Harry Potter and the Purposes of Tort Law

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Tort scholars are divided over what would seem a simple question: What is tort law for? The leading answer is that tort law promotes efficient behavior by giving people incentives to take account of costs they impose on others.1 Another familiar answer is that tort law aims at corrective justice, enforcing a moral requirement that “wrongdoers . . . repair the wrongful losses their conduct occasions.”2 For many years, those answers set the terms of debate, but a third contender has emerged. Tort law, according to civil recourse theorists, empowers individuals to seek redress from who have wronged them.3

There is no reason to think that the question “What is tort law for?” admits only one answer. Tort is an ancient institution, and it is possible, even likely, that it serves many purposes and has been repurposed many times. But efficiency,

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corrective justice, and civil recourse are in deep tension with one another. On the economic view, tort law allocates accident costs according to forward-looking principles. A plaintiff’s loss is to be shifted to the defendant only if doing so would minimize the costs of future accidents. In contrast, for corrective justice theorists, the past is the point. Tort law assigns costs on the basis of backward-looking principles that address the question who, among the parties, is responsible for the plaintiff’s injury. Proponents of civil recourse theory reject both views, in part because they reject the idea that tort law is centrally concerned with cost allocation.

I think we should go a step further and reject all three accounts. Tort law is a richer institution than the prevailing theories portray it. Both the economist and the corrective justice theorist aim to explain the substantive rules of tort; they generate theories that explain who gets money and under what circumstances. But there is more to tort than transfer payments. Plaintiffs are motivated by money, but not always and not only. Plaintiffs also sue to get answers about how they were injured. They sue to force defendants to explain their behavior, in a public forum, upon a charge of wrongdoing. They sue to get the vindication of a court judgment in their favor. For their part, defendants litigate to avoid liability. But they also go to court to reestablish their good name, or to vindicate their belief that their behavior was justified. On the older accounts of tort law, the non-monetary aspirations that tort litigants bring to the courthouse are peripheral, if they are visible at all. Civil recourse theory is potentially more congenial to these concerns. But as we shall see, civil recourse theorists tend to paint a partial picture of tort law too.

In the opening sections of the Essay, I present three iterations of a thought experiment (starring Harry Potter), in which tort is reimagined to exemplify as far as possible the purposes posited by economics, corrective justice, and civil recourse. The thought experiments highlight features of tort
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law that the standard accounts overlook. In the sections that follow, I argue that an adequate account of tort law will give these features a central role.

I. Harry Potter and the Cost of Accidents

Imagine that after graduating from Hogwarts School of Witchcraft and Wizardry, Harry Potter goes to law school. As a 1L, he takes torts from a professor with an economist’s view of the institution. She teaches Potter that the purpose of tort law is to minimize the sum of the costs of accidents and the costs of accident prevention. Tort law does this, she explains, by giving people incentives to take account of the costs they impose on others.

Like many other first-year students, Potter is enamored with economic analysis. He appreciates the elegance with which it accounts for central features of tort law, and he finds the normative theory underpinning it attractive. But the more enchanted Potter becomes with the economic account of tort law, the more disenchanted he becomes with tort law itself. “Tort law is awfully expensive,” he thinks. “Surely, there must be a cheaper way to reduce the costs of accidents.” And then, remembering that he is the world’s most powerful wizard, he raises his wand. Potter casts a spell that works like this. Every time a person imposes a cost on another that would be compensable by the tort system (say, by flying carelessly and knocking someone off his broomstick), a sum of money equal to the cost is transferred from the bank account of the injurer to the account of the victim, and a message is dispatched informing the person of the debit to their account and the reason for it. Potter eliminates the administrative costs of the tort system with one swoop of his wand, and the results are impressive. The spell pushes accident costs nearer their optimal level than the tort system, because all and only those who are actually liable are made to pay, they are made to pay
immediately, and they cannot avoid paying by investing in lawyers rather than safety.

That’s no small feat, yet Potter’s professor will surely tell him that he has cast the wrong spell. Tort’s rules, she will explain, are shaped by administrative costs. Because Potter can dispense with them, he should not replicate tort doctrine. Instead of charging the accounts of those that could be held liable in tort law, for example, Potter’s spell should take money from the person or institution who could have avoided an accident most cheaply. Car manufacturers, for example, may have superior information about how accidents are likely to occur than drivers do. If it is more cost effective for them to invest in accident prevention by installing safety equipment than it is for drivers to take extra care, Potter’s spell should hold them liable, even if they would not be a proper defendant in a tort suit. Tort law, Potter’s professor will tell him, doesn’t hold cheapest cost avoiders liable only because the cost of identifying them is high, a problem Potter does not face.

Potter’s professor will also point out that the money taken from the cheapest cost avoider’s account need not be transferred to the victim. To be sure, the money must be transferred to somebody; if Potter’s spell simply deducted the money without directing it elsewhere, the spell would not be costless. Tort requires defendants to pay victims primarily so that victims have an incentive to sue defendants. But no inducement to litigation is needed once Potter casts his spell. Of course, other considerations may support transferring money to victims. There are costs to bearing the costs of accidents which might be mitigated by the transfer, and in some circumstances compensating victims can promote efficient activity levels. But it is an open question whether these are the most productive uses to which the money the spell seizes could be put. Perhaps the money is better transferred the state’s treasury, or channeled to the poor, or spread among all those suffering physical infirmities, regardless of their source. If
Potter’s spell can determine who is the cheapest cost avoider of an accident, surely it can determine the optimal recipient of seized funds.

Potter’s professor may not stop her tinkering there. She might suggest that Potter’s spell take money from those who create risk, whether or not the risks are realized. She might suggest that Potter adjust tort’s mix of strict liability and fault where necessary to encourage efficient activity levels. Or that Potter hold people liable for causing pure economic loss. Or that Potter make any number of changes that would promote efficient behavior. As the professor revises Potter’s spell, it will look less and less like tort law, but it will better achieve tort law’s aims.

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The question what form Potter’s spell should take boils down to this: What is the optimal legal regime if there are no administration costs? That is an interesting question, even if it has no practical upshot. There is, however, a deeper question I want to pursue through this thought experiment: If Potter was here, right now, offering to cast the spell the best economic theory would recommend, would there be any reasons to reject his offer? What, if anything, would we sacrifice by eliminating tort law in favor of a costless scheme that provided perfect incentives for efficient behavior, and should we care about the loss?

If promoting efficient behavior is the answer to the question what tort law is for, we can do no better than Potter’s spell. There is nothing tort law is meant to do that the spell does not accomplish. The spell, to be sure, does not do everything tort law does, but happily so. Tort law, for example, affords defendants opportunities to delay or avoid payment by putting plaintiffs to their proof even if they know they are liable. The spell does not, and it achieves more effective deterrence.
because of that. Tort law also creates employment opportunities, for lawyers and experts, among others. No one objects to jobs, of course, but salaries comprise of large part of tort’s administrative burden, and if we can accomplish the aims of tort law without paying them, we should be glad for the savings.

There are things tort law does, however, which we might not be as happy to forego. Tort law provides a public forum where those who have been injured may lodge complaints against those they believe responsible. The spell does not. Tort law invites those accused of wrongdoing to explain their behavior and justify it if they can. The spell does not. Tort law furnishes people with tools to discover who is responsible for their injuries and how their injuries came about. The spell does not. And tort law provides an opportunity for public vindication of one party’s position in a dispute over another’s. The spell, of course, does not. We might tie all these together, loosely, by saying that tort law allows people to hold one another publicly accountable. Potter’s spell does not.

If I am right in thinking that is important that tort law allows people to hold one another accountable in these ways (later I will defend the claim that it is), one natural thought is that Potter’s spell could be tweaked to accommodate these aims. That may be true, but it is beside the point. Potter’s spell implements the legal regime that best achieves the aims economists posit for tort law. Potter’s spell does not do the things listed above because, on the economic view of the institution, tort suits are transaction costs. Litigation is the thing we must do to determine who pays whom and how much, but the point is in the paying not in the procedures that get us there.

So back, then, to our question: What would we sacrifice by eliminating tort law in favor Potter’s spell, and should we care about the loss? We would give up tort litigation, and we should care because lawsuits institutionalize practices of interpersonal
accountability that are valuable quite apart from the transfers of money they ultimately license. In Part IV, I will defend that claim, but we have more to ask of Harry Potter before we get there.

II. Harry Potter and the Rectification of Wrongs

Imagine again that Harry Potter leaves Hogwarts and heads to law school. This time, however, Potter takes torts from a professor who has a corrective justice theorist’s view of the institution. She tells Potter that morality requires those who infringe the rights of others to repair the wrongful losses they cause, and that tort law enforces that moral requirement. Once again, Potter is taken with his professor’s account of the institution, but he is struck by the thought that tort law is awfully expensive and slow. “Surely,” he muses, “there must be a cheaper, faster way of doing justice between wrongdoers and their victims.” And then, remembering that he is the world’s most powerful wizard, Potter raises his wand. He casts a spell that works like this. Every time a person causes a loss in a way compensable by the tort system (say, by carelessly cracking someone else’s crystal ball), the precise sum of money necessary to repair the loss is transferred from the bank account of the injurer to the account of the victim.

Potter’s professor will be impressed, but she may suggest that Potter tweak his spell. Corrective justice is the animating

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4 For ease of exposition, Potter’s professor has a full-blown normative commitment to the principle of corrective justice, but one can one can think tort law is best understood as embodying that principle without taking a view on whether wrongdoers really do have a moral obligation to repair the wrongful losses they cause. See Jules L. Coleman, The Practice of Principle: In Defence of Pragmatist Approach to Legal Theory 5 (2001) (“The defensibility of corrective justice as a moral ideal is . . . independent of its role in explaining tort law.”).
principle of tort law, she will tell Potter, but it is also true that, on occasion, tort allows plaintiffs to recover from people who have not wronged them. The market-share liability cases, especially *Hymowitz v. Eli Lilly & Co.*\(^5\) have this character,\(^6\) and several other tort doctrines seem at best tenuously connected to the demands of corrective justice.\(^7\) Potter’s professor will not insist that Potter change his spell, as her economically-oriented counterpart did with the economically-enamored Potter. The fact that a transfer from defendant to plaintiff is not demanded by corrective justice does not mean that it is itself unjust. Thus, Potter may leave tort law as it is without undermining its efforts to implement corrective justice. But, if Potter is a purist, he may jettison several tort doctrines.

The professor may agitate more strongly for a different revision to Potter’s spell. Many wrongs, she will point out, fly below the radar of tort law. For example, one can unjustifiably humiliate another without incurring liability for intentional infliction of emotional distress, because the criteria for application of that doctrine are so demanding. One can also fail to rescue a person in need without incurring liability, even if the rescue could be accomplished with no cost or risk to oneself. On plausible (though in the latter case not incontestable) constructions of our moral obligations, these courses of conduct are wrong and should generate duties of repair. Thus the professor may urge Potter to revise his spell to

\(^6\) *Hymowitz* allowed plaintiffs to recover even from defendants who could prove that they had not manufactured the DES pills their mothers had taken. See Coleman, *supra* note 2, at 397-406 (suggesting “that we read the DES cases not as an effort to implement corrective justice . . . but as an effort to implement localized or constrained at-fault pools to deal with injuries caused by certain kinds of defective products).
\(^7\) Among them, strict products liability for manufacturing defects, and the reasonable person standard as applied to the mentally disabled.
enforce all duties of repair, not simply those that tort law implements.

Once again, however, the professor will not insist that Potter make this revision. Corrective justice theorists do not take the view that tort law seeks to maximize the amount of corrective justice done (as, say, economists think that tort law seeks to maximize social welfare). It doesn’t follow from the fact that tort law redresses some injustices that it must aim to redress all of them, or even that it must seek to redress all those injustices that can be redressed without causing injustices of a greater magnitude.\(^8\) In fact, it may not be appropriate for the state to play a role in redressing some forms of injustice. Once one notices this, it becomes apparent that corrective justice is at best a partial answer to the question what is tort law for. Tort law implements some moral duties of repair, but not others, and one cannot derive from the principle of corrective justice limitations that explain tort law’s boundaries. Thus, the principle of corrective justice must be supplemented with a principle of political morality that tells us what duties of corrective justice the state should enforce. To know whether he should take on his professor’s suggestion to expand the ambit of his spell, Potter will need to do some political philosophy.

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Once again, I want to set aside the question what form Potter’s spell should take if he accepts that corrective justice is the aim of tort law. Our question is if Potter stood before us offering to cast the spell that the best theory of corrective justice would recommend, should we take him up on it? What, if anything, would we sacrifice by eliminating tort law in favor

\(^8\) Indeed, Jules Coleman argues that the state need not implement duties of corrective justice at all. Coleman, supra note 2, at 367 (“The state has the moral authority, but not the moral duty, to implement corrective justice.”)
of a costless scheme that enforced duties of repair, and should we care about the loss?

One might object to Potter’s spell on the ground that it does not in fact enforce duties of corrective justice. Corrective justice provides agent-relative reasons for repair. If Smith negligently crashes his car into Jones, and Jones is injured, we all have reason to be concerned with Jones’s well-being, and possibly even reasons to ameliorate his injury. The reasons that we share are agent-neutral. According to the corrective justice theorist, however, Smith has a reason the rest of us don’t. Having breached an obligation to Jones, Smith (and Smith alone) owes him a duty of repair. So, one might object, Potter’s spell does not enforce Smith’s duty of repair, because it is through Potter’s action that Jones is compensated, not Smith’s.

This objection is misplaced for two reasons. First, Potter’s spell takes money from Smith and gives it to Jones, so there is a sense in which it is Smith that satisfies the duty of repair. To be sure, the payment is involuntary. But then payment after a tort judgment is often involuntary too. In neither circumstances is involuntary payment problematic: One who has been forced to discharge a duty does discharge it, even if we might regard her performance as, in some other sense, defective. Second, duties of repair need not be satisfied by the person subject to the duty. 9 If Smith’s wealthy cousin offers to cut Jones a check for his injuries on Smith’s behalf, in the normal case, no injustice is done by the fact that the check is not drawn on Smith’s account, and Jones has no further claim against Smith for compensation once he has been fully paid by Smith’s cousin. There may be circumstances in which it is inappropriate for one person to satisfy another’s duty of repair. Tort law, for example, allows an insurer to discharge duties of repair arising from negligence, but not from intentional

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9 Coleman, supra note 2, at 327-328.
misconduct. But even if, in some circumstances, a wrongdoer must personally repair her victim’s loss, Potter’s spell comes as near to that ideal as the tort system does, since it draws on wrongdoers’ accounts to pay their victims.

Even though the objection is misplaced, its focus on the impersonality of Potter’s spell is not. Through the spell, Smith’s duty of repair to Jones is satisfied. But Jones has no role in holding Smith accountable for his wrongdoing. He does not get to file suit complaining about Smith’s conduct. He does not get to demand that Smith explain his behavior or justify it if he can. He does not get to commandeer the subpoena power of the court to better understand how Smith caused his injury. And he does not get the satisfaction of having his view that Smith wronged him vindicated in a court judgment.

To be sure, the spell might be adjusted to serve some of these aims. For example, the fact that the spell transferred money from Smith to Jones on account of Smith’s negligence might be published, and this might satisfy Jones’s interest in public vindication of his claim (though, of course, Jones never gets to make a claim). But that is beside the point. For the corrective justice theorist, tort litigation is every bit as much a transaction cost as it is for the economist. It is the thing that we must do to determine the existence and content of duties of repair. If Potter’s spell does that flawlessly, as we are supposing it does, there is no reason on the corrective justice model to go on with tort litigation.

If corrective justice really is the aim of tort law, then Potter’s spell is as good as we can get. However, if I am right in thinking that we should value tort’s institutionalization of interpersonal accountability apart from the money ultimately transferred (or here, the duties of repair ultimately satisfied), we have reason to pause before taking Potter up on his offer. Shortly, I will defend the claim that it is important to allow Jones to hold Smith accountable in the ways just highlighted, but first we have one last spell to ask of Potter.
Imagine (for the last time) that Harry Potter leaves Hogwarts and goes to law school. This time Potter takes torts from a civil recourse theorist. She tells him that people have a moral right to respond to legal wrongs inflicted upon them. Since the state prohibits private violence, it is obligated to provide a civil means of recourse against wrongdoers. Tort law, she explains, authorizes successful plaintiffs to act against those who wrong them, in most instances by taking compensation for their injury if the defendant refuses to pay it. On other occasions, the state allows plaintiffs to force defendants to take specific remedial action, like returning stolen goods or abating a nuisance. Tort law does not demand that wrongdoers pay compensation or return stolen goods; rather it empowers victims to make these demands at their discretion.

Potter is persuaded by his professor’s take on tort law, but he finds himself frustrated that the procedure for authorizing plaintiffs to act against those who wrong them is costly and ponderous. And then, remembering that he is the world’s most powerful wizard, Potter raises his wand. He casts a spell that works like this. Every time a person wrongs another in a way compensable by the tort system (say, by accidentally serving up a poisonous potion), a certificate is immediately dispatched to the injured party authorizing him to take compensation from the wrongdoer (by garnishment or attachment) if he refuses to pay. And every time a person wrongs another in a manner that

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10 Once again, I have given Potter’s professor a full-blown normative commitment to the principle of civil recourse. One could think that tort law embodies that principle without thinking the principle justified, i.e., without thinking that victims really do have a moral right to respond to wrongdoing. See supra, note __.

11 For a crisp statement of civil recourse theory, see Benjamin C. Zipursky, Civil Recourse, Not Corrective Justice, 91 GEORGETOWN L.J. 695 (2003).
would lead to equitable relief under tort law, an appropriate injunction is delivered to the injured party so that he may serve it on the wrongdoer if he chooses.

Potter’s spell instantaneously determines whether an injured party has a right to redress from a wrongdoer and provides them authorization to act if they do. Potter’s professor will be impressed, but nevertheless might suggest revisions. The spell could, for example, make it easier for victims to take action against wrongdoers, if they so choose. For example, when a victim receives notice that he may take compensation from a wrongdoer, he might be given an opportunity to exercise the option such that if he does, the money is automatically transferred from the wrongdoer’s bank account to his. Potter, after all, need not leave victims to the navigate civil courts to collect their judgments any more than he need leave them there to obtain judgment in the first place.

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Again, we are not concerned with whether Potter has his spell right. Our question is if Potter stood before us offering to cast the spell that the best theory of civil recourse would recommend, should we take him up on it? What, if anything, would we sacrifice by eliminating tort law in favor of a costless scheme that authorized those who had been legally wronged to take civil action against those who injured them, and should we care about the loss?

To understand civil recourse theory, it is important to keep straight what its proponents mean when they say that one who has been legally wronged has a right of action against the wrongdoer. They do not mean by “right of action” the right to sue. Rather, they mean the right to act against the wrongdoer by taking compensation or other damages, or by forcing the defendant to embark on (or refrain from) a particular course of
conduct.12 Civil recourse theorists are not interested in lawsuits themselves; they are interested in lawsuits as a vehicle through which plaintiffs obtain redress.13

12 See Zipursky, supra note __, at 739 (“Consider the statement that there is a right of action for medical malpractice. First, this statement sometimes asserts that, in light of the rules, norms, and principles of our tort system, a person is legally entitled to prevail in litigation and win a judgment against one who committed malpractice against that person. Second, to say that there is a right of action for a person who has been injured by medical malpractice is to assert sometimes that in light of the rules, norms, and principles of our tort system, a person is legally entitled to sue one whom she can, alleging upon information and belief that a particular person committed medical malpractice against her. It should be clear that I have been utilizing the first sense of ‘right of action’ and not the second.”).

Jason Solomon has recently offered a defense of civil recourse theory that draws on Stephen Darwall’s work on the second-person standpoint in moral discourse. Solomon has a broader perspective on a victim’s right to act against a wrongdoer. See Jason Solomon, Equal Accountability Through Tort Law, unpublished manuscript, at 27 (“The final possibility is to ‘act against’ the other person or business in some fashion, one way being to file a lawsuit. I define ‘acting against’ as speech or conduct directed toward an alleged wrongdoer to express blame or make a demand in response to being harmed.”). Solomon gives a more prominent role to the dialogue embedded in tort litigation, and he highlights the defendant’s “answerability” to the plaintiff. Id., at 40-41. His views are more congenial to the argument of this paper than other civil recourse theorists’. In fact, I take Solomon to offer a revision of civil recourse theory more than a defense of it, as he emphasizes several aspects of tort law that civil recourse theory traditionally doesn’t, including both tort suits and the capacity of tort law to do justice. See Section V below [which remains to be written].

13 That is how I read most civil recourse theorists, though there is ambiguity on this point. For example, John Goldberg says, “the notion of tort as a law of redress should be distinguished from the notion that alleged victims of wrongdoings are entitled to a day in court, or must otherwise have their claims treated and resolved on a highly individualized basis.” The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs, 115 YALE L.J. 524, 605 (2005). But he also says that “[t]he core claim of redress theory is that tort law’s distinctiveness resides in
Still, civil recourse theorists are attentive to one feature of tort procedure that economists and corrective justice theorists are not: Tort law grants plaintiffs a power to pursue remedies; it does not demand that they do so. In that way, civil recourse theory takes an important step forward, recognizing that tort law empowers plaintiffs to hold defendants accountable for wrongdoing. However, it has too limited a view of the ways in which tort law empowers plaintiffs to hold defendants accountable. And it has nothing to say of the value of tort litigation to defendants. Even in the civil recourse story, Potter’s spell fails to fully instantiate the system of interpersonal accountability tort law embodies.

IV. The Point of Procedure

In each iteration of the Harry Potter experiment, we reimagined tort law to exemplify so far as possible the aims posited by a leading theory of the institution. The exercise revealed that the economic, corrective justice, and civil recourse accounts share something in common. Each treats litigation as merely a means to tort law’s ends (though, of course, as means to different ends). Until now, I have simply asserted that tort litigation is important independent of the results it licenses. The burden of this section is to establish that there is value in the doing of tort law, not just in the things that tort law does.

conferring on individuals (and entities) a power to pursue a legal claim alleging that she (or it) has suffered an injury flowing from a legal wrong to her by another. How that claim is pursued and resolved is, accordingly, a matter for the victim to decide. If it is vitally important to her to obtain a public acknowledgment of wrongdoing from her peers or a presiding official then she is entitled to ask for a jury trial and pursue the claim to judgment.” Id. The latter passage seems to imply what the former denies—that victims are entitled to a day in court, if they demand it. See also Zipursky, supra note __, at 739. But see, Solomon, supra note __.
To start, we should get a fix on what tort litigation involves. John Gardner has characterized lawsuits as “structured explanatory dialogues in public.”\textsuperscript{14} The structure of the dialogue in a tort suit is familiar. A plaintiff files a complaint against a defendant. A defendant answers or moves to dismiss. In answering a complaint, a defendant admits the plaintiff’s allegations, or denies them. She may raise counterclaims of her own, which require response. And if at the end of all that, the plaintiff has stated a claim on which relief can be granted, discovery begins and the parties trade interrogatories and subpoenas, take depositions and review documents. If there are material facts left in dispute at the end of discovery, a trial is scheduled. At trial, both sides may present their view of the case, through their own testimony and that of other witnesses. And when it is all over, a judge or jury pronounces a verdict, which vindicates the position of one side or the other.

There is nothing special to tort law in these procedures, both because they are used to resolve all manner of civil dispute and because they need not be. We might arrange tort litigation differently, and indeed some jurisdictions have, erecting hurdles, for example, that plaintiffs in medical malpractice suits must overcome before filing a complaint, or mandating mediation prior to trial. Even in those places, however, tort litigation remains a structured explanatory dialogue that takes place in public; it is just structured differently. Our question is whether there is a point to such dialogues that is not instrumental to the legal consequences that follow from them.

For a first cut at answering the question we might look to the people who start tort suits. It is tempting to think that what plaintiffs really want from a lawsuit is compensation, such that they would be glad to have Potter’s spell (whichever version)

pay them swiftly and fully for their injuries. I do not dispute that plaintiffs want compensation. Of course they do, and many would prefer a system that offers fast compensation to one that requires them to file a lawsuit to obtain relief. But it is simply not true that tort plaintiffs seek compensation above all else. In fact, research on why people sue shows that money is but one reason, and often not the most important.

In a recent study of the reasons medical malpractice plaintiffs file suit, 59% mentioned a desire to have the defendant admit fault or accept responsibility for their injury, a proportion matched only by those who said they sued to prevent similar incidents from happening again. Nearly as many (53%) said they wanted answers. Retribution and punishment were cited as litigation aims reasonably frequently (41% and 24% respectively). And money? Forty-one percent did not mention it at all, 35% said it was of secondary importance, 18% said it was their primary objective, and only 6% said money alone was their motivation for filing suit.15 Those results are hardly unique.16 Studies of plaintiffs in defamation suits show similar motivations.17 And a more general study of why people sue “found almost no support for the notion that people decide whether to litigate based on some cost-benefit analysis.”18

16 [Cite other malpractice studies].
17 See, e.g., Randall Bezanson, Libel Law and the Realities of Litigation: Setting the Record Straight, 71 IOWA L. REV. 226, 227 (“[M]oney seems rarely to be the reason for suing. Most plaintiffs sue to correct the record and to get even.”).
18 James B. Stewart, Seeking Justice: People Prone to Sue Have Many Reasons and Money is but One, WALL ST. J. (May 20, 1986) (quoting Susan Sibley).
The fact that many plaintiffs file suit seeking something other than money is instructive, but it does not get us very far. We might interpret the fact that plaintiffs often sue for reasons other than money as a sign that the tort system is broken. We know that only a small percentage of those with legitimate claims file suit. If tort litigation was not so arduous, perhaps more people would seek compensation. Instead, the expense and hassle involved discourages the majority of people with valid claims, leaving behind perverse souls who are willing to pursue non-monetary objectives despite the misery litigation will cause them and their quarry.

I am not prepared to defend tort practice in all of its particulars; it causes more pain than necessary, to plaintiffs and defendants alike. But we shouldn’t dismiss plaintiffs’ non-monetary objectives lightly. Even from a narrow economic perspective, they are relevant. A full accounting of the tort system must pay attention to the utility plaintiffs derive from lawsuits that is not reflected in the damages they obtain. In addition, if there are demoralization costs to being denied one’s day in court, those must be factored in as well. All that would no doubt complicate the calculus involved in determining how to minimize the sum of the costs of accidents and the cost of accident prevention, if that’s what we aim to do.

If we broaden our focus to include non-economic concerns, it is even clearer that plaintiffs’ non-monetary objectives should be taken seriously. The insight at the core of the corrective justice account is that tort law can be understood to force defendants to discharge a moral duty to pay compensation to repair the wrongful losses their conduct occasions. But compensation is not the only, and perhaps not even the primary,
form of redress we expect from those who wrong us. To see this, take a simple example. Imagine that Smith and Jones have agreed to meet at noon for lunch. Smith is up late the night before, and he forgets to set his alarm. He sleeps straight through his appointment with Jones. When he wakes up shortly after 1 p.m., what ought Smith to do? Well, it is too late for Smith to do what he promised—have lunch with Jones at noon. And it is probably too late for Smith to have lunch with Jones at all, at least that day. But that does not mean that Smith should simply roll over and go back to sleep. Even though he cannot keep his commitment to Jones, it still makes demands on him. Once Smith realizes what he has done, he ought to call Jones, explain that he overslept, and apologize for missing lunch. Failing to do that would compound the wrong.

Perhaps Smith should do more than explain and apologize. Depending on their relationship and the purpose of their meeting, it might be appropriate for Smith to offer Jones a chance to reschedule. We can even imagine odd circumstances in which monetary compensation would be warranted (perhaps if Jones had travelled at great expense for the sole purpose of the meeting). But explanation and apology will be in order, whether or not some form of compensatory repair is.

Smith’s infraction is trivial, but explanation and apology are commonly part of making amends for more serious transgressions, and centrally so. Indeed, one reason to offer compensation is to signal that proffered explanations and apologies are genuine. William Ian Miller relays the following story from a thirteenth century Icelandic saga.

X accidentally hits Y with a pole in a game in which poles were used to goad horses to fight each other, not whack people. X immediately calls out to Y, “I am sorry. I didn’t mean to hit you.” Here is the crucial addendum. “I will
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pay you sixty sheep so that you will not blame me and will understand that I did not mean it.”

Sincerity is here demonstrated at a high price, worth paying because it is critical that the apology be accepted. Which is not to say that compensation is never warranted independent of the credence it lends an apology. In fact, an offer of compensation helps to establish the sincerity of an apology because it shows that the wrongdoer is willing to make all the amends warranted by his action, not just those that come cheaply or are faked easily.

These examples serve as a reminder of something that lawyers often forget: Apart from law, explanation and apology are at least as central to our practice of making amends as monetary compensation is. That raises a question: If we have a system that allows victims to demand compensation, why not give them an opportunity to demand explanation and apology? Well, it turns out that we do, at least in part. Tort law empowers plaintiffs to demand explanations. Remember that more than half the plaintiffs in the study cited above said they filed suit to get “answers.” Explanation is, of course, not a remedy in the formal legal sense. One does not pray for it alongside damages and equitable relief at the end of a complaint. But in a practical sense, tort litigation often remedies a defendant’s failure to explain herself, or to do so satisfactorily. A wrongdoer may ignore her victim, but a defendant must answer a plaintiff’s complaint. And she must submit to the plaintiff’s reasonable demands for depositions and evidence that shed light on her conduct.

Plaintiffs can, of course, extract an explanation from a defendant without proving that the defendant did anything wrong. They are typically entitled to an answer and discovery if they survive a motion to dismiss for failure to state a claim.

21 WILLIAM IAN MILLER, FAKING IT 85 (2003).
But it should not seem odd that a plaintiff obtains the “remedy” of an explanation without proving that the defendant wronged her. Our responsibility to explain ourselves to others is not conditional on our having done something wrong. Take Smith and Jones again. Suppose that Smith’s wife falls severely ill the morning he is to meet Jones. Smith takes his wife to the hospital instead of going to lunch. Smith is fully justified, of course, but that does not mean that his obligation to meet Jones for lunch is discharged, just as if he had shown up. Once the emergency abates, Smith should call Jones and explain his absence. If he doesn’t and Jones nurses a grudge over the perceived slight, it is Smith who is to blame. Not for missing lunch, but for failing to tell Jones why. So too with the law. A defendant may have a perfectly good justification for his conduct, or failing that, an adequate excuse. But justifications and excuses must be pled, outside law and within it.

If tort litigation offers a remedy for a defendant’s failure to offer satisfactory explanation, what about apology? Victims are plausibly entitled to apologies every bit as much as they are entitled to explanations and compensation. But apologies are not a remedy available in a tort suit, and tort litigation itself does not remedy the failure of a defendant to apologize, as it does her failure to explain. This is not surprising, for any apology secured through litigation would be severely compromised. The sibling of a child forced to apologize by a parent knows that the apology is not genuine, and that diminishes its value. A court-mandated apology would suffer the same defect, and on top of that, it would come awfully late.

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22 Which is not to say it has no value. See MILLER, supra note __, at 87-90 (arguing that forced apologies are valuable to recipients because of the pain and humiliation involved in giving them).
Notwithstanding these problems, there is a movement to incorporate apologies formally into tort practice, and there is a wealth of research suggesting that when potential defendants apologize early, they are less likely to be sued. Apologies are clearly an important form of redress, just not one that tort law is well-suited to provide.

One suspects that the reason apologies prevent lawsuits is that a genuine apology acknowledges responsibility. Recall that the majority of medical malpractice plaintiffs in the study noted above cited a desire to have the defendant admit fault or accept responsibility as a motive for filing suit. Of course, tort law is no better positioned to force people to accept responsibility than it is to insist on an apology. But tort can offer a second-best solution. A plaintiff’s verdict assigns responsibility to the defendant for the plaintiff’s injury, giving her what she has improperly refused to take on her own. Even if there were no consequences to a court judgment—no damages or injunctions—it is easy to imagine that many plaintiffs would still prize the vindication a favorable verdict provides. This suggests that we should regard verdicts as another remedy offered by tort suits.

In fact, tort judgments are remedial in two senses. In addition to assigning responsibility to a defendant who was refused to accept it, tort judgments have an important social role. Many torts—especially (but not just) assault, battery, and defamation—humiliate victims and diminish their social standing. Tort suits are ways to reclaim respect, if not from the defendant, then from others. Consider the famous case of

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24 Not always, of course. You won’t win respect if you make “a federal case”—or any case—out of a small slight.
Alcorn v. Mitchell. Alcorn sued Mitchell for trespass. “At the close of trial the court adjourned, and, immediately upon the adjournment, in the court room, in the presence of a large number of persons, [Alcorn] deliberately spat in the face of [Mitchell].” Mitchell then sued Alcorn for battery and was granted $1000 in “vindictive” damages. On appeal, Alcorn contended that the damages were excessive. In upholding the judgment, the Illinois Supreme Court explained:

So long as damages are allowed in any civil case, by way of punishment or for the sake of example, the present, of all cases, would seem to be a most fit one for the award of such damages.

The act in question was one of the greatest indignity, highly provocative of retaliation by force, and the law, as far as it may, should afford substantial protection against such outrages, in the way of liberal damages, that the public tranquillity may be preserved by saving the necessity of resort to personal violence as the only means of redress.

The delicious part of the case is that Alcorn was the plaintiff in an action against Mitchell when he spit upon him. Thus, we get a stark contrast between modes of vengeance. Alcorn sues and then spits. Mitchell sues over the spit, but his suit is taken by the court to be a substitute for spit (or worse) of his own. Both suit and spit are vindictive. No doubt, Mitchell’s quest to reclaim respect is aided by the damages awarded—$1000 sent a strong message in 1872. But damages alone don’t do the trick. The message is not just that Alcorn must pay Mitchell

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25 63 Ill. 553 (1872).
26 Id.
27 Id. Today, we would call the damages “punitive.”
Harry Potter and the Purposes of Tort Law

$1000, but that he must pay upon Mitchell’s demand as redress for the wrong.

Civil recourse theorists rightly emphasize that tort law provides a substitute for unregulated vengeance.²⁹ But tort law counts as a substitute for vengeance only because vengeful motives can be channeled through it. Recall that in the study above, retribution and punishment were cited as litigation aims by a substantial portion of plaintiffs (41% and 24% respectively). Philosophers are wont to distinguish between retributive and corrective justice, and for a variety of reasons align tort law with the latter. But it is not hard to see in the plaintiffs’ desire to punish a drive to get even, and one we can admire, where a plaintiff is trying to reclaim respect. There is a world of difference between compensation paid from a state fund or through Harry Potter’s spell, and compensation paid at the public demand of a plaintiff, upon an official judgment that she is entitled to it. That is an important reason to maintain tort litigation, even if we might have Potter’s spell instead.

To this point, I have focused on remedies that tort suits offer plaintiffs—explanation and vindication—beyond the familiar legal remedies. But potential defendants (all of us, really) have reason to want a world with tort suits too. That sounds strange because no one likes to be sued, and even less do they like the nasty consequences of losing. But, of course, tortfeasors don’t escape nasty consequences under Harry

²⁹ See Goldberg, supra note __, at 602 (“Vengeance is an unregulated response by which a victim seeks satisfaction directly and by the means of her choice. For good reasons, Anglo-American law allows almost no room for it. Because it is unmediated, vengeance runs high risks of error, overkill, additional violence, and ongoing feuds, which tend to work against the resolution of disputes and to undermine civil order. Even when the law permits self-help—e.g., recapture of chattels—it limits the privilege by requiring that it be done peaceably. Redress through law, as Locke and Blackstone understood, is a substitute for vengeance.”)
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Potter’s spell; they pay the same damages they would upon losing a lawsuit. So why, then, would they prefer to suffer litigation in addition to liability? Well, there are obvious reasons. Litigation allows defendants to delay or avoid paying compensation, even when they know they are liable. And it holds out the possibility that they can reduce payouts by investing in lawyers, rather than safety. But these are not the reasons I have in mind. Indeed, a compelling reason to ask Potter to cast his spell is that wrongdoers will be made to pay and quickly.

There is a more respectable reason defendants should want a world with tort suits. John Gardner draws a distinction between consequential responsibility and basic responsibility. One is “consequentially responsible if some or all of the unwelcome moral or legal consequences of some wrong or mistake . . . are [one’s] to bear.”30 One has basic responsibility if one can have and give rational explanations for one’s actions.31 Gardner illustrates the difference through the cases of several victims of domestic violence who killed their abusers. Each had available a defense of diminished responsibility, based on medical evidence of “learned helplessness.” A diminished responsibility defense would reduce the verdict from murder to manslaughter. Rather than raise the defense, however, the women sought the benefit of a different defense—provocation—and their decision posed serious risk, as it was more difficult to plead and prove. Their decision was even more striking because a successful provocation defense would have precisely the same legal import as one of diminished responsibility—reduction from murder to manslaughter. If the women were concerned only for their consequential responsibility, there was no reason to plead

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31 Id.
the riskier defense. But as a matter of basic responsibility, the defense made all the difference. In pleading learned helplessness, the women would demean themselves as agents. In pleading provocation, they were asserting that “[t]here were reasons . . . to get angry or aggrieved to a murderous extent, and [that they got] angry or aggrieved for those reasons.”32 The women wanted to account for themselves as “fully responsible, adult, sane, human being[s].”33 In Gardner’s view, though we frequently want to avoid consequential responsibility for our actions, we have a strong interest in being responsible for what we do in the basic sense.

It is fashionable to think of tort law as a substitute for regulation, or even as a kind of regulatory regime. But tort law depends on a richer conception of human agency than regulation does. To be sure, people react to incentives. And policymakers can take advantage of our cognitive limitations to “nudge” us one way or another.34 When economists look at tort law, they see agents pushed and pulled by incentives. But tort doesn’t conceive of us that way; it treats us as responsible agents in Gardner’s basic sense. In tort suits, we are called to give accounts of ourselves, as beings with reasons for action, expected to provide justifications and excuses for what we have done. Only then do we face consequences. Nobody wants to be sued. But it is in all of our interests to be recognized as beings who it is sensible to sue, rather than simply nudge.

That may be reason enough to resist Harry Potter’s spell, but we can follow this train of thought even further. Not only does tort law treat us as responsible agents, it helps make us so. As a causal matter, being held responsible precedes being responsible. Parents turn their children into responsible agents

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32 Id., at 160.
33 Id.
by treating them as if they already are. They demand explanations and dole out punishments long before children fully develop the capacity to act on and offer reasons for action.\footnote{I owe this observation to Don Herzog.} Parents nudge their children toward responsibility. Tort law may do the same for adults. As Gardner explains:

\begin{quote}
\[E\]ven if for some reason we abolished the whole apparatus of criminal sentences and civil remedies, we should still think twice about abolishing . . . trials[.] In fact, one important (although not sufficient) reason for \textit{having} the apparatus of criminal sentences and civil remedies is to \textit{motivate} the trials themselves. It is to put people under extra instrumental pressure to give decent public accounts of themselves, in the knowledge that this will normally help them to eliminate or reduce the burden of consequential responsibility they might otherwise bear.\footnote{Gardner, \textit{supra} note __, at 168.}
\end{quote}

In other words, the risk of being \textit{held} responsible encourages people to \textit{be} responsible.

Tort suits express and encourage responsibility in Gardner’s basic sense. But there is another sense of responsibility in play in tort suits, which is also key to understanding their value. Through tort suits, we are held responsible \textit{to} one another. Tort scholars have increasingly recognized that lawsuits are means to call others to account, both literally and figuratively.\footnote{See, \textit{e.g.}, Coleman’s new essay; Solomon, \textit{supra} note __; Hershovitz, \textit{Two Models}.} Literally, because lawsuits are structured dialogues in which plaintiffs may demand that defendants account for their behavior. And figuratively, because lawsuits empower plaintiffs to hold defendants accountable through the imposition of consequential responsibility—damages and the like. Litigation is not necessary to accountability in the figurative sense. On the civil recourse version of Potter’s spell, victims
may demand damages or serve injunctions upon receiving authorization; an administrative system might operate similarly. But accountability in the literal sense is important too. As we saw before, plaintiffs are entitled to explanation as much as compensation. We could, of course, force wrongdoers to explain themselves in state-initiated proceedings. But there are reasons to confer on plaintiffs the power to demand account from those they believe have wronged them, reasons, that is, to make defendants accountable to plaintiffs. Some are instrumental—victims are in a better position than the state to know when a wrongdoer should be called to account, and they have greater incentive to make it happen. But there is more than that. Empowering victims to call wrongdoers to account expresses and gives force to the idea that we occupy a community of equals, answerable to one another for what we do.38

We have now seen several reasons to have tort suits, some remedial, some expressive. Before we move on, it is worth saying a few words about the point of conducting tort litigation in public. Most tort suits are, of course, resolved privately. They settle long before trial, on terms that are typically confidential. But they settle only at the joint discretion of the litigants, who each have the right to insist on a day in court. The publicity of tort litigation serves many purposes. First, plaintiffs are not the only important recipients of the

38 Jason Solomon explores this thought at length in Solomon, supra note __. He draws on Stephen Darwall’s work on the second-person standpoint to illuminate many aspects of tort law. Darwall’s work is controversial among philosophers, not least because of his assertion that second-personal reasons are a special kind of reason, not reducible to reasons that are agent-neutral. But the insights Solomon gleans from Darwall’s work can be captured in ways that do not depend on Darwall’s controversial claims about reasons.

For a helpful cautionary note on thinking about responsibility relationally, outside law and within it, see Gardner, supra note __, at 164-166.
explanations that defendants proffer. We all have an interest in hearing those who have been charged with wrongdoing account for their behavior, and indeed, an interest in knowing of the allegations in the first place. These interests vary in strength depending on the wrong and the parties involved, and they may be outweighed in particular cases by litigants’ interest in keeping a dispute confidential (though perhaps not as often as current practice allows). But the provision of a public forum for tort suits reflects the fact that we all have an interest in how one another are treated. The public nature of tort suits can serve interests of litigants as well. We saw above that tort suits substitute for vengeance, helping victims to reclaim respect and restore social standing. To achieve those aims, an avenger must be seen exacting her price.39 And, on many occasions, the public nature of tort suits holds out similar promise to defendants. One who believes she has been accused of wrongdoing unjustly may challenge a plaintiff to file suit. And when a suit is filed, a defendant may insist on a public forum to fight for her reputation.

39 WILLIAM IAN MILLER, EYE FOR AN EYE 18 (2006) (“At a minimum . . . you want to make sure you (and others) can see he is humiliated as you were seen to have been.”)