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TORT, MORAL LUCK, AND BLAME

CHRISTOPHER JACKSON*

For the last several decades, academics have been fighting over what we might think of as the soul of tort law. Law & economic theorists contend that tort is about the efficient allocation of the costs of accidents; traditionalists view tort as a law of wrongs and redress. A common criticism wielded against the traditionalists is the problem of moral luck: It is a bedrock principle of morality that you can only be responsible for that which is under your control. But in many cases, whether and how much a plaintiff recovers against a defendant will turn entirely on factors outside of either party's control. And if tort law is fundamentally at odds with a bedrock principle of morality, then any view of tort as a law of wrongs is incoherent, or at least morally arbitrary, and must be rejected.

While traditionalists have proposed a variety of answers to this critique, this Article argues that the best response is two-fold. First, the scope of the problem of moral luck is really quite limited: it applies only to the concept of moral blame. As such, the traditionalist can neatly avoid objection entirely by grounding her tort theory on notions of wrongdoing that don't make use of blame. Second, the use of the problem of moral luck in the context of tort law requires the law & economic theorists to take on several controversial positions in the realm of normative ethics—positions in conflict with many of our everyday moral judgments. While some scholars may be perfectly happy to adopt these views, these unintended consequences must be recognized, articulated, and defended before the law & economic theorists can get any traction in their critique.

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I. INTRODUCTION

Legal theorists have long been fighting over what we might think of as the soul of tort law. Traditionalists view tort as a law of wrongs and redress, an area of law that is supposed to be responsive to the moral obligations we owe to each other.¹ The law & economic theorists, on the other hand, believe that tort law is, or at least ought to be, concerned only with the efficient allocation of certain kinds of losses—it seeks to minimize the costs of accidents.² One of the most common arguments posed by the law & economic theorists is that traditionalism suffers from what is known as the problem of moral luck: It is a bedrock principle of morality that you can only be responsible for that which is under your control. But in many cases, whether and how much a plaintiff recovers against a defendant in tort will turn entirely on factors outside of either party’s control—it is a matter of luck whether a person commits a tortious act, whether that tortious conduct actually causes an injury, who it is who suffers the injury, how significant the injury is, and so on. And if tort law is fundamentally at odds with a bedrock principle of morality, then any view of tort as a law of wrongs is incoherent, or at least morally arbitrary, and must be rejected.

While several scholars have argued that it is possible to re-imagine or reinterpret tort law—or more ambitiously, all of moral philosophy—in a way that harmonizes the two,³ there is no need to engage in that kind of mental gymnastics to respond to the law & economic theorists’ criticism. Rather, the best answer is two-fold. First, the scope of the problem of moral luck is really quite limited: it applies only to the concept of moral blame. By recognizing that blame (that is, an agent’s moral praise- or blameworthiness) is distinct from other concepts that might fall under the generic term “wrongdoing,” the traditionalist can respond with a fairly simple set of claims: (1) the problem of moral luck is a problem for moral blame only; (2) the connection tort law bears to morality is not on the basis of blame, but utilizes some other conception of wrongdoing;⁴ (3) therefore, the problem of moral luck does not apply

¹ Here I am thinking of Jules Coleman, John Goldberg, Stephen Perry, Ernest Weinrib, and Benjamin Zipursky, among others.

² Oliver Wendell Holmes, Jr., Guido Calabresi, and Richard Posner come to mind.

³ *E.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1164-69 (2007). Tony Honoré outlines a similar view when he suggests that the policy justifications for holding a person responsible for a bad outcome—he focuses on the interest in maximizing utility and avoiding problems of proof—might justify our reconceptualizing the term “fault” to include situations where a person couldn’t have done otherwise. TONY HONORÉ, RESPONSIBILITY AND FAULT 18–21 (1999).

⁴ Not all traditionalists can make this move, of course: there are some who are firmly committed to the connection between tort and moral blame. *See infra* Section IV.A.

to tort law. The second answer is to recognize that the use of the problem of moral luck by the law & economic theorists requires the adoption of a number of controversial views in the realm of normative ethics. In particular, utilizing this critique would require us to give up on much of our everyday intuitions about moral responsibility and blame. While some scholars may be perfectly happy to make this move, these unintended consequences must be recognized, articulated, and defended before the law & economic theorists can get any traction in their critique.

Two introductory points: First, I am not going to attempt to defend a particular traditionalist view of tort law wholesale—indeed, the very point of the argument laid out above is that it is open to any non-blame-based view of wrongdoing. Rather, I will only be responding to the problem of moral luck, a specific charge leveled against traditionalism, albeit usually in an inchoate form. However, the response to this objection clarifies an issue that I believe has been overlooked by a number of academics when they do make these more ambitious arguments. As a result, this Article makes two contributions to the debate: it both engages with a specific debate in tort theory and, perhaps more importantly, brings out and analyzes an intuition many people have but rarely articulate in a precise manner.

Second, in Part IV of this Article, I highlight the difference between moral blame and moral obligation. I do so not because I think the traditionalist view must be concerned with one or the other—as Section IV.A demonstrates, there are a number of traditionalist theories that don't have much to do with either—but as a way to bring out the contours of the problem of moral luck. While I am quite sympathetic to the obligations-based view of tort that I discuss below, in this piece I bring it up only to make the smaller point that *any* non-blame-based view of tort straightforwardly avoids the problem of moral luck.

Part II of this Article provides the background: Section II.A sets up the debate between the traditionalists and the law & economic theorists, while Section II.B discusses the problem of moral luck as it has been articulated by moral philosophers. Section II.C explains the law & economic theorists' use of moral luck as a critique of traditionalism. Part III looks critically at the problem of moral luck. Section III.A sets out the distinction between moral obligation and blame, commonly discussed in philosophy, to demonstrate that the term “wrongdoing” is actually open to a variety of different interpretations. Section III.B argues that if moral luck poses a problem at all, it is one for our understanding of blame only, and not for all concepts that fit under the heading “wrongdoing.” Part IV brings Part III's conclusions to bear on the theory of tort law. Section IV.A first provides some background on the variety of flavors traditionalism comes in; Section IV.B delves more deeply into one of these sub-views, the obligations-based theory of tort, to demonstrate the limited reach moral luck has on traditionalism; and Section IV.C analyzes just what the law & economic theorists have gotten wrong in their luck-based criticisms of traditionalism. Finally, Part V considers a surprising and unintended outcome that falls out of the law & economic theorists' use of moral luck: following the moral luck objection to its logical end requires us to take on controversial commitments in the realm of moral philosophy, making it that much harder to accept the idea that moral luck really is a legitimate objection to traditionalism.

II. THE BACKGROUND

A. *Wrongs or Losses?*

Let us begin by giving a brief account of the difference between what I have called the traditionalists and the law & economic theorists. Traditionalists believe that tort is “a law of wrongs and redress,” where the term “wrongs” is meant in the moral sense.⁵ Tort law is concerned with wrongs—moral wrongs—the violation of which creates an obligation in the tortfeasor to compensate the victim for her injury. The most prominent defender of this view, Ernest Weinrib, argues that for a victim to be able to recover in tort, her injury “must be something . . . that ranks as the embodiment of a right.”⁶ If the tortfeasor violates a right of the victim, then he is obligated to compensate her for the injury caused. This obligation arises out of the violation of the right: “With the materialization of wrongful injury, the only way the defendant can discharge his or her obligation respecting the plaintiff’s right is to undo the effects of the breach of duty.”⁷ Or again, “[t]he plaintiff’s suffering of a[n] unjust loss is the foundation of his or her claim against the person who has inflicted that loss.”⁸ There are, in other words, certain obligations that we owe to each other, and if I violate one of these duties and injure you, then I am obligated to fix the injury that I’ve caused.

“Traditionalism” is actually a broad term that captures a number of competing theories. Most traditionalists adhere to the thought that there are certain conditions where *A*, having causally contributed to *B*’s loss, owes a duty to compensate *B* for the injury suffered, and that *B* has a correlative right to recover from *A*. At this point however, traditionalism breaks down into a series of competing sub-views. I give a fuller account of the different theories that fall under the term “traditionalism” in Section IV.A below.

In contrast, the law & economic theorists believe that tort law isn’t about the redress of moral wrongs, but rather the efficient allocation of certain kinds of losses. “Tort is [most] accurately and usefully understood as a scheme by which government, for reasons of policy or principle, shifts or allocates losses initially born by the unfortunate victim who has suffered”⁹ Those who take this approach—most notably Richard Posner and Guido Calabresi—believe that the government ought to impose the costs of accidents in the manner that most efficiently reduces those costs. Posner’s “economic meaning of negligence” holds that “the dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety.”¹⁰ Similarly, then-Professor Calabresi wrote, “I take it as given that the principle functions of ‘accident law’ [that is, tort law] are to compensate victims and reduce accident costs The notion that accident law’s role is punishment of

⁵ Goldberg & Zipursky, *supra* note 3, at 1138.

⁶ ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* 134 (1995).

⁷ *Id.* at 135.

⁸ *Id.* at 144.

⁹ Goldberg & Zipursky, *supra* note 3, at 1148.

¹⁰ Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972); *see also* WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987).

wrongdoers cannot be taken seriously.”¹¹ Though the law & economics approach was put forward only a few decades ago, it has attracted a great deal of attention and become the dominant theory of tort law.¹² Weinrib nicely highlights the difference between this approach and the traditionalist view when he argues that “[i]n bringing an action, the plaintiff does not step forward as the representative of the public interest in economic efficiency or in any other condition of general welfare. The plaintiff sues literally in his or her own right as the victim of the defendant’s unjust act.”¹³

All that being said, there is a third possible interpretation of tort law, one that does not easily fall into either the traditionalist or law & economic theorist camp. This alternative view goes along with the law & economic theorists in arguing that tort is about efficient reduction of some variable, but it is concerned with minimizing violations of rights, rather than the costs of accidents.¹⁴ Whether or not one finds this alternative compelling, this “rights maximizing” view can be grouped with the anti-traditionalists for purposes of this Article: it takes issue with the idea that tort law is about compensation for wrongful losses, and as such can, if a rights-maximizing theorist were so inclined, make use of the problem of moral luck to attack the traditionalist position in the same manner as a law & economic theorist.

B. *The Problem of Moral Luck*

The problem of moral luck was most clearly articulated and systematized at a symposium with Thomas Nagel and Bernard Williams,¹⁵ though the issue had been kicking around in one form or another for millennia. Generally speaking, the situations that produce moral luck are those where the way we evaluate an agent depends at least in part on factors which are outside of the agent’s control—factors which are, at least with respect to the agent, entirely a matter of luck. According to Nagel, “[w]here a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment, it can be called moral luck.”¹⁶ Moral luck is just the contradiction between two deeply felt intuitions we have about morality: our belief that we are only responsible for that which is under our control (the “control principle”), and our everyday intuitions where we make moral judgments on the basis of factors that are entirely outside the person’s control. Let us take each in turn.

¹¹ Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 713 (1965); see also Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

¹² *Boyle v. United Techs. Corp.*, 487 U.S. 500, 530 (1988) (Brennan, J., dissenting) (“The tort system is premised on the assumption that the imposition of liability encourages actors to prevent any injury whose expected cost exceeds the cost of prevention.”).

¹³ WEINRIB, *supra* note 6, at 143.

¹⁴ E.g., Gregory Keating, *Strict Liability and the Mitigation of Moral Luck*, 2 J. ETHICS & SOCIAL PHIL. 1, 4 (2006), available at http://www.jesp.org/PDF/StrictLiability_FinalVersion.pdf.

¹⁵ Thomas Nagel, *Moral Luck*, in MORAL LUCK 57 (Daniel Statman ed., 1993); Bernard Williams, *Moral Luck*, in MORAL LUCK, *supra*, at 35.

¹⁶ Nagel, *supra* note 15, at 59.

The control principle has been formulated in a number of ways, and they all tend to revolve around nebulous phrases like “one cannot . . . be subject to luck as far as one’s moral worth is concerned,”¹⁷ morality must only judge what is “in the self”¹⁸ or—more tautologically—that people “cannot be morally assessed for what is not their fault.”¹⁹ In any case, the underlying intuition is fairly simple: you cannot be responsible for something you cannot control. I’m not blamed for the thunderstorm sweeping the Midwest, nor for the fact that Dennis Rader committed ten murders. Why? Because there isn’t a thing I can or could have done to affect either outcome. True, it is sometimes difficult to determine what is in fact “under my control.” I probably do have control over whether I raise my hand, and probably don’t over the path of the Earth relative to the Sun. But there are lots of interesting middle cases: can I control my seemingly overwhelming desire to eat a piece of chocolate cake, and forego desert? How about my pathological desire to commit arson? Or my addiction to painkillers? The problem of moral luck doesn’t turn on how we answer these questions. The point is that, whatever one’s definition of “under your control” is, if some feature of the world doesn’t fall under that description, you’re not responsible for it.

On the other hand, we have a lot of very basic intuitions that push against the control principle. These intuitions come in three flavors. The most famous example, falling under Nagel’s category of “consequential luck,” involves two drivers.²⁰ Sally and Sue both drive down the same road at the same time of day in the same car under the same conditions at the same rate of speed—twenty-five miles per hour over the limit. Sally makes it to her destination on time, but Sue fares quite a bit worse: out of the blue, a small child darts into the road and due to her excessive speed, Sue is unable to stop, and hits and kills the child. Sally, we think, did something wrong (she shouldn’t have sped so fast), but not anything particularly terrible. Sue’s actions, on the other hand, tend to intuitively be considered significantly more egregious: she’s committed a homicide and is subject to significant legal punishment and a large recovery in tort; not only that, but there is also an intuition that she’s done something *worse* than Sally, and ought to be *blamed* for her actions in a way that differs from Sally. But Sally and Sue performed exactly the same actions with exactly the same intention under exactly the same circumstances; Sally disregarded the same level of risk Sue did in choosing to drive faster than the speed limit. It was purely a matter of luck—and entirely outside of either driver’s control—that a child leapt out in front of Sue’s car, but not Sally’s.

The consequences of our actions aren’t the only realm in which the problem of moral luck appears. The same problem arises with regard to the circumstances we find ourselves in—in Nagel’s parlance, “circumstantial luck.”²¹ It isn’t up to me whether someone I really dislike comes around when I’m in a bad mood, or whether I am offered a substantial amount of money to write another person’s paper, or even how often my significant other asks me what I think of her new clothes. In each of

¹⁷ Daniel Statman, *Introduction*, in *MORAL LUCK*, *supra* note 15, at 1.

¹⁸ Williams, *supra* note 15, at 35.

¹⁹ Nagel, *supra* note 15, at 58.

²⁰ *Id.* This hypothetical comes from Nagel’s discussion in that work.

²¹ *Id.* at 60.

these cases, I am placed in a situation where I am tempted to do something wrong—to be cross with another person, to cheat, or to lie. If I make the wrong decision, then barring some excuse or justification for my action, I'm to blame; but at the same time, there is a sense in which I was unfortunate in having to face the situation in the first place. Another person, someone who would have made exactly the same bad choice, may never face the temptation to do wrong, and therefore may never be held responsible for the kinds of things that I am to blame for.

Finally, constitutive luck also plays a significant role in our everyday lives. There are things about me—my attitudes, desires, abilities, and so on—that I can't do anything about. It is what Nagel refers to as “the kind of person you are . . . your inclinations, capacities and temperament.”²² I cannot, for example, change the fact that I am particularly clumsy or prone to very strong desires to do dangerous things. But if I do something clumsy and cause some kind of harm as a result, then I am to blame for that consequence, whether or not I could have done any differently.

As I mentioned above, what we have are competing intuitions: the control principle, on the one hand, and the fact that consequential, circumstantial, and constitutive luck seem to play a large role in our everyday moral evaluations, on the other. As a matter of formal logic, then, there are three ways we can respond to our quandary. We can accept the fact that luck plays a role in our moral evaluations and give up on or restrict the control principle.²³ Alternatively, we can instead claim that despite appearances, there isn't actually any such thing as moral luck and modify our everyday intuitions about consequential, circumstantial, and constitutive luck to reflect this fact.²⁴ Finally, we might say that the problem is so intractable that there is no way to adequately deal with it, and consequently give up on the notion of moral blame altogether.²⁵

C. Moral Luck and Tort Law

The application of the problem of moral luck to the traditionalist view of tort law is fairly straightforward. It is a fundamental principle of morality that you can only

²² Nagel, *supra* note 15, at 60.

²³ “There can be no such thing as a coherent general objection to our being exposed to moral luck. Attempts to explicate such an objection are an object lesson in the hazards of argumentative overkill.” John Gardner, *Obligations and Outcomes in the Law of Torts*, in *RELATING TO RESPONSIBILITY* 111, 127 (Peter Crane & John Gardner, eds. 2001). This argument is further developed in John Gardner, *The Wrongdoing that Gets Results*, 18 *PHILOSOPHICAL PERSPECTIVES* 53 (2004).

²⁴ See Daniel Statman, *Introduction*, in *MORAL LUCK*, *supra* note 15, at 18-21. Interestingly, the Wikipedia entry on moral luck casts, implicitly and without defense, a strong vote in favor of this approach with its introductory statement, “Moral luck describes circumstances whereby a moral agent is assigned moral blame or praise for an action or its consequences even though it is clear that said agent did not have full control over either the action or its consequences.” WIKIPEDIA, *Moral Luck*, http://en.wikipedia.org/wiki/Moral_luck (last visited Nov. 18, 2010) (emphasis added).

²⁵ E.g., FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* (Walter Kaufman, trans. 1967) (“In this psychological cruelty there resides a madness of the will which is absolutely unexampled: the *will* of man to find himself guilty and reprehensible to a degree that can never be atoned for; his *will* to think himself punished without any possibility of the punishment becoming equal to the guilt . . .”).

be held blameworthy for that which is under your control. But in tort law, whether and how much a victim ever recovers is entirely dependent on things that are outside of the tortfeasor's and the victim's control. Tort law instantiates all three types of moral luck discussed above—constitutive, consequential, and circumstantial.

Richard Posner famously rejects the view of negligence as “moral or moralist” because “The morality of the fault system is very different from that of everyday life. Negligence is an objective standard. A man may be adjudged negligent though he did his best to avoid an accident and just happens to be clumsier than average.”²⁶ To put the matter in more theoretical terms, Posner is pointing to what Nagel called constitutive luck.²⁷ Tort law doesn't really care, for the most part, whether you're actually able to adhere to your legal duties.²⁸ Negligence is an objective standard, and a defendant coming in to court to argue that though he acted unreasonably, he couldn't have done otherwise, isn't going to get anywhere. In a similar vein, Oliver Wendell Holmes noted, “The law considers . . . what would be blameworthy in the average man . . . and determines liability by that. If we fall below the level in those gifts, it is our misfortune”²⁹

Consequential luck also runs rampant throughout tort law. Take the well-known eggshell skull rule. In *Smith v. Leech Brain & Co.*, for example, the plaintiff, William Smith, sued his defendant-employer after he “sustained a burn on his lip from a spattering of molten metal” because his employer did not provide adequate safeguards to prevent injury. While the injury was relatively slight—only Smith's lip was burned—the wound never healed, and he eventually developed cancer at the point of the burn, which led to his death.³⁰ The court rejected the defendant's argument that the amount of damages was all out of proportion to the degree of fault, finding that “a tortfeasor takes his victim as he finds him.”³¹ An admittedly culpable tortfeasor may find himself on the hook to compensate for massive loss, a loss disproportionate to the blameworthiness of his conduct, though he had no way of knowing—or controlling—the degree of injury caused by his negligent action.³²

Finally, the same is true of circumstantial luck, which also appears throughout tort law. Consider the tortfeasor who engaged in negligent conduct that proximately resulted in serious harm, but knows full well that there are other people who, if put in his situation, would have committed exactly the same tort. True, the tortfeasor may be obligated to pay back the losses he caused, but what of all the would-be

²⁶ Posner, *supra* note 10, at 31.

²⁷ Nagel, *supra* note 15, at 60. Goldberg and Zipursky discuss this type of luck under the heading of “compliance luck,” though the two terms are not perfectly interchangeable. Goldberg & Zipursky, *supra* note 3, at 1144.

²⁸ E.g., James Goudkamp, *The Spurious Relationship Between Moral Blameworthiness and Liability for Negligence*, 28 MELB. U. L. REV. 343, 352–56 (2004). This is particularly apparent in the content of strict liability. E.g., *id.* at 356–58.

²⁹ OLIVER W. HOLMES, JR., *THE COMMON LAW* 108 (1881).

³⁰ *Smith v. Leech Brain & Co.*, 2 Q.B. 405 (1962).

³¹ *Id.*; see also *Vosburg v. Putney*, 50 N.W. 403, 404 (Wis. 1891).

³² E.g., Goudkamp, *supra* note 28, at 364–65 (discussing the “proportionality principle”). For a more detailed discussion of this objection to tort, see my discussion of Waldron's work in Section IV.C.

tortfeasors who get off scot-free because they had the good fortune not to be faced with those circumstances in the first place? It was entirely out of either individual's control whether he would be faced with a difficult dilemma, and though both would have engaged in exactly the same wrongful conduct, only one is held liable.

Luck is interwoven throughout every fiber of tort law, and so is at odds with an axiom of morality. Indeed, the point has been made many times over in the tort theory literature.³³ Tort law thus cannot possibly be understood to incorporate a normative view of human behavior. "The conduct which tort law identifies as wrongful is sufficiently removed from standard moral conceptions of wrongdoing that tort cannot plausibly be what it appears to be, namely, law that empowers victims of wrongs to obtain redress from wrongdoers."³⁴

III. MORAL LUCK REVISITED

In this Part, I lay out the distinction between moral blame and obligation and go on to apply that analysis to the problem of moral luck in the context of moral philosophy. In doing so, I demonstrate that the problem of moral luck is actually rather limited in scope, applying only to blame.

A. *Blame and Obligation*

In this Section, I explain a distinction that will be helpful in bringing out the contours of the problem of moral luck: the difference between moral blame and moral obligation. The distinction isn't particularly complicated, nor has it been ignored in moral philosophy. Jules Coleman recognizes something like the obligation/blame distinction when he takes up the question of how an injurer's conduct can be wrongful when it is measured against an objective negligence standard (a form of constitutive luck, discussed in Section II.B, *supra*). "In what sense," asks Coleman, "can an injurer who does the best he can, but fails nevertheless to act as would have a reasonable person, be said to have acted wrongfully?"³⁵ His answer lies in drawing a distinction between what he calls "fault in the doing" and "fault in the doer."³⁶ Coleman asserts that the standard of tort law is fault in the doing.

The failure to abide by the relevant norms of conduct is enough to render the action a form of wrongdoing . . . and the losses that result wrongful . . . even if it is inadequate to render the agent a culpable wrongdoer, someone who would be worthy of blame, sanction or punishment.³⁷

³³ See, e.g., Christopher H. Schroeder, *Causation, Compensation, and Moral Responsibility*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 347, 361 (David G. Owen, ed., 1995) ("The fact of causation seems too slender a reed, too weak a foundation, upon which to base such sharp distinctions.").

³⁴ Goldberg & Zipursky, *supra* note 3, at 1148.

³⁵ COLEMAN, *supra* note 1.

³⁶ *Id.*

³⁷ *Id.* at 334. It isn't entirely clear what precisely the difference is between fault in the doing and fault in the doer. While Coleman spends a great deal of time discussing what constitutes a wrong and a wrongdoing, he doesn't say whether either instantiates a morals-based view. This analysis appears to be in line with the way Stephen Perry distinguishes

The point is easily stated: blame deals with the degree to which an agent is praise- or blameworthy for her conduct; it is concerned with the agent's culpability. Moral obligation has to do with what morality requires agents to do – what we might think of as the content of the moral law. Horder refers to the Aristotelian distinction between “normative” and “ascriptive” rules, where normative rules “concern what we ought (not) to do or are (not) permitted to do,” while ascriptive rules “concern the conditions in which we are (not) to be blamed for breach of a normative rule.”³⁸ To be sure, this explanation leaves quite a bit unanswered: there is wide disagreement about the content of our moral duties, and the term “blame” is particularly difficult to define. But I want to push on the basic intuition that there is something different about what we're obligated to do and what we're to blame for. In most cases, when a person does something she was under a moral obligation not to do – conduct which we would quite easily describe as “wrongful” – we blame her for what she has done. In the “normal” or “everyday” case, a person's doing something wrong is good reason to think that she is to blame. That is not to say, however, that one *necessarily* follows as a result of the other, and indeed, the two are not perfectly coextensive. As T.M. Scanlon noted, “[W]rongness and blame can come apart.”³⁹ The mere fact that a person has not lived up to her moral duties doesn't end the inquiry into whether or not she is to blame for that violation. This is how we make sense of intuitions of the form, “Well of course it was wrong of her to yell at her friend; but it wasn't her *fault* – her grandmother died just yesterday and was so distraught.”⁴⁰ There are cases, in other words, where a person did something wrong – she violated a moral duty – but she is not to blame for her wrongful conduct.⁴¹

* * *

between two general types of corrective justice theories of tort law, with Coleman standing (mostly) alone in holding that the obligation to compensate for a wrongful loss is a “general social responsibility” not specific to the tortfeasor, and “involving more widespread reasons for action.” Stephen R. Perry, *Corrective Justice & Formalism: The Care One Owes One's Neighbors*, 77 IOWA L. REV. 449, 450 (1992).

³⁸ Jeremy Horder, *Can the Law Do Without the Reasonable Person?*, 55 U. TORONTO L.J. 253, 264 (2005); *see also* Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137, 140 (2008) (discussing the distinction between “unlawful conduct” and “culpability”).

³⁹ T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 124 (2008).

⁴⁰ P.F. Strawson's extraordinarily influential work *Freedom and Resentment* develops this view:

If someone treads on my hand accidentally, while trying to help me, the pain may be no less acute than if he treads on it in contemptuous disregard of my existence or with a malevolent wish to injure me. But I shall generally feel in the second case a kind and degree of resentment that I shall not feel in the first.

P.F. Strawson, *Freedom and Resentment*, in FREEDOM AND RESENTMENT AND OTHER ESSAYS 5 (1974).

⁴¹ The two might also come apart in exactly the opposite way, where we blame someone even though she did not do anything wrong. SCANLON, *supra* note 39, at 124.

Considering a counterargument to the obligation/blame distinction will help to illuminate the point. Someone might argue that when we refrain from blaming the person who just lost her grandmother, we aren't saying that what she did was wrongful, but it was understandable that she did it. The fact that her grandmother's death made her so distraught makes the conduct *not wrongful*; that is, she did not breach any duty. Our moral obligation isn't just "do not yell at your friends," but rather, "do not yell at your friends unless you are seriously distraught over the death of a loved one." There isn't any real distinction between obligation and blame: what we are morally obligated to do are just those things that we would be blamed for if we did not do them.

There are three reasons why this "coextensivist" view cannot be a plausible account of moral obligation and blame. First, it does not accurately capture the way we articulate our moral obligations. God said, "Thou shalt not kill," not "Thou shall not kill unless you do not realize that your conduct might result in a death, or you are acting in self defense, or you are acting in defense of others, or you are acting on the basis of necessity because a great many people would die otherwise, or you are a soldier fighting in a just war and your victim is a part of the force you are fighting against . . ." and on and on. We do not think of the content of our moral obligations to be a prohibition of some kind of conduct followed by a very long (and perhaps infinite) set of disjuncts that act as exceptions to the prohibition.

Moreover, if we do not buy into the obligation/blame distinction, we are at a loss in explaining the concept of excuse.⁴² Roughly speaking, a person has an excuse when she did something that was wrong, but isn't blamed for her wrongful conduct because of one reason or another: "[A] defense of excuse . . . does not make legal and proper conduct which ordinarily would result in criminal liability; instead, it openly recognizes the criminality of the conduct but excuses it . . ."⁴³ So the distraught person who yells at her friends but does so because her grandmother just died has an excuse: her conduct was wrongful, but we have a reason to overlook her failing and not hold her accountable for it. Excuse plays an important role in criminal law,⁴⁴ and it tracks well with our everyday beliefs about morality. But under the coextensivist view, there is no such thing as an excuse: all conduct is either wrongful or it is not, and "excuses" are nothing more than particular disjuncts that appear in a proper formulation of our moral duties.

⁴² For the same reasons, the coextensivist view is also at a loss to explain the concept of justification, if one takes "justification" to mean cases where there is some reason that makes conduct that appears to be wrongful actually not wrongful (perfect self-defense and necessity in criminal law, for example, are traditionally viewed as justifications). *CRIMINAL LAW: CASES AND MATERIALS* 515 (John Kaplan et al., eds. 2008). However, because there is disagreement about what constitutes a justification—indeed, many commentators do not believe there is a rigid line between justification and excuse, see, e.g., *AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, PART I*, at 2-4 (1985)—I do not take up the issue here. For more on this point, see Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 *MCGILL L. J.* 91, 128-29 (1995).

⁴³ *State v. Leidholm*, 334 N.W.2d 811, 814 (N.D. 1983). Or as an alternative formulation, "[T]o say that someone's conduct is 'excused' ordinarily connotes that the conduct is thought to be undesirable but that for some reason the actor is not to be blamed for it." *CRIMINAL LAW*, *supra* note 42.

⁴⁴ See, e.g., sources cited *supra* notes 42–43.

Third and finally, the things that we consider in deciding whether a particular act is wrong are not the same set of things we consider in deciding whether someone should be blameworthy for engaging in wrongful conduct. For example, we are obligated not to kill. While there may not be widespread agreement about what exactly makes killing wrong, there are certain plausible candidates: killing decreases overall utility or preference satisfaction; it isn't conducive to human flourishing; it is a violation of the categorical imperative; it deprives the victim of a future life like ours. Similarly, while not everyone agrees what factors are relevant in assessing whether we should blame someone who kills, it plausibly has something to do with whether the person was insane, whether she was aware of what she was doing at the time, whether she was acting in self defense or defense of others, and so on. But this goes to show that what makes the conduct of killing wrongful is not the same thing that justifies our blaming someone who does kill. Even if it were true that the set of things which we are obligated not to do is perfectly coextensive with the set of things we are blameworthy for, that fact can't be deduced by formal logic – there would have to be some analytical connection, some argument, about why it is that conduct which is wrongful is, and is always, blameworthy.

B. What Is Moral Luck a Problem for?

The distinction between blame and obligation helps us to recognize that the problem of moral luck is really a problem for blame, but not for obligation, or, for that matter, anything else that might fall under the term “wrongdoing.” The explication of moral luck in Section I.B gives us a good starting point: the control principle says that agents are only *responsible* – in the sense of being blameworthy – for that which is under their control; it does not say anything about what agents are obligated to do. The concern that moral luck raises does not alter or push up against any of these moral obligations. Let's go back to the example of Sally and Sue, the two drivers. The concern was that we hold Sue more *blameworthy* than Sally, even though the relevant difference between Sally and Sue was a factor entirely outside of either agent's control. This concern had nothing to do with Sally's or Sue's moral obligations: both had the same duty to operate their vehicles in a safe manner, and that obligation was independent of whether Sally or Sue had any control over whether a child ran out onto the road. In other words, the fact that Sally and Sue did not have complete control over the consequences that resulted from their actions (that is, that consequential luck was involved) does not tell us anything about what Sally and Sue were obligated to do.

Consider a few theories in normative ethics. Preference utilitarianism holds that an agent is obligated to do just that which maximizes aggregate preference satisfaction among the relevant class of persons.⁴⁵ Kantian ethics requires that we only act on a maxim that we can will to be a universal law, or alternatively, that we always treat moral agents as ends, but never as means.⁴⁶ Virtue ethics tells us to

⁴⁵ *E.g.*, PETER SINGER, PRACTICAL ETHICS (2d ed. 1993).

⁴⁶ IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 79 (Mary J. Gregor ed., trans., Cambridge University Press 1996) (“Now I say that the human being and in general every rational being *exists* as an end in itself.”); *see also* CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 106 (1996). There are, depending on how one counts, one or two additional formulations of Kant's categorical imperative, but that is not relevant to the argument being presented here.

engage in conduct that leads to human flourishing.⁴⁷ Each of these is a theory about the content of our moral obligations. But if someone who is sympathetic to the law & economic theorists' use of moral luck were to object to any of these theories by arguing that it is arbitrary, or merely a matter of luck, whether a person in a given situation actually complies with her moral obligations, that would simply be nonresponsive to the prior question of what those moral obligations are—the argument is a non sequitur, having no bearing on the point at hand. And that is just because theories about our obligations are distinct from those about when and why we are blameworthy or praiseworthy.

There is one important caveat to the claim that moral luck does not pose any kind of problem for our view of moral blame. Recall the discussion of the three ways in which a person might respond to the problem of moral luck.⁴⁸ One of those three ways is to throw up our hands, say there is no adequate way to respond, and give up on the notion of moral blame altogether. In that case, moral luck would seem to pose a significant problem to our understanding of moral obligation: if we are giving up on an agent's being praiseworthy or blameworthy, how can we make sense of the idea that we're morally obligated to do anything? What would it mean to say that moral agents have obligations if they are never held accountable for failing to live up to them? I think this is a fair point, as far as it goes: if moral luck really is so intractable that there is no coherent view of blame, it might very well not make much sense to talk about our moral obligations.⁴⁹ At the same time, as I discuss below in the context of tort law,⁵⁰ making that move requires us to give up on too much of our most basic beliefs. It is a price, I think, that we are unwilling to pay.

IV. TORT LAW REVISITED

Having elaborated on the obligation/blame distinction and how it relates to the problem of moral luck, I now turn to the tort law. Moral luck doesn't get much traction against the traditionalist view. In Section IV.A, I provide some background on traditionalism, offering a brief account of some of its variations. In Section IV.B, I focus in on one variant—the obligations-based view—and use it as a kind of case study to demonstrate the severely limited reach moral luck actually has on traditionalism. Finally, in Section IV.C, I bring out what it is the law & economic theorists have gotten wrong in their use of moral luck.

A. Variants on Traditionalism

The term “traditionalism” isn't quite as univocal as one might think. It captures a number of divergent theories that can only be loosely grouped under the same term. In giving this brief overview, I borrow heavily from Stephen Perry's taxonomy.⁵¹

⁴⁷ E.g., VIRTUE ETHICS (Stephen Darwall ed., 2003); Julia Annas, *Virtue Ethics*, in THE OXFORD HANDBOOK OF ETHICAL THEORY 515 (David Copp ed., 2006).

⁴⁸ See *supra* Section II.B; see also *infra* Section IV.B.

⁴⁹ I should say that while this is a plausible argument, it is by no means easy or obvious. One could coherently argue that even though we are never to blame, there still is a moral law which imparts obligations on us.

⁵⁰ See *infra* Section IV.B.

⁵¹ Perry, *supra* note 37, at 449.

Perry recognizes two broad categories that fall under my use of the term “traditionalism”: the first holds that the purpose of any theory of corrective justice is to annul wrongful gains or losses. Importantly, the responsibility to annul does not belong to the tortfeasor alone, but is a social obligation.⁵² Jules Coleman, the most prominent defender of this type of theory, argues that while a wrongful loss does give rise to an obligation to repair, that obligation does not belong to the tortfeasor exclusively: “[I]t is a general social responsibility involving more widespread reasons for action.”⁵³ The second, and dominant, sub-category of traditionalism regards corrective justice as “involving a limited moral relationship that holds only between the injurer and victim.”⁵⁴ In certain situations, a person who causes another’s injury is obligated to compensate the victim for that injury. The trick, of course, is to define what the “certain situations” are that give rise to this kind of obligation. To answer this question, Perry identifies three sub-sub-theories: the restitution theory, the localized distributive justice theory, and the volitionist theory. The restitution theory says that “A has come into possession of something that belongs to B and hence must give it back.”⁵⁵ While Perry initially grounds the argument in an Aristotelian view of corrective justice,⁵⁶ he recognizes that modern scholars have also taken this approach. Richard Epstein, for example, argues for a strikingly strong connection between takings in property law and destruction or injury in tort law, asserting that “torts themselves are a sub-class of takings.”⁵⁷

Under the localized distributive justice theory, A bears a causal connection to B’s loss and, as between the two of them, it is better that A bear the loss. It comes in two forms.⁵⁸ The strict liability view (which Perry offers a rather devastating critique of⁵⁹) says that it is the fact that A acted which provides the reason to shift the loss to B; under the fault-based view, it is that A acted *wrongfully* that grounds the obligation to compensate: as between a faulty injurer and faultless victim, it is better that the victim not bear the loss.⁶⁰ Perry places Tony Honoré firmly in this camp,

⁵² *Id.* at 449-50.

⁵³ *Id.* at 450; JULES COLEMAN, RISKS AND WRONGS 324 (1992); Coleman & Ripstein, *supra* note 41 (arguing that the proper concern of corrective justice is to answer the question, “Who owns which of life’s misfortunes?”).

⁵⁴ Perry, *supra* note 37, at 450.

⁵⁵ *Id.* at 451.

⁵⁶ *Id.* at 452-55.

⁵⁷ *Id.* at 458-59; *see also* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 38 (1985).

⁵⁸ Perry, *supra* note 37, at 461, 467.

⁵⁹ *Id.* at 463-64.

⁶⁰ *Id.* at 467-68. Perry critiques this view by arguing that it is arbitrary to “localize” its scope so that it only applies to the victim and the alleged tortfeasor. Carried to its logical end, the fault-based redistributivist view is not localized at all, but requires that “social burdens . . . be distributed among persons in accordance with the degree to which they have exhibited moral deficiency or shortcoming.” *Id.* at 471-72. The criticism is not particularly persuasive; the argument is that there is no principled reason to limit application of the redistribution of harm to the victim and the tortfeasor. However, it is only arbitrary if we concede Perry’s claim

recognizing that Honoré's argument depends on the "moral deficiency or shortcoming" of *A*.⁶¹ For this reason it is clear that Honoré is wedded to a blame-based conception of traditionalism: In *Responsibility and Fault*, Honoré tackles the problem of moral luck head-on, recognizing that the control principle is at odds with the objective standard of negligence.⁶² He considers possible justifications for imposing liability in these kinds of cases that sound in policy arguments, concerns about availability of proof, theories of promising, and the like.⁶³ Ultimately finding these explanations unsatisfactory, Honoré constructs a theory of tort as a "betting system" where the system is fair because it "entail[s] that when we bear the risk of bad luck we also benefit if our luck is good"⁶⁴ – we take the good with the bad. "The person concerned, though he cannot be sure what the outcome of his action will be, has chosen to act in the knowledge that he will be credited or debited with whatever it turns out to be."⁶⁵

Finally, the volitionist theory grounds the obligation to compensate in the fact that *A* engaged in voluntary action. Under the strict-liability volitionist view, *A* is responsible to *B* just because all people are responsible for the proximate effects of their voluntary actions, whether good or bad; under fault-based volitionism, *A*'s engaging voluntarily in *wrongful* action imparts on *A* an obligation to compensate.⁶⁶ Goldberg and Zipursky are probably best understood as taking a fault-based volitional view, where the term "fault" has something to do with moral blame.⁶⁷ In their article, they consider the moral luck objection, recognize the intuitive pull of the argument that it is "indefensible to treat someone who does his best to be careful as having acted in a wrongful manner,"⁶⁸ and move on "to consider how much of a notion of wrongdoing is left when we are dealing with a standard . . . that does not assess behavior in terms of or with sensitivity to incompetencies . . ."⁶⁹ The fact that Goldberg and Zipursky think of moral luck as getting traction against the notion

that the theory should be expanded to take into account the moral worth of actions that did not causally contribute to the injury at issue. *Id.*

⁶¹ *Id.* at 472-73.

⁶² TONY HONORÉ, *RESPONSIBILITY AND FAULT* 18 (1999).

⁶³ *Id.* at 18-22.

⁶⁴ *Id.* at 24.

⁶⁵ *Id.* at 31. This argument is very close to Jeremy Waldron's adaptation of David Lewis's "penal lottery." See *infra* Section IV.C. Importantly, this lottery concept grapples only with consequential luck, and does not provide an answer to the concerns we have with respect to circumstantial or constitutive luck: there isn't a meaningful sense in which we choose to bet with respect to the circumstances we find ourselves in or the kind of characteristics that we have.

⁶⁶ Perry, *supra* note 37, at 474-75.

⁶⁷ However, I think the paper is frustratingly ambiguous on this point, and the pair could plausibly be placed under the fault-based localized distributive justice view as well. Their theory clearly depends on the wrongfulness of *A*'s conduct, but they do not discuss what the mechanism is that makes *A*'s wrongful conduct give rise to an obligation to repair.

⁶⁸ Goldberg and Zipursky, *supra* note 3, at 1153.

⁶⁹ *Id.* at 1154.

of “wrongs” suggests they understand the term to refer to blame, but the point is never clearly articulated. The argument seems to be that while tort law is not exactly the same as our intuitive understanding of wrongdoing – where “wrongdoing” here probably, but not necessarily, means blameworthy conduct – it is “close enough” to still be considered a wrong: “These five features are quite enough to earn legal negligence, and torts more generally, the status of wrongs.”⁷⁰

Perry, for his part, finds that these theories all come up short in one way or another. He advocates instead for a theory where “the localized distributive argument . . . and the agency-oriented understanding of outcome-responsibility [the strict-liability volitionist theory] are complementary.”⁷¹ A person’s voluntary action which proximately causes a loss entails that she is “outcome responsible” for that loss, and that means that she bears a special relationship to that loss – it is in some sense hers (the strict liability volitionist argument). And among those people who have this kind of a normatively significant connection to a loss, it is morally preferable that the person who acted wrongfully bear it (the distributive argument).⁷²

B. The Obligations-Based View

In this Section, I set out a traditionalist theory of tort law which makes use of the obligation/blame distinction discussed in Section III.A. I do so not to assert that this particular theory is correct, but as a means to bring out just how narrow moral luck’s application is to traditionalist views of tort law.

The distinction between moral blame and obligation discussed above permits the traditionalist to neatly avoid the problem of moral luck in tort law by constructing an obligations-based theory. The argument is quite simple: moral luck, if it is a problem at all, is one for our understanding of blame, not obligation. Traditionalism connects tort law to morality via moral obligation, not blame. Therefore, moral luck gets no traction against the theory.

The key move in this argument is, of course, that the traditionalist view “links up” to morality on the level of moral obligation, rather than blame. To make the proposal clearer, let us consider an alternative theory, the obligations-based view, which holds that the connection between tort law and morality is on the basis of moral obligation: when we are deciding *what kinds of actions* constitute tortious conduct, this approach argues, we should look to normative ethics. This is not to say that the set of our moral obligations is coextensive with the set of our duties under the tort law; they can and do come apart in significant ways. But in the same way that the criminal law bears a substantial connection to morally blameworthy conduct,

⁷⁰ *Id.* at 1156. Zipursky has also proffered a descriptive account of tort law as a model of “civil recourse,” where tort is interpreted as a “civilized transformation” of an instinct for retributive justice. Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 5 (1998). A retributive justice-based account of tort would, of course, make use of moral blame.

⁷¹ Perry, *supra* note 37, at 497.

⁷² *Id.* at 499. While I am generally sympathetic to Perry’s theory, I am, for the reasons give above, not sure that the strict liability volitionist argument is necessary to limit the scope of the localized redistributive theory, and think a plausible claim can be made that localized distributivism taken alone can give rise to a tortfeasor’s obligation to repair the victim’s loss.

but does not capture all instances where an agent is blameworthy,⁷³ so tort bears a substantial connection to moral obligation. Tort law is not so much a law of *wrongs* as it is a law of *wrongdoing* which captures, in some significant way, the kind of conduct that we as moral agents are and are not permitted to engage in. To go back to Perry's terminology, this falls under the second sub-class of corrective justice theories of tort law, those that hold that a person who causes another's injury is, in some situations, obligated to compensate the victim for that injury. The phrase "some situations" is filled out by making reference to our moral duties: a person has an obligation to redress an injury when she wrongfully and proximately causes that injury, and "wrongfully" means "acting in violation of her moral obligations." This obligations-based approach is ambivalent between Perry's fault-based local redistributive his fault-based volitionist theories. Moreover, while I classify the obligations-based view as "fault-based," the theory can still capture torts of strict liability: the move is to say that our moral obligations include certain duties to succeed (not only duties to try) a la Gardner.⁷⁴ In any case, the claim is that the obligation to redress exists any time *A* violates her moral obligations and *B* is proximately harmed as a result, but it does not specify the precise mechanism by which that obligation to redress is brought about: it may be because *A* acted wrongfully and as between *A* and *B*, it is preferable that *A* bear the loss;⁷⁵ or because *A* voluntarily engaged in wrongful conduct, and one of the normative incidents of *A*'s wrongful conduct is that she must compensate *B*.⁷⁶

This line of reasoning explains cases like the classic *Vosburg v. Putney*⁷⁷ – a fact that goes to show how little traditionalists actually give up by avoiding blame-based views of tort. There the defendant, an eleven-year-old boy, hit the plaintiff's shin with his toe while the two were at school.⁷⁸ The jury specifically found that the defendant did not intend to do any harm to the plaintiff, but the court upheld the award.⁷⁹ The defendant might very well not be to blame for his conduct – he

⁷³ There are still actions an agent could do that are blameworthy but are not criminalized: lying, for example, or cheating on one's partner. The reasons given in the criminal law context for why we do not criminalize certain kinds of blameworthy conduct will also apply in the context of torts: protection for individual autonomy, limiting the scope of the coercive powers of government, respect for people's privacy, etc.

⁷⁴ See *supra* note 28 and accompanying text. This feature folds in nicely with the arguments in favor of strict liability. Much of the justification of non-fault liability is utilitarian in nature: by imposing strict liability, we are able to maximize utility in a way we wouldn't under a negligence rule. But to make that argument means that you buy into utilitarianism, at least to some extent, as a theory of normative ethics. And that means that your view on normative ethics is informing your approach to tort law, which looks very much like the obligations-based view I've been discussing here.

⁷⁵ The obligations-based theory is different than Tony Honoré's in the way it fills out the term "wrongfully": while Honoré will make references to the culpability or moral worth of *A*, the obligations-based view grounds the term in the violation of one's moral obligations.

⁷⁶ This approach would also part ways with Goldberg & Zipursky's fault-based volitional theory in the same way – in how it defines "wrongfully."

⁷⁷ *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891).

⁷⁸ *Id.* at 403.

⁷⁹ *Id.*

certainly had no intent and did not believe that his action would hurt his schoolmate – but the plaintiff was entitled to recover nonetheless. “[S]uch act was a violation of the order and decorum of the school, and necessarily unlawful.”⁸⁰ Once the plaintiff’s actions were found to be a violation of the relevant conduct-governing rules – once it was determined that the defendant violated an obligation – that was the end of it, with no inquiry into defendant’s culpability necessary. On any traditionalist view that connects the tort law with moral blame however, it is much harder to make sense of *Vosburg*: the fundamental characteristic of tort law – its concern with blameworthiness – is entirely irrelevant to the case.⁸¹

* * *

Whether one ends up finding the obligations-based view of tort compelling, it should be obvious by now that the same sort of response to the problem of moral luck can be made on behalf of number of traditionalist theories. As Part III demonstrated, moral luck does pose a problem for moral blame, but not for moral obligation. As a result, traditionalist views that make use of blame – certainly Honoré’s, and probably Goldberg and Zipurksy’s – have to contend directly with moral luck and furnish a compelling answer. Theories that are grounded in moral obligation, on the other hand, do not. And as for those theories that do not make use of either concept (here I am thinking primarily of Richard Epstein’s restitution theory and Perry’s combination of outcome responsibility and fault-based localized distributive justice), it would depend on the specifics of the theory. For Perry in particular, it depends on what he means when he says a person has “a normatively significant connection with [an outcome] that is capable of affecting her subsequent reasons for action.”⁸² The larger point being made in this Section – in this Article – is that the problem of moral luck, properly understood, doesn’t capture all that much of the wide spectrum of traditionalist theories. It certainly poses a problem (though not an insurmountable one, as I discuss in Section III.B) for those that are based on blame, but it doesn’t get anywhere with a great many others.

C. The Law & Economics Theorists and Wrongdoing

Having run through the theory underlying the problem of moral luck and demonstrated that it doesn’t really pose a problem for most variants of traditionalism, we can now turn to the way this objection tends to be articulated and see where the argument goes awry. In particular, law & economic theorists who have used moral luck as an objection to traditionalism have consistently failed to recognize that the term “wrongdoing” may actually refer to a number of different concepts that are frequently conflated. That is, the standard use of moral luck by the law & economic theorists assumes that “wrongdoing” or “morality” is a univocal term, susceptible to only one meaning – and that this meaning is all about blame. Judge Calabresi, for example, takes this narrow, blame-based view when he says:

⁸⁰ *Id.* at 404 (emphasis added).

⁸¹ Indeed, if the traditionalist view really is meant to capture a view of blameworthiness, then I think it falls prey to the straightforward critiques of the traditionalist view that are made by Holmes, Goudkamp, Calabresi, and Posner, among dozens of others, discussed below.

⁸² Perry, *supra* note 37, at 497.

If the time-honored, though somewhat shopworn, distinctions between legal and moral fault and between damages and degree of culpability which prevail in tort law do not sufficiently demonstrate this proposition [that the purpose of tort law isn't to punish], then surely the prevalence of insurance priced on the basis of categories that have little to do with any individual insured's "goodness" or "badness" must.⁸³

Calabresi's argument is that tort law cannot be reasonably understood as a way of punishing a tortfeasor for her negligent conduct, and so we must instead view tort as a system of "nonfault liability" that seeks to reduce the cost of accidents.⁸⁴ Judge Posner's implicit conflation of blame and obligation is even more apparent:

Characterization of the negligence standard as moral or moralistic does not advance analysis. The morality of the fault system is very different from that of everyday life. Negligence is an objective standard. A man may be adjudged negligent though he did his best to avoid an accident . . .⁸⁵

As a result, he argues, we should adopt an "economic meaning of negligence," discounting any morally based conception of tort.⁸⁶ Finally, consider an article by James Goudkamp which begins with the assertion, "The prevailing understanding of the tort of negligence is that notions of moral *blameworthiness* furnish the philosophical foundation for liability."⁸⁷ As a defense of this claim, Goudkamp quotes an Australian jurist who said, "[L]iability for negligence . . . is no doubt based upon a general public sentiment of moral *wrongdoing* for which the offender must pay."⁸⁸ In each of these three cases, the analytical move is that tort law cannot be squared with a blame-based traditionalist view, and so we must give up on traditionalism entirely.⁸⁹ But of course, Calabresi, Posner, and Goudkamp do not consider the distinction between blame and obligation (or between blame and any other concept that might fit under the heading of "wrongdoing," "fault," or "morality"): Calabresi only refers to moral culpability; Posner does not seem to be aware that the terms "moral" and "moralistic" might be referring to very distinct concepts; and Goudkamp explicitly conflates the term "wrongdoing" with "blameworthiness." The argument for each is that the control principle is a foundational axiom of morality, tort law is at odds with the control principle, and therefore there can be no coherent, morals-based theory of tort. But as I hope to have shown, this argument misses the mark because it fails to recognize the various concepts the word "morality" might be referring to, and therefore ignores the possibility that there are traditionalist theories that are *not* subject to moral luck.

⁸³ Calabresi, *supra* note 11, at 713-14.

⁸⁴ *Id.* at 713.

⁸⁵ Posner, *supra* note 10, at 31.

⁸⁶ *Id.* at 31-32 (citing Holmes, *supra* note 29, at 108).

⁸⁷ Goudkamp, *supra* note 28, at 343 (emphasis added).

⁸⁸ *Id.* at 344 (emphasis added).

⁸⁹ Although, as I mentioned earlier, I *do* find these objections to blame-based views of tort quite devastating.

The law & economic theorist may argue that even if the traditionalist can avoid the technical, philosophical problem of moral luck, she will still have to contend with something closely akin to it. For no matter how we define “wrongdoing,” the same facts are true: whether and how much anyone recovers in tort is completely arbitrary. A morals-based theory must pay heed to the proportionality principle (a permutation on consequential luck): “[T]he extent of the loss a person should be required to bear ought to be proportional to the degree of moral shortcoming that he or she has exhibited.”⁹⁰ It’s important to recognize just how strong the intuitive pull of this response is: while philosophers can work out a complex theory to explain why and how the violation of a duty gives rise to a corresponding obligation to remedy the harm resulting from that violation, there’s a strong sense in which tort law is simply *unfair*. Even if the point isn’t to blame someone for her breaching a duty, people’s lives go on much differently as a result, and this calls into question the moral justification of tort law as a legal institution. Jeremy Waldron’s important work, *Moments of Carelessness and Massive Loss*,⁹¹ puts a sharp point on this critique, arguing that tort law is fundamentally unfair on two fronts: (i) in the way that it distinguishes between people who have acted negligently on the basis of whether their negligent conduct caused a wrongful injury, and (ii) in how it can impart massive loss onto a tortfeasor for very short, well, moments of carelessness.⁹² Waldron—indeed, any argument that rests its critique of tort on notions of fairness—recognizes that such a critique relies on the idea that tort is based on notions of “just dessert,”⁹³ which invokes the idea of blameworthiness. In responding to those, like me, who argue that moral blame has no place in tort, Waldron says that “[i]t would be wrong . . . to infer that individual moral dessert, broadly construed, has no place in our understanding or assessment of tort liability.”⁹⁴ We invoke notions of fairness in all sort of situations—arguing about whether students “deserve” their grades, entrepreneurs their profits, and so on—and “a gaping disproportion between individual outcomes and the morality of individual characters and conduct seems to be a primary form of unfairness,”⁹⁵ anywhere we find it.

While Waldron’s argument—as well as any argument sounding in fairness against tort law, which necessarily makes use of retributive justice⁹⁶—is well taken, there are several lines of entry that deflate much of his concern as it relates to this Article. To begin with, this criticism goes to the very heart of tort law: tort frames

⁹⁰ Perry, *supra* note 37, at 470.

⁹¹ Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 387 (David G. Owen ed., 1995). In this article, Waldron considers the situations of Fate and Fortune, who both drove their cars negligently down a city street. While Fortune is lucky insofar as no one is hurt by his conduct, Fate’s negligence causes a massive amount of damage – \$5 million.

⁹² *Id.* at 389.

⁹³ *Id.* at 390.

⁹⁴ *Id.*

⁹⁵ *Id.* at 391.

⁹⁶ In this Section I refer to the fairness critique as “Waldron’s argument,” but the arguments made here apply with equal force to others who have invoked fairness as a reason to reject traditionalism.

the question of who should bear the costs of a particular injury as between the injurer and her victim, and Waldron asks why we shouldn't "abandon the framework that confines our attention to the two of them, and seek a way of addressing accident costs that does not involve arbitrary elements of this sort."⁹⁷ As such, it cannot be used as an internal critique to favor one interpretation of tort law over another: it applies with equal force to all theories of tort. The same point is made, from a corrective justice perspective, by Perry:

[S]uch a claim would be based on a misunderstanding. Distributive justice [only requires] that there be a uniform relative proportionality between the need or merit or fault of each of the members in the distributive group and the respective shares they receive . . . If we assume with Prosser that the injurer in a particular case of harmful interaction was at fault and that the victim was entirely innocent, then the only proportionality that can rationally be sought is met by placing the entire loss, whatever its size, on the injurer alone.⁹⁸

The business of tort is to allocate a loss—whatever its size—to those who should bear it. The debate between the law & economic theorists and the traditionalists is what rule that allocation should be governed by: efficient reduction of accidents costs or moral fault. To argue that the size of the loss is disproportionate to the allocation rule simply misses the point of tort law, which is to take a preexisting loss of whatever size and distribute it appropriately. True, the particular allocation rule one advocates for might be subject to the problem of moral luck (for example, blame-based theories in traditionalism), but the proportionality is an objection to tort law *qua* tort law. And therefore the fairness critique of tort isn't unique to traditionalist theories, but would apply equally well to the perspective of the law & economic theorists: in the same way that law & economic theorists wouldn't defend utterly draconian punishments on the mere ground of efficient reduction in crime, in the realm of tort a critique of fundamental fairness would apply to equally the law &

⁹⁷ *Id.* at 397. This is quite close to Coleman's assertion that a wrongful loss gives rise to a general or social obligation to redress, rather than applying only to the tortfeasor. See sources cited *supra*, note 53. Waldron also claims that Coleman and others are wrong in asserting that "the legal system is either imposing the loss on Fate or imposing the loss on Hurt, and the only question is which." Waldron, *supra* note 91, at 395. He says that it is:

[o]dd . . . almost to the point of incoherence, to say that a refusal by the courts to make Fate compensate Hurt would amount to the imposition of liability on Hurt. Liability is a two-term relation: if Fate is held liable, he is held liable to hurt. To whom, on Coleman's account, is Hurt held liable [. . .] ?

Id. The answer to this, of course, is no one. Waldron isn't aware that the term "liability" can be understood as something that "holds someone back; a handicap." This is the everyday sense of the word, in the way that we say things like, "My short temper is a liability." I suppose it's a liability to me, but that is only in the same sense that Hurt's loss is a liability to him. All of this is just to point out that Coleman is, I think, exactly right in asserting that a failure to assign Hurt's loss to Fate is tantamount to saying that Hurt must bear the loss. Any argument otherwise would have to be making implicit use of the doing/allowing distinction, which isn't the route Waldron is taking.

⁹⁸ Perry, *supra* note 37, at 471.

economics view. It *is* true that Waldron's argument poses a problem for any affirmative defense of tort law, but that is not the focus of this Article.

Second, Waldron's argument incompletely analyzes the relationship between tort law and retributive justice. Waldron's fairness critique is predicated on the discrepancy between just desserts and tort liability. But at the same time, he is only concerned with moments of *massive* loss and *minimal* carelessness: he says, after all, that it's the "gaping disproportion between individual outcomes and morality"⁹⁹ that he is most concerned about, and recognizes that "[t]ort law is not criminal law, and tort liability is certainly not supposed to duplicate retributive justice."¹⁰⁰ But if Waldron is right that the tort law is unfair precisely because of this disconnect between moral dessert and tort liability, why should we think that a small but real discrepancy between the just desserts of the tortfeasor and the liability imposed on her is permissible? That is, if tort law is not meant to *duplicate* retributive justice, but is still beholden to a critique based on retributive justice grounds, just how much unfairness is too much in tort, and why should we draw the line at any particular point? This concern is particularly apparent a few pages later when Waldron discusses an adaptation of David Lewis's penal lottery as a response to his unfairness argument:

In some contexts, macabre appropriateness may be all there is to fairness. There is a strong strand of retributivism which holds that the imposition on a miscreant of a pain, loss, or risk which exactly matches what he imposed on his victim is a good thing in itself But, as Coleman reminded us, the logic of torts *is not necessarily the logic of retribution*. In retributive justice, paying back the criminal for his crime is the whole point In tort, there is a different main point¹⁰¹

Waldron is using retributive justice as both a sword and a shield: it is sufficiently connected to tort to throw out the entire institution as arbitrary and unfair, but not so connected that a response to the fairness objection on retributive grounds gets anywhere. Such an incompletely theorized objection—one that seems peculiarly designed as an attack on tort law—should not be accepted.

Waldron's objection also folds back into the broader discussion about moral luck, demonstrating that the unfairness critique isn't really so set apart as its advocates might believe. As I noted in Part II, a host of philosophers—Nagel, Williams, Thomson, and others—argue that the proper response to moral luck is to say that luck *does* play a significant role in our evaluations of people's moral character.¹⁰² The fact that Fate, but not Fortune, actually caused significantly more harm to his victim means that he is actually more blameworthy than Fortune, and the

⁹⁹ Waldron, *supra* note 91, at 391.

¹⁰⁰ *Id.* at 403.

¹⁰¹ *Id.* at 406 (emphasis added). As Goldberg and Zipursky point out, the Supreme Court doesn't consider compensatory damages "fines" within the meaning of the Eighth Amendment, suggesting along these lines that tort doesn't treat damages like punishment, keyed to a notion of desert. Goldberg & Zipursky, *supra* note 3, at 1141 (citing *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263-64 ("[T]he Excessive Fines Clause . . . does not constrain an award of money damages in a civil suit.")).

¹⁰² *See supra* Section II.B.

concern about the relationship between blameworthiness and the amount of loss evaporates. And so Waldron's critique is based on an implicit assumption about moral luck: namely, that the proper response to the issue is to give up on some of our everyday judgments, rather than rejecting the control principle.¹⁰³

Moreover, Waldron's conclusion is something that I—and anyone else interested in defending tort law—can agree with. An insurance scheme which more evenly distributes wrongful losses might very well be a better system. But the fact that a better system exists from a public policy perspective, or even as a matter of general fairness or more broadly as a normative judgment, isn't to say that we must reject every alternative. In the criminal context, for example, we might prefer a system that reduces the commission of crimes *ex ante* by investing in social programs rather than punishing criminals *ex post*. But that doesn't prove that it's unjust to mete out punishment to those who do break the law. Stating a preference for some state of affairs isn't to say that any other state of affairs is *wrong*.

Finally, Waldron's argument is, at bottom, an intuition pump. He suggests that our intuitive response to moments of carelessness and massive loss is that tort exacts an unfair outcome in an unfortunate situation. Intuition pumps are, of course, a common tool of philosophers and there is nothing wrong with using them. But in the end, I have to admit that I just don't buy it. It certainly is horrible that Fate has to suffer such a significant loss as a result of his minimally negligent conduct. But it is better that he—rather than Hurt or anyone else—bear it because he is the one who wrongfully caused that loss. It would certainly be a much better state of affairs if there were no loss, and perhaps it would even be better if a social insurance scheme existed to spread the cost of the accident around a wider pool. But that does not change the fact that, unless Hurt is compensated some other way, Fate has a duty to make things right for Hurt.

V. UNINTENDED COMMITMENTS

At this point it is worth stepping back to consider the implications of the law & economic theorists' use of moral luck as an argument against traditionalism and focus in on the other theoretical baggage that accompanies this argumentative move. This Part highlights a wholly unrecognized problem of using moral luck in the context of tort law and provides an independent basis for rejecting the objection. Contrary to what the law & economic theorists might assume, if we do find that moral luck requires us give up on any form of traditionalism, we will be forced to take on quite a bit else in the field of moral philosophy. That is, even if the law & economic theorist admits the moral luck objection doesn't get traction against a non-blame-based traditionalist view and confines her critique to blame-based traditionalism, this limited application of the argument still creates significant problems. To see why, we should first consider again the options that are available to deal with the problem of moral luck.

A. *The Options*

As I discussed above, the problem of moral luck is generated by the contradiction between the control principle and a great many of our everyday moral judgments. As a result, we have three options to resolve this conundrum: we can find that the

¹⁰³ For a longer discussion about the ways we might respond to moral luck, *see infra*, Part IV.

problem is intractable and give up on the idea moral blameworthiness entirely, we can reject our everyday moral judgments, or we can reject the control principle. Let's consider each of these options in turn.

1. Reject Normative Ethics

Our first option is to decide that the problem of moral luck is irresolvable: it is a decisive objection to our understanding of normative ethics. The problem, this argument goes, is that the control principle is too fundamental to be abandoned. The idea that a person can be held morally responsible for something out of her control is anathema to our most basic beliefs about morality. But at the same time, our everyday moral judgments are infused with luck. Day in, day out, we make judgments on the moral responsibility of people in ways that are based entirely on fortune. As a result, there's no way to make sense of the way we make moral evaluations, and so we have to get out of the business altogether: moral judgments are out; moral responsibility is out; and praise- and blameworthiness must likewise be rejected. This *would* get us to where the outcome the law & economic theorist is aiming for. If we give up on blame, we would of course be giving up on blame in the context of tort law. This move might even require us to give up on an obligations-based theory of tort. This goes back to the caveat I noted in Section III.B: If we are giving up on the idea of blame entirely, we might conclude that there isn't much of a reason to care about our moral obligations in the first place. And if giving up on blame entails our giving up on moral obligation, we would have to give up on moral obligation in the context of the tort law.

2. Reject the Control Principle

Our second option is to choose to reject the control principle, as Nagel, Williams, and Gardner urge us to do,¹⁰⁴ and accept that blame is rife with luck. In the contest between the control principle and our intuitive moral judgments, it is the control principle that must give way. But the problem with this option for the law & economic theorists is that if we adopt it, the problem of moral luck doesn't get up off the ground, and hence it poses no problem for traditionalism: if our everyday judgments about blame really are infused with luck, then the law & economic theorist cannot claim that tort law's dependence on luck is at odds with blame. We've handled the problem of moral luck by giving up on the premise that was being used as a wedge against traditionalism—that people cannot be held blameworthy for factors out of their control. In cases where it seems arbitrary that *A*'s negligent conduct causes substantial injury while *B*'s negligence causes no harm at all, there is a moral justification for tort law's treating the two differently: *A* is more blameworthy than *B*, and this is so just because his conduct harmed another person.

3. Reject Our Intuitions

The last option has us give up our everyday intuitions and hold fast to the control principle. When our intuitive moral judgments conflict with the control principle—when we see consequential, circumstantial, or constitutive luck rear their ugly heads—we should think that it's our intuitions that have steered us wrong. But doing so would require us to give up on more than just some of our moral

¹⁰⁴ See sources cited *supra* note 15.

intuitions.¹⁰⁵ Consider consequential luck. Assuming that we hold steady to the control principle, we must deny that there is a moral distinction between two situations where the only difference has to do with a factor not under the agent's control. In the example of the two drivers discussed in Section I.B., Sally and Sue bear the same degree of moral responsibility for their negligent driving. As a result, we must accept the more general proposition that when an agent is held morally blameworthy, the thing that she is held blameworthy for cannot be the consequences she causes: otherwise Sally and Sue, who brought about different consequences, could not be equally blameworthy. To be sure, this view is hardly revolutionary: a number of thinkers from Kantians to rule utilitarians have thought that moral blame isn't dependent on the consequences of an agent's actions. But at the same time, it is *not* universally accepted, and it is compelled by our taking this third option.

Turning to circumstantial luck, the third option also requires us to reject our moral judgments when they depend on circumstances that are outside of the agent's control, and thus conflict with the control principle. This again goes back to Section I.B, and in particular to those cases where person *A* did do something morally wrong, and person *B* *would have* done—but did not actually do—precisely the same action if placed in the same circumstances. It was only because *B* had the good fortune not to face that particular situation that she avoided the bad conduct. Our intuitions suggest that *A* is more blameworthy than *B*. But as with consequential luck, this intuition conflicts with the control principle: we assumed both that if *B* were placed in the same situation as *A*, he would have engaged in the wrongful conduct, and that it was outside of both parties' control whether they did face that particular situation. Having made these assumptions, we can say that it was out of *B*'s control whether or not he actually engaged in the wrongful conduct. And since the control principle holds that no one can be held to blame for those factors that are out of her control, we must conclude that *A* and *B* are equally blameworthy. Now we've arrived at a less intuitive proposition: most people are uneasy about the idea of holding a person blameworthy only because she *would have* done a bad thing if the circumstances were different, but didn't actually do the bad thing, yet that is exactly the claim we must adopt. Moreover, in the same way we rejected that consequences can serve as the basis for moral blame, we must now also reject the notion that a person is morally blameworthy for her acts or intentions:¹⁰⁶ because *A* and *B* must be held equally blameworthy and *A* and *B* committed different acts and had different intentions, their blameworthiness cannot be dependent on either their acts or their intentions. In other words, the problem of circumstantial luck poses a conflict between our being responsible for our actions and intentions, on the one hand, and the control principle, on the other. As a result, we have to give up on our acts or intentions serving as the basis for moral blame.

Having concluded that a person cannot be held blameworthy for the consequences she causes, her conduct, or her intentions, we have to consider what

¹⁰⁵ While no particular paper makes the argument I put forward in this Section explicitly, Daniel Statman's *Moral Luck* provides background reading that fleshes out my analysis. See generally MORAL LUCK, *supra* note 15.

¹⁰⁶ By "intentions" I mean to draw a distinction between an agent's actions or the consequences she causes and what she intended her actions or consequences to be. In criminal law, this comes up in the context of mens rea. See MODEL PENAL CODE § 2.02, and in mistakes of law and fact defenses, at § 2.04.

she *can* be blamed for. Daniel Statman makes what might now be the obvious move in his introduction to *Moral Luck* when he compares two people, one who actually committed a murder and the other who attempted to do so but failed: “In the eyes of God, the actual and the would-be murderers bear the same blame.”¹⁰⁷ While this position might sound a bit too theological, Statman is trying to bring out the distinction between evaluating an agent’s actions and evaluating the agent herself. The idea follows one of Judith Jarvis Thomson’s formulations of blame:

A person P is to greater or lesser blame for doing (or being) such and such, where his doing (or being) the such and such is unwelcome, just in case P’s doing (or being) the such and such is a stronger or weaker reason to think that P is a bad person.¹⁰⁸

People are to blame, in other words, for just those things that indicate they are *bad*, in a moral sense. Thomson is certainly not the first thinker to propose such an interpretation of blame: the idea of a moral character in one form or another can be traced directly to Aristotle’s *Nicomachean Ethics* and is a central feature of contemporary virtue ethics. Nevertheless, the quote nicely captures the idea that blame has something to do with a person’s character. A similar view is defended by Nomy Arpaly. Arpaly begins her discussion on moral worth with Kant’s so-called “prudent grocer,” the person who fairly charges his young clients for the goods they buy even though he could get away with unethically charging more. He does this not because it is the right thing to do but because he knows that if he made it a practice to overcharge people who didn’t know better, his reputation would be tarnished and his business would suffer. Arpaly argues, in the same vein as Barbara Herman,¹⁰⁹ that even if the prudent grocer did the right thing every time, there is still something about his act which isn’t morally praiseworthy: “[T]he grocer’s morally right action does not stem from any responsiveness on his part to moral reasons.”¹¹⁰ She claims that because the grocer’s “*reasons for action* do not correspond to the action’s *right-making features*,”¹¹¹ his actions do not display or have any moral worth. “For an agent to be morally praiseworthy for doing the right thing is for her to have done the right thing for the relevant moral reasons – that is, the reasons for which she acts are identical to the reasons for which the action is right.”¹¹²

Turning back to tort law, our third option of giving up on our intuitions in favor of the control principle does work well for the law & economic theorist: the idea is that when the control principle and our everyday intuitions conflict, we should give up on our intuitions. In the realm of torts, that means that when the control principle conflicts with principles of tort law, we should give up on the idea that tort law has anything to do with blame.

¹⁰⁷ Daniel Statman, *supra* note 15, at 20.

¹⁰⁸ Judith Jarvis Thomson, *Morality and Bad Luck*, in *MORAL LUCK*, *supra* note 15, at 202.

¹⁰⁹ Barbara Herman, *On the Value of Acting from the Motive of Duty*, 90 *PHIL. REV.* 359 (1981).

¹¹⁰ NOMY ARPALY, *UNPRINCIPLED VIRTUE* 72 (2003).

¹¹¹ *Id.* at 72.

¹¹² *Id.*

B. The Upshot

The upshot of all this is, again, pretty straightforward. The law & economic theorists' use of moral luck requires their taking on much more than they bargained for. By making use of the problem of moral luck to attack blame-based views of traditionalism, the law & economic theorist has two options: (i) give up on the idea of moral responsibility altogether, or (ii) claim that moral blame is grounded in judgments about an agent's character, rather than in consequences, acts, or intentions. With regard to the former, recognize how much of our most fundamental beliefs we've jettisoned: *we've rejected morality outright*. People are no longer accountable for what they do. Our everyday reactive attitudes about other peoples' behavior, our judgments about good and bad conduct, the very idea that we have obligations to be honest or compassionate or virtuous, must be rejected. I won't go into too much detail here, as there is a vast and well-respected literature about the dangers of going down this path,¹¹³ but it is enough to say that precisely because this option requires such a revolutionary departure from our most basic beliefs – a move that we are incapable as a matter of human psychology to make¹¹⁴ – it's a nonstarter. "It follows that to object to moral luck *tout court* is to object to morality *tout court* . . . The conclusion is absurd – agency *does* have some reach and moral judgment *does* have some area of application – so something must have gone wrong in the premises."¹¹⁵ In any case, if this truly is the position the law & economic theorists want us to adopt, it's safe to say that it is a revolutionary departure from people's everyday beliefs and extraordinarily controversial. And that is precisely my point: using moral luck as a means to attack traditionalist theories of tort goes hand-in-hand with taking on some very counterintuitive positions on moral theory.

If, as I think they must, the law & economic theorists take the latter route instead and adopt a character-based conception of moral blame, they have saddled themselves with a very particular view in normative ethics, contrary to Nagel,¹¹⁶ Williams,¹¹⁷ Gardner, most consequentialists and Kantians,¹¹⁸ and a host of others. And while this is a defensible position that isn't nearly so radical as rejecting all of moral blame outright, it isn't uncontroversial.

I think this point is particularly fascinating, and up to now totally unrecognized. When Posner, Calabresi, and others claim that tort law cannot be understood as a law of moral wrongs just because of the arbitrary manner in which recovery is had, they are implicitly requiring us to give up on a great many of our everyday moral judgments. The claim "moral luck poses a decisive objection to blame-based

¹¹³ For a worthwhile account of how America's reaction to the horrors of World War II was a resurgence of natural law and the creation of a particular conception of individual rights, see RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* (1999).

¹¹⁴ STRAWSON, *supra* note 40.

¹¹⁵ GARDNER, *supra* note 23, at 24.

¹¹⁶ "True enough—if the [moral luck] objection makes sense. But, as Nagel established, it does not." GARDNER, *supra* note 23, at 24.

¹¹⁷ See WILLIAMS, *supra* note 15.

¹¹⁸ While I'm not sure whether Kant himself would have been willing to reject the control principle, John Gardner makes an interesting case for that interpretation. GARDNER, *supra* note 23 (starting at page 57).

theories of traditionalism” requires adoption of the assertion, “moral blame is based on an evaluation of an agent’s character, not the consequences she brings about, the acts she does, or the intentions she has.” And while I am sympathetic to the position that the control principle is so fundamental it cannot be rejected, the law & economic theorists now have to contend with a large philosophical literature that vociferously argues otherwise. The onus is on them to provide us with *some* kind of explanation about why this is the route to take.

* * *

There’s a counterargument to the broader argument here that bears considering. My claim is that using the moral luck objection in the realm of tort theory requires taking on some controversial positions in moral philosophy. I’ve suggested that law & economic theorists must go with the third option (holding on to the control principle when it comes in conflict with our everyday intuitions) rather than the first (reject all of normative ethics out of hand). But someone with a particular view of the law & economics movement might answer the critique by saying that law & economic theorists *would* choose that first option. The assumption of interdisciplinary economics is that the best way to understand most – perhaps all – disciplines is to view them through the lens of a particular methodology: individual rationality as utility maximization. For tort law, that means adopting the rules that most efficiently reduce the cost of accidents.¹¹⁹ But if we’re now moving onto the field of normative ethics, the law & economic theorist is just going to give the same response – she will say that I’ve employed the wrong methodology for moral philosophy. The question of who we should praise and blame, like all questions from the law & economic theorist’s perspective, is a question about who it would be good to blame.¹²⁰ So when I summarily dismissed the first option as an unviable one for the law & economic theorist, I misconstrued their position.

There are a few reasons why I think this objection isn’t going to get up off the ground. One significant error of this line of thinking is the assumption that the law & economic theorist is an economist “all the way down” (or if that sounds too reductivist, “all the way through”). To say that you are a law & economic theorist means you think economic methodology plays an important role in either descriptive or normative accounts of the law. And in the context of tort, that means economic methodology can most profitably be used to analyze tort as an efficient reducer of accident costs.¹²¹ But why would someone who has this view of tort law—or of

¹¹⁹ It’s a non-obvious proposition that utility maximization in tort law equates to efficient reduction of accident costs: even if we buy the maxim “rationality is utility maximization,” we’ve got to figure out what “utility” means. The law & economic theorists seem to have come to believe that in tort, it’s the reduction of accident costs; but we could instead think it’s about any number of other candidates, including a number of so-called “collateral benefits” like efficient conveyance and dissemination of important information or providing a forum for conversations we believe should take place in a public forum. See Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 74 (2010) (arguing in part that the law & economic theorists have unjustifiably limited their scope in the costs and benefits they consider in the context of tort.).

¹²⁰ Thanks to Scott Hershovitz for noting this possible response and helping me to think through its implications.

¹²¹ Well, not exactly. It might mean something else. See *supra* note 119.

contract law, or securities law, or sociology, or whatever—think that this way of thinking *necessarily* applies to moral philosophy, or any other field, for that matter? Why, in other words, does a law & economic theorist automatically become a *normative ethics* & economic theorist? This move is, contrary to the assumption of many practicing law & economic theorists, not an obvious one: even if I grant that a particular set of legal doctrines is best explained, normatively or descriptively, as utility maximization – and even if I believe that “utility” means something like cost in terms of material wealth – why does that require me to further believe that the vast majority of Western moral thought is egregiously off the mark, that morality isn’t anything more than a tool to bring about desirable social ends, and that ethics is justified by a utilitarian viewpoint?¹²² This all goes back to the point that was made much more forcefully and cogently by Don Herzog.¹²³ The dispute between, in Herzog’s parlance, the political theorists and economists is not whether economics can *ever* be used in any discipline: as he says, “[A]ny competent social or political theorist will have some economics implements in her toolbox”¹²⁴ But before we start pulling out our calculators and tallying up costs and benefits in normative ethics, we have to have two additional arguments: (i) a good reason to think that, in *this* context, rational human behavior is best understood as utility maximization, and nothing more, and (ii) a thick account of what “utility” is in this context (preference satisfaction? Moral worth? *Eudemonia*? Happiness? Knowledge? Virtue? There are a lot of possibilities here, and they’re hotly contested). Following through on this second issue, it’s not clear that happiness or preference satisfaction—what we commonly take the word “utility” to mean—is the right way to look at moral responsibility. You might instead have the following view: it makes sense to think of rationality as wealth maximization when we’re talking about markets. After all, for the market to function the way we want it to, at least some people must act in precisely this way.¹²⁵ But when we start talking about praise- and blameworthiness, we care about something totally different. An agent is blameworthy not because she reduced overall wealth, preference satisfaction, or happiness, but because she engaged in wrongful conduct. Or perhaps because she intended to engage in wrongful conduct, whether or not she actually did so. Or maybe it has something to do with her moral character. There are a lot of different theories on the table,¹²⁶ but the point is that none are suggesting that blameworthiness is something we should feel free to twist and contort to bring about a preferential outcome. No matter what you think about economic analysis in tort law or any other field, you have to give some reason for thinking it applies in the context of normative ethics. And that answer can’t be grounded in appeals to maximizing benefits and minimizing costs, lest it degrade into circularity: we should think about blameworthiness in terms of

¹²² This is emphatically not the same as saying, “I am a utilitarian,” or any other type of consequentialist. A utilitarian believes that a person is obligated to do that which maximizes utility; what justifies this assertion is another question entirely.

¹²³ Don Herzog, *Externalities and Other Parasites*, 67 U. CHI. L. REV. 895 (2000). And I do mean *much* more forcefully.

¹²⁴ *Id.* at 923.

¹²⁵ *See id.* at 902–03.

¹²⁶ *See* SCANLON, *supra* note 39.

the costs and benefits it brings about because if we did, that would bring about the best mix¹²⁷ of costs and benefits.¹²⁸

Perhaps law & economic theorists have some very good reasons to take these positions. But that is precisely my point: using the moral luck objection in tort law requires us to take on some controversial views in other areas and we have to think seriously about whether these views are correct. We cannot uncritically apply economic models to all areas of human life.

VI. CONCLUSION

In this Article I have highlighted the general difference between the traditionalist and law & economic theorist approaches to tort law. A common criticism leveled against the traditionalists is that the way in which tort law permits recovery is morally arbitrary, and therefore tort cannot be a law of wrongs and redress. But, moral luck poses a problem only for our understanding of moral blame, and I have shown that most strains of traditionalism do not depend in any significant way on praise- or blameworthiness. Moreover, the use of moral luck against traditionalism requires the law & economic theorist to take some very specific and controversial positions in moral philosophy, positions that have up to this point gone totally undefended by these theorists. In the end, I hope to have provided some insight into just what the problem of moral luck is and what implications flow from its use in the context of tort law. Doing so will, I hope, be a first step in recognizing that tort law speaks to us not as policymakers interested in efficiently allocating certain kinds of losses or as judges of the personal failings of others, but rather as ethical agents, concerned about what the moral law requires us to do.

¹²⁷ Even in the realm of tort, it isn't always clear which view law & economic theorists have in mind when they invoke the terms "maximization" or "efficiency." It might be a simple maximization function of costs and benefits ($y = C - B$), but some have invoked at least two now-famous alternatives: (1) Pareto efficiency, where an allocation is optimal if at least one individual is made better off without making any other individual worse off. It is of course possible for a change to the status quo to be Pareto efficient but it not be the case that $y_2 > y_1$. And (2) Kaldor-Hicks efficiency, where a change is optimal if the individual who gains the advantage can compensate those who were made worse off, even if they never do. This type of efficiency is similarly non-determinative of either simple maximization or Pareto efficiency.

¹²⁸ It's worth mentioning that even hard-line consequentialists don't have to go as far as the law & economic theorists have in this discussion. A consequentialist is committed to saying that our moral obligations are defined by the maximization of some good or set of goods: an agent ought to do that, and only that, which maximizes whatever is "good," whether it be utility, honor, moral worth, or something else altogether. But that doesn't require the utilitarian to say that a person has to be *blamed* for each failure to fulfill her obligations. As I've stressed repeatedly above, having a theory about what we're obligated to do doesn't tell us what we're to praise or blame for.