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THE CRITICS AND THE "CRISIS": A REASSESSMENT OF CURRENT CONCEPTIONS OF TORT LAW

Steven D. Smith†

The tort law system currently faces a crisis of legitimacy. Prominent scholars contend that the system is both ineffective and intolerably expensive and urge that it be largely or entirely abandoned in favor of alternative regulatory or insurance schemes for dealing with accidents and injuries.¹ While abolition of our present tort law system hardly seems imminent, many state legislatures, as well as Congress, are considering (and sometimes enacting) far-reaching statutory revisions.²

Critical evaluations of our present tort law system necessarily adopt, at least implicitly, a conception of what tort law is all about—a theory of what the system's functions and objective are and should be. Most commentators assume that the system's primary objective is to provide compensation for accident victims³ or to deter unsafe and uneconomical behavior.⁴ Some commentators also view punishment of wrongful conduct as a proper function of tort law.⁵ Whatever the assumed objectives, however, the commentators level

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¹ E.g., O'Connell, *Alternatives to the Tort System for Personal Injury*, 23 SAN DIEGO L. REV. 17, 35 (1986) ("Almost anything is likely to be better than the common-law tort system that lawyers have devised."); Pierce, *Institutional Aspects of Tort Reform*, 73 CALIF. L. REV. 917 (1985) (tort reform better achieved by administrative agencies than legislatures or courts); Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555 (1985) (proposing bifurcation of compensation and deterrence, accomplishing compensation through social insurance and employee benefit plans and deterrence through regulatory schemes); cf. Rabin, *Indeterminate Risk and Tort Reform: Comment on Calabresi and Klevorick*, 14 J. LEGAL STUD. 633 (1985) (criticizing operation of tort law in remote causation and mass injury cases and suggesting replacement of tort law in such cases by ad hoc compensation plans).

² Several commonly proposed "reforms" are reviewed in Birnbaum, *Tort Reform Proposals Analyzed*, Nat'l L.J., June 23, 1986, at 15, col. 1. Among the most prominent are suggestions to (1) abolish the collateral source rule; (2) limit the liability of local governments; (3) establish sanctions for frivolous claims and defenses; and (4) structure payment of personal injury judgments to allow periodic payments. *Id.*; see also O'Connell, *supra* note 1, at 26-31 (proposal for federal "no fault" legislation).

³ See *infra* notes 10-11 and accompanying text.

⁴ See *infra* notes 27-28 and accompanying text.

⁵ See *infra* note 43 and accompanying text.

a shared indictment against the present system: it is ineffective and fiscally inefficient in achieving these objectives.

Apologists for the tort law system ordinarily rebut such criticisms on the critics' own terms. They may argue that the system *does* effectively compensate accident victims, deter unsafe behavior, or punish wrongful conduct.⁶ Similarly, they may insist that the critics' alternative insurance and regulatory schemes would not achieve their objectives any better than the present system does.⁷ These responses, although differing with the critics as to the merits of the present tort law system, nonetheless implicitly accept the critics' general conception of tort law's objectives—and, therefore, the critics' standards of evaluation as well. Such defensive strategies implicitly concede that the function of tort law is to compensate victims, to deter unsafe behavior, or, perhaps, to punish wrongful conduct, and that tort law should be evaluated by its success in achieving these goals.

This essay suggests that both the attacks and the apologies share a common flaw. The standard debate misperceives the essential function of the tort law system and consequently adopts incorrect standards for evaluating that system. Tort law's primary function, this essay proposes, is not to compensate, deter, or punish, but rather to resolve disputes arising from perceived breaches of important social norms, thereby reducing conflict and reaffirming those norms.

This suggestion that tort law exists primarily to resolve disputes seems at once prosaic and yet, in the current academic climate, strangely alien.⁸ For many critics and defenders of the current sys-

⁶ See, e.g., Rosenberg, *The Dusting of America: A Story of Asbestos—Carnage, Cover-up, and Litigation* (Book Review), 99 HARV. L. REV. 1693, 1695 (1986) (“[T]he tort system emerged as the uniquely effective and indispensable means of exposing and defeating the asbestos conspiracy, providing compensation to victims, and deterring future malfeasance.”); cf. Posner, *Can Lawyers Solve the Problems of the Tort System?*, 73 CALIF. L. REV. 747, 749-51 (1985) (defending tort law's ability to promote efficient behavior). See generally ABA SPECIAL COMM. ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW (1984) [hereinafter ABA REPORT] (concluding that the tort law system effectively serves its stated goals).

⁷ See, e.g., Phillips, *In Defense of the Tort System*, 27 ARIZ. L. REV. 603, 604-08 (1985) (criticizing operation of workers compensation, no-fault, and social insurance alternatives); Posner, *supra* note 6, at 751 (arguing that “all of the alternatives [to the present tort law system] . . . are bound to have serious problems of implementation and efficacy of their own”).

⁸ Grant Gilmore concluded *The Ages of American Law* by suggesting both the centrality of law's dispute resolution function and our chronic tendency to ignore that function:

[T]he lesson of the past two hundred years is that we will do well to be on our guard against all-purpose theoretical solutions to our problems. As lawyers we will do well to be on our guard against any suggestion that,

tem, dispute resolution is not the *objective* of tort law, but rather is a *means* of achieving tort law's real objective: compensation, deterrence, or punishment. This essay proposes that these priorities be reversed: dispute resolution should be recognized as the *objective* of tort law, whereas compensation, deterrence, or punishment are merely means which the system employs as appropriate to achieve its primary end. By inverting the means/end relationship presupposed in much scholarly analysis,⁹ the proposed dispute resolution approach renders the compensation, deterrence, and punishment functions of tort law at most subsidiary and derivative. Accordingly, from this perspective critiques which isolate such functions and then use them as standards for evaluating the tort law system are fundamentally misconceived.

Section I of this essay summarizes the most prevalent criticisms of the tort law system, focusing on the functions and objectives which such criticisms attribute to tort law. Section II develops an alternative conception of tort law as a process for resolving disputes according to, and in reaffirmation of, social norms and expectations. In doing so, section II relies upon recent research investigating the social psychology of "justice." This research suggests that tort law's dispute resolution function is more sensitive to societal and individual values than are proposals to replace tort law with insurance programs for dealing with injuries and the like.

The dispute resolution perspective developed in section II casts tort law's traditional functions and objectives in a fundamentally different light. It illuminates purposes and consequences of compensation, deterrence, and punishment which much contemporary criticism either overlooks or deemphasizes. Section III takes a fresh look at those functions from the perspective of dispute resolution and re-examines the criticisms described in section I which presuppose the primacy of compensation, deterrence, and punishment.

I

CRITICISMS OF THE TORT LAW SYSTEM

The controversy over the adequacy of the current tort law sys-

through law, our society can be reformed, purified, or saved. The function of law, in a society like our own, is altogether more modest and less apocalyptic. It is to provide a mechanism for the settlement of disputes in the light of broadly conceived principles on whose soundness, it must be assumed, there is a general consensus among us.

G. GILMORE, *THE AGES OF AMERICAN LAW* 109 (1977). This essay suggests that Gilmore's "lesson" has gone largely unheeded in the current tort law debate.

⁹ For a discussion of the ways in which a claimant-based "internal" perspective clarifies tort law's dispute resolution function and of how such a perspective differs from much current scholarship, see Smith, *Rhetoric and Rationality in the Law of Negligence*, 69 MINN. L. REV. 277, 286-92 (1984).

tem has generated a considerable literature. This section summarizes the principal criticisms of the system, emphasizing the functions and objectives which those criticisms attribute to tort law.

A. Conundrums in Compensation

A generation ago, scholars such as Fleming James regarded compensation as tort law's primary objective.¹⁰ As the focus of scholarship shifted to reduction of accident costs, compensation received relatively less attention. Recent commentary, however, has revived the emphasis on compensation as an animating goal of tort law.¹¹ Accepting compensation as a principal objective, critics of the current system press two major objections. First, they contend that tort law's choice of whom to compensate is irrational and capricious. Second, they claim that the system, having chosen to compensate particular claimants, errs in the amount of compensation that it awards.

1. *Caprice in the Choice of Beneficiaries*

Critics argue that tort law employs irrational criteria in deciding which injury victims should be compensated and which should not. If tort law's function is to compensate persons who have suffered loss as a result of accidental injury, the critics argue, it makes little sense to compensate persons injured by another's negligence while denying compensation to those injured by non-negligent human activities,¹² illnesses, natural catastrophes, or physical and mental disabilities. Such injuries may certainly be as severe as in the case of a negligently inflicted harm. Moreover, in each instance the injuries result from accidental or fortuitous causes. If a policy compensating for accidental injuries is justified, the critics assert, then the system should compensate all such victims.¹³

The point of this criticism is not merely that tort law errs in

¹⁰ See Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 465-83 (1985) (recounting development and pervasive influence of James's analysis of tort law as a compensation system).

¹¹ See generally Schwartz, *Foreword: Tort Scholarship*, 73 CALIF. L. REV. 548, 551 (1985) (describing revival of compensation scholarship attempts to "reestablish the priority of the compensation question").

¹² Under strict liability doctrines, of course, some non-negligent human activities may support liability for injuries which they cause. Even so, many injuries caused by faultless human activity still fall outside tort law's remedial scope.

¹³ See Sugarman, *supra* note 1, at 592-93 (describing "liability gap" created when accident victims are unable to identify a credible defendant); see also Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 775 (1985) (if full compensation were system's goal, all accident victims would be compensated); cf. Fleming, *Is There a Future for Tort?*, 44 LA. L. REV. 1193, 1203-04 (1984) (discussing discrimination between accident victims); Owen, *Deterrence and Desert in Tort: A Comment*, 73 CALIF. L. REV. 665, 667 n.18 (1985) (agreeing with Sugarman's criticism, but suggesting that same

applying its own criteria, so that claimants who should recover under established liability rules sometimes lose while claimants who should lose sometimes recover. Although the relative imprecision of tort liability rules may exacerbate the problem,¹⁴ that criticism applies to *any* body of substantive law: error in applying the law to particular cases is always a possibility. Rather, the critics' more fundamental objection is that tort law's compensation policy is capricious and irrational in principle. This objection would retain its force even if tort liability rules were applied with perfect accuracy and consistency.

One natural response to this criticism is that tort law compensates victims only when there is a wrongdoer who should be forced to pay for the injury. Thus, negligence-caused injuries should be treated differently than other kinds of accidental injuries. To respond in this way, however, is merely to restate the problem: why, in a system designed to compensate victims of accidental injuries, should we distinguish negligence-caused from other accidental injuries? Moreover, this defendant-based response shifts the defense of tort law to other grounds, such as punishment or deterrence, which deserve independent justification.¹⁵ If we focus solely on tort law's purported *compensation* function, the critics have a point: there seems to be no persuasive reason for distinguishing between victims of human negligence and victims of other kinds of accidental injuries.

2. *Incoherence in the Measurement of Compensation*

After deciding which claimants to compensate, tort law faces the daunting task of determining how much these claimants should receive. Critics argue that here too the system fails dismally. Compensation's cardinal principle prescribes that injured plaintiffs should receive an amount necessary to make them "whole," that is, to restore them to the position they would have occupied but for the defendant's tortious conduct.¹⁶ This "make whole" principle is dif-

logic might require compensation for persons with "classifiable mental disease" and other "mental conditions—including laziness and plain stupidity").

¹⁴ See generally Henderson, *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 908-09, 919-22 (1982) (characterizing modern tort system as dominated by vague principles of reasonableness); Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976) (criticizing indeterminacy of negligence doctrine).

¹⁵ This essay considers whether it is fair to evaluate tort law's compensation function independently of its other functions *infra* Section I(D).

¹⁶ See, e.g., Agoglia & Beckett, *Personal Injury*, in DEALING WITH DAMAGES 137, 138 (N. Itzkoff ed. 1983) ("[T]he object [of personal injury damages] is to make the plaintiff whole, addressing the totality of the wrong done . . ."); Bell, *The Bell Tolls: Toward Full Tort Recovery For Psychic Injury*, 36 U. FLA. L. REV. 333, 393 (1984) ("The point of compensation in tort law is to put an injured plaintiff back in the same relative position that he occupied before he was injured."); see also R. POSNER, *ECONOMIC ANALYSIS OF LAW* 150 (2d ed. 1977); 1 T. SEDGWICK, *A TREATISE ON THE MEASURE OF DAMAGES* § 30 (A.

difficult enough to apply to a plaintiff's purely monetary loss, such as medical expenses or future lost earnings. However, when we apply the standard to nonpecuniary intangible losses such as pain and suffering, psychic injury, or distress from the loss of a loved one, quantifying such losses in monetary terms becomes not merely difficult but conceptually impossible.¹⁷

The impossibility of measuring intangible losses generates diverse and conflicting criticisms: awards for intangible losses are considered both overcompensatory and undercompensatory.¹⁸ Neither criticism seems entirely apposite, however, because each presupposes that intangible losses are *capable* of translation into monetary terms and argues that courts merely get the translation wrong. In fact, intangible losses and monetary damages are simply incommensurable.¹⁹ The real difficulty with damage awards for intangible loss is that they purport to be compensatory when in reality they are not.²⁰ It is misleading to talk as if a translation could be correct or incorrect when the very concept of translation is meaningless. Indeed, the notion of calculating damages for intangible injuries inevitably suggests that mangled limbs and deceased spouses or children can be treated as commodities subject to purchase, sale, or bargain.²¹

Some defenders of the tort system respond that although intan-

Sedgwick & J. Beale 9th ed. 1912). Some refer to the "make whole" concept as the principle of restoring plaintiffs to their "original" or "rightful" position. *E.g.*, D. LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 15 (1985).

¹⁷ See Ingber, *supra* note 13, at 778-79; O'Connell, *supra* note 1, at 19.

¹⁸ Compare O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333, 339 (pain and suffering damages lead to "fortuitous profits for the trivially injured, as well as planned profits for the fraudulently uninjured") with R. POSNER, *supra* note 16, at 149-50 (damage awards for intangible injuries usually undercompensate those seriously harmed).

¹⁹ Such intangible injuries, of course, may generate costs such as the costs of medical care or psychological counseling that *are* pecuniary in character and thus truly compensable, but compensation for the harms *themselves* is conceptually impossible.

²⁰ In a sense, the claim that awards for intangible injuries are undercompensatory and the claim that they are overcompensatory are *both* correct. Such awards leave tort victims uncompensated for real losses; on the other hand, they give tort victims substantial amounts of money that can serve no real compensatory purpose. *Cf.* Borer v. American Airlines, Inc., 19 Cal. 3d 441, 447, 563 P.2d 858, 862, 138 Cal. Rptr. 302, 306 (1977) ("[M]onetary compensation will not enable plaintiffs to regain the companionship and guidance of a mother; it will simply establish a fund so that upon reaching adulthood . . . they will be unusually wealthy men and women.").

²¹ Richard Abel argues that "damages for pain and suffering commodify experience" and that damages awards for injuries to relationships commodify love. Abel, *Torts*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 185, 195 (D. Kairys ed. 1982). In tort law, therefore, "all relationships are treated as a form of prostitution." *Id.* at 196; see also Hutchinson, *Beyond No-Fault*, 73 CALIF. L. REV. 755, 762 (1985) ("In pursuing the liberal approach [to compensation], the market has converted health into another commodity to be traded for and traded off. Human life and suffering represent just one more variable in the production-consumption equation.").

gible losses are admittedly very difficult to quantify in monetary terms, they are not *in principle* incommensurable with dollars.²² One attempt to equate intangible losses with monetary damages relies upon a pleasure/pain ratio.²³ Before being injured, this approach suggests, a tort victim enjoyed a particular ratio of pleasure to pain. Intangible injuries, such as physical suffering or the loss of a loved one, skew this ratio by augmenting the pain side of the equation and reducing the pleasure side. Although compensation may not correct the victim's precise injuries, the theory runs, it does allow the victim to purchase other pleasures, thereby restoring the pleasure/pain ratio which she previously enjoyed.²⁴ To use a crude but not atypical example, the law may not be able to bring Jane's spouse back to life or ease the grief she feels from her loss, but a damage award *can* permit her to purchase pleasure, such as hot fudge sundaes, or a season's pass to the golf course, and thereby restore her pleasure/pain ratio to approximately its former level.

This attempt at commensurability succeeds only if we can reduce the rich complexity of human experience to the procrustean categories of pain and pleasure. If we resist such reduction, however, we see that Jane's former enjoyment of her husband's companionship and her enjoyment of the taste of hot fudge sundaes are wholly different kinds of experiences: Jane's psyche harbors no unitary quality or entity which corresponds to the word "pleasure." It is only the illusion of unity which this word provides that allows the reductionist to pretend that we can somehow compare Jane's diverse experiences on a single spectrum. The attempt to make intangible injury commensurable with money by fabricating a pleasure/pain ratio overlooks what Alasdair MacIntyre has aptly termed the "polymorphous character of pleasure."²⁵

²² One attempt to correlate intangible injuries with money damages employs the notion of a hypothetical market for injuries. R. POSNER, *THE ECONOMICS OF JUSTICE* 61-62 (1981); see R. POSNER, *supra* note 16, at 149-51. This essay considers the market approach to measuring damages below. See *infra* notes 36-42 and accompanying text. At this point it is sufficient to note that the hypothetical market approach, even if feasible, is not specifically designed to make individual victims "whole" and would in many cases undermine the "make whole" principle. The subjective "value" of an intangible injury in the mind of a particular plaintiff would often bear little relation to the injury's "market value." Thus, a plaintiff receiving the injury's "market value" would often end up more than, or less than, "whole."

²³ Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 502-04 (1982).

²⁴ See Bell, *supra* note 16, at 398 (through award for intangible injury, "[t]he plaintiff is invited to purchase units of pleasure to offset the units of pain he has experienced").

²⁵ A. MACINTYRE, *AFTER VIRTUE* 64 (2d ed. 1984). MacIntyre explains that "different pleasures and different happinesses are to a large degree incommensurable: there are no scales of quality or quantity on which to weigh them." *Id.*

In sum, if tort law's objective is to compensate, then its efforts to articulate appropriate measures of recovery seem not merely ineffective but fundamentally misconceived. The recognition of compensation's conceptual flaws almost certainly underlies recent efforts to "reform" tort remedies by, for instance, imposing limits on damages awardable for intangible injuries.²⁶

B. Difficulties in Deterrence

A second commonly posited objective of tort law is to deter unsafe or imprudent behavior that results in injuries which are not cost-justified. Although a deterrence analysis can become intricate and divide advocates of negligence and strict liability rules,²⁷ the basic idea is straightforward: tort law should encourage investment in safety up to, but not beyond, the point at which incremental safety costs equal incremental injury costs. Spending either more or less for safety constitutes an inefficient allocation of resources. Efficiency-minded proponents of the tort system argue that the system creates (or could create) incentives for injurers to adopt the appropriate safety measures. If the system holds injurers responsible for the injury costs which they generate, it will motivate them to adopt cost-justified safety measures.²⁸ Injuries, in this view, are a cost of the activities from which they result.

Critics of the system respond to the deterrence rationale in two ways. Some broadly assert that tort law has no substantial deterrent effects.²⁹ The deterrence view of tort law, these critics argue, rests upon wildly unrealistic assumptions about human knowledge, decision making, and conduct. To believe that tort law deters inefficient

²⁶ E.g., 1986 Md. Laws ch. 639 (adopting \$350,000 ceiling for all noneconomic personal injury damage awards); see Birnbaum, *supra* note 2, at 18, col. 3.

²⁷ Compare Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972) (advocating strict liability as best way of reducing accident costs) with Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) [hereinafter *Theory of Negligence*] (arguing that negligence doctrine reduces accident costs) and Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 213-15 (1973) (criticizing Calabresi and Hirschhoff's strict liability proposal). But see Landes & Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535, 555-56 (1985) (acknowledging that strict liability is preferable in some categories of product injury cases). For a recent, refined analysis of the efficiency implications of alternative negligence and strict liability rules, see Calabresi & Klevorick, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585 (1985).

²⁸ The classic exploration of tort law's role in reducing both accidents and accident prevention costs is G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970). A good exposition of the competing Chicago view of deterrence is Landes & Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1981).

²⁹ For an extensive critical analysis of tort law's deterrence rationale, see Sugarman, *supra* note 1, at 564-81; cf. Pearson, *Liability for Negligently Inflicted Psychic Harm: A Response to Professor Bell*, 36 U. FLA. L. REV. 413, 417 (1984) ("It is unlikely in the extreme that the law relating to damages for emotional harm will have any impact on how people behave.").

behavior, one must accept that (1) human beings know what the law is; (2) they have the information and ability to perform the sophisticated cost/benefit calculus upon which the deterrence rationale relies; and (3) humans are rational creatures who actually make and act upon such cost/benefit calculations. Critics claim that such assumptions contradict not only ordinary experience and observation, but psychological research as well.³⁰

The second objection to the deterrence rationale suggests that even if the psychological assumptions of the deterrence view were sound, tort law still would not produce optimal levels of safety investment. Optimal levels would be achieved only if *all* actual injury costs—and no more than actual costs—were allocated to the injury-causing activities. If injurers are liable for *less* than actual costs, their incentive to adopt safety measures is insufficient; if they are liable for *more* than the actual costs of injuries, they overinvest in safety.³¹

In practice, it seems certain that tort law does not allocate to injurers even the approximate costs of injuries. Most injury victims never assert claims.³² Others settle their cases for less, or more, than they would have received had they gone before a jury.³³ Moreover, even when a victim asserts a claim and the tort process runs full course, the impossibility of measuring intangible losses poses intractable problems. Although intangible, such losses are undeniably real and thus merit inclusion among the costs assigned to the injury-causing activity.³⁴ However, the conceptual incommensurability of intangible losses and monetary compensation forecloses the possibility of allocating the correct amount of costs to the injury-

³⁰ See Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 710-19 (1978) (criticism of psychological assumptions underlying deterrence defense of contributory negligence doctrine); cf. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CALIF. L. REV. 677, 678-79 (1985) (criticizing behavioral assumptions in typical deterrence analysis).

³¹ R. POSNER, *supra* note 16, at 143.

³² See Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1296 (1980) ("Only a small fraction of personal injuries . . . actually yield a claim for compensation."); cf. Best & Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints and Obtaining Redress*, 11 LAW & SOC'Y REV. 701 (1977) (empirical study showing that few perceived consumer problems result in complaints to sellers).

³³ The implications of nonassertion and settlement of claims for the deterrence rationale are discussed in Smith, *supra* note 9, at 308-14.

³⁴ One commentator notes,

Unless the full costs of physical and emotional distress are properly internalized through tort law, the price of the activities that generate such injuries will insufficiently reflect their actual costs. In effect, victims or the public would subsidize the cost of high-risk activities, thereby leading to inadequate deterrence and resource misallocation.

Ingber, *supra* note 13, at 799 (footnote omitted); see also Bell, *supra* note 16, at 349.

causing conduct.³⁵

Proponents of deterrence through tort law would overcome this difficulty by relying upon a "hypothetical market" measure for intangible injuries.³⁶ It is, of course, conceivable that we could establish "markets in mutilation":³⁷ we could perform studies to determine how much money people would demand before agreeing to accept certain levels of pain, the mangling of body parts, or the death of loved ones. And our unwillingness actually to conduct such studies does not prevent judges and jurors from estimating what the results of such studies might be. If judges and jurors could properly perform the task,³⁸ awarding damages for intangible injuries according to a hypothetical market measure might well assign the correct costs to injurious activities.

But the hypothetical market approach has serious flaws. Perhaps most obviously, there is no reason to expect that juries, through freeform thought experiments, could accurately estimate the values that a hypothetical injury market would assign to particular injuries. Indeed, it is doubtful that such a project is even intelligible. For example, most people would surely refuse to incur certain injuries (most obviously loss of life) for *any* amount of money. Does the hypothetical market measure mean that the monetary cost of such injuries is infinite? If so, how would a jury express that value in an actual damage award?

An economist might reply that people simply do not behave as if life has infinite value:³⁹ people agree, for a price, to perform tasks involving a serious risk of death. But that observation hardly establishes the feasibility of placing a market value on intangible injuries. If a firefighter will accept an assignment involving a one percent chance of death in exchange for a \$1,000 bonus, it hardly follows that the firefighter values his life at \$100,000. Would anyone be surprised if the same firefighter demanded \$1,000,000 to incur a fifty percent chance of dying (rather than \$50,000) and refused at any price to accept a job involving a ninety-five percent risk of death? Such varying responses to the threat of death, although profoundly unmathematical, are profoundly human. The discrepancy simply

³⁵ See Ingber, *supra* note 13, at 803 ("Considerable variations in damage awards for [intangible] injuries make any likelihood of an 'accurate' cost evaluation and 'proper' resource allocation a matter of blind faith.").

³⁶ E.g., R. POSNER, *supra* note 16, at 149-51.

³⁷ The phrase is Judge Posner's. He explains that the absence of such markets is the source of our difficulty in placing a value on certain kinds of injuries. R. POSNER, *supra* note 16, at 149.

³⁸ Judge Posner suggests that evidence of the premiums in the form of additional compensation demanded by workers engaged in risky activities might help in ascertaining the market value of particular injuries. See *id.* at 151.

³⁹ See *id.* at 150-51.

shows that matters involving life and death, and probably other serious intangible injuries as well, are beyond the competence of the market's mundane computing rationality. Hence, applying a market value approach to such matters merely appears grotesque or obtuse.⁴⁰ The inadequacy of the market approach is hardly surprising; intangible injuries and monetary measures are, as suggested above⁴¹ (and, I suspect, as nearly any lay person would cheerfully concede), incommensurable.

Moreover, even if the hypothetical market approach were capable of measuring intangible injuries, the approach does not describe existing tort law. Present doctrine reflects a deliberate decision *not* to ask jurors to determine an appropriate market value for an injury or to decide how much they, or someone else, would demand before agreeing to incur a particular injury.⁴² The hypothetical market approach remains an economist's mirage; it is not a real-world instrument for measuring intangible losses. Accordingly, the argument that tort law can allocate to injurers the correct costs of injuries and thereby prompt the correct level of safety investment seems manifestly implausible.

C. Problems with Punishment

A third objective often attributed to the tort law system is the

⁴⁰ For instance, while Judge Posner recognizes that a child's value to its parents is not limited to the monetary income that the child might provide them, he nonetheless remains committed to applying a hypothetical market approach in assessing the parent's loss upon the child's death. Hence, Posner has suggested that a minimum estimate of the parents' loss might be their investment in time and money in rearing the child to the date of its death. The child must be worth at least this much to the parents, or else why would they have made the investment? *Id.* at 150-51. Even from the market perspective, however, Posner's reasoning seems detached from reality; a moment's reflection suggests various possibilities that such reasoning ignores. The child might well have been a source of worry and anguish to the parents: it might have represented a losing investment—but one, which unlike stocks and bonds, the parents could not voluntarily unload because of legal and social constraints. On the other hand, the parents might have more than recouped their investment through the emotional satisfaction they received in the child's early years; they might have anticipated, as the child entered the more taxing teenage years, that the child's incremental value to them would decline dramatically. Finally, the parents' financial investment might consistently have equalled the emotional dividends with which the child rewarded them—the child's death would produce an economic wash. Of course, the point of this discussion is not to generate refinements in the methods of child appraisal, but to underscore the absurdity of treating the worth of a child, or the pain of bereaved parents, as an accounting problem.

⁴¹ See *supra* notes 16-26 and accompanying text.

⁴² Courts have "uniformly rejected" both the "Golden Rule argument, which asks jurors how much they would want if they had suffered plaintiff's injuries," and "[t]he argument that jurors should give the market value of the injuries, or the amount it would cost to hire someone to suffer these injuries." D. LAYCOCK, *supra* note 16, at 76.

punishment of wrongdoers.⁴³ Critics of this ostensible function assert two principal objections. One holds simply that punishment is not a legitimate state function.⁴⁴ This objection equates punishment with simple vengeance—a relic of the primitive need to “get even.” Professor Sugarman describes the punishment rationale as follows: “Tort is necessary in order to strike back at and hurt wrongdoers.”⁴⁵ So depicted, the punishment rationale seems more compatible with Mosaic law’s “eye for eye”⁴⁶ (or *lex talionis*) approach than with an “enlightened” twentieth-century jurisprudence.⁴⁷

A second objection to the punishment function asserts that even if punishment is an appropriate state function, tort law is a poor instrument for the task. Tort rules often impose liability upon persons or institutions for conduct that cannot be considered blameworthy.⁴⁸ Strict liability doctrines expressly renounce “fault” as a requisite for liability. Even negligence principles employ an “objective” standard of reasonable conduct that may impose liability upon persons who lack the subjective ability to understand or conform to objective standards and who thus cannot be considered culpable.⁴⁹

Moreover, even when a defendant is blameworthy, tort sanctions often seem radically out of proportion to the defendant’s “fault.”⁵⁰ If a motorist cited for driving thirty-one miles per hour in a thirty miles-per-hour zone were fined \$500,000, most people

⁴³ See, e.g., Owen, *supra* note 13, at 667-68; ABA REPORT, *supra* note 6, at 4-170 to -173.

⁴⁴ See Sugarman, *supra* note 1, at 610 (noting “fundamental theoretical problems with viewing our tort system as a punishment scheme”).

⁴⁵ *Id.* at 609. In a similar vein, Professor Owen explains that punishment “provid[es] psychological ‘satisfaction’ to the victim—who receives pleasure from causing the injurer himself now to suffer.” Owen, *supra* note 13, at 668. Despite this lurid characterization, Owen believes that punishment is “in principle” a proper objective of tort law. *Id.*

⁴⁶ *Deuteronomy*, 19:21.

⁴⁷ Cf. Miller & Vidmar, *The Social Psychology of Punishment Reactions*, in *THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR* 145, 150 (M. Lerner & S. Lerner eds. 1981) (“Punishment for the purpose of deflecting vengeance is probably more significant and common in tribal societies . . .”).

⁴⁸ O’Connell, *supra* note 1, at 19 (notion that tortfeasor is “an evil person” no longer correct); Sugarman, *supra* note 1, at 610 (citing strict liability doctrine and situations where defendant is incapable of improving behavior as examples of liability for nonblameworthy conduct).

⁴⁹ See G. CALABRESI, *IDEALS, BELIEFS, ATTITUDES AND THE LAW* 22 (1985) (“To act reasonably one had to do more than do the best one could, at a minimum one also had to behave as a reasonably prudent man would have behaved under the circumstances.”); *Theory of Negligence*, *supra* note 27, at 31-32 (“A man may be adjudged negligent though he did his best to avoid an accident and just happens to be clumsier than average.”).

⁵⁰ Professor Owen observes, “The scales of justice are hardly righted by requiring a slightly guilty injurer to relieve the victim of his entire loss; they are only tipped the other way.” Owen, *supra* note 13, at 669.

would regard the fine as grossly disproportionate to the offense. Yet, under the "negligence per se" doctrine,⁵¹ if the same motorist's speeding happens to cause an unintended but serious injury to a bystander, the motorist might be held liable for a comparable damage award. This result is difficult to explain by reference to any sensible notion of punishment.

D. Dissonance—the "House Divided" Syndrome

By separately analyzing tort law's performance of three independent functions, the foregoing criticisms may seem to rely unfairly upon a "divide and conquer" strategy. Even if no *single* objective or function can justify the system's considerable expense, perhaps we might defend it on the basis of its partial achievement of *several* objectives.⁵² Critics respond, however, that the system fares even worse if its goal is simultaneously to satisfy multiple objectives: they argue that each function pulls tort law in a different direction, producing an internal strain that renders the system incapable of effectively discharging *any* of its functions.⁵³

That dissonance should result from such disparate aims is hardly surprising. After all, the compensation function suggests the need for liability rules that impose injury costs on those parties most capable of bearing and redistributing such costs. The deterrence function, on the other hand, suggests that those parties best able to avoid accidents or to evaluate the cost-justified amount of safety should bear losses. Finally, the punishment function demands that losses be assigned to morally blameworthy parties. There is no reason to expect compatibility among these various directives. Quite often the party most capable of bearing and spreading losses is not in the best position to avoid injuries or to evaluate safety costs.⁵⁴ Moreover, if the cost-bearing party can simply pass the loss onto a diffuse group of customers or fellow liability policy-holders, the sanction's deterrent effect will obviously diminish. Finally, the best loss spreaders or accident avoiders may be morally blameless.

In short, tort law's compensation, deterrence, and punishment functions appear to prescribe, respectively, an insurance policy, a regulatory policy, and a retribution policy. These policies, while oc-

⁵¹ For a general discussion of the "negligence per se" doctrine, see W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 36, at 229-31 (5th ed. 1984).

⁵² Cf. ABA REPORT, *supra* note 6, at 11-2 (suggesting that strength of tort law is its capacity "of responding to multiple social goals, necessarily invoking plural rationales").

⁵³ See Sugarman, *supra* note 1, at 616 ("By trying to do many different things, . . . tort law ends up doing none of them well.")

⁵⁴ Injuries resulting from the misuse or unintended use of products are an example: the consumer may be best able to avoid injury by using the product properly, but the manufacturer may be best able to bear and spread injury costs.

asionally complementary, ultimately pull the law in different directions.⁵⁵ Indeed, the very suggestion that a single institution could simultaneously pursue three such divergent objectives seems to undermine any claim to institutional rationality. Critics suggest instead that each function might be better served by separate institutions, such as social insurance programs, regulatory agencies, and the criminal justice system, that are specifically designed for and devoted to achieving those disparate objectives.⁵⁶

II

AN ALTERNATIVE CONCEPTION: TORT LAW AS A DISPUTE RESOLUTION SYSTEM

The criticisms considered in the preceding section are powerful ones. In fact, they may be *too* powerful. The cogency of those criticisms rests, after all, upon the assumption that compensation, deterrence, and punishment are the *objectives* of tort law. If tort law is as ill-suited to accomplishing compensation, deterrence, and punishment as critics suggest, then we must question whether it is at all proper to attribute those goals to tort law. If tort law instead has a primary function different than compensation, deterrence, and punishment, then it is hardly pertinent to attack tort law for failing to achieve those ends. The very incompatibility of the tort law system with such objectives suggests that critics, as well as many proponents, have misconceived the proper function of that system.

This section proposes that tort law's primary function is simply to resolve disputes. Concededly, an unadorned dispute resolution function may seem somewhat modest to justify the elaborate procedural and substantive edifice that constitutes tort law. Moreover, proponents of alternative compensation schemes might respond that their programs would largely obviate the need for dispute resolution: if social insurance compensated victims, they would no longer need to seek redress through adversary action against their supposed injurers. In response to these objections, this section argues that tort law's dispute resolution function serves vital needs, both social and individual, that social insurance programs cannot. I first consider a societal perspective and suggests that dispute resolution through tort law reinforces the normative order enabling us to live as a society. Then I examine dispute resolution from an individ-

⁵⁵ Cf. Fleming, *supra* note 13, at 1203 ("The more you fine-tune internalization or risk-avoidance, the more you get away from the principle of insurance, that is, risk-spreading.")

⁵⁶ See, e.g., Owen, *supra* note 13, at 674 (proposing that legislatures abolish the accident law of tort and use instead a public welfare system for compensation and public regulation to punish and deter undue hazards).

ual standpoint and argue that tort law's performance of that function recognizes and responds to the totality of a victim's injury in a way that mere compensation cannot.

A. A Societal Perspective: Dispute Resolution and the Normative Order

In any moderately complex or diverse society, disagreements and disputes among members inevitably arise. Commentators often observe that resolving such disputes through law helps prevent the violence that would otherwise accompany private vindication of grievances.⁵⁷ Nonetheless, although tort law clearly benefits society by preventing violence and maintaining civil peace, this observation does not fully capture the pervasive influence of dispute resolution in upholding the social order.

Dispute resolution's full significance becomes apparent only when viewed in the broader context of the social universe which human beings inhabit. That universe is composed, in large part, of a system of social norms—"shared expectations and guidelines for belief and behavior."⁵⁸ In much the same way that gravitational and kinetic laws give order to the physical universe, social norms give order to the social universe: all of us rely constantly upon norms in deciding how we should think, speak, and behave and in anticipating how others in society will think, speak, and behave. Without such norms, social intercourse would be unpredictable and chaotic. Recognized norms are thus an essential condition of rational social life.⁵⁹

Unlike natural laws, however, social norms are hardly inviolable: transgression of norms is a common occurrence. And when transgressions occur, society must decide how to respond. Choosing a response is a delicate process, involving competing concerns. On the one hand, if society permits deviation from its norms, the

⁵⁷ See, e.g., Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1815-16 (1986) ("In the absence of an effective peaceful means of vindicating private rights, people retain a plausible claim that they are entitled to vindicate these rights through self-help."); see also Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 372 (1978) ("The object of the rule of law is to substitute for violence peaceful ways of settling disputes.").

⁵⁸ S. KIESLER, *INTERPERSONAL PROCESSES IN GROUPS AND ORGANIZATIONS* 96 (1978). A norm . . . is a rule or a standard that goverus our conduct in the social situations in which we participate It is a cultural specification that guides our conduct in society. It is a way of doing things, the way that is set for us by our society. It is also . . . the essential instrument of social control.

R. BIERSTEDT, *THE SOCIAL ORDER* 175 (1957).

⁵⁹ See S. KIESLER, *supra* note 58, at 98 (norms provide social life with "structure, strength, and substance").

norms will come to lose their force and reliability.⁶⁰ Thus, imposing sanctions (which may range in severity from a stern glance to a stiff criminal sentence) upon norm-violators is essential to maintaining the system of norms upon which an orderly, rational society depends.⁶¹

On the other hand, society must take care that its enforcement of norms is not unduly severe. Some norms are relatively trivial and imposition of a strong sanction upon one who violates such a norm would seem incongruous and inhumane. And even with respect to more fundamental norms, excessive penalties may be detrimental. For example, social psychologists have found that mild sanctions are often more effective than harsh sanctions in causing people to internalize social norms.⁶² Moreover, social norms do and should evolve; deviation from a norm is one way of changing it, perhaps in a beneficial way.⁶³ Overly rigid enforcement of norms might lead to social ossification.

In sum, society must enforce its norms, but it must not enforce them too rigorously or mechanically.⁶⁴ Although no single test or criterion can wholly reconcile these competing needs, one factor which powerfully influences the response to norm violation is the resulting harm or lack of harm.⁶⁵ A trivial norm violation, such as a

⁶⁰ See *id.* at 120-21; see also M. DEUTSCH, *DISTRIBUTIVE JUSTICE: A SOCIAL-PSYCHOLOGICAL PERSPECTIVE* 181 (1985) ("Members of a group who accept common norms of justice also share obligations to protect these norms and to respond to their violation."); cf. Miller & Vidmar, *supra* note 47, at 155 ("Laws and rules derive from social groups. In addition to providing behavioral proscriptions, they help to define the boundaries and the social reality of the group Violation of these laws or rules constitutes a threat to the group.").

⁶¹ See R. BIERSTEDT, *supra* note 58, at 183 ("Sanctions are the supporters of the norms, the punishments applied to those who do not conform . . .").

All social systems include certain additional instrumentalities for inducing socially appropriate behavior. Perhaps the most important of these are *social sanctions*.

Broadly defined, sanctions represent the rewards and punishments allocated to group members by other individuals and the group at large in consequence of adherence to or departure from the behavioral norms prescribed by the group.

Inkeles & Levinson, *National Character: the Study of Modal Personality and Sociocultural Systems*, in 4 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 418, 471-72 (G. Lindzey & E. Aronson eds. 1969).

⁶² See E. ARONSON, *THE SOCIAL ANIMAL* 149 (4th ed. 1984) ("The less severe the threat, the less external justification; the less external justification, the greater the need for internal justification.").

⁶³ See S. KIESLER, *supra* note 58, at 120-23 (noting integration as example of deviation that has become beneficial social innovation).

⁶⁴ One commentator explains that "groups need both conformity to norms and roles and they need deviance. . . . [C]onformity provides stability, including predictable degrees of change, structure, and meaning. Deviance is a source of growth." *Id.* at 122.

⁶⁵ See Miller & Vidmar, *supra* note 47, at 158 ("In general, the greater the harm, the greater the punishment reaction.").

breach of table etiquette, usually harms no one; such a violation therefore results at most in social disapproval. At the other extreme, criminal law enforces norms, such as the norm against taking human life, whose violation consistently results in serious harm. Between these extreme lies a set of norms that, although important, are not as imperative as those enacted into criminal law. Such middle level norms constitute the essence of tort law,⁶⁶ which seeks to capture such norms with formulas that often amount to little more than open-ended, incorporative allusions to whatever pertinent social norms may exist. Thus, when people act in ways that affect others, tort law requires them to use the care expected of "the reasonable person."⁶⁷ Similarly, manufacturers must produce goods that conform to "consumer expectation."⁶⁸

Tort law imposes sanctions for violations of these norms only when such violations result in injuries that in turn generate disputes among members of society. By limiting itself to dispute resolution, tort law avoids overly rigid enforcement of norms and directs its efforts to maintaining those norms which society most clearly wants reinforced. Society preserves social norms, after all, not for their own sake, but because people rely upon them—and need to be able to rely upon them—in conducting their lives. If no one objects to the violation of a norm, the reason for maintaining the norm disappears. It is only when a violation gives rise to a dispute that reinforcing the norm becomes important. When a dispute occurs, a court's essential task is to resolve the dispute by determining whether a norm has been violated and, if so, what the consequences of the violation should be.⁶⁹ In doing so, the court reaffirms those norms that make rational society possible.

⁶⁶ Cf. ABA REPORT, *supra* note 6, at 3-23 (court and jury define limits of community's tolerance).

In reality, of course, norms and social responses do not fall into three neat categories. Occasionally, criminal law embodies norms whose violation may not cause serious harm to others—laws against marijuana use might be an example. Moreover, violations of imperative norms may result in tort sanctions as well as in criminal punishments.

⁶⁷ See generally W. PROSSER & W. KEETON, *supra* note 51, § 32.

⁶⁸ See Wheeler, *Comment on Landes and Posner*, 14 J. LEGAL STUD. 575, 576 (1985) (noting that many courts have adopted "consumer expectation" test for products liability). See generally W. PROSSER & W. KEETON, *supra* note 51, § 99, at 698-99; RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).

⁶⁹ This description of the relationship between tort law and social norms does not suggest that applying such norms in tort cases is simple, mechanical, or purely one-directional. The content of pertinent norms is often controversial, in part because different individuals perceive the norms differently and because different groups in a society may conform to different norms. The jury's role assumes vital importance in this regard, as a (hopefully) representative and unbiased index of prevailing norms. Moreover, tort law does not simply reflect social norms. Judges, lawyers, and litigants are participants in society, after all, and are therefore actively involved in evaluating and shaping norms as well as in reacting to and applying them.

From a societal perspective, therefore, tort law's dispute resolution function is vital not merely because it prevents private violence, but more importantly because it reinforces the normative order upon which society depends.⁷⁰ A negative example illustrates the point. Imagine that the tort system degenerated to the point that it either ceased to exist or, although continuing to decide cases, rendered bizarre and chaotic results that failed to reflect society's sense of justice. One possible consequence of such a breakdown is that instead of peacefully resolving their disputes in court, injury victims would try to satisfy their grievances through private threats, violence, and vigilante justice.⁷¹ Such a scenario vividly illustrates the value of a functioning tort system. But this is not the only—and perhaps not the most plausible—scenario. It is also conceivable that most victims would not resort to private violence either because they are docile, or because the police effectively contain private violence, or perhaps because injurers as a class command greater force than victims. Such private passivity, even if unaccompanied by violence, would have corrosive social consequences. Many important norms would relinquish much of their power, because few or no legal sanctions would follow upon their violation. People would lose the ability to conduct their lives on the assumption that others would act and respond in predictable, reasonable ways. Unless other institutions were to assume tort law's role, social disintegration would inevitably result.

In sum, dispute resolution is hardly a negligible or unworthy task for tort law to perform; instead, it is vital to the maintenance of an orderly and rational society. And if dispute resolution is tort law's principal function, then we ought to evaluate it by focusing on how well it performs *that* function, not by its success in achieving

⁷⁰ Professor Sugarman's attack on tort law considers the possibility that society "uses the tort process to establish community standards for reasonable conduct," but he rejects that conception of tort law on the grounds that tort liability rules are too indeterminate to give clear signals regarding what behavior is and is not proper. Sugarman, *supra* note 1, at 611-12. However, even if Sugarman is right about the indeterminacy of tort liability rules, his criticism is not directly pertinent to the conception of tort law advanced here. This essay does not assert that tort law is the *source* of norms of proper conduct or that people learn proper behavior directly from tort liability rules. Rather, tort law *reinforces* social norms by providing a highly flexible mechanism for imposing sanctions upon those who violate such norms and thereby cause injury. The lack of specific substantive content in tort liability rules, far from preventing the performance of this function, allows tort law the freedom to incorporate social norms with as much or as little substantive specificity as those norms in fact exhibit. *Cf.* Smith, *supra* note 9, at 296-300 (negligence doctrine's "reasonableness" concept is valuable rhetorical device because it is formal concept with capacity to assume as much or as little substantive content as given context permits).

⁷¹ *Cf.* Alschuler, *supra* note 57, at 1815-16 (describing "the Lockean lesson of Goetz's gun"—namely, lesson that lack of adjudicative services may lead to vigilante acts such as that of Bernard Goetz).

other objectives such as compensating victims or efficiently allocating economic resources.

B. An Individual Perspective: Remediating the "Sense of Injustice"

Proponents of alternatives to tort law might suggest that if social insurance programs were to compensate injury victims then disputes would be avoided and dispute resolution would become unnecessary. This view, however, rests upon an oversimplified, narrow conception of the nature of the injuries which tort victims suffer, and accordingly underestimates dispute resolution's restorative function.

The narrow view of personal "injury" likely derives from the typical computation of tort damages, which generally enumerates the kinds of injuries for which the victim may recover damages in tort cases. The resulting list usually includes lost income, medical expenses, pain and suffering, and emotional distress or psychic injury.⁷² To be sure, a tort victim often suffers all of these kinds of injury, which this essay will refer to collectively as "actual loss." However, the list typically omits an important element of the tort victim's injury: it fails to recognize the victim's consciousness of having been wronged by the violation of a social norm. This aspect of injury—the sense of having been wronged—might be termed the "sense of injustice."⁷³

It is not surprising that discussions of tort damages fail to include the sense of injustice. As mentioned, a victim's sense of having been wronged is normally not an injury for which damages are available; in most tort cases, the plaintiff can recover only for actual loss, such as economic loss or physical pain.⁷⁴ In addition, most courts determine whether the plaintiff has suffered from the violation of a social norm during the liability phase of a tort dispute; they consider appropriate remedies only *after* the liability question has been answered in the plaintiff's favor. Thus, the defendant's violation of a norm seems to be a prerequisite to a remedy rather than an element of the plaintiff's injury.

⁷² See, e.g., D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 8.1 (1973).

⁷³ Cf. E. CAHN, THE SENSE OF INJUSTICE 13 (1949) (the "sense of injustice" is "a familiar and observable phenomenon" that is "alive with movement and warmth in the human organism"). The sense of injustice has recently become a subject of study by social psychologists. See, e.g., M. DEUTSCH, *supra* note 60, at 180-95; THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR, *supra* note 47.

⁷⁴ The common law has traditionally awarded presumed damages for certain torts, such as defamation, without proof of actual loss. But these limited instances are exceptional; presumed damages for defamation are "an oddity of tort law." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

However, drawing sharp lines between liability questions and remedy questions can obscure the real character of the victim's grievance. Certainly a defendant's liability should hinge on whether he has breached a norm. But it does not follow, once a breach is found, that the breach itself does not contribute greatly to the victim's injury. As a factual matter, the sense of having been wronged is an unquestionably real and important aspect of a plaintiff's injury. Were this not so, one would expect that victims fully compensated for their "actual loss" should feel satisfied, even with no finding of wrongdoing and no sanction imposed against their injurers. Lawyers know, however, that clients are not interested solely in the monetary amount of their recovery; they frequently want to proceed with cases just for the "principle" at stake.⁷⁵ Experimental research confirms this observation: in simulated studies, social psychologists have found that injury victims feel most satisfied when the harmdoer provides compensation.⁷⁶ If instead a third party pays compensation, victims are not as satisfied and may even feel that the payment constitutes a further inequity.⁷⁷ One researcher concludes, "It seems as though receiving the compensation *from the harmdoer* is necessary to produce positive reactions."⁷⁸

We cannot dismiss this psychological need for "justice" as merely an irrational reaction to injury. To one hurt by violation of a norm, consciousness of the violation is an essential component of the injury.⁷⁹ The tort threatens the victim's ability to rely upon the

⁷⁵ See Vidmar, *Justice Motives and Other Psychological Factors in the Development and Resolution of Disputes*, in *THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR*, *supra* note 47, at 395, 403 (noting that "it is not unusual for persons to pursue a dispute even after it becomes abundantly clear that they will incur substantially more costs than can be gained even if the suit is won").

⁷⁶ deCarufel, *Victims' Satisfaction with Compensation: Effects of Initial Disadvantage and Third Party Intervention*, 11 J. APPLIED SOC. PSYCHOLOGY 445, 452 (1981). deCarufel's findings confirm earlier results reported in Miller & McCann, *Children's Reactions to the Perpetrators and Victims of Injustices*, 50 CHILD DEV. 861 (1979). Miller and McCann found that children believe that it is even more important to punish a perpetrator of injustice than to compensate a victim. Moreover, older children held this belief as strongly as did younger children. *Id.* at 866-67.

⁷⁷ deCarufel, *supra* note 76, at 452-55.

⁷⁸ *Id.* at 452 (emphasis added).

⁷⁹ Cf. Hutchinson, *supra* note 21, at 763 ("The victim's agony is not merely the physical pain, but the frightening realization that she has been destroyed as a person. Accident victims' self-esteem and confidence in the community 'become as ashes in [their] mouth[s].'" (quoting R. LEWISTON, *HIT FROM BOTH SIDES* 32 (1967))).

[W]hen one person intentionally harms another person (i.e., violates a rule) far more is involved than the physical, material, or social hurt itself, [sic] The offender is frequently perceived as demonstrating contempt for the person harmed, as asserting power over him, or as attempting to assert the superiority of the offender's belief or value system. For the victim-reactor, therefore, punishment helps to reestablish the psychological equilibrium by redressing the sense of inferiority that the act of harm has

norm in question and, inferentially, to depend upon other norms that the victim had previously trusted. If someone other than the tortfeasor compensates for actual loss and if society imposes no sanction upon the tortfeasor, the entire normative structure loses much of its force. The message conveyed is that although society cares for those who suffer loss, it also permits people to violate its norms with impunity.⁸⁰ But norms that can be violated with impunity cease to be norms and no longer reliably guide conduct.⁸¹ Thus, a breach of the normative order inflicts real psychic injury, which mere payment of compensation cannot remedy.

Recognition of the full character of a tort injury leads to a deeper understanding of tort law's remedial function. Tort law's treatment of injury is not confined to payment of monetary damages. Although responsive to the victim's "actual loss," monetary damages do not specifically treat the victim's sense of injustice, an essential part of her injury. Rather, the tort process's response to injury includes the liability determination and the assessment of damages *against the tortfeasor*. A system of social insurance would go only halfway: although it would address the victim's "actual loss," it would lack the tort process's comprehensiveness and sensitivity to the full scope of the victim's injury.

III

THE OBJECTIONS REEXAMINED: CRITICIZING THE CRITICS

The preceding section suggests that compensation, deterrence, and punishment are not the primary objectives of tort law. Nonetheless, a depiction of tort law which simply disregarded these functions would be incomplete. If tort law is viewed as a system for resolving disputes, these functions do not disappear, but rather become derivative of tort law's primary objective. Compensating victims, punishing wrongful conduct, and deterring unsafe behavior are means to, or consequences of, the resolution of disputes. A dispute resolution perspective thus permits a fresh assessment of these traditional objectives and of the criticisms they generate.

engendered. Indeed, failure to punish may lead to a greater sense of inferiority.

Miller & Vidmar, *supra* note 47, at 155.

⁸⁰ Miller and McCann offer a possible rationale for the belief of children studied that perpetrators of injustice must be punished: "Allowing the perpetrator to go unpunished may prove disruptive to social commerce either by allowing him to victimize others or by allowing him to serve as a model for others to transgress in similar ways." Miller & McCann, *supra* note 76, at 867.

⁸¹ See *supra* notes 60-61 and accompanying text.

A. The Logic of Tort Compensation

1. *Tort Law's Choice of Beneficiaries*

Critics of the tort system argue that it is arbitrary to compensate persons injured by the negligent conduct of others yet fail to compensate victims of nonnegligent accidents, illnesses, or natural injuries and disabilities.⁸² The preceding section's discussion of injury suggests, however, that the distinction is firmly grounded in social and psychological reality.⁸³ A negligently inflicted injury, one that results from violation of a social norm, is different in character, and not merely in cause, from a natural injury.

Consider the cases of Peter and Paul. Both are paralyzed, Peter from a fall while mountain climbing, Paul through the reckless conduct of a drunken driver. To a point, their injuries are similar: both will suffer medical expenses, loss of income, physical pain, and loss of the enjoyment of life. Unlike Peter, however, Paul also suffers from a "sense of injustice"—a consciousness of having been wronged by another's violation of an important social norm.⁸⁴ This sense of injustice is a very real element of Paul's injury. Moreover, if it is not somehow remedied, then even if Paul's paralysis is cured and his economic losses and medical bills are paid, his ability to plan and conduct his life according to reliable social norms will be undermined.

Thus, Peter's and Paul's injuries, while outwardly almost identical, are in fact quite different in character. That Paul's injury may generate a dispute cognizable under tort law and Peter's injury will produce only a claim against his medical and disability insurance policies reflects the difference in character. The distinction between the cases appears capricious only if one ignores tort law's dispute resolution function and its concomitant reinforcement of social norms and views the law simply as an injury compensation scheme.

2. *Taming the "Make Whole" Principle*

The objection that tort law incorrectly or incoherently measures compensation, especially when awarding damages for intangible injuries,⁸⁵ raises more complex issues. The basic difficulty again, originates with the notion that tort law's primary function is to compensate victims, even though some injuries are clearly not compensable in any meaningful sense. The primacy of compensation is closely tied to the entrenched principle that tort victims

⁸² See *supra* text accompanying notes 12-13.

⁸³ See *supra* notes 72-81 and accompanying text.

⁸⁴ See *supra* note 79 and accompanying text.

⁸⁵ See *supra* notes 16-26 and accompanying text.

should be "made whole"—a manifestly unachievable goal. Tort law, it may seem, creates its own predicament by promising the impossible.

An examination of the anatomy of a tort dispute suggests a possible escape from that predicament through a more realistic conception of the "make whole" principle. Section II suggested that a tort victim actually suffers two kinds of injury: "actual loss," such as economic loss and pain and suffering, and a "sense of injustice," a consciousness of having been wronged by the violation of an important social norm. In section II, I argued that we should recognize this sense of injustice as an integral element of a plaintiff's injury. The present analysis can now go further and assert that tort law is *primarily* concerned with the sense of injustice. This is because tort law's function is to resolve disputes, and a plaintiff's sense of having been wronged is what generates a dispute.⁸⁶ Absent this sense of injustice, a plaintiff's injury would give rise only to an insurance claim, not to a dispute. Tort law resolves the dispute by determining whether a violation of an important social norm has actually occurred and, if so, by affording a remedy that assuages the plaintiff's sense of injustice.

Although tort law's primary concern is with the victim's sense of injustice, that concern naturally leads to an effort to compensate the victim for her actual loss. As a matter of pure logic, of course, dispute resolution need not concern itself with actual loss. A mechanical damages schedule,⁸⁷ or even an authoritative chastisement of wrongdoers, might suffice to resolve disputes and satisfy injury victims. Alternatively, victims might be satisfied that justice has been restored only upon reparations of several times the value of the injury.⁸⁸ Though not axiomatic or self-evident, however, the "make whole" principle has a certain logic. The principle assures victims that they can rely upon norms, not because the norms are inviolable (a victim is painfully aware that they are not), but because in the name of the "make whole" principle society will both restore them to their former positions and hold responsible those who violate norms. Conversely, if a court has the power to correct detrimental consequences of the norm violation but declines to do so, the message is that the plaintiff *cannot* rely upon the norm. At the very least, the message is that she will be worse off for doing so and that

⁸⁶ See Vidmar, *supra* note 75, at 401 ("It is fair to assert that justice motives underlie every dispute . . .").

⁸⁷ See 1 T. SEDGWICK, *supra* note 16, §§ 9-11 (describing preestablished schedules of damages used in early Anglo-Saxon law).

⁸⁸ See Exodus 22:1-9 (Mosaic restitution requirements, ranging from one-for-one restitution in cases of injury from simple trespass to quadruple restitution for conversion of sheep and quintuple restitution for conversion of oxen).

violators may benefit by breaching it, because society is unwilling to back up the norm.

The "make whole" principle is logically sound as long as injuries are truly compensable or, more precisely, as long as monetary awards can actually restore victims to their previous condition. Thus, with respect to purely economic losses of ascertainable magnitude, the "make whole" principle poses no problem. The principle functions somewhat differently, however, with respect to those injuries, such as intangible injuries, that are not truly compensable. In such instances, a monetary award expresses the strength of society's commitment to the norm that the tortfeasor has violated and acknowledges the fact and magnitude of the plaintiff's injury. The award also ensures that the tortfeasor will not profit from violating the norm.⁸⁹ Thus, an award for intangible injuries makes the plaintiff "whole" not by restoring the plaintiff to her former condition, but by reestablishing her belief in the reliability of the normative order and thereby alleviating the sense of injustice which is the basis of the dispute.

When we view compensation and the "make whole" principle as means of fulfilling tort law's dispute resolution function rather than as independent objectives of the law, damage awards for intangible injuries appear in a new and more acceptable light. The "make whole" principle no longer requires that damage judgments measure the "market value" of the plaintiff's injury or restore the pleasure/pain ratio which the plaintiff previously enjoyed. The impossibility of precisely quantifying intangible injuries does not mean that awards for such injuries are necessarily illegitimate. Instead, the dispute resolution conception of tort remedies suggests that damage awards express societal recognition of the gravity of the plaintiff's injury. A nominal award for a serious intangible injury, such as the loss of a limb or of a loved one, would communicate either a refusal to acknowledge the severity of the plaintiff's intangible loss or a lack of social commitment to the norm in question. Such an award would hardly assuage the plaintiff's sense of injustice or reassure the plaintiff of the normative order's reliability.⁹⁰ Tort law

⁸⁹ See Ingber, *supra* note 13, at 781 ("Refusal to grant damages effectively bestows upon the injurer a form of legal 'entitlement' to cause the injury.").

⁹⁰ Because this justification of damages for intangible injuries rests upon social and psychological premises, and not upon some a priori notion of corrective justice, it need not hold for all societies at all times. In fact, a small-scale study of injury victims conducted some years ago reported that damages for pain and suffering "had no significant relationship in assuaging any feelings of resentment." O'Connell & Simon, *Payment for Pain & Suffering: Who Wants What, When and Why?*, 1972 U. ILL. L.F. I, 46. If this conclusion is correct, the tort law system could eliminate damages for pain and suffering without any impairment of the system's dispute resolution function. However, the study also found that most injury victims believe that they should recover pain and suffering dam-

should aspire in such cases to a symbolic proportionality between injury and remedy: the more substantial the injury, the more substantial the award. Instructions that tell jurors to make a "reasonable" award, but decline to suggest objective guidelines for finding a monetary equivalent for the injury,⁹¹ probably communicate this aspiration as well as can be expected.

This analysis of the "make whole" principle may also apply to damages for losses that, although pecuniary in nature, are unascertainable in amount. When a jury predicts the amount of income a disabled worker will lose over a period of years, or even decades, and in doing so estimates how long the worker will live and what promotions, raises, demotions and layoffs he would have received but for the injury, it is simply not realistic to pretend that the award actually restores the worker to the economic position that he would have enjoyed but for the tort. Courts aggravate this pretense of precision when they seek not only to determine future lost income, but also to fine-tune such inherently uncertain amounts for inflation and interest.⁹² Rather than pretending to measure the immeasurable,

ages. *Id.* at 32, 49. That finding weakens the argument that such damages do not advance the resolution of disputes.

⁹¹ See, e.g., G. DOUTHWAITE, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS § 6-14, at 220 (1981); see also 2 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 78.05 (2d ed. 1970).

⁹² In this decade both the Supreme Court and the Seventh Circuit have treated lower courts to learned discussions of the intricacies of adjusting awards for inflation and interest. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983); *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194 (7th Cir. 1982). These opinions consider the diverse factors (social and personal) which may cause wages to increase, as well as the various components of interest rates. In dealing with the problem of reducing an award to present value, the *Pfeifer* opinion debates whether it would be preferable to assume that the plaintiff, an injured barge worker, would "invest [the damage award] in a mixture of safe short-term, medium-term, and long-term bonds, with one scheduled to mature each year of his expected work-life," or would instead "invest exclusively in safe short-term notes, reinvesting them at the new market rate whenever they mature." 462 U.S. at 539 n.23. The Court found, after reflection, "no intrinsic reason to prefer one assumption over the other." *Id.* That the plaintiff might invest the award in *unsafe* bonds, put it into his savings account, use it to buy a car or make a mortgage payment, or squander it on a trip to Aruba were possibilities that either did not occur to the Court or that the Court saw no need to consider. In the end, neither *Pfeifer* nor *O'Shea* specified any single method for treating inflation and interest. The Supreme Court even issued a warning—one which ironically seems the more necessary after its own opinion—against believing that the problem could be resolved with "delusive exactness." *Id.* at 552. However, the Supreme Court did admonish the lower court to make a "deliberate choice" among methods, *id.* at 553, and the Seventh Circuit, through Judge Posner, insisted that the calculation must be "an analytical rather than an intuitive undertaking." 677 F.2d at 1201. The economic and accounting analysis exhibited in both opinions is impressive evidence of the literalistic devotion which even judges sometimes pay to the "make whole" principle. In the abstract, the calculations recommended in these decisions seem perfectly plausible. Whether flesh-and-blood plaintiffs such as Margaret O'Shea, towboat cook, and Howard Pfeiffer, barge worker, will feel that the fairness of legal decisions is significantly enhanced by such calculations is perhaps more dubious.

perhaps the law ought to strive self-consciously for a symbolic proportionality here as well.⁹³

In sum, if we regard the “make whole” principle and the compensation objective not as the primary ends of tort law, but as means of achieving the resolution of disputes, then criticisms based upon these supposed ends lose much of their force. From a dispute resolution perspective it is highly appropriate, rather than a cause for criticism or puzzlement, that tort law concerns itself only with those injuries that result from norm violations and which consequently give rise to disputes. And the impossibility of assigning a correct market or monetary value to many tort injuries does not discredit the law’s efforts to recognize that such injuries are nonetheless real and are appropriate subjects for redress.

B. Indirect Deterrence

Scholars advocating deterrence as a principle function of tort law often assume a direct relationship between liability rules and real world behavior. Potential tortfeasors supposedly gauge their precautionary expenditures in direct response to their anticipated liability. Although such a direct relationship surely exists in some instances—large manufacturers, for instance, do consider potential liability in designing and marketing their products—critics properly doubt the general validity of the psychological assumptions underlying this defense of tort law.⁹⁴ The dispute resolution conception of tort law nonetheless suggests that tort law may have a fairly significant deterrent function, one that goes largely unnoticed in the typical “law and economics” debate.

Let it be conceded that most individuals, and perhaps even most businesses and other institutional actors, do not deliberately decide upon appropriate levels of safety with their potential liability in mind. What then determines the degree of caution and safety which these actors observe in their conduct? Although no single factor fully accounts for accident-avoidance behavior, one obvious and influential determinant of safety in everyday life is, of course, the prevailing normative structure. To be sure, members of a society or group may sometimes conform to norms because of anticipated rewards for compliance or punishments for nonconformity. More often, however, the norms serve an informational function:

⁹³ Under such an approach, evidence of lost income would be relevant in determining the severity of a plaintiff’s injury and thus would help establish the proportionality of the damage award. But because the damage award would not pretend actually to be paying the plaintiff what he would have earned but for the tort, lost income (although relevant to the assessment of damages) would not be viewed as the definitive *measure* of damages.

⁹⁴ See *supra* notes 29-30 and accompanying text.

they teach people what is proper, and people conform because they believe that the norms reflect correct behavior.⁹⁵ Most people probably learn to drive properly, for instance, not by studying traffic codes or judicial opinions in auto accident cases, but rather by observing how others drive and then adopting the prevailing methods in their own driving.

This view of human conduct suggests that although the relationship between liability rules and safety decisions is usually indirect, it is no less real. People often adopt social norms without consciously reflecting on their own vulnerability to legal liability, but the norms themselves are regulated and reinforced by tort rules. The initial decision to conform may arise out of simple imitation or perhaps a perception that the norm embodies correct behavior. But because the norm has teeth, it effectively deters widespread nonconformance. If the law imposed no sanctions for norm violations, the norms would ultimately lose their force and cease to influence the levels of safety adhered to in everyday conduct. Conversely, when violators compensate their victims, the breached norms are reaffirmed.⁹⁶ Thus, criticisms that attack the psychological assumptions of the economic theory of law fail to show that tort law is without effect in deterring imprudent behavior.⁹⁷

C. The Positive Face of Punishment

Responding to the suggestion that tort law punishes wrongdoers, critics contend that retribution or vengeance is simply not a legitimate state function. And even if it were, critics argue, tort law abuses its license by punishing people who are not blameworthy and by imposing sanctions grossly out of proportion to the tortfeasor's

⁹⁵ See E. ARONSON, *supra* note 62, at 27 (arguing that "conformity resulting from the observation of others for the purpose of gaining information about proper behavior tends to have more powerful ramifications than conformity in the interest of being accepted or of avoiding punishment"); cf. R. AKERS, *DEVIAN'T BEHAVIOR: A SOCIAL LEARNING APPROACH* 8 (2d ed. 1977) ("After the initial period of socialization most people conform by controlling their own behavior without further directly applied sanctions.").

⁹⁶ Cf. E. WALSTER, G. WALSTER, & E. BERSCHIED, *EQUITY: THEORY AND RESEARCH* 56 (1978).

The repentant harmdoer [who voluntarily compensates his victim] should become a stauncher adherent of the equity norm. He should also serve as a behavioral model for others . . .

. . . The harmdoer who is forced to compensate at least is dissuaded from justifying his inequitable behavior and is prevented from serving as a negative model for others.

Id. (footnote omitted).

⁹⁷ Professor Sugarman suggests that because "moral inhibitions" deter conduct that is unreasonably dangerous, tort law has little incremental effect on such conduct. Sugarman, *supra* note 1, at 563. Sugarman's analysis assumes, however, that "moral inhibitions" and tort law are wholly independent constraints, and he thus overlooks tort law's role in reinforcing those social norms whose very roots lie in "moral inhibitions."

“fault.”⁹⁸ The dispute resolution conception of tort law suggests, however, that these criticisms are misdirected and may even negate each other.

Punishment, viewed simply as vengeance, is admittedly not an appealing task for the tort law system to perform. Although some argue that legalized vengeance releases feelings of hostility that might otherwise erupt in violence,⁹⁹ the argument is far from compelling. Society might better teach people to control their vindictive urges than legitimate those urges by giving them the force of law.¹⁰⁰ However, it is not so clear that punishment necessarily reduces to simple vengeance. Indeed, the second objection to tort law’s punishment function here begins to undermine the first. For if tort law regularly penalizes people whom almost no one would regard as blameworthy or imposes sanctions that plainly exceed any standard of appropriate retribution, then we must begin to doubt whether vengeance motivates the tort system’s imposition of punishments. It seems more plausible that tort law is doing something other than merely administering revenge.

But if punishment is not merely vengeance, then what is it? Section II’s discussion of dispute resolution, and in particular of the tort victim’s sense of having been wronged by the violation of a norm, suggests a more positive side to punishment. A victim’s sense of injustice does not amount simply to an irrational need to strike back at a wrongdoer; rather, it represents the victim’s consciousness that the normative order upon which the victim has relied has been threatened, and that if the norms constituting that order can be breached with impunity then they will lose their meaning and force. Therefore, when a tortfeasor compromises the normative order, punishment is not merely vindictive, but also serves a positive, restorative purpose. Holding the violator responsible for her violation restores the victim’s confidence in the system of norms and reinforces the norm in question so that it can continue to provide coherence and stability to the larger community.¹⁰¹

⁹⁸ See *supra* notes 43-51 and accompanying text.

⁹⁹ See ABA REPORT, *supra* note 6, at 3-16 (arguing that “the right of citizens to bring suit for private wrongs . . . provides an important outlet for conflict that otherwise would break out into violence”).

¹⁰⁰ Cf. E. ARONSON, *supra* note 62, at 192-98 (criticizing “catharsis” hypothesis—the notion that channelled aggression reduces destructive tendencies).

¹⁰¹ In reality, of course, the positive and vindictive aspects of punishment are not so easily separable. Miller and Vidmar distinguish the “behavior control orientation” from the “retributive orientation” of punishment, but they acknowledge that “punitive action often involves elements of both types of motivation.” Miller & Vidmar, *supra* note 47, at 146. Hogan and Emler speculate that the desire for vengeance is a functional evolutionary development arising from the need to maintain social norms:

From the perspective of socioanalytic theory, of which “retribution the-

This conception of tort law's punishment function responds to the objection that tort sanctions do not correlate well with fault. When used in connection with tort doctrines or philosophies, the term "fault" does not equate with moral culpability.¹⁰² Rather, if tort law's purpose is to resolve disputes arising from violations of social norms, then perhaps "fault" can more properly be understood as "norm violation."¹⁰³ Thus, even if we agree that a mentally incompetent tortfeasor is not *morally* blameworthy, we might nonetheless believe that his conduct violates the social norm prescribing caution in behavior that may cause harm to other people. A tort system that finds a morally innocent person at fault, and therefore liable for injuries caused, is not inconsistent; the system is simply not using the term "fault" in a purely moral sense.

The fallacy in asserting an incongruity between tort sanctions and fault becomes more clear if one considers the precise problem facing a court in a tort dispute. When tragic accidents occur, it is often true that neither the victim nor the tortfeasor has done anything so morally blameworthy that we can declare that either party *deserves* to suffer such a loss.¹⁰⁴ Unfortunately, one or both of them must. Thus, the court's concern is not with *a priori* conceptions of justice or moral desert, but rather with the pragmatic, post-accident problem of proffering reasons why one party should bear a loss

ory" is a corollary, the survival of a culture or a social group depends vitally on its members' maintaining the rules of the culture. This is particularly true when *culture* is considered from the perspective of evolutionary theory. The disposition to comply with authority, to respond to social expectations, and to invent metaphysical rationalizations for the rules of one's culture is seen as biologically preprogrammed. But it also makes sense, from an evolutionary perspective, that if one perceives that . . . malefactors are not appropriately punished, then one should react with moralistic aggression. From this perspective, then, perceptions of injustice (defined as others' getting more than their fair share, or not getting their just deserts after misbehaving) are followed by aggressive reactions that may serve one's selfish best interests but are not prompted by considerations of self-interest. Rather, moralistic aggression is akin to a reflex following perceptions of injustice . . .

Hogan & Emler, *Retributive Justice*, in *THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR*, *supra* note 47, at 125, 136 (citations omitted).

¹⁰² Oliver Wendell Holmes stressed the point over a century ago. *See* O. HOLMES, *THE COMMON LAW* 107-09 (1881).

¹⁰³ This is not to divorce "fault" or "norm violation" from morality altogether. The universe of social norms includes, but is not confined to, the realm of morality. Thus, "norm violations" might well involve moral breaches, but they just as easily might not. *See supra* note 97.

¹⁰⁴ Some cases, of course, present the opposite situation; we may feel that a defendant's wrongful conduct is so egregious that the defendant deserves a sanction *greater* than the amount of the victim's loss. Punitive damages are one possible response to such wrongdoing.

which neither party may truly deserve.¹⁰⁵ This burden is vastly different, and less demanding, than the task of explaining why the losing party *deserves*, in some moral sense, to suffer a sanction in an amount equal to the victim's loss. The fact that one party's violation of a social norm caused an injury, and was in that sense his fault, offers a plausible justification for assigning the loss to that party. To be sure, the loss actually assigned may greatly exceed any sanction we might deem an appropriate punishment for such behavior were we evaluating it in the abstract, without reference to a concrete injury and loss. Accordingly, the justification for imposing such a sanction upon the violator of a norm works only in the context of a dispute (which *must* be resolved) concerning an accomplished injury (which represents a loss that *must* be borne by someone).¹⁰⁶

By the same token, in some instances the tortfeasor may have been subjectively incapable of complying with the relevant norm. That incapacity might render the justification based upon norm violation less appealing and might in some cases convince courts that the violation of a norm does not justify assigning the loss to the injurer.¹⁰⁷ But subjective incapacity does not wholly nullify the justification based upon norm violation. After all, even if the injurer was subjectively unable to comply with the norm, it remains true that he reaps the benefits of a society which generally observes and relies upon the norm. Further, the victim's ability to rely upon the norm will falter if she is left to bear the loss, and the norm will lose some of its force and value if society tolerates violations—even violations committed by subjectively incompetent individuals. Thus, the bare fact of a norm violation provides at least *one* reason for holding the violator responsible. On the other hand, there may be *no* reason why the victim should bear the loss as against the violator. Therefore, despite the absence of moral culpability, the violator of a norm may properly be held responsible for resulting injuries.

D. The Unification of Tort's Diverse Objectives

A body of law that seeks simultaneously to compensate injury victims, to deter inefficient behavior, and to punish wrongdoers may

¹⁰⁵ The fairest outcome in some cases may be for the parties to share the loss. Comparative negligence doctrine permits this solution.

¹⁰⁶ To the extent that a tort sanction seems excessive in light of the actual behavior involved, the dispute resolution conception advanced here does not require that the excess amount come from the tortfeasor himself (as opposed to some other provider of compensation, if any exists). Thus, this view of tort law may be entirely compatible with social or liability insurance programs, so long as such programs retain appropriate sanctions for the tortfeasors. See *infra* text accompanying notes 111-12.

¹⁰⁷ See generally W. PROSSER & W. KEETON, *supra* note 51, § 32, at 175-84 (discussing application of "reasonable person" standard to physically or mentally incapacitated defendants, children, and abnormally unknowledgeable defendants).

seem badly fragmented, riven by commitments to incompatible objectives.¹⁰⁸ Viewing tort law as a dispute resolution system permits at least partial reconciliation of these apparently conflicting goals. In this view, tort law's *objective* is to resolve disputes; it compensates victims and punishes wrongdoers only to the extent that these subsidiary functions further that objective. Similarly, direct deterrence of unsafe behavior, to the extent that it occurs, is a valuable but nonetheless incidental benefit of resolving disputes. That tort law fails fully to realize any or all of these derivative benefits should be neither surprising nor, in itself, a cause for criticism. Those benefits are not, after all, the objectives of the law.

Some tensions remain. Dispute resolution still involves compensation, and because many tortfeasors are wholly or partially judgment-proof, compensation is most likely to occur if injurers are covered by liability insurance. However, the punishment function suggests that holding the harmdoer responsible is also essential to effective dispute resolution and that compensation paid by a third party will leave the victim unsatisfied.¹⁰⁹ Liability insurance increases the likelihood of compensation, but it removes the major burden from the tortfeasor. Insurance therefore appears to frustrate tort law's punishment function.¹¹⁰

This dilemma, however, may be largely illusory. Although victims will feel less than satisfied either if their compensable losses go uncompensated or if tortfeasors escape responsibility for violating social norms, it does not necessarily follow that dispute resolution requires that tortfeasors directly pay *all* of the victims' compensation costs. We hold tortfeasors responsible (instead of merely compensating victims through social insurance programs) in order to reestablish victims' confidence that a reliable normative order still exists and that the violators will not profit from their violations. But the benefit a tortfeasor derives from violating a social norm is often much less than the victim's loss; indeed, in many instances a tortfeasor—a careless driver, for instance—may not benefit at all and may himself suffer from the violation. Forcing the tortfeasor in such a case personally to pay for the victim's entire loss is hardly necessary to ensure that the tortfeasor does not profit from his wrong.¹¹¹ A finding of tortious conduct and the imposition of *some*

¹⁰⁸ See *supra* notes 53-56 and accompanying text.

¹⁰⁹ See *supra* note 76 and accompanying text.

¹¹⁰ See, e.g., Fleming, *supra* note 13, at 1197; Ingber, *supra* note 13, at 790; Sugarman, *supra* note 1, at 573-81.

¹¹¹ Where a tortfeasor *does* directly benefit from his wrong, as in cases of fraud or conversion, restitution or "disgorgement" can eliminate the imbalance. See D. DOBBS, *supra* note 72, § 4.1 at 224.

sanction against the defendant,¹¹² coupled with full compensation by the defendant's insurance carrier, should suffice to restore the victim's confidence in the normative order.

This possibility suggests that the tension between compensation and punishment may be more apparent than real and that widespread liability insurance does not impede tort law's dispute resolution function.¹¹³ At the same time, this reasoning shows the fallacy in the argument that because tort judgments are really paid by insurance companies anyway, it would be just as well to eliminate the middleman—the tortfeasor—and to adopt a “no fault” insurance scheme, thereby reducing administrative costs.¹¹⁴ Although providing compensation, such a scheme would sacrifice the tort law system's principle virtues: dispute resolution and reinforcement of social norms.¹¹⁵

E. The Question of Cost

Whatever the value of tort law in resolving disputes, the matter of cost remains. There are, after all, less expensive methods of dealing with injuries, grievances, and disputes;¹¹⁶ tort law might simply be a luxury we can no longer afford. Indeed, tort law faces an irony in this respect. The high cost of litigating tort disputes flows in large measure from procedures such as discovery and jury trials—and the consequential need for high-priced legal counsel—designed to improve the accuracy and fairness of the dispute resolution process.¹¹⁷ At the same time, by increasing costs these very procedures may make the tort system less accessible and consequently a less satisfactory means of resolving disputes.¹¹⁸ This essay's defense of tort law thus seems to provide some support for criticisms based upon high litigation costs.

¹¹² An increase in the defendant's insurance rates might constitute a sufficient sanction. Professor Fleming notes the likely increase in a tortfeasor's insurance premiums as one reason for concluding that tort awards continue to serve an admonitory function. Fleming, *supra* note 13, at 1197.

¹¹³ See *supra* note 106.

¹¹⁴ See generally O'Connell, *supra* note 1, at 22-26.

¹¹⁵ Cf. E. WALSTER, G. WALSTER & E. BERSCHIED, *supra* note 96, at 59 (warning of deleterious social consequences that would attend compensation of crime victims by society rather than by harmdoers).

¹¹⁶ See E. JOHNSON, V. KANTOR & E. SCHWARTZ, *OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES 85-92 (1977)* (discussing possibility of reducing costs through alternative dispute resolution methods).

¹¹⁷ See Alschuler, *supra* note 57, at 1824-25 (criticizing American procedural complexity as directly increasing financial cost of obtaining justice).

¹¹⁸ See J. MARKS, E. JOHNSON & P. SZANTON, *DISPUTE RESOLUTION IN AMERICA: PROCESSES IN EVOLUTION 17 (1984)* (“The costs of attorneys, court fees and lost work combine to bar access [to the courts] for many citizens, middle-class as well as poor, unless their legal costs are somehow subsidized.”).

At the same time, the dispute resolution conception of tort law suggests that at least one common cost-based objection to the system is misconceived. Critics sometimes focus on imbalance between the expenses of administering the system or the premiums paid into private liability insurance programs, and the amount of money tort victims actually receive. Jeffrey O'Connell, perhaps the foremost proponent of a no-fault insurance system, contends that only about twenty-eight cents of every dollar spent on medical malpractice insurance and only about thirty-seven cents of every dollar invested in products liability insurance actually go to injured claimants.¹¹⁹ O'Connell argues that a social insurance scheme would be far less expensive and could therefore pay out in compensation a higher percentage of the premiums it received.¹²⁰

The flaw in O'Connell's argument is that it conceives of tort law simply as a method of compensating victims: O'Connell measures the system's benefit solely by the dollars paid out in compensation. But if tort law's primary objective is to resolve disputes and thereby to reinforce social norms, then his analysis is misguided. Tort law's value lies not in its ability to distribute dollars, but rather in its ability to further civil peace and enhance the social order. This value, although difficult to estimate in monetary terms, probably far exceeds the dollar amounts of compensation that tort plaintiffs recover. For instance, O'Connell's figures attribute no benefit at all to cases that result in verdicts favoring defendants, because no compensation occurs in such cases—the costs incurred in adjudicating such cases are simply wasted. From a dispute resolution standpoint, by contrast, “no liability” decisions are as valuable as those producing monetary awards to plaintiffs.

The point emerges more clearly through an inexact but useful analogy to another legal institution that upholds social norms—the criminal justice system. Traditionally, criminal law has paid nothing to victims of crime. Although recent victim compensation legislation¹²¹ has begun to reverse matters somewhat, the compensatory amounts paid under these schemes are undoubtedly minuscule in proportion to the expense of the criminal justice system. Nonetheless, criticizing the criminal justice system on that ground would be absurd, for it is clear that the system's primary purpose is not to compensate victims. A similar response applies, albeit less strongly, to cost-based criticisms of the tort system. Compensation admittedly plays a much larger role in tort law than in criminal law, but if

¹¹⁹ O'Connell, *supra* note 1, at 21.

¹²⁰ See generally *id.*

¹²¹ See, e.g., Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 3579-3580 (1982).

compensating victims is not the tort law system's primary objective, then it simply misses the point to contend that compensation figures can somehow measure the system's value.

CONCLUSION

This essay does not pretend to make the case for preserving the tort law system. Its aim has been more modest. The essay simply claims that tort law should be understood—and hence evaluated—as a system for resolving disputes generated by the violation of social norms. Whether the system adequately performs its dispute resolution function remains an open question¹²²—it is a question that can be answered not in the abstract, but only through experience and continuing practical evaluation.

Nonetheless, more general recognition of the primacy of tort law's dispute resolution function would constitute a valuable achievement. Most importantly, it would illuminate the fallacy in critical evaluations that judge tort law by its success, or lack of success, in achieving subsidiary goals such as victim compensation, deterrence of inefficient behavior, and punishment. In addition, such a recognition would promote a greater sensitivity to the social and psychological needs that tort law's dispute resolution function fulfills and that proposed alternatives neglect. The dispute resolution conception thus suggests the need for a more searching evaluation of tort law than recent criticism typically provides.

¹²² This essay has considered criticisms calling for the replacement of tort law with insurance or regulatory schemes, *not* proposals to replace or supplement tort law with alternative dispute resolution methods. The latter proposals raise a different set of questions. See generally S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* (1985).