WHAT IS INSURANCE FOR TORT LAW?

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This Article reexamines the relationship between liability insurance and tort law to answer a deceptively simple but foundational question: What is insurance for tort law? Building on prior work and responding to the recent call by Kenneth Abraham and Catherine Sharkey to close the "glaring gap" in tort theory, the Article makes both descriptive and normative contributions. It summarizes how liability insurance structures tort law in action—determining which claims are brought, who defends them, and who pays—as well as how insurance shapes tort doctrine by channeling litigation toward insured defendants and insured causes of action. It analyzes how that insurance influences tort law's potential foundations, justifications, functions, or objectives: compensation, deterrence, corrective justice, retribution, or civil recourse. And it argues that liability insurance is not merely a mechanism for satisfying tort judgments but a constitutive force that shapes the distribution of correction and civil recourse. Drawing on the work of Stephen Perry and John Gardner, the Article introduces a framework for understanding how insurance law and market practice define who has meaningful access to corrective justice and civil recourse. It urges influential tort theorists to reconsider their exclusion of insurance from normative analysis and calls for courts to weigh the presence of liability insurance when evaluating whether to expand tort doctrine—while cautioning against judicial efforts to predict insurance market responses. By integrating insights from insurance law, tort practice, and moral theory, the Article strengthens the case for treating liability insurance as central to understanding what tort law is, does, and ought to be.

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INTRODUCTION

This Article provides a long-deferred answer to a question a student asked in my torts class some years ago: "What is insurance for tort law?" As I answered more briefly then, insurance is many things for tort law. Insurance not only dominates the defense side of most tort litigation, with all the institutional consequences that entails, but it also affects how we understand tort law. For example, the spread of liability insurance allowed mid-twentieth-century torts scholars and judges to imagine tort law as a loss-spreading and cost-internalizing institution,[1] and liability insurance has simultaneously advanced and undercut tort law's deterrence and corrective justice ever since its invention in the late nineteenth century.[2]

My original plan was to write a short essay for torts teachers and students that summarized insights from prior work on the relationship between insurance and tort law. But recent, high-profile work by Kenneth Abraham and Catherine Sharkey prompted deeper exploration.[3] In their 2024 *Yale Law Journal* article, Abraham and Sharkey argue that there is a "glaring gap in tort theory" that results from the failure of tort theorists to adequately address the dominant role of liability insurance in tort law and practice.[4] They report that some courts are ahead of these tort theorists in that regard, already taking liability insurance into account when making tort doctrine.[5] They applaud that practice and suggest that courts should do so more often, more explicitly, and on a more informed basis.[6]

Their analysis prompted me to examine what philosophically oriented tort theorists have said about liability insurance. I found that, contrary to what a casual reader of Abraham and Sharkey's article might conclude, tort theorists operating within the framework of moral philosophy have in fact considered liability insurance.[7] But, having done so, they decided that liability insurance considerations lie normatively outside the theories of tort law that they are developing.[8] Abraham and Sharkey

[1] See infra Section III.A.

[2] See infra Sections III.B–C; Kenneth S. Abraham, Liability Insurance and Accident Prevention: The Evolution of an Idea, 64 Md. L. Rev. 573, 580 (2005).

[3] Kenneth S. Abraham & Catherine M. Sharkey, The Glaring Gap in Tort Theory, 133 Yale L.J. 2165 (2024).

[4] Id. at 2169.

[5] Id. at 2191.

[6] Id. at 2242.

[7] See, e.g., Jules L. Coleman, On the Moral Argument for the Fault System, 71 J. Phil. 473, 487 (1974) [hereinafter Coleman, On the Moral Argument]; Jules L. Coleman, Justice and the Argument for No-Fault, 3 Soc. Theory & Prac. 161, 164–65 (1974) [hereinafter Coleman, Justice and the Argument].

[8] See, e.g., Jules L. Coleman, Risks and Wrongs 198 (1992); John C.P. Goldberg, Unloved: Tort in the Modern Legal Academy, 55 Vand. L. Rev. 1501, 1519 (2002); Gregory C. Keating, Reasonableness and Risk: Right and Responsibility in the Law of Torts 290 (2022) ("[N]othing in negligence liability forbids injurers from insuring against potential liability, but nothing in negligence liability requires it either."). For a notable exception, see

disagree with that decision, but they support their disagreement with arguments that are unlikely to be persuasive to these theorists.[9]

My encounter with the work of these theorists, as well as with tort law practitioners, persuades me that there is value in trying to work out tort law right and wrong on some basis other than the inevitably incomplete social welfare analysis offered by standard law-and-economics accounts. If the scholars doing that work have concluded that liability insurance lies outside their project, the burden is on me to persuade them to reconsider. That requires using arguments that they could find persuasive.

This Article takes on that challenge while answering the original motivating question. As such, the Article makes both descriptive and normative contributions. The descriptive contributions are: summarizing what prior work teaches about the impact of liability insurance on tort cases (such as which cases are brought, who defends them, and who pays for them), extending Abraham and Sharkey's claim that liability insurance affects the development of tort doctrine, and describing for the first time in one place how liability insurance relates to a set of potential foundations, justifications, functions, or objectives for tort law (compensation, deterrence, corrective justice, and retribution).

The normative contributions build on the descriptive, starting with the observation that the (un)availability of liability insurance strongly affects the nature of justice available within the domain of tort law. As the title of Stephen Perry's classic article reminds us, tort theory should address "The Moral Foundations of Tort Law."[10] I argue that this requires attending not only to the presence or absence of adequate justifications for tort liability, but also to the distribution of the right to the redress that tort liability provides. That requires considering who has liability insurance for what wrongs and whether what we find satisfies the minimal demands of whatever moral theory of tort law we find persuasive, whether that be corrective justice, civil recourse, utilitarianism, some mix of the foregoing, or something else.

Tony Honoré, The Morality of Tort Law—Questions and Answers, *in* Philosophical Foundations of Tort Law 73, 85–90 (David G. Owen ed., 1995).

[9] Abraham & Sharkey, supra note 3, at 2231–33 (suggesting that deontic theories should accommodate "instrumental and policy-based considerations" implicated by the presence or absence of liability insurance).

[10] Stephen R. Perry, The Moral Foundations of Tort Law, 77 Iowa L. Rev. 449 (1992) [hereinafter Perry, Moral Foundations].

Traditionally, tort theorists operating within the framework of moral philosophy have resisted being drawn into questions of distribution.[11] As they explain, generalized, community-wide distributive justice considerations cannot provide a compelling justification for providing compensation to tort victims rather than people injured in other ways.[12] I agree, but the distribution of the right to corrective justice or civil recourse is different. As Stephen Perry first articulated, there is a *local* question of distribution that informs corrective justice.[13] Who among all the people with a causal relationship to an injury should bear the loss associated with that injury?[14] That local question differs from questions of general distribution because there are agent-specific reasons to include someone in the local consideration set and agent-specific reasons for deciding who among that set should bear the loss.[15]

In later work, the legal philosopher John Gardner expanded Perry's concept of local distribution to a more general "distribution of correction." As Gardner explained, when courts or legislatures create tort law rules that give victims of some morally wrongful acts, but not others, a legal right to recourse from their wrongdoers, they are distributing the legal right to correction.[16] I argue that tort theorists should attend not only to the gaps between moral and legal rights to correction, but also to the gaps between legal rights to correction and their actualization.

When tortfeasors do not have liability insurance, victims bear wrongful losses on their own, unless they are lucky enough to find that the wrongdoers have substantial assets. For everyone else facing an uninsured defendant, tort law provides only a pretense of the right to

[11] See, e.g., Ernest J. Weinrib, Toward a Moral Theory of Negligence Law, 2 Law & Phil. 37, 38 (1983) (describing tort law as embodying corrective justice as opposed to distributive justice); Jules L. Coleman, The Mixed Conception of Corrective Justice, 77 Iowa L. Rev. 427, 433 (1992) (arguing that the moral principle of corrective justice cannot be satisfied by a distributive scheme of liability).

[12] See, e.g., Ernest J. Weinrib, Corrective Justice in a Nutshell, 52 U. Toro. L.J. 349, 351–52 (2002); Coleman, supra note 11, at 435.

[13] Perry, Moral Foundations, supra note 10, at 461; see also Stephen R. Perry, On the Relationship Between Corrective and Distributive Justice, *in* 4 Oxford Essays in Jurisprudence 237, 237 (Jeremy Horder ed., 2000) (clarifying that while there is a normative connection between distributive justice and corrective justice, the two have different purposes and are conceptually independent).

[14] Perry, Moral Foundations, supra note 10, at 461.

[15] Id.

[16] John Gardner, Torts and Other Wrongs 83–86 (2019).

corrective justice. While there may not be a compelling basis in generalized, community-wide distributive justice for providing compensation to these victims rather than others, there is a compelling basis in corrective justice, which supplies the agent-specific obligations of the tortfeasors who could be made to pay—if they had the liability insurance that the present structure of the liability insurance market does not provide them.[17]

Retributive justice provides yet another reason for tort theorists to reexamine their decision to set liability insurance considerations aside. As Jules Coleman explained at the dawn of corrective justice theory, retributive justice does not provide an adequate moral foundation for tort law.[18] But that does not mean (and he never contended) that retribution has no place in tort law or theory.[19] Indeed, Tony Honoré has suggested that considerations of retributive justice should "temper[]" the corrective justice that tort law provides.[20] Moreover, as any successful plaintiff lawyer can attest, retribution is alive and well in civil justice, as demonstrated by the extent to which plaintiff lawyers work to arouse jurors' feelings of outrage and condemnation.[21]

Where corrective justice provides reasons to attend to the gaps created by the absence of liability insurance (and reasons to encourage its presence), retributive justice provides reasons to attend to the presence of liability insurance. These latter reasons cut in two directions. On the one hand, the presence of liability insurance may ameliorate concerns about disproportionate liability—because an insurer, not the less-than-fully culpable defendant, will pay the damages.[22] On the other hand, the presence of liability insurance may raise retributive justice

[17] See infra Part IV.

[18] See Coleman, On the Moral Argument, supra note 7, at 481–82; Coleman, Justice and the Argument, supra note 7, at 174–75.

[19] Coleman, Justice and the Argument, supra note 7, at 177–78; see also Scott Hershovitz, Treating Wrongs as Wrongs: An Expressive Argument for Tort Law, 10 J. Tort L. 405, 408 (2017) (arguing that tort liability expresses the judgment that the defendant has wronged the plaintiff); David G. Owen, Deterrence and Desert in Tort: A Comment, 73 Calif. L. Rev. 665, 666 (1985) (describing punishment and compensation as the two broad functions of tort law).

[20] Honoré, supra note 8, at 90.

[21] Tom Baker, Transforming Punishment into Compensation: In the Shadow of Punitive Damages, 1998 Wis. L. Rev. 211, 226–28 [hereinafter Baker, Transforming Punishment]; cf. Kenneth S. Abraham, Shadow Tort Law: Lessons from the *Reptile*, 122 Colum. L. Rev. F. 110, 114–15 (2022) (describing plaintiff lawyers' efforts to appeal to jurors' instincts to protect themselves and their communities from wrongdoing).

[22] Honoré, supra note 8, at 90.

concerns when that insurance insulates culpable, solvent defendants from financial consequences for serious wrongs.[23]

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The Article proceeds as follows. Part I addresses the impact of liability insurance on tort law in action. Part II addresses the impact of liability insurance on tort doctrine. Part III addresses the relationship of liability insurance to the compensation, deterrence, corrective justice, and retributive justice provided by tort law.

Part IV takes a more explicitly normative turn, making the case for tort theorists to incorporate insurance considerations into their normative analysis. In that regard, I argue that tort theory should acknowledge the role that liability insurance can play in promoting corrective justice and civil recourse, and it should attend to features of liability insurance law and practice that limit the distribution of corrective justice and civil recourse. With regard to retribution, I argue that private law theorists should recognize the role that liability insurance practice has played in suppressing the retributive aspects of tort law, making contemporary tort law more about deterrence and corrective justice than the desire for vengeance out of which tort law arguably emerged.[24]

Part V turns to Abraham and Sharkey's central normative claim: that courts should take liability insurance into account when making tort doctrine. I first provide reasons within the domain of moral philosophy to support that claim in certain cases. For example, where there are historical gaps in tort liability that raise significant questions about the existing distribution of correction, the presence of a robust market for insurance that would cover liability for wrongs in those gaps could be relevant to a court deciding whether the time had come to fill or narrow those gaps. Liability insurance promotes corrective justice by providing an institutional structure that allows victims to recover from wrongdoers and, thus, all other things being equal, courts do more to promote corrective justice when they channel tort doctrine toward liability insurance. Thus, the existence of relevant liability insurance should

[23] See infra Section III.D.

[24] See David J. Seipp, The Distinction Between Crime and Tort in the Early Common Law, 76 B.U. L. Rev. 59, 59–60 (1996); Mark A. Geistfeld, Hidden in Plain Sight: The Normative Source of Modern Tort Law, 91 N.Y.U. L. Rev. 1517, 1522–23, 1529 (2016) (arguing that Holmes overstated the retributive origins of tort law); cf. Scott Hershovitz, Tort as a Substitute for Revenge, *in* Philosophical Foundations of the Law of Torts 86, 98 (John Oberdiek ed., 2014) (arguing for understanding revenge in corrective justice terms).

provide a thumb on the scale in favor of narrowing the gap between moral and legal conceptions of corrective justice.

I part ways with Abraham and Sharkey in circumstances in which (a) there is not an existing liability insurance market that would cover the kind of liability in question or (b) the defendants (or other interested parties) contend that changing tort doctrine would destabilize an existing liability insurance market. I provide conceptual and empirical reasons to support my view that courts and other lawmakers should not make liability decisions that are based on predictions about what kinds of liabilities are capable of being insured as a technical or actuarial matter. Such decisions are unlikely to support the goals of tort law explored earlier, and courts lack the institutional competence to make reliable predictions about the effect of their decisions on the liability insurance market. Insurance is "an uncertain business" in which insurers regularly insure uncertain risk.[25] If insurers cannot reliably predict what can and cannot in the long run be insured, there is little reason to believe that courts will do any better. To this extent I disagree with Abraham and Sharkey and with judicial decisions such as those that cut back on strict products liability on the grounds that it would be impossible to insure against an uncertain risk.[26]

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Before proceeding, I should mention an understanding about the history of tort law that many legal historians and legal scholars have so internalized that we sometimes forget to express.[27] It is only a slight exaggeration to say that tort law as we know it has never existed in the United States without insurance. John Witt's *The Accidental Republic* and Kenneth Abraham's *The Liability Century* stand out for me as the leading monographs making this case.[28] As their work shows, there

[25] Richard V. Ericson & Aaron Doyle, Uncertain Business: Risk, Insurance, and the Limits of Knowledge 5, 16 (2004); Tom Baker, Uncertainty > Risk: Lessons for Legal Thought from the Insurance Runoff Market, 62 B.C. L. Rev. 59, 65 (2021).

[26] See, e.g., Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 559 (Cal. 1991) (providing an insurance market justification for requiring trial courts to instruct the jury on the "state of the art" defense).

[27] Thank you to Sandra Mayson for prompting me to make this point explicit.

[28] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, at 172–73 (2008) [hereinafter Abraham, The Liability Century]; see also Kenneth S. Abraham, Free Speech, Breathing Space, and Liability Insurance, 111 Va. L. Rev. 1007, 1015 (2025) (recognizing the unsung role of insurance markets even in providing "financial protection against speech-tort liability," a topic not addressed in *The*

never was a stable set of tort law doctrines and causes of action upon which insurance institutions subsequently acted. Rather, modern tort law and liability insurance emerged and evolved together.

Despite that history, all leading tort theory proceeds as if there were a primary institution called "tort law" upon which another, secondary institution called "insurance" acts. Although that is decidedly not my perspective, I am writing this Article for four audiences that take this perspective, at least as a starting point: judges making tort doctrine; students taking a tort law class; torts teachers who teach torts from that perspective but want to consider ways to better prepare their students; and philosophically oriented tort theorists. For that reason, my description starts from that perspective as well.

I. LIABILITY INSURANCE AND TORT LAW IN ACTION

This first Part addresses the significance of liability insurance to tort law in action—the lived, institutional reality of the tort system, which is shaped not only by formal doctrine but also by the practical influences of litigation strategy and the economic incentives and institutional structures that determine which claims are pursued and how they are resolved. This Part is shorter than the others, not because it is less important (quite the contrary), but rather because there is no need for me to do more than summarize what we know from prior research. The summary of the summary is this: insurance provides the money that changes hands through tort cases, insurance controls the defense side of tort cases, and insurance shapes which tort cases are brought and how they are pursued.[29]

A. Insurance Provides the Money That Changes Hands Through Tort Claiming

As Abraham and Sharkey put it most recently, "Liability insurers pay virtually all of the billions of dollars of tort liabilities that individuals incur each year and the majority of liabilities incurred by commercial

Liability Century). See generally John Fabian Witt, The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law (2004).

[29] See Tom Baker, Liability Insurance as Tort Regulation: Six Ways That Liability Insurance Shapes Tort Law in Action, 12 Conn. Ins. L.J. 1, 3–4 (2005).

and other entities."[30] Many individuals do not have enough assets that can be reached to satisfy a significant tort claim,[31] and those who do buy many kinds of insurance to protect those assets, including liability insurance.[32] For example, liability coverage is part of the insurance policy that a homeowner in the United States must have to take out the kind of home mortgage that is eligible for sale in the secondary market.[33] As a result, it is nearly impossible to own a home in the United States without also buying liability insurance.[34]

Of course, some organizations have enormous assets that could be used to satisfy tort judgments against them, but they also buy insurance to protect those assets and those of their senior people.[35] When deep-pocketed organizations face significant types of tort liabilities that commercial insurers are unwilling to insure, they create industry-specific mutual insurance organizations or their own "captive" insurance companies to help manage those liabilities.[36] These industry mutuals and captive insurers represent distinct types of insurance institutions, but they employ much the same forms, technologies, and imaginaries as their commercial counterparts, making this largely a distinction without a difference for purposes of this Article.[37]

Significantly, liability insurers pay for more than just tort settlements and judgments. They also pay the lawyers on both sides of tort claims.

[30] Abraham & Sharkey, supra note 3, at 2181; see also Kenneth S. Abraham & Lance Liebman, Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury, 93 Colum. L. Rev. 75, 86 (1993) ("An insured defendant does not personally correct the injustice done in causing injury to the plaintiff; rather, the defendant's liability insurer performs this correction.").

[31] Stephen G. Gilles, The Judgment-Proof Society, 63 Wash. & Lee L. Rev. 603, 606 (2006).

[32] Stephen C. Yeazell, Re-Financing Civil Litigation, 51 DePaul L. Rev. 183, 186–87 (2001).

[33] See, e.g., Tom Baker, Kyle D. Logue & Chaim Saiman, Insurance Law and Policy: Cases and Materials app. A at 705 (5th ed. 2021) (providing an example of a standard homeowners policy).

[34] Yeazell, supra note 32, at 187–88 (noting that by the year 2000, "an owned house was almost certainly an insured house" in the United States).

[35] See, e.g., Abraham, The Liability Century, supra note 28, at 232–35 (describing large corporations' purchase of liability insurance); Tom Baker & Sean J. Griffith, Ensuring Corporate Misconduct: How Liability Insurance Undermines Shareholder Litigation 44–45 (2010) (discussing the commonly held expectation of D&O (directors and officers) insurance availability for individuals serving on public company boards).

[36] See, e.g., Tom Baker & Rick Swedloff, Mutually Assured Protection Among Large U.S. Law Firms, 24 Conn. Ins. L.J. 1, 10–12 (2017).

[37] Id.

They pay defense lawyers, win or lose, and, because of the near ubiquity of contingent fees on the plaintiff side, they also pay plaintiff lawyers. Indeed, liability insurers rarely pay a tort plaintiff directly. Instead, they pay the plaintiff lawyer, who deposits the funds in a client trust account and distributes them on the terms spelled out in the retainer agreement.[38]

Thus, it is no exaggeration to say that liability insurers provide almost all the money that changes hands through the tort claiming process. They pay the plaintiffs, the defense lawyers, and the plaintiff lawyers, and they even pay a significant share of the costs of the court system, which is financed in part by fees in most jurisdictions.[39] They pay defendants' court fees directly and they pay plaintiffs' court fees as part of the money they wire into plaintiff lawyers' trust accounts, because one of the things the lawyer does with that money is reimburse the law firm for such expenses.

B. Insurance Controls the Defense of Tort Claims

With money comes control. When defendants are individuals, liability insurers have near total control over the defense and settlement of tort claims.[40] Insurers hire, pay, and direct the lawyers who defend tort claims brought against individuals, and insurers decide whether and when to settle those claims, and for how much.[41] There are exceptions at the margin,[42] but insurers sufficiently dominate the defense side of tort litigation to make this a useful generalization.

The extent of insurer control is nearly the same for all but the largest organizations.[43] And even a big business expects insurers to pay to settle claims that are large enough to exceed the (increasingly large) self-

[38] See, e.g., Florida Bar, Formal Ethics Op. 00-2 (2000) ("Typically, a settlement check is deposited into an attorney's trust account . . . .").

[39] See James R. Maxeiner, Cost and Fee Allocation in Civil Procedure, 58 Am. J. Compar. L. 195, 197 (2010).

[40] Restatement of Liab. Ins. § 10 (A.L.I. 2019) (describing the insurer's right to defend); id. § 24 (describing the insurer's discretion to settle).

[41] Baker, supra note 29, at 9–10.

[42] See, e.g., Tom Baker, What Litigation Funders Can Learn About Settlement Rights from the Law of Liability Insurance, 25 Theoretical Inquiries L., July 2024, at 17, 29 ("When the insurer is providing a defense but has reserved the right not to pay a judgment, the potential arises for conflicts that may require a more structural solution. Accordingly, courts have fashioned special liability insurance law rules that limit insurers' control in that context.").

[43] Id. at 30, 32; Tom Baker, Where's the Insurance in Mass Tort Litigation?, 101 Tex. L. Rev. 1569, 1573 (2023).

insured layer in the business's insurance program, and it is my informed opinion that insurers generally do pay, even if it sometimes takes slow and expensive litigation to get them to do so.[44] The existence of industry mutuals and captives may change this situation somewhat in some arenas, but mutuals and captives buy reinsurance from the same globally dominant reinsurers as their commercial insurance counterparts, making them behave like commercial insurers in many respects.[45]

C. Insurance Shapes Which Tort Cases Are Brought

To a substantial degree, liability insurance determines which tort cases are brought in the first place. Because most people lack sufficient collectible assets to satisfy a significant tort judgment, contingency-fee lawyers will not pursue claims against most uninsured defendants.[46] As a result, the availability of liability insurance conditions access to the tort system. Where there is insurance, there can be a viable claim; where there is none, even meritorious claims are abandoned. This means that entire categories of wrongs go unredressed,[47] not because they are less serious or morally ambiguous, but because the tortfeasors do not have liability insurance.[48]

This structuring effect of liability insurance not only filters which cases are brought but also shapes how those cases are pursued.[49] Plaintiff lawyers strategically frame complaints to avoid triggering policy exclusions; they downplay the intentionality of harm to preserve

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[44] Abraham, The Liability Century, supra note 28, at 232–35; see, e.g., Jeff Sistrunk, Excess Insurer Owes Pfizer Coverage for Securities MDL, Law360 (Aug. 31, 2020, at 16:42 ET), https://www.law360.com/lifesciences/articles/1305918/excess-insurer-owes-pfizer-coverage-for-securities-mdl (describing the multi-year litigation between Pfizer and one of its insurance companies, which resulted in the Delaware Superior Court ordering the insurance company to pay).

[45] See generally Baker & Swedloff, supra note 36 (analyzing law firms' use of mutual insurers and captives).

[46] Baker, supra note 29, at 4; Gilles, supra note 31, at 617–19; Yeazell, supra note 32, at 186–87.

[47] See, e.g., Jennifer Wriggins, Domestic Violence Torts, 75 S. Cal. L. Rev. 121, 135–36 (2001) (explaining that domestic violence torts often go unaddressed due to the lack of third-party liability insurance coverage).

[48] See Baker, supra note 29, at 13 ("[W]e might say that uninsured individuals are 'outlaws' with regard to tort law and that liability insurance industry practices have the effect of making people outlaws with regard to tort liabilities.").

[49] See generally Ellen S. Pryor, The Stories We Tell: Intentional Harm and the Quest for Insurance Funding, 75 Tex. L. Rev. 1721 (1997) (exploring how liability affects strategy in tort litigation).

coverage; and they target less-culpable but insured defendants over more-culpable but uninsured ones.[50] In short, liability insurance functions not just as an institutional feature in the landscape of tort law in action but as a constitutive force that defines the practical boundaries of that law in action.

II. LIABILITY INSURANCE AND TORT DOCTRINE

The impact of liability insurance on tort doctrine was not on my list when I first answered the "What is insurance for tort law?" question in my torts class, nor when I first described in print how insurance affects tort law.[51] For starters, I believed that documenting the impact of insurance on tort law in action should be, and in most cases was, enough to convince tort law scholars to care about insurance—there never was any need to convince tort law practitioners; they taught me.[52] More importantly, because some tort theorists were so committed to the normative position that insurance should not shape tort doctrine,[53] I expected that they would demand proof of the impact of insurance on tort doctrine that would be difficult to provide in any empirically rigorous way. Also, I knew enough about my own knowledge and interests to conclude that I would be unlikely ever to know as much about the details and history of the development of tort doctrine as those theorists. So, the effort required to make the case that insurance shaped tort doctrine didn't seem worth it. Thankfully, Abraham and Sharkey made that effort.[54] My explanation here builds on and extends their analysis.

In summary, insurance is an institutional force that shapes tort doctrine by putting massively repeat players on the defense side of tort litigation, channeling plaintiffs toward insured defendants and insured causes of action, reducing concerns judges may have about legal rules

[50] Baker, supra note 29, at 3–5.

[51] Id.

[52] See generally Baker, Transforming Punishment, supra note 21 (containing interviews with South Florida personal injury lawyers discussing the role insurance plays in cases); Tom Baker, Blood Money, New Money, and the Moral Economy of Tort Law in Action, 35 Law & Soc'y Rev. 275 (2001) [hereinafter Baker, Blood Money] (containing interviews with Connecticut personal injury lawyers discussing the role insurance plays in cases).

[53] Ernest J. Weinrib, The Insurance Justification and Private Law, 14 J. Legal Stud. 681, 683, 687 (1985).

[54] See generally Abraham & Sharkey, supra note 3 (detailing the profound impact of liability insurance on the dynamics of tort litigation).

that might produce disproportionate liability, and promoting tort reform through education, research, and lobbying. In addition, as Mark Geistfeld has explained, the presence of insurance reduces the cost of bearing risk and, thus, the availability of liability insurance reduces the burden of tort duties.[55] The Sections that follow explain each of these dynamics in turn.

A. Putting a Massively Repeat Player on the Defense Side

Like law generally, tort law is a game that includes rules for changing the rules of the game.[56] Those who play just once, or only a few times, play to win only their specific instances of the game.[57] These "one shotters" don't care about changing the rules, except as it may help win their games. Repeat players play to win their games, too, but they play with an eye toward their games of the future. Repeat players play to change the rules.[58]

A controversial legal procedure known as vacatur illustrates this dynamic. Vacatur allows parties to a lawsuit to settle their dispute after a court has rendered a decision and then petition the court to vacate that decision.[59] If the court grants the petition, the decision never appears in the official law reports. Vacatur allows a losing repeat player to cut a deal with a winning one shotter. The one shotter cares about the win—the money—not about the rule, so the one shotter does not mind de-publishing the opinion. Thus, vacatur allows repeat players to keep the precedents they like and jettison the ones they do not, illustrating the repeat player advantage in shaping tort doctrine.

[55] Mark A. Geistfeld, Tort Law in a World of Scarce Compensatory Resources, 124 Mich. L. Rev. 59, 108 (2025).

[56] Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95, 96–101 (1974); cf. Scott J. Shapiro, Law, Plans, and Practical Reason, 8 Legal Theory 387, 422 (2002) (discussing how, through democratic self-rule, individuals can influence the rules of the legal system). For avoidance of doubt, my use of the word "game" here is metaphorical, not a position on whether law is a moral practice. Scott Hershovitz, Law Is a Moral Practice, 15 Juris. 123, 123–24 (2024).

[57] Galanter, supra note 56, at 100.

[58] Id.

[59] Jill E. Fisch, Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur, 76 Corn. L. Rev. 589, 589 (1991) [hereinafter Fisch, Rewriting History]; Jill E. Fisch, The Vanishing Precedent: Eduardo Meets Vacatur, 70 Notre Dame L. Rev. 325, 328–29 (1994); Eugene R. Anderson, Mark Garbowski & Daniel J. Healy, Out of the Frying Pan and Into the Fire: The Emergence of Depublication in the Wake of Vacatur, 4 J. App. Prac. & Process 475, 491 n.80 (2002).

Courts have become more reluctant to grant vacatur requests,[60] but there are other, less blatant ways for a repeat player to play to change the rules of the game in their favor.

A 1985 trucking accident case that reached the Supreme Court of Arkansas provides an instructive example of an insurer playing to change the rules.[61] The case involved a truck driver who hit a stopped car while going seventy miles an hour, killing the two occupants and causing a small amount of property damage to a moving company truck stopped in front of the car. The estates of the two decedents and the moving company sued the truck driver's employer. At trial, the jury awarded $4.4 million in compensatory damages to the estates of the decedents and a mere $15,000 in compensatory damages to the moving company (which the judge reduced to less than $2,000). In addition, because of some damning evidence (e.g., the driver had been seen driving recklessly earlier that day, and there was some evidence he did not even try to put on the brakes), the jury awarded $100,000 in punitive damages to each of the estates and to the moving company.[62] The defendant's liability insurer paid the compensatory and punitive damages awarded to the estates and the $2,000 compensatory damages awarded to the moving company and appealed only the punitive damages awarded to the moving company.[63]

Paying the compensatory and punitive damages awarded on behalf of the two people killed, plus the tiny compensatory damages awarded to the moving company, and then appealing only the punitive damages awarded to the moving company makes sense to someone who is playing for the rules. It seems likely that there was some midpoint between zero and $100,000 that would have made commercial sense for a one-shotter defendant to pay rather than incur the appeal costs and for the moving company to accept to avoid the cost and risk of the appeal. As a repeat player, however, the liability insurer likely handling the trucking company's defense recognized that the case presented an opportunity to play for the rules by using this case to narrow the grounds

[60] See Fisch, Rewriting History, supra note 59, at 600–01; see also Anderson et al., supra note 59, at 484 (claiming that *Bonner Mall* reduced the amount of vacated decisions).

[61] Nat'l By-Prods., Inc. v. Searcy House Moving Co., 731 S.W.2d 194, 195 (Ark. 1987).

[62] In 2026 dollars, those amounts would be $12.93 million in compensatory damages to the estates, $44,080 in compensatory damages to the moving company, and $293,871 in punitive damages to each of the three plaintiffs. U.S. Bureau of Lab. Stat., CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm (last visited Apr. 8, 2026).

[63] *Nat'l By-Prods.*,731 S.W.2d at 195.

for awarding punitive damages in Arkansas.[64] The decision to press the appeal to the Arkansas Supreme Court paid off for the insurer. The court found for the defendant in a ruling that made it more difficult for plaintiffs to get punitive damages in the future.[65] Indeed, if applied retroactively, the ruling could well have voided the punitive damages awarded to the estates of the decedents as well as to the moving company.

Liability insurers' control over the defense side of tort claims makes them massive repeat players in the tort law game. These two examples illustrate how insurers' repeat player status can tilt the tort law playing field to favor defendants. I still believe that to be largely the case. But Abraham and Sharkey explained how an insurance law rule that requires insurers to make reasonable efforts to settle tort claims before trial creates a dynamic that cuts in the other direction.[66]

The insurance law rule they point to is the duty to make reasonable settlement decisions. The breach of that duty has the effect of removing the dollar limit of coverage on the defendant's insurance policy.[67] Abraham and Sharkey point out that this duty encourages liability insurance companies to refuse to settle any claim in which a plaintiff is trying to expand liability.[68] Because courts are notoriously reluctant to change the common law, any such tort claim would have a low probability of success. Thus, it would be perfectly "reasonable"—in the sense meant by the insurer's legal duty to make reasonable settlement decisions—for the insurer to refuse to settle such a claim for anything other than a nominal amount.

Most of the time, refusing to settle these low-probability cases should work out well for the insurer. And when it does not, the insurance policy limit protects the claims adjuster's job and caps the insurer's financial exposure in that case—because it was reasonable not to settle.[69] But that

[64] At the time, the United States was in the middle of a major liability insurance crisis said to be caused by profligate expansions in tort law, runaway juries, and too-easy-to-access punitive damages. See George L. Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521, 1535–37 (1987). The only tangible harm in this case to the moving company caused by the accident was a trivial amount of property damage that would make almost anyone wonder about the need for punitive damages.

[65] *Nat'l By-Prods.*, 731 S.W.2d at 196–97.

[66] Abraham & Sharkey, supra note 3, at 2223–26.

[67] Restatement of Liab. Ins. § 24 cmt. b (A.L.I. 2019).

[68] Abraham & Sharkey, supra note 3, at 2223, 2225–26.

[69] Restatement of Liab. Ins. § 24 (A.L.I. 2019).

policy limit does not protect this insurer in the future cases that have been made more valuable because of the plaintiff's long shot victory. Absent the option of vacatur (which, as just noted, is typically not available), the insurer must live with this precedent in the future.

B. Focusing Plaintiffs on Insured Defendants and Insured Causes of Action

Another dynamic that affects tort doctrine follows from plaintiffs' preference for suing insured defendants and for structuring their suits to fit within defendants' insurance coverage. The preference for suing insured defendants means that plaintiffs will present courts with more opportunities to expand the liability of parties with insurance than parties without liability insurance. The preference for pleading into liability insurance coverage means that plaintiffs will present courts with more causes of action that lawyers believe will be covered by defendants' liability insurance policies than those that lawyers believe are not covered by those insurance policies. Together, these preferences channel the development of tort doctrine toward causes of action that are covered by liability insurance.

This dynamic helps to explain the expansion of premises liability duty rules and the elimination of family and charitable immunities that Abraham and Sharkey described.[70] Because most property owners, families, and charities had liability insurance—in the form of auto, homeowners, and general liability insurance policies—plaintiff lawyers could push for exceptions to or the elimination of these restrictive tort duty rules safe in the knowledge that the judges making these decisions would know that the defendants themselves would not have to pay.

Two other examples in which tort doctrine has developed in ways that are consistent with this dynamic follow from the fact that general liability insurance and auto liability insurance policies only cover legal actions that seek "damages because of 'bodily injury' or 'property damage.'"[71] The "bodily injury" requirement discourages personal injury lawyers from taking pure emotional distress cases at all, and, if

[70] Abraham & Sharkey, supra note 3, at 2196–2201, 2203–06. For an early discussion of the role of insurance in the narrowing of immunities, see Fleming James, Jr. & John V. Thornton, The Impact of Insurance on the Law of Torts, 15 Law & Contemp. Probs. 431, 437–40 (1950).

[71] See, e.g., Baker et al., supra note 33, app. B at 733, app. C at 751–52 (providing examples of standard commercial general liability and automobile insurance policies).

they do take such cases, to work them up to create a defensible basis for concluding that the emotional distress caused the plaintiff to suffer some form of bodily injury. Thus, the bodily injury requirement helps to explain why courts do not regularly encounter negligent infliction of emotional distress cases and why leading negligent infliction of emotional distress cases feature plaintiffs who claim to have suffered bodily injury from the emotional distress.[72]

The "property damage" requirement similarly discourages cases in which the plaintiffs' only losses are financial, with the important difference that some defendants have other kinds of insurance that do cover the purely financial losses that tort doctrine refers to as "pure economic loss." It is my impression based on forty years of close examination of insurance coverage litigation that, until relatively recently, the only kinds of defendants who had such insurance for pure economic loss were lawyers, accountants, stockbrokers, insurance brokers, real estate brokers, and others who were especially vulnerable to what became known as the "special relationship" exception to tort law's no duty rule for pure economic loss.[73] This is of course a chicken-and-egg situation. Did accountants' potential liability for pure economic loss make them more likely to demand liability insurance that covered pure economic loss? Or did the presence of that insurance make it more likely that they would be sued for such losses? I have not been able to answer that question, but the fact that these service providers have such insurance increases the likelihood that they will be sued and, thus, presents the courts with more opportunities to develop legal rules regarding their liability.[74]

A third example involves the "contractual liability" exclusion in most liability insurance policies.[75] Because that exclusion is subject to an

[72] See, e.g., Robb v. Pa. R.R. Co., 210 A.2d 709, 714–15 (Del. 1965); see also Maloney v. Conroy, 545 A.2d 1059, 1061 (Conn. 1988) (discussing courts' concern that allowing emotional distress claims without a showing of bodily injury could "inundate judicial resources with a flood of relatively trivial claims").

[73] To my knowledge, no academic publication has systematically examined the professions that initially had insurance coverage for pure economic loss.

[74] Kent D. Syverud, On the Demand for Liability Insurance, 72 Tex. L. Rev. 1629, 1636–40 (1994).

[75] See Commercial General Liability Coverage Form CG 00 01 04 13 (Ins. Servs. Off. 2012) (excluding liability "[a]ssumed in a contract or agreement," except for liability the insured would have had absent the contract or that is assumed under an "insured contract"); Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's Lond., 327 S.W.3d 118, 135 (Tex.

exception for causes of action that would exist even in the absence of a contract, plaintiffs and their lawyers consistently emphasize the tort basis for their claims,[76] channeling disputes that occur during a contractual relationship into the tort law realm, once again presenting the courts with more opportunity to develop legal rules regarding their liability.

Abraham and Sharkey admit that they could not provide an empirically rigorous proof that insurance shapes tort doctrine, and my additions don't solve that problem.[77] Nevertheless, our accounts should pose a challenge to any tort theorist who is open to persuasion. The cases for and against the various interpretive theories of tort law are not subject to that kind of proof, either, yet tort teachers and theorists debate and teach their students about them. The proposition that insurance shapes tort doctrine deserves at least the same attention.

C. Relieving Judicial Concerns About Disproportionate Liability

A third dynamic follows from judges' and juries' (presumed) knowledge that tort defendants rarely pay the judgments against them. Abraham and Sharkey argue that this knowledge not only makes juries more willing to award damages to a needy plaintiff, but it also affects tort doctrine. In support of this claim, they identify a series of tort law doctrines that require individual defendants to make payments in circumstances or amounts that they believe would violate deeply held notions of fairness—that is, if anyone expected individuals to personally pay their own lawyers and judgments. These include: the "thin skull rule," which requires defendants to compensate plaintiffs for even entirely unforeseeable and unusually expensive consequences of a tort; the failure of tort doctrine to tailor damages to the degree of a

2010) (holding that the contractual liability exclusion applies when the insured assumes liability in a contract, even for performance obligations).

[76] See, e.g., Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 243 P.3d 521, 524–25 (Wash. 2010); Comind, Companhia de Seguros v. Sikorsky Aircraft Div. of United Techs. Corp., 116 F.R.D. 397, 409, 412 (D. Conn. 1987); Atkins v. Swimwest Fam. Fitness Ctr., 2005 WI 4, ¶¶ 2, 13–14, 277 Wis. 2d 303, 691 N.W.2d 334.

[77] For an example of a tort theorist who reports that he agrees with their intuitions on this point, see Anthony Sebok, We Don't Talk About Insurance (No, No, No!), JOTWELL (Apr. 5, 2024), https://torts.jotwell.com/we-dont-talk-about-insurance-no-no-no/ [https://perma.cc/SV6W-YFXS] (reviewing Abraham & Sharkey, supra note 3).

defendant's negligence; and the American rule on legal fees, pursuant to which each party pays its own lawyers regardless of who wins.[78]

Of course, no legal professional expects individuals to make those payments personally, except in unusual circumstances.[79] Because all the relevant legal professionals understand that insurance companies are paying, the potential fairness concerns evaporate, as evidenced by the fact that changing these pro-plaintiff doctrines seemingly has not been on the tort reform agenda of business lobbyists in the United States. Moreover, it turns out that tort law in action does tailor damages to the degree of the defendant's negligence, as plaintiffs demand "blood money" on top of the insurance money in the case of egregious fault,[80] and insurers refuse to pay for all the defendant's damages when there is a strong argument that the defendant "expected or intended" the harm.[81]

D. Promoting Tort Reform

One final way that insurance has shaped tort doctrine has a stronger foundation in empirical legal research. The liability insurance crises of the late twentieth century drove restrictive tort reform legislation in many states in the United States.[82] Abraham and Sharkey do not discuss this dynamic, perhaps because the legal actors were lobbyists and

[78] Abraham & Sharkey, supra note 3, at 2216–20. For purposes of this discussion, I am assuming as true Abraham and Sharkey's assertion that these rules violate deeply held notions of fairness, but I observe that their notion of fairness aligns either with a "costs of accidents" approach or a retributive justice approach, both of which at least some theorists regard as irrelevant or worse. See, e.g., Keating, supra note 8, at 29 (explaining that the corrective justice approach to torts looks backward at the harm: "[t]he reason we hold defendants liable in tort is that people who have inflicted wrongful losses on others should make good the losses they have inflicted" and not to "induce cheapest cost-avoiders to minimize future wrongful losses"). I can imagine Weinrib, for example, justifying the thin skull rule and the purely compensatory focus of damages on the principle of correlativity and identifying the American rule on attorney fees as a procedural rule that lies outside the domain of tort theory.

[79] Baker, Blood Money, supra note 52, at 275.

[80] Id. at 285.

[81] Tom Baker, Reconsidering Insurance for Punitive Damages, 1998 Wis. L. Rev. 101, 119–20 [hereinafter Baker, Reconsidering Insurance].

[82] Tom Baker, Medical Malpractice and the Insurance Underwriting Cycle, 54 DePaul L. Rev. 393, 436–37 (2005); see also Priest, supra note 64, at 1523–24 (discussing state implementation of tort reform and insurance legislation); Mark A. Geistfeld, Legal Ambiguity, Liability Insurance, and Tort Reform, 60 DePaul L. Rev. 539, 564–67 (2011) (explaining that liability insurers supported tort reform in an effort to reduce legal ambiguity).

legislatures, not litigants and judges, but the impact on tort law doctrine has been significant: caps on damages, the elimination or modification of joint and several liability, and the modification of the collateral source rule.[83] Of course the insurance crises were not the only cause. Among others, developments in tort theory by Jane Stapleton's Yale Lawyers and others provided an intellectual foundation,[84] and the Reagan Revolution meant that there was a sympathetic Justice Department in place to encourage the reform efforts.[85] But the sudden doubling of liability insurance premiums and the complete loss of coverage by some day care centers and others surely helped to light the match.[86] Moreover, there is at least some basis to believe that the resulting political dynamic led to a change in state court judicial personnel that made those courts more open to defense-oriented tort law arguments, affecting tort doctrine in a more traditional, judge-led way.[87]

III. LIABILITY INSURANCE AND THE OBJECTIVES OF TORT LAW

In this Part, I describe how liability insurance relates to what can be understood, depending on one's perspective or theoretical commitments, as the foundations, objectives, functions, or justifications of tort law. The traditional set of such foundations/objectives/functions/justifications is compensation (for

[83] See, e.g., Nancy L. Manzer, Note, 1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability, 73 Corn. L. Rev. 628, 633–34 (1988).

[84] "Yale lawyers" is Jane Stapleton's label for a group of law-and-economics scholars, two of whom were at Yale Law School, who made these arguments. Jane Stapleton, Tort, Insurance and Ideology, 58 Mod. L. Rev. 820, 833 (1995); see Priest, supra note 64; Gary T. Schwartz, The Ethics and the Economics of Tort Liability Insurance, 75 Corn. L. Rev. 313 (1990). See generally Weinrib, supra note 53 (discussing insurance-based liability and published when Weinrib was teaching at Yale Law School), and the articles collected in that issue of the Journal of Legal Studies. Symposium, Critical Issues in Tort Law Reform: A Search for Principles, 14 J. Legal Stud. 459 (1985).

[85] Stephen D. Sugarman, Taking Advantage of the Torts Crisis, 48 Ohio St. L.J. 329, 338–40 (1987) (recounting Reagan's 1985 creation of the tort-reform-friendly Tort Policy Working Group under the leadership of the Justice Department's Robert K. Willard).

[86] See, e.g., Nancy R. Page, Recent Development, The Insurance Crisis: Who's Looking After Day Care?, 9 Harv. Women's L.J. 199, 199–201 (1986).

[87] See George L. Priest, Modern Tort Law and Its Reform, 22 Valparaiso U. L. Rev. 1, 3 (1987); Georgene Vairo, The Role of Influence in the Arc of Tort "Reform," 65 Emory L.J. 1741, 1743 (2016).

injury), deterrence (of future injury), corrective justice,[88] and retribution, recognizing that different approaches to tort law might emphasize one or more of these over the others and even exclude one or more as illegitimate.

A. Liability Insurance Made It Possible to Understand Tort Law as Loss-Spreading

As a doctrinal matter, tort law indisputably aims to compensate individuals who have been injured through tortious conduct. Liability insurance facilitates tort victim compensation and, thus, in the most basic sense, furthers that objective. At a more conceptual level, however, liability insurance elevates the compensation objective by supercharging the claims that can be made for tort law as a compensation *system*.

To understand this point, it is helpful to recognize that tort law has "imaginaries," to borrow the evocative term that François Ewald used to describe the ideas, concepts, and understandings that allow people to imagine a social phenomenon in a manner that they then will into being (or that helps them understand and manage the phenomenon as it exists).[89] Starting at some difficult-to-pinpoint moment in the twentieth century, legal scholars and judges began making a connection between liability and liability insurance that led them to connect the emerging loss-spreading imaginary of insurance to tort law, so that tort law could also be imagined as a system for compensating the injured and spreading those losses among parties able to bear them.[90]

[88] In this Part, I collapse corrective justice and civil recourse. They are of course not the same, though it is worth noting that the difference between, e.g., Weinrib's and Hershovitz's understandings of corrective justice is greater than the difference between Hershovitz's understanding of corrective justice and the civil recourse understanding of Goldberg and Zipursky.

[89] François Ewald, Insurance and Risk, *in* The Foucault Effect 197, 198 (Graham Burchell, Colin Gordon & Peter Miller eds., 1991). Ewald's notion of the "insurantial imaginary" as an epistemological framework through which industrial societies came to "conceive their principle of organization, functioning and regulation" bears the influence of earlier French left-intellectuals' work on the social imaginary. Id. at 210; see, e.g., Cornelius Castoriadis, The Imaginary Institution of Society 146–56 (Kathleen Blamey trans., Polity Press 1987) (1975); John B. Thompson, Ideology and the Social Imaginary: An Appraisal of Castoriadis and Lefort, 11 Theory & Soc'y 659, 664–65 (1982).

[90] See, e.g., Fleming James, Jr., Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale L.J. 549, 549–50 (1948).

These scholars and judges took note of the fact that insurance companies—not automobile drivers, small businesses, manufacturers, or professionals—were paying tort settlements and judgments. As they observed, insurance companies get the money to pay those tort losses from other people who buy insurance, spreading the losses throughout the economy—to businesses, professionals, and drivers who were lucky enough not to be sued and even to the customers of those businesses and professionals.

In this initial understanding, tort law itself does not spread loss. Tort claims are distinct events brought against distinct individuals and firms, and it is liability insurance companies that spread the losses shifted to those individuals and firms. In his famous 1944 opinion in *Escola v. Coca Cola Bottling*, Justice Traynor wrote, "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[91] Consistent with this view, Justice Traynor eventually persuaded his colleagues on the influential Supreme Court of California that the "availability, cost, and prevalence of insurance for the risk involved" should be one of the factors they should consider when deciding whether to limit or extend the reach of tort law.[92]

With the rise of mass transit and mass production for consumer markets, however, the connection between the imaginaries of tort law and liability insurance could become less literal and more metaphorical. Writing in 1961, Justice Traynor argued for greater judicial supervision over pain and suffering damages on the grounds that such damages "become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation."[93] Traynor may still have had in mind his original connection between tort liability and liability insurance companies, with commercial liability insurance companies providing the "orderly distribution of losses." Nevertheless, his opinion suggests an understanding of the tort claiming process itself as the loss distribution mechanism. Manufacturers and transportation companies pay tort claims out of the money that they collect from their

[91] Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

[92] Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968).

[93] Seffert v. L.A. Transit Lines, 364 P.2d 337, 345 (Cal. 1961) (Traynor, J., dissenting).

customers and distribute those losses through their prices. In this understanding, there no longer is any need for the liability insurance intermediary if the tort defendant has a large enough customer base. Tort law itself functions as a loss-spreading insurance system.[94]

Perhaps ironically, this loss-spreading insurance imaginary may have flowered most explicitly in the work of torts scholars who sought to use that imaginary to cut back tort liability.[95] These scholars, Jane Stapleton's "Yale lawyers," pointed out that, because of the high transaction costs, tort law is a more expensive form of insurance than others, and they argued on that basis that tort law was an inefficient way to distribute the costs of accidents.[96] Stapleton penned a vigorous rejoinder that rejected their use of insurance as a metaphor for tort liability, but the passion of her response only highlights the existence and potential power of insurance imaginaries in the tort law domain.[97]

More recently, some legal scholars and policy entrepreneurs in the United States have used an "insurance as governance" imaginary to propose the combination of tort liability and liability insurance as a promising new approach to regulation.[98] Examples include proposals to adopt strict liability for data breaches to encourage cyber liability insurers to impose cyber safety requirements,[99] as well as proposals to require gun owners to purchase liability insurance to raise the price of owning a gun and encourage liability insurers to impose gun safety requirements on gun owners.[100] While these insurance optimists may overestimate insurers' interest in and ability to engage in loss prevention,[101] their turn to insurance as a form of governance provides

[94] Baker, supra note 43, at 1591.

[95] Tom Baker, On the Genealogy of Moral Hazard, 75 Tex. L. Rev. 237, 290 (1996) [hereinafter Baker, Genealogy of Moral Hazard].

[96] See Stapleton, supra note 84, at 835–36.

[97] Id. at 834–37.

[98] See, e.g., Omri Ben-Shahar & Kyle D. Logue, Outsourcing Regulation: How Insurance Reduces Moral Hazard, 111 Mich. L. Rev. 197, 200–02 (2012).

[99] James C. Cooper & Bruce H. Kobayashi, Unreasonable: A Strict Liability Solution to the FTC's Data Security Problem, 28 Mich. Tech. L. Rev. 257, 263–64 (2022).

[100] See Peter Kochenburger, Liability Insurance and Gun Violence, 46 Conn. L. Rev. 1265, 1270–71 (2014). But see Adam F. Scales, Any Weapon to Hand? An Essay on Gun Regulation and the Limits of Insurance, 10 J. Tort L. 23, 38 (2017) (describing gun insurance proposals as unrealistic without "seismic changes in liability law").

[101] For literature taking a more empirically informed, measured view, see, e.g., Ronen Avraham & Ariel Porat, The Dark Side of Insurance, 19 Rev. L. & Econ. 13 (2023); Tom Baker & Anja Shortland, How Crime Shapes Insurance and Insurance Shapes Crime, 15 J.

another illustration of the influence of insurance imaginaries in the tort law domain.

B. Liability Insurance Advances and Undercuts Deterrence

The leading consequentialist approach to tort law first systematized by Guido Calabresi and Richard Posner posits the purpose of tort law as deterrence—reducing the costs of accidents to an efficient minimum.[102] In this account, tort law deters accidents by imposing their costs on those best able to minimize them—the least cost avoiders. A substantial law-and-economics literature develops and refines this approach.[103] While there is fierce debate about how well this approach fits tort doctrine (i.e., whether it is an adequate "positive" account of tort law),[104] there is little doubt that it has had an enormous impact on how law professors understand and teach tort law. This is true even of law professors who reject this approach, because it was early law-and-economics work that spurred the development of corrective justice and civil recourse theory.[105]

For present purposes, we can ignore the details of tort law and economics and focus on its core insights. First, if we assume that (a) defendants would be able to pay tort damages in the absence of liability insurance and (b) plaintiffs would bring tort claims in those same circumstances, then (c) we can easily see how the existence of liability insurance limits the impact of tort claims on defendants and,

Legal Analysis 183 (2023); Kenneth S. Abraham & Daniel Schwarcz, The Limits of Regulation by Insurance, 98 Ind. L.J. 215 (2022); Baker & Griffith, supra note 35.

[102] Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis 26–31 (1970); Richard A. Posner, Economic Analysis of Law 69–70 (1973); see Benjamin C. Zipursky, Corrective Justice Theory, *in* Encyclopedia of the Philosophy of Law and Social Philosophy 618, 618–19 (Mortimer Sellers & Stephan Kirste eds., 2023); Jules Coleman, The Costs of *The Costs of Accidents*, 64 Md. L. Rev. 337, 339–41 (2005) (reviewing Calabresi, supra).

[103] See Alvin K. Klevorick, Legal Theory and the Economic Analysis of Torts and Crimes, 85 Colum. L. Rev. 905, 906–11 (1985); John J. Donohue III, The Law and Economics of Tort Law: The Profound Revolution, 102 Harv. L. Rev. 1047, 1048–49 (1989) (reviewing William M. Landes & Richard A. Posner, The Economic Structure of Tort Law (1987) and Steven Shavell, Economic Analysis of Accident Law (1987)).

[104] See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs 29–30 (2020).

[105] See infra Section IV.A.

thus, reduces the deterrence provided by tort law.[106] In this sense, insurance undercuts deterrence.

Second, even in those circumstances, the insurance/deterrence tradeoff may be less severe than might be thought because liability insurers respond to the moral hazard (reduced incentive to take care)[107] created by their insurance. Liability insurers have an incentive to prevent loss because they have assumed the financial responsibility for that loss. They can do so by taking measures to maintain their insureds' incentive to prevent loss or by doing things to prevent loss that individuals could not or would not do on their own.[108] In that sense, the presence of insurance may even increase deterrence by solving a collective action problem.[109]

Third, although this point does not appear in the canonical law-and-economics accounts, I have come to appreciate that people fear being held personally liable even when they have liability insurance.[110] Whether this is because of uncertainty aversion,[111] ignorance of or lack of trust in the "no blood money" norm,[112] or some other reason is an open question, but this behavioral regularity further reduces the insurance/deterrence tradeoff.

Fourth, people are risk averse. This means they greatly value the risk spreading provided by insurance. The combination of individuals' risk

[106] Steven Shavell, On Liability and Insurance, 13 Bell J. Econ. 120, 121 (1982); Tom Baker & Peter Siegelman, The Law and Economics of Liability Insurance: A Theoretical and Empirical Review, *in* Research Handbook on the Economics of Torts 169, 172–73 (Jennifer Arlen ed., 2013).

[107] Baker, Genealogy of Moral Hazard, supra note 95, at 275–77.

[108] For a recent example in the context of criminal risks, see generally Baker & Shortland, supra note 101.

[109] Id.; see also Abraham & Schwarcz, supra note 101, at 266–69 (outlining the relationship between moral hazard, loss prevention, and regulation); Roy Baharad, Deterrence by Insurance, 54 J. Legal Stud. 239, 244–48 (2025) (discussing third-party deterrence replacing third-party moral hazard). See generally Ben-Shahar & Logue, supra note 98 (analyzing whether liability insurers can do more than make up for moral hazard).

[110] My earlier work only hinted at this, see Baker, Blood Money, supra note 52, at 282–85, 314 (discussing the reluctance to go after people's homes and concluding that "a trial could result in a legal obligation to pay blood money," which "provides a significant inducement to settle"). My conversations with lawyers and litigants since then have amplified my view that, despite the "no blood money norm," people fear personal liability any time that there is even a small chance that the damages will exceed their insurance limits.

[111] Tom Baker, Alon Harel & Tamar Kugler, The Virtues of Uncertainty in Law: An Experimental Approach, 89 Iowa L. Rev. 443, 466 (2004).

[112] Baker, Blood Money, supra note 52, at 282–83 (contrasting tort law's assumption that defendants themselves pay with plaintiffs' desire to collect only insurance money).

aversion and liability insurers' loss prevention incentive allows economists to argue that the social welfare benefits of the risk spreading provided by liability insurance likely exceed the social welfare costs imposed by the reduction in individuals' loss prevention incentives.[113]

Finally, how any of this falls out in practice is an empirical question.[114] For example, if potential defendants would be judgment-proof in the absence of insurance, there would not be any tort actions in the absence of insurance, and, thus, the presence of insurance could only improve the situation from a deterrence perspective, by providing a form of private policing.[115] Conversely, if wealthy potential defendants can use insurance to shield their assets from liability for seriously wrongful behavior, the presence of that insurance could undercut deterrence.[116] In addition, the serious nonfinancial consequences to accidents (think about pain) or more intentional wrongs (think about jail) mean that insurance will affect even wealthy people less than might be thought.[117] And the question of what liability insurers can and will do to prevent loss is a real-world, not theoretical, matter.[118] All this means that law-and-economics scholars (and those who think like them) recognize the need for research into tort and liability insurance practice to reach informed judgments about the relationship between liability insurance and deterrence.

C. Liability Insurance Advances and Undercuts Corrective Justice

Corrective justice theorists envision tort law as a set of private law rules that assign people a duty to redress certain wrongs that they have

[113] Shavell, supra note 106, at 120, 128.

[114] See, e.g., Jules L. Coleman, The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory 13 (2001); Duncan Kennedy, Law-and-Economics from the Perspective of Critical Legal Studies, *in* 2 The New Palgrave Dictionary of Economics and the Law 465, 466 (Peter Newman ed., 1998).

[115] See, e.g., Wriggins, supra note 47, at 153–54, 157 (advocating for providing coverage for domestic violence torts in auto insurance policies on this basis).

[116] See, e.g., Baker & Griffith, supra note 35, at 2 (suggesting that some corporate bad actors may use D&O insurance in this way).

[117] Tom Baker, Liability Insurance at the Tort-Crime Boundary, *in* Fault Lines: Tort Law as Cultural Practice 70, 72 (David M. Engel & Michael McCann eds., 2009).

[118] See, e.g., Abraham & Schwarcz, supra note 101, at 226; Avraham & Porat, supra note 101, at 26; Tom Baker & Charles Silver, How Liability Insurers Protect Patients and Improve Safety, 68 DePaul L. Rev. 209, 210 (2019).

inflicted on others.[119] While one might imagine that corrective justice theory might require that the wrongdoers themselves, and not liability insurance companies, provide that redress, that is not the consensus view among corrective justice theorists.[120]

In corrective justice theory, tort law is concerned with determining who among the people who causally contributed to a loss should be responsible for compensating the person who suffered the loss.[121] Tort law holds people responsible based on a comparative inquiry that allows objectively determined negligence (and even less culpable conduct in some cases) to serve as an adequate basis for deciding the morally preferable bearer(s) of a loss.[122] Within that conceptual framework, tort liabilities can be understood as private debts to tort plaintiffs that tort defendants can assign to their liability insurance companies to discharge.[123] Because corrective justice aims to require responsible parties to provide redress to their victims and to encourage people to act responsibly, not to punish, the presence of liability insurance does not offend corrective justice even in the case of highly wrongful conduct.[124]

A plaintiff could bring a lawsuit to seek redress against a person without any reachable assets, but people don't do that, or at least not very often, for obvious reasons.[125] Accordingly, liability insurance advances corrective justice whenever the presence of liability insurance

[119] See, e.g., Gardner, supra note 16, at 73–74 (explaining that the primary role of tort law is to create rights and duties and only secondarily to provide redress for them); cf. Keating, supra note 8, at 7 (criticizing Coleman and Weinrib for ignoring the role of tort law in establishing primary rights and responsibilities).

[120] See Jules L. Coleman, Tort Law and the Demands of Corrective Justice, 67 Ind. L.J. 349, 351 (1992); Stephen R. Perry, Comment on Coleman: Corrective Justice, 67 Ind. L.J. 381, 384–85 (1992); Ernest J. Weinrib, The Idea of Private Law 135 n.25 (1995).

[121] See, e.g., Perry, Moral Foundations, supra note 10, at 449–50. Note that Keating persuasively argues that reparation is secondary to the primary duty not to engage in wrongful conduct. See Gregory C. Keating, The Priority of Respect Over Repair, 18 Legal Theory 293, 297 (2012); see also Hanoch Sheinman, Tort Law and Corrective Justice, 22 Law & Phil. 21, 34–35 (2003) (arguing that the primacy of conduct duties undercuts the corrective justice interpretation of tort law); Gardner, supra note 16, at 47–48 (suggesting that developing norms should be understood as part of corrective justice). Hershovitz argues, also persuasively, that another important corrective justice objective is to announce, "The defendant wronged the plaintiff." Hershovitz, supra note 19, at 406 (emphasis omitted). The presence of liability insurance can facilitate that objective as well. Baker, Reconsidering Insurance, supra note 81, at 126–27.

[122] Perry, Moral Foundations, supra note 10, at 509.

[123] Id.

[124] See, e.g., Gardner, supra note 16, at 61–62.

[125] See, e.g., Baker, Blood Money, supra note 52, at 289.

facilitates a deserving claim against a defendant who otherwise could not satisfy the tort judgment.[126] Because most people do not have general-purpose assets that can be reached to satisfy a tort law obligation of any significant size,[127] the availability of liability insurance promotes corrective justice by allowing the victims of wrongful conduct to obtain lawyers and seek redress.

Although liability insurance may advance corrective justice in some cases, it does not always do so. The absence of liability insurance for certain wrongs or among certain populations leaves many victims of asset-poor defendants with only a hollow right to redress.[128] This includes the victims of intentional torts and residents in neighborhoods populated by renters or homeowners without liability insurance.[129] More broadly, insurance product design, insurance marketing, and other activities that reduce access to liability insurance within some segments of society, or for some wrongs or injuries, undercut the ability of tort law to provide corrective justice within that segment of society, or for those wrongs or injuries.

In addition, liability insurers' efforts to prevent liability for harm (as opposed to preventing harm itself) or to delay or deny compensation in the face of liability also leave a corrective justice gap.[130] Finally, the strategic decisions that lawyers make to obtain compensation for their clients in the face of these and other liability insurance gaps—whether to target less culpable defendants with more assets or to under-plead against highly culpable defendants to avoid triggering "bad actor" exclusions in their liability insurance policies—may lead to plaintiffs

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[126] Abraham & Sharkey, supra note 3, at 2230, also make this point.

[127] Gilles, supra note 31, at 606.

[128] See, e.g., Wriggins, supra note 47, at 135 (arguing that the absence of liability insurance contributes to the death of tort lawsuits against perpetrators of domestic violence).

[129] Cf. Robert L. Rabin, Enabling Torts, 49 DePaul L. Rev. 435, 443–44 (1999) (discussing attacks that occurred in rental properties).

[130] Examples of preventing liability include promoting the use and enforcement of tort liability waivers, promoting the adoption of restrictive tort reform statutes, and supporting the election or appointment of judges who favor restrictive changes in the common law of torts. See David A. Hoffman & Rick Swedloff, Insurers as Contract Influencers, 110 Minn. L. Rev. 769, 802 (2025) (using qualitative research to document that liability insurers encourage their insureds to use tort waivers); Albert Yoon, Damage Caps and Civil Litigation: An Empirical Study of Medical Malpractice Litigation in the South, 3 Am. L. & Econ. Rev. 199, 200 (2001) (discussing insurers promoting tort reform); Joanna M. Shepherd, Money, Politics, and Impartial Justice, 58 Duke L.J. 623, 629 (2009); Jay M. Feinman, Delay, Deny, Defend: Why Insurance Companies Don't Pay Claims and What You Can Do About It 212–13 (2010).

recovering more from the wrong people or under the wrong causes of action, as compared to what at least some ideas of corrective justice would require.

For all these reasons, liability insurance clearly affects what we might think of as the *distribution* of corrective justice—who gets it from whom, and for what wrongs.[131] I address normative aspects of this topic in Part IV.

D. Liability Insurance Advances and Undercuts Retribution

The central concern of retribution is providing appropriate consequences for morally culpable conduct—consequences that are proportional to the wrongfulness of the conduct.[132] A private plaintiff may be authorized to pursue retribution and receive damages on that basis, but that plaintiff typically does so on behalf of the community.[133] Thus, legal theory would not regard retribution-based liability as a private debt to a tort plaintiff in the same sense as a corrective-justice-based liability, and the discharge of a retribution-based liability by a liability insurance company could easily be seen to pose a retributive justice problem.[134]

For this reason, it is hardly surprising that some states prohibit liability insurance for punitive damages of any kind, many states prohibit liability insurance for directly assessed (as opposed to vicarious) punitive damages, most states prohibit liability insurance for punitive damages assessed on the basis of intentional harm, and many states prohibit liability insurance for compensatory damages assessed on the basis of at least some intentionally caused harm, and liability insurance routinely excludes criminal fines and penalties.[135] To this

[131] On the distribution of correction, see Gardner, supra note 16, at 83–93.

[132] Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. Rev. 1659, 1686, 1690 (1992).

[133] Id. at 1694. Thank you to John Oberdiek for reminding me that there are conceptions of punitive damages as compensatory, at least in certain circumstances. See, e.g., Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 3, 10–11 (1982); Baker, Reconsidering Insurance, supra note 81, at 103.

[134] Baker, Reconsidering Insurance, supra note 81, at 112–13; Geistfeld, supra note 55, at 98.

[135] Regulatory Defense and Penalties Coverage, IRMI, https://www.irmi.com/term/insurance-definitions/regulatory-defense-and-penalties-coverage [https://perma.cc/7KSL-RHTU] (last visited Mar. 27, 2026) ("Most types of insurance exclude these items because covering fines and penalties is usually considered contrary to public policy."); Catherine M. Sharkey,

extent at least, insurance law rules and practice reflect a retributive justice vision of tort law. These rules aim to promote retributive justice, and they arguably do so when they make solvent wrongdoers pay, but they also inhibit retributive justice when they lead tort plaintiffs to abandon or transform suits against defendants without significant assets.[136]

Coleman's early work demonstrated that retributive justice cannot provide an adequate foundation for the tort law of accidents, but that does not mean that retribution has no place in tort law.[137] The Israeli tort theorist Ronen Perry has provided a more recent, relatively sympathetic account of retributive justice in tort law.[138] While Ronen Perry agrees with other tort theorists that retributive justice does not provide an adequate foundation for tort law, he identifies several tort doctrines that appear to be shaped by retributive principles. He divides these examples into two categories: doctrines that prevent disproportionate liability and doctrines that "preserve and vindicate criminal justice."[139] In the first category, he lists rules that limit pure economic or emotional loss.[140] In the second category, he lists punitive damages as well as rules that prevent plaintiffs from recovering for profits of illegal activity or for harm suffered while engaging in extremely grievous conduct.[141]

Revisiting the Noninsurable Costs of Accidents, 64 Md. L. Rev. 409, 427–30, 432–34, 456–60 (2005).

[136] Baker, Reconsidering Insurance, supra note 81, at 113, 129; Baker, Transforming Punishment, supra note 21, at 219–22, 225.

[137] See Coleman, On the Moral Argument, supra note 7, at 487; Coleman, Justice and the Argument, supra note 7, at 171–72; see also Hershovitz, supra note 19, at 41 ("A standard way of carving legal institutions assigns tort the aim of corrective justice, and criminal law the aim of retributive justice. This is much too neat.").

[138] Ronen Perry, The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory, 73 Tenn. L. Rev. 177, 189–91 (2006) (reviewing the reasons why tort law is not a retributive mechanism). For more recent writing, see, e.g., Kit Barker, Punishment in Private Law—No Such Thing (Any More), *in* Punishment and Private Law 35 (Elise Bant, Wayne Courtney, James Goudkamp & Jeannie Marie Paterson eds., 2021); Andrew Roberts & Megan Richardson, Privacy, Punishment, and Private Law, *in* Punishment and Private Law, supra, at 83.

[139] Perry, supra note 138, at 192.

[140] Id. at 193–204. To this list I would add cases that relieve liability on proximate cause doctrine when there is a highly culpable superseding tortfeasor.

[141] Id. at 206–14, 225–30. To this list I would add the concept of the flagrant trespasser, who is treated as a trespasser under tort law's traditional rules even in jurisdictions that otherwise have softened the traditional distinctions among entrants on land. See, e.g., Nora Freeman Engstrom & Robert L. Rabin, Felons, Outlaws, and Tort's Troubling Treatment of the "Wrongdoer" Plaintiff, 16 J. Tort L. 43, 49–50 (2023).

Given how large retribution looms in tort law in action,[142] this list of doctrines is surprisingly unimpressive. As Coleman explained, even very basic tort doctrines, such as the objective approach to the standard of care, regularly produce tort liability out of proportion to what retributive justice would require.[143] Thus, from a retributive justice perspective, the problem with tort doctrine is far worse than might be suggested by the anodyne conclusion that retributive justice cannot serve as an adequate moral foundation for tort law.

Liability insurance helps explain why the law-in-action's emphasis on retribution is not reflected more strongly in tort law doctrine. Liability insurance not only softens the blow of disproportionate liability,[144] it also strengthens the blow of ordinary liability for highly wrongful conduct. Liability insurance accomplishes the former by paying claims, and the latter by resisting coverage in cases involving aggravated fault.[145]

Notably, each of the four doctrines that Abraham and Sharkey cite as "significant tort law doctrines . . . [that] would have a radically different shape if liability insurance had never existed" are doctrines that address the potential for disproportionate liability.[146] The thin skull rule, the broader failure to calibrate damages to the degree of fault, and the nearly one-size-fits-all standard of care in negligence cases each permit the imposition of liability that would be disproportionate to the defendant's fault.[147] Even the remaining doctrine they cite—the requirement that a

[142] See, e.g., Baker, Blood Money, supra note 52, at 299–300; Baker, Transforming Punishment, supra note 21, at 234; Abraham, supra note 21, at 116–17. See generally David Ball & Don C. Keenan, Reptile: The 2009 Manual of the Plaintiff's Revolution (2009) (advising plaintiff lawyers to appeal to jurors' retributive instincts).

[143] Coleman, Justice and the Argument, supra note 7, at 169–70.

[144] See Honoré, supra note 8, at 90 ("[Insurance] helps to ensure that tort damages are in most cases not grossly disproportionate to the fault of the defendant who has caused the harm.").

[145] Baker, Blood Money, supra note 52, at 279–80, 285, 294; Baker, Reconsidering Insurance, supra note 81, at 130.

[146] Abraham & Sharkey, supra note 3, at 2216.

[147] Id. at 2217–19. Courts also impose liability through doctrines that further weaken the connection between culpability and responsibility. For example, Coleman notes that vicarious liability and the contributory negligence rule both disconnect liability from blameworthiness. These doctrines permit or preclude recovery without regard to the moral desert of the parties involved and thus stand in tension with retributive accounts of tort law. See Coleman, Justice and the Argument, supra note 7, at 163, 172; Coleman, On the Moral Argument, supra note 7, at 486.

successful defendant pay its own legal fees[148]—can be understood as a penalty assessed on an innocent defendant.

The two doctrines on which Abraham and Sharkey promise further work—vicarious liability and punitive damages—also present the possibility of disproportionate liability.[149] Because of vicarious liability, the law treats the organization as the relevant actor, and the law regularly treats the organization as a unitary, if artificial, person,[150] and, thus, suing the organization for this historical conduct is entirely unproblematic from a doctrinal perspective. Yet the people who acted wrongfully may be long gone, along with many if not most of the people who owned or controlled the organization at the time. Any honest assessment of that situation would admit that it challenges the usual justifications for tort liability, except of course the desire to compensate the victim and, relatedly, the superior ability of the organization to bear the losses.

[148] Abraham & Sharkey, supra note 3, at 2220.

[149] See id. at 2192 n.85. The potential for punitive damages to be disproportionate is well known, but vicarious liability is so widely accepted that its potential to inflict disproportionate liability may not be adequately appreciated. Employer liability for the tortious conduct of employees committed in the long-ago past provides good examples, including the following: (1) the conduct of executives in the Metropolitan Life Insurance Company in the early part of the twentieth century regarding the risks that its occupational safety experts and actuaries knew were posed by asbestos, Paul Brodeur, The Asbestos Industry on Trial—II: Discovery, New Yorker (June 10, 1985), https://www.newyorker.com/magazine/1985/06/17/the-asbestos-industry-on-trial-ii-discovery; (2) the failure of hospital and other managers to take adequate precautions to protect patients from sexual predators that are only now coming to light because of the statutes that temporarily lifted the statute of limitations on such misconduct, see, e.g., Christina Goldbaum, An Esteemed Doctor, Child Sexual Abuse Claims and a Hospital That Knew for Years, N.Y. Times (Oct. 18, 2018), https://www.nytimes.com/2018/10/18/nyregion/dr-reginald-archibald-rockefeller-abuse.html (referring to a statute that was subsequently enacted); and (3) the negligence of executives in chemical and other companies that produced substances that they knew were toxic but only later were proven to cause injuries that could be adequately linked to those substances to satisfy tort law's causation requirements, see, e.g., Robert Bilott, Exposure: Poisoned Water, Corporate Greed, and One Lawyer's Twenty-Year Battle Against DuPont (2019); Sharon Lerner, How 3M Discovered, Then Concealed, the Dangers of Forever Chemicals, New Yorker (May 20, 2024), https://www.newyorker.com/magazine/2024/05/27/3m-forever-chemicals-pfas-pfos-toxic.

[150] Cf. Marc Galanter, Planet of the APs: Reflections on the Scale of Law and Its Users, 53 Buff. L. Rev. 1369, 1372 (2006) (explaining that language and legal practice treat institutional actors' "thoughts and actions as belonging to the institutions themselves" (quoting Sanford A. Schane, The Corporation Is a Person: The Language of a Legal Fiction, 61 Tul. L. Rev. 563, 607 (1987))).

With the complicated exception of punitive damages,[151] liability insurance ameliorates the retributive justice challenge posed by disproportionate liability in these examples. In each case, it is not defendants themselves who pay all the damages or costs of defense; it is an insurance company.

Liability insurance also ameliorates the retributive justice concerns posed by the "moral luck" problem in tort law, i.e., the fact that tort law does not impose any liability on people who were negligent but lucky in the sense that their breach did not cause anyone any harm.[152] Jules Coleman addressed that concern in his early work by suggesting that an "at-fault pool" would be a morally superior alternative to tort law that would better serve both compensatory and retributive justice. His "at-fault pool" would pay victims out of the premiums paid by people who violated the standard of care, without regard to whether the payers injured anyone in the process of violating that standard of care.[153] That would "annul" both the losses (to the victim) and the gains (to the wrongdoer) caused by the wrong.[154] It is not hard to understand an experience-based automobile liability insurance regime as a practical alternative to the at-fault pool, especially now that auto insurers have greater access to information about driving behavior.[155] The insurer's payment to accident victims annuls their loss, and drivers' payment of the portion of the liability insurance premium that reflects driving behavior annuls wrongdoers' gain.

IV. EXTENDING THE CONVERSATION WITH TORT THEORISTS

This Part shifts from the descriptive to the normative. I begin by providing a summary of leading tort theorists' engagement with liability insurance. I show how ideas developed in the course of that engagement point the way toward a reconsideration of the place of liability insurance in tort theory—from merely the *means* for satisfying a defendant's tort

[151] Baker, Reconsidering Insurance, supra note 81, at 129.

[152] Tom Baker, Liability Insurance, Moral Luck, and Auto Accidents, 9 Theoretical Inquiries L. 165, 166, 175–76 (2007).

[153] Coleman, On the Moral Argument, supra note 7, at 484.

[154] Id. at 485–86. Although Coleman later rejected the annulment theory, see Coleman, supra note 11, at 433–34, the relevance of his "at-fault pool" to the present discussion remains.

[155] Baker, supra note 152, at 175.

law debt to a *constitutive force* shaping the normative landscape of tort law.

A. Liability Insurance in Contemporary Accounts of Tort Law

Contemporary philosophical accounts of tort law emerged in U.S. scholarly discourse in the early 1970s in reaction to the then-emerging field of tort law and economics pioneered by Calabresi's *The Costs of Accidents* and Posner's *A Theory of Negligence*.[156] For me, Jules Coleman appears as the first key actor in that emergence.[157] Coleman completed his Ph.D. dissertation on "Fault, Blame and Justice in the Distribution of Automobile Accident Costs" in 1972, and he published a series of articles in philosophy journals in the early 1970s that extended that work.[158]

Coleman encountered a world in which the intellectual heirs of Fleming James sought to spread the costs of accidents as a way to provide compensation to the injured,[159] and the early law-and-economics scholars were pressing for a more tailored approach that would minimize the costs of accidents by placing liability on those best able to avoid them.[160] Coleman entered the scene asking whether there was a moral basis for requiring fault, in the demanding sense that moral philosophy understands that term, as a basis for tort liability and compensation.[161]

[156] Benjamin C. Zipursky, Civil Recourse, Not Corrective Justice, 91 Geo. L.J. 695, 695–96 (2003).

[157] Others point to Richard Epstein and George Fletcher. See, e.g., Weinrib, supra note 120, at 53–55, 171–77 (discussing Epstein and Fletcher). As a fresh set of eyes on the literature, I see Epstein's torts work as an abandoned branch on tort theory's evolutionary tree, at least in part because of Coleman's and Weinrib's analysis of that work. Fletcher is a more complicated story. See, e.g., Keating, supra note 8, at 283–87 (relying on Fletcher's concept of reciprocal risk). As between Coleman and Weinrib, there is no doubt that Coleman published first.

[158] Jules L. Coleman, Fault, Blame and Justice in the Distribution of Automobile Accident Costs (1972) (Ph.D. dissertation, Rockefeller University); see Coleman, On the Moral Argument, supra note 7; Coleman, Justice and the Argument, supra note 7.

[159] E.g., William L. Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 793–94 (1966); James, supra note 90, at 569.

[160] E.g., Calabresi, supra note 102, at 26–31; see also George P. Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537, 537 (1972) (observing that current tort theory was conducted in "the idiom of cost-spreading, risk-distribution and cost-avoidance").

[161] See generally Coleman, On the Moral Argument, supra note 7 (explaining that moral philosophy employs a more demanding understanding of fault than much of tort law).

That was a pressing question in the context of the then-current debate over the proposal to replace tort liability for auto accidents with a no-fault insurance system.[162] In exploring that question, Coleman distinguished between an injured victim's right to compensation for a wrong, which he described as a question of "compensatory justice," and the consequences to the wrongdoer, which he described as a question of "retributive justice."[163] Although tort law could potentially satisfy both forms of justice by making the wrongdoer pay for the victim's loss, he concluded that tort law's bilateral structure was merely convenient, not morally required.[164] Moreover, because tort law held liable people who did not satisfy the demanding fault requirement of retributive justice, and because tort law did not hold liable people who did satisfy that requirement (for example because they were lucky and didn't hurt anyone), retributive justice provided a poor justification for tort liability.[165]

Having answered that initial question "no," Coleman turned to exploring the moral basis for tort law as we know it.[166] Tort law may not require moral culpability in a strong sense, but it does require fault in a less demanding sense, and it renders liable only the person(s) responsible for that wrong. Are those features morally required?

Coleman's engaging, thinking-out-loud approach to answering that question drew in other legal philosophers such as Ernest Weinrib and Stephen Perry. Writing for and against each other, they developed what came to be known as corrective justice theory.[167] Significant later participants in this conversation include Arthur Ripstein, John Gardner, Gregory Keating, Scott Hershovitz, Benjamin Zipursky, and John

[162] See, e.g., id. at 487.

[163] Coleman, Justice and the Argument, supra note 7, at 172 (comparing tort and no-fault in terms of retributive and compensatory justice); Coleman, On the Moral Argument, supra note 7, at 487.

[164] Coleman, supra note 120, at 365.

[165] Coleman, On the Moral Argument, supra note 7, at 483–84.

[166] See id.; Coleman, Justice and the Argument, supra note 7, at 168–70.

[167] Zipursky, supra note 102, at 618–20. Steve Hedley observes, "There is no canonical version of corrective justice theory as applied to private law, and much of the literature is taken up with debating different versions of it." Steve Hedley, Corrective Justice—An Idea Whose Time Has Gone?, *in* Law in Theory and History: New Essays on a Neglected Dialogue 305, 306 (Maksymilian Del Mar & Michael Lobban eds., 2016).

Goldberg.[168] The latter two developed civil recourse theory as an alternative,[169] but it will surprise no one who has read this literature that some of the others contend, at least some of the time, that civil recourse theory is just another version of corrective justice theory.[170]

By the late 1980s, Coleman moved away from retributive justice as a potential foundation for tort law and began to explore corrective justice. He introduced the annulment theory of corrective justice, using the hypothetical "at-fault pool" to illustrate his views.[171] In that approach, corrective justice required compensation to the victim, but there was no necessary connection between that compensation and the wrongdoer.[172]

But then Coleman encountered Stephen Perry. Perry argued that, by separating the victim's right to compensation from the wrongdoer's duty of care, Coleman made victim compensation a matter of distributive justice, thereby begging the question of why tort victims' losses should be paid but not those of others in equal or greater need.[173] Perry counseled Coleman to accept the bilateral structure of tort law as necessary to corrective justice, not only because that was a better positive theory of tort law, but also because it provided an answer to the question of why tort victims get paid when others do not.[174] Tort victims get compensation from tortfeasors, not society as a whole, and tortfeasors have that obligation because they caused the harm through conduct that satisfies tort law's corrective-justice-based requirements.[175]

While I am not sure that he was right about this, Perry appears to have believed that one reason Coleman had rejected the necessity of the

[168] Arthur Ripstein, Private Wrongs 5–7 (2016); Gardner, supra note 16, at 81–82; Keating, supra note 8, at 7–8; Hershovitz, supra note 19, at 36–37; Goldberg & Zipursky, supra note 104, at 154–63.

[169] John C.P. Goldberg & Benjamin C. Zipursky, Replies to Commentators, 41 Law & Phil. 127, 147–58 (2022).

[170] Gardner, supra note 16, at 19–21; see also Zipursky, supra note 102, at 622 (reporting that Weinrib also contends "that civil recourse theory is a form of corrective justice theory, rather than a competitor to it").

[171] Coleman, supra note 120, at 365–69. In previous work, Coleman had stated, "Individuals who are at fault in causing harm fulfill what I have called all along the 'fault principle' . . . . These individuals in some sense of the term are 'blameworthy' in causing harm." Coleman, On the Moral Argument, supra note 7, at 483.

[172] Coleman, supra note 120, at 367–68.

[173] Id. at 365–66; Coleman, supra note 114, at 31–36; cf. P.S. Atiyah, The Damages Lottery 138–39 (1997) (arguing for the immorality of tort law on distributive justice grounds); Perry, supra note 120, at 397.

[174] Perry, supra note 120, at 397–400.

[175] Id. at 394.

bilateral structure to corrective justice was because Coleman believed that making that structure a requirement would mean that the defendant, and not a third party like a liability insurer, must pay the plaintiff directly.[176] Perry explained that corrective justice required the defendant to have a duty to pay, but it was acceptable for the defendant to arrange for a liability insurer to discharge that duty.[177] In support of that argument, Perry pointed to Coleman's own arguments in favor of the annulment theory. As Coleman had argued, a tort liability is a debt owed by one person to another, and it is morally acceptable for people to arrange for their debts to be discharged by others.[178]

Coleman accepted Perry's arguments and abandoned his earlier annulment approach in favor of a theory of corrective justice that recognized the bilateral structure of tort law as fundamental.[179] With that conceptual move, Coleman was no longer interested in the at-fault pool, and, as far as I can tell, he stopped writing about insurance except to echo his earlier point about liability as a debt.[180] Coleman clearly understood that liability insurance was central to tort practice, but it was not central to his corrective justice theory.

Reading Weinrib's writing from that same period, it is easy to see why Coleman and Perry might have thought that Weinrib understood corrective justice to require direct payment by the defendant to the victim.[181] Weinrib grounds much of his theoretical work in private law on the "idea of correlativity."[182] Correlativity holds that "liability reflects the conclusion that the defendant and the plaintiff have respectively done and suffered the same injustice."[183] Correlativity demands that a tort remedy "simultaneously remov[e] the defendant's excess and mak[e] good the plaintiff's deficiency."[184] In that way,

[176] Id. at 384–86.

[177] Id. at 386.

[178] Id. at 386–87.

[179] See Coleman, On the Moral Argument, supra note 7, at 488–90; Coleman, Justice and the Argument, supra note 7, at 166–67; Coleman, supra note 8, at 311–12.

[180] Coleman, supra note 8, at 311–12. Note that the concept of liability as a debt and, therefore, the claim as an asset is a hot topic today in the context of litigation finance.

[181] See, e.g., Gardner, supra note 16, at 36–37 (suggesting that the corrective justice proposition of, e.g., Weinrib can be "weaken[ed]" so that "a norm of corrective justice only regulates the actions of the person from whom the transfer back is to be made *or another person acting on behalf of that person*").

[182] Ernest J. Weinrib, Corrective Justice 2 (2012).

[183] Id. at 10.

[184] Id. at 17.

"[j]ustice is thereby achieved for both parties through a single operation in which the plaintiff recovers precisely what the defendant is made to surrender."[185] Put another way, "if the law gave money to the plaintiff without taking it from the defendant, the injustice done by the defendant would remain uncorrected."[186]

On their face, such statements could easily be read to suggest that corrective justice requires defendants themselves to pay and, thus, that Weinrib's conception of corrective justice is hostile to liability insurance. I have found only one place that Weinrib addresses this reading in writing. Buried about halfway through *The Idea of Private Law*, there is a footnote that I see as a response to criticism about the alleged direct payment requirement of his conception of corrective justice.[187] Weinrib explained that corrective justice is concerned only with the "nature of the obligation"—e.g., tort doctrine—and not "the mechanism by which the obligation is discharged," echoing (consciously or not) Coleman's reference to tort liability as a debt that can be discharged by others.[188] He concludes, "Nothing about corrective justice precludes the defendant from anticipating the possibility of liability by investing in liability insurance."[189] Thus, Weinrib agreed with Coleman and Perry that liability insurance did not pose a challenge to the claim that corrective justice is a plausible theory of tort law.

That is not to say that Weinrib never wrote about insurance. To the contrary, one of his first tort theory articles addressed "The Insurance Justification and Private Law."[190] In that article, Weinrib discussed the fact that prominent judges in the United States and the United Kingdom

[185] Weinrib, supra note 12, at 350. In response to the observation that the wrongdoer's gain rarely matches the victim's loss in tort claims, Weinrib explains that the "loss" and the "gain" that are the concern of corrective justice are moral concepts, not yardsticks for measuring money or welfare. Those concepts match each other by definition. Id. at 354–55.

[186] Weinrib, supra note 182, at 87–88.

[187] See Perry, supra note 120, at 386 (discussing the direct payment requirement).

[188] Here is Weinrib's complete statement from that footnote:

> [C]orrective justice is applicable in the modern world despite the fact that the prevalence of liability insurance means that the defendant personally does not compensate the plaintiff for the loss. Corrective justice goes to the nature of the obligation; it does not prescribe the mechanism by which the obligation is discharged. Liability insurance presupposes liability, and it is that liability which is intelligible in the light of corrective justice. Nothing about corrective justice precludes the defendant from anticipating the possibility of liability by investing in liability insurance.

Weinrib, supra note 120, at 135 n.25.

[189] Id.

[190] Weinrib, supra note 53, at 681.

had identified the presence of liability insurance as a reason for holding the defendant liable and thereby spreading the loss in question.[191] Weinrib forcefully rejected this instrumentalist rationale as contrary to corrective justice and called for it to be expunged from the justificatory apparatus of tort law.[192] For Weinrib, "tort law as a normative practice" does not have any goals that are external to its own internal normativity.[193] Weinrib understood insurance as a technology for loss spreading, and he regarded loss spreading as lying in the realm of distributive justice and, thus, external to the corrective justice that animates tort law.[194] This appears to remain the view of other corrective justice theorists as well, whose work largely ignores liability insurance.[195]

The leading contemporary competitor to corrective justice theories of tort law is the civil recourse theory first proposed by Benjamin Zipursky and then developed jointly with John Goldberg.[196] Zipursky and Goldberg regard tort law as an embodiment of the state's obligation to provide individuals with a right to recourse for wrongs done to them.[197] The form of that right bears some resemblance to the right to corrective justice,[198] but Goldberg and Zipursky dispense with some of the conceptual intricacies of corrective justice theory, notably for present purposes those related to the form of redress.[199]

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[191] Id. at 681 & n.2.

[192] Id. at 686–87.

[193] Ernest J. Weinrib, Correlativity, Personality, and the Emerging Consensus on Corrective Justice, 2 Theoretical Inquiries L. 107, 110 (2001).

[194] Weinrib, supra note 53, at 684, 686; see also Weinrib, supra note 11, at 46 (dismissing Charles Fried's idea of a risk pool as addressing distributive, not corrective, justice). Among other reasons, the latter essay is worth reading for a masterful justification of the objective standard of negligence and the Learned Hand formula.

[195] Abraham & Sharkey, supra note 3, at 2229–30. But see Honoré, supra note 8, at 89–90. John Gardner identified the challenge and opportunity that liability insurance posed to corrective justice as an interpretive theory, but he never further explored this topic in his writing. Gardner, supra note 16, at 37 n.25.

[196] For early exposition, see, e.g., Benjamin C. Zipursky, Rights, Wrongs, and Recourse in the Law of Torts, 51 Vand. L. Rev. 1, 82–88 (1998); Zipursky, supra note 156, at 738–39. For the fullest statement of their theory, see Goldberg & Zipursky, supra note 104, at 3.

[197] Goldberg & Zipursky, supra note 104, at 3.

[198] See Ernest J. Weinrib, Civil Recourse and Corrective Justice, 39 Fla. St. U. L. Rev. 273, 273–75 (2011).

[199] Hershovitz contends that corrective justice theory should treat questions of redress similarly to Goldberg's and Zipursky's civil recourse theory, thereby addressing much of their critique of corrective justice theory. Hershovitz, supra note 19, at 440–45.

The right to civil recourse shares the bilateral structure of corrective justice. The right belongs to the wrongly injured person and can be asserted only against a wrongdoer, but it is independent of any gain that the wrongdoer may (or may not) have realized through the wrong.[200] For that reason, it does not matter whether the defendant herself pays or even whether the wronged person seeks recourse at all, provided that the state has granted that person the right to obtain recourse.[201] Thus, while recognizing that liability insurance impacts tort practice,[202] Goldberg and Zipursky give it very little attention, other than to reject the assertion that "the fact that tort law today is bound up with liability insurance" undercuts their description of "tort law as a law of wrongs and redress."[203] In their magnum opus, they do acknowledge that "[t]here is a lot more to be said about liability insurance than we have room to say here."[204] But the little that they do have to say is primarily directed at defending their theory from criticism rather than exploring liability insurance as an institutional force that shapes the normative landscape of tort law.[205]

In sum, my reading of these philosophical theorists suggests that they understand tort law as a system for assigning responsibility based on corrective justice (Coleman, Gardner, Hershovitz, Perry, Weinrib, and others) or as the way the state provides its citizens with civil recourse (Hershovitz, Goldberg, and Zipursky), and they understand liability insurance as a means for defendants to satisfy tort law debts. Given that understanding, the presence of liability insurance does not interfere with the corrective justice dispensed or civil recourse provided by tort law. And, because liability insurance functions to spread loss, they understand liability insurance as an instrument of distributive justice, outside the considerations that should determine tort law doctrine.[206]

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[200] Goldberg & Zipursky, supra note 169, at 134–36.

[201] Id. at 135.

[202] See, e.g., John C.P. Goldberg, Leslie C. Kendrick, Anthony J. Sebok & Benjamin C. Zipursky, Tort Law: Responsibilities and Redress 655–57 (5th ed. 2021); see also Abraham & Sharkey, supra note 3, at 2230 n.254 (discussing what Goldberg and Zipursky said about insurance).

[203] See, e.g., Goldberg & Zipursky, supra note 104, at 274–75. The commonality of civil recourse theory with corrective justice theory in this regard is the reason that I do not devote more attention in this Article to explicating civil recourse theory.

[204] Id. at 275.

[205] Id. at 273–76.

[206] Weinrib, supra note 53, at 683–84; see also Perry, Moral Foundations, supra note 10, at 513 (arguing that loss-spreading schemes like no-fault insurance plans reflect agent-neutral

Of course, there should not be any doubt that insurance can be put in the service of corrective justice, but that is my project, so far at least, and not (yet) theirs.[207]

B. Liability Insurance and the Right to Corrective Justice or Civil Recourse

The discussion so far explains why the *presence* of liability insurance has not posed a significant challenge to corrective justice or civil recourse theory. But it says nothing about (a) the potential for liability insurance to promote corrective justice or civil recourse or (b) the challenge posed by the systematic *absence* of liability insurance for certain wrongs or certain populations.

If, as I have long argued, liability insurance is a de facto element of a tort action whenever the defendant is an ordinary individual or small business,[208] then the systematic absence of liability insurance within a community or demographic group means that there is only the pretense of a right to corrective justice or civil recourse for wrongs committed by people within those communities or groups (many of whose victims are likely to be members of those communities and groups). And the fact that insurance is not widely available for certain kinds of torts—for example, domestic violence torts and intentional shootings[209]—means that there is only the pretense of a right to civil recourse or corrective justice for the wrongs encompassed by those torts, except in the unusual case in which the person who committed the wrong is wealthy or was

distributive concerns); Goldberg & Zipursky, supra note 104, at 274 n.18 ("Our theory maintains that tort law confers a legal power on tort victims that corresponds to a liability incurred by the tortfeasor, not a duty of repair. Accordingly, there is simply no reason to see tort liability as somehow undercut by its insurability."). If even one of these theorists disagrees with me in this regard in print and explains why, I will have achieved one of my primary goals for this Article.

[207] As noted, supra note 8, Tony Honoré is an exception, but his observation that liability insurance softens the disproportionality of the liability permitted by corrective justice appears to have gone unnoticed in the tort theory literature.

[208] Baker, Reconsidering Insurance, supra note 81, at 101–03, 118; Baker, supra note 29, at 4–5. Abraham and Sharkey, supra note 3, at 2242, refer to liability insurance as a "characteristic ingredient of tort liability," which I take to be making a similar point.

[209] Merle H. Weiner, Civil Recourse Insurance: Increasing Access to the Tort System for Survivors of Domestic and Sexual Violence, 62 Ariz. L. Rev. 957, 967–70 (2020); see Rick Swedloff, Uncompensated Torts, 28 Ga. St. U. L. Rev. 721, 759–60, 774 (2012); Wriggins, supra note 47, at 124; Tom Baker & Thomas O. Farrish, Liability Insurance & the Regulation of Firearms, *in* Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts 292, 298–300 (Timothy D. Lytton ed., 2005).

working at the time for an organization with assets (and, even then, the odds are that the court will find that the tortfeasor was not acting within the scope of employment).[210]

The hollow nature of the right to recourse in these contexts poses a challenge to civil recourse theory because tort law may be the most important means by which the state fulfills what civil recourse theory regards as the state's obligation to provide community members with a right to redress for certain wrongs committed against them.[211] If the absence of insurance means that tort law does not fulfill that obligation, then the persistence of significant gaps in liability insurance coverage challenges the claim that civil recourse theory is a compelling positive theory of tort law and, if theorists are to maintain that civil recourse is a compelling interpretive theory, they should at least consider why the state has not done more to reduce those gaps. In other words, if the state has a moral obligation to provide civil recourse, then the state and the people whose professional interest involves theorizing about the state have an interest in understanding where, when, and why liability insurance is not available, or not widely purchased when available, and, at the very least, considering whether something should be done to expand the availability and purchase of liability insurance to fill that civil recourse gap.

Corrective justice theory addresses the obligations that members of a community owe one another rather than the obligations of the state. Nevertheless, corrective justice theorists appear to assume that the members of the community will use private law to obtain whatever redress corrective justice requires, unless the state sets up an alternative mechanism.[212] If there is no access to tort law without liability insurance, and if the state has not provided an alternative, then

[210] See Mark A. Geistfeld, Reformulating Vicarious Liability in Terms of Basic Tort Doctrine: The Example of Employer Liability for Sexual Assaults in the Workplace, 99 N.Y.U. L. Rev. 578, 578–80 (2024) (arguing that courts "almost invariably" apply the motive test to exclude intentional torts such as sexual assault from the scope of employment; first citing *Burton v. Chen*, 2023 UT 14, ¶¶ 5–10, 14–32, 532 P.3d 1005, which affirmed that a physician assistant's sexual assault fell outside the scope despite occurring in a medical setting; and then citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 757 (1998), in which the Supreme Court confirmed that sexual harassment generally is not within an employee's scope of employment for purposes of *respondeat superior*); cf. Restatement (Third) of Torts: Miscellaneous Provisions § 11 (A.L.I., Tentative Draft No. 4, 2025) (making certain employers vicariously liable for sexual assault).

[211] Goldberg & Zipursky, supra note 169, at 135–36.

[212] See, e.g., Coleman, supra note 114, at 16; Weinrib, supra note 182, at 6–7.

corrective justice theorists also have an interest in understanding where, when, and why liability insurance is not available, or not purchased when available.

Because some leading corrective justice theorists have been at pains to distinguish their theories from those of distributive justice, it is easy to imagine them dismissing the question of who has liability insurance for what wrongs as a question of *distributive*, not corrective, justice.[213] To some extent they would be right. The moral significance of who has how much of any resource presents a question of distributive justice. But the resource we are examining here—liability insurance—turns out to be essential to the legal right to corrective justice, so much so that the distribution of liability insurance defines who gets access to that legal right.

Moreover, as Perry and Gardner have explained, there is not the hard-and-fast separation between distributive justice and corrective justice that theorists sometimes assume.[214] In an article written at the same time he was counseling Coleman to lean into the bilateral nature of tort law, Perry worked through much of the existing work in tort theory and arrived at a novel, two-part moral foundation for fault-based tort liability that invoked a special distributive justice situation.[215] His analysis supports my argument.

In setting out his moral foundation for tort law, Perry first drew on work by Tony Honoré that developed the concept of "outcome responsibility"[216] to provide a moral foundation for tort law. Honoré concluded that it is morally appropriate to hold liable for a loss anyone who was "responsible" for that outcome, and (to oversimplify) the responsible parties are the people who caused that outcome.[217] Perry endorsed the concept of outcome responsibility, but only to a point. He agreed that the concept of outcome responsibility provides a satisfactory basis for determining who is among the set of *potential* bearers of a loss.

[213] See, e.g., Weinrib, supra note 182, at 6; Coleman, supra note 114, at 44–45, 53. But see Gardner, supra note 16, at 37.

[214] Perry, Moral Foundations, supra note 10, at 513; Gardner, supra note 16, at 39–41.

[215] Perry, Moral Foundations, supra note 10, at 496–97, 514.

[216] Id. at 489; Tony Honoré, Responsibility and Fault 14 (1999).

[217] Perry, Moral Foundations, supra note 10, at 489–90; Honoré, supra note 216, at 14–15, 40; cf. Tom Baker, Risk, Insurance, and the Social Construction of Responsibility, *in* Embracing Risk: The Changing Culture of Insurance and Responsibility 33, 33–51 (Tom Baker & Jonathan Simon eds., 2002) (highlighting the multiplicity of meanings of "responsibility" and the role that insurance plays in their construction).

That set includes the person whose interests were injured and any others who "causally contributed to a harmful outcome."[218] But because of the pervasive indeterminacy of causation that should be familiar to most torts teachers, Perry concluded that the concept of outcome responsibility, alone, cannot explain who among that set has an obligation to repair or compensate the loss.[219]

As Perry put it, the concept of outcome responsibility cannot do more than identify a "localized distributive" problem that tort law needs to solve.[220] Something more than causation is required to determine who, if anyone, among the people with outcome responsibility should be obligated to provide reparation for the harm. Perry concluded that tort law's answer is *fault*, in the minimal tort law understanding of that term.

Perry argued that morally culpable conduct that causes harm (e.g., conduct that intentionally or knowingly causes harm without justification) provides an easy solution to this localized distributive justice problem, because such conduct obviously distinguishes the wrongdoers from others among the outcome-responsibility set.[221] He argued, further, that the paradigm of culpable fault can be extended to all whom tort law identifies as being "at fault" in the lesser, tort law sense of that term. As he explained:

> The key here is that culpable fault is defined independently of principles of reparation, so that the application of the localized distributive argument to instances of culpable wrongdoing can serve as a paradigm that enables us to extend the argument analogically to cases where fault is *not* characterized apart from reparative concerns. The paradigm gives us the idea of a *comparative* inquiry in which it is asked who among the members of a distributive group, defined in the manner described above, should be regarded as the morally preferable bearer of a given loss.[222]

Unlike the "concern for human well-being that ultimately underpins distributive concerns at the comprehensive, community-wide level of

[218] Perry, Moral Foundations, supra note 10, at 507.
[219] Id. at 494–96.
[220] Id. at 497, 513–14.
[221] Id. at 507–09. Notice that not only does Perry link corrective justice to a problem of "localized distributive justice," but he also grounds his solution to the problem in a notion of "culpable fault" that appears to be consistent with notions of retributive justice. Id. at 507–09, 513.
[222] Id. at 508–09.

social justice," this localized distributive argument provides a basis for placing agent-specific obligations on "persons whose faulty actions were causes of the relevant loss."[223]

I suggest that Perry's concept of localized distribution can and should be expanded to address the corrective justice gaps that liability insurance law and practice create. If tort law is a system for providing corrective justice, then distinguishing among the potential bearers of tortious losses is also a matter of corrective justice. When the preferable bearer of the loss does not have liability insurance (or cannot supply that "insurance" itself through the prices of goods and services that it sells), the person who suffered the loss will tend to be the bearer of that loss. Systematic gaps in the distribution of liability insurance produce systematic gaps in the distribution of corrective justice that are unjust in a manner that differs substantively from distributive concerns at the comprehensive, community-wide level of social justice, because each of the wrongdoers who is not held accountable has an agent-specific obligation to a particular tort victim. This agent-specific distributive injustice distinguishes tort victims from others and, thus, is worthy of attention from corrective justice theorists.

John Gardner's discussion of the "distribution of correction" has already taken tort theory much of the way there.[224] He wrote:

> [Imagine] [t]here is a moral duty of corrective justice in the neighbourhood, and it is now a candidate for institutionalization. The relevant question of justice now is: How do we *allocate* the institutionalization? How do we *distribute*, across the vast range of candidate wrongdoers and candidate persons wronged, the numerous possible sets of legal arrangements to support the doing of corrective justice as between them?[225]

As Gardner recognized, in deciding which classes of people will have a legal right of reparation against which classes of people who harm them, judges distribute access to a state-enforced private right to corrective justice.[226] My argument takes this one step further: the

[223] Id. at 513.

[224] Gardner, supra note 16, at 83–85.

[225] Id. at 85 (emphasis added).

[226] Id. at 89 ("Attempts at distributive justice are also inevitable because . . . the standard way for judges to develop the law is by making comparisons between different classes of plaintiffs, and between different classes of defendants."); id. at 91 ("[W]hat is distributed remains something irreducibly corrective.").

insurance law rules and insurance market practices that determine which classes of people have liability insurance for which types of wrongs also distribute access to a state-enforced, private right to corrective justice. For example, the judge-made rule prohibiting insurance for intentional injury deprives many victims of intentional injuries of corrective justice, and statutes that require the purchase of liability insurance ensure that certain victims obtain corrective justice. Such liability insurance law rules lie within the domain of moral theories of tort law, not beyond it.

C. Liability Insurance and Retributive Justice

As I described earlier, at least some liability insurance law rules and practice embody a retributive justice vision of tort law, as reflected in the rules in many states that prohibit insurance for punitive damages, fines, and penalties, and insurance for liability for intentional injury.[227] These rules promote retributive justice when they make solvent wrongdoers pay for morally culpable conduct, but they also inhibit retributive justice when they lead tort plaintiffs to abandon or transform suits against such wrongdoers because of a lack of collectible assets.[228] In addition, liability insurance ameliorates the retributive justice concern with disproportionate liability by spreading the impact of any arguably disproportionate liability among the liability insurance pool.[229] This reduces whatever pressure there might otherwise have been on tort doctrine to address that concern.

At a minimum, this situation suggests that tort law theorists writing about retributive justice should consider liability insurance, for reasons similar to those I have given for corrective justice and civil recourse theorists.[230] Insurance law rules and insurance market practices that determine which classes of people have liability insurance for which

[227] Supra Section III.D; see also Lei No. 15.040, de 9 de Dezembro de 2024, Diário Oficial da União [D.O.U.] de 10.12.2024 (Braz.) (codifying the recent Brazilian insurance code, which prohibits insurance for intentional injury).

[228] Baker, Reconsidering Insurance, supra note 81, at 113; Baker, Transforming Punishment, supra note 21, at 220–22; Geistfeld, supra note 55, at 111.

[229] Supra Section III.D.

[230] Tort scholars writing about punitive damages do discuss liability insurance, but generally they do so within a law-and-economics framework that focuses on deterrence, not retribution. See, e.g., Sharkey, supra note 135, at 443–44; A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869, 873 (1998); George L. Priest, Insurability and Punitive Damages, 40 Ala. L. Rev. 1009, 1012–14 (1989). For a recent exception, see Geistfeld, supra note 55, at 107–11.

types of wrongs also distribute retributive justice. Thus, those liability insurance rules and practices similarly lie within the domain of retributive tort theory. Indeed, the reason why the presence of liability insurance does not offend corrective justice—corrective justice focuses on the redress of wrongful *losses*, not punishment for *wrongs*—demonstrates why the presence of liability insurance can offend retributive justice.[231]

Consider for example the legal rule against insurance for intentional injury. Should we allow insurance for intentional torts if such insurance is necessary to the victim's right to receive redress?

This question presents a potential conflict between retributive and corrective justice. The presence of liability insurance could further corrective justice, especially when the defendant does not have significant assets. But the presence of liability insurance could thwart retributive justice by protecting whatever assets the defendant might have. Thus, the legal rule against allowing liability insurance privileges retributive justice over corrective justice.

There is an insurance law rule that would resolve the conflict: allow liability insurance against intentional injury but make that insurance *secondary* to the defendant's own assets (meaning that liability insurance would pay the tort damages only to the extent that the defendant lacked sufficient assets to do so).[232] When defendants have limited means, the rule against insurance for intentional injury inhibits *both* retributive and corrective justice, by depriving the plaintiff of access to a lawyer needed to obtain redress. Allowing such insurance,

[231] See Coleman, supra note 8, at 325:

> Annulling moral wrongs is a matter of justice: retributive, not corrective, justice. There is a legal institution that, in some accounts anyway, is designed to do retributive justice, namely, punishment. The bulk of cases in which claims in corrective justice are valid do not involve wrongs in this sense. If we abandon the view that corrective justice requires annulling wrongs as such, we are left with the claim that corrective justice imposes the duty on wrongdoers to annul the wrongful losses their conduct occasions.

[232] Arguably, tort law in action tends toward this result. See Baker, Transforming Punishment, supra note 21, at 224–25 (demonstrating the alignment of interest between plaintiffs and defendants to secure insurance coverage so that plaintiffs do not allege intentional injury when defendants do not have money); Baker, Reconsidering Insurance, supra note 81, at 130 (asserting that the intentional harm exclusion promotes deterrence and retribution); cf. Ambassador Ins. Co. v. Montes, 388 A.2d 603, 606 (N.J. 1978) (allowing the liability insurer to subrogate against the insured defendant in a case of highly culpable wrongdoing, an approach that produces a result similar to that of the liability rule suggested in the text above); Baker, supra note 117, at 74 (discussing *Ambassador Insurance Co.*).

but making it secondary to the defendant's other assets, would promote retributive and corrective justice by providing the means for the plaintiff to pursue the defendant, announce the wrong, and obtain compensation. In most cases, the defendant is likely to have at least some collectible assets, the forfeiture of which will satisfy retributive concerns. When defendants have substantial means, liability insurance is not necessary to corrective justice, and thus, a legal rule making insurance secondary to the defendant's own assets would not offend corrective justice. As this example further illustrates, liability insurance rules lie within the domain of moral theories of tort law, not beyond them.

V. SHOULD COURTS CONSIDER LIABILITY INSURANCE IN TORT CASES?

While other tort theorists may not have stated the case as bluntly as Weinrib, I conclude from the silence of other leading philosophers of tort law that they agree with Weinrib's view that courts should not take liability insurance into account when making tort doctrine.[233] By showing that important courts already take liability insurance into account in significant cases, Abraham and Sharkey challenge these theorists' claims to offer a positive theory of tort law.[234] And, by arguing that more courts should take liability insurance into account more openly and more often, they challenge these theorists on normative grounds as well.[235]

In this Part, I offer an argument from within philosophical tort theory in partial support of Abraham and Sharkey's normative position. I then provide an institutionalist account that, if persuasive, would limit the circumstances in which courts should consider liability insurance.

A. Why Courts May Consider Insurance When Making Tort Doctrine

Because law does not enforce all moral rights and obligations, there always will be some gap between moral and legal rights and obligations. As Gardner points out, corrective justice is no different in that regard.[236] In making decisions about who has a tort law duty to whom, courts shape the gap between the moral rights and obligations that sound in corrective justice and the subset of those rights and obligations that are

[233] Weinrib, supra note 120, at 221.
[234] Abraham & Sharkey, supra note 3, at 2188–2214.
[235] Id. at 2246.
[236] Gardner, supra note 16, at 87–88.

institutionalized in tort law. Those judicial decisions *distribute* correction by providing a governmentally subsidized and enforced mechanism for the redress of some violations of corrective justice obligations, but not others.[237]

This was the insight that I extended in arguing for tort theorists to take a greater professional interest in who has insurance for what liabilities. This same insight also provides the foundation for my explanation of why courts may consider liability insurance when making tort doctrine while remaining consistent with corrective justice theory.

Gardner argues that when deciding which corrective justice norms to institutionalize in tort law, courts do and should consider the objectives of corrective justice: adherence to the norms of conduct articulated through the lawmaking process in the first instance and recourse for harm that results from a violation of those norms in the second. In this view (to which I subscribe), tort law is instrumentalist even when understood in purely corrective justice terms.[238] Furthermore, even a court that is exclusively dedicated to doing corrective justice inevitably will take pragmatic considerations into account when making tort doctrine. Such considerations inform courts' judgment about whether extending tort law's reach is sufficiently likely to advance corrective justice to justify the disruption involved in making that change.

Courts that attempt to describe openly what they are doing when they are making such decisions tend to do so using lists of the factors that they considered. One such factor famously considered by the California Supreme Court is the "availability, cost, and prevalence" of liability

[237] Id. at 86:

> In deciding whether something should be a tort, then, it is never enough to conclude that it is a wrong calling for repair. It is not even enough to conclude that it should be *recognized by the law* as a wrong calling for repair. The question that must be confronted, in addition, is whether the law should give it *this kind of recognition*—the tort-law kind of recognition—complete with its generous terms for power-sharing and cost-sharing as between the aggrieved party and the legal system. That question is a question of distributive justice. The law is selecting some people for a measure of official support in their personal affairs that most other clients of the welfare state can only dream of.

[238] Id. at 85–86; see also Coleman, supra note 114, at 33 ("[W]hile the set of holdings that can be secured by a practice of corrective justice need not coincide exactly with the holdings that should exist according to the best theory of distributive justice, holdings must nonetheless satisfy certain minimal conditions of moral legitimacy in order for it to make sense for us to speak of protecting them by a practice of corrective justice.").

insurance.[239] From a corrective justice perspective, taking insurance into account can be appropriate, not because loss spreading is the primary purpose of tort law,[240] but rather because liability insurance will reduce the disruption involved in changing tort doctrine and, thus, should count in favor of making a change that is justified on corrective justice grounds. While there may well be (many!) other aspects of the California Supreme Court's tort law opinions that are not consistent with corrective justice theory, taking liability insurance into account in this manner is not one of them.

For example, eliminating the historic distinction between invitees and licensees would have been more disruptive had it not been for the fact that anyone likely to be a defendant in a suit in which that distinction would have made a difference would almost certainly have had some form of general liability insurance that provided both defense and indemnification coverage.[241] The same was true for the elimination of parental, spousal, and charitable immunities.[242] And, at least during the expansionary era of products liability doctrine, the same was true of product sellers.[243]

When considering a doctrinal change that would expand the reach of tort law, courts can reasonably expect that the presence of an existing, relevant liability insurance market would make it more likely that the court's corrective justice objectives will be met. Those injured by violations of the newly institutionalized corrective justice obligation would be more likely to obtain recourse. There would be more opportunities for the courts to articulate the norms to which actors should adhere to avoid future liability. And, if there is anything to the

[239] Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968); Abraham & Sharkey, supra note 3, at 2203–04.

[240] See, e.g., Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 559 (Cal. 1991).

[241] See *Rowland*, 443 P.2d at 568; Abraham & Sharkey, supra note 3, at 2203–04; see also Yeazell, supra note 32, at 187–88 (describing the spread of general liability insurance through the mortgage market).

[242] Abraham & Sharkey, supra note 3, at 2196–2201.

[243] See, e.g., Kenneth S. Abraham & G. Edward White, Rethinking the Development of Modern Tort Liability, 101 B.U. L. Rev. 1289, 1292, 1313 (2021). More recently, the larger pharmaceutical and medical device companies find it difficult or impossible to obtain liability insurance, but these companies are so large that, from a loss-spreading perspective, they can function as "insurance." Baker, supra note 43, at 1591.

idea of insurance as governance, liability insurance organizations would provide at least some institutional force encouraging that adherence.[244]

Weinrib was right that insurance is external to tort law in the following sense: unlike tort law doctrine, the liability insurance market is not within the control of courts. A court can declare a tort law rule, but a court cannot declare a liability insurance market. Weinrib may also have been right that the judges he criticized were acting as the social engineers that Calabresi and Posner encouraged them to be.[245] But he was wrong to condemn consideration of insurance across the board on that basis. If, like Coleman, Gardner, and Hershovitz, we accept that corrective justice can be an objective of tort law, and not simply a formal structure of tort law,[246] judges can consider whether there is an existing, robust liability insurance market while remaining true to the norms of corrective justice.

B. When Courts Should Consider Insurance When Making Tort Doctrine

Notwithstanding the foregoing, I have strong reservations about judges making tort law decisions based on their assessment of the impact that their decisions might have on the liability insurance market. My reason is simple. Courts lack the institutional competence to predict what will happen in liability insurance markets, and insurance market dynamics are far too complex to allow armchair law and economics to provide a reliable guide.[247]

Even appropriately incentivized insurance companies struggle to predict what liabilities they can and cannot profitably insure.[248] Insurance companies fail to offer insurance for liabilities that turn out to

[244] See, e.g., Tom Baker & Anja Shortland, Insurance and Enterprise: Cyber Insurance for Ransomware, 48 Geneva Papers on Risk & Ins. 275, 278–80 (2022) (summarizing the current debate about the nature and extent of insurance as governance).

[245] Weinrib, supra note 53, at 681, 684 (citing Traynor and Denning).

[246] Coleman, supra note 11, at 429 n.11; Gardner, supra note 16, at 333; Scott Hershovitz, Book Review, 32 Law & Phil. 817, 820–21 (2013) (reviewing Ernest J. Weinrib, Corrective Justice (2012)); cf. Weinrib, supra note 53, at 686 (characterizing corrective justice as a formal structure, not an objective structure).

[247] See Baker, Genealogy of Moral Hazard, supra note 95, at 283–84 (discussing how the lack of a sufficient understanding of economics has resulted in negative outcomes); Peter Siegelman, Adverse Selection in Insurance Markets: An Exaggerated Threat, 113 Yale L.J. 1223, 1225 (2004) (criticizing courts' and scholars' simplified law-and-economics accounts of adverse selection).

[248] Baker, supra note 25, at 66.

be profitable,[249] and they insure liabilities, sometimes for decades, that turn out to be so unprofitable that they cause the companies to fail.[250] But even in those circumstances a second or third wave of insurance companies may succeed.[251] Moreover, the liability insurance market is subject to a business cycle that complicates making such predictions in the first place and further complicates evaluating their accuracy after the fact.[252]

The only realistic way that generalist judges could do better at predicting what markets are capable of insuring would be through dumb luck. Thus, courts should refrain from making any attempt to predict whether liability insurance companies would rewrite their insurance policies, adjust their underwriting practices, or change their appetite for one or another line of insurance in response to a change in tort doctrine. If there is not an existing insurance market that would cover the new liability, they should make no assumptions about whether an insurance market will emerge. If there is an existing insurance market that would cover the new liability, courts should assume that it will continue. If it later appears that narrowing the gap between moral and legal conceptions of corrective justice destabilized the liability insurance market, state legislatures and state insurance departments are well positioned to investigate and respond as appropriate.[253]

[249] See Sean J. Griffith, Deal Insurance: Representation and Warranty Insurance in Mergers and Acquisitions, 104 Minn. L. Rev. 1839, 1843, 1911–13 (2020) (explaining that more than twenty insurers now offer representations and warranties insurance, underwriting hundreds of deals annually, and that the market continues to grow despite classic concerns about adverse selection and moral hazard; insurers rely on buyer incentives, underwriting exclusions, and deal diligence to manage risk).

[250] See Jeffrey W. Stempel, Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute, 12 Conn. Ins. L.J. 349, 352–54 (2006); Tom Baker & Anja Shortland, The Government Behind Insurance Governance: Lessons for Ransomware, 17 Regul. & Governance 1000, 1009–10 (2023) (describing the development of environmental liability insurance).

[251] E.g., Baker & Shortland, supra note 250, at 1010.

[252] Baker, supra note 82, at 398–99; Sean M. Fitzpatrick, Fear Is the Key: A Behavioral Guide to Underwriting Cycles, 10 Conn. Ins. L.J. 255, 259–60 (2004); Patricia Born, W. Kip Viscusi & Tom Baker, The Effects of Tort Reform on Medical Malpractice Insurers' Ultimate Losses, 76 J. Risk & Ins. 197, 205–06 (2009).

[253] See, e.g., Baker & Shortland, supra note 250, at 1010 (describing legislative action to facilitate brownfield redevelopment).

CONCLUSION

In sum, liability insurance is not merely a means to discharge tort law debts. Rather, liability insurance is an institutional force that shapes the normative landscape of tort law. Liability insurance provides the money that changes hands through tort claiming. It determines which claims are brought and how they are defended, and it shapes the development of tort doctrine, among other ways by channeling tort claims toward insured defendants and insured causes of action and by putting massively repeat players on the defense side of the tort law equation.

Liability insurance also allows courts to understand tort law as a loss-spreading and cost-internalizing system. It profoundly affects the distribution of correction and civil recourse, and it even affects the distribution of retribution. Whatever force is left of the idea that the development of tort law is a process of the law working itself pure should be abandoned in favor of, or at the very least supplemented by, engaging with liability insurance and other institutional forces that shape who can bring which tort claims against whom. For these same reasons, when making tort doctrine courts should feel free to consider whether there is an existing liability insurance market that would cover the liability in question, because the presence of such insurance would reduce both (a) the disruption the legal change would cause potential defendants and (b) the potential for that change to offend the proportionality requirement of retributive justice that, in Honoré's words, should "temper[]"[254] the corrective justice that tort law provides.

[254] Honoré, supra note 8, at 90.