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LEGAL PLURALISM IN TORT LAW THEORY: BALANCING INSTRUMENTAL THEORIES AND CORRECTIVE JUSTICE

Benjamin Shmueli*

ABSTRACT

Unified-monistic theories of tort law focus on a single goal, usually corrective justice, distributive justice, or optimal deterrence. Unlike these approaches, mixed-pluralistic theories attempt to balance between various goals of tort law by integrating several of the considerations underlying these different goals. These theories of legal pluralism reflect ideological diversity, in this case between different theories of the same legal system. This Article discusses the challenge of legal pluralism to settle the possible collision between different goals of tort law within the framework of tort law theory.

Starting from a position of support for the mixed-pluralistic thesis, this Article first identifies the advantages this approach offers and then proposes a new mixed-pluralistic approach which is adapted to the multitude of significant changes that have affected contemporary common tort law in recent years. This new approach divides (mostly negligence) issues into two principal categories based on the profile of the defendant and the nature of his tortious act, striking a balance between the various goals of tort law, as the situation warrants. Thus, the suggested mixed-pluralistic approach offers a new and actual balance between corrective justice and instrumental theories—that is, distributive justice and optimal deterrence. It balances between deontological theories, which are interested in the moral aspect of a tort action, and utilitarian theories, which are interested in the consequentialist outcome of a tort action. The proposed approach will be implemented through the presentation of a number of tort issues, some traditional and classic and others modern and novel.

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The suggested approach challenges the study of both law and economics and corrective justice by trying to delimit their dominance as sole goals. It also corresponds with other pluralistic approaches to the study of torts.

INTRODUCTION: BALANCING INSTRUMENTAL THEORIES AND
CORRECTIVE JUSTICE AS A CASE OF LEGAL PLURALISM

An intelligent approach to the study of law must take account of its purpose, and must be prepared to test the law critically in the light of its purpose.¹

At a conference held in tribute to Izhak Englard—a renowned scholar in the field of tort law²—Ariel Porat, one of the preeminent scholars in the field,³ gave the following example: A driver is speeding in his vehicle. While speeding, he calculates the benefit he derives from his fast driving (saving time) and compares it to the risk his speeding poses to others and to himself (self-risk). In effect, Porat examined the efficiency of an activity through an example that illustrates a particular application of law and economics analysis.⁴ Porat asked Englard, an adamant opponent of law and economics analysis, possibly humorously, whether he had already retracted his objections to the law and economics approach to policy analysis. Guido Calabresi, a U.S. Court of Appeals for the Second Circuit judge, a professor, and formerly the dean of Yale Law School, sat onstage, listening with great attention. There were

1. Glanville L. Williams, *The Aims of the Law of Tort*, 4 CURRENT LEG. PROBLEMS 137, 137 (1951), reprinted in MARK LUNNEY & KEN OLIPHANT, TORT LAW: TEXT & MATERIALS 18 (3rd ed., 2008).

2. Upon his retirement from the Israeli Supreme Court, Bar-Ilan Law School, Israel, December 21, 2005. He is now an Emeriti Professor at the Hebrew University, and served as a Visiting Professor at many universities, including Yale Law School, USC Law School, University of Rome, University of Zurich, University of Pennsylvania Law School, and Columbia Law School. Englard is an author of many books, among them: THE PHILOSOPHY OF TORT LAW (Aldershot: Dartmouth, 1993); CORRECTIVE AND DISTRIBUTIVE JUSTICE: FROM ARISTOTLE TO MODERN TIMES (Oxford University Press, 2009).

3. A professor of law (then the Dean) at the Tel-Aviv University School of Law, and serves as a Visiting Professor at the University of Chicago (where he visits annually), and was also a Visiting Professor at the universities of Berkeley, Columbia, NYU, and the University of Virginia Law Schools. Porat is an author of several books, including TORT LIABILITY UNDER UNCERTAINTY (2001) (with Alex Stein); GETTING INCENTIVES RIGHT—IMPROVING TORTS, CONTRACTS, AND RESTITUTION (2014) (with Robert Cooter), and author of many articles in torts and contracts, including in the Yale Law Journal (2011, 2012, 2012), Michigan Law Review (2000, 2006, 2007, 2009, 2009, 2014), Cornell Law Review (2011), and many more.

4. Porat wished to say that in those cases, courts usually do not take into consideration the driver's self-risk but only the risk that the driver poses to others, as opposed to himself. However, in his opinion, in analyzing these cases through law and economics analysis, one should also examine the driver's self-risk. See Robert Cooter & Ariel Porat, *Does Risk to Oneself Increase the Care Owed to Others? Law and Economics in Conflict*, 29 J. LEG. STUD. 19 (2000).

hundreds of people in the audience. Englard stated he was not retracting his objection to law and economics. He then argued passionately that no driver calculates the benefit and enjoyment derived from fast driving against the risk to himself and others ensuing from that fast driving. “It is not realistic; people do not calculate such things!” Englard exclaimed: “It is simply unreal; the driver can be killed.” Porat tried to explain his line of thought, but Englard remained adamant: “It is unreal.” Calabresi moved to mediate between the two parties; turning to Englard, he said: “Try to use this example in the case of economic damage, not in a case where the driver might be killed.”

However, it seems that Calabresi was not truly trying to reconcile the approaches. He is one of the founding fathers of (tort) law and economics, so he likely agreed with Porat. Calabresi was trying to placate Englard by distancing the argument from the specific, perhaps controversial example Porat provided while at the same time supporting and strengthening Porat’s fundamental approach.

Concluding either that Porat and Englard are both, each in his own way, completely wrong, or alternatively, completely right, is equally hard to accept. If Porat is completely right, why does his example fail to persuade on its merits, compelling Calabresi to “seek refuge” in an example of economic damages? And if Englard is completely right, how can a simple wave of the hand negate more than four decades of law and economics analysis of tort law? In certain circumstances, it seems, Porat’s law and economics example might certainly be realistic; in other circumstances, however, there will be room for other theories to take the dominant role. That is the basis of this Article.

To this day, legal scholars have spent relatively little time comprehensively discussing the goals of tort law and prioritizing them in the event of a clash. Instead, scholars usually focus on efforts to examine, develop, or critique a particular aim—usually corrective justice, distributive justice, or optimal deterrence—for a specific purpose, a process which has been variably termed “unified,” “monistic,” or “integrated.”⁵

5. Cf. Steven J. Burton, *Normative Legal Theories: The Case for Pluralism and Balancing*, 98 IOWA L. REV. 535, 537 (2013) (“Robust pluralist theories take all relevant values into account and balance them when they compete.” There are different pluralistic possibilities. *See id.* at 544; W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 1–7 (5th ed., 1984); Williams, *supra* note 1, at 138; KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 14 (3rd ed., 2007); John C. P. Goldberg, *Ten Half-Truths about Tort Law*, 42 VAL. U.L. REV. 1221, 1246–48 (2008). Goldberg defines pluralism in torts differently than is common. *See id.* at 1249 (“As I have just noted, the standard way to be pluralistic about tort law is to assign tort law various different “purposes,” such as deterrence and compensation. The journey to this sort of position typically works backward from remedy to theory. The remedy most closely associated

Unlike these approaches, “mixed” or “pluralistic” theories of tort law attempt to integrate several of the considerations underlying the different goals to balance between various goals of tort law.⁶ The existing pluralistic approaches differ from each other in different aspects.

The need to balance disparate goals of tort law supports legal pluralism, which addresses situations in which several legal systems operate concurrently in one social unit or sphere.⁷ This paradigm conflicts with the hegemonic perception of legal centralism, especially of the state as the sole source of a system of normative arrangements.⁸ Indeed, the most classic, albeit not sole, form of legal pluralism is that of one state legal system versus a private, non-state legal system. In recent years, legal pluralism also has included global phenomena, referred to as “global legal pluralism,” challenging the notion of the state as the exclusive source of regulation in the international domain and highlighting the increasing influence of non-state regimes.⁹ But there are also cases of ideological

with tort law is, of course, the damages payment. The question then asked is: What agendas can government advance by ordering this sort of payment? Here we are led to the ideas of deterrence, compensation, and restoration.”). Goldberg and Benjamin Zipursky present a different approach—civil recourse. *See id.* at 1252 (“The civil recourse account of tort is simultaneously limiting and capacious. It is limiting in insisting that tort law is something, not nothing or everything. The basic idea is that tort has certain central features—private rights of action, substantive requirements (e.g., proof of injury and breach of a duty owed to the victim), characteristic procedures (court-supervised resolution), etc.—that, taken together, reveal a consistent concern to enable persons who have been victimized in certain ways to respond to that victimization by obtaining a certain kind of satisfaction, through law, as against the wrongdoer . . . Yet at the same time it is capacious. Because it frames the enterprise in terms of defining wrongs and empowering victims to respond to wrongs, rather than as an enterprise that seeks to achieve a collective goal such as deterrence or loss-spreading, it is not embarrassed by features that other theories are forced to regard as facially dysfunctional.”). *See also* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010) [hereinafter Goldberg & Zipursky 2010]; John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007) [hereinafter Goldberg & Zipursky 2007].

6. *Cf.* Burton, *supra* note 5, at 537 (“A monist theory takes one and only one value into account and, consequently, hopes to avoid balancing competing values.” Burton also notes that “[o]ver the last four decades, monist theories have proliferated, notably those based on efficiency.”).

7. *See, e.g.*, Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869, 870 (1988).

8. *See* John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 56 (1986).

9. *See e.g.*, Oren Perez, *Legal Pluralism*, in OXFORD ENCYCLOPEDIA OF AMERICAN POLITICAL AND LEGAL HISTORY (Donald T. Critchlow & Philip R. VanderMeer eds., 2012) [hereinafter Perez 2012]. *See also* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); Oren Perez, *Purity Lost: the Paradoxical Face of the New Transnational Legal Body*, 33 BROOKLYN INT’L L.J. 1 (2007) [hereinafter Perez 2007]; Gunther Teubner, ‘Global Bukovina’: *Legal Pluralism in the World Society*, GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997); William Twining, *Normative and Legal Pluralism: A Global Perspective*, 20 DUKE J. COMP. & INT’L L. 473 (2010).

diversity *within* national legal systems.¹⁰ Two examples of this are a possible collision between tort law and contract law¹¹ or between tort law and family law.¹² Another relevant example is a collision between different theories of the same legal system:

[T]he notion of legal pluralism is also used to describe ideological diversity within national legal systems, e.g., the tension between deterrence, corrective justice[,] and distributive justice in tort law¹³

Some authors have emphasized the *risk* that legal pluralism—any kind of legal pluralism—will potentially result in incoherence or even collisions between regimes, legal systems, or legal disciplines; others, however, have pointed out the possible *contribution* of legal pluralism to the creation of a more liberal, democratic, and tolerant society.¹⁴ Likely, legal pluralism in tort law would *contribute* to a more liberal, open, and pluralistic society. The challenge of legal pluralism is to successfully settle the possible collision within the framework of tort law theory. Alternatively, it merely describes the collision. Do the different goals of tort law necessarily collide? Or is it possible to present an approach that tries to bridge the different goals?

This Article's purpose is not only to introduce possible collisions between different goals of tort law but to propose a new pluralistic theory that strikes a balance between these goals (mostly regarding the rule of negligence) and that is compatible with complex modern realities. This Article critically discusses existing pluralistic approaches and suggests a new mixed-pluralistic approach. Thus, this Article offers a new and applicable balance between corrective

10. Perez 2012, *supra* note 9. Cf. William Twining, *Normative and Legal Pluralism: A Global Perspective*, 20 DUKE J. COMP. & INT'L L. 473, 488–89 (2010).

11. In some jurisdictions, tort law steps aside and does not act at all when there is an *ex ante* conflict between it and other laws. Examples of such an approach are the non-cumul principle with regard to French contract law and the use of contract law in most claims in English law until 1995. See Nuno Garoupa & Carlos Gómez Ligüerre, *The Syndrome of the Efficiency of the Common Law*, 29 B.U. INT'L. L.J. 287, 313–18 (2011); DONALD HARRIS, DAVID CAMPBELL & ROGER HALSON, REMEDIES IN CONTRACT AND TORT 575–78 (2d ed., 2002).

12. See, e.g., Benjamin Shmueli, *Tort Actions for Acts that are Valid according to Religious Family Law but Harm Women's Rights: Legal Pluralism in Cases of Collision between Two Sets of Law*, 46 VAND. J. TRANSNAT'L L. 823 (2013).

13. See Perez 2012, *supra* note 9.

14. See e.g., Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT. L. 999 (2004) (presenting the problem of regime collision from different aspects); Twining, *supra* note 9 (examining the relations between legal pluralism, normative pluralism, and general normative theory from a global perspective; trying to differentiate between social and other norms; and presenting the mainstream literature on legal pluralism).

justice—a goal focused solely on the parties—and instrumental theories like distributive justice and optimal deterrence—goals that see tort law as an instrument for achieving and promoting social aims. In doing so, this approach tries to bridge deontological and utilitarian theories.

It should be emphasized that the pluralistic analysis here presented is not meant to confront existing pluralistic approaches; rather, it moves to incorporate their advantages. Also, the new approach does not intend to confront unified-monistic approaches; the separate analysis of each goal is needed in order to reach a proper balance between different goals. This approach merely claims that analysis is insufficient when it focuses completely on only one goal.

Part I presents and defines the goals of contemporary tort law. Part II discusses the principal prevailing mixed-pluralistic theories. Part III establishes the new mixed-pluralistic theory. Part IV attempts to answer potential critique and intermediate cases.

I. THE GOALS OF CONTEMPORARY TORT LAW

A. Background

This Article begins with Glanville L. Williams' opening statement in an article examining the aims of tort law from a mixed-pluralistic perspective.¹⁵ The year was 1951—before developments such as the spread of the economic analysis of (tort) law, mass torts, and the insurance mechanism. Indeed, the world in which tort law acts in 2015 is quite different from that of 1951.

Various factors concerning the nature of tort law have not reached a general consensus concerning the goals of tort law.¹⁶ Some even argue that tort law developed without any clear aim or that underlying tort law is a mixture of goals, not all of which apply suitably in every given case.¹⁷ Others assert that the lack of consensus over tort law's goals is due to tort law's common law roots, which resulted in *ad hoc* development in every state.¹⁸ Accordingly, scholars also claim that, until the nineteenth century, tort law was

15. Williams, *supra* note 1.

16. See KEETON ET AL., *supra* note 5, at 1–7; ABRAHAM, *supra* note 5, at 14; W.V.H. ROGERS, WINFIELD & JOLOWICZ ON TORTS 1 (16th ed., 2002).

17. See, e.g., Williams, *supra* note 1, at 152; ABRAHAM, *supra* note 5, at 14; WINFIELD & JOLOWICZ, *supra* note 16, at 1.

18. ABRAHAM, *supra* note 5, at 14; Christopher J. Robinette, *Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine*, 43 BRANDEIS L.J. 369, 390–98 (2005).

never considered an independent branch of the law in the common law countries or, at least, not as a comprehensive branch equivalent to contracts or criminal law.¹⁹

Even now, no general consensus exists concerning the goals of tort law.²⁰ However, based on the literature's entire body of theories, identifying some primary, independent goals of tort law, drawn in part from civil and criminal law,²¹ is possible.

B. The Goals of Tort Law: Corrective Justice, Compensation, and Restoring the Status Quo Ante, Distributive Justice, and Optimal Deterrence

Corrective justice focuses on correcting the wrong a particular tortfeasor committed against a particular victim. The examination is limited solely to the relations between the two parties.²² According to most corrective justice approaches, this goal is reached mostly through reliance on culpability (in negligence) and causation between the action of the tortfeasor and the damage to the injured party. If the tortfeasor has breached her duty of care, she must pay the injured party.

Different theories of corrective justice exist.²³ However, the most prominent contemporary theoretician in the area of corrective justice is Ernest J. Weinrib, who asserts that corrective justice is conclusive. Weinrib espouses limiting the examination solely to the

19. *E.g.*, Robinette, *supra* note 18, at 393.

20. *See, e.g.*, KEETON ET AL., *supra* note 5, at 1–7; Williams, *supra* note 1, at 138; Abraham, *supra* note 5, at 14; WINFIELD & JOLOWICZ, *supra* note 16, at 1.

21. Robinette, *supra* note 18, at 398.

22. Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 410 (1992) (“In Aristotle’s account of corrective justice, quantitative equality pairs one party with another. Corrective justice treats the defendants unjust gain as correlative to the plaintiff’s unjust loss. The disturbance of the equality connects two, and only two, persons. The injustice that corrective justice corrects is essentially bipolar.”).

23. *See, e.g.*, George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (stating that the use of the tort law system in order to attain social aims creates an inappropriate mixture between corrective justice and distributive justice.) Fletcher himself takes corrective justice as a derivative of examining the risk that every party may cause to the other party. In his opinion, in every liability regime (negligence, strict liability, and intentional torts) one should examine the reciprocal risks that the parties create. If the risks are reciprocal or relatively equal, then the defendant should not be held liable if he caused the damage. But if the wrongdoer put the plaintiff at risk in a nonreciprocal and unilateral way, and the plaintiff was harmed, then the defendant should be held liable. Reciprocal risk exists where from the beginning the defendant’s activity puts the plaintiff at risk more than the opposite activity, or when from the beginning the risks are nonreciprocal, but become reciprocal due to the negligence of the defendant. JULES L. COLEMAN, *RISKS AND WRONGS* (1992) (arguing that the parties have the duty to correct the harms their torts have created, as a moral basis for liability and therefore for compensation); RICHARD A. EPSTEIN, *A THEORY OF*

relations between the two concrete parties—the tortfeasor and the injured party—and disregarding any consideration extraneous to the parties.²⁴ It seems that he perceives corrective justice, which relies on culpability and causation, as the sole legitimate goal of tort law.²⁵ The principle of correlativity is primary in Weinrib’s theory—only the tortfeasor must pay the whole sum of damages to only the injured party: no less and no more.²⁶

Others see **compensation**, or restoring the *status quo ante*,²⁷ as an independent and even predominant aim.²⁸ Some perceive it as an important secondary principle that other goals aim to achieve.²⁹ If the tortfeasor cannot provide compensation for his tortious act, it is of social importance to find others who can provide compensation,

STRICT LIABILITY (1980) (offering a theory of strict liability, which is not based on culpability but on causality).

24. Weinrib, *supra* note 22; ERNEST J. WEINRIB, THE IDEA OF PRIVATE L. 5, 56–83 (1995) [hereinafter WEINRIB, PRIVATE LAW]; ERNEST J. WEINRIB, *The Gains and Losses of Corrective Justice*, 44 DUKE L. J. 277 (1995) [hereinafter Weinrib I, *Gains and Losses*].

25. See ERNEST J. WEINRIB, CORRECTIVE JUSTICE 72–75 (2012) (explaining that the law should choose one avenue of justice, because there cannot be an integration between corrective and distributive justice. Only corrective justice accomplishes justice aims) [hereinafter WEINRIB, 2012]; ERNEST J. WEINRIB, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice* 2 THEORETICAL INQUIRIES L. 107, 108 (2001) (addressing the centrality of corrective justice) [hereinafter Weinrib, 2001].

26. See, e.g., Weinrib, 2001, *supra* note 25. For a critique on Weinrib see Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992) (presenting a different approach to corrective justice); Bruce Chapman, *Pluralism in Tort and Accident Law*, PHILOSOPHY AND THE LAW OF TORTS 250 (Gerald J. Postema ed., 2001), *passim* (rejecting monism and demonstrating intensively from Weinrib’s approach and summarizing that “just as the compensation theorist could not purge the system of compensation completely of deterrence-like concerns under a strategy of criterial separation, so the corrective justice theorists cannot, even in his own terms, hold onto the purity of corrective justice within tort law.”).

27. See, e.g., Abraham, *supra* note 5, at 14; Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 466–67 (1990); WALTER J. BLUM & HARY KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS 13 (1965); Stephen Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 591 (1985).

28. DAN B. DOBBS, THE LAW OF TORTS §10, at 17 (2000) (“Compensation of injured persons is one of the generally accepted aims of tort law. Payment of compensation to injured persons is desirable. If a person has been wronged by a defendant, it is just that the defendant make compensation. Compensation is also socially desirable, for otherwise the uncompensated injured persons will represent further costs and problems for society.” (reference omitted)).

29. Williams, *supra* note 1, at 137, 172–73; KEETON ET AL., *supra* note 5, at 5–6 (“There remains a body of law which is directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally, rather than one interest only, where the law considers that compensation is required. This is the law of torts.” *Id.* at 5–6 (references omitted)). The authors refer also to Cecil A. Wright, *Introduction to the Law of Torts*, 8 C.A.M.B. L.J. 238 (1944): “The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.” *Id.* at 6). See also Ariel Porat, *Offsetting Risks*, 106 MICH. L. REV. 243, 256, 276 (2007) (examining compensation as an independent goal, though awarding more space to optimal deterrence).

such as a deep pocket close to the tortfeasor. The question of who pays is sometimes considerably less salient according to this goal.³⁰ Therefore, even if the direct tortfeasor is not the source of compensation, anyone else, like an insurer or employer, or the state or a public fund could provide compensation.³¹ In this manner, compensation differs from corrective justice. Also, compensation is provided based on not only the tortfeasor's culpability or fault but also on other grounds, which varies from the fault-based emphasis of corrective justice.³²

Distributive justice is concerned with allocating "slices of the cake" that make up the aggregate welfare of society. This view ascribes to law the role of the fair allocation of the costs of accidents according to some measure of merit and the redistributing benefits from the stronger and wealthier segments of society to those who are in need.³³ It is therefore an instrumental goal. It binds all potential parties to the distribution of wealth and other resources. It benefits society according to relativity for the purpose of promoting social goals, and it does not focus solely on the two specific parties to a tort.³⁴

Some see loss distribution as an independent goal, while others see it as a part of distributive justice.³⁵ Loss distribution means that society's losses must be distributed among the social strata that use the service or product that caused the damage. Accordingly, liability is imposed on whoever can spread and distribute the loss to a large number of participants in an activity (e.g., drivers or consumers) so that each of them will bear a small share of the cost of

30. Williams, *supra* note 1, at 137, 151–53, 173.

31. See IZHAK ENGLARD, *THE PHILOSOPHY OF TORT LAW* 13, 18, 220–23 (1993) (discussing mass torts and market share liability as suitable examples for compensation funds which replace the traditional tort system, and which are not compatible with traditional corrective justice).

32. See DOBBS, *supra* note 28, at 15 (discussing the differences between compensation and corrective justice, and arguing that "[A] corrective justice system of tort law will compensate only those who are injured by some conduct that can be called a wrong. A tort system based solely on social policy might conceivably seek to exact compensation from defendants who have caused harms by accident but not by wrongdoing or, alternatively, might provide a social system of insurance for everyone."); Chapman, *supra* note 26, at 302–03 (discussing Weinrib's approach and differentiating between corrective justice and compensation by an outside institution).

33. See, e.g., Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L. J.* 499 (1961); Gregory Keating, *The Idea Of Fairness in the Law of Enterprise Liability*, 95 *MICH. L. REV.* 1266 (1997).

34. DOBBS, *supra* note 28, §§ 9, at 13–14 (2000).

35. ENGLARD, *supra* note 31, at 55; Izhak Englard, *The System Builders: A Critical Appraisal of Modern American Tort Law*, 9 *J. LEGAL STUD.* 27 (1980) [hereinafter Englard 1980].

righting the wrong or fixing the tort at the lowest cost.³⁶ For example, providers of services can offset risk by slightly raising the cost of their product, thereby spreading the loss to the consumer public. This is a form of self-insurance that uses the same public that comprises the community of potential injured parties.³⁷ Another method of redistribution is to impose the burden of loss on the wealthy (“deep pockets”) rather than on all members of the relevant group, since the wealthy are able to absorb the loss without prejudicing their social and economic status.³⁸ These individuals are also able to self-insure, as insurance companies naturally distribute loss on the basis of insurance arrangements that are created in accordance with market forces.³⁹

Even though independent rationales justify distributing loss, it is *not* an independent goal of tort law in this author’s opinion. Rather, it is a technique for implementing a goal, because liability for the deep pocket entails transferring wealth from the stronger to the weaker party. However, some regard it as an independent aim or even part of the goal of compensation.⁴⁰

While distributive justice focuses on distributing aggregate welfare, **optimal deterrence**—another instrumental goal, derived from law and economics—seeks to increase aggregate welfare and maximize the wealth in society.⁴¹ Optimal deterrence seeks to maximize

36. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 50–54 (1970); *See generally* Calabresi, *supra* note 33 (discussing of the various meanings of “distributin[g] the losses.”). Calabresi argues that loss distribution may have three different meanings: (1) spreading the losses, both interpersonally and intertemporally; (2) those who are most able to pay will bear the burden of losses; (3) the enterprises which give rise to a loss should bear the burden, “whether or not this accomplishes the prior two aims.” *Id.* at 499. In order to decide when and how to distribute losses, one must examine the theoretical justifications for each of these three meanings and presume that these three are not always consistent with each other. *Id.*

37. CALABRESI, *supra* note 33.

38. 2 FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* 762, 759–64 (1956) (arguing that “the best and most efficient way to deal with accident loss [is] to distribute the losses involved over society as a whole or some very large segment of it”); CALABRESI, *supra* note 36, at 40–41.

39. CALABRESI, *supra* note 33, at 39–42, 46–48 (presenting a few methods of loss distribution, including social and private insurance as systems of distributing losses).

40. *See* Abraham, *supra* note 5, at 17–18. In any event, loss distribution is not a part of corrective justice, since its rationale is to spread the loss even among participants of the relevant activity who have no fault in causing that loss.

41. *See, e.g.*, Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 LEG. STUD. 243, 244 (1980) (arguing that maximizing the aggregate welfare, that is wealth maximization, is nothing but the principle of compensation); Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 29 (1960) (discussing the aim of promoting the economic welfare according to Pigou); ENGLARD, *supra* note 31 at 227 (criticizing law and economics, which insists on absolute economic efficiency, and trying to reach the objective of achieving aggregate social welfare for disregarding the bilateral relationship between the concrete litigants).

wealth and increase efficiency by avoiding imposing liability on a tortfeasor at a rate below the cost of the loss the tortfeasor has caused.⁴² This imposes an incentive on the potential tortfeasor to avoid a tort that is commensurate with the cost of the loss that tort would cause. Optimal deterrence also seeks to avoid over-deterrence, or overcautious behavior that the imposition of an excessive amount of liability may cause.⁴³ Optimal deterrence aspires to limit the loss of welfare caused when two activities clash by attempting to introduce changes into the nature or scope of those activities. It seeks to prevent losses from risky activities when the expected benefits of those activities are less than the expected costs.⁴⁴ In this way, optimal deterrence becomes an effective means of changing the nature and scope of the parties' activities and an efficient means of increasing the aggregate welfare ensuing from clashing activities.⁴⁵

Ronald H. Coase,⁴⁶ Guido Calabresi,⁴⁷ and Richard A. Posner⁴⁸ primarily led the (tort) law and economics revolution.⁴⁹ Coase argued that, from the standpoint of economic efficiency, the actor who is assigned rights to create a nuisance and avoid hazards from the nuisance is irrelevant so long as transaction costs are sufficiently low.⁵⁰ Calabresi constructed his strict liability theory by examining the cheapest cost avoider or, as later formulated, the best decision

42. Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEG. STUD. 243, 244 (1980).

43. See generally, Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984) (presenting how legal rules advance deterrence); CALABRESI, *supra* note 36, at 69 (explaining that the objective of tort law is to prevent the costs resulting from a tort event, or at least to reduce them as much as possible as part of a theory postulating a need to reach optimal deterrence, based on the understanding that it is not possible and not desirable to try to prevent all accidents because the cost would be infinitely high).

44. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD., 29, 40–41 (1972) (explaining that liability is based upon risks caused by the acts of the tortfeasor and not upon actual harms); Jerry Green, *On the Optimal Structure of Liability Laws*, 7 BELL J. ECON. 553, 554 (1976).

45. See Posner, *supra* note 44, at 48.

46. Coase, *supra* note 41.

47. CALABRESI, *supra* note 36; Guido Calabresi, *First Party, Third Party, and Product Liability Systems: Can Economic Analysis of Law Tell Us Anything About Them?*, 69 IOWA L. REV. 833 (1984) [hereinafter Calabresi 1984]; Guido Calabresi & Jon T. Hirschoff, *Toward a Test of Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

48. See generally, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed., 2007) [hereinafter POSNER 2007]; POSNER, *supra* note 44; Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975) [hereinafter Posner 1975].

49. Mataja's analysis, in the late 19th century, is a strong sign for this revolution. See Izhak England, *Victor Mataja's Liability for Damages from an Economic Viewpoint: a Centennial to an Ignored Economic Analysis of Tort*, 10 INT'L REV. L. & ECON. 173 (1990).

50. Coase, *supra* note 41, at 15 (explaining that most of the time it is unrealistic to assume that there are no costs at all in carrying out market transactions).

maker, for allocating the costs associated with the loss in a tort.⁵¹ Posner relied on the fault-based Learned Hand formula, which compares the costs of prevention to the expected cost of the harm in order to determine culpability.⁵²

Underlying this instrumentalist theory is an economic calculation of the cost of precautions, i.e., of taking measures against risks to prevent the loss (this cost is not solely financial but also a matter of convenience, time, etc.), while emphasizing the importance of economic efficiency in preventing future accidents or reducing their number and costs. This concept may be contrary to corrective justice, which requires the tortfeasor to remunerate the injured, regardless of cost-benefit analyses.⁵³

Distributive justice and deterrence are goals which deal primarily with steering the behavior of actual or possible future tortfeasors, as part of an instrumentalist theory, which perceives the law as a device for promoting social goals. These can possibly be classified as goals that have an instrumentalist rationale which does not necessarily focus on the actual parties. Compensation and corrective justice, however, belong to another category, which focuses on the concrete parties to the tort (corrective justice on the concrete tortfeasor and injured party, and compensation mainly on the concrete injured party) rather than on principles and elements extraneous to the concrete parties.

Scholars have rarely discussed the entire set of tort law goals and their proper balance in order to reach pluralism in the event of a

51. CALABRESI, *supra* note 36, at 26–31 (developing the “cheapest cost avoider” test, whose objective is to reach an optimal point of deterrence where the total costs of the accident and the costs of preventing the accident will be smallest). The cheapest cost avoider test seeks for tort law to achieve effective and optimal deterrence at the lowest cost, avoid accidents, and increase the aggregate welfare. This theory imposes strict liability on the person who can prevent the damage in the cheapest way. Calabresi and Hirschhoff improved problems in the cheapest cost avoider test by devising the “best decision maker” test. *See* Calabresi & Hirschhoff, *supra* note 47 at 1060. According to this doctrine, liability is imposed on the entity that belongs to the group that is in the best position to reach “a decision as to which of the parties to the accidents is in the best position to make the cost-benefit analysis between accident costs and accidents avoidance costs and to act on that decision once it is made.” *Id.* (emphasis omitted).

52. POSNER 2007, *supra* note 48, at 167–71; ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 349–53 (6th ed. 2012). For critics on the Hand formula, see Goldberg, *supra* note 5, at 1248; Englard, *supra* note 31; Izhak Englard, *The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law*, *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* (David G. Owen ed., 1995) [hereinafter Englard 1995]; Izhak Englard, *The Cost of Accidents: A Retrospect View from the Cathedral*, 64 *MD. L. REV.* 355, 361 (2005) [hereinafter Englard 2005]. According to Weinrib, the English and Commonwealth approach differs from the Hand formula and thus is closer to corrective justice, because it disregards the cost of precautions—an inherent part of the Hand formula. *See* WEINRIB, *supra* note 22, at 148; Chapman, *supra* note 26, at 311–12 (discussing Weinrib’s approach).

53. DOBBS, *supra* note 28, at 14, 19.

clash between them.⁵⁴ Instead, most scholarship focuses on a single unified-monistic theory.⁵⁵

It seems that optimal deterrence and corrective justice are now considered tort law's two primary unified-monistic goals. Scholars who seek optimal deterrence and corrective justice do not necessarily try to reconcile or harmonize clashing goals but instead examine a single goal in a sectorial self-interested manner. Some of these unified-monistic theories focus on social-economic principles (for example, law and economics as optimal deterrence, corrective justice, feminism, or human rights approaches as distributive justice). These theories are instrumental in nature—they perceive tort law as an instrument for achieving social goals. Accordingly, they divert focus away from the specific parties to the tort, contrary to the strictness of corrective justice. By contrast, pluralistic theories, which have been neglected to some extent, are unwilling to focus on a sole goal of tort law, however important that goal may be.⁵⁶ The aim of this Article is not necessarily to fight monist theories, however; in fact, all pluralistic theories rely in this way or another on monistic theories, in trying to balance them.⁵⁷

54. For pluralistic approaches that have been presented see *infra* Part II.

55. For different monistic approaches see *infra* Part I.B.

56. Cf. Burton, *supra* note 5, at 535 (“The monists’ call for meta-principles is a red herring. Sweeping it aside clears the path to a thorough analysis of pluralism, balancing, and monism.”).

Monist legal theories suffer from a telling normative deficiency. Due to their monism, such theories are not capable of satisfying the finality and inclusiveness conditions for normativity. Therefore, they cannot reach the normative goal by justifying final recommendations about what the law should be, all things considered To be capable of success, a theory must satisfy two necessary conditions for normativity—finality and inclusiveness, among others. Pluralist theories can satisfy both. The monism of monist theories, however, precludes them from satisfying either. Because no other kinds of theories are relevant, it follows logically that all normative legal theories should be pluralist.

Id. at 562, 575. Burton demonstrates his thesis from contract law, and also argues that the law is fundamentally pluralist. *Id.* See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1723–24 (1976) (posing a similar argument).

57. Cf. Burton, *supra* note 5, at 574–75 (emphasizing, despite his opposition to monism and support for pluralism, that “[m]onist arguments can, and often should, be components in pluralist theories. Thus, a monist efficiency argument could support a preliminary and tentative conclusion about what the law should be. A monist fairness argument could do the same. If both arguments are sound and concur in their conclusions, the theory should recommend that conclusion, all else being equal. If the arguments come apart, the law should balance and reflect both values in an accommodation or compromise or, if necessary, the stronger argument should control.”). Burton also discusses possible claims of monism against pluralism, e.g., pluralism being less predictable than monism (a parameter that is not necessary or sufficient, in Burton’s opinion, for a success of an approach). See *id.* at 561–62, 571–73. See *id.* at 568–74 (for more possible critics of monism on pluralism).

II. CURRENT MIXED-PLURALISTIC APPROACHES: AN OVERVIEW

Ernest J. Weinrib argued that private law is a “congeries of unharmonized and competing purposes.”⁵⁸ John C.P. Goldberg has stated that, in many cases, different tort theories lead to contrary interpretations.⁵⁹ Obviously, identifying or creating harmony between different goals, which reflects legal pluralism, is preferable. However, if some goals clash or are incompatible, courts must weigh their respective values in the case at hand and in accordance with the society’s current values. This Part presents the primary mixed-pluralistic approaches and explains the need for a fresher pluralistic concept consistent with contemporary tort law.⁶⁰

Goldberg opposes pluralistic approaches, claiming that pluralism actually leaves us “puzzle[d] over how exactly the accommodation among tort’s multiple purposes is to take place.”⁶¹ He asks: “If tort law is a device for deterring undesirable conduct, spreading losses, and restoring the disturbed equilibrium, which of these should it do, and on what occasions?”⁶² Goldberg explains that the answer “cannot be ‘all three all the time’ because the pursuit of one interferes with the achievement of others.”⁶³ He further explains:

Deterrence might require us to award damages even where no losses are in need of spreading. Concern to spread losses may likewise justify ordering payment where there is no deterrence to be had. If payment is really going to count as corrective justice, we will need a genuine victim with a claim. Yet giving only genuine victims claims cuts against the goal of deterrence. And so on.⁶⁴

Scholars in the analytical field of torts have produced differing mixed-pluralistic theories over the years in an attempt to strike a

58. WEINRIB, PRIVATE LAW, note 24, at 5; see also Chapman, *supra* note 26, at 277 (criticizing Weinrib’s approach).

59. See John C. P. Goldberg, *Twentieth Century Tort Theory*, 91 GEO. L. J. 513, 580 (2003).

60. Note that not all the approaches try to balance all four goals. Some of them present fewer than four. Cf. Burton, *supra* note 5, at 544 (“Feeble theories consider more than one but fewer than all relevant values.”).

61. Goldberg, *supra* note 5, at 1249.

62. *Id.*

63. *Id.*

64. *Id.* Goldberg also argues that “[t]aken on their own terms, pluralist theories are profoundly *immodest* in their conception of the place of tort law in our legal and political system.” *Id.* at 1254–55.

balance. This Part now turns to an examination and critique of a number of noteworthy pluralistic approaches to tort law.⁶⁵

The following pluralistic approaches in this Part should overcome the challenge of properly balancing goals and demonstrate a solid pluralistic thesis.

A. Izhak Englard: “Complementarity”—An Attempt to Reach Harmony Between Corrective and Distributive Justice

In 1993, Izhak Englard advanced the concept of “complementarity,”⁶⁶ which deals primarily with the clash between corrective justice and distributive justice, and seeks to harmonize these goals. Englard views compensation, or retribution as a component of corrective justice and deterrence, and loss distribution as components of distributive justice.⁶⁷ Englard believes that other theories have failed to capture the moral dimensions of distributive justice.⁶⁸ Indeed, an examination of the parties’ wealth prior to the tortious event is likely not compatible with Englard’s view of corrective justice, as this factor is unrelated to the tortious event itself. According to Englard, it is always necessary to consider the application of all the goals in every tortious event.⁶⁹ Distributive justice does not always contradict corrective justice. Thus, for example, the idea that a wealthy person will be more generous toward a poor person—the concept underlying the theory of distributive justice—is based on a moral notion that underlies the theory of corrective justice. Likewise, the existence of tortious elements, including causation, is not always sufficient to impose liability—hence the need for a moral basis.⁷⁰ Accordingly, in cases where a wealthy defendant causes injury but is not at fault, the imposition of liability can be regarded as an integration of the two goals.⁷¹ In Englard’s opinion, deterrence

65. For the purpose of the summary, and in view of the constraints of space, this Part covers approaches which are manifestly different from each other. In addition, it is problematic to absolutely compare the approaches since not all of them deal with and consider all four goals separately and independently. However, each of them tries to strike a balance between goals which are located on different sides of the divide.

66. ENGLARD, *supra* note 31, at 85–92; Englard 1995, *supra* note 52, at 183; Englard 2005, *supra* note 52, at 361.

67. ENGLARD, *supra* note 31, at 145 (“[T]he non-instrumentalist idea of retribution, falling under the concept of corrective justice, confronts the instrumentalist goals of specific and general deterrence, which are associated with distributive justice.”); Englard 2005, *supra* note 52, at 360–61.

68. ENGLARD, *supra* note 31, at 15.

69. *Id.* at 56.

70. *Id.* at 15–16, 54–55.

71. *Id.* at 16, 54.

falls within the framework of distributive justice, which is possibly consistent with corrective justice because the imposition of liability not only rights the wrong but also deters potential tortfeasors.⁷²

While Englard prefers not to discuss the contradiction in these goals and focuses instead on achieving harmony between them, he does refer to the fact that corrective justice ultimately needs to be given superior weight. According to Englard, no tort law can exist without corrective justice at its core, and, therefore, he explicitly prefers corrective justice to distributive justice.⁷³ He believes that tortious liability loses the moral component found in fault when deterrence, economic efficiency, and loss distribution are added to the mix.⁷⁴

Some have criticized Englard's view on the grounds that it simply gives one goal an advantage over another rather than achieving a real harmony between goals.⁷⁵ A more practical method of reconciling different goals is to strike a balance, rather than harmonizing them.⁷⁶ Despite the critique, the structure of Englard's thesis is very useful to the presentation of a new pluralistic theory.

B. Gary T. Schwartz: Optimal Deterrence as the Dominant Goal and Its Constraint by Corrective Justice Considerations

In 1997, Gary T. Schwartz pointed to three primary goals of tort law: corrective justice, distributive justice, and deterrence.⁷⁷ According to Schwartz, the contemporary tortious method does not give what law and economics would regard as adequate consideration to deterrence. In many cases it also fails to restore the *status quo ante* in

72. ENGLARD, *supra* note 31, at 145.

73. *See id.* at 145. This was also his approach in his judgments as an Israeli Supreme Court judge. *See, e.g.*, CA 2825/97 Abu Zeid v. Meckel, 53(1) IsrSC 402, 413 [1999]; CA 3668/98 Best Buy Ltd. V. Fidias Maintenance Ltd., 53(5) IsrSC 180, 191 [1999]. *See also* IZHAK ENGLARD, CORRECTIVE AND DISTRIBUTIVE JUSTICE: FROM ARISTOTLE TO MODERN TIMES (2009) (presenting the intricate history of the distinction between corrective and distributive justice, which is elaborated in the 5th book of Aristotle's *Nicomachean Ethics*).

74. ENGLARD, *supra* note 31, at 111.

75. *See* Avner Levin, *Quantum Physics in Private Law*, 14 CAN. J. OF L. & JURIS. 249, 255 (2001).

76. *But see* ENGLARD, *supra* note 31, at 88–89 (emphasizing that complementarity means more than balancing; it means real harmony and integration of contrary and competing interests).

77. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1804 (1997). Schwartz actually rejects distributive justice as a viable goal of tort law. *See id.* at 1818 n.128. *See also* Jeffrey O'Connell & Christopher Robi-nette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137, 146 n.58 (1999) (protesting Schwartz's rejection of distributive justice).

accordance with principles of corrective justice.⁷⁸ Schwartz attacks the notion of corrective justice as the sole objective of tort law that Weinrib and Coleman supported. He argues that it is difficult for corrective justice to exist alongside deterrence, as deterrence takes into account factors apart from the two direct parties to the tort—the tortfeasor and the injured.⁷⁹ According to Schwartz, deterrence examines the principle of creating risks, whereas corrective justice examines the damage which actually occurred.⁸⁰ Under corrective justice, liability is imposed on the tortfeasor and not necessarily on the best possible avoider of the damage. According to the theory of pure corrective justice, there is no room for distributive considerations, which also take into account other factors.⁸¹ Accordingly, Schwartz wonders whether loss comes from every direction, since great costs may ensue if each goal is taken into account separately.⁸² He states that the advantages of integrating the two goals exceed the structural costs of doing so.⁸³ Schwartz discusses cases where it is possible *ab initio* to compromise between the goals; however, he ultimately argues for the centrality of optimal deterrence, except in cases where considerations of corrective justice prevent this.⁸⁴

Unlike England, Schwartz does not purport to attain harmony between goals in every case. Rather, he presents a theory of balances, in which it is possible to integrate goals without necessarily seeing them as competing. Goals do not clash in practice—they are simply different. Corrective justice begins where the rationale of deterrence ends. In other words, the injured party can demand that the tortfeasor correct the wrong he has committed in cases where deterrence failed. Schwartz adds that deterrence gives rise to justice of another type. In his opinion, focusing on the goal of deterrence can lead to prevention of the accident *ab initio*, and this is more than just the provision of reparation in retrospect.⁸⁵ This is a justice that is “more just” than corrective justice, which he calls “protective justice.”⁸⁶ Thus, in his view, deterrence involves not only economic-

78. Schwartz, *supra* note 77, at 1815–19.

79. *Id.* at 1809.

80. *Id.* at 1816.

81. *Id.*

82. *Id.* at 1826 (demonstrating from system’s costs in cases of applying corrective justice alone or deterrence alone).

83. *Id.* at 1826–27.

84. *Id.* at 1824 (comparing his pluralistic theory in torts to that of Hart in criminal law).

85. *Id.* at 1831–32 (“It is common to say that ‘justice’ or ‘rights’ approaches to tort liability necessarily see tort liability in ‘noninstrumentalist’ terms. Yet the deterrence that negligence law provides can itself be understood not just as a maximizer of utility but also as a device for achieving justice (or at least as a device for reducing the amount of injustice.)” (citations omitted)).

86. *Id.* at 1832.

utilitarian but also ethical and moral principles. Accordingly, corrective justice follows optimal deterrence, which is actually based on protective justice. Schwartz believes protective justice is secondary and enters the picture in retrospect only when optimal deterrence and protective justice do not succeed.

Schwartz criticizes England's theory as an arbitrary attempt to reconcile two irreconcilable goals.⁸⁷ Therefore, Schwartz asserts that balancing goals and not necessarily searching for harmony, which is sometimes impractical, is a more realistic mixed-pluralistic theory.⁸⁸ Schwartz admits that, realistically, his theory cannot explain and include all cases of tortious liability.⁸⁹

Schwartz's contribution in elucidating practical possibilities for an integrated analysis of differing goals provides strong support for a pluralistic theory of tort law. However, he also manifestly prefers a single specific goal, using another only as a qualifier in relatively rare cases of immorality. Is Schwartz, in fact, a monist disguised as a pluralist? His approach is close to Guido Calabresi's, who also takes account of moral considerations only to set a certain "ceiling" when he applies law and economics theory. For example, Calabresi contends that if a system of accident precaution (prevention costs) leads to a very immoral outcome in a particular case, then the court should not have adopted that system even if it is highly efficient.⁹⁰ Thus, in Calabresi's view, justice is certainly not equal in value to optimal deterrence. This is not a pluralistic approach, asserting the dominance of optimal deterrence, but is instead a unified-monistic approach that focuses on deterrence as being constrained and inapplicable only in particularly immoral cases. Schwartz is perhaps slightly more moderate in his rhetoric than Calabresi, offering a number of possible compromises between different goals.

87. *Id.* at 1819 n.132, 1828 n.187.

88. *Id.* at 1828 ("Working out the sequence of deterrence and corrective justice certainly improves the coherence of this mixed theory. Still, the theory remains apparently mixed in that it includes two objectives that are seemingly quite distinctive").

89. *Id.* at 1834 ("Mixed theories of tort law hold promise. Admittedly, efforts to develop a mixed theory applicable to all of tort law do not immediately pay off.").

90. Over the years, Calabresi has made more room for considerations of justice—mostly distributive—in his writings, withdrawing somewhat from the totality of one goal only. *See, e.g.*, Guido Calabresi, *We Imagine the Past to Remember the Future—Between Law, Economics, and Justice in Our Era and according to Maimonides*, 26 *YALE J. L. & HUMAN.* 135, 139–41 (2014) (responding to Yuval Sinai & Benjamin Shmueli, *Calabresi's and Maimonides's Tort Law Theories—A Comparative Analysis and A Preliminary Sketch of a Modern Model of Differential Pluralistic Tort Liability based on the Two Theories*, 26 *YALE J. L. & HUMAN.* 59 (2014), explaining that although optimal deterrence takes first place in this work, since his early writings, he always leaves place for justice and moral considerations, although he does not use the terms deontological considerations).

It is problematic to contend that it is necessary to prefer deterrence in each and every case. Sometimes, compensation and corrective justice actually should override deterrence in the overall balancing process. An *a priori* determination that one goal is dominant, in every case, and that the other goal only occasionally constrains it, may shackle tort law to a preference that is not always appropriate.

*C. Mark Geistfeld: Out of a Number of Possible Efficient Outcomes,
the Most Moral will be Chosen*

In 2001 Mark Geistfeld proposed that the most moral and just resolution should be selected out of a series of several efficient outcomes.⁹¹ His approach is the product of the “social welfare function.”⁹² Geistfeld’s theory is a version of economic analysis of law, which is interested in aggregate social utility, social welfare, individual welfare, and distributing the welfare in a more appropriate manner.⁹³

According to Geistfeld, the theory of law and economics is incomplete without a moral analysis. Geistfeld argues that the pure aggregate social welfare is dependent on the welfare of the individual and is connected to notions of equality, personal safety, and justice—which must take precedent over the interest in the tortfeasor’s freedom.⁹⁴ Hence, economic analysis of law must be limited to examining which rule of liability will best deter immoral conduct at a minimum of accident costs: it is necessary to choose the moral theory which influences individual welfare justly when there are a number of ways to maximize society’s wealth.⁹⁵

This theory may solve numerous tortious situations. However, like complementarity, it does not seem to provide an answer to situations where corrective justice and efficiency clash, i.e., where one cannot identify a moral outcome among different efficient approaches. In particular, it does not provide an answer when two outcomes are possible: one more efficient but less just, and the other more just yet less efficient.

91. See MARK GEISTFELD, *Economics, Moral Philosophy, and the Positive Analysis of Tort Law*, in PHILOSOPHY AND THE LAW OF TORTS 250, 268 (Gerald J. Postema ed., 2001).

92. *Id.* See also Matthew D. Adler, *Risk Equity: A New Proposal*, 32 HARV. ENV’L L. REV. 1, 25–28 (2008) (discussing the social welfare approach to distributive issues within the framework of various theoretical policies and regulations).

93. *Id.*

94. GEISTFELD, *supra* note 91, at 251–53, 265–68.

95. See *id.* at 265–68.

This Article suggests implementing Geistfeld's thesis to reach the opposite conclusion under similar circumstances, i.e., if a number of just and moral outcomes are available, one should choose the most efficient. But this requires multiple initial solutions that are equally just. Different degrees of justice make it hard to strike a balance with efficiency. Regardless, Geistfeld, like Englard and Schwartz, does not follow the path of categorization and does not distinguish between tortious events. Rather, he speaks of a single solution, which he intends to be compatible with all tortious events.

Sometimes it is impossible to identify and choose, in a non-arbitrary manner, an efficient outcome which is also just (or the most just) or vice versa. In cases in which goals from both categories clash, Geistfeld's theory may not apply in practice.

*D. Fleming James Jr. and Christopher J. Robinette: A Casuistic
Case-by-Case Approach*

The final approach presented is not fixated on the dominance of a single goal in relation to every tortious event. Rather, it discusses distributing torts into groups that possess similar characteristics in accordance with the goals underlying tort law and, thus, finding the right dominant goal for each case on its merits.

Fleming James, Jr.'s work as a whole appears to suggest he is a monist devoted to compensation; however, in 1959 he argued that tort law cannot be confined to a single approach because the theoretical analysis of both negligence and strict liability is multifaceted.⁹⁶ He acerbically attacked the integrated-monistic perspective, describing it as useless.⁹⁷ He suggested that those discussing it were wasting their valuable time, as no unified-monistic theory could provide a complete analysis, and that it was incorrect to try and unite something as naturally heterogeneous as the theories underlying tort law.⁹⁸ Note, this was written prior to the appearance of law and economics. James called for an empirical analysis of the system by classifying torts with similar characteristics in accordance with the goals relevant to the issues underlying tort law.⁹⁹ He suggested that identifying the problem underlying each issue and studying the potential solutions to that problem would

96. Fleming James Jr., *Tort Law in Midstream: its Challenge to the Judicial Process*, 8 BUFF. L. REV. 315 (1959). This paper was based on the James McCormick Mitchell Lectures, delivered at the University of Buffalo School of Law, April 3-4, 1959.

97. See Robinette, *supra* note 18, at 378-82 (discussing James Jr.'s approach).

98. James Jr., *supra* note 96, at 315, 320, 325.

99. *Id.* at 320.

accomplish that aim.¹⁰⁰ This interesting approach has somehow been neglected to date.

In a 2005 article, Christopher J. Robinette devalued the unification project in favor of tort theory disaggregation.¹⁰¹ In his opinion, monistic theories are doomed to failure, both doctrinally level and historically, since tort law developed on a case-by-case basis in the common law, rather on a single clear rationale.¹⁰² In order to explain his theory, Robinette analyzed two areas of tort doctrine—automobile accidents and medical malpractices—both based on a rule of negligence and cases of unintentional torts.¹⁰³ Robinette argues that if it is not possible to give a full, theoretical, unified-monistic explanation of the appropriate solution regarding these two common types of torts, then a unified-monistic theory is of no avail in explaining tort law.¹⁰⁴ According to him, deterrence operates differently in each of these two situations.¹⁰⁵ By contrast, causation is relatively simpler in cases of automobile accidents than in cases of medical malpractice, since the person's condition before and after the accident is different. Thus, it is easy to distinguish and identify the injury caused by the accident.¹⁰⁶ Causation is more complex in medical malpractice cases because of the quasi-contractual nature of the relationship between the patient and the medical system.¹⁰⁷ Additionally, the patient is already sick or injured, which is the initial reason for commencing medical procedures. In such cases, it is difficult to distinguish between the original injury and the injury the negligent act added. Medical science's very nature complicates the determination of a causal connection between a breach of the duty of care and damage in such cases.¹⁰⁸ In view of this, plaintiffs need to hire the services of expensive medical experts. Many medical malpractice cases never become legal suits at

100. *Id.*

101. Robinette, *supra* note 18, at 413.

102. Robinette, *supra* note 18, at 371, 412–13.

103. Robinette, *supra* note 18, at 399–412.

104. *Cf.* Robinette, *supra* note 18, at 412 (“In comparing just two areas of tort doctrine . . . [a] unified theory of torts . . . does not appear possible.”).

105. *Cf.* Robinette, *supra* note 18, at 402–05 (questioning the deterrent value of tort law in the context of automobile accidents).

106. *Id.* at 805 (“Causation in automobile accidents tends to be relatively simple to establish”).

107. *Id.* (“Causation in a medical malpractice action tends to be complex and very difficult to establish”).

108. DAVID M. HARNEY, *MEDICAL MALPRACTICE* 419–27 (2nd ed. 1987) (arguing that this is why the quantum of proof should be less in malpractice suits than in personal injury lawsuits); Robinette, *supra* note 18, at 408 (noting the fact that medicine is a profession that governs itself and sets its own standards).

all.¹⁰⁹ Those that do generally are concluded with compensation that is less than the real loss incurred.¹¹⁰ Data Robinette cites indicates that only eight percent of medical malpractice victims achieve any compensation in the United States—in other words, only forty percent out of the twenty percent who decide to sue.¹¹¹ This situation is problematic with regards to the goals of compensation and corrective justice and is also contrary to deterrence to a certain extent.¹¹²

Robinette suggests dismantling the system of tort law into its different components and applying different theories to different situations to decide which theory fits.¹¹³ In his opinion, it is not right, from a historical and doctrinal point of view, to engage in an all-embracing discussion of all goals in all situations.¹¹⁴ However, it seems that Robinette's approach differs from that of James Jr. Robinette. Robinette clarifies that his meaning was not to apply the rationales to each case on its own merits but instead to advocate a process of grouping cases by doctrine.¹¹⁵ In other words, the words "case-by-case" are applicable to torts doctrines, similar to the auto accidents and medical malpractice examples, and goals need to be determined at the level of each tort, for the purposes of tort theory, and not at the level of all torts (like monists would) or on a literal case-by-case basis.¹¹⁶

James Jr.'s approach is correct at its core but may go too far. Indeed, becoming fixated on a single goal of tort law, as within unified-monistic theories, is even more problematic than his pluralistic approach since these strictly prefer a particular goal in every clash, irrespective of the type of tortious event. At the same time, examining every case on its merits without general guidelines regarding which goals are more relevant, as James Jr. suggests, is undesirable and carries great administrative costs. A preference for

109. Robinette, *supra* note 18, at 406.

110. Robinette, *supra* note 18, at 406–07.

111. Robinette, *supra* note 18, at 406 (citing DON DEWEES, ET AL., *EXPLORING THE DOMAIN OF ACCIDENT LAW* 425 (1996)).

112. Robinette, *supra* note 18, at 405–09. *See also* TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* 63 (2005) (demonstrating the low aggregated cost of medical malpractice insurance relative to the higher aggregated cost of automobile accident insurance, despite the high rate of medical malpractice deaths relative to automobile accident deaths).

113. *Cf.* Robinette, *supra* note 18, at 399 (“The comparison leads me to conclude that various areas in tort law will be understandable only in terms of different rationales.”).

114. Robinette, *supra* note 18, at 371, 409, 413.

115. Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 *GEO. MASON L. REV.* 360 n.179 (2007) (describing the pluralist scholar's task as one of grouping torts at the doctrinal level, e.g., medical malpractice). Robinette agrees that a “case-by-case” approach is not practical. *Id.*

116. *Id.*

certain goals of tort law can be expressed even *ex ante*. In certain cases, a particular goal is possibly less relevant. A superior vantage point, achieved by examining groups of cases in accordance with their nature, and not in relation to each and every case on its merits, is the preferable way to view the tort system and develop a vantage point.

It is not always clear which goals are irrelevant and fall “outside the game” in relation to a particular issue. Without a clear categorization of goals and cases, it is impossible to apply the theory as a practical matter since that would introduce enormous uncertainty regarding the decision of actual cases. The absence of any guiding hand would lead to chaos and even the breakdown of the tort system. Additionally, this approach does not clearly determine the outcome when goals clash and simply allows for an unrealistically cumbersome casuistic case-by-case examination. Robinette’s approach seems more applicable and balanced in its core, but it needs to be expanded and to identify when to give more dominance to certain goals and when to grant more dominance to others, and why. Nonetheless, these proposals, in combination with the other theories discussed previously, plays an important role in establishing a new pluralistic model.

E. Integrating Advantages from Prevailing Pluralistic Approaches with Original Rationales: Toward a New Pluralistic Approach

As we have seen, monistic theories focus solely on the relations between the two parties while disregarding every other consideration. Instrumentalist theories attempt to use tort law as a device for promoting social goals, but they fail to take sufficient account of the two concrete individual parties to the dispute. Proponents of pluralistic theories consider both monistic and instrumentalist theories as unbalanced and unable to reflect the full tortious and social picture.¹¹⁷ Modern tort law is highly diverse, and a single unified-monistic theory cannot explain it. The multiplicity of situations as well as the variety of plaintiffs and defendants requires the adoption of a mixed-pluralistic theory in order to reach a legal pluralism in tort theory scholarship.

117. WINFIELD & JOLOWICZ, *supra* note 16, at 2; Cf. BURTON, *supra* note 5, *passim* (distinguishing between monism and pluralism and describing monists as focused on only one value, where pluralists balance all relevant values).

Englard and Schwartz, each attempted to present a pluralistic theory possessing a similar rationale, according to which the examination of all the tortious issues as a single body, despite the multiplicity of situations illustrated above, based on a fixed analysis of the goals in all the tortious events, which granted dominance to a particular goal. This is best categorized as a unified-monistic path, not a pluralistic one. Englard calls for harmony and complementarity between goals, with a preference for corrective justice.¹¹⁸ A tension exists between examining the goals' harmony and prioritizing one goal. By contrast, Schwartz also attempts to balance goals, with a qualifying deference to corrective justice.¹¹⁹ His theory does not strike a real balance between goals, but clear prefers, *ex ante*, optimal deterrence and gives justice only a secondary role.

Englard's theory prioritizing corrective justice and Schwartz's theory prioritizing optimal deterrence are overly broad. A more flexible and less fixed thinking is needed, particularly in a world in which there are such diverse tortious situations. James Jr. is positioned at the other end of the spectrum. He discusses each and every goal case by case. However, that approach is problematic for legal stability and certainty, and involves excessive specificity, which may lead to a situation in which no theory will find a place.

The above analysis of extant pluralistic theories shows room for presenting a solid and intermediate mixed-pluralist theory of contemporary tort law which is neither excessively general nor excessively specific and takes into account the development of modern tort law. This approach will not make decisions on a case-by-case basis as that process does not answer cases involving a real clash between goals. Accordingly, in order to reach legal pluralism in tort theory scholarship, determining dominance and priorities is necessary. This approach is different than Englard and Schwartz. Geistfeld's approach is also different as it does not provide a comprehensive answer to the question of a clash between efficient and just outcomes. Accordingly, a certain adjustment of James Jr.'s theory to modern tort law can further implement the proposed mixed-pluralist theory. It thus arrives at a specific rationale for each type or group of cases.

This is not to say that every mixed-pluralistic or unified-monistic theory is incorrect or inappropriate. However, reaching legal pluralism in tort law theory requires fresh thinking. Examining the possibility of adjusting current pluralistic theories helps form a new theory that builds on current pluralistic theories' advantages.

118. *See supra* text accompanying note 73.

119. *See supra* text accompanying note 86.

III. A NEW MIXED-PLURALISTIC ANALYSIS

A. *Suggested Analysis*

Scott Hershovitz claims that economists failed to offer a complete theory of tort, stating “[e]conomists have ignored tort’s collateral costs and benefits, and because of the oversight we must approach every assertion they make about the efficiency of tort doctrine with a healthy skepticism.”¹²⁰

Hershovitz claims that philosophers have also failed to offer a complete theory: “Philosophers have missed the fact that tort does more to respond to wrongdoing than enforce duties of repair, and as a consequence, they have given us impoverished theories of both corrective justice and tort. That is the bad news.”¹²¹

This Part proposes fixing this theory through a new mixed-pluralistic approach that builds from the different monistic approaches and integrates some original rationales.

Moreover, Steven Burton claims that although “[p]luralist balancing would contribute more than monism to the legal system’s legitimacy: Simply put, relying on several converging values provides a stronger justification than relying on only one,”¹²² “[p]luralists have done little to defend their turf.”¹²³ This Part will attempt to provide that justification as well.

1. The Rationale: Classification of Tort Issues into Two
Categories (Correction-Compensation and
Instrumental) in Accordance with the Nature
of the Defendant’s Activity

This Article proposes a two-stage legal pluralism model. The first stage determines the dominance of a particular category of goals based on the defendant’s profile, her financial wherewithal, and

120. Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 *STAN. L. REV.* 67, 114 (2010). *But cf.* EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* (2010) (addressing the required balance between utilitarian and deontological considerations). Zamir and Medina examine the possibility of combining economic methodology and deontological morality through explicit and direct incorporation of moral constraints into economic models. In addition, they argue that the normative flaws of economic analysis can be rectified without relinquishing methodological advantages. They present a widely described and pluralistic-based approach that tries to bridge utilitarian and deontological considerations. They illustrate the implementation of their proposed balanced approach in several legal fields; tort law is not among them.

121. Hershovitz, *supra* note 120 at 114.

122. Burton, *supra* note 5, at 555 (emphasis omitted).

123. Burton, *supra* note 5, at 538.

the nature of the tortious activity. The second stage balances these categories to give the dominant category higher priority, while also qualifying that preference when overweighting it would significantly impair the other categories' goals.

Tort law is more complex than the scheme whereby A commits a tortious act and injures B, who suffers damage. A causal connection exists between the act and the damage, and B is interested in suing A. The complexity of tort law beyond this scheme is particularly true with respect to the identity of the defendant (in contrast to the identity of the injurer). Contemporary tort law is often applied to resource-wealthy, sophisticated defendants or to defendants not directly involved in the tortious act.¹²⁴ In the past huge claims were not brought for medical malpractice or in tobacco-related cases against manufacturers, the state, its institutions, etc.¹²⁵ The massive proliferation of insurance has also played a magnifying role. A large proportion of defendants today are not individuals but large and sophisticated economic, commercial, or governmental entities such as communications providers, state authorities, or insurers, all of whom possess deep pockets and distribute loss.¹²⁶ Some of them are serial and/or mass tortfeasors.¹²⁷ In many of these cases, a significant power gap exists between the institutional defendant and the injured party. Evidence suggests that these institutions take into account awards of compensation as part of their ongoing business expenses.¹²⁸ They routinely calculate the cost-effectiveness of their activities and take into account costs of accidents as a disbursement, like every other disbursement in their operations.¹²⁹ In other words, they manage their risks carefully.¹³⁰ These potential defendants use the tort mechanisms to significantly reduce the number of accidents and their costs. They also have an incentive to develop better precautions since they understand that the tortious activities are not financially worthwhile. Indeed, these entities must apply optimal deterrence.¹³¹ By contrast, other considerations may deter the classic private tortfeasor (who, in some cases, is not insured and

124. Cf. Sinai & Shmueli, *supra* note 90, at 119–21 (describing Guido Calabresi's focus on "mass tortfeasors with deep pockets, risk managers and entities calculating damages").

125. Cf. *id.* at 121–24 (attributing the absence of mass and serial tort analysis in Maimonides' tort scholarship to pre-industrial historical context).

126. Cf. *id.* at 119–21 (describing Guido Calabresi's focus on "mass tortfeasors with deep pockets, risk managers and entities calculating damages").

127. Cf. *id.*

128. See *id.* at 120.

129. *Id.* at 128–29.

130. Cf. *id.* at 120.

131. Cf. Sugarman, *supra* note 27, at 573 n.67 (describing the role liability insurance plays in shifting economic deterrence from would-be tortfeasors to insurance companies).

behind whom there is no principal or employer). Deterrence *ab initio* may be less significant in these situations since it is difficult to imagine a private tortfeasor who carefully manages risks by making a carefully reasoned and precise calculation of the cost of a tort and its probability. This is distinct from England's criticism that such actors do not calculate risk.¹³²

As a result, one can conceive of one mechanism for compensation that will abrogate the classic law of tort and replace it with a regime of social security and the liability of the state, or the like. Without discussing such proposals (an issue which falls outside the scope of this Article) and on the assumption that tort law will remain as it is, it is necessary to determine what impact this factor should have. Clearly, it cannot be ignored.

Pure corrective justice approaches focus on the relations between the parties to a tort. Some regard the primary weakness of unified-monistic theories of corrective justice to be their compatibility with the normative reality where entities other than those directly involved in the tort are involved.¹³³ Patrick Atiyah argues that massive developments in insurance mechanisms have made the goal of corrective justice redundant since the insurance company is the one providing the actual compensation in the case of a tort, which distributes the costs of the accident across society.¹³⁴ According to Atiyah, insurance also minimizes deterrence since there is no great difference between the premiums of different insured individuals and thus no real incentive to refrain from committing a tort.¹³⁵ Atiyah suggests that one should not use tort law at all in personal injuries and instead proposes a regime of private and social insurance.¹³⁶ Other scholars disagree.¹³⁷

Thus, claims against large and sophisticated institutional defendants—especially claims injured individuals bring—justify attaching considerable weight to distributive justice and distribution of loss,

132. See *supra* INTRODUCTION.

133. See ENGLAND, *supra* note 31, at 56–57 (suggesting that Ernest Weinrib's strict notion of liability would unlikely apply equally to the car owner who loans the vehicle and the one who later commits a tort).

134. Cf. PATRICK S. ATIYAH, THE DAMAGES LOTTERY 189 (1997) (drawing a parallel between the rise in personal injury lawsuits and the rise of third party insurance).

135. PATRICK S. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW Chapter 24 (3rd ed., 1980) (arguing that accident law does not deter accidents in an effective way because imperfect insurance swamps any deterrent effect. This insurance does not properly punish for careless or unsafe behavior) [hereinafter ATIYAH 1980]; Patrick S. Atiyah, *Accident Prevention and Variable Premium Rates for Work-Connected Accidents*, 4 INDUS. L.J. (U.K.) 1, 89 (1975) (discussing insurance's impact on injury-causing behavior) [hereinafter Atiyah 1975].

136. ATIYAH 1980, *supra* note 135, at Chapter 8.

137. See, e.g., ANDREW BURROWS, UNDERSTANDING THE LAW OF OBLIGATIONS: ESSAYS ON CONTRACT, TORT AND RESTITUTION (1998).

as well as efficiency in optimal deterrence. This is the *instrumental category of goals*, which uses the specific case to guide the behavior of the potential tortfeasor and tort law as a device for social progress. Refraining from focusing on concrete parties may injure the individual plaintiff or assist him, as it makes additional types of arguments available to him. For example, a plaintiff may argue that a defendant such as an insurance company is a “deep pocket” and efficient distributor of loss, even if this is not really pure corrective justice.

Two goals constitute the dominant category in cases of large and sophisticated institutional defendants—distributive justice and optimal deterrence. Although both belong to the instrumental category, they are not identical goals.¹³⁸

As to distributive justice, the theory may take into account groups’ economic and/or social status when they bring suit against large, powerful institutions. Indeed, there are those who believe that the defendant’s wealth *per se* can justify imposing liability under certain circumstances.¹³⁹ The legislature may, after considering the discrepancy in power between the weak injured party and the strong tortfeasor, impose strict liability on manufacturers for defective products. Manufacturers are better positioned to redistribute losses through insurance or by raising the price of the product slightly to spread the loss to multiple consumers so that each will bear a negligible amount of the loss. Thus, no single tortfeasor will carry a heavy burden. In view of the greater opportunities to sue large bodies, and even the state and its authorities, this issue has assumed great importance.

Optimal deterrence is applied most appropriately in dealing with large, sophisticated, and calculated defendants that manage risks and often become serial and/or mass tortfeasors due to the extent of their activities. Determining optimal deterrence includes weighing the costs of precautions against the probability that damage will occur, identifying the cheapest cost avoider, and generally making an effort to reduce the cost and number of accidents. Since a private individual is not always expected to make intricate calculations, he is unlikely to respond to a cost-driven incentive scheme.

Hence, under this Article’s proposal, the instrumental category (including the goals of distributive justice and optimal deterrence)

138. Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income?*, 23 J. LEG. STUD. 667 (1994) (expanding on the contradiction between these two goals).

139. *But see* ENGLARD, *supra* note 31, at 54 (“True, had [wealth] been the only argument against the defendant, his personal obligation to compensate would be completely unfounded, since nothing distinguishes him from all other wealthy people.”).

will be dominant in actions against large and sophisticated institutional defendants.

However, when dealing with two private, non-institutional, uninsured individuals, following the traditional tortious scheme and taking into account goals from the *correction-compensation category*, which include compensation and corrective justice, is more appropriate. This focuses on the specific parties to the tort. In such cases it is more appropriate that the private tortfeasor, who caused damage in a less deliberate and more spontaneous fashion, should restore the *status quo ante* as a matter of moral retribution. Where tortfeasors are less deliberate in the actions surrounding the tort (unlike product liability cases, for example), the instrumental category becomes less relevant since it is difficult to influence and direct the behavior of these tortfeasors, thereby increasing aggregate welfare.

In “mixed cases,” where the tortfeasor is either insured or acting in his capacity as a worker of a large employer, the instrumental category is also relevant. There, an institution again provides the actual compensation for that individual. Nonetheless, even in these cases, liability is effectively imposed on the direct tortfeasor, although different mechanisms apply for compensating and distributing the loss. This is not a case of classical corrective justice since it is not the actual tortfeasor who directly compensates the injured party. Even if the tortfeasor is deterred from committing crimes or if he bears certain indirect costs, he has not actually paid the injured party. Factors such as deductibles or reputation damages will cause potential tortfeasors to take some precaution.

2. Stage 1: The Degree of Dominance of the Category of Goals will Depend on the Basis of the Defendant’s Profile and the Nature of His Actions

To determine the relative importance of each category of goals—the instrumental and the correction-compensation—it is necessary to examine tort law in relation to two groups of cases derived from the defendant’s character, tortious activity, and economic strength. One group of cases is composed of large, sophisticated, insured, and calculated defendants; private defendants comprise the other group. This Article examines these categories separately, as opposed to James Jr.’s case-by-case approach. This approach differs from monistic approaches that stick to the same method of examination, regardless of the case and the circumstances.

This Part examines each of these two groups of cases (which is determined according to the nature of the defendant) as to the relative importance of the category (correction-compensation or the instrumental category). Practically, greater weight must be given *ex ante* to the instrumental category in contemporary actions involving financially sophisticated, risk-managing institutions. In lawsuits involving uninsured private individuals who must actually pay for the cost of the harm they have caused and whose acts are generally spontaneous, occasionally performed in a moment of passion, and uncalculated, the correction-compensation category should be given more weight. In other words, one should not focus on notions of distributive justice or optimal deterrence in claims between individuals nor on traditional corrective justice in claims against sophisticated and economically strong defendants.

Hence, the category of goals this model prefers varies based on the type of case. This variance is contrary to Schwartz and Englard's actual theories, which favored the same goal in every type of case. James Jr.'s case-by-case examination also prefers one category of goals over the competing category.

But this model is not contrary to the existing approaches. It utilizes the advantages of each of the existing models and discards their disadvantages to reach a true legal pluralism in tort law theory. Schwartz's approach of prioritizing optimal deterrence is particularly suitable to large, calculated, and sophisticated defendants. They are potentially serial and/or mass tortfeasors, who can be deterred through financial sanctions and for whom considerations of corrective justice are of limited relevance. Approaches which prefer corrective justice (like Englard's) or stick conclusively to that goal (like Weinrib's or Coleman's) are more appropriate to private injurers, who are less calculated, usually do not manage risks, and frequently act more spontaneously. Here the application of financial sanctions is less likely to provide for a high level of deterrence—although some private individuals are calculated tortfeasors and may manage risks carefully, they are rare.¹⁴⁰

If the essence of the different prevailing approaches is distilled and separated in accordance with the nature of the tortious issue, the defendant's economic profile, and his tortious conduct, it is possible to ensure the relational legal certainty and stability Robbinette advocated.¹⁴¹ At the same time, it identifies some dominant goals of tort law, as Geistfeld, Schwartz, and Englard advocate but without overweighting a single goal in every case.

140. See discussion *infra* Part IV.

141. See *infra* Part II.D.

Thus, lawsuits involving uninsured private individuals, whose acts are spontaneous and who must actually pay for the cost of the harm they have caused, should focus on corrective justice and compensation. Namely, the focus is not on the instrumental category but on the correction-compensation category. Englard's criticism of law and economics support the argument that individuals do not manage risks and do not compute losses and probabilities in a manner that would make them susceptible to financial deterrents. Englard argues that the economic calculation is simplistic and disregards important data.¹⁴² Hence, he sows doubts regarding the ability of the economic analysis of law to reduce the costs of accidents. He argues that individuals cannot actually use the hypothetical deterrence effect since the cost of preventing an accident, which derives from forgetfulness, error, and human confusion, is frequently difficult to quantify.¹⁴³ Mario Rizzo advances a similar criticism of some of the consequentialist theories, concluding that "efficiency, as normally understood, is impossible as a goal for tort law. The law cannot and should not aim toward the impossible. Consequently, both the normative and positive justifications for the efficiency approach to tort law must be rejected."¹⁴⁴ Additional critics of tort law and economics include Richard Epstein, who argues that applying law and economics enables judges to undermine existing principles of private law.¹⁴⁵ Zamir and Medina have also criticized law and economics, comparing it to the deontological theories along these dimensions.¹⁴⁶ They claim that it often disregards the moral aspect of actions and extols the virtues of integration between the two.¹⁴⁷ From this, one can critique law and economics in terms of the unrealistic view that a person is calculated and non-spontaneous.

It is sometimes difficult to imagine a private spontaneous tortfeasor who actually calculates in detail the costs of prevention

142. ENGLARD, *supra* note 31, at 40–42.

143. *Cf. id.* at 31–35 (describing the major obstacle to implementing Guido Calabresi's economic theory of liability as conflicting instrumentalist objectives coupled with an undefined notion of justice); Englard 2005, *supra* note 52, at 356–57 (describing the basis of Englard's doubts about Calabresi's economic theory as the absence of exact data).

144. Mario Rizzo, *Law Amid Flux: The Economics of Negligence and Strict Liability in Tort*, 9 J. LEGAL STUD. 291, 291 (1980).

145. Robinette, *supra* note 18, at 387; *see also* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 228 (expanded ed. 2003) (describing Epstein's concern that a reasonableness standard delegates too much power to judges). Epstein criticized law and economics, but in the last few years his resistance to it seems to have lapsed; *see, e.g.*, RICHARD A. EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE? (1997).

146. ZAMIR & MEDINA, *supra* note 120; *see* Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law*, 96 CAL. L. REV. 323 (2008) (exploring deontologically constrained cost-benefit analysis).

147. Zamir & Medina, *supra* note 120, at 370.

versus the probability of the damage's occurrence and then acts according to that calculation. But, some individuals may reasonably calculate risks along those lines. Englard's critique may be overly broad, but it is still necessary to support it in essence and join to it the criticisms that Epstein and others voice regarding consequentialism. For example, a person who breaks the speed limit or does not stop at a stop sign and thereby benefits by arriving at his destination earlier, will find it difficult to calculate how much this is really "worth" to him in terms of increasing the probability of an accident, i.e., versus an increased risk of damage to others or self-risk.¹⁴⁸ Indeed, in many cases, it is simply human nature to consider only saving time and not the increased probability of an accident with disastrous consequences. Instead, people tend to think that "it will not happen to me." A certain calculation of the feasibility of speeding and the time gained against the increased risk of being harmed, harming others, or of getting caught may play a certain role in the criminal aspect; however, seeing a similar deterrence effect in the tort aspect is difficult. If a person is not deterred from being harmed or even from being killed, the deterrent effect of tortious liability is even less.¹⁴⁹ Private defendants may sometimes calculate this risk, as a rough assessment, and sometimes may not. Accordingly it is conceivable that some drivers do roughly estimate the calculation.

In the above case, the actor performs, at most, some rough calculation at a very general level. Under such circumstances, the actor's anticipation of a risky outcome generally stems from an understanding of the potential criminal repercussions, such as the risk of being caught by the police if an offense is committed. Englard may have meant by opposing Porat's analysis of self-risk that there are private individual tortfeasors who calculate, but that it is usually hard or even impossible to perform this calculation *ex post* in court. Doing so is indeed fictitious.

Even if we assume that individuals can perform such calculations, courts still struggle to understand the calculations the individuals should have made and to perform an approximate calculation of this type even in hindsight without the analysis being too artificial or disconnected from reality. These calculations may also have great administrative costs. Even if individuals sometimes do calculate, they are definitely not managing risks in a precise way that

148. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 5-6, 186 (1987); see also, generally, Porat & Cooter, *supra* note 4.

149. See Englard 1980, *supra* note 35, at 45 (questioning whether economic pressure is likely to motivate an actor already risking his life).

enables real optimal deterrence as a reflection of law and economics. Even Calabresi himself has admitted that there are goals which are compatible with one type of accidents¹⁵⁰ and that law and economics cannot really present solutions to every question connected to preventing accident costs.¹⁵¹ In cases of individual tortfeasors and victims, it is preferable to focus on rectifying the wrong even if the basic economic calculation does not indicate the need to impose liability or if it is difficult to perform this calculation *ex-ante*.

Englard's criticism seems somewhat excessive—especially in the context of an institutional defendant who is capable of making tort-related cost-benefit analyses. Since the power and influence of an institutional defendant is significantly greater than that of an individual plaintiff, questions of distributive justice and loss distribution may also reasonably arise in this context.

Therefore, when both plaintiff and defendant are individuals, courts should accord the correction-compensation category greater weight. In these cases, it is reasonable to require the tortfeasor to compensate the victim—relying on the traditional moral-deontological principle of fault as the primary goal of tort law in this category. Indeed, here too, a proper and balanced legal policy will not lead to a situation where liability is imposed in each and every case, and different interests, personal and social, are balanced.

This requires a certain qualification of Englard's critique, while drawing clear divisions based on the nature of the defendants: there are types of cases in which optimal deterrence and distributive justice are more suitable, and some in which they are less suitable. The best parameter for distinguishing between these cases is the type of defendant and the character of her activity.

A true balance must be struck between the categories, depending on the type of tortious conduct and the defendant's character. Under this theory, different goals do not necessarily contradict, but they may need to be adapted in different circumstances. Each of the two groups of characteristic issues (divided according to the type of defendant) has a corresponding category of goals which is

150. CALABRESI, *supra* note 36, at 14–15

[T]he importance of each goal may well vary in the different areas in which accidents occur. Moreover, even if the goals are given the same weight in different areas, different structural in the areas may require different systems. A system that is desirable for work accidents may not be desirable for automobile accidents, either because what we desire may be different, or because the structure of the activities involved may require different systems to accomplish the same ends.

Id. at 15.

151. *Id.* at 18–20 (cautioning that economic theory alone cannot balance lives against money or convenience).

more appropriate for that group of cases. The more appropriate category should take priority in determining tortious liability while the less appropriate category should be given less weight, but still considered.

3. Stage 2: A Pluralistic Balance—Certain Consideration is Given to the Less Dominant Goal Category When its Values are Significantly Harmed

After determining the priority of the two categories of goals within a group of cases, the two categories must be balanced. Thus, the less dominant category assists the balancing process, although its initial weight is smaller. The less dominant category is more than a pointer on a set of scales, as Schwartz suggested,¹⁵² namely that considerations of corrective justice be recognized only in cases where the implementation of principles of optimal deterrence causes a very unjust outcome.

In run of the mill cases, the dominant category of goals will receive significant consideration. In situations where a decision made in accordance with the dominant category may significantly impair the secondary category of goals, the secondary category will receive some more consideration. Therefore, in cases where the defendant is a financially powerful institution, the instrumental category will be dominant. However, this does not impose across-the-board liability on the defendant in every case and in every circumstance. Taking into account considerations of corrective justice will constrain the application of liability to recognition of across-the-board liability of defendants that are financially powerful institutions if they are not the direct tortfeasors. The rule will still impose liability but simply not in every case. And the converse is also true. In litigation between individuals, the correction-compensation category is dominant. However, in cases where deterrence is nevertheless desired, and in cases where it is possible to identify a power struggle between strong and weak individual parties, the instrumental category will be taken into account for the purpose of constraining the correction-compensation category.

Unlike some of the present pluralist theories (Schwartz, Geistfeld, and, in a certain sense, also England), which treat all tortious constraints as a single corpus and argue that one goal always takes precedence over the other, this Article argues that torts can

152. See *supra* text accompanying note 86.

be divided into two groups (and not more, as in James Jr.'s approach), with different goals receiving different priorities as a function of the group membership of the tort at hand. This seeks to balance the dominant group with the subordinate group, not only when the case is rare and severe, as Schwartz suggested, and not only in rare and serious cases such as cases of public policy, but even when the dominant category significantly impairs the rationale underlying the secondary category.

4. Intra-Category Conflicts: Cases of Contradictions Between Goals that Belong to the Same Category

When dividing tort law into categories, one may assume that all goals within a single category share certain common elements. However, significant differences exist between some of these goals. Consequently, intra-category conflicts can arise.¹⁵³ Take, for instance, the case of child or spousal abuse. There, questions of distributive justice may be more important than optimal deterrence, due to the huge power gap between the abuser and the abused. The efficient-economic deterrence of the abuser—who acts out of emotion, desire, or insanity and does not conduct a cost-benefit analysis—may be impossible. That means conflicts can arise between distributive justice and optimal deterrence—both of them belong to the same category, the instrumental one. Likewise, conflicts may occur within the correction-compensation category. Corrective justice requires corrective action with respect to the tortfeasor and the injured party. Compensation requires corrective action with respect to the injured party.

It is possible to sketch a framework for cases that involve intra-category clashes. Giving greater weight to the other category can express non-agreement within the same category of goals. Here a number of situations are possible. First, this is possible if there is no intra-category clash within the dominant category, but there is one in the secondary category, as in the domestic violence case. This situation is fairly clear—the secondary category receives even less weight than it would otherwise, as even internally there is no agreement as to the desired outcome. Second, this is possible if an intra-category clash exists only within the dominant category. In this case

153. Of course, sometimes the legislature decides *ex ante* to prefer one category or one goal, e.g., in choosing a strict liability regime in some cases. In this case, the suggested balance is not needed. This balance is intended for the *ex post* use of the courts and particularly in the rule of negligence.

the secondary category should receive more weight, possibly up to the amount accorded to the dominant category. In other words, in such a case, one should examine all of the goals equally, perhaps in a manner similar to the approaches of James Jr. and Robinette, which, while usually too general, seem more suitable in these cases. Third, the most problematic case is where there is an internal clash within both the dominant and the secondary categories of goals concurrently. In these cases the dominant category has more power, but it also has less room for legal presumptions and more room for common sense. This latter case will clearly be relatively rare and must be treated as such.

5. Cases in which One of the Goals is Irrelevant

If only one goal is relevant in one of the categories, the other goal will of course not be taken into consideration. That will *not* affect the weight or balance of the categories. For example, if the question is an injunction (e.g., for the removal of a nuisance), then only the goal of corrective justice is relevant in the correction-compensation category because there is no matter of compensation at hand (of course in proper cases a plaintiff can apply for both remedies).

6. Cases of Reciprocal Harm between Categories

Consideration must be given to the question of reciprocal harm, i.e., where the implementation of one category of goals causes significant harm to the other category. The nature of the harm and the dominance of the category harmed are especially important for this analysis. Under these circumstances, there are a few options. If the two categories harm each other in a similar manner, the harms may offset each other and the dominant category remains dominant. Accordingly, when the two categories of goals cause significant reciprocal harm, the more dominant category of goals will naturally supersede. If the harm to the dominant category is more significant, the other category will qualify it only slightly. If the harm to the secondary category is more significant, this will lead to greater qualification of the dominant category.

Thus, in every situation the supremacy of the more dominant category appears in different degrees. The less dominant category will also be felt, sometimes more, sometimes less, depending on the circumstances.

7. Summary

This paper proposes a novel mixed-pluralistic theory of tort law, especially to the rule of negligence, in order to reach a true legal pluralism in tort law theory. The goals of contemporary tort law are divided into two primary categories: correction-compensation and instrumental.

In the first stage of the analysis, the correction-compensation category is prioritized in cases where there is a single, uninsured injured party and a single, uninsured tortfeasor, and the latter pays damages out of his own pocket. The instrumental category is prioritized where institutional entities are involved. In the second stage, this Article describes prioritizing each category as a function of the group of torts to which a case belongs and not on a case-by-case basis. A certain weight is given to the secondary category of tort goals, varying as a function of the circumstances and specifics of the case at hand. There are also solutions for cases of a clash or disagreement between two goals that belong to the same category.

Thus, most cases have a mixed theory, which strikes a true pluralistic balance, taking into account the entire spectrum of goals and the range of tortious events. This proposed model allows the consideration of many different goals of tort law while prioritizing those goals that are most relevant to the case at hand. The model is a coherent and practically implementable legal regime, which ensures that both private considerations (related only to the parties of the tort) and public considerations (related to social welfare) are appropriately considered in each case.

B. From Theory to Practice: Adapting the Proposed Analysis to Changing Legal and Social Realities

This Part provides a series of examples of the consequences of implementing the proposed model. The outcome in some of these examples differs from prevailing practices, while in others the outcome is similar. The purpose of this discussion is to provide a framework for understanding the tradeoffs between different categories of goals under different circumstances.¹⁵⁴

154. The chosen issues feature different and even contradictory outcomes derived from the implementation of the two categories of goals. This Part does not discuss all those cases where all the goals of the law of torts have the same direction, and the result of their implementation is clear—the sweeping acknowledgment or non-acknowledgment of tort liability.

1. The Dominance of the Instrumental Category in Cases of Financially Powerful Institutional Defendants and Its Partial Qualification By the Secondary Correction-Compensation Category

This Part applies the proposed approach by examining cases where the dominance of the instrumental category (that is consisted of deterrence and distributive justice) explains the outcome. It also discusses the role of the other secondary and less dominant correction-compensation category in determining the outcome of the case.

The first examples are classic and general. The first example is taken from nuisance cases, and here the analysis of the proposed model proposes a change of the prevailing law. In the other example, vicarious liability, the proposed model is indeed compatible with the legal situation but offers a wide and fresh theoretical background for this outcome.

i. Nuisance

A classic example where the remedy sought is an injunction, not only compensation, is a nuisance. Although the purpose of the tort of nuisance is to ensure that the plaintiff may live her life in peace and quiet, the law does not ignore the benefit arising from the act causing the nuisance, its social importance, and whether a legitimate interest underlying the cause of the nuisance. For example, cellular antennas may broadcast electromagnetic waves and injure an individual, but they also benefit society. Nuisance is a question of tradeoffs. On the one hand, not every injury to an individual for the benefit of society is justified. On the other hand, it is unreasonable to put an end to all commercial and social activities, even if they cause a nuisance.

This particular example concerns an individual claim brought against a large plant.¹⁵⁵ If this Article's theory is adopted, a fine balance is possible between the respective interests of the parties, which solves the case in a different manner than the court employed.

The air conditioning and refrigeration units in a textile company plant employing thousands of workers operated twenty-four hours a

155. C.A. 44/76 Ata Textile Co. Ltd. v. Schwartz, 30(3) IsrSC 785 [1976] (Isr.). See David Kretzmer, *Judicial Conservatism v. Economic Liberalism: Anatomy of a Nuisance Case*, 13 ISR. L. REV. 298 (1978).

day. Mr. Schwartz, who lives near the plant, claimed that the noise issuing from the units after the plant moved to twenty-four-hour-a-day activity impaired his ability to lead a normal life. Production had increased in order to cover the plant's losses. The assumption was that if the plant reduced its activities, it would lose more and have to close its gates within about two years. The plant exported goods, so the government earned taxes from its activity. It also provided work for thousands of families. If it closed its gates, the owners as well as the workers and the government would lose. The company would have to pay unemployment allowances and face social and economic problems. Schwartz appealed to the court to order the shutdown of the units or alternately to significantly dampen the noise issuing from them. The plant asserted that there was no nuisance and only a reasonable level of noise. The court found that a nuisance did exist, according to the statutory provision defining nuisance as a "material interference with another person's reasonable use and enjoyment of immovable property, having regard to the situation and nature thereof."¹⁵⁶

Indeed, the statute itself does some of the balancing by stating that the tort only occurs in cases of *material* interference with the reasonable use of immovable property and that not all interferences will be wrongful. However, it is clear that the provision itself, without proper interpretation and without a balance between the categorical goals of tort law, cannot achieve a practical outcome.

The model this Article proposes first identifies the outcomes the different categories indicated. The instrumental category, which is the dominant category in a case where the plaintiff is an ordinary individual and the defendant a big manufacturer, points to one outcome. The correction-compensation category, which is secondary in this case, points to a different outcome.

This Part first examines the instrumental category and then moves on to the goal of optimal deterrence. On the one hand, if the plant were to close its gates, move to another location, or even reduce its activities, this would amount to over-deterrence since the outcome would cost more than the plant's damage to Schwartz. On the other hand, if the plant were to continue to commit a wrong in the same manner, this would constitute under-deterrence. Is it possible to achieve optimal deterrence? Here, the Coase Theorem is relevant.¹⁵⁷ According to Coase, although the nuisance causes damage to the victim, terminating it may also cause financial and social damage—including damage to the creator of the nuisance—and

156. Civil Wrongs Ordinance, 5732–5733, 1 LSI 44 (1972) (Isr.).

157. Coase, *supra* note 41.

also reduce social welfare.¹⁵⁸ Thus, it is necessary to examine what will cause a greater amount of damage: continuing the nuisance or terminating it. Schwartz, in a way also, would also cause damage by preventing the plant from exploiting its manufacturing capacity, and, maybe, Schwartz should be “taxed.”

In that case, the plant may attempt to purchase Schwartz’s right, and this transaction might increase aggregate welfare. Imposing a judicial injunction against the plant would require the plant owner to change the scope or nature of his activities. In addition, the profits earned from the manufacturing activity would decrease, while the residence’s benefit would grow. An award of damages rather than an injunction would not alter the scope and nature of the activities, as the plant would continue to cause a nuisance, but it would decrease the plant’s profits and increase the residents’ welfare.¹⁵⁹ Forcing the plant to close its gates may deter other entrepreneurs and thus prevent desirable social activity, which would reduce aggregate welfare.

According to distributive justice—the other goal in the instrumental category—the plant is a large, financially powerful institution causing a nuisance to a private individual, and the court should prefer the solution which benefits the weaker party. However, the solution does not need to be completely one-sided—for example, evacuating the plant or significantly reducing its activities (which would lead to its closing its gates within two years). Without a statutory provision on this matter, reaching an outcome, in which a strong entity must retreat in all cases before a weaker party, might be possible. However, the statute in question already strikes a balance and does not allow this outcome in all cases, but rather inquires as to the existence of material interference.¹⁶⁰ This interference must be for a reasonable use, and the law also allows compensation in the event of minor interferences. According to

158. *Id.* at 2 (arguing that the matter of restraining one harming another is actually a reciprocal one: whether A should be allowed to harm B, or B to harm A).

159. *Cf.* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–10 (1972) (presenting a few property and liability rules and incentivizing the parties, by some of these rules, to negotiate in order for one party to sell his rights to the other as an outcome of these negotiations, and also suggesting in some cases in which the plant preceded the plaintiff to reach a conclusion of the damaged party pays in order the plant stops polluting); *see also* *Spur Industries, Inc. v. Del E. Webb Development Co.*, 494 P.2d 700 (Ariz. 1972) (reaching in fact an outcome similar to Calabresi & Melamed’s forth rule, i.e. enabling the harm activity to exist but enables the injured party to buy the nuisance removal). These sources deal also with the question of who was there first—whether the resident came to the nuisance or vice versa. In this case that point seems less relevant because, although the plant preceded Schwartz, the large noise due to the increased work in the plant began after he resides there.

160. Civil Wrongs Ordinance [New Version] 5732–5733, 1 LSI (1972) (Isr.).

distributive justice, solutions must be found to stop the noise or reduce it significantly so that it will not amount to a material interference with Schwartz's reasonable use of his apartment. But distributive justice—unlike corrective justice—also deals with parties other than those immediately related to the tort. For example, the plant employees and their families may also be considered weaker parties for the sake of distributive justice. The same may apply even to the consumers of the plant's products, if, for example, it manufactures cheap products that are worthwhile to them. In that case, the court should prefer these parties over Schwartz.¹⁶¹ Accordingly, distributive justice may support a solution other than closing the plant or significantly reducing its activities. Loss distribution also hints at an outcome where it is possible to arrive at a result which distributes the loss to some extent not only between both parties, but also at least partially onto the shoulders of others.

The correction-compensation category is secondary. As the request is an injunction, only the goal of corrective justice is relevant here.¹⁶² However, this has no effect on the weight of the category and its balance with the other category. According to corrective justice, one only looks at the two concrete parties to the tort, which disregards aggregate social welfare (the harm to the business of the plant owner, the possible harm to the livelihood of thousands of families, the harm to the consumer and even to the state). In this situation, it is necessary to order the nuisance's removal and award damages to Schwartz for his suffering. This leaves the plant owner very few options: she can move the plant to a different location, stop the operation of the units (and in effect close its gates), or significantly reduce the activities (thereby considerably slashing the volume of the production, in effect closing its gates within two years). The state will also have to bear the cost of the redundancy of numerous workers who will seek unemployment benefits, some of whom may become a burden on the social services, as well as a reduction to the state's tax base, since neither plant nor workers will be paying the state taxes.

The harm caused to the correction-compensation category by not stopping the plant's activities is grave, and principles from within this category must be taken into account. Moving Schwartz to another location in consideration for compensation seems like an unfortunate outcome, which interferes with Schwartz's right to property and the rationale underlying the tort of nuisance. Doing

161. Cf. Calabresi & Melamed, *supra* note 159, at 1120–21 (describing the negative effects on distribution of altering a nuisance producing coal factory).

162. See *supra* Part III.A.5.

nothing and enabling the existing situation to persist is also not a balanced outcome from a correction-compensation perspective. A true balance in the spirit of legal pluralism should be struck between the interests.

According to optimal deterrence, the court should seemingly examine which of two harms is greater. One possibility is to stop the nuisance, which harms the plant and the aggregate welfare. The other possibility is to allow the noise to continue, which harms Schwartz. Note that there is also an option to award damages—a secondary remedy of the liability rule kind—instead of an injunction ordering the plant's removal or reducing its activity—a primary remedy of the property rule kind.¹⁶³ But it is inconvenient to look at the situation only from a cost-benefit point of view, given that it involves an innocent injured party and a tortfeasor that is not innocent, even if its intention is not to harm Schwartz but to gain profits and avoid closing the plant. The court could also consider the extent and severity of the harm, among other considerations. In other words, the greater the harm to Schwartz, the more weight that should be given to considerations from the correction-compensation category that guard him, rather than the tortfeasor and society. Nonetheless, the instrumental category is clearly dominant here. It is not really possible to compare the harm to social welfare (the harm to the owner of the plant, the harm to thousands workers and their families, and perhaps even indirect harm to consumers and to the state) with the harm caused to Schwartz. However, the harm caused to Schwartz will still be significant if nothing is done. Assuming this is true, is it possible to think of an intermediate pluralistic solution acknowledging the dominance of the instrumental category, yet still influenced by the correction-compensation category?

The judgment of the court clearly leaned in the direction of correcting the damage by decrying pure law and economics calculations. The result was full justification for granting an injunction until the decibel level dropped below a certain point since the nuisance was so substantial.¹⁶⁴ This approach, which vests the right to an injunction in the victim of a nuisance who suffers material damage, almost independently of the social cost of the injunction, is contrary to the economic perception of optimal deterrence but

163. Cf. Calabresi & Melamed, *supra* note 159 (presenting both property and liability rules, as different methods of defending the entitlement. For example, liability rule in favor of the damaged party provides the injured person damages only but not injunction against the creator of the nuisance).

164. C.A. 44/76 Ata Textile Co. Ltd. v. Schwartz, 30(3) IsrSC 785, 816–17 [1976] (Isr.).

consistent with the narrow principles of corrective justice. The decision was explained on the grounds that law and economics is not central to a decision, but merely one of a broad range of factors, and that the most important factor is the relationship between the tortfeasor and the victim: i.e., corrective justice.¹⁶⁵

In this case, the harm to Schwartz is significant. He experienced harm to his nervous system from the continuing noise, and he argued that awarding damages was not a satisfactory remedy under the circumstances. Negotiations between a large plant and a private person may put Schwartz in a strikingly inferior position. However, since Schwartz could drag other residents into the appeal as well, the plant may have had an interest in settling with him before reaching court. Therefore, the law and economics that encourages negotiations should gain more weight.

Hence, identifying intermediate solutions beginning from a dominant instrumentalist premise is necessary, as well as taking the secondary category into account as a qualifier. One possible balanced solution is to increase the cost of manufacturing, in order to alleviate Schwartz's suffering. If there is an alternative form of manufacturing which is less harmful and preserves at least some profitability, this would be preferable, even if it requires a change in the manufacturing system and/or installation of new units. In the case at hand the court, while not barring such a solution,¹⁶⁶ did not compel it. This solution would have distributed the cost of the nuisance among consumers (through the price of the product, although one must not ignore competition), producers (through the increase in manufacturing costs), and Schwartz (who still suffers from the nuisance to a certain degree). The premise here is that the operations, which cause the nuisance, should continue, as follows from the instrumental category, and that the loss should be distributed to various parties while still giving certain consideration to the correction-compensation category.

Another intermediate solution is soundproofing Schwartz's apartment to significantly reduce the noise. The plant would bear the cost of the insulation. Even though the nuisance would not be completely eliminated, it could be reduced to a reasonable level. This has a certain advantage over the award of compensation, because it is unclear whether Schwartz would use compensation to soundproof his apartment or to relocate. Under these circumstances, a somewhat paternalistic solution that requires the plant to insulate Schwartz's apartment may be the best method to ensure

165. *Id.* at 816.

166. *Id.*

that the nuisance is eliminated or lessened. The costs of soundproofing Schwartz's apartment are of course less than closing the plant or reducing its level of activity. Nevertheless, if the plant succeeds in continuing the manufacturing process in a less noisy manner, this provides a benefit to all future claimants against the nuisance and not just to Schwartz, as in the soundproofing solution, where it is assumed that the future standard will be for the plant to soundproof all of the houses surrounding it. However, ultimately insulating a few dozen or even hundred apartments at a certain radius from the plant may still be more feasible and financially attractive than changing the plant's manufacturing process, which may be impossible.

Closing the plant or significantly reducing its activities is also likely financially unattractive. In practice, this indeed is what the plant tried to do to reduce the level of noise below the decibel level the court set.¹⁶⁷ However, Schwartz objected to insulating his apartment, and the plant argued that Schwartz's objection derived from an attempt to raise the price for the plant to buy his house.¹⁶⁸ Further negotiations between the parties failed. However, had the court ordered such a solution and supervised its implementation, the conflict could have successfully concluded.¹⁶⁹

One of the aims of the qualification is to make the next owner of potentially nuisance-causing plants think twice before causing nuisances and to prepare possible solutions. This directs her behavior, rather than encouraging the annoying activity. This also provides an incentive to pay serious attention to victims' complaints of nuisance and make a genuine effort to limit their damage. However, within the framework of the appropriate balance, identifying solutions that are economically profitable in manufacturing terms is necessary. Such intermediate solutions under the auspices of the court would not only have provided a more appropriate solution to the specific dispute between the plant and Schwartz, but they would also have created a suitable charter for potential future cases as well.

In the case at hand, the final solution was fairly one-sided. Surprisingly, the plant, extremely dissatisfied with the judgment, requested that the Minister of Finance expropriate Schwartz's apartment in return for compensation, and the request was

167. *Id.* at 790–91. The Supreme Court emphasized, nonetheless, that if Ata would have given full notice to Schwartz's claims the litigation would have been avoided. *Id.* at 791.

168. *Id.* at 791.

169. However, the need for court intervention means more costs.

granted.¹⁷⁰ Schwartz was compensated for the expropriation in accordance with the laws of governmental takings, but at a lower rate than the one that he demanded from the plant and that the plant offered during the course of negotiations.¹⁷¹ The courts determined that the expropriation process was lawful.¹⁷²

Allegedly, this outcome indicates that the right way in practice was to follow Coase and let the parties negotiate. However, a balanced pluralistic solution would have ensured a better result: it would have outlined a map for the future, in terms of directing potential tortfeasors (initiators and other existing plants) and directing other residents who are current or potential victims of similar nuisances. The prevailing situation after the judgment is uncertain since on one hand, potential tortfeasors may see an incentive to harm, to ignore the injured party, and not to reduce the harm in the possibility of referral to the Minister of Finance (that he might expropriate property in return for compensation). On the other hand, potential tortfeasors may be deterred from creating nuisances that might be useful for society or even from operating plants, since there is no assurance that the Minister of Finance will expropriate property in return for compensation again in similar cases.

Starting from the dominance of the instrumental category will require potential tortfeasors and injured parties to understand that the plant will not close its gate or dramatically reduce its activity as a matter of routine in such cases. A certain balance with the correction-compensation category will qualify this outcome, attempt to consider the injured party's interest, and balance it against the interests of the plant, the state, the workers, and the consumers.

ii. Vicarious Liability

Distributive justice imposes vicarious liability on an employer for a tort committed by her employee. The premise is that an employer has a "deep pocket," can distribute loss well, and is generally insured. The employee on the other hand generally possesses limited resources and may fail to fully compensate the injured (whether a third party or the worker himself). Therefore, if the loss falls on the shoulders of the employee, it may cause her financial collapse, or, if the individual tortfeasor is unable to pay, it may cause the loss to

170. HCJ 114/77 Schwartz v. Minister of Finance, 31(2) PD 800 [1977] (Isr.).

171. *Id.* at 807.

172. *Id.* at 800.

fall on the injured party. Neither outcome is socially desirable. The employer is better able to absorb the costs of the torts that may result from her employees' actions.¹⁷³ She is also able to insure herself. In such a case, it is appropriate to identify the defendant with financial capacity, who is closest to the resource-constrained employee, and who generally benefits from the employee; namely, the employer. This point is significant, as it may increase the courts' willingness to determine the liability of an employer in order to reach the outcome of the imposition of liability on a distributor of loss possessing a "deep pocket"¹⁷⁴ and not on the simple employee.

Imposing vicarious liability also stems from the goal of optimal deterrence since it will motivate the employer to invest in restricting her employee's wrongdoing. The employer is better positioned to correctly evaluate the cost of accidents and to then provide safety training accordingly. She can prevent accidents by increasing safety precautions, refreshing procedures, conducting training sessions, or refraining from employing employees who are careless if the danger can be anticipated. The employer's control compared to the employee justifies imposing liability on her even if she was not negligent.¹⁷⁵ In many cases, imposing liability on an employee will not change her conduct, even if she thus endangers herself. On the other hand, it is always possible for the employer to take more precautions and invest in safety measures for employees. Indeed, vicarious liability may "make employers more careful, and make them responsible for costs imposed by their employees."¹⁷⁶ In addition, the employer can dismiss or sanction employees who are not sufficiently careful, thus influencing their employees' activities. Additionally, the sword of dismissal hangs over the head of such an employee, deterring her from committing negligence. Other sanctions, such as not being promoted or creating a bad reputation as neglectful, can also motivate an employee. Of course, the employee can get hurt and even die in cases of self-induced harm. Consequently, the employee is likely to "pay" when he commits a tort for which the employer is liable, though not necessarily the type of payment corrective justice demands.

The imposition of vicarious liability is better explained, even if only apparently, in terms of deterrence than in terms of corrective

173. See ENGLARD, *supra* note 31, at 53–55.

174. ABRAHAM, *supra* note 5, at 191–92.

175. Calabresi & Hirschhoff, *supra* note 47, at 1064 (seeing employers as cheapest cost avoiders and best decision makers).

176. Guido Calabresi, *Toward a Unified Theory of Torts*, 1:3 JTL 1, 5 (2007) (arguing that this was one of the mission of traditional common law).

justice.¹⁷⁷ A circumscribed and “pure” theory of corrective justice would hold that the employers’ liability for their employees’ acts is contrary to the theory of culpability, as it was not the employer herself who performed the tort.¹⁷⁸ According to this reasoning, if the employee does not have resources, the loss will fall on the injured party, who will remain empty-handed. This outcome is unsatisfactory in terms of the goals of corrective justice and compensation.¹⁷⁹ That said, a broader theory of corrective justice may encompass vicarious liability since the employer benefits from his employees’ actions and must be responsible for their consequences.¹⁸⁰ The employee is the employer’s tool for the purpose of obtaining a profit; therefore the employee does not need to bear the losses which are an outcome of the employer’s enjoyment of her services. The reverse is true as well, to some extent. The employee also enjoys the benefit of the resources of the employer and, in fact, the actual employment itself. Thus, the employer is not really extraneous to the situation. Nonetheless, it is clear that this is not corrective justice in its basic format, in which the defendant is the tortfeasor and not another party as the employer (or the insurance), but an attempt to examine it from a broad perspective.

One may argue that expanding the employer’s liability does not necessarily benefit the employee. As the employer has to purchase

177. Schwartz, *supra* note 77, at 1822–25.

178. ABRAHAM, *supra* note 5, at 190.

179. See ENGLARD, *supra* note 31, at 53–55.

180. Cf. DOBBS, *supra* note 28, at 15 (comparing strict liability and corrective justice and the possibility of commensurability between the two and explaining that one idea behind strict liability is that when one makes choices about her conduct, she is entitled to the gains that may result from that conduct, so she should also take responsibility for the losses. This can also be seen as a form of strict liability because the employer is not directly at fault. This idea may also be a basis for vicarious liability according to a wide view of corrective justice because the employer gains and enjoys from the employee, so he should also pay for the losses the employee causes to a third party or to himself. In any case, Dobbs deals there with some commensurability between corrective justice and strict liability, and I think this example can fit this notion); cf. Tsachi Keren-Paz, *Egalitarianism as Justification: Why and How Should Egalitarian Concerns Shape the Standard of Care in Negligence Law?*, 4 THEORETICAL INQUIRIES L. 275, 284 (2003) (discussing fairness and the distinctions between corrective justice and distributive justice, and explaining that “[a] fairness approach maintains that those who benefit from a given activity should bear its costs and risks. It is important to note that a distinction can be made between fairness as a distributive criterion in tort law and fairness as a guideline in a corrective justice approach to determining what kinds of activities are negligent. One way to look at this difference is as the distinction between the ex post distribution of harm and the ex ante distribution of risk, respectively. When a defendant’s activity, examined ex ante, is going to allocate the benefits from the activity to the defendant and the risks, or costs, to the plaintiff, the activity might create a duty to compensate the victim as a matter of corrective justice. When the defendant’s activity, viewed ex ante, should benefit many people, including the defendant, and imposes an equal risk on all, but the risk materializes randomly and is borne only by some of its beneficiaries, imposing a duty to compensate can be explained as a matter of distributive justice.”).

insurance to compensate for her employees' negligent acts, the employee also bears some of the cost through reduced compensation.¹⁸¹ Most employees likely prefer this option over purchasing self-insurance, directly compensating the injured party, or bearing the loss in cases of self-induced harm. This reduction in salary is a kind of internal insurance. Even if the employee is not interested in this mechanism, she usually has no other option than to accept it or become an independent contractor.

Allegedly, the goal of compensation is satisfied even if liability is imposed on the employee, so that this goal, like corrective justice, provides little support for the imposition of liability on the employer. Indeed, as the employee will frequently lack resources, the goal of compensation is still satisfied since, according to this goal, no importance attaches to the identity of the compensating body. Consequently, no true clash exists between the goals of compensation and corrective justice, and the correction-compensation category does not strongly support the imposition of liability on employers instead of employees. Thus, an analysis of the instrumental category can support the imposition of vicarious liability. However, in the second stage of the analysis, the other category is also relevant when its values are significantly harmed. Ostensibly, if the dominant category for vicarious liability cases is the instrumental category, it would be necessary to impose liability on employers in every case where the employee commits a tort since it is clearly justified from the view of optimal deterrence and distributive justice. If the correction-compensation category were relevant here, imposing liability on employees who are direct injurers would not be appropriate. Both results seem extreme. It follows that applying one category of goals alone would severely compromise the other. In this type of case, considering the values of the secondary category is important.

An interim arrangement is appropriate: liability would still be imposed on employees as a rule—in accordance with the demands of the instrumental category—but the rule would be qualified in cases where a violation of the other category is especially egregious. In some legal systems, liability is imposed on an employer when certain conditions are met. These conditions include employer control of the employee's actions, whether the tortious actions took place

181. See, generally as to the insurance premiums, George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1540–41, 1564–66 (1987) (addressing the increased premiums of the insured's, not necessarily the employer); Hugh S.E. Gravelle, *Insurance Law and Adverse Selection*, 11 INT. REV. L. ECON. 23 (1991) (addressing the insurance pool in general).

in the course of the employee's employment, whether the employer approved of the actions of the employee, and the like. This is indeed a balanced solution that the model justifies. When these considerations are absent, justifying the transfer of liability to the employer may be difficult. For example, it is totally unjustified to hold an employer liable when an employee acted in direct contradiction to the employer's express instructions¹⁸² or even acted intentionally in order to cost the employer money. Although the instrumental category is dominant here, qualifying employer liability is possibly a method of incorporating considerations that belong to the secondary correction-compensation category. It is necessary to genuinely confine the implementation of the instrumental category in cases where it is almost impossible to distinguish between the employee and the employer, so that even when liability is imposed on the employer it will seem natural that it is the employer who is required to right the wrong her employee committed. Indeed, liability should not be imposed if the employee acted in direct contradiction to the employer's express instructions or intentionally cost the employer money. If vicarious liability is imposed in such cases, corrective justice could cause serious harm, since the employer should not repair such harms for which she has no real responsibility.

So far, the discussion has revolved around two classical and general issues. Regarding the first—nuisance—the analysis of the proposed model leads to a different outcome from the prevailing court ruling. For the second—vicarious liability—the proposed model is compatible with the legal situation in some countries but offers a wide theoretical background for outcomes deriving from intuitions or from other theories on which legislation has been based. In these two issues the proposed pluralistic model dealt with a clash between goals and tried to provide an answer.

An analysis of additional, specific, modern, and more novel cases illustrates the need to prioritize the instrumental category, in view of the power gap between the plaintiff and the large, calculating defendant. However, it is important to not disregard the consequences of considerations, which may ensue from the correction-compensation category. Market share liability is an example that implements the basis of the suggested model in a different way.

182. ABRAHAM, *supra* note 5, at 191–92.

iii. Market Share Liability

The issue of market share liability is a part of a wider issue of damages resulting from the creation of risk by large bodies,¹⁸³ where there is a structured power gap between those bodies and the plaintiffs. In such cases, establishing the factual causal connection on a preponderance of the evidence to prove the tort is problematic.¹⁸⁴ On occasion the uncertainty stems from the tortfeasor's identity; sometimes from the injured party's identity. Added to the power gap between the parties is the fact that sometimes the case involves an individual plaintiff facing a group of strong defendants, thereby even further enhancing the dominance of the goal of distributive justice.

If a product that a number of manufacturers marketed injures a consumer, identifying which manufacturer injured him in practice (even though all of them created the same type of risk) may be impossible. It is problematic to dismiss the claim against each of the manufacturers due to the difficulty of proving the factual connection on a preponderance of the evidence, since in fact the specific tortfeasor is unknown. If the instrumental category of distributive justice and optimal deterrence are treated as dominant in such a case, it would seem that the court should impose liability on those manufacturers, either jointly or severally, for creating the risk. Every one of them was neglectful (or marketed a defective product). Deterrence is important here, even if one cannot attribute the concrete injury to the concrete tortfeasors. Deterrence here means that the tortfeasor will have to pay for its actions, for otherwise it will not have any incentive to not commit torts in the future. No compensation at all would mean under-deterrence, but it would be over-deterrence for the manufacturer to pay the entire compensation. If a mass or serial tort is in question, identifying the tortfeasors and the injured parties is easy but does not establish the plaintiff and the defendant in each case. However, this is not compatible with corrective justice, as it is impossible to prove that upon the realization of the risk it was the specific manufacturer being sued that did in fact injure the specific victim.

183. Cf. ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 181–82, 186–87 (2001) (explaining that market share liability is but one doctrine used in cases of casual indeterminacy).

184. *Id.* at 181–82; see generally, Glenn O. Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982); Richard P. Murray, *Sindell v. Abbott Laboratories: A Market Share Approach to DES Causation*, 69 CAL. L. REV. 1179 (1981).

Some courts solve this problem through the imposition of market share liability.¹⁸⁵ According to this theory, the plaintiff receives damages from each of the manufacturers in accordance with its market share during the relevant period. Thus, if three different manufacturers marketed a drug, one of which held fifty percent of the market share in the relevant place and time; the second, thirty percent; and the third, twenty percent, those would also be their shares of the plaintiff's damages.¹⁸⁶ Thus, every victim receives full compensation for his damage, and every tortfeasor pays in accordance with the risks it created. Such a solution—particularly, but not only, in the case of a mass tort—is clearly compatible with the instrumental category of deterrence and distributive justice as well as with the goal of compensation. However, this process is contrary to Weinrib's notion of correlativity and the moral principle of personal liability, which underlies corrective justice.

An expansive approach to corrective justice might hold that the specific tortfeasor does not necessarily pay the victim directly, as it is impossible to identify the genuine "pair" of tortfeasors and victims in this example. Nonetheless, the very fact that the tortfeasor pays for the damage he has created and the victim is compensated for his injury amounts to corrective justice. Here too, classical corrective justice is not applied, and it may be possible to accept a situation in which classic corrective justice does not ensue.

Therefore, in cases of sophisticated and large defendants the instrumental category is of particular relevance. In the second stage of the analysis, the competing category is important if its underlying rationale has been significantly impaired, particularly so in cases where justifications exist for expanding tortious liability. Such an expansion of liability is more difficult to accept if the defendant was a private person.

2. The Dominance of the Correction-Compensation Category in Cases of Individual Defendants and its Partial Qualification by the Secondary Instrumental Category

The previous Part addressed situations in which the instrumental category is dominant and the correction-compensation category is secondary. This Part deals with the opposite: situations in which the

185. *See, e.g., Sindell v. Abbott Labs.*, 607 P.2d 924, 937–38 (Cal.1980).

186. *Id.*

correction-compensation category is dominant and the instrumental category serves a balancing role.

It is difficult to imagine a spontaneous private tortfeasor carefully conducting a punctilious cost-benefit analysis. This is not to say that private individuals do not engage at all in risk-benefit calculations. There are cases of some calculation, albeit very rough and general, but these do not come close to large, financially powerful entities that routinely manage their risks. In many cases, even if a private tortfeasor does take into account the risks his tortious activity entails, this assessment usually involves criminal acts or the fear of self-induced harm, rather than fear of financial liability pursuant to a tort suit.

The following examples help illustrate this point.

i. Non-Pecuniary Loss Resulting from Urges and Serious Emotional Harm

In cases of torts resulting from urges, which cause non-pecuniary emotional harm, it is difficult to quantify the harm in advance and weigh it against the necessary precautions.¹⁸⁷ Such torts include battery, spousal abuse, child abuse, and child neglect. In these cases, it is certainly difficult to speak of risk management. It seems that the assailants and abusers act in response to their emotions, even disregarding the criminal consequences of their actions, *a fortiori* the optimal deterrence in tort law. It is almost impossible to expect a person who strikes his neighbor as a result of a quarrel or a parent who abuses his child to manage risks and be deterred efficiently in tort. In the same way, it is hard to imagine that speeding drivers carefully calculate the cost and probability of accidents to themselves and to others, as compared with their expected benefit of arriving early. At most, it is reasonable to believe that a speeding driver broadly takes into consideration how likely she is to be caught by the police if she speeds and what the consequences of being caught would be. The same holds true of an individual taking a shortcut through his neighbor's yard or in cases of nuisances between private neighbors.

Where emotions are involved, it seems—as Eric A. Posner argues—that “economic analysis [of law relies] . . . on methodologies that are not well suited to analyzing emotion.”¹⁸⁸ Posner argues that

187. See generally, Alan R. Prest & Ralph Turvey, *Cost Benefit Analysis: A Survey*, 75 *ECON. J.* 683, 696 (1965) (arguing that some types of harm are difficult to quantify).

188. Eric A. Posner, *Law and Emotions*, 89 *GEO. L. REV.* 1977, 1977–78, 1997–98 (2001).

people are self-conscious and generally knowledgeable about their emotional dispositions, and thus drape emotions over the rational choice framework.¹⁸⁹ They are still responsive to incentives and thus may be deterred, at least in terms of pre-emotion (calm) state deferability.¹⁹⁰ Posner claims that “people can cultivate their emotions” and emotional reactions since they are not necessarily or merely a matter of reflex.¹⁹¹ Therefore sanctions may be effective when people are in the calm state.¹⁹² Once they enter the emotion state, they are usually not subject to deterrence—deterrence should take place when they are in the calm state, to “[influence] investment behavior during the calm state.”¹⁹³ “An angry person’s action tendency is to harm the offender, even at cost to oneself.”¹⁹⁴

However, Posner’s framework focuses on situations in which a person knows his emotional dispositions and can take steps to modify or avoid conditions that activate them.¹⁹⁵ He thinks that in these situations “agents anticipate their emotion states and take actions in anticipation of them.”¹⁹⁶ Posner offers the example of an irascible person who knows that if he goes to a rowdy bar, he may be insulted and strike the person who insulted him. Such a person has two options: he can either avoid the bar, or he can try to overcome his irascibility beforehand through behavior modification techniques.¹⁹⁷ But these options are not suited to each and every situation. For example, in domestic violence cases, the abusive parent or spouse usually cannot simply avoid contact with the family (although s/he could attend therapy sessions or make other modifications that made it less likely to lose control—something most people seem not to do).

Sometimes the opposite is true when a person tries to control his emotions while in the calm state in order not to activate them while in the emotion state. A person may, when calm, best plan his steps in order to exact revenge, etc., sometimes irrationally,¹⁹⁸ and thus

189. *Id.* at 1981–98.

190. *Id.* at 1982, 1990, 1994.

191. *Id.* at 1985.

192. *Id.* at 1994.

193. *Id.*

194. *Id.* at 2007.

195. *Id.* at 1982.

196. *Id.*

197. *Id.*

198. And sometimes even rationally, as in the case of a planning euthanasia for a dying spouse. *Cf. id.*, at 1995 n.34.

cannot be deterred even in the calm state.¹⁹⁹ In addition, sometimes it is not reasonable to avoid the situation. For example, in cases of neighborly disputes, one should not expect that an irascible neighbor will move to another building in order to avoid confrontations. Indeed, Posner himself admits that there are such cases. A husband who finds out that his wife is being unfaithful has no way of anticipating the situation, in contrast to the tortfeasor in the bar example above. Thus, the husband cannot realistically be expected to invest in avoiding the stimulus or cultivating a peaceful disposition.²⁰⁰ According to Posner, there may be room for a reduced sanction in cases where the sanction does not deter emotion-state behavior and there is little difference between the preferences in the calm and emotion states.²⁰¹

Posner examines this situation only from the point of view of deterrence. From a pluralistic point of view, these cases have room for other goals to enter the picture, and deterrence alone should not necessarily determine them.

In most of these cases of urges which cause serious emotional non-pecuniary harm, insurance is irrelevant since it does not apply to intentional torts. Accordingly, the defendants must bear the consequences of their actions. They cannot be deemed calculated risk managers to an extent that is even proximate to a business entity, and therefore the defendants are not persons who are efficiently deterred. In other words, in these cases—and only in these cases, contrary to Englard's sweeping criticism—optimal deterrence is not a realistic outcome. Furthermore, the court is hard pressed to conduct such a calculation *ex post facto*. Consequently, the correction-compensation category is dominant in these types of cases.

In circumstances where individuals might plausibly conduct cost-benefit analyses, even if they do not carefully manage risks, the secondary instrumental category should also play a role. This category may manifest itself as an award of punitive damages (discussed below), but the primacy of the correction-compensation category remains clear.

The instrumental category can also bring third-party considerations into tort decisions. For example, certain principles, which take into account factors extending beyond the two parties, can qualify the correction-compensation category in cases of domestic

199. *Cf. id.* at 1994 (“Reducing the sanction for emotion-state behavior, relative to calm-state behavior, is justified even though the sanction does not deter emotion-state behavior when (1) the calm-state preferences and emotion-state preferences differ only a little.”).

200. *Id.* at 1996.

201. *Id.* at 1994.

violence. This includes third parties who are indirectly involved in the dispute, including the children of the disputing couple, and other family interests. The consideration given to children in intra-spousal tort actions is particularly consistent with distributive justice, since children's weak and vulnerable positions make them difficult to ignore, even if children are neither the plaintiffs nor the defendants in a case. Consequently, in situations where the welfare of children is at stake, courts may give additional consideration to the instrumental goals while still requiring that any solution account for correction-compensation goals.

The correction-compensation category must receive dominancy without denying the influence of extraneous principles. This is particularly true if the tortious activity is continuous, deliberate, and not genuinely spontaneous, and so long as the dominant focus placed on the direct parties is to this sensitive clash within the family unit. Accordingly, in cases where the claim would have a very negative impact on the family as a whole, the court may do its utmost to conclude the dispute through peaceful means rather than block the claim as a routine matter. The premise should be that there is no immunity for such claims, as there was in the past in the common law,²⁰² but the court should consider damage to the children's welfare as an outcome of the lawsuit. The court may decide to send the spouses to mediation, for example.²⁰³ If the correction-compensation category were considered alone, the court would accept the lawsuit and not consider the children's welfare or the aggregate family harmony.

It is thus possible to analyze, for example, a tort claim for breach of visitation rights.²⁰⁴ Here it is relevant to speak of the children as third parties. Suppose a couple divorced. The mother received custody of the children and the father received visitation rights. The father filed a tort action against the mother for preventing him from seeing the children. The correction-compensation category should undoubtedly be the dominant category. If the mother caused emotional harm by preventing contact between the father and his children, it would be right for her to pay. She was not a

202. See Notes, *Litigation between Husband and Wife* (1966) 79 HARV. L. REV. 1650, 1660–65; Yuval Sinai & Benjamin Shmueli, *Changing the Current Policy towards Spouse Abuse: A Proposal Inspired by Jewish Law for a New Model*, 32 HASTINGS INT'L & COMP. L.J. 155, 161–62 (2009); Benjamin Shmueli, *Love and the Law: Or, What's Love Got to Do With It?* 17 DUKE J. GENDER L. & POL'Y 131, 145–46 (2010).

203. Benjamin Shmueli, *Tort Litigation between Spouses: Let's Meet Somewhere in the Middle*, 15 HARV. NEGOT. L. REV. 201, 239–40 (2010).

204. Such a claim was recognized in FamC (Jer.) 13993/02 *Anon. v. Anon*, Tak-Mish, 2007(1) 516 [2007] (Isr).

calculated tortfeasor managing risks in the same way as a business entity, but one motivated by negative emotions following the divorce. Indeed, the need for correction and compensation led the court to award damages. However, there was also room for weighing the instrumental category, even if only partially. The court should consider the children and perhaps even the importance of restoring some peace to the family itself—albeit a disbanded family—as a whole.

A glance at the injured father shows the need for compensation. But this compensation may ultimately come at the children's expense. Upholding such a claim would not entail an increase in aggregate welfare. According to distributive justice, even though the children are not a formal party to the claim, the reduction of maintenance would ultimately harm the children, however justified the correction-compensation category makes it appear. However, if these had been the dominant considerations, they would have provided a form of incentive to continue the wrong, thereby causing overly serious harm to the dominant category and not resulting in legal pluralism.

In addition, instrumentalist thinking could lead to the conclusion that preserving certain reasonable contact between the parents, even though they are divorced, would be extremely important. First, absolutely severing contact harms children whose parents are divorced. Indeed, the very fact that the claim was filed may be harmful. It is hard to believe that relations will remain sound between ex-spouses after they have filed for divorce. As the dominant category here is correction-compensation, the institution of such a claim ought not be obstructed or dismissed for instrumentalist reasons, even if these reasons are very important. Nonetheless, the court should make a greater effort to send the parties to mediation or counseling, or to reach a settlement that is based on the parties' agreement.²⁰⁵ In this manner, only certain and limited expression is given to the instrumental category in order to avoid considerable harm to the dominant category. Doing this for the sake of the aggregate welfare is compatible with optimal deterrence, and considering weak parties who are not the official parties to the tort is compatible with distributive justice.²⁰⁶ In this way, the less dominant category is also taken into consideration.

205. See Shmueli, *supra* note 203, at 245.

206. Cf. Calabresi & Melamed, *supra* note 159, at 1098–1101 (explaining why it is important to bring into account also distributive considerations alongside efficiency. See also *id.* at 1124, where the authors explain also why distributional considerations are important for the sake of the decision whether an entitlement is alienable or not).

In the same way and perhaps even more so, tort actions brought by spouses who are still married can be qualified, e.g., in relation to battery or damage to property or defamation. Here too, the premise must be correction-compensation, and the instrumental category must qualify it moderately. If distributive justice is relevant to the matter— e.g., in the case of a tort committed by a husband against his wife which involves the use of force—and if instrumental family principles are relevant, such as harmony in the family unit and the best interest of the children, this will not lead to immunity. However, it may help to identify extralegal solutions insofar as they exist, as the spouse will be left not only with the compensation payment but also, one can assume, with a family which has been destroyed, an outcome that harms both her and her children.

ii. Punitive Damages

The instrumental category also plays an important role in determining punitive damages in some cases where the correction-compensation category is dominant. Under certain circumstances, courts have recognized the right to include a punitive/instructive element in civil tort law,²⁰⁷ i.e., awarding damages that do more than compensate the individual victim, often in order to express repugnance towards particularly serious, intentional, and heinous acts. In other words, courts may have the power to award damages for punishment, education, and deterrence. At the same time, recognition of punitive damages has been the subject of significant criticism from those who argue that the civil context is not a suitable forum for awarding punitive damages and that the mingling of the criminal principles with the civil is wrong.²⁰⁸ Since punitive

207. See generally David Partlett, *Punitive Damages: Legal Hot Zones*, 56 LA. L. REV. 781, 783–87 (1996) (presenting the deep common law roots of punitive damages in tort law). See also Neil Vidmar & Matthew Wolfe, *Punitive Damages*, 5 ANN. REV. L. & SOC. SCI. 179, 192 (2009) (indicating that punitive damages are most likely to be awarded in cases where the harm or potential harm is very serious or the tortfeasor's behavior is reprehensible); *State Farm v. Campbell* (2003) 538 U.S. 408, 416 (2003) (clarifying that the purpose of punitive damages is deterrence and retribution); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 585–86 (1996) (limiting punitive damages under the Due Process Clause of the 14th Amendment); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) (ruling that a jury should not consider damages to third parties as part of the punishment calculation of punitive damages, but that damage to third parties may impact the determination of reprehensibility of the action). For a historical overview of the case law on punitive damages, see, e.g., Dorsey D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 12–20 (1982).

208. See, e.g., Matthew Parker, *Changing Tides: The Introduction of Punitive Damages into the French Legal System*, 41 GA. J. INT'L & COMP. L. 389, 413–14 (2013) ("Because punitive damages serve as a form of criminal-like sanction, critics maintain that they should be abandoned,

damages should be uncommon and only in malicious-intentional torts, from a distributive justice perspective, instrumental analysis should only apply to the relevant cases in which both deterrence and punishment have great significance²⁰⁹ and when the defendant enjoys a huge power advantage over the plaintiff.

One might think that punitive damages would lead to over-deterrence. However, the multiplier approach—the common economic analysis of law—suggests otherwise. Since many injured parties do not actually sue²¹⁰ and many tortfeasors end up not paying, requiring tortfeasors to pay for the damage they cause often results in

and proper recourse for the vindication of public rights should be in a criminal court. . . . punitive damages increase the possibility of further upsetting the moral balance by over-penalizing tortfeasors for their wrongdoing”); David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 VILL. L. REV. 363, 382–83 (1994) (arguing that given the lower burden of proof in the civil arena and the possibility of multiple lawsuits based upon a single tort incident with multiple victims, punitive damages, while similar in rationale to criminal fines, lack the protections present in the criminal context).

209. Cf. *Getz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). See also Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 421–66 (2007) (arguing that punitive damages are properly conceived of as a form of punishment for private wrongs). But there exist approaches that see punitive damages as a way to provide redress for the victim and/or as a societal compensation goal, which means that these are extra-compensatory damages to the plaintiff. However, from the defendant’s standpoint punitive damages are what he must pay in the eyes of the society, that wants to reduce this behavior but not through criminal sanctions. Cf. Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 61, 85 (1993) (arguing that redress provides a more useful framework for understanding punitive damages, forcing the wrongdoer to recognize that what s/he did was wrong, and stating that redress seeks to “symbolize public respect for the existence of certain rights and public recognition of the transgressor’s fault in disrespecting those rights.”). See also David G. Owen, *Response, Aggravating Punitive Damages*, 158 U. PA. L. REV. 181, 182, 192–93 (2010) (arguing that punitive damages “offer [] victims of aggravated wrongdoing robust redress for the panoply of losses that were aggravated by the flagrancy of a wrong,” and emphasizing that their role is not simply to punish or deter, but to restore to victims and redress wrongs); John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 530 (2005) (“notwithstanding the dominant tendency among modern scholars to treat tort law as an instrument for attaining public goals such as loss-spreading or efficient precaution-taking, it is still best understood as a law of redress”). Therefore, Sharkey suggests that in cases of intentional torts, the court should award “societal damages.” These appear to be actual punitive damages by another name, emphasizing the societal damage that has not been sued for. In essence, her approach is very similar to that of the multiplier and Calabresi’s approaches presented below. See also Thomas C. Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117, 128–46 (2003) (presenting a similar approach). Others focused on revenge and the dignity of the victim. See, e.g., Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383, 1394–95 (2009) (seeing punitive damages as a mechanism for vindicating a victim’s dignity and autonomy interests).

210. Victims do not sue, e.g., because of the victim’s disinclination to do so, his assessment of the cost of filing and conducting a suit versus the compensation he might expect, the unwillingness of his attorney to manage the claim because of issues of cost-effectiveness, evidentiary problems and uncertainty, and even because of various errors made in the enforcement process. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic*

under-deterrence.²¹¹ For example, if a tortfeasor causes harm worth ten dollars each to six persons, the total cost of the negative externalities of his action is sixty dollars (ten dollars for six persons). Suppose that, due to some non-substantial reasons, only two injured persons are anticipated to bring actions against him; then the tortfeasor internalizes an expected cost of only twenty dollars. If the plaintiffs are awarded only compensatory damages, the defendant will not pay the full amount his tortious action caused. Consequently, punitive damages can increase the level of deterrence afforded to potential (mostly serial and mass) tortfeasors and ultimately result in optimal deterrence, provided the correct amount of punitive damages is awarded.²¹² In other words, if tortfeasors are subjected to punitive damages because they acted in a deliberate and reprehensible manner, then in total these tortfeasors will be paying for the aggravated wrong they caused even though this represents a certain overpayment locally. This outcome would create optimal deterrence (or something proximate to optimal deterrence) and not over-deterrence. If tortfeasors take this possibility into account in advance, it will lead to greater efficiency in their actions and consequently to increased aggregate welfare. In the above mentioned example, if the injurer were liable with a two-in-six (or one-in-three) chance, damages should be \$60 minus the \$20 harm ($\$10 \times 2$), multiplied by three ($1/.333$). The first part of the equation represents compensatory damages, and the remainder is the optimal amount of punitive damages.²¹³ According to this approach, the award of punitive damages cannot be deemed

Analysis, 111 HARV. L. REV. 869, 888 (1998); cf. Ellis, *supra* note 207, at 25–26 (discussing potentially inefficient economic outcomes in tort suits); *In re Zyprexa Products Liability Litig.*, 489 F. Supp. 2d 230, 245 (E.D.N.Y. 2007) (“Despite this effective civil prosecution network, there are usually a substantial number of potential harmed plaintiffs who never press their claims”).

211. See ENGLARD, *supra* note 31, at 145–46.

212. Polinsky & Shavell, *supra* note 210, at 873–74, 888–90. For similar approaches in Federal courts see *Ciraolo v. City of New York*, 216 F.3d 236, 243–50 (2d Cir. 2000) (Calabresi, J., concurring) (in which Judge Calabresi uses the same substantial approach, calling it “socially compensatory damages”); *Mathias v. Accor Economy Lodging Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (in which Judge Posner applies the multiplier approach). These judgments were delivered prior to recent developments in the Supreme Court where the multiplier approach was denied. See generally Steve P. Calandrillo, *Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics*, 78 GEO. WASH. L. REV. 774, 781–93 (2010) (overview of the denial of the multiplier approach in Supreme Court judgments).

213. The formulae for calculating punitive damages according to optimal deterrence examine the expectancy that the court will impose liability on the tortfeasor vs. the scope of the damage. See Polinsky & Shavell, *supra* note 210, at 888–90. As there is a problem in examining this data and predicting, even approximately, in which cases litigation will ensue and in which cases it will not, the question arises whether these formulae can in fact be applied in practice. Expanding on this question is beyond the scope of this Article.

overcompensation but is rather a measure intended to disclose an element of efficiency.

It is particularly necessary to increase deterrence for serial tortfeasors, such as a polluting plant that may harm many residents, manufacturer who may harm many people who use his products, or hospital in which many cases of medical malpractice occur. Accordingly, under this approach, the basis for punitive damages is over-deterrence and over-enforcement and not necessarily the fact that the act is malicious and reprehensible. According to this rationale, courts should award punitive damages against a large, economically powerful, and sophisticated tortfeasor in every case where it is sued and not only in cases of malicious conduct.

At first glance, punitive damages seem incompatible with the goals of compensation and corrective justice since punitive damages exceed the boundaries of compensation and retribution.²¹⁴ A judgment where compensation is intended to affect the incentives of tortfeasors in other cases is not compatible with the correction-compensation category. This is not a case of restoring the *status quo ante* but rather of giving of the plaintiff advantage²¹⁵—even the prospect of a windfall—to incentivize her to bring a suit. It would also not be compatible with the correction-compensation category to give these punitive damages to a special fund and not to the plaintiff because they are distributed to third parties—that is to other injured persons. Recall that, according to the correction-compensation category, the focus should be on the concrete parties themselves, not on other or potential tortfeasors or social redress.²¹⁶ It is therefore impossible to accept the approach whereby overcompensation in one case covers under-compensation or non-compensation in another, while also accepting the notion that extra-compensatory damages for the plaintiff incentivize her to sue.

214. WINFIELD & JOLOWICZ, *supra* note 16, at 2.

215. At the same time, the Supreme Court in *State* emphasized that it will award punitive damages only for harm caused to the injured party and not in relation to other situations where the tortfeasor did not behave or act properly. 538 U.S. at 422–23. To a certain extent, this notion is close to that of corrective justice, since if the tortfeasor acted improperly, but this was not connected directly to the harm caused to the injured party, there is no reason why the injured party should receive these punitive damages. According to this view, courts should award punitive damages only in regard to the two parties only, ignoring third parties—including those who may have suffered from the same acts of the tortfeasor. In doing so, the Supreme Court actually rejected the common economic analysis of punitive damages and adopted a view that punitive damages can serve a redressive function, maybe as derivative of victim's Constitutional rights and in line with the concepts of vengeance and making the tortfeasor suffer. See Parker, *supra* note 208, at 404–05; Colby, *supra* note 209, at 430–40 (arguing that the American tradition of punitive damages is based upon the protection of victims' rights in addition to the concept of vengeance and making the tortfeasor suffer).

216. See *supra* text accompanying note 53.

Therefore, if the correction-compensation category were dominant here, there would be no room for the routine award of punitive damages, at least not according to the multiplier approach outlined above.

However, the appropriateness of punitive damages is determined during the second stage: the greater the dominance of the correction-compensation category, the less likely the award of punitive damages between individuals becomes. Nonetheless, punitive damages must be given a certain role in view of the rationale of the other, instrumental category, even though in many cases a private tortfeasor is not a serial wrongdoer. Additionally, no under-enforcement or under-deterrence will happen since the defendant has committed the wrong in multiple instances and will actually be sued in only a few instances. By contrast, in the case of economic and business defendants where the instrumental category is dominant, punitive damages can play a greater role, especially when the defendant is a serial and mass tortfeasor. Accordingly, punitive damages in actions brought against a private tortfeasor must be reserved for exceptional cases that are repugnant, aggravating, and reprehensible. The court should impose punitive damages as an educational matter and as an indication of the economic price which society demands for conduct which society regards as particularly abhorrent and blatantly harmful.

Thus, the court can rule that if the defendant was convicted in criminal procedures, there is no reason to punish him again in the civil arena, even though his acts were repugnant.²¹⁷ Additional constraints and balances might dictate that it is appropriate to award punitive damages, for example for twenty percent of the total damage or at another predetermined ceiling, particularly (but not only) in a jury system where limiting the jury's discretion is appropriate to prevent especially disproportional punitive damages.²¹⁸ This avoids moving too far away from the corrective-compensation category and also does not enrich the injured individual at the defendant's expense.

When the lawsuit is brought against a big, sophisticated, calculated, and especially serial and mass tortfeasor, one should not reject less constrained punitive damages that go far beyond corrective justice and take into account deterrence and distributive justice principles. Normatively, there is room to consider imposing

217. Permission to Civil Appeal 9670/07 *Roe v. Doe* IsrSC [not published, 2009] (Isr).

218. *Cf. State Farm*, 538 U.S. at 429 (the Court returned a decision in which the jury had awarded the sum of \$145 million to the State Court of Utah, for the purpose of awarding more reasonable damages which would be compatible with constitutional principles).

relatively high punitive damages on big defendants. It is true that a private defendant subjected to punitive damages may also have misused her relative power and acted deliberately. Such a wrongdoer, even if she is not wealthy, becomes similar to the big and sophisticated wrongdoer since the power gap can derive from a non-economic form of control (as in cases of child or spouse abuse). Nevertheless, even where it is appropriate to impose punitive damages on a private uninsured defendant, the court should constrain the award to avoid her total financial collapse. A private defendant is less likely to become a mass or serial tortfeasor, and therefore, the multiplier approach is less appropriate in this case. This is the proper normative view on this issue, although not all legal systems act this way.

iii. Nuisance

The last example is the case of nuisances between private neighbors, such as when one neighbor gives drum lessons that disturb another neighbor who is a writer and requires a quiet environment. An alternative scenario is a person who keeps many animals in her condominium, causing her neighbors to suffer from noise and odors. Let us assume that the nuisance causes real harm and that the victim is seeking an injunction, not only damages.

In such cases, the dominant category is correction-compensation, because such tortfeasors-defendants are more emotional and less calculated. Even if the music teacher is more calculated and less emotional than the neighbor who keeps pets, neither will generally engage in genuine economic calculations or risk management. Accordingly, the nuisance must be removed and compensation provided for past suffering, as well as rectification of past and future damage. Therefore, optimal deterrence is less relevant to tortfeasors of this type. This case is not fundamentally one of the strong against the weak (beyond the practical “advantage” that the person committing the nuisance holds over the victim) and only loss distribution can be relevant in particular circumstances. Accordingly, an injunction is necessary to prevent the continuation of the nuisance. However, it is necessary to qualify the injunction in accordance with the instrumental category, as the harm of removing the nuisance is significant when the activity is socially desirable. This qualification may apply in a number of ways which provide intermediate solutions.

Indeed, the aim is removing the nuisance. According to the instrumental category, which advocates loss distribution and

examines the harm caused to aggregate welfare, achievable solutions that are less severe than actual removal are possible from the point of view of the person causing the nuisance. However, this is the less dominant category. Yet how can this category still qualify the sweeping outcome of an injunction? The court could decide, for example, that the injunction will take effect after a certain period of time has elapsed, thereby enabling better preparation and perhaps opening the door to new or additional negotiations between the parties for compensation. This means that the victim of the nuisance will be in a better position in these cases. Thus, an agreement could be reached that the drum lessons will only be given during certain hours of the day and with the windows closed or that only the neighbor will keep a few pets rather than dozens. Through negotiations, the parties could distribute the loss to all of the neighbors, so that each absorbs or waives some damage, making it possible to avoid a sweeping outcome where the drum lessons stop and the teacher's livelihood is impaired or where all of the pets are removed and the pet owner's enjoyment is infringed. This would encourage good neighborly relations and agreements between neighbors in which each concedes a little or does not insist on complete vindication of his rights. These kinds of social values are instrumental and apply beyond the two concrete parties, but they must be given some weight, particularly in the case of two private individuals such as neighbors where there is no structural discrepancy in power.

The court could provide that if the person committing the nuisance and the victim of the nuisance reach an agreement regarding damages, the injunction will lapse and be voided.²¹⁹ Alternatively, a precondition may be set for the injunction's entry into force, under which the person committing the nuisance pays the injured party a certain periodic sum. Another possible qualification is to lessen the award of damages for past harm, in view of the gravity of the remedy for the future. A court could also rule that during the interim period between the grant of the injunction and its entry into force, parallel damages will not be awarded. In some cases, in addition to or instead of these suggestions, courts could order a partial injunction with respect to the extent of the nuisance. In cases where even greater weight is given to the instrumental category as a qualifying category, it may be held that the person causing the nuisance should move his residence to another area or that the nuisance stop

219. Cf. *Boomer v. Atlantic Cement Inc.*, 257 N.E.2d 870, 873, 877 (N.Y. 1970) (enjoining defendant for 18 months, unless the defendant pays the plaintiff permanent damages).

completely. The victim of the nuisance may concurrently be required to contribute to the cost of moving, although it would undoubtedly be wrong for the victim to pay in full to prevent the nuisance or to move the cause of the nuisance.²²⁰

In all of the above cases, the victim of the nuisance participates to some extent in the damages, whether financially or by making some other concession, even though the aim is still to prevent the nuisance. This represents a certain qualification of the correction-compensation category by the instrumental category as a legal pluralism balance, as the latter would be significantly impaired if the former were implemented without any qualification.

Thus, the rule accords dominance to the compensation-correction category insofar as the case involves private parties, who generally act spontaneously and without specific calculation, and who do not possess exceptional economic means. The balance with distributive justice and deterrence does exist, but it is only a balance, and it enters the picture only where the rationale underlying the instrumental category is significantly injured.

IV. ANSWERING POTENTIAL CRITICISM AND INTERMEDIATE CASES

Even if the method for determining tort cases presented here is generally correct, "borderline cases" exist where the method does not provide a clear-cut solution. Nonetheless, not all of these cases challenge the basis of the thesis. The latter must be compatible with presumptions as to the *type* of defendant, since on occasion a specific defendant will act contrary to other similar defendants.

In the context of vicarious liability, some defendants are not sophisticated, large, or calculating. For example, a small building contractor with one or two employees is not comparable to a government agency or large commercial company. An injury to others caused by an uninsured employee for this small contractor is perhaps more similar in nature to damage caused between individuals. Additionally, no significant power gap may exist between the contractor and his employee. In such situations, one could say that the instrumental category should not be dominant or that the situation is properly balanced in terms of the respective weight of the two categories. At the same time, the concept must be clear-cut. If an

220. Cf. *Spur Industries*, 494 P.2d at 701. In this case it is relevant to think of a solution that involves removing the tortfeasor. Sometimes, as in the example of the plant presented above, it is of course not realistic in many cases. Cf. Calabresi & Melamed, *supra* note 159, *passim* (presenting a few solutions in accordance with a division between property and liability rules).

employer is liable by virtue of distributive justice and optimal deterrence, he must ensure the training and precautions of his workers. It would be improper to exempt a small employer from these obligations. In any event, the instrumental category does not focus on the specific tortfeasor but rather on the *group* to which the tortfeasor belongs, even if the specific tortfeasor acts in a different manner than is expected of him. This approach is also more effective from an incentivizing perspective. If the small employer did not carry out training exercises, take precautions, and purchase insurance, the court should not allow him to hide behind the assertion that he should be treated like private spontaneous tortfeasors. The law should definitely incentivize small employers to manage their risks and take the same steps as large employers.

On the other hand, a private tortfeasor can also be highly sophisticated and calculated and manage his risks to some extent. As noted, distributive justice does not deal exclusively with the distribution of wealth but also with the distribution of power. In intra-familial tort actions there are cases that involve a very significant power gap between a strong defendant (in terms of sexual, physical, or psychological violence) and a weaker plaintiff. On occasion, the wrongdoing is intentional in that context. In such cases the tortfeasor calculates her actions and knows that she is obtaining enjoyment and advantages from the tortious act. There are also private tortfeasors who knowingly perform continuous and/or serial torts. In all of these cases, the private tortfeasor possesses considerable power compared to the plaintiff—the tortfeasor's position is closer to that of an institutional defendant. At the same time, corrective justice and compensation must still be dominant since this case involves individuals. In appropriate cases, as mentioned above, the court can impose punitive damages.

Another intermediate case is the converse of the small employer. Take, for example, the case of a large and powerful institution that does not manage risks and thus, ostensibly, operates in the same way as an uncalculating individual. The defendant likely belongs to the group of powerful and sophisticated tortfeasors that are presumed to be efficiently deterred. The fact that it does not actually engage in risk management should not protect it or afford it any additional balancing between the categories. Indeed, it is in society's interest that such large groups manage their risks. In such cases, the instrumental category remains dominant, but sometimes significant concern for the correction-compensation category can act as a mitigator. Under the proposed model, the dominant category must remain dominant, and the degree of influence the less

dominant category exerts will change depending on the circumstances. If the circumstances are unusual, a different balance may be struck than in other cases and greater weight given to the less dominant category. However, the balancing process cannot be completely overturned.

The presumption is that there are different types of tortfeasors-defendants in accordance with the type of activity have adopted, and there is no need to examine each defendant's means and capabilities. Likewise, it is not the financial means *per se* which are relevant but the logical consequences of belonging to a certain type, such as the ability to purchase insurance and distribute loss or the ability to manage risks. Giving consideration to the parties' economic condition in the concrete case is therefore problematic. Taking into account the presumption regarding the fundamental types of defendants on the basis of their activities is legitimate and even inevitable.

A more complex intermediate case concerns multiple private tortfeasors. When multiple tortfeasors jointly commit the same tort against an individual, the power discrepancy between the many individuals and the single injured party can bring to mind a defendant who is a large entity, if only in terms of distributive justice and not from the point of view of optimal deterrence and risk management.

Another special case is that of an institution that sues another institution. Here no significance attaches to distribution considerations, as is the primary concern is the transfer of wealth within the same slice of the aggregate welfare cake (albeit loss distribution may be significant here). Optimal deterrence, however, is still significant. This does not mean that the instrumental category is necessarily weakened, as it is when the goal is relevant and taken into account, but not implemented. In this case, the balance of power between the categories is examined as usual according to the proposed model. In practice, however, only the goal of optimal deterrence in the instrumental category is relevant, and that category will not necessarily lose strength vis-à-vis the competing category in the final outcome.

In all of these intermediate cases, the rule remains the same (in terms of the dominance of the category of goals each time), although the *balance* between the groups may be slightly different. This preserves the dominance of each category, but the less dominant category will perhaps be given greater weight than in other situations. However, this is a question of quantity and rate of balance, and the basic dominance will continue to prevail. For

example, if a private tortfeasor's actions are so calculated that he is the equivalent of a commercial, economically powerful, and sophisticated body, then the purposes underlying the instrumental category will carry greater weight against the dominant correction-compensation category; for example, in the direction of imposing punitive damages (which are contrary to the correction-compensation category). Punitive damages can certainly be used to balance the two categories. These are a device for increasing deterrence, which is also an aspect of distribution considerations, i.e., fairer and more equal distribution in the case of torts where the discrepancy in power is improperly exploited. This does not mean that the court should impose punitive damages in every case and for any amount. The measure must be qualified, as was illustrated above. It is also possible to "play" with the balances between the categories in relation to punitive damages. If a large body is not really a serial tortfeasor, although its proven behavior that is the subject of the lawsuit is repugnant and reprehensible, the court is justified in imposing at least some amount of punitive damages.

In any event, these cases are exceptions, and this should only lead to a finer pluralistic balancing process between categories of goals, not a change of concept.

CONCLUSION

Sometimes conflicts exist between the different goals of tort law. Occasionally, corrective justice, which focuses solely on the two parties and is derived from a moral-deontological theory, clashes with instrumental theories—which go beyond the two concrete parties—of distributive justice and optimal deterrence. Therefore, it is often difficult to universally harmonize the goals of tort law. One of the consequences of this difficulty is the proliferation of pluralistic approaches that ascribe strict priority to one goal of tort law over others—as opposed to balancing between the different goals.

The proposed model draws on existing theories of tort law, dividing the goals of tort law described in these theories into two categories—instrumental, which focuses on directing behavior and the use of tort law as a device for promoting societal goals, and corrective-compensative, which focuses on the specific parties to the tort. Tort law cases are then divided into two broad groups according to the defendant's nature—large, calculating institutions and insurance companies that manage their risks versus individuals. In cases involving sophisticated, risk-managing institutions, instrumental goals are preferred over corrective-compensative goals,

although corrective-compensative goals may still have a role to play in certain situations. Likewise, in cases of torts between two individuals, who usually act spontaneously and do not manage their risks, corrective-compensation goals should take precedence over instrumental goals—though here instrumental goals may have some influence as well.

This is a case of legal pluralism which relates to ideological diversity within national legal systems, in this case between different theories of the same legal system. Using legal pluralism in tort law contributes to a more liberal, open, and pluralistic society. The challenge of legal pluralism in this Article was to successfully settle the possible collision within the framework of tort law theory. This Article has proposed a usable mixed-pluralistic approach that balances the different goals of contemporary tort law. Modern tort law is complex and requires a mixed-pluralistic examination of its goals, which in part involves striking a proper balance between the various goals. Encompassing the complex range of tortious situations from the perspective of a single goal is impossible. It is also improper to undermine the legal certainty and stability of this system of law, and leave the balancing of various goals to a case-by-case examination as some mixed-pluralistic approaches suggest. Some mixed-pluralistic approaches try to determine *ex ante* which goal should be supreme. That is understandable; however, a more comprehensive mixed-pluralist approach, compatible with the notion of legal pluralism, would try to strike a balance between goals.

The substance of the proposed model is in accordance with modern tort law and considers traditional, modern, and innovative issues. Some of these issues overlap with the proposed normative situation and the existing positivist situation. In other cases there is a discrepancy between these situations, and this proposal in effect calls to change the *status quo*.

The proposed model is not confined to confronting prevailing mixed-pluralistic approaches, the advantages of which are utilized to a certain extent to construct the solution offered in this Article. Nor does it challenge unified-monistic approaches. The latter interprets specific goals of tort law each time; however, in accordance with the mixed-pluralistic view, it is necessary to balance each goal against others and not restrict oneself to considering only that goal or primarily that goal as most significant to determining the case.

To conclude, the appropriate pluralistic solution to achieving the goals of modern tort law is an examination of two groups of cases and a balance between the goals in situations where the less dominant category is significantly impaired.