct signal’ largely devoid of useful guidance”).

89. See Gerald F. Tietz, *Strict Products Liability, Design Defects and Corporate Decision-Making: Greater Deterrence Through Stricter Process*, 38 VILL. L. REV. 1361, 1405–08 (1993) (discussing the “isolation that comes from the rigid vertical organization in many corporations”); see also Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (reporting that police officers are virtually never individually responsible for the costs of tort judgments against them); Monica Davey & Timothy Williams, *Chicago Pays Millions but Punishes Few in Killings by Police*, N.Y. TIMES (Dec. 17, 2015), <http://www.nytimes.com/2015/12/18/us/chicago-pays-millions-but-punishes-few-in-police-killings.html> [<https://perma.cc/AF5N-6CKG>].

privilege increasing profits in the near term over avoiding risks in the long term.<sup>90</sup>

Severing tortfeasor and victim also makes for more efficient compensation. There are instances in which victims are undercompensated or overcompensated because of the need to tie their compensation to a particular defendant. The most obvious example is the judgment-proof tortfeasor with shallow pockets and no liability insurance. It is so difficult to collect on judgments in such cases that victims almost never bring suit in the first place.<sup>91</sup> There is, similarly, no compensation rationale for awarding punitive damages to victims because they, by definition, exceed the amount needed to provide compensation for the victim's harm. Coercive insurance helps address this problem by spreading the costs of accidents over time and among similarly situated actors, so that a victim receives full compensation regardless of the tortfeasor's ability to pay.

#### B. ANTICIPATING HARM

Insurance also has built-in timing advantages over tort liability, in that it is predictive rather than reactive. Models of the tort system that see it as a mechanism for achieving efficient outcomes are premised on the idea that tort judgments for past transgressions will act to deter conduct in the future. Coercive insurance, by contrast, quantifies the risk associated with certain behaviors and imposes the costs associated with that risk on those who create it in small increments going forward. Of course, the insurance industry cannot foresee with perfect accuracy how many injuries a particular type of risk is likely to cause.<sup>92</sup> Like the tort system, it draws on a pool of data concerning past accidents to calculate the connection between actions and the harms they cause. The key difference lies in what is done with that data. Whereas the tort system imposes costs on tortfeasors only after their actions have resulted in injuries, coercive insurance uses past data to extrapolate into the future, in effect treating all risky conduct as actionable, regardless of who it injures. The tort system simply has no ability to impose liability for risk before it results in injury because it operates on a purely *ex post* basis.<sup>93</sup>

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90. See George W. Dent, Jr., *Academics in Wonderland: The Team Production and Director Primacy Models of Corporate Governance*, 44 Hous. L. Rev. 1213, 1238–39, 1244–49 (2008) (noting that managers are often compensated in ways that lead to “myopic behavior”); cf. Galle, *supra* note 84, at 1734–38 (describing the “myopia problem” as a serious limitation on the effectiveness of *ex post* penalties in affecting *ex ante* behavior and noting various mechanisms by which governments have attempted to mitigate this problem).

91. See *infra* notes 109–12 and accompanying text.

92. Insurers do try, however. In the products liability context, for example, insurers study the design of the products their policyholders make and their manufacturing processes in an effort to identify possible sources of risk. See, e.g., Ben-Shahar & Logue, *supra* note 22, at 218–19.

93. In a narrow range of cases, plaintiffs have tried to impose liability for risks that have not been realized, largely based on past exposure to harmful substances that have not yet ripened into actual harm. See *infra* notes 165–66 and accompanying text. These efforts have largely been unsuccessful.

This feature gives insurance premiums a timing advantage when it comes to deterrence. From the perspective of a potential tortfeasor, like a driver, correctly processing tort law's supposed economic inputs requires a great deal of work. To perform calculations using the Hand formula (which is, after all, what we are supposed to do to meet our obligation to behave efficiently), a driver must, for each particular risky behavior, come up with an estimate of how likely that behavior is to result in injury and what the cost of that injury is likely to be. Take falling asleep at the wheel. An individual might be forced to work the late shift or face losing her job, requiring her to drive home late at night and risk getting in an accident. The classical economic account of tort law suggests that this worker should compare the burden of finding a new job (or some other way to avoid driving late at night) with the expected cost of untold years of statistically risky driving. It should be obvious that individuals simply lack the tools to engage in this type of calculus on anything but the most generalized, intuitive level.<sup>94</sup> Coercive insurance helps. Instead of vague notions of risk, it delivers a price, expressed as a dollar figure that appears on a monthly bill. Coercive insurance, at least in this admittedly theoretical form, empowers individuals to think in ways that always seemed fancifully idealized under the law and economics account of the traditional tort system. If liability rules are a menu of prices for engaging in certain activities, only coercive insurance provides a menu with actual prices on it. Like expensive seafood, the prices for behaviors provided on the tort system's menu say nothing more determinate, *ex ante*, than "market."

Drivers must pay insurance premiums as soon as they buy a car, regardless of whether they actually crash it. Tort liability only deters conduct to the extent that individuals and companies are able to make inferences about the expected costs of that liability based on past experience, either their own or the experience of others. Individuals are far better at reacting to immediate, certain costs than to delayed, uncertain ones. This suggests that insurance premiums that must be paid immediately and regularly have a much more powerful effect on individual decisions than the perhaps remote prospect of liability in tort.

#### C. INSTITUTIONAL COMPETENCIES

Our tort and insurance systems are administered by different institutions with different competencies. The tort system is notoriously inefficient. One estimate places the transaction costs associated with imposing liability in tort at roughly 50%, compared with 21% for the insurance-like workers' compensation sys-

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94. See Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 107 (2010) ("[I]t is extraordinarily rare that judges or juries have enough information to put the theory [embodied by the Hand formula] into practice. They are left to guess, or at least they would be were they trying to apply the Hand Formula." (internal citation omitted)).



tem.<sup>95</sup> There are also important differences in the way the two systems collect and process information. The tort system, functioning within the courts, is subject to the rules of evidence and discovery. In most cases, it is beyond the capacity of the tort system to collect information about the behavior of potential tortfeasors on an ongoing basis. Insurance companies, by contrast, frequently collect data on their policyholders and usually do so before policies go into effect and in some cases regularly thereafter.<sup>96</sup> Indeed, in many cases, insurers even conduct their own research into new ways of mitigating risk.<sup>97</sup>

Insurance companies have, in some cases, been at the forefront of encouraging the mandatory adoption of safety features in ways courts cannot replicate. Insurers helped push for rules requiring the inclusion of seatbelts and airbags in cars and lobbied for stricter building codes to help prevent damage to homes.<sup>98</sup> The Insurance Institute for Highway Safety (IIHS), for example, conducts elaborate crash tests on cars and provides ratings that are meant to encourage the adoption of new accident-prevention technologies.<sup>99</sup> In 2006, the IIHS announced that it would no longer award its “top safety pick” award to any car that did not feature electronic stability control (ESC), a supplement to antilock brakes that helps cars maintain control during abrupt turns.<sup>100</sup> Research conducted by the IIHS and the National Highway Traffic Safety Administration had estimated that ESC had the ability to prevent about one-third of fatal accidents, saving roughly 10,000 lives each year.<sup>101</sup>

The tort system mostly lacks the ability to encourage innovation in this way, as the example of ESC demonstrates. A few plaintiffs have filed products liability actions against car manufacturers for not including ESC in their

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95. Engstrom, *supra* note 14, at 82–83. Abraham reports that only 46% of tort expenditures end up in the hands of victims, whereas insurance-based systems pay as much as 90% of their costs to victims. ABRAHAM, *supra* note 17, at 9–10.

96. This freedom is, of course, limited by what the market will bear. Although the telematics devices used to adjust auto insurance premiums have so far been offered on a purely voluntary basis, it is easy to imagine them becoming mandatory in the future. *See supra* note 40; *see also infra* note 121.

97. Ben-Shahar & Logue, *supra* note 22, at 223–25. The homeowner’s insurance industry, for example, funds a research facility that studies how buildings respond to hazards like high winds. *Id.*

98. *Id.* at 222–24.

99. The insurance industry also operates the related Highway Loss Data Institute, which publicizes insurance data on the losses suffered by different types of vehicles. *About the Institutes*, INS. INST. FOR HIGHWAY SAFETY, <http://www.iihs.org/iihs/about-us> [<https://perma.cc/ZQ2F-RLXL>].

100. 2007 Top Safety Pick Award Winners: Award Criteria are Tougher; SUVs Eligible for First Time, IIHS NEWS (Nov. 21, 2006), <http://www.iihs.org/iihs/news/desktopnews/2007-top-safety-pick-award-winners-award-criteria-are-tougher-suvs-eligible-for-first-time> [<https://perma.cc/TM4S-FVZJ>].

101. *Electronic Stability Control Could Prevent Nearly One-Third of All Fatal Crashes and Reduce Rollover Risk by As Much As 80%; Effect Is Found on Single- and Multiple-Vehicle Crashes*, IIHS NEWS (June 13, 2006), <http://www.iihs.org/iihs/news/desktopnews/electronic-stability-control-could-prevent-nearly-one-third-of-all-fatal-crashes-and-reduce-rollover-risk-by-as-much-as-80-effect-is-found-on-single-and-multiple-vehicle-crashes> [<https://perma.cc/GJP5-4HJG>]; Jennifer N. Dang, *Preliminary Results Analyzing the Effectiveness of Electronic Stability Control (ESC) Systems*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN. (Sept. 2004), <http://www.nhtsa.gov/cars/rules/regrev/evaluate/809790.html> [<https://perma.cc/PBS6-DKCQ>].



vehicles; all of these claims have failed.<sup>102</sup> With only 29% of cars featuring ESC as of 2006<sup>103</sup> and no federal regulation requiring it, the tort system concluded that its absence did not render a car defective.<sup>104</sup> The problem of encouraging the incorporation of this technology was ultimately solved by regulation: in 2007, NHTSA promulgated a rule requiring that all cars include ESC by 2011.<sup>105</sup> Learned Hand's opinion in *The T.J. Hooper* notwithstanding,<sup>106</sup> the tort system is not normally in the business of forcing the adoption of new technologies that improve safety.<sup>107</sup> High-profile tort suits do have the ability to publicize new dangers in ways that sometimes lead to their elimination,<sup>108</sup> but the system itself typically relies on others to make the case that a product or behavior should be outlawed or modified as a regulatory matter.

The tort system also has a notorious problem with the huge portion of Americans who are effectively judgment-proof.<sup>109</sup> As scholars of inequality

102. See *Hinkle v. Ford Motor Co.*, No. 3:11-24-DCR, 2013 WL 2285447, at \*3 (E.D. Ky. May 23, 2013) (noting jury's verdict in favor of defendant on design defect claim); *May v. Ford Motor Co.*, No. 09-165-GFVT, 2010 WL 5391605, at \*2 (E.D. Ky. Dec. 22, 2010) (granting summary judgment for defendant on plaintiff's design defect claim); *Garcia v. Nissan Motor Co.*, No. Civ.A. M-05-59, 2006 WL 869944, at \*3–\*4 (S.D. Tex. Mar. 30, 2006) (rejecting plaintiff's argument that vehicle's lack of ESC made it defective, because "a product is not defective merely because it could be safer"); *Cambron v. Ford Motor Co.*, No. B225122, 2012 WL 34233, at \*3 (Cal. Ct. App. Jan. 9, 2012) (noting jury's rejection of plaintiff's design defect theory); *Fleurime v. Ford Motor Co.*, No. 14 FJVR 6-2, 2013 WL 8642137 (Fla. Cir. Ct. Sept. 25, 2013) (jury verdict in favor of defense on design defect claim); *Gallagher v. DaimlerChrysler Corp.*, 238 S.W.3d 157, 160 (Mo. Ct. App. 2007) (affirming jury verdict in favor of defendant and denial of plaintiff's motion for new trial); *Hamid v. Lexus*, 369 S.W.3d 291, 300–01 (Tex. App. 2011) (affirming jury verdict in favor of defendant and trial court's instruction that jury could presume that car was not defective because it complied with applicable safety regulations).

103. Federal Motor Vehicle Safety Standards; Electronic Stability Control Systems; Controls and Displays, 72 Fed. Reg. 17236 (Apr. 6, 2007) (to be codified at 49 C.F.R. pts. 571 & 585).

104. See *supra* note 102 and accompanying text.

105. Federal Motor Vehicle Safety Standards, 72 Fed. Reg. at 17236.

106. See *The T.J. Hooper v. N. Barge Corp.*, 60 F.2d 737, 740 (2d Cir. 1932) ("Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."). Part of the empirical debate over tort law's ability to deter has looked at its aggregate effects over time within broad categories of activity, like automobiles or pharmaceuticals. See generally *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* (Peter W. Huber & Robert E. Litan eds., 1991). This debate has often treated tort law's deterrent effect as presenting society with a trade-off between safety and innovation. As the example of ESC demonstrates, this dichotomy is often a false one.

107. A similar dynamic played out during the gradual adoption of the airbag. Most courts rejected plaintiffs' argument that cars not fitted with airbags were therefore defective. Murray Mackay, *Liability, Safety, and Innovation in the Automotive Industry*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION*, *supra* note 106, at 191, 215.

108. See Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 603 (2008) (noting tort law's role in publicizing harms); Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 908–10 (2007) (discussing tort law's disclosure benefits).

109. Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 609 (2006) ("[T]he deterrence, corrective-justice, and loss-spreading functions of tort law are badly compromised by the omnipresence of judgment-proof tortfeasors."); see generally S. Shavell, *The Judgment Proof Problem*, 6 INT'L REV. L. & ECON. 45 (1986) (analyzing distortions in the tort system caused by judgment-proof defendants).

have noted, the bottom half of Americans now possess only 1.1% of the country's net worth.<sup>110</sup> Because the tort system relies almost entirely on contingent fee litigation, suit is rarely brought against tortfeasors who have no assets.<sup>111</sup> Indeed, the problem extends beyond the significant portion of Americans who literally have no net worth because various barriers to collecting tort judgments insulate the income and property of individuals at all levels of wealth.<sup>112</sup> This means that, as far as the tort system is concerned, many American drivers are essentially invisible.<sup>113</sup> Although the mere threat of liability, with the attendant strain of being a defendant in a tort action, certainly has some deterrent effect regardless of how successful a plaintiff ultimately is in collecting a judgment, the myriad ways in which the tort system is essentially precluded from pursuing actions against such a broad swath of American drivers pose a serious problem for the notion that it can deter risky driving.

Of course, the insurance system is not without flaws of its own. Even though car insurance is mandatory in virtually every state,<sup>114</sup> a significant percentage of motorists are uninsured.<sup>115</sup> Of those who have insurance, a sizable portion are thought to be underinsured.<sup>116</sup> The vast majority of states require that motorists carry no more than \$50,000 in third party, per-occurrence liability coverage for

110. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519, 554 (2016) (noting that “the bottom half of the distribution always owns close to zero wealth on net”).

111. See Yeazell, *supra* note 59, at 186 (“No one working on a contingent fee intentionally sues an insolvent defendant.”).

112. See Gilles, *supra* note 109, at 607, 623–60 (“Most Americans are judgment-proof not because we are poor, but because state and federal laws entitle us to be judgment-proof.”). For instance, the vast majority of states have laws that exempt some amount of home equity from judgment creditors. *Id.* at 630–32. Even when defendants have nonexempt equity in their homes, other barriers, like the priority of mortgage lenders and the cumbersome need to initiate foreclosure proceedings to force a sale, act to hamper plaintiffs’ efforts to collect judgments. *Id.* at 632–33.

113. See *id.* at 606 (“Most people in our society face little or no threat of personal liability for any intentional or unintentional torts they might commit.”). Gilles goes so far as to call personal tort liability a “myth.” *Id.* at 605.

114. New Hampshire is the only state that does not require all drivers to carry auto insurance. Penny Gusner, *Minimum Car Insurance Requirements*, <http://www.insure.com/car-insurance/minimum-coverage-levels.html> [<https://perma.cc/2DY7-9FYF>]. New Hampshire’s Division of Motor Vehicles does, however, require that certain individuals carry insurance, particularly those who have engaged in conduct like driving while intoxicated or leaving the scene of an accident. *Insurance Requirements/SR-22*, N.H. DEP’T OF SAFETY, DIV. OF MOTOR VEHICLES, <https://www.nh.gov/safety/divisions/dmv/financial-responsibility/insurance.htm> [<https://perma.cc/Y2TH-RCGT>]. In addition, Virginia allows motorists to forego insurance and pay a \$500 “uninsured motor vehicle fee.” *Insurance Requirements*, VA. DEP’T OF MOTOR VEHICLES, <https://www.dmv.virginia.gov/vehicles/#insurance.asp> [<https://perma.cc/5GC3-TFA9>].

115. The Insurance Research Council’s most recent analysis estimated that 12.6% of motorists were uninsured in 2012. *New Study Reveals a Declining Trend in the Percentage of Uninsured Motorists*, INS. RESEARCH COUNCIL (Aug. 5, 2014), [http://www.insurance-research.org/sites/default/files/downloads/IRC%20UM\\_NewsRelease\\_1.pdf](http://www.insurance-research.org/sites/default/files/downloads/IRC%20UM_NewsRelease_1.pdf) [<https://perma.cc/HDX5-E2M6>].

116. See STEMPER, SWISHER & KNUITSEN, *supra* note 57, at § 13.01 (calling state-mandated minimum coverage levels “almost ridiculously too low” and noting the resulting “large number of auto accidents and lawsuits [that] involve underinsured drivers”); Baker & Swedloff, *supra* note 5, at 1429 (“[M]ost people buy automobile liability insurance limits that are much less than the potential damages in a serious claim.”).

bodily injuries, a figure that plainly would not suffice to cover a wide range of tort claims that can arise from negligent driving.<sup>117</sup> Even though otherwise judgment-proof individuals—puzzlingly, to economists—often choose to purchase more extensive coverage,<sup>118</sup> the problem remains significant, as it artificially reduces insurers' responsibility for the tortious driving of their policyholders in a certain share of cases.

It is also not necessarily the case that insurers have an incentive to deter risky driving only to an efficient degree. Once a driver becomes the customer of an insurance company, the insurer would prefer that the driver experience no loss whatsoever and may well overdeter risky driving in the interest of avoiding losses.<sup>119</sup> Nor do insurers necessarily relish paying claims. These latter two problems (overdeterrence and refusal to pay claims) are somewhat mitigated by competition among insurers eager to present themselves to potential customers as offering reasonable rates and no-hassle claims processes.<sup>120</sup> Competition also, however, limits to some degree the ability of insurers to collect information from their customers. No insurer has so far been willing to make use of a telematics device mandatory, and advances in the type of data that can be collected are frequently met with resistance from customers.<sup>121</sup>

Despite the insurance industry's weaknesses, however, it seems fair to conclude that the tort system is inherently less well-suited to promoting wealth maximization through efficient deterrence. The tort system carries with it notoriously high transaction costs, has difficulty influencing the large proportion of Americans who are judgment-proof, and is subject to serious limitations in its

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117. *Compulsory Auto/Uninsured Motorists*, INS. INFO. INST. (Apr. 2016), <http://www.iii.org/issue-update/compulsory-auto-uninsured-motorists> [<https://perma.cc/EN3K-SQBP>]. Only Alaska and Maine require that motorists carry more than \$65,000 in per-occurrence third party liability coverage for bodily injuries. *Id.*

118. See Gilles, *supra* note 109, at 663–64.

119. Similarly, insurers may encourage their policyholders to avoid running afoul of legal rules rather than encouraging them to avoid causing the harm the legal rules are designed to prevent. Talesh, *supra* note 59, at 630, 634 (describing insurance companies' advice to avoid sexual harassment liability by refraining from referring to employees as supervisors).

120. AFLAC, to take just one example, has run a series of advertisements touting its rapid claims process. See, e.g., *Individuals*, AFLAC, <https://www.aflac.com/individuals/default.aspx> [<https://perma.cc/6C5V-TXJH>] (“When it comes to paying claims, no one flies faster. We’ll process, approve, and pay in just a day.”); see also *Why Choose State Farm*, STATE FARM, <https://www.statefarm.com/claims/why-choose-state-farm> [<https://perma.cc/2GYJ-T6LZ>] (“We Pay Claims. It’s true: we hold up our end of the bargain. . . . Immediate, personal claims assistance is available 24 hours a day, 7 days a week, all year long.”). State laws also forbid insurers from unreasonably refusing to pay claims or delaying claims payments. Daniel Schwarcz, *Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection*, 61 UCLA L. REV. 394, 414–15 (2014). On the other hand, data on individual insurers’ promptness or reliability in paying claims is not generally made publicly available, hampering consumers’ ability to select insurers on this basis. *Id.* at 414–20.

121. Scism, *supra* note 36 (noting privacy concerns as a source of resistance to telematics devices and quoting Progressive CEO as reporting that early surveys showed that “about 40% of people had a viewpoint that was some variation on ‘No way in hell’”). Despite these concerns, about a quarter of new Progressive customers and a third of new Allstate customers opt in to the companies’ telematics programs. *Id.*

ability to collect information and encourage the development and adoption of efficient safety measures. The insurance industry, by contrast, operates much more freely, and has in fact played a significant role in encouraging the adoption of several life-saving innovations. There is a certain artificiality in comparing separately two systems that in reality are fused together.<sup>122</sup> The point, however, is that examining the fundamental institutional competencies and limitations of the tort and insurance systems suggests that coercive insurance could do the work of efficient deterrence much more cheaply, more creatively, and more effectively than could tort law.

#### D. COERCIVE INSURANCE AS AN EFFICIENT LIABILITY RULE

Economic efficiency theorists have struggled to explain why tort law works the way it does if it is a system for efficiently allocating accident costs. Defending their vision of tort law, efficient deterrence theorists have offered a range of explanations for tort law's requirement of a connection between tortfeasor and victim and *ex post* operation. None of these arguments are especially convincing as an explanation of why tort law operates the way it does.<sup>123</sup> More importantly, such arguments are only attempts to reconcile features of tort law with a particular account of tort law's purpose and structure. Efficiency theorists do not, in other words, argue that tort law is optimally efficient or that its insistence on *ex post* adjudication of harms caused to a victim by a tortfeasor makes it the most efficient system possible for achieving the overall goal of efficient deterrence.

Efficiency theorists have advanced a variety of arguments as to why tort law's insistence on a connection between tortfeasor and victim fits within their picture of tort as a system that promotes efficiency. Richard Posner, for instance, has argued that the point of making the victim bring suit against a tortfeasor is that it is more efficient for the victim to bear the cost of prosecuting the action and of gathering the necessary evidence.<sup>124</sup> The truth of this claim is not self-evident. It is not clear, after all, why individuals are able to investigate and prosecute wrongs they have suffered more efficiently than the state or some other specialized entity having nothing to do with the underlying injury.<sup>125</sup> Nor is it clear why the goal of efficient deterrence would not be well-served by allowing a broad range of people other than the plaintiff to bring suit if for some reason the plaintiff declines to do so, or why the amount of damages the

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122. See *supra* notes 59–62 and accompanying text.

123. See Richard W. Wright, *The New Old Efficiency Theories of Causation and Liability*, 7 J. TORT L. 65, 65 (2014) (discussing the “efficiency theorists’ inability to explain and justify the factual causation requirement in tort law”).

124. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.10 (8th ed. 2011).

125. Goldberg, *supra* note 6, at 554 (referring to the “dubious hypothesis that a system empowering victims to act as private attorneys general will be more efficient than a scheme of regulatory fines”); see also Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 702 (2003) (noting that “law and economics scholars are increasingly wary of wholeheartedly endorsing” this argument).

plaintiff receives is tied to the plaintiff's loss and not the amount necessary to incentivize the plaintiff to pursue her claim.<sup>126</sup> At the very least, if tort law's award of damages is aimed at incentivizing plaintiffs to sue, it would seem to be a failure: the vast majority of accident victims do not file suit.<sup>127</sup>

Economists have also failed to show that the *ex post* causation inquiry so central to the adjudication of tort claims actually serves the interest of efficiency. As Coase and Calabresi have demonstrated, economic efficiency is less concerned with asking which actor caused a particular injury than it is with asking which actor could most efficiently avoid causing similar injuries in the future.<sup>128</sup> If the goal is to answer that latter question, deciding cases on the basis of whether a defendant's behavior was a but-for cause of the plaintiff's injury begins to look like a distraction at best and counterproductive at worst.<sup>129</sup> It also entails a different inquiry, one that focuses entirely on an *ex post* analysis of the circumstances of a particular injury and ignores an *ex ante* evaluation of the various levels of care available to a defendant.<sup>130</sup> Efficiency theorists have attempted to defend the compatibility of their views with the causation requirement, but have often done so by arguing that the causation requirement itself is deeply flawed, for instance by suggesting that it is incoherent or unintelligible<sup>131</sup> or that it is actually just part of the breach inquiry.<sup>132</sup>

Although Calabresi's embrace of efficiency led him to the mechanism of assigning liability to the lowest-cost avoider of a particular harm, and thus to a kind of strict liability that looks a lot like coercive insurance,<sup>133</sup> Posner's economic interpretation might appear to present a problem. For Posner, negligence embodies a norm of efficiency and promotes efficient behavior by imposing liability on defendants who behave in inefficient ways.<sup>134</sup> This entails a much more individualized analysis of an individual's behavior than coercive insurance would seem to permit. For example, where coercive insurance would penalize a driver for braking too suddenly, Posner might object that a defendant driver should only be held liable if the braking was inefficient, which would require understanding why the driver slammed on the brakes or, to put it another way, whether the benefit derived from slamming on the brakes outweighed the cost involved in doing so (perhaps by avoiding a more catastrophic accident

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126. Weinrib, *supra* note 80, at 508–09; Wright, *supra* note 123, at 73 n.31.

127. *See supra* note 82.

128. Wright, *supra* note 123, at 72–74 (citing CALABRESI, *supra* note 10, at 239–87); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 499–500 (1961); R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

129. *See generally* Calabresi, *supra* note 76 (discussing the incompatibility of various causal concepts with the goal of promoting “market deterrence”).

130. Wright, *supra* note 123, at 75–83.

131. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 229 (1987).

132. *Id.* at 229–30.

133. CALABRESI, *supra* note 10, at 135–43.

134. Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 99, 99–103 (David G. Owen ed., 1995).



than the one that was caused). It would be a mistake, however, to see this inquiry as beyond the ken of coercive insurance. Insurers are rapidly developing technology that can understand and interpret the conditions of the road at the time of an event like a rapid deceleration and are working toward the goal of penalizing their customers only when their behavior is truly unjustified, in the sense that it creates rather than mitigates risk.<sup>135</sup> Nor does this analysis help reconcile the goal of efficiency with tort law's causation requirement, which refuses to impose liability on a defendant, however negligent (read: inefficient) his behavior, unless that behavior is the but-for cause of a plaintiff's injury.<sup>136</sup>

At any rate, these arguments are attempts to reconcile the requirements of tort law with the view that it promotes economic efficiency, not to argue that tort law is itself more efficient than an alternate system would be.<sup>137</sup> Indeed, some economists, most notably Calabresi, have explicitly abandoned the idea that tort law consisting of victim-initiated, *ex post* lawsuits is actually more efficient than some alternative system that, like coercive insurance, imposes liability equal to the expected harm on an actor whenever his conduct creates risks to others.<sup>138</sup>

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135. Scism, *supra* note 36 (describing patent issued to Allstate for sensors that would “track nearby cars’ driving patterns”); KARAPIPERIS ET AL., *supra* note 1, at 13 (discussing this issue and emphasizing the need to “differentiate, for example, between types of braking events and how and where they took place in order to assess their true overall contribution to risk”). Another obvious candidate for refinement is insurers’ determination that nighttime driving involves higher risk. Combining in-car technologies that are able to determine when a driver is dangerously sleepy (or tipsy) with data on customers’ driving habits, insurers may soon be able to distinguish between the bartender finishing a shift who is perfectly alert at 2 a.m. and the exhausted patron who should have taken a cab. *See supra* note 44.

136. The difficulty here is seen most clearly in cases where the defendant was plainly negligent but did not cause the plaintiff’s injuries. In *Weeks v. McNulty*, for instance, the defendant failed to install statutorily required fire escapes on his building and the plaintiff died in a fire. 48 S.W. 809, 810 (Tenn. 1898). Thanks to evidence that the plaintiff could not have used the fire escape even if it had been installed, the defendant won, as his negligence was not a but-for cause of the plaintiff’s death. *Id.* at 812. This result is hard to square with the idea that a defendant should be held liable for behavior that, *ex ante*, is inefficient. *See* Richard W. Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435, 452–55 (1985) (discussing and critiquing the “forward-looking risk analysis” of liability advocated by Landes and Posner).

137. *See* Goldberg, *supra* note 6, at 554–56 (noting that “efficiency theory’s interpretive account of tort law . . . ultimately cannot explain why we find ourselves with the institution of tort law itself” and that, from an efficiency perspective, “it is unclear why we would have a system that requires plaintiffs to commence suit, one that employs lay jurors to assess damages, and one that requires the plaintiff to prove that the defendant’s conduct caused injury to him or her”). Moreover, none of the efficiency theorists’ accounts of these features of tort law are convincing as explanations of the way the terms or concepts are ordinarily understood or actually employed. *See id.* at 553 (“To the extent interpretive economic analysis purports to capture the meaning of the concepts that citizens and legal actors actually employ . . . that attempt must be considered a failure.”); Wright, *supra* note 123, at 83–90.

138. *See* Calabresi, *supra* note 76, at 78–79, 84–87 (noting that “but for” causation is inconsistent with “specific deterrence” and inadequate for achieving “market deterrence”); Wright, *supra* note 136, at 438 (citing CALABRESI, *supra* note 10, at 251, 267–70, 286–87); *see also* Goldberg, *supra* note 6, at 554 (noting that efficiency theorists “ultimately cannot explain why we find ourselves with the institution of tort law itself” because “it is unclear why we would have a system that requires plaintiffs to commence suit . . . and one that requires the plaintiff to prove that the defendant’s conduct caused

If tort law's purpose in society is to serve as a liability rule, promoting efficiency by properly allocating and distributing the costs of accidents, then coercive insurance should be an entirely preferable replacement.<sup>139</sup> Coercive insurance does away with the distortions that result from requiring a connection between tortfeasor and victim, particularly the luck of the wrongdoer who happens to avoid causing harm, the need to underdeter or overdeter in the interest of compensation, and the need to overcompensate or undercompensate in the interest of deterrence. More broadly, accounts of the tort system that are grounded in efficiency rely on the idea that the system is able to aggregate the individual harms that end up as tort suits. But deterring the conduct of individual people and companies requires imposing costs in a way that they can be rationally accounted for—something the tort system has trouble doing.

### III. WHAT'S MISSING? IMPLICATIONS FOR TORT THEORY

Seeing coercive insurance as a liability rule that has certain inherent efficiency advantages over tort law helps shed light on tort theorists' decades-long struggle over the soul of tort law. Comparing coercive insurance with tort law demonstrates the irreducible inefficiency of two key features of tort law: its insistence on a connection between tortfeasor and victim and that it operates on a strictly *ex post* basis. That coercive insurance jettisons these requirements suggests two conclusions: first, that tort law cannot, as a purely descriptive matter, be said to be a system for achieving the efficient allocation of accident costs because it contains these features that are so demonstrably inefficient as to be plainly not about efficiency, and second, that a satisfying descriptive account of tort law cannot simply eliminate these features because doing so results in a system that is not recognizable as tort law. Turning away from efficiency-based accounts of tort law leaves the question of what features of tort law cannot be captured by coercive insurance and therefore comprise the core of tort law. Probing coercive insurance's compatibility with the leading rights-based accounts of tort law, corrective justice, and civil recourse theory, I argue that coercive insurance supports civil recourse over corrective justice as capturing more closely what is unique about tort law.

#### A. EFFICIENCY THEORIES

Efficiency theorists' claim that tort law is a system for efficiently allocating accident costs cannot be squared with two of the most fundamental features of

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injury to him or her"); James J. Heckman, *The Intellectual Roots of the Law and Economics Movement*, 15 L. & HIST. REV. 327, 328–29 (1997) (noting that “there is no necessary connection between the punishments constructed to deter an act and the compensation due to persons injured by the act” and that “[s]eparating issues of efficiency from issues of redistribution and compensation . . . is thus analytically fruitful”).

139. See Goldberg, *supra* note 6, at 556 (“From a deterrence perspective, faulty conduct ought to be deterred if it *risks* harm in the future, regardless of whether it happened to cause harm in the past.”).



tort law: its insistence on a connection between tortfeasor and victim and its *ex post* operation. Coercive insurance both demonstrates that these features are a hindrance to the goal of efficiency and that these features are central to tort law. It thus poses a significant challenge to efficiency accounts of tort law that purport to be descriptive.

An efficiency theorist might object that the claim that tort law is about the efficient allocation of accident costs merely describes a complex and imperfect system and that tort law can be “about” economic efficiency in some fundamental sense without being the most efficient system possible. In other words, an efficiency theorist might insist, coercive insurance may well be preferable to tort law from a normative perspective, but this does not necessarily undermine the descriptive claim that tort law is about efficiency.<sup>140</sup> After all, for tort theorists, descriptive accounts of tort law often bleed into prescriptive recommendations for making the system fit the descriptive account more closely.<sup>141</sup> The descriptive claim that tort law is about efficiency thus often becomes a prescriptive claim that tort law should be tweaked in some way to make it more efficient.<sup>142</sup> This rhetorical move has been used for a generation.<sup>143</sup>

This objection has some force, but its force is limited. There is an inherent tension between a purportedly descriptive account of an existing system and any normative argument that supports significant changes to that system by appealing to the descriptive claim. The more radically you suggest changing tort law

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140. Calabresi, for instance, treated tort law as merely one alternative among an array of systems that have as their aim the efficient allocation of accident costs. CALABRESI, *supra* note 10, at 311–18. He otherwise treated liability rules generally as an irreplaceable part of a “mixed” (that is, not purely liberal or purely collectivist) legal regime. *See* Calabresi, *Mixed Society*, *supra* note 54, at 521–28. For a discussion of this seeming contradiction, *see* Coleman, *supra* note 72, at 1149–53.

141. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 971–72 (2010) (noting that the attractiveness of efficiency theorists’ account of what tort law accomplishes has led some of them “to abandon any effort to defend their theories as interpretively plausible and to shift instead to a forthright call for the revision or elimination of doctrines that prevent tort from operating more satisfactorily as a scheme of loss allocation”).

142. *See, e.g.*, Kaplow & Shavell, *supra* note 56, at 1097–102 (arguing that tort law is suboptimal in part due to an overemphasis on notions of fairness); *cf.* Abraham, *supra* note 5, at 655 (“When we ‘describe’ a subject . . . the description is likely to have normative implications. It is easy enough to get an ‘ought’ from an ‘is’ when a particular subject or phenomenon typically has distinctive norms associated with it.” (internal citation omitted)). Weinrib pointed out the circularity of this argument in 1989. *See* Weinrib, *supra* note 80, at 503 (noting that efficiency theorists “correctly understand the incompatibility of tort law and instrumentalist goals” but ignore the possibility that the solution is to understand tort law “non-instrumentally” rather than reform or abolish tort law).

143. *See, e.g.*, Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517, 517–19 (1984) (arguing that tort compensation is inefficiently generous and thus should be offset by a reduction in all public benefits enjoyed by successful plaintiffs in the amount of any damages award); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 870 (1998) (arguing that most punitive damages awarded against corporations are ineffective); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1546–47, 1589 (1987) (arguing that pain and suffering damages are not efficient and thus should not be awarded); *see also* Joanna M. Shepherd, *Tort Reforms’ Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905, 914–21 (2008) (summarizing arguments in favor of tort reform).

to make it better at achieving efficiency, the more you undermine the original claim that it is in fact about efficiency. For example, suppose a tort theorist offered the claim that tort law is all about punishing people for actions that cause harm to others. A satisfying response would be to point out that this cannot be a complete account of tort law because criminal law already occupies this terrain.<sup>144</sup> There are a variety of reasons for this, chief among them being that criminal liability places the discretion to vindicate society's interest in meting out punishment in the hands of a public official, whereas tort law merely assigns a right of action to a victim.<sup>145</sup> The key point, however, is that this argument would have rhetorical force regardless of whether criminal law actually existed. In other words, saying that tort law is all about punishment would be unsatisfying even if there were no such thing as criminal law because we can easily think of ways in which tort law is incompatible with such an account and because we can easily imagine a system that would be about punishment, and that system quite evidently would not look like tort law.<sup>146</sup>

Coercive insurance fills the same role here in responding to the efficiency account of tort law. Although efficiency theorists may have explanations for why linking tortfeasor and victim or providing *ex post* adjudication serve the goal of efficiency, or how they came to be part of tort law, the existence of a more efficient system that jettisons those requirements entirely demonstrates that, to an efficiency theorist, they are at best bugs, not features. That a satisfying descriptive account of tort law should treat them as features rather than bugs is demonstrated by the unrecognizability of coercive insurance as tort law. It is a kind of *reductio ad absurdum*: if stripping out these features of tort

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144. See *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 101 (N.Y. 1928) (arguing that allowing a plaintiff to sue based on an act that was wrongful only to some third party would be “to ignore the fundamental difference between tort and crime”); JULES L. COLEMAN, *RISKS AND WRONGS* 222–24, 325 (1992) (reasoning that tort law cannot be about retributive justice because “[t]here is a legal institution that, in some accounts anyway, is designed to do retributive justice, namely, punishment”); see also Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 141, at 926, 933 (discussing Coleman’s argument); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1636 (2002) (contrasting treatment of inchoate wrongs in tort and criminal law). Coleman distinguishes tort law from criminal law in arguing that tort law is about correcting losses as opposed to wrongs. See *infra* notes 177–79 and accompanying text.

145. To be sure, there are ways in which retribution plays a role in tort law, and there are some who have seen tort law as being rooted in retributivist impulses. See Scott Hershovitz, *Tort as a Substitute for Revenge*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS*, *supra* note 6, at 86, 86–89; OLIVER WENDELL HOLMES, *THE COMMON LAW* 88–96 (1881); Roscoe Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 198–202 (1914). For Hershovitz, tort law is a substitute for revenge in that both serve as forms of corrective justice. Hershovitz, *supra*, at 89. This concept is in many ways distinct from that of criminal punishment. See Heidi M. Hurd, *Expressing Doubts About Expressivism*, 2005 U. CHI. LEGAL F. 405, 406–08 (2005).

146. I understand Scott Hershovitz to be making a similar argument in *Harry Potter and the Trouble with Tort Theory*, *supra* note 94. Hershovitz asks his readers to imagine Harry Potter casting a spell that endows tort law with magical properties, allowing it to shift costs instantaneously and with perfect efficiency. *Id.* at 69–70. The trouble with the spell is that it eliminates the collateral costs and benefits of tort law as it operates in the real world—costs and benefits that are ignored by the economic account of tort law. *Id.* at 75–78.

law leads to coercive insurance and coercive insurance is not tort law, then a descriptive account of tort law must explain these features, not treat them as accidents that are just as soon eliminated.<sup>147</sup>

#### B. RIGHTS-BASED THEORIES

Rights-based theories of tort law do better at accounting for what makes tort law different from coercive insurance. If coercive insurance shows that efficiency theorists cannot provide a satisfying account of why tort law works the way it does, it also highlights the aspects of tort law that can only be explained by turning to rights-based theories. Initially, the two leading rights-based theories, corrective justice and civil recourse theory, both appear to account for the fact that tort law is built around a connection between tortfeasor and victim and that it operates on a purely *ex post* basis. Indeed, the centrality of the link between tortfeasor and victim, which has been referred to as the “bipolar,”<sup>148</sup> “relational,”<sup>149</sup> “correlative,”<sup>150</sup> “bilateral,”<sup>151</sup> or “transactional”<sup>152</sup> aspect of tort law, has for years been at the core of corrective justice and civil recourse theorists’ attack on efficiency theorists’ understanding of tort law.<sup>153</sup>

In making these attacks, rights-based theorists have developed a positive account of the significance of these aspects of tort law. To rights-based theorists, treating tort law as a set of liability rules misses its normative content. By requiring an injury and an action brought by a plaintiff against a defendant that

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147. See Zipursky, *supra* note 125, at 701–02. Zipursky uses a “thought experiment” about the possibility of negligence actions being brought by the state to level the same criticism against efficiency theorists. *Id.* (observing that, for economists, the connection between tortfeasor and victim is “merely contingent, relative to their fundamental account of what tort law is” and arguing that “the plaintiff-beneficiary aspect of tort law is essential, rather than merely contingent”); see also ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 8–16 (1995) (arguing that there are features of private law that “have a special significance . . . in the sense that their systematic absence would mean the disappearance of private law as a recognizable mode of ordering. . . . At the level of theory, they are the features that must be explained or explained away, because an exposition that ignores them or does them violence runs the risk of being regarded as contrived or artificial or somehow amiss”). Indeed, one response the efficient deterrence camp has made to the charge that their vision of tort law cannot account for the connection between tortfeasor and victim has been to describe this feature as historically contingent. Zipursky, *supra* note 125, at 701–02, 707. In finding that argument unsatisfying, I recognize that I am espousing a “strong interpretivism” that some efficiency theorists may not share. See Goldberg, *supra* note 6, at 558 n.205 (“[S]trong interpretivism maintains that an interpretive claim succeeds only when it can demonstrate how the institutions and doctrines of tort law are bound up in something more than an ad hoc or contingent arrangement—that there is a deep structure or logic to the system.”).

148. WEINRIB, *supra* note 147, at 134–36; Weinrib, *supra* note 80, at 494.

149. COLEMAN, *supra* note 144, at 311–18; Peter Benson, *The Basis of Corrective Justice and its Relationship to Distributive Justice*, 77 IOWA L. REV. 515, 568 (1992); Goldberg & Zipursky, *supra* note 141, at 945.

150. Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 507 (1992); WEINRIB, *supra* note 147, at 114–44.

151. JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 13–24 (2001).

152. Arthur Ripstein, *Tort Law in a Liberal State*, 1 J. TORT L. 3, 14–15 (2007).

153. See Weinrib, *supra* note 80, at 501–03; COLEMAN, *supra* note 144, at 380–82.

alleges a breach by the defendant of a duty owed to the plaintiff, tort law expresses judgments about conduct that are not captured by coercive insurance. In this sense, tort law “maps onto our moral lives” and “reflects the normative structure of our relationships with one another.”<sup>154</sup> With the relationship between tortfeasor and victim sharply in focus, liability rules (as Calabresi defined them) look like nothing more than a “menu of prices one has to pay for noncompliance with the relevant norms.”<sup>155</sup>

Not only does the “menu of prices” view of tort law undermine the law’s expressive, normative function, it also fails to take rights seriously.<sup>156</sup> To rights-based theorists:

A liability rule does not confer any primary or basic normative powers on those who have entitlements. Quite the contrary in fact: a liability rule . . . confers a normative power on those without rights to infringe, invade or take what others have a right to on the condition that in doing so they pay compensation for the losses, if any, the right holder experiences.<sup>157</sup>

That the concept of a liability rule does not assign any particular value to the idea of a right to be free from some sort of interference, or to be treated according to a certain objective standard of conduct, can be seen most clearly in the widespread theoretical application to tort law of the Coase theorem, which holds that in the absence of transaction costs it makes no difference which party an entitlement is assigned to.<sup>158</sup> Indeed, for Calabresi, the “freedom” to infringe

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154. Coleman, *supra* note 72, at 1155; *see also* Goldberg & Zipursky, *supra* note 141, at 975 (arguing that tort law “guides conduct by reference to, gives recognition to, and enforces duties not to mistreat others”); John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 366–70 (2005) (arguing that tort law “is devoted primarily to articulating relational obligations and empowering victims injured by breaches of those obligations to sue for redress” and thus promotes, *inter alia*, “the values of holding persons responsible to members of identifiable classes of other persons” and “encouraging citizens to conceive of themselves as bearers of obligations to others”); Zipursky, *supra* note 125, at 721 (arguing that tort law “enunciates norms that designate certain courses of conduct as tortious and, in a sense, as legally wrongful, or as violations of legal rights” and thus “is injunctive and guiding”).

155. Coleman, *supra* note 72, at 1149.

156. I cannot help but think of the scene from *The Godfather* in which Sonny catches the FBI taking pictures of the guests at his sister’s wedding. Sonny strides up to the FBI agent, grabs his camera, and smashes it on the ground. Before turning to walk away, he takes out a wad of cash and disdainfully tosses a few bills to the ground, where they fall next to the smashed camera. *THE GODFATHER* (Paramount Pictures 1972). Treating this provision of compensation for the forced transfer of an entitlement as equivalent to what would happen in the tort case of *FBI Agent v. Corleone* misses something profound.

157. Coleman, *supra* note 72, at 1150; *see also* Keith N. Hylton, *A Missing Markets Theory of Tort Law*, 90 NW. U. L. REV. 977, 980 (1996) (a liability rule “allows the nonholder to transfer without the holder’s consent and to pay a market price for the transfer of the entitlement”); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1864 (1987) (describing liability rules as “a scheme of allowable coerced transfers at market prices set by official entities”).

158. R. H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 157, 159 (1988); Coase, *supra* note 128, at 2–15.

on the rights of others conveyed by the vision of tort law as a liability rule is one of its attractive features and part of what makes our society democratic and not “collectivist.”<sup>159</sup> If the question is why we should not jettison tort law in favor of coercive insurance, rights-based theories offer an answer where efficiency theories cannot: coercive insurance, like Calabresi’s liability rule, cannot capture the normative content of tort litigation.<sup>160</sup>

Although the example of coercive insurance largely supports accounts of tort law that take seriously *ex post* adjudication between victim and tortfeasor, it does not support all such theories equally. Coercive insurance arguably provides a basis to distinguish between corrective justice and civil recourse theories and to prefer the latter. Although corrective justice theorists have emphasized the “bipolar” nature of tort law, insisting that the adversarial adjudication between tortfeasor and victim is a crucial aspect of the law of torts, there are reasons to think that their particular view of the primary and secondary duties tort law creates might be more compatible with coercive insurance than they would appear to suggest. Indeed, the way in which coercive insurance responds to the magnitude of a tortfeasor’s breach and the way its mechanism for pooling risks flattens out the differences between tortfeasors both arguably make it a better system for effecting corrective justice than the tort system we have today. Civil recourse theory, by contrast, takes as its touchstone the grant to victims of an avenue of recourse against those who have wronged them. This feature of tort law, and the accompanying moral character of the confrontation it entails, is utterly absent from coercive insurance, suggesting that civil recourse theory provides a more accurate descriptive account of tort law.

### 1. Corrective Justice Theory

Corrective justice theory is built on the idea that when one person wrongfully injures another, he is required to correct this injury by making the victim whole.<sup>161</sup> This notion of correction can be traced back to Aristotle, but it fell out

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159. See Calabresi, *Mixed Society*, *supra* note 54, at 526–34. In more recent work, Calabresi has argued that the price assigned by the liability rule carries society’s normative message about the desirability of the “transfer” it seeks to compensate for: where society imposes a price below that which would be set by a market, it is effectively endorsing the transfer, and where society imposes a price above that which would be set by the market, it is expressing its disapprobation. See Calabresi, *Broader View*, *supra* note 54, at 8–9.

160. My point here is only that by doing away with any meaningful connection between tortfeasor and victim, coercive insurance destroys the normative confrontation that is so central to rights-based accounts of tort law. It would be wrong to say that insurance never conveys any moral content. When insurers impose the same premiums on a group of people despite differences in the degree of risk they face, the message is one of shared burden and responsibility. See ABRAHAM, *supra* note 17, at 18. The Affordable Care Act (ACA), which prohibits charging women higher premiums than men, is a prominent example. Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 (2015); see Helveston, *supra* note 32, at nn.246–48 and accompanying text (discussing the ACA’s limitations on risk-rating).

161. See COLEMAN, *supra* note 144, at 361; WEINRIB, *supra* note 147, at 134–35; Perry, *supra* note 150, 452–56.

of favor with the rise of instrumentalist theories in the mid-twentieth century before enjoying a revival in recent decades.<sup>162</sup> Although there is a degree of diversity among corrective justice theorists, the basic version sees tort law as consisting of primary and secondary duties: primarily, a duty to not wrongfully injure others, and secondarily, a duty to correct any wrongful injury that one causes.<sup>163</sup>

Corrective justice theorists have grappled with the issues presented by coercive insurance in a few contexts. As an abstract matter, much of what corrective justice theorists have to say about the bipolar nature of tort law and the nature of the wrongs with which it concerns itself is relevant to evaluating a system that breaks the connection between tortfeasor and victim and penalizes wrongdoing as contrasted with wrongs. More concretely, these issues have come to the fore in tort theorists' consideration of alternative compensation systems, particularly those that seek to replace tort law in its entirety. New Zealand, which has adopted a universal social insurance system and effectively done away with large swaths of tort law, is an outlier and has generated a certain amount of serious theoretical scholarship in the United States.<sup>164</sup> In addition, a wave of cases in the 1980s sought to impose tort liability not for injuries the plaintiffs had already suffered, but for exposure to a risk of developing an injury at some time in the future.<sup>165</sup> These cases primarily concerned exposure to environmental toxins with a known risk of causing health problems, a risk that often would take years to materialize and would be costly to detect. Despite the variety of factual circumstances, they generated a sustained scholarly examination of whether mere exposure to a risk of harm could qualify as a tort.<sup>166</sup>

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162. ERNEST J. WEINRIB, *CORRECTIVE JUSTICE* 9 (2012); Goldberg & Zipursky, *supra* note 141, at 921–25.

163. See Goldberg, *supra* note 6, at 570 (noting that the views of Weinrib, Coleman, Perry, and Ripstein “each fit within this general description”).

164. See, e.g., COLEMAN, *supra* note 144, at 386–406; Coleman, *supra* note 72, at 1155 & n.22; see generally Enoch, *supra* note 6.

165. See Goldberg & Zipursky, *supra* note 144, at 1626, 1628–29. The cases involving diethylstilbestrol (DES) attracted particular attention. DES was an antimiscarriage drug that caused cancer in the daughters of some of the women who took it, decades after their mothers' exposure. The time gap made it impossible to determine which manufacturers produced the DES the plaintiffs' mothers had taken. Damages were therefore apportioned based on the various manufacturers' market share at the time of exposure. COLEMAN, *supra* note 144, at 397 (first citing *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980); then citing *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989).

166. See COLEMAN, *supra* note 144, at 386–406; Stephen R. Perry, *Risk, Harm and Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, *supra* note 134, at 321, 330–39; Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 214 (Gerald J. Postema ed., 2001); Hurd & Moore, *supra* note 68; Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 262–65 (1996); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 439 (1990) [hereinafter Schroeder, *Corrective Justice and Liability*] (arguing that corrective justice requires the imposition of liability on the creation of risk); Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. REV. 143, 143–44 (1990) [hereinafter Schroeder, *Corrective Justice, Liability*] (same).



In their explorations of these issues, both Coleman and Weinrib treat alternative compensation systems like that of New Zealand (or, for that matter, coercive insurance) as emphatically apart from corrective justice. For them, coercive insurance would not be an extension of corrective justice or an alternative means of implementing corrective justice. Nor, Coleman argues, would systems like coercive insurance be an “affront” to corrective justice. For Coleman, the corrective justice duty of repair “can be superseded by other practices that create reasons for acting,” practices that can “sever the relationship between agents and losses.”<sup>167</sup> Coleman thus sees corrective justice not as an indispensable part of a liberal society, but as something that arises from, and is contingent on, the nature of the legal structures a society chooses to adopt. Coleman and other corrective justice theorists end up expressing a certain degree of agnosticism on the question of whether tort law should be replaced by some other system that reduces the net costs of accidents more effectively.<sup>168</sup> Coleman’s point is only that other systems, like coercive insurance, would not be “normatively continuous” with tort law and that tort law’s normative content is something that should be acknowledged in any assessment of its function.<sup>169</sup>

But is coercive insurance really so incompatible with corrective justice as to simply supersede it? There are reasons to think that the thrust of corrective justice—that it consists of primary duties to avoid wrongfully injuring others and secondary duties to provide compensation for those injuries when they occur—is not inherently incompatible with a system of coercive insurance. If what truly motivates corrective justice is the idea that a tortfeasor “corrects” the wrong he has done by compensating a victim, corrective justice offers no reason to think that the compensation must be provided directly from tortfeasor to victim in one lump sum payment made after the injury has occurred.<sup>170</sup> From

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167. COLEMAN, *supra* note 144, at 403. Making the point even clearer, Coleman adds that although he “used to say that other practices can *discharge* the wrongdoer’s duty,” he later came to articulate his point differently, arguing that “such practices either *extinguish* duties in corrective justice that would otherwise arise or that duties in corrective justice simply do not arise.” *Id.* at 494 n.7.

168. Coleman, *supra* note 72, at 1170. Other corrective justice theorists have expressed similar views. See ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY AND THE LAW* 21 n.24 (1999) (“It may be that a widespread social insurance scheme would actually approximate corrective justice better at a micro level than does the current tort system.”); Perry, *supra* note 150, at 513 (“[L]ocalized distributive justice can be replaced by more general distributive schemes, like a compulsory no-fault insurance plan, without violating any fundamental moral rights.”); Ernest J. Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 412 (1989) (noting that corrective justice “provides no reason for preferring tort law to its competitors”); Ernest J. Weinrib, *The Insurance Justification and Private Law*, 14 J. LEGAL STUD. 681, 687 (1985) (“Affirmation of the coherence of private law in terms of corrective justice is in no way inconsistent with the advocacy of the replacement of tort law by a comprehensive compensation scheme on the New Zealand model.”).

169. Coleman, *supra* note 72, at 1169–70.

170. Corrective justice has always seen the nature of the interaction between tortfeasor and victim as one that triggers a duty on the part of the tortfeasor, rather than a right on the part of the victim, and it has been criticized on this basis for arguably departing from the way the tort system really works. See, e.g., Zipursky, *supra* note 125, at 738. Even taking the tortfeasor’s duty as the touchstone—as corrective justice does—it is hard to see why a tortfeasor cannot satisfy his duty to correct by drawing



the tortfeasor's perspective, coercive insurance looks much different in these respects than the tort system, but from the victim's perspective, receiving compensation via coercive insurance provides just as much correction as the tort system. Indeed, to the extent that coercive insurance provides fuller, faster compensation, it could be said to be better at correcting disruptions in the preexisting normative equilibrium than the tort system.<sup>171</sup>

There are, moreover, reasons to think that the penalties imposed by coercive insurance might align more closely with our ordinary moral sense of the duty to correct. As some critics of corrective justice have observed, it is easy to think of instances in which tort liability diverges wildly from a moral duty of repair.<sup>172</sup> Transgressions that are minor at best from a moral point of view, like allowing an icy patch to develop on a sidewalk, or a momentary lapse of attention while driving, can lead to massive tort judgments. A moral duty of repair might also be sensitive to extrinsic factors like the relative wealth of the tortfeasor and victim.<sup>173</sup> Tort law is not.<sup>174</sup> In a sense, coercive insurance does a better job of smoothing out these anomalies. By pooling payments from tortfeasors, coercive insurance helps ameliorate the problem of imposing massive liability for relatively minor infractions, as well as the problem of imposing crushing liability on paupers to compensate for the injuries of billionaires.<sup>175</sup>

A corrective justice theorist might argue that although coercive insurance still requires a tortfeasor to correct the injuries he causes, it nevertheless works a fundamental change in the normative treatment of a wrong. There is certainly some truth to this. Making incremental payments to a fund every time one's conduct deviates from a standard of care is not the same, normatively, as having

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from a pool of funds he has gradually set aside, *ex ante*, in anticipation of just such an accident. And if corrective justice has no objection to a tortfeasor satisfying his duty to correct by drawing on gradually accumulated savings, why should it object to a set of potential tortfeasors collectively pooling their savings to prepare for the same risk of accident? For corrective justice, the duty to correct is about fixing an imbalance by repairing the harm done to the victim, not inflicting some quantum of retributivist financial suffering on the tortfeasor. The billionaire tortfeasor thus satisfies her duty to correct by compensating her victim, even though the money may mean little to her. Accepting this view, it is hard to see why the duty to correct cannot be satisfied by an insurance payment.

171. At least one corrective justice theorist, Christopher Schroeder, has argued that the tort system should be replaced by an at-fault pool much like coercive insurance. Schroeder, *Corrective Justice and Liability*, *supra* note 166, at 465–69, 473–78; Schroeder, *Corrective Justice, Liability*, *supra* note 166, at 155–60. For Schroeder, the moral luck inherent in traditional tort law is objectionable on Kantian grounds and so should be eliminated by a system that discards the requirement of causation and assigns liability based on market share. Schroeder, *Corrective Justice and Liability*, *supra* note 166, at 451–60.

172. See Zipursky, *supra* note 147, at 728 (citing Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, *supra* note 134, at 387, 388–91).

173. See Ripstein & Zipursky, *supra* note 166, at 214, 221.

174. Zipursky, *supra* note 147, at 729.

175. Coercive insurance certainly does not address all of the moral problems stemming from such extrinsic considerations. People in poor neighborhoods are likely to pay more for car insurance because their rates of loss due to crime are higher. See, e.g., JAMES M. ANDERSON, PAUL HEATON & STEPHEN J. CARROLL, *THE U.S. EXPERIENCE WITH NO-FAULT AUTOMOBILE INSURANCE: A RETROSPECTIVE* 52–53 (2010). Even if they did not, insurance premiums would have to be adjusted enormously to reflect the differences in wealth among drivers.

to provide compensation directly to a victim when one's wrongful conduct injures that person.<sup>176</sup> Still, the point only has so much force. Corrective justice still conceives of the duty to correct as being satisfied by "repairing the wrongful losses" a tortfeasor causes, that is, paying money from one party to another.<sup>177</sup> In this sense, it is an allocative vision of tort law, like that of the economic efficiency camp.<sup>178</sup> Nor is it necessary to turn to efficiency to develop an account of why penalizing wrongdoing might be preferable to the current system. For both deontological and utilitarian moral theories, it arguably makes more sense to penalize deviations from the standard of care regardless of whether those deviations happen to cause injury.<sup>179</sup>

None of this is to suggest that coercive insurance and tort law are "normatively continuous" or that coercive insurance and tort law can be described with equal plausibility as systems of corrective justice. There are important ways in which coercive insurance is truly not compatible with corrective justice. For instance, Coleman sees corrective justice as being about "wrongs," not "wrongdoing," by which he means that activity that merely increases the risk of harms to others is not properly the subject of corrective justice.<sup>180</sup> Unlike liability for exposure to risk, coercive insurance does not endeavor to correct anything—in the sense of compensating a victim—until a fully realized injury has occurred. Nevertheless, coercive insurance does diverge from a conception of wrongs in some important respects. In particular, the idea that a tortfeasor who pays higher premiums for risky driving is making down payments against a future duty to correct assumes that his driving will one day injure someone. Coercive insurance thus creates a broader duty than corrective justice's duty of repair in that it is triggered regardless of whether any repair is actually necessary.

My claim, then, is only that there are reasons to think coercive insurance might not be as antithetical to corrective justice as Coleman suggests it is. Were our society to adopt coercive insurance, we would not be simply setting aside

176. For Enoch, the normative difference lies in the tort system's ability to make tortfeasors take "responsibility" for the consequences of their risk-creating activities. See Enoch, *supra* note 6, at 250–52, 270–71. He ultimately stops short, however, of arguing that the concept of taking responsibility is corrective justice's definitive answer to what is missing in New Zealand's compensation system, suggesting only that it "seems . . . to capture something in the vicinity of corrective justice intuitions." *Id.* at 270. I see this and similar concepts as being more at home in civil recourse theory than in corrective justice.

177. COLEMAN, *supra* note 144, at 323–26 (describing the "mixed view" of corrective justice, under which a wrongdoer has no duty to repair the wrong, but rather a "duty to repair the wrongful losses that are his responsibility"); see also Goldberg & Zipursky, *supra* note 73, at 1147.

178. See RIPSTEIN, *supra* note 168, at 3; Jules Coleman & Arthur Ripstein, *Mischief & Misfortune*, 41 MCGILL L.J. 91, 93–94 (1995); Goldberg & Zipursky, *supra* note 73, at 1147 (citing COLEMAN, RISKS AND WRONGS, *supra* note 144, at 324–26).

179. See Goldberg & Zipursky, *supra* note 141, at 935–36. Utilitarians might see risky driving as wrongful in the sense that it creates "net disutility," whereas for Kantians, that risky driving is done without consideration of the harms it might cause others makes it inherently wrongful. *Id.* at 936; see also Schroeder, *Corrective Justice and Liability*, *supra* note 166, at 451–60.

180. This is not to say that Coleman sees wrongdoing as morally irrelevant, only that he sees addressing it as a departure from corrective justice. COLEMAN, *supra* note 144, at 386–406.

corrective justice as an animating principle. Unlike a uniform national insurance system without risk-rated premiums, coercive insurance still contains bright glimmers of the idea that we have duties not to wrongfully injure others and to correct those injuries when we do. If corrective justice theorists' reliance on the duty to correct thus undermines (to some degree) their account of tort law, we need a theory that more precisely explains what makes coercive insurance different from tort law.

## 2. Civil Recourse Theory

Civil recourse theory offers a rights-based account of tort law that is distinct from that of corrective justice and utterly incompatible with coercive insurance. Where economic efficiency and corrective justice theories fail to offer complete accounts of what makes tort law distinct from coercive insurance, civil recourse theory suggests ways in which the two do not line up and thus tells us what makes tort law unique. Civil recourse theory embraces tort law's treatment of moral luck and explains why it is important that the victim have a right to seek redress from a tortfeasor. Given these features, it is unsurprising that civil recourse theorists are less willing to countenance the replacement of tort law with systems like coercive insurance.<sup>181</sup>

Civil recourse theory conceives of the wrongs tort law concerns itself with as triggering not a duty to correct on the part of the tortfeasor, but a right to recourse on the part of the victim, a right that the victim is free to exercise or not as he sees fit.<sup>182</sup> In so doing, tort law "respects the principle that the plaintiff is entitled to act against one who has legally wronged him or her."<sup>183</sup> Civil recourse theory also breaks from corrective justice in adopting an independent, purely legal conception of what constitutes a wrong. Whereas corrective justice theory sees a wrong as an action that disrupts a preexisting normative equilibrium and thus has moral salience independent of any legal system, civil recourse theorists see the wrongs involved in tort law as purely legal wrongs. These wrongs "tend to track" ordinary morality, but their being immoral is neither necessary nor sufficient to make them wrongs in the legal sense.<sup>184</sup>

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181. See *infra* notes 192–94 and accompanying text.

182. John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS*, *supra* note 6, at 17, 27; Zipursky, *supra* note 147, at 739 ("The role of the state in a tort action is not to enforce a duty of the defendant's, but to empower a plaintiff with a claim.").

183. Zipursky, *supra* note 147, at 735.

184. Goldberg & Zipursky, *supra* note 73, at 1167; Zipursky, *supra* note 125, at 729. It can sometimes be easier to understand civil recourse theory in terms of the flaws it identifies in corrective justice theory. For civil recourse theorists, corrective justice theory fails to explain why our tort system merely assigns victims the option to bring suits against their injurers (rather than forcing the injurers to satisfy their duties to correct), fails to explain tort law's array of remedies that are not tied to correcting plaintiffs' injuries, and fails to explain the various situations in which tort law declines to hold defendants liable for injuries their tortious actions caused plaintiffs. Zipursky, *supra* note 125, at 710.

Focusing on the victim's right to seek redress from a tortfeasor highlights what is necessarily missing from coercive insurance. Although coercive insurance still provides compensation to victims, arguably correcting their injuries in the sense that that term is used by corrective justice theorists, it gives victims no right to seek recourse directly from their injurers in any way. For civil recourse theorists, tort law's assignment of this right to victims is freighted with meaning. Analogizing the right of action in tort to self-defense in criminal law, Zipursky argues that tort law represents "a reservation of the liberty to act against persons in the type of situation in which tort plaintiffs act against tort defendants."<sup>185</sup> The connection between the wrong done to a victim by a particular individual and the right to recover from that individual is paramount, and in this sense filing a tort action begins to look something like seeking revenge.<sup>186</sup> Coercive insurance strips away this aspect of tort law, preventing victims from having any meaningful interaction with those who have injured them. Think of the parties to a car crash simply exchanging insurance information. It should be obvious that such an interaction does nothing to satisfy the retributive urge that may well motivate some tort actions.<sup>187</sup> Perhaps it also helps explain why states that have adopted no-fault systems have always failed to keep injured motorists from resorting to the tort system.<sup>188</sup>

Civil recourse theory also unabashedly embraces tort law's treatment of moral luck. For civil recourse theorists, "[u]ntil the injury pregnant in an actor's misconduct occurs, there is no wrong in the tort sense of wrong . . . because the duties imposed by tort law are duties of *noninjury*."<sup>189</sup> Casting off the utilitarian and deontological problems with what they call the "injury-inclusive conception of wrongs," Goldberg and Zipursky appeal to ordinary, commonsense moral judgment, which tends to see misconduct that results in an injury as far worse than misconduct that has no effect whatsoever.<sup>190</sup> Again, this view of tort law helps explain what distinguishes it from coercive insurance.<sup>191</sup>

185. Zipursky, *supra* note 125, at 735–36.

186. *Id.* at 737; Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1389, 1403–05 (2003); *see generally* Herskovitz, *supra* note 145.

187. *See* Zipursky, *supra* note 125, at 737.

188. *See* Engstrom, *supra* note 14, at 88–96 (describing history of no-fault auto insurance and showing that lawsuits are filed at a higher rate in no-fault states than in states that retain the tort system).

189. Goldberg & Zipursky, *supra* note 141, at 935.

190. *Id.* at 935, 944–45.

191. Goldberg and Zipursky also defend tort law's realization requirement on the grounds that it affords individuals a certain amount of latitude to engage in risky conduct without consequence. *See* Goldberg & Zipursky, *supra* note 144, at 1654. Analogizing to the rule against prior restraint in freedom of speech, they argue that people need a kind of "buffer zone" that permits harmless transgressions like "occasionally driving unreasonably." *Id.* at 1655. My sense is that this instinct stems from another feature of tort law that Goldberg and Zipursky defend, the often-significant mismatch between the magnitude of breach and the magnitude of liability imposed. *See* Goldberg & Zipursky, *supra* note 73, at 1140. Coercive insurance fixes this problem by spreading out and thus dramatically reducing the costs of each individual breach. I suspect that Goldberg and Zipursky would be less eager to see risky driving as an important freedom if the cost assigned to it was on the order of mere pennies

Perhaps because it so precisely identifies the irreducible features of tort law, civil recourse theory is far less sanguine than corrective justice about the prospect of tort law's replacement with an alternative compensation system like coercive insurance. Where corrective justice theorists offer no objection to the idea of the state simply setting aside corrective justice in the interest of, say, promoting efficiency, civil recourse theorists see tort law as a vital and irrevocable aspect of a modern state. For Goldberg and Zipursky, "the provision of tort law is . . . a political duty that the state owes its citizens."<sup>192</sup> This need for an avenue of civil recourse is seen as rooted in the Lockean social contract: citizens give up the right to seek redress from those who wrong them using force, and in exchange the state is obligated to provide a civil alternative.<sup>193</sup> Although Goldberg and Zipursky are quick to insist that they are not providing an instrumentalist account of tort law, their vision of the importance of civil recourse takes on a civilizing, equalizing quality: "In holding all persons—rich and poor, powerful and powerless—to the same duties and by empowering each to seek redress when duties are breached and injuries result, tort law embodies and enforces notions of social equality."<sup>194</sup> That civil recourse theory provides an account of why tort law should not be replaced by coercive insurance is another reason to prefer it as a descriptive account of what tort law does.<sup>195</sup>

#### C. IMPLICATIONS

With the advent of coercive insurance, it is important to establish an accurate picture of what tort law is, what it does, and why we should or shouldn't preserve, change, or replace it. My quarrel here is not with the goal of efficient deterrence as a normative matter, but with the descriptive claim that pursuing that goal is what tort law is chiefly about. My point is not to advocate for or against adopting a system of coercive insurance. Coming out one way or another on that question would, I think, require a more rigorous empirical

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per instance. At any rate, it is hard to know why the freedom to be negligent is important when it is impossible to know *ex ante* whether any particular instance of negligence will cause injury. The freedom to be lucky hardly seems worth fighting for.

192. Goldberg & Zipursky, *supra* note 182, at 27; *see also* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *YALE L.J.* 524, 606–11 (2005) ("With resort to self-help blocked by the law, government is obligated, at least to some degree, to provide an alternative path for the attainment of satisfaction.").

193. Zipursky, *supra* note 147, at 737 ("[T]he point is that the state may not stop plaintiffs from acting against defendants in a certain way, and that the state is furthermore obliged to provide plaintiffs with an avenue of recourse through which they are empowered to do this."); *see also* Goldberg & Zipursky, *supra* note 141, at 972–74.

194. Goldberg & Zipursky, *supra* note 73, at 1167.

195. I do not mean to suggest here that descriptive accuracy must necessarily go hand in hand with a claim that a particular field of law is woven into the social contract or cannot be modified or eliminated. My point is that corrective justice's seeming indifference to the prospect of tort law's elimination shows that it provides a less than fully satisfying account of what makes tort law unique, and what our society would lose by getting rid of it. Any descriptive account of a turtle should emphasize its shell. In doing so, it helps to explain why the shell is necessary.

understanding of how much more effective coercive insurance would be at preventing accidents, how many lives and limbs it would save. There is reason to believe that coercive insurance would be far more effective in deterring risky driving than tort law is. But gains in safety should be weighed against the loss of tort law, which does more than simply internalize externalities. In comparing the two systems, it is crucial to understand what aspects of tort law cannot be replicated by coercive insurance. Economic efficiency theories fail on that score, distracting us from what we would lose by abandoning tort law. At stake is tort law's moral content—its effort to embody and enforce the norms that our society sets for itself.<sup>196</sup> By separating tortfeasor and victim, and by shifting costs before negligent behavior results in injury, coercive insurance makes gains in efficiency while forfeiting the normative, expressive content for which tort law should be known.

It may be that coercive insurance and tort law each have a place in our society, and that weighing the benefits of the two systems leads to different conclusions in different contexts. Just as risky driving is leading the way in the adoption of coercive insurance, we may well think of the vast majority of car accidents as presenting weak cases for the normative aspects of tort law that coercive insurance cannot replicate. Car accidents kill tens of thousands of Americans every year, and it seems likely that many of the transgressions that cause those deaths (when in fact they involve transgressions at all) would be perceived as minor from a moral perspective.<sup>197</sup> This may help explain why virtually all car insurance claims are resolved by settlements.<sup>198</sup> Accidents we regard as inescapable parts of modern life often do not call for the vengeful moral confrontation that tort law can provide.

On the other hand, it is easy to imagine risks that are less susceptible to being deterred by insurance companies wielding sophisticated sensors and big data. It is harder to picture an effective means of *ex ante* cost shifting in the context of battery, or defamation, or intentional infliction of emotional distress. And these may be among the areas in which we feel most keenly the need to seek redress against those who wrong us, and to enlist the help of the state in doing so. The less susceptible a category of harms is to efficient deterrence, the less sanguine we might feel about abandoning tort law in that area. And vice versa: the areas of tort law in which the economic efficiency account seems most plausible are likely to be the areas in which tort law seems least necessary.

Seeing tort law as a mechanism for the efficient allocation of accident costs interferes with these ways of thinking. By insisting that tort law can and should serve this end, efficiency theorists have—perhaps unwittingly—fostered a kind of adherence to the tort system. To the extent that tort law falls short of

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196. See Hershovitz, *supra* note 94, at 110–11 (“We do not have many public institutions through which we engage one another as moral agents. Tort law is one, and we would do well not to lose sight of that.”).

197. See Zipursky, *supra* note 125, at 728.

198. See *supra* note 61 and accompanying text.



efficiency, the efficiency theorist says, we should tweak, reform, and improve it. This has arguably, and ironically, distracted attention from alternatives to the tort system that offer the promise of greater efficiency. If tort law is about efficiency, it becomes both the problem and the solution. If it isn't, it becomes more fruitful to consider alternative systems that are. Doing so might well help us create a safer world.

#### CONCLUSION

As technological innovations give the insurance industry more and more powerful tools to track and assign costs to individuals' behavior in real time, insurance is beginning to look more and more like a liability rule in the sense that that term is used to describe tort law. And if coercive insurance is a liability rule, the radical differences between it and tort law make it inherently more efficient. Unlike tort law, it can deter inefficient behavior immediately, by imposing liability in amounts that need not be tailored to the need to compensate a particular victim. Coercive insurance also lacks, as an institution, the myopia caused by tort law's insistence on resolving disputes between individuals, as well as the enormous costs of that effort. But coercive insurance thus poses a challenge for those who would see tort law as a system for efficiently deterring risky behavior. On that account, as coercive insurance shows, several of tort law's most recognizable features become mere bugs, historical accidents at best. To understand what makes tort law different from coercive insurance, and what purpose these aspects of it might serve, it is necessary to turn to corrective justice and civil recourse theories, both of which provide an account of the normative content of tort law's "bipolar" structure. Only civil recourse theory, however, with its intense focus on the right of action assigned to the victim, provides a complete understanding of how tort law differs from coercive insurance, helping us understand more fully what would be lost by pursuing the goal of efficient deterrence to its logical conclusion.