ON THE ECONOMIC INEFFICIENCY OF A LIBERAL-CORRECTIVE-JUSTICE-SECURING LAW OF TORTS†

*Richard S. Markovits**

This article is a companion to Professor Markovits's article, Liberalism and Tort Law. *In that article, he articulated a vision of what liberalism means and its implications for the content of a liberal-corrective-justice-securing law of torts. Liberalism values most highly individuals having and seizing the opportunity to lead a life of moral integrity. A tort law system in a liberal, rights-based society will therefore, above all, offer redress for violations of this right to live a life of moral integrity.*

In this article, Markovits reviews his conception of liberalism and its tort-law implications and then describes twelve reasons why a liberal-corrective-justice-securing tort law will not maximize economic efficiency. These reasons are rooted in liberalism's (1) overall "goal" of allowing all members of society to pursue a life of moral integrity above everything else, (2) the distinction between choices based on the desire to inflict pain and degradation on others versus choices made for other reasons, and (3) the notion that harming others is different from not helping others. Thus, the choices that people make and the decisions made by courts in response to these choices will often be based on factors that do not maximize economic efficiency, but rather support the pursuit of a life of moral integrity.

This article delineates and explains twelve reasons why a body of tort law whose purpose is to enable victims of conduct that would be tortious in a liberal, rights-based society[1] to secure their corrective-justice

† © 2005 Richard S. Markovits. All rights reserved.

* John B. Connally Chair in Law, University of Texas School of Law. B.A., Cornell University, 1963; Ph.D., London School of Economics, 1966; L.L.B., Yale University, 1968; M.A., Oxford University 1981. I would like to thank Tom Kohler of the Boston College School of Law, Daniel Markovits of Yale Law School, and my colleagues David Anderson, Mitch Berman, Mark Gergen, Lynn Blais, David Robertson, and Jane Stapleton for useful comments on earlier versions of the manuscript.

1. The textual statement manifests my assumption that one cannot establish an objectively true, universally applicable conception of justice (from which tort-right conclusions could be derived) either through conceptual argument that tries to derive such a conception from certain ineliminable features

tort rights[2] may be economically (hereinafter allocatively) inefficient.[3] Rights-based societies are societies whose members and governments (1) draw a strong distinction between moral-rights claims (about the just) and moral-ought claims (about the good) and (2) are committed to fulfilling their moral-rights (justice) commitments even when the good as relevantly conceived[4] must be sacrificed to do so. *Liberal*, rights-based societies are societies whose concrete justice-commitments manifest their placing a lexically highest value on individuals' having and seizing the opportunity to lead lives of moral integrity—i.e., on individuals' having and seizing the opportunity to take seriously both their moral obligations and the dialectical task of choosing a morally-defensible conception of the good and leading lives consonant with this personal choice. Somewhat more concretely, a liberal, rights-based society's members and participants are basically obligated to treat all moral-rights bearers for

of "the moral," from a conception of human freedom, from a conception of human flourishing, from a conception of human nature or in any other way. Although I believe that "the moral" has some ineliminable features (that the concept is far from being completely socially negotiable), I also believe that different individual rights-based societies (see the following text) can base their respective conceptions of justice on different moral norms and that different individual "goal-based" societies (see below) and different individuals in a given rights-based society can base their respective conceptions of the good on different moral norms. "Goal-based societies" are societies that do not draw a strong distinction between moral-rights claims and moral-ought claims: if someone in a goal-based society uses moral-rights language, he does so simply to indicate that he is very sure that the choice in question morally ought to be made and/or that he believes that, from the perspective of the relevant conception of the good, the choice he is saying someone has a "moral right to" is vastly superior to its alternative. I should add that both rights-based societies and goal-based societies can have moral integrity—in particular, will have moral integrity if they fulfill their commitment to instantiating the moral norm to which they subscribe to some hard-to-define, requisite extent.

2. In standard usage, "corrective justice" requires that "individuals who are responsible for the wrongful losses of others have a duty to repair the losses." *See* Jules Coleman, *Tort Law and Tort Theory: Preliminary Reflections on Method*, *in* PHILOSOPHY AND THE LAW OF TORTS 183, 184 (Gerald Postema ed., 2001).

3. I am substituting the expression "allocative efficiency" for "economic efficiency" to remind the reader that the concept is a technical, economic concept and that the fact that a choice is "economically or allocatively efficient" is neither a necessary nor a sufficient condition for either its justness or its moral desirability from the perspective of any conception of the good. For a detailed discussion of this last proposition, see Richard S. Markovits, *On the Relevance of Economic Efficiency Conclusions*, 29 FLA. ST. U. L. REV. 1, 26–43 (2001). In my usage, a choice or event is said to increase allocative (economic) efficiency if the number of dollars its beneficiaries would have to receive in an inherently neutral way that did not impose any net secondary-feedback effects on them to be left as well-off as the choice or event would leave them *exceed* the number of dollars its victims would have to lose in an inherently neutral way that did not impose any net secondary-feedback effects on them to be left as poorly off as the choice or event would leave them. The "inherently neutral way" qualification is designed to exclude the possibility that the relevant parties would value or disvalue the money-payment or money-withdrawal in itself (as a parent might disvalue in itself receiving "blood money" to compensate him or her for the loss of a child). The "no net secondary-feedback impact" qualification is designed to exclude the possibility that the money-payment or money-withdrawal in question would affect the relevant party indirectly (e.g., because the financing of the payment would reduce the wealth of someone who would adjust to this change in his position by making fewer purchases from a beneficiary who originally profited on the sales in question or by driving a more breakdown-prone, noisy, and polluting car in the beneficiary's neighborhood).

4. When the choice to be made is a choice of an individual, the relevant conception of the good is the individual's conception of the good. When the choice is a governmental choice, the relevant conception of the good is the particular conception of the good the government would want the decision in question to instantiate if it were not constrained by the society's moral-rights commitments.

whom they are responsible (all such creatures that have the neurological pre-requisites for leading a life of moral integrity[5]) with appropriate, equal respect and for showing appropriate concern[6] not just for their "well-being" or "utility"—i.e., for their "welfare" as economists would understand that concept—but pre-eminently for their having an appropriate opportunity to fulfill their morally-defining potential to lead a life of moral integrity. The governments of a liberal, rights-based society are basically obligated to treat all moral-rights bearers for whom they are responsible with appropriate, equal respect and appropriate, equal concern.

This article should be of interest to everyone who (1) favors, opposes, or wants to learn more about liberalism and (2) believes or recognizes that others believe that the fact that a choice or the use of a decision-standard will increase allocative efficiency favors the moral desirability of the choice or the use of the decision-standard in question. However, it clearly will be of more interest to American legal scholars if (as I and many other academics believe to be the case) (1) the United States is a liberal, rights-based society and (2) the government of such a society is morally and therefore presumptively constitutionally obligated to provide its members and participants with a legal right of redress against tortious wrongdoers[7] (a duty it can fulfill either by establishing

5. This resolution of the so-called boundary condition issue links the characteristics that make a creature rights-bearing in a liberal, rights-based society to the moral rights that rights-bearers have in such a society.

6. The omission of the word "equal" before the word "concern" is intentional. It reflects the fact that, when acting in their nonpolitical capacities, the members of and participants in a liberal, rights-based society may favor the welfare of some over others. In part, this conclusion reflects the facts that (1) the favored parties are likely to be intimates of the chooser and (2) liberalism places a high value on intimate relationships. This second fact reflects the reality that intimate relationships both (1) make significant contributions to their participants' moral self-discovery (discovery of their conception of the good) and (2) provide a context in which individuals are especially likely to learn to take their obligations seriously and to instantiate their conceptions of the good.

7. My conclusion that the United States is a liberal, rights-based society is based on an admittedly armchair application of the detailed empirical protocols I have developed to determine whether a society is amoral, immoral, a rights-based society, or a goal-based society and to identify the moral norm from which a rights-based society is committed to deriving its moral-rights conclusions. *See* RICHARD S. MARKOVITS, MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION 23–34 (1998). The latter protocol derives from Ronald Dworkin's suggestion that an ideal judge (Hercules) should use the criteria of "fit" and "explicability of 'nonfit'" to infer from its positive law the moral norm a given society's legal system is committed to instantiating. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 106, 118–23, 126–28 (1977). Dworkin actually proposes that Hercules should also be guided by a third, "best light" criterion. *See id*. at 107; *see also* RONALD DWORKIN, LAW'S EMPIRE 215, 337–54 (1986). For my reasons for rejecting this "best light" criterion, see MARKOVITS, *supra*, at 94–95. Dworkin is the most prominent legal academic to analyze legal issues on the premises that the United States is a liberal, rights-based society and that the liberal moral norm it is committed to instantiating is generically inside the law. Some other highly respected legal academics who operate from these premises are Stephen Perry, David A.J. Richards, and Lawrence Sager. *See, e.g.*, LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES (2004); Stephen Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS, *supra* note 2, at 72; David A.J. Richards, *Constitutional Legitimacy, the Principle of Free Speech, and the Politics of Identity*, 74 CHI.-KENT L. REV. 779 (1999). Other legal academics who have not adopted these premises have nevertheless shown that particular legal doctrines that

common-law courts or by passing legislation that gives such parties a legal right to obtain corrective justice from tortious wrongdoers).

This article has two parts. The first, shorter part summarizes the conclusions of a companion-piece[8] about (1) the primary, tort-related rights and obligations of the members of and participants in a liberal, rights society, (2) the tort-related obligations of the government of a liberal, rights-based society, (3) the showing that a putative tort victim must make to establish his corrective-justice (moral and legal) right to redress from a particular putative injurer, and (4) the reasons why the common law of torts of any liberal, rights-based society will be exclusively directed at securing the tort-related corrective-justice rights of those of its members and participants who are victims of tortious wrongdoing.[9] The second, longer part examines twelve reasons why a body of tort law that is perfectly designed to secure such secondary, liberal-corrective-justice rights may not be allocatively efficient.[10]

were not otherwise explicable can be derived from the basic liberal norm (actually, from a Kantian commitment to a certain set of obligations that are essentially liberal). *See* Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004).

8. Richard S. Markovits, *Liberalism and Tort Law: On the Content of the Corrective-Justice-Securing Tort Law of a Liberal, Rights-Based Society*, 2006 U. ILL. L. REV. 243 (2006).

9. I do not deny that a law that secures the secondary, corrective-justice rights of a tort victim by enabling him to obtain compensation from his wrongful injurer will simultaneously tend to secure the primary tort-related rights of his society's members and participants by deterring tortious wrongdoing.

10. Some of the reasons why a *liberal*-corrective-justice-securing tort law may not be allocatively efficient will also be reasons why a *non-liberal*-corrective-justice-securing tort law may not be allocatively efficient. For example, if one assumes (contrary to my own view) that libertarianism deserves to be called a *moral* norm, a tort law that secures *libertarian*-corrective-justice rights may also not be allocatively efficient because, like liberalism, libertarianism does not recognize a moral duty to make decisions in one's own interest or to rescue strangers. Other reasons why a *liberal*-corrective-justice-securing tort law may be allocatively inefficient—e.g., the fact that liberalism condemns acts that are critically motivated by the actor's desire to unjustifiably control, degrade, or inflict losses on the act's victim—may not apply when the issue is the allocative efficiency of a non-liberal- (say, *libertarian*-) corrective-justice-securing tort law (though the non-liberal norm in question may, for different reasons, lead to the same conclusion that the liberal norm favors). The set of reasons why a liberal-corrective-justice-securing tort law may not be allocatively efficient will also not be identical to the set of reasons why a goal-based tort law (e.g., a body of tort law that is supposed to maximize the total utility of all creatures whose utility counts) may not be allocatively efficient. Because the set of reasons why a body of tort law that is not designed to secure liberal-corrective-justice rights may not be allocatively efficient will vary considerably with the non-liberal point of the body of law in question, this article will say no more about whether the various reasons why a liberal-corrective-justice securing tort law may be allocatively inefficient are also reasons why other "sorts" of tort law may not be allocatively efficient.

I. THE TORT-RELATED COROLLARIES OF LIBERALISM, THE NOTION OF CORRECTIVE JUSTICE, AND THE POINT OF THE COMMON LAW OF A LIBERAL, RIGHTS-BASED STATE

A. The Primary Tort-Related Moral Rights and Obligations of a Liberal, Rights-Based Society's Members and Participants

Liberalism and Tort Law articulated seven corollaries of liberalism that relate to the primary tort-related moral rights and obligations of a liberal, rights-based society's members and participants and one corollary of liberalism that relates to a wrongdoer's secondary duty of repair.[11] To prepare the way for this article's analysis of the allocative efficiency of a liberal-corrective-justice-securing law of torts, I will explain the seven primary-tort-duty implications of "liberalism."[12] However, before doing so, I should point out that they manifest three kinds of incommensurability that many economists will find uncongenial, all of which tend to make the corrective-justice-securing tort law of a liberal, rights-based society allocatively inefficient.

First, liberalism distinguishes (a) the satisfaction or utility individuals obtain by dominating, degrading, or inflicting pain or other sorts of losses on others or seeing others treated in such ways from (b) the satisfaction or utility choices confer on their beneficiaries for other reasons. Rather than counting in a choice's favor the fact that it will generate satisfaction for the choosers and/or anyone else for the former types of reasons, a liberal evaluation will either place a zero or negative value on satisfactions that have been generated for these reasons or, when the selection of the choice to be evaluated was critically affected by the fact that it would generate satisfaction for such reasons, will conclude that the choice was rendered morally impermissible (i.e., moral-rights violative) by the role such satisfactions played in its selection.

Second, liberalism distinguishes the kind of utility changes or welfare changes on which economists tend to focus (which I will call impacts on "mere utility") from changes in the opportunity individuals have to lead lives of moral integrity. Liberalism values the promotion of lives of moral integrity not primarily because such lives increase utility but because it values such lives in themselves. Indeed, not only does liberalism value the promotion of lives of moral integrity differently from the generation of additional utility, it lexically orders any increase (no matter how small) in the opportunity individuals have to lead lives of moral integrity above any increase (no matter how large) in mere utility.

11. *See* Markovits, *supra* note 8, at 257–83.

12. The eighth, secondary-tort-related corollary of liberalism is that each tortious wrongdoer in a liberal, rights-based society has a positive duty to inform his victims that he wrongfully caused their losses and to compensate them appropriately.

Third, liberalism distinguishes the obligations that a member of or participant in a liberal, rights-based society has to avoid harming others from the obligations he has to confer benefits on others whom he otherwise would not have harmed (e.g., by providing them with rescue-services). At least on my account, this liberal distinction has two factual premises: (1) that individuals will be more likely to seize their opportunity to lead a life of moral integrity if they perceive themselves to be the authors of their own lives and (2) that the imposition of a general duty to provide assistance to others whenever doing so would yield more utility-type benefits than direct utility-type costs or whenever the rescue-attempt would otherwise increase the on-balance opportunity of all relevant parties to lead a life of moral integrity will militate against people's taking their lives morally seriously by undermining their perception that they are in control of and hence responsible for their lives.

I will now delineate the seven primary-tort-right corollaries of liberalism. The first relates to the assessment of avoidance-move rejections that may deprive their victims of the opportunity to lead lives of moral integrity by killing them or depriving them of the neurological prerequisites for leading a life of moral integrity or significantly militate against their seizing the opportunity to take their lives morally seriously by subjecting them to life-dominating pain or depression. According to this corollary, a moral agent who is a potential injurer who knew or should have known that his choice might prevent or militate against someone else's leading a life of moral integrity will be able to justicize his choice (i.e., demonstrate its justness) if and only if, after doing appropriate research, he concluded ex ante that his choice should not be predicted to disserve the on-balance "leading a life of moral integrity"-related interests of those for whom he was responsible. I should add that the alleged tortfeasors' injurious choice could serve the interests of the relevant population in having the opportunity to lead a life of moral integrity not only directly (say, by producing or inducing him to produce additional units of a drug that would save their consumers' lives or free them from life-dominating pain or depression) but also indirectly (1) by affecting the decisions of others to produce goods and services whose consumption would enhance their consumers' opportunity to lead a life of moral integrity or (2) by giving the chooser or someone else the feeling that she is the author of her own life (see corollary two). However, I should also add that I am confident that otherwise wrongful choices will rarely if ever be rendered rightful by either or both of the indirect effects just delineated.

The second primary-tort-duty-oriented corollary of liberalism also relates to living a life of moral integrity. According to this corollary of liberalism, a choice may also be tortious because it militates against the victim's taking his life morally seriously by undermining his belief that he is the author of his own life. I believe that the classification of many

types of behavior as tortious—e.g., (1) assault and battery, (2) libel, slander, and defamation, (3) fraud, intentional misrepresentation, and deceit, (4) false imprisonment, (5) various sorts of interferences with property rights, and (6) various types of invasions of privacy—reflects this concern. I also think that this concern underlies the plethora of no-duty holdings in the common law of torts.

The third primary-tort-duty corollary of liberalism relates to the right of privacy. Liberalism favors providing substantial protection to individuals' privacy not only because doing so gives moral-rights holders the feeling that they are the owners and authors of their own lives, but also (perhaps primarily) because privacy protects an individual's anonymity, secrecy, and solitude in ways that promote his ability to lead a life of moral integrity. More particularly, protecting an individual's privacy promotes his leading a life of moral integrity (1) by facilitating his participation in intimate relationships, which encourage him to develop his own conception of the good and provide a context in which he is particularly likely to learn to take his obligations seriously and to conform his conduct to his conception of the good, (2) by providing him with the opportunity to contemplate the moral alternatives available to him, and (3) by reducing the cost to him of experimenting with different lifestyles and value choices.[13]

The fourth primary-tort-duty corollary of liberalism is that a liberal, rights-based-society's members and participants have a moral right not to be harmed by choices that were critically motivated by the chooser's desire to control, degrade, or inflict pain or other types of losses on them. From a liberal perspective, the fact that a choice yields satisfaction for these sorts of reasons is irrelevant to, or counts against, its "moral permissibility." Indeed, the fact that these types of satisfaction critically affected the chooser's decision to make the choice in question is a sufficient condition for its moral impermissibility in a liberal, rights-based society. This corollary of liberalism is most relevant to such torts as invasions of privacy, assault, battery, false imprisonment, and the intentional infliction of emotional distress.

The fifth primary-tort-duty corollary of liberalism applies only to avoidance-choices (1) whose rejection was not critically motivated by the chooser's or someone else's desire to degrade, control, or inflict pain on or depress its victims (see corollary four), (2) whose rejection would not preclude or militate against its victims' leading lives of moral integrity by killing them, depriving them of their moral agency, or subjecting them to life-dominating pain or depression (see corollary one), and (3) whose rejection would also not militate against its victims' leading such lives by undermining their belief that they are the authors of their own lives (the possibility with which the second corollary is concerned). This fifth cor-

13. I have derived this analysis from Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980).

ollary is that, when acting in nonpolitical capacities and considering avoidance options whose wrongfulness would not be controlled by the first, second, or fourth corollaries (in part because the loss they would prevent the chooser from inflicting on others would be a "mere-utility" loss), each morally responsible member of a liberal, rights-based society has a moral duty to make all avoidance-moves that he would conclude would reduce the net certainty-equivalent *equivalent-dollar* losses he imposed on others (if he did the morally appropriate amount of research into this issue) that he would find attractive to make if he placed the same weight on the average net certainty-equivalent *equivalent-dollar* gain he expected the avoidance-move would confer on others as on the average certainty-equivalent equivalent-dollar he expected it would cost him.

The fifth corollary reflects two premises. The first is that the liberal duty of appropriate, equal respect and concern implies that any choice in this category (any mere-utility-reducing choice) violates the chooser's duty of appropriate, equal respect and concern if his decision to make that choice was critically influenced by his placing a lower weight on the average "unit of harm" he inflicted on others than he would have done had he experienced that harm himself. The second premise—liberal dualism—is relevant to the way in which the relevant "units of harm to others" and "units of benefits to oneself" should be defined. More particularly, the variant of liberal dualism I am referencing asserts that the obligations of individuals who are acting in nonpolitical capacities when making private choices that will tend to affect the certainty-equivalent accident-or-pollution losses others confront depend on those choices' *equivalent-dollar* effects as opposed to depending on the *utility* consequences or "*opportunity to lead a life of moral integrity*" consequences of the equivalent-dollar effects in question. This conclusion seems to me to follow from the "reality" that, in the general run of instances, (1) the putative obligor's private conduct will not be a cause-in-fact of the putative obligee's poverty or other attributes (e.g., physical or mental handicaps, poor education, disposition to take pleasure from material resources, etc.) that affect the contribution that additional resources will make to the putative obligee's mere utility or ability to lead a life of moral integrity and (2) so long as it was not wrongful, the putative obligor's private conduct would not make him individually morally responsible for these conditions or attributes even if it did cause them for some reason.

The sixth primary-tort-duty corollary of liberalism is actually a pair of "research"-related corollaries. The word "research" is enquoted because in this context I am defining "research" expansively not only to refer to efforts to discover (1) new, safer (i.e., less-accident-and-pollution-loss-prone) production-techniques, (2) the previously unknown fact that the use of a particular location for a particular purpose will be morally superior because the use of this location for the purpose in question will

be less-accident-and-pollution-loss-prone, and (3) new product variants whose introduction would be morally superior because their production and consumption combined would be less-accident-and-pollution-loss-prone than the production and consumption of the units of old products the units of the new products will "replace" but also to refer to the non-innovative efforts of a potential tort-loss cogenerator to identify (4) the avoidance-moves known to others that are available to him and (5) the known private and allocative costs and benefits these avoidance-moves would generate.

In any event, liberalism has two major implications for the "research" obligations of a liberal, rights-based society's members and participants. First, liberalism implies that such individuals are not obligated to do research that would enable them to increase the benefits they conferred on others, regardless of whether those benefits were mere-utility benefits or "opportunity to lead a life of moral integrity"-related benefits. Liberalism implies that any research obligations such individuals have are restricted to research that would enable them to reduce the harm they do to others—more precisely, to research that might produce information that would obligate them (and others) to reduce the harm they do to others.[14]

Second, not surprisingly, liberalism implies that the research obligations of a potential injurer in a liberal, rights-based society depend on the type of loss his research might enable him to avoid by using any new discovery it yields or any known information it uncovers for him. If this loss is a mere-utility loss, his "research" obligation will be governed by the monetized tort-duty the fifth corollary of liberalism articulates—i.e., he will be obligated to do the research that would have been profitable for him to do if the equivalent-dollar benefits it should be expected to confer on others by (1) inducing him and others to use any discovery it yields to reduce the mere-utility loss they impose on others or (2) by inducing him to use any "known" information it reveals to him to reduce the mere-utility loss he imposes on others were internalized to him (i.e., if he placed the same weight on the average equivalent-dollar gain the research and its use would confer on others as on the average equivalent-dollar it would cost him). If, on the other hand, the loss that the potential injurer might be able to prevent himself or others from causing by doing "research" and using the "research output" is the kind of loss that would directly preclude the victim from leading a life of moral integrity or would significantly militate against the victim's (or each of the relevant others') taking his life morally seriously, the potential injurer will be

14. I should point out that this research-related implication of liberalism is related to liberalism's implications for the duty to rescue of a liberal, rights-based society's members and participants that will be discussed next: both derive from liberalism's concern that the imposition of duties to provide benefits to others may deter people from leading a life of moral integrity by militating against their perceiving themselves to be the authors of their own lives.

obligated to do the research he should have known ex ante would prevent the combination of his research and the activity to which it related from disserving the interest of others in having and seizing the opportunity to lead a life of moral integrity if he made appropriate use of the discovery it yielded or information it brought to his attention and others made the use of this information.

The seventh primary-tort-duty-related corollary of liberalism relates to the duty of the members of and participants in a liberal, rights-based society to supply rescue services to each other. The basic liberal duty to rescue or provide assistance is an accommodation of two corollaries of liberalism that have already been articulated that have conflicting implications for the duty to rescue. In the one direction, liberalism's commitment to valuing individuals' having the opportunity to lead lives of moral integrity favors the members of and participants in a liberal, rights-based society's having a duty (1) to prevent co-members and co-participants from suffering losses that would preclude them from leading such lives and (2) to prevent losses whose non-prevention manifests a kind of disrespect for the victim that is bad in itself and also bad because it alters the victim's (and perhaps various observers') self-conceptions in a way that militates against his (their) taking his life (their lives) morally seriously. In the other direction, the liberal commitment to valuing individuals' not only having but also seizing the opportunity to lead a life of moral integrity disfavors imposing duties on individuals that would militate against their taking their own lives morally seriously either by creating a risk that they will be damaged in a way that will preclude them from leading a life of moral integrity or by causing them to feel that their life is not their own—i.e., by militating against their leading a life of moral integrity by undermining their belief in their control over their own lives and derivatively in their moral agency.

My tentative conclusion is that, from the perspective of liberalism, the following basic duty to rescue would represent the proper accommodation of these two corollaries of liberalism: members of and participants in liberal, rights-based societies are morally obligated to take those steps they can take to prevent other members of and participants in the society in question from suffering a loss the potential injurer could not otherwise be said to have wrongfully caused if, and only if, (1) the potential rescuee's loss might preclude him from, or might strongly militate against, his living a life of moral integrity and (2) the relevant rescue-attempt would not (A) impose a significant risk of substantial bodily injury or death on the rescue-attempter or (B) require him to devote an exorbitant amount of time to the rescue effort. Indeed, even if these conditions are satisfied, a potential rescuer may not have a duty to rescue if he is not the only person who would have such a duty if these conditions were not satisfied for anyone else or (even more comprehensively)

if he were not the best-placed potential rescuer of the potential rescuee in question.[15]

B. The Tort-Related Obligations of the Government(s) of a Liberal, Rights-Based State

Liberalism implies that the government of a liberal, rights-based State of perfect moral integrity will have legally-enforceable constitutional duties (1) to avoid tortious wrongdoing, (2) to take all steps that would promote relevant individuals' rights-related interests on balance by deterring tortious wrongdoing by others, (3) to provide the society's members and participants with an appropriate opportunity to secure corrective justice through law by demonstrating that more probably than not a particular wrongdoer's wrongdoing has imposed a recoverable loss on them, (4) to provide tort victims with an appropriate opportunity to secure compensation from wrongdoers whose wrongdoing has imposed the kind of loss each victim has suffered on some moral-rights holder when, through no fault of their own, the individual victims cannot identity the particular wrongdoer who harmed them, (5) (in so-called simultaneous-independent-causation cases) to enable victims to recover losses from wrongdoers whose wrongdoing was a necessary element of a set of sufficient causes of their loss whose fulfillment was not a necessary cause of their loss, and (possibly) (6) to deter individuals from making individual choices that were not individually wrongful but that collectively imposed losses when it would be incontestably desirable for at least some of the losses to be prevented by inducing some of the relevant individuals to avoid.[16]

The "on balance" component of the second of these positions requires some explanation and justification. In my judgment, the concrete moral rights on which the moral-rights discourse of a rights-based society focuses are only *prima facie* rights in that the party accused of violating the concrete right in question will have wronged the relevant moral-rights holder if, and only if, the choice he made that injured this victim reduced the extent to which the relevant population's total (*prima facie*) concrete rights were secured (hereinafter reduced the extent to which the

15. This non-uniqueness qualification to the duty to rescue is clearly warranted when the potential rescuer reasonably believes that someone else will effectuate the rescue if he does not or, somewhat more accurately, that his failure to attempt the rescue will not affect the probability of rescue. Even when this condition is not satisfied, the non-uniqueness qualification might be justified by its possible tendency to increase the desirability of the set of rescue attempts that are made. Finally, a prudential argument can be made for not making any moral duty of non-uniquely placed potential rescuers legally enforceable—the fear that a government that is authorized to make violations of this duty civilly or criminally actionable may exercise this power illicitly by using it selectively to penalize political opponents or targets of prejudice. For further discussions of these possibilities, see Markovits, *supra* note 8, at Part II.A.7.

16. For the description of such a situation, see Markovits, *supra* note 8, at 284 n.50; *infra* Part II.K.

relevant population's rights-related interests were secured). Relatedly, the basic obligation of the government of any rights-based State is to do its best to maximize the extent to which the society's members' and participants' total *prima facie* rights (hereinafter rights-related interests) are secured: the government of a rights-based State not only may but is obligated to make a choice that violates one or more individuals' *prima facie* concrete moral rights when the relevant choice increases the extent to which the rights-related interests of those for whom it is responsible are secured on balance (to an extent that no other choice that would be less inimical to the concrete right in question could do).

C. The Showing That a Member of or Participant in a Rights-Based Society Must Make to Establish a Secondary, Corrective-Justice Right to Secure Redress from a Particular Putative Injurer

In order to establish a corrective-justice right to compensation from a given defendant, a victim must prove that, more probably than not, the defendant's wrongful choice imposed a recoverable loss on him in the sense of being a necessary (but-for) cause of his suffering the loss. I want to make three points about this requirement. The first is explanatory. This conjunctive requirement is more stringent than a requirement that the plaintiff demonstrate separately that (1) the probability that the defendant behaved wrongfully is over 50% and (2) the probability that, if the defendant behaved wrongfully, his wrongful act caused the victim's loss in the sense of being a necessary cause of the loss' occurring is over 50%. To see why, note that if each of these latter two separate probabilities were 60%, the probability that the defendant wrongfully caused the victim's loss would be 60%(60%) = 36%.

The second point relates to the circumstances in which this requirement of corrective justice will produce conclusions that at least some will find unjust. At least two such sets of circumstances are worth pointing out. In the first, the plaintiff can demonstrate that two or more actors made wrongful choices that inflicted the kind of loss the plaintiff suffered on someone but cannot prove that any individual wrongdoer more probably than not harmed him.[17] In the second, the plaintiff can demonstrate that two or more actors made wrongful choices that were necessary elements of a set of sufficient conditions for the plaintiff's suffering his loss but is prevented from establishing a corrective-justice right by the fact that none of those actors' choices was a necessary cause of his loss because more than one set of such sufficient conditions were fulfilled.[18]

The third point relates to circumstances in which it would seem desirable to supplement corrective-justice law with some goal-based law. I

17. *See infra* Part II.L.
18. *See infra* Part II.J.

will focus on two situations in which a non-corrective-justice-securing law would have to be passed to secure allocative efficiency (which would seem desirable to do if allocative-transaction-cost considerations and/or distributive-justice concerns did not justify the opposite conclusion). In one such set of circumstances, imperfections in the information available to the trier-of-fact would preclude him from making the liability-assignment that would be allocatively efficient if he were constrained to make the defendant 100% liable if the plaintiff made out his corrective-justice case and to make the plaintiff 100% liable if he failed to make out his corrective-justice case.[19] The second situation is one in which a series of choices, none of which was individually wrongful, would be collectively undesirable.[20]

D. The Exclusive Corrective-Justice Focus of the Legitimate Common Law of Torts of a Liberal, Rights-Based Society

Many Law & Economics scholars subscribe to the position that what they inaccurately and contestably denominate "the rules of judge-made law"[21] are best-explained as efforts—however unwitting—to bring about (economically) efficient results.[22] Since the paradigm example of law that these scholars believe judges "make" is the common law of the common-law family of nations and this article argues that any body of tort law that is exclusively oriented toward securing corrective justice will often be allocatively inefficient, the article's relevance to this "economic efficiency of judge-made law" hypothesis would clearly be enhanced if I could show that, to be legitimate, the common law of torts of any rights-based society must be exclusively directed at securing their members' and participants' tort-related corrective-justice rights. Hence this section.

In my judgment, it is morally impermissible in a liberal, rights-based State (i.e., inconsistent with such a State's moral-rights commitments) for judges to make decisions in common-law cases that cannot be justified in liberal-corrective-justice terms. Three interconnected points are relevant in this context. First, the fact that the cases in question are common-law cases implies that their internally right resolution cannot be derived from (1) legislation passed by official State legislators or (2) constitutional texts that do something other than articulate the moral rights of those for

19. *See infra* Part II.L.

20. *See infra* Part II.K.

21. This designation is inaccurate in that the law judges announce consists of principles and standards as well as rules. The designation is contestable in that it implies that judges *make* rather than *find* the law. I do not think that judges are authorized to make the law, and as I will argue two paragraphs hence in the text, I do not think that they make the law in the sense of exercising legislative power in many instances in which Law & Economics scholars would claim they do—e.g., when they announce law that had not been previously articulated.

22. *See* William A. Landes & Richard M. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 102 (1978).

whom the relevant State is responsible and the moral duties that the relevant State has in relation to those rights. Second, the preceding point implies that any attempt by a common-law judge to resolve a common-law (tort) case in other than corrective-justice terms would amount to an exercise of legislative power by that judge, which would violate the political-participation/influence rights of the members of the society in question[23] unless "the People" had explicitly authorized the courts to exercise such power or the legislature to redelegate such power to the courts. Third, since the resolution of a common-law case in favor of a plaintiff that is not based on the plaintiff's pre-existing corrective-justice rights imposes a legal duty on the defendant that he did not have at the time he rejected the choice the court says he is legally obligated to have made, it seems accurate to conclude that defendants in such cases have been subjected to *ex post facto* legislation, which violates the liberal duty of appropriate, equal respect and concern for at least four somewhat-overlapping reasons:

(1) because *ex post facto* legislation is unauthorized, it fails to show the respect that is due to members of the society in question by denying them the ability to be the authors of the laws that constrain them;

(2) it denies its victims political procedural fairness—i.e., various opportunities they would have to protect themselves in the normal legislative process;[24]

(3) it fails to show the society's members appropriate, equal respect and concern by denying its victims fair notice; and

(4) it fails to show the society's members appropriate, equal respect and concern by facilitating the government's punishing its political opponents and disadvantaging the targets of the prejudices of government officials and/or their constituents (by reducing the extent to which the government is inhibited from imposing losses on particular individuals by the facts that legislative decisions have more widespread applicability and are more difficult to reverse or ignore than are judicial decisions).

I hasten to point out that the preceding analysis does not imply the moral impermissibility of common-law judges' making decisions that recognize tort-related legal rights that had not been previously recognized if those rights derive from tort-related moral rights (whose exis-

23. That is, the right to have an appropriate, equal role in determining the laws that will subsequently govern them.

24. I admit that this objection may be unjustified for both conceptual and empirical reasons. The conceptual problem relates to the difficulty of providing a coherent or persuasive concretization of the political-participation/political-influence rights of the members of a liberal, rights-based State. For a discussion of this difficulty, see Daniel S. Markovits, *Democratic Disobedience*, 104 YALE L.J. 1897 (2005). For the possibility that the relevant concern is unjustified for empirical reasons (that the participation and influence imperfections that would be connected with such judicial legislation would offset the participation and influence imperfections associated with actual legislative-branch and executive-branch legislation), see LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES 202–07 (2004).

tence may or may not have been previously recognized). If I am correct that the moral principles on which a rights-based State is committed to grounding its moral-rights discourse and conduct are inside its common law, judges who resolve common-law cases by reference to those principles (and the corrective-justice notions they entail) will be finding the law and not promulgating new legislation even when their conclusions reflect insights into the concrete implications of our society's moral commitments and/or refinements in the conceptualization of those commitments that no other judge, legal scholar, or legal or philosophical commentator respectively had or made, those who are disadvantaged by correct common-law decisions will not be victims of *ex post facto* legislation, both sides of a common-law dispute will have fair notice of the terms on which it will be decided (since members of and participants in a rights-bases society are responsible for knowing both the abstract moral principles to which membership or participation in that society commits them and the concrete corollaries of those principles), and the probability that government will use the common-law courts to punish its opponents and disadvantage the targets of its prejudice will be reduced (though, given the contestability of the correct answer to many corrective-justice questions, the opportunity for corruption will not be eliminated).

II. THE POSSIBLE ALLOCATIVE (ECONOMIC) INEFFICIENCY OF THE INTERNALLY CORRECT RESOLUTION OF CORRECTIVE-JUSTICE CLAIMS IN COMMON-LAW TORT-SUITS IN A LIBERAL, RIGHTS-BASED SOCIETY

Part II delineates and explores twelve reasons why the resolution of either common-law tort-issues or common-law tort-cases that is correct as a matter of law in a liberal, rights-based State may not be allocatively efficient even if no allocative-efficiency problems are caused by (1) any tort doctrine not required by our liberal commitments that is not first-best-allocatively-efficient (allocatively efficient in an otherwise-Pareto-perfect world), (2) the transaction costs that are generated by the making, defending, and processing of tort claims, or (3) any mistake of the relevant tort cogenerators or adjudicative decision makers other than those this section discusses.

A. The Fact That the Members of and Participants in a Liberal, Rights-Based Society Have No Duty to Make the Choices that Maximize Their Equivalent-Dollar Gains When Those Choices Are Not Required by the Rights of Others or the Actor's Duty to Take His Life Morally Seriously

Liberalism's implications for the duties that the members of and participants in a liberal, rights-based society are complicated and contestable. This section is based on the following tentative conclusions:

(1) the members of and participants in a liberal, rights-based society do have a duty, as well as a right, to take their lives morally seriously—to lead a life of moral integrity;

(2) this duty/right grounds the duty of the governments of a liberal, rights-based State to put these individuals in a position to lead such a life by ensuring that they have the health care, police protection, nutrition, housing, clothing, education, experiences, and exposure to alternative value-choices and lifestyles that will contribute significantly to their ability to lead lives of moral integrity and by preventing them from making choices to kill themselves (in most circumstances), to sell themselves into slavery, or (in most circumstances) to become addicted to some drug that will deprive them of a meaningful opportunity to lead a life of moral integrity;[25]

(3) the fact that a liberal, rights-based State's members have a duty to lead a life of moral integrity does not imply that the governments of a liberal, rights-based State have a duty to induce these individuals to lead lives of moral integrity by penalizing their failure to do so since what is valued is individuals' freely choosing to lead lives of moral integrity, though it may imply that the governments of a liberal, rights-based State have a duty to explain the attractiveness of leading lives of moral integrity; and

(4) the individual members of and participants in a liberal, rights-based State have no duty to maximize their equivalent-dollar interests when their failure to do so would not violate the rights of others or their own duty to lead a life of moral integrity.

The fourth conclusion has the following corollary: even if potential avoiders' appropriate estimates of the equivalent-dollar costs and benefits that their various avoidance options would generate were always accurate and even if the accident law of a liberal, rights-based State of perfect moral integrity would always require accident participants to make all those avoidance-moves that would reduce the certainty-equivalent equivalent-dollar loss they imposed on others that would be allocatively efficient for them to make and only those avoidance-moves in this category that would be allocatively efficient for them to make, the common law of torts of such a State would not legally obligate potential injurers who belonged to the set of potential victims of their own injurious conduct always to make allocatively-efficient avoidance choices. In particular, given that private actors in a liberal, rights-based State do not have an obligation to maximize their own equivalent-dollar interests when their failure to do so would not violate any other rights or obligations, a liberal, rights-based State would not be morally obligated to impose a legal duty on injurer-victims to make an avoidance-move that would in-

25. The governments of liberal, rights-based States might also be obligated to prohibit and prevent prostitution and polygamy if there were sufficiently good reason to believe that participation in these activities or relationships would in practice cause a sufficient percentage of the participants to lose their ability to make autonomous choices.

crease allocative efficiency when the avoidance-move in question would not on balance decrease the certainty-equivalent equivalent-dollar harm the chooser imposed on others (when the sign of the move's impact on allocative efficiency was critically influenced by the fact that it would reduce the certainty-equivalent equivalent-dollar loss the injurer-victim in question would inflict on himself). This conclusion implies that the common law of torts of a liberal, rights-based State would fail to increase allocative efficiency by imposing a legal duty on relevant actors who are not only potential injurers but would also be victims of their injurious choices to make avoidance-moves whose allocative efficiency was critically affected by the equivalent-dollar gains those moves would confer on the potential injurer/victims in question.

B. The Fact That, in Many Circumstances, a Liberal, Rights-Based State's Members and Participants Will Not Be Obligated to Make Ex Ante *Allocatively-Efficient Rescue-Attempts or Do* Ex Ante *Allocatively-Efficient Rescue-Related Research*

My discussion of the duty-to-rescue-oriented corollaries of liberalism argued that, for two or possibly three reasons, the members of and participants in a liberal, rights-based society may not have a duty to execute an ex ante allocatively-efficient rescue-attempt. First, when the potential rescuee will suffer a "mere-utility loss" if he is not rescued and the potential rescuer has no promise-related, status-related, or culpable-causation-related duty to attempt the relevant rescue, the potential rescuer will have no duty to attempt the relevant rescue even if its execution would be ex ante allocatively efficient. Second, even if the potential rescuee may be prevented from leading a life of moral integrity if he is not rescued, the potential rescuer will have no duty to attempt a rescue if the rescue attempt would subject him to a significant risk of substantial bodily harm or death, regardless of whether he had the option of executing a rescue attempt that would be ex ante allocatively efficient. Third, and more contestably, even if each individual member of a multi-member set of potential rescuers would be morally obligated to execute an allocatively-efficient rescue-attempt if he were the only person in a position to make such a rescue attempt, no individual potential rescuer may be obligated to make the ex ante allocatively-efficient rescue-attempt when more than one person was in a position to make such a rescue attempt. If for any of these reasons the members of or participants in a liberal, rights-based society are not morally obligated to make an ex ante allocatively-efficient rescue-attempt, the common law of torts of such a society will not be allocatively efficient because it will fail to impose a legal duty on such parties to make ex ante allocatively-efficient rescue-attempts even if it would be allocatively efficient for it to do so.

My discussion of the research obligations of potential researchers also indicated that liberalism would not impose a duty on them to dis-

cover or uncover information that would enable them to increase the benefits they conferred on others (as opposed to reducing the harm they imposed on others) even if it would be allocatively efficient for them to do the research in question.

C. The Fact That the Value or Moral Significance That Liberals Assign to the Pleasure That Invaders of Privacy, Batterers, Rapists, and False Imprisoners Obtain Because Their Acts Inflict Pain on, Degrade, and Control Their Victims Differs from the Value That Would Be Assigned to Such (Illicit) Pleasures in an Allocative-Efficiency Analysis

The fact that invasions of privacy, batteries, rapes, and false imprisonment give their perpetrators pleasure by inflicting pain on, degrading, and/or controlling their victims may increase their allocative efficiency—in particular, will affect their allocative efficiency by (1) the number of dollars the relevant injurers would have to obtain in an inherently neutral way to be left as well-off as these pleasures left them *minus* (2) the net external costs (*plus* the net external benefits) that the generation of such pleasures impose on others who disapprove or approve of individuals' obtaining such pleasures.[26] Such illicit pleasures may therefore either

26. At least orally, some Law & Economics scholars contend that the equivalent-dollar gains and losses individuals experience because they approve or disapprove of some act or state of affairs should not be counted in allocative-efficiency analysis. *See, e.g.*, Matthew D. Adler & Eric A. Posner, *Implementing Cost-Benefit Analysis When Preferences Are Distorted*, *in* COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES 269, 276–77 (Matthew D. Adler & Eric A. Posner eds., 2001). However, these scholars have no principled argument for this conclusion—i.e., their only justification for it is the supposed difficulty of measuring such equivalent-dollar gains and losses. In fact, in our worse-than-second-best world (in which Pareto imperfections abound and both data and analysis are inevitably costly and data is virtually always imperfect), I am not convinced that it will be less practicable to estimate such moral-value-generated equivalent-dollar gains and losses than to estimate the kinds of equivalent-dollar consequences on which conventional allocative-efficiency analysis focuses or is supposed to focus.

I should say that some philosophers have reached a related conclusion that the overall desirability of a choice should not be affected by so-called external preferences (preferences for or against other people's gains and losses) for a very different reason—*viz.*, because, in their view, a procedure that counts external preferences is inegalitarian in that it counts more than once the utility of anyone for whose utility there are net external preferences and less than once the utility of anyone for whose utility there are net external dispreferences. I disagree with this latter position (taken, for example, by DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 7, at 234–38). To my mind, taking external preferences into account is not counting the utility of the relevant winner twice. The direct winner's utility gain counts only directly. The fact that it counts indirectly as well when it shows up in someone else's utility function does not involve double counting any more than would counting the utility someone else obtained because the utility gain of the direct winner induced the direct winner to change his behavior in ways that benefited the second party in question. Of course, from some value perspectives, some external preferences and dispreferences (such as an external dispreference based on a prejudice) might not deserve to be given a positive weight (indeed, might even be assigned a negative weight) at the overall-desirability-evaluation stage of the policy-evaluation process (indeed, might as the text indicates, render the choice in question rights-violative if it critically affected the chooser's choice). See the immediately following text and *supra* note 25. For perceptive discussions of much of the relevant economic and philosophical literature, see Howard F. Chang, *The Possibility of a Fair Paretian*, 110 YALE L.J. 251 (2000); Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L.J. 173 (2000).

favor or disfavor the allocative efficiency of the acts that generate them. By way of contrast, such illicit pleasures will never favor the moral permissibility of the acts that yield them from a liberal perspective. Indeed, from a liberal perspective, the fact that the acts in question generate such illicit pleasures may render them morally impermissible—i.e., may count against them more severely than the statement that they would be assigned a negative value would suggest. Indeed, I say "may" only because the fact that an act generates illicit satisfactions may render it morally impermissible only if those satisfactions critically affected its attractiveness to its perpetrator.[27]

Economists are wont to make two arguments against the conclusion that tort decisions that impose costs on actors whose choices give them illicit pleasures (in my terms but not theirs, that correctly enforce liberal norms in illicit-pleasure tort-cases) may be allocatively inefficient.[28]

27. In our society, people who consider themselves to be "liberal" in the sense in which I am using this term take at least three different positions on the moral significance of the fact that the perpetrator of an act had an illicit motive for committing it. First, some argue that an individual's motivation for committing an act is irrelevant to its permissibility. I think this position is clearly wrong. The liberal duty of appropriate, equal respect and concern seems to me to imply that the fact that an act manifests its perpetrator's disrespect and lack of concern for one or more others is highly relevant to its moral permissibility. Thus, the fact that an executive in a large company chose not to promote a Black employee because he was prejudiced against Blacks strikes me as highly relevant to whether his decision violates the rejected candidate's moral rights (say, in a case in which the rejected Black candidate was equally qualified but not more qualified than the successful non-Black candidate and could have made no justified moral objection if a random-choice procedure resulted in the white candidate's selection). (A related issue of contemporary interest is whether a crime is made worse if it is motivated by hate.)

Second, some individuals who consider themselves to be liberal in my sense argue that the fact that an individual's commission of an act was motivated by its satisfying his illicit desires renders it morally impermissible only if he would not have found it attractive on balance (henceforth "profitable") but for its satisfying some of his illicit desires.

Third, some liberals would argue that the basic liberal principle of appropriate, equal respect and concern implies that any act is rendered morally impermissible by its satisfying the actor's illicit desires if it does so (A) at all, (B) to a significant extent, or (C) sufficiently to make it "profitable" to him on that account alone even though this consequence was not necessary for its being "profitable" for him.

(In the United States, constitutional law experts disagree about a related issue—*viz*., whether an analog of the second or an analog of some variant of the third position just described should be the test for whether the fact that some of those who made a State decision had an illicit motive for doing so renders it unconstitutional. The analog to the second position would be that the unconstitutional motivation (say) of some legislators renders a statute they passed unconstitutional only if it was essential to the passage of the legislation in question. The analog to the third test would be that a statute is rendered unconstitutional by the illicit motivation of (some of) the legislators who supported it only if a significant number of the legislative supporters of the legislation were significantly unconstitutionally motivated to support it, only if a significant number though not necessarily a critical number of its supporters would have rejected it but for their unconstitutional motivations, or only if the relevant unconstitutional motivations were a sufficient condition for its passage. My own position on this moral-rights issue, and on the constitutional law issue discussed in this paragraph, is the second position delineated above.)

28. Economists are not inclined to make a third argument that favors their conclusion—*viz.*, the argument that such legal decisions encourage such rights-violations not only by increasing the "profitability" of rights-violating conduct to individuals whose preferences make such conduct allocatively efficient by reducing the "law-related cost" of engaging in it but also by encouraging people to develop such preferences in the first place (or, perhaps more accurately, by deterring them from combating the development of such preferences) not just by increasing the profitability of satisfying them but by "ex-

First, they point out correctly that moral-rights-violating behavior that would be allocatively efficient if it affected no one else's choices generate allocative costs by making it "profitable" for its perpetrator's potential victims to make allocatively costly avoidance-moves. Although this consequence obviously affects the actual allocative efficiency of the relevant moral-rights-violating conduct and hence the allocative inefficiency of decisions to make the relevant moral-rights violators civilly liable, there would be no reason to believe that it would always be critical even if this effect of such a decision were not at least somewhat offset by the tendency of decisions to impose civil liability on such violators to increase their incentive to escape detection and hence the allocative costs they generate when attempting to escape detection.

Second, economists argue that decisions to hold moral-rights violators liable in these cases will tend to be allocatively efficient because they will induce the perpetrators to purchase, as opposed to taking, what they want—i.e., because they will tend to induce the perpetrators to engage in voluntary market transactions. According to this argument, this tendency promotes allocative efficiency because it puts to a market test the perpetrator's claim that the equivalent-dollar value to him of "what he took" is higher than the equivalent-dollar cost to his victim of "his taking what he took." Although there is something to this argument, for two reasons, it does not demonstrate the universal, greater allocative efficiency of market transactions or legal rules that encourage them. The first such reason is less interesting and may be less important: the argument ignores the allocative mechanical transaction cost of voluntary market transactions. Even if, allocative transaction costs aside, voluntary market transactions tend to be more allocatively efficient than involuntary transfers, at least in some identifiable sets of cases, the differences in question may be smaller than the allocative-transaction-cost savings the involuntary transfers permit.

The second reason is more interesting and may be critical in those instances in which it is relevant: the allocative-efficiency argument for inducing individuals to purchase what they want in a voluntary market transaction rather than to take it ignores the fact that the acts of purchasing and selling some "things" in a voluntary market transaction sometimes change what is "transferred" from both the original possessor's and the later possessor's points of view in ways that affect the equivalent-dollar value the later possessor obtains and the equivalent-dollar cost the original possessor incurs and derivatively affects the allocative efficiency of "the transfer" in question. Thus, one cannot buy friendship, and paid-for sex is not the same thing as rape or voluntary, unpaid-for sex from either participant's perspective. Because a rapist may place a higher

pressing" a tolerance for them. I suspect that economists' failure to make this argument (indeed, their general reluctance to admit the "expressive" function of law) reflects their tendency to assume that tastes or preferences are exogenous to the system.

equivalent-dollar value on rape than on purchased sex if he views the rape as more controlling of or more degrading to his victims and because a woman may find it more degrading or self-definitionally costly to sell sexual services than to be the (involuntary) victim of a rape, the fact that the highest price that a rapist would have been willing to pay his victim for her sexual services in a voluntary market transaction is lower than the lowest price his victim would have been willing to accept in a voluntary market transaction in exchange for her sexual services is perfectly compatible with the rape's having been allocatively efficient—i.e., with the conclusion that the equivalent-dollar gain the rapist obtained from his act exceeds the equivalent-dollar loss it imposed on his victim. I admit that this outcome may be empirically unlikely, but, in principle, if it occurs, a legal rule that prevented rapes in the relevant set of circumstances would generate some allocative inefficiency. Indeed, the legal rule in question would even generate some allocative inefficiency if it induced a sale of the sexual service if the difference between the equivalent-dollar value and cost of the sold service were lower than its counterpart for the rape. I should add that a similar point could be made if the "object" in question was private information about a particular individual.

In short, neither of the arguments that economists make against the conclusion that it will sometimes be allocatively inefficient to make privacy-invaders, batterers, rapists, or false imprisoners who take illicit pleasure from their acts civilly or criminally liable carries the day. Hence, in some privacy, battery, rape, and false imprisonment cases, it will be allocatively inefficient for tort law to effectuate liberal-corrective-justice norms.

D. The Fact That the Value or Moral Significance That Liberalism Assigns to Various Costs and Benefits Differs from the Value That Would Be Assigned to Them in an Allocative-Efficiency Analysis

Even when liberalism does place a positive value on all equivalent-dollar gains a choice conferred on its conventional beneficiaries and others who placed a positive equivalent-dollar value on it and does place a negative value on all equivalent-dollar losses a choice imposed on its conventional victims and others who placed a negative equivalent-dollar value on it, liberalism may conclude that an allocatively efficient choice is morally impermissible and that an allocatively inefficient choice is morally permissible because the relative absolute significance of different effects for liberal evaluations may differ from their relative absolute significance for allocative-efficiency analyses. At least in part, this possibility reflects the fact that liberal evaluations are not always based on the evaluations that a choice's conventional victims and beneficiaries and various concerned "observers" give to such effects (even if these evaluations reflect these parties' actual priorities), and in part it reflects the fact that liberalism uses a different metric to value such losses—

values them not in terms of their direct and indirect equivalent-dollar effects but in terms of the disrespect or respect they manifest for the victims and beneficiaries in question and usually for all members of the society in question as well as in terms of their direct and indirect impact on these parties' having and seizing the opportunity to lead lives of moral integrity.

I should add that the fact that most members of a liberal, rights-based society are committed to liberal values does not eliminate the possibility that the difference between the liberal valuation of the effects of some choice and the allocative-efficiency significance of these effects may make the corrective-justice-securing tort law of such a society allocatively inefficient. Not all members of a liberal, rights-based society are liberals, and the difference between such "dissenters'" evaluations of the relevant effects and the liberal evaluation of such effects might make a choice liberalism requires allocatively inefficient and might make a choice liberalism does not require allocatively efficient. I should also add that I recognize that this reason why a liberal-corrective-justice-securing tort law may not be allocatively efficient could be combined with its predecessor.

E. The Reality That Some Accident Participants Who Have Done Appropriate Research into the Avoidance-Moves That Are Available to Them and the Net Effect of These Choices on Either Allocative Efficiency or the Opportunities That Their Society's Members and Participants Have to Lead Lives of Moral Integrity May Misestimate Those Options' Consequences in Ways That Lead Them to Reach the Mistaken but Self-Justifying Conclusion That They Are Morally Obligated to Make a Particular Avoidance-Move That Is Available to Them (That Lead Them to Reach the Otherwise-Mistaken Conclusion That, in Effect, They Are Morally Obligated to Execute the Move in Question)

This possibility is complicated to explain. The argument proceeds in three stages. The first establishes that even tort cogenerators who have fulfilled their duty to do research into the identity and relevant consequences of their various available avoidance-options will sometimes misestimate the consequences of making one or more of the avoidance-moves they currently believe they could make in ways that lead them to make the self-justifying mistake of concluding that they are morally obligated to make the move(s) in question. This mistake is self-justifying because, once the chooser has concluded mistakenly that he was morally obligated to make a particular avoidance-move that was available to him, this mistaken conclusion renders his rejection of the move in question wrongful. Admittedly, the avoidance-move the mistaken injurer failed to make would not have been allocatively efficient (in cases in which the relevant possible loss was a mere-utility loss) or would not have increased the on-balance opportunity of relevant individuals to lead lives

of moral integrity (in cases in which the relevant possible loss was a loss that could have reduced such opportunities). However, that fact is consistent with the relevant choice's inflicting a mere-utility loss on some individuals or depriving some individuals of the opportunity to lead a life of moral integrity—i.e., with the relevant choice's having wrongfully inflicted a recoverable loss on some moral-rights holders. (This conclusion has no counterpart in the situation in which the injurer believed ex ante that he had an avoidance-move option that he was obligated to make use of that he did not in fact have since, in such a situation, his wrongful rejection of this non-existent option could not harm anyone.) Unless the fact that the wrongful rejection of the avoidance-move in question did not generate a net loss of the relevant kind (conferred net benefits of the relevant kind on others, including possibly the injurer) that were at least as big as the loss it imposed on its victims for some reason extinguishes the victim's rights, the victim would be entitled to recover the loss he suffered because his mistaken injurer wrongfully rejected an avoidance-move that was available to him. I can think of no such reason, though the tort-law rule that victims who have suffered a mere pecuniary loss are not entitled to recovery gives me some pause on this account (since the distinguishing feature of at least some pecuniary-loss cases—e.g., cases in which the plaintiff is a business owner whose business is harmed by pollution generated by a ship-collision[29]—is that, from an allocative-efficiency perspective, most of the victim's losses are "offset" by gains to his rivals—other businesses that make sales to the customers who no longer patronize the businesses that suffered losses).

The second stage of the relevant argument focuses on the allocative inefficiency of the avoidance-move the potential injurer mistakenly but self-justifyingly believes he was morally obligated to make. When the loss the potential injurer believed he might generate was a mere-utility loss and he should have expected ex ante that his act or activity would impose net equivalent-dollar accident-or-pollution losses on others if he did not avoid, his obligation was to make allocatively-efficient avoidance-decisions, and the move he mistakenly concluded he was obligated to make must have been allocatively inefficient. When the loss the potential injurer believed he might generate was an on-balance reduction in the opportunity that relevant individuals had to lead a life of moral integrity, the move he mistakenly but self-justifyingly believed he was morally obligated to make may or may not have been allocatively inefficient, but clearly some of the moves in question will have been allocatively inefficient.

The third stage of the relevant argument explains why it will be allocatively inefficient for the courts to enforce the rights of such victims. The best explanation I can provide is that doing so will be allocative-

29. *See, e.g.*, State of Louisiana *ex rel* Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985).

transaction-costly, will tend to decrease the allocative efficiency of potential-victim avoidance-decisions, and will have an ambiguous effect on the allocative efficiency of potential-injurer avoidance-decisions. Decisions to enforce victims' rights in these cases will probably increase transaction costs by leading victims to bring suits they would not otherwise have brought and by causing the court in question and future courts to investigate the relevant mistake-issue in any such cases that are brought (even though such decisions may also tend to reduce the allocative transaction costs and public-finance-connected nontransaction-cost allocative costs generated by loss-related government-transfer claims that would be prevented by tort awards). Moreover, even in our highly-Pareto-imperfect world, a decision to enforce the victim's rights will tend to decrease the allocative efficiency of potential-victim avoidance-decisions by reducing the incentive of victims to make presumptively-allocative-efficient avoidance-decisions whose rejection will not be deemed contributorily negligent either because the move in question is a type of move whose rejection is never assessed for contributory negligence (or negligence) or because impacted information will cause the trier-of-fact to make a false-negative error on the contributory-negligence issue. Admittedly, such decisions will have an ambiguous effect on the misallocation that potential injurers generate when making avoidance-decisions. In the one direction, to the extent that such a decision will induce potential injurers who mistakenly believed that some avoidance-move available to them was allocatively efficient to make the move in question, it will tend to decrease allocative efficiency on that account. In the other direction, to the extent that such a decision will induce potential injurers to make avoidance-moves they correctly perceived to be ex ante allocatively efficient by establishing that they will be liable for the losses their rejection of these moves generate even if their perception turns out to have been wrong, it will tend to increase allocative efficiency on this account (particularly in our highly-Pareto-imperfect world in which the relevant imperfections already deflate potential-injurer avoidance-incentives on balance[30]). If, as I suspect, these two effects on the allocative efficiency of potential-injurer avoidance-decisions are pretty much a wash, decisions by courts to enforce the rights of victims in these mistake cases will be allocatively inefficient on balance.

30. For an explanation, see Richard S. Markovits, *The Allocative Efficiency of Shifting From a "Negligence" System to a "Strict-Liability" Regime in Our Highly-Pareto-Imperfect Economy: A Partial and Preliminary Third-Best-Allocative-Efficiency Analysis*, 73 CHI.-KENT L. REV. 20, 38–95 (1998).

F. The Reality That Some Accident-Participants Who Have Correctly Identified the Avoidance-Moves Available to Them and Correctly Estimated Their Net Effect on the Extent to Which the Relevant Society's Members Take Their Lives Morally Seriously or on Allocative Efficiency May Still Incorrectly Conclude That They Are Morally Obligated to Make a Particular Avoidance-Move Because They Have Made One or More Mathematical Errors

This argument is perfectly analogous to the argument of the preceding subsection.

G. The Possibility That Adjudicators in a Liberal, Rights-Based State That Fulfills All Its Moral Obligations at the Time of Decision May Have Made Internally-Incorrect, Allocatively-Inefficient Decisions in the Past That Have Legitimate, Critical Precedential Weight

Even if one assumes (contrary to fact) that, in cases of first impression, the internally correct answer to all accident-law issues would be allocatively efficient, the internally correct answer to some of those legal issues in later cases may be allocatively inefficient if those issues were internally-incorrectly resolved in an allocatively inefficient way in earlier cases and decisions to correct the earlier errors would wrong parties who reasonably relied on the precedents in question. This conclusion reflects the fact that the moral significance that liberalism attributes to such precedents may be different from the impact of their existence on the allocative efficiency of following them.[31]

H. The Possibility That Pareto Imperfections May Create Situations in Which the Compensatory Damages That Corrective Justice Requires Will Not Induce the Relevant Actors to Make Allocatively-Efficient Avoidance-Moves

As I have explained elsewhere in great detail,[32]

> (1) imperfections in seller and buyer competition, externalities that will not be internalized by the tort-law decision in question, taxes on the margin of income, actor non-sovereignty and non-maximization, and buyer surplus can all distort the private profitability of avoidance-moves both individually and collectively,
>
> (2) potential-avoider non-sovereignty and non-maximization can both individually and collectively cause potential avoiders to make unprofitable decisions to reject profitable avoid-

31. For a detailed analysis of the factors that affect the appropriate weight for a liberal, rights-based society to give to precedent if it adopts a system in which previous legal decisions may affect the legal rights of parties to legal disputes, see MARKOVITS, *supra* note 7, at 72–74.

32. *See* Markovits, *supra* note 30, at 46–50, 74–78; Richard Markovits, *Monopoly and the Allocative Inefficiency of First-Best-Allocatively-Efficient Tort Law in Our Worse-Than-Second-Best World: The Whys and Some Therefores*, 46 CASE W. RES. L. REV. 313 (1996).

ance-moves or to make unprofitable avoidance-moves, and as a result

(3) potential avoiders may not make allocatively-efficient avoidance-decisions even if the law will make them compensate their conventional tort-loss co-generators for the losses their allocatively-inefficient avoidance-move rejections impose on them—i.e., there is no reason to believe that the net distortion in the private profitability of avoidance that Pareto imperfections would generate and the errors that potential avoiders would commit when making their avoidance-decisions would in the relevant sense cancel each other out.

Since adjudicators in common-law tort cases in liberal, rights-based societies are obligated to set damages at a level equal to the loss the victims suffered,[33] it would be internally incorrect for them to adjust their damage award in a given case to the level that would be required to induce (say) the injurer to make allocatively-efficient avoidance-decisions. Indeed, even if the damage awards required by liberal corrective justice include compensation for the transaction costs an entitled victim reasonably incurred to pursue his claim and even if potential victims of a culpable non-avoider are entitled to receive compensation for the risk costs their injurer's non-avoidance imposed on them, the internally correct damage award in a common-law tort case in a liberal, rights-based society may be allocatively inefficient.

The following two numerical examples illustrate this possibility. The first illustrates the problems that Pareto imperfections beyond the control of the tort-case adjudicator can cause by distorting the profitability of avoidance even if the relevant potential avoider is a sovereign maximizer. Assume the following facts:

(1) the private cost of the rejected allocatively-efficient avoidance-move to the injurer was $105;

(2) those private costs were undistorted—i.e., the allocative cost of the relevant avoidance-move was also $105;

(3) both the potential victims and the potential injurer are indifferent to risk;

(4) the rejected allocatively-efficient avoidance-move would have reduced from 20% to 10% the probability of the victim's suffering a $1,000 loss—i.e., would have reduced the potential victim's weighted-average-expected loss by $100;

33. I ignore punitive damages, whose award in any event would not be guided by the goal of maximizing allocative efficiency. I should add that I suspect that the award of punitive damages may be illegitimate in common-law tort cases in a liberal, rights-based society—at least to the extent that such damages do not constitute compensation for the extra harm the victim suffered because of the particularly insulting character of the choice that made the injurer liable. This conclusion is compatible with the legitimacy of a liberal State's imposing civil fines or criminal penalties on injurers whose conduct might currently cause them to have to pay punitive damages.

(5) the victim would not have had to incur any private transaction costs to collect his claim if his injurer would be found liable, and the processing of any loss-related legal claims (and insurance and government-transfer claims) would generate no allocative transaction costs;

(6) the $1,000 loss the injurer's avoidance-move might have prevented would have consisted solely of lost wages that the avoidance would have prevented by preventing the temporary disablement of the victim in question;

(7) because the potential victim's labor increased the unit output of an imperfect competitor who did not engage in price discrimination and whose valuation of the victim's labor-product was not distorted by any other Pareto imperfection, the allocative benefits that the avoidance would have generated if it prevented the potential victim's disablement (the allocative value of his output if as I will assume he was indifferent between working in an uninjured state and consuming leisure while temporarily disabled) would have been $1200;[34] and

(8) the potential avoiders (injurers) whose avoidance-choices will be affected by the legal ruling in question will be large, sophisticated companies that either will know or should know that the allocative value of their potential victims' labor will be higher than the victims' wages—more particularly, that the allocative benefits of avoidance will be $120 (10% of $1200) rather than $100 (10% of $1,000)—and that the avoidance-move in question will therefore be allocatively efficient.

Now assume that the adjudicator knows all these facts, concludes on this basis that the injurer's avoidance-move rejection was wrongful, and therefore holds the injurer liable. In this type of case, corrective justice would require that the injurer fully compensate the victim for his loss—i.e., pay the victim $1,000. But if the injurer did not have to incur any private transaction costs to settle or litigate the victim's claim or to pay these damages (and possibly even if he did), the prospect of these damages' being awarded would not induce him or his future counterparts to make the allocatively efficient avoidance-move in question since the private cost to him (and them) of rejecting that move (the weighted-average-expected amount of damages the rejection would cause him to pay—10% of $1,000 = $100) would be lower than the private cost to him of making the move ($105).

The second example illustrates the relevance of the potential avoider's non-sovereignty and non-maximization in an otherwise-Pareto-

34. Roughly speaking, *ceteris paribus*, the allocative value of the unit output produced by a laborer who works for a non-discriminating imperfect competitor will be higher than the value of his output to his employer (and hence the wage the worker receives) because the allocative value of his output equals the price for which it will be sold while its value to his employer depends on the (lower) marginal revenue its sale yields him.

perfect world. This example maintains all the assumptions of its predecessor except that it assumes that the private benefits of avoidance were not distorted and that the private cost of avoidance was $95. In this case, the avoidance-move would have increased allocative efficiency by $5, the potential injurer in question would be culpable and therefore be found liable for rejecting it, and the avoidance-move in question would therefore be profitable for him to make. But now assume that—despite that fact—the relevant potential injurer would not make the move in question because he would underestimate the relevant private and allocative benefits, overestimate the relevant private and allocative costs, or simply not pay attention. In such a situation, allocative efficiency might be increased by a rule that awarded victims supra-compensatory damages—i.e., the allocative-efficiency gains such a rule would generate by inducing potential injurers to avoid by causing them to pay more attention, to make more accurate estimates of the relevant costs and benefits, or to do their maths correctly might exceed the allocative-efficiency losses the rule might generate by inducing victims to reduce allocative efficiency by putting themselves in harm's way by making allocatively inefficient choices that will not in practice be found contributorily negligent and by inducing potential injurers who fear that they may be incorrectly found to have been negligent to overavoid from the perspective of allocative efficiency. However, even if this is the case, it would be internally incorrect for adjudicators in common-law tort cases in a liberal, rights-based State to award entitled tort-victims supra-compensatory damages.

I. The Possibility That No Damage Award a Court Could Make Would Minimize the Amount of Misallocation Caused by the Type of Contingency with Which a Given Tort Case Was Concerned

So far I have assumed that, if the liberal conception of corrective justice required a common-law court in a liberal, rights-based society to award the plaintiff in a common-law tort suit the damages that would minimize tort-contingency-related misallocation, a perfectly informed trier-of-fact and court would be able to do so. This section points out that, in many situations, even if the court makes the damage award that is the most-allocatively-efficient award it could make, its decision would not constitute the most-allocatively-efficient response the State could make to the relevant tort contingency for reasons unrelated to the allocative-transaction-costliness of adjudicative proceedings. The problem is that

> (i) In general, in order for a public decision maker to be able to induce X types of decisions to be made allocatively efficiently, he must have X policy instruments at his disposal and
>
> (ii) when the allocatively efficient response for private actors to make to a tort contingency includes fixed-cost as well as variable-cost decisions, common-law courts will not have enough

policy instruments to induce all the relevant types of decisions to be made in an allocatively efficient way.

For example, when the allocatively efficient response to a possible-rescue contingency involves the execution of allocatively-efficient rescue-operation investments as well as the execution of rescue attempts that are allocatively efficient, given the investments that have been made, the most-allocatively-efficient award that courts could offer a successful rescuer might not minimize the total allocative cost the relevant contingency generates because the award that would eliminate rescue-attempt, rescue-attempt-offer acceptance/rejection, and potential-rescuee-avoidance misallocation might cause rescue-operation-investment misallocation and vice versa—i.e., because the most-allocatively-efficient response to the relevant contingency would require an appropriate set of investment subsidies to be combined with an appropriate set of damage awards.[35]

I should not close this section without admitting that this possibility may not belong in Part II's list since it does not suggest a reason why a common-law court should not make the most-allocatively-efficient decisions it could make—i.e., because it indicates only that in some circumstances that decision will not be so allocatively efficient as a more complicated policy package to which it might belong.

* * *

The next three reasons why the common law of torts of a liberal, rights-based society may not be allocatively efficient are connected to what I will refer to as our society's binary conception of corrective-justice rights. According to this "binary" conception of corrective-justice rights, in order to demonstrate that he has a corrective-justice right to compensation from someone he alleges has wrongfully and tortiously harmed him, a victim must establish that, more probably than not, the defendant made a wrongful choice that (1) violated his duty to the victim and (2) was a but-for cause of the victim's loss.[36] This conception of corrective-justice rights is "binary" because, under it, a "defendant" who may have been a wrongful but-for cause of a loss is liable for the full loss if it is found that, more probably than not, he made a wrongful choice that was a but-for cause of the loss' occurrence (regardless of the fact that the probability that he made a wrongful choice that was a but-for cause of the loss was under 100%) and is liable for none of the loss if the probability of his having been a wrongful but-for cause of the loss was not

35. For a detailed theoretical analysis of this kind of possibility, see Richard S. Markovits, Marine-Salvage Law and Marine-Peril-Related Policy: A Second-Best and Third-Best Economic-Efficiency Analysis of the Problem, the Law, and the Classic Landes and Posner Study (2005) (unpublished article manuscript under submission, on file with author).

36. I realize that the common law of the United States may not have adopted this rule of liability even in negligence cases—in particular, may require that the victim show only that (1) more probably than not, the defendant behaved wrongfully and (2) more probably than not, the defendant's wrongful choice was a but-for cause of the victim's recoverable loss. To see why this requirement differs from the corrective-justice requirement I have articulated, see the first paragraph of Part I.C.

higher than 50% (despite the fact that the probability that he had made a wrongful choice that was a but-for cause of the loss was higher than 0%).[37]

This conception of corrective-justice-right claims has two critical elements. The first is the "but-for cause" element of moral causation, which I perceive to be an ineliminable feature of any conception of corrective-justice-right claims—i.e., not to be particularly connected to either liberalism or the binary conception of corrective justice. The second element of the binary conception of corrective-justice-right claims is its more-probable-than-not element, which is its defining component and determines the loss-division it sanctions in all cases in which the loss has not been but-for caused more probably than not by the wrongful conduct of both the putative injurer and the victim. Although I do not find this defining feature of the binary conception of corrective justice inconsistent with liberal principles of justice, I also do not think that it is entailed by liberalism. Loss-division protocols under which the division of the loss varies more continuously with probabilities of wrongful but-for causation would seem to me to be equally compatible with liberal concerns that possible wrongful injurers be treated in a way that encourages them to consider themselves to be the authors of their own lives and that possibly wronged victims be treated with the respect that is their due.

In any event, the first two of the next three reasons why the common law of torts of a liberal, rights-based society may not be allocatively efficient relate to the "but-for causation" conception of moral responsibility that I do think is primitively correct and therefore not specially connected to liberalism, and the last of these three reasons is at least somewhat connected to the binary character of our society's conception of corrective-justice rights, which I believe is consistent with though not required by liberal commitments.

J. Simultaneous-Independent-Causation and the Causation and Wrongfulness Elements of Corrective-Justice-Right Claims

Assume that (1) the independent choices of two or more actors belonged to two or more different sets of sufficient conditions for the generation of some loss, (2) each such choice would be allocatively inefficient if none of the other choices were made, (3) all such choices combined were allocatively inefficient, (4) the relevant sets of sufficient conditions were fulfilled at times that resulted in two or more such sets' "causing" the loss to occur simultaneously, and (perhaps redundantly) (5) the loss was not increased by the fulfillment of more than one set of the relevant sets of sufficient conditions. In situations of this kind, it would be allocatively efficient to prevent the relevant choices from being

37. Admittedly, corrective justice is compatible with both the injurer's and the victim's bearing some part of the loss in cases in which, more probably than not, each's wrongful choice caused the loss.

made. However, for two reasons, no court *may be* authorized to resolve a common-law (corrective-justice-based) tort suit in such a situation in the way that would be allocatively efficient. First, in this type of situation, the corrective-justice-based common law of torts may not be able to secure allocative efficiency by holding all the relevant choosers liable because no individual chooser was a but-for cause of the loss that resulted. (I will refer to choosers in this situation as "putative injurers" because no such choosers are "but-for causes" of the loss.)

Second, in at least some of these situations, a common-law court may not be authorized to reach the allocatively efficient conclusion because none of the putative injurers may have behaved wrongfully. At least, this conclusion is warranted when (1) the individual putative injurers' failures to avoid were independent—i.e., when each believed that the others would fail to avoid regardless of what he did, (2) each individual putative injurer knew that one or more others was sufficiently likely not to avoid for his avoidance-move rejection not to be allocatively inefficient or wrongful for a life-of-moral-integrity-related reason, and (3) the profitability or attractiveness of not avoiding to each putative injurer was not critically affected by his desire to have the loss generated.[38]

An ingenious argument made by my colleague David Robertson requires me to qualify the preceding two paragraphs. Robertson suggests that, at least when there are just two putative injurers whose choices are members of one or more sets of sufficient causes of a loss whose fulfillment will "cause" that loss simultaneously and neither avoids, each is a wrongful cause of the loss because each has either caused the physical loss wrongfully or tortiously impaired the victim's cause of action against the other.[39] Robertson is bothered by the fact that the "impairment loss" is a pure economic loss. However, the American positive-law doctrine

38. Each such choice would clearly be wrongful if all such choices were interdependent in the sense that none would be made if it were not made since in such a situation each of the relevant choices would be a but-for cause of the loss' occurring. At least, this conclusion would be warranted if, as I suppose, the individual choosers in question could not absolve themselves by arguing that they were not responsible for though they caused the relevant non-avoidance choices of others because these choices were made by autonomous choosers.

I also am confident that the individual choices in question are wrongful when each individual chooser believes that his choice will be a but-for cause of the loss—does not know *ex ante* that the loss would be caused in any case by the satisfaction of one or more other sets of conditions to which his choice does not belong (one or more other sets that may or may not include human choices).

I admit, however, that in this situation the wrongfulness of the relevant choices is more problematic when each individual chooser did not know and should not have known that his choice would affect the outcome—i.e., did the research he was obligated to do and concluded, reasonably, that the loss would occur regardless of what he did because Mother Nature either on its own or in combination with choices of others would cause exactly the same loss to occur at exactly the same time. I am inclined to say that some choices made in this situation are wrongful because they manifest the chooser's desire for the loss to be inflicted—i.e., because they manifest the chooser's wrongful disposition. Of course, this characterization will be justified only if the choice in question would not have been attractive to the chooser had he not valued (however nonrationally) its connection to the loss' generation.

39. *See* David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1787–99 (1997).

that underlies his concern is not germane to my argument: although in some cases there may be sound grounds for holding pure economic losses not to be actionable,[40] doing so cannot be justified in the kind of situation with which this section is concerned. Admittedly, Robertson's argument would have the consequence of causing a second potential avoider to engage in socially pointless, presumably costly avoidance once a first potential avoider had mistakenly failed to avoid. But this possibility would be practically important only if the first potential avoider made a mistake since (at least if Robertson's solution were conjoined with an appropriate set of damage-assignment rules) his argument would make it profitable for the first potential avoider to avoid.

In any event, standard textbook examples of this type of situation include cases in which a house is simultaneously consumed by two or more fires each of which was caused wrongfully,[41] cases in which an individual is simultaneously killed by two or more bullets that were wrongfully shot,[42] and cases in which a pollution loss was simultaneously caused by two or more sets of pollutants that were wrongfully discharged by different polluters in circumstances in which the second through n^{th} set of pollutants did not affect the resulting loss.[43] I suspect that such independent-simultaneous-causation cases occur very rarely, though the importance of *possible* cases of this kind is undoubtedly enhanced by the inability of relevant victims to prove that, more probably than not, one such set of sufficient causes "first caused" the loss.

K. "Overdetermined" Step-Function-Loss Cases and the "But-For Causation" Element of Corrective-Justice-Right Claims

Assume that the function that relates the loss that will result from varying amounts of pollution's being put into some medium is a "step function"—i.e., would be represented in a two-dimensional diagram in which the loss was measured along the vertical axis and the pollution along the horizontal axis as a series of disconnected horizontal lines that could be connected by verticals at their successive end and beginning points. Environmental specialists indicate that this type of loss function is not uncommon.[44] Thus, it is said that, in the river-pollution context, below some level of pollution, no harm results; suddenly, at a particular level, one cannot swim in or fall into the river without incurring some health risk; over some range above that level, additional pollution does

40. *See supra* text accompanying note 29.

41. *See, e.g.*, Kingston v. Chi. & N.W. Ry. Co., 211 N.W. 913 (Wis. 1927).

42. *See, e.g.*, Summers v. Tice, 199 P.2d 1 (Cal. 1948).

43. In most such pollution cases, no choices of an individual polluter will be wrongful because no such choice will have affected the loss that was generated either directly or indirectly by influencing other polluters' pollution-decisions.

44. *See, e.g.*, BRUCE A. ACKERMAN, ET AL., THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY (1974).

not change the resulting loss; and then suddenly at some higher level of pollution, the fish are no longer edible; again, over some range above this latter level, additional pollution does not change the environmental loss; and then suddenly when pollution increases above some level, the fish die and the river smells. Assume in addition that (1) each of 30 polluters put two units of pollution into some body of water without influencing his fellow polluters' decisions to pollute, (2) no loss would be generated by the presence of zero to 49.99 units of pollution, (3) $100 in mere-utility losses would be generated by the presence of 50 to 120 units of pollution, and (4) the cost to each polluter of eliminating part or all of his pollution was $4.

Although on these assumptions it would be allocatively efficient for six polluters to eliminate their pollution in the situation in question (although their reducing the total amount of pollutants in the water from 60 units to 48 units would increase allocative efficiency by $76—$100-6[$4]), the common law could not secure this result by making the polluters liable to their victims because, for two reasons, no victim would have a corrective-justice claim against any individual polluter: (1) because no polluter was a but-for cause of the loss in question (because no individual polluter's pollution affected the loss either directly or by influencing other polluters' pollution-decisions since each's pollution raised total pollution from 58 to 60 units) and (2) because, on the above account, no individual polluter behaved wrongfully by polluting (since each's pollution was allocatively efficient—saved him $4 in abatement costs and caused no damage).

L. Imperfections in the Information Available to the Trier-of-Fact on the "More Probable Than Not" Element of the Operative Conception of Corrective-Justice-Right Claims

This section discusses four types of information whose imperfect availability to the trier-of-fact can make the decision in a corrective-justice-based tort suit that is correct as a matter of law allocatively inefficient as well as the possibility that the decision in a corrective-justice tort suit that would be allocatively efficient because it would induce actual and potential tortfeasors to supply the courts (and various regulatory authorities) with information about the toxins they and others are generating, the harm these toxins do, the avoidance-moves available to them, and the various types of costs and benefits these moves would generate would not be correct as a matter of law.

The first type of information whose imperfect availability can render allocatively inefficient the internally correct resolution of a common-law tort case in a liberal, rights-based State is information on whether a *possible* simultaneous-independent-causation case is an *actual* simultaneous-independent-causation case and, if not, on the identity of the "first causer" of the loss in question (i.e., the "causer" whose choice generated

the loss before any other choice could do so). If the trier-of-fact cannot determine that there was a "first causer" and/or the identity of the "first causer," the common-law court will not be authorized to hold any putative injurer liable even if one of them was a "first causer" and it would be allocatively efficient for all of them to avoid. By way of contrast, if the trier-of-fact could determine that there was a "first causer" and could identify not only him but also the "second through n^{th} causers," it would be authorized to hold all of them liable if each's failure to avoid were wrongful, *inter alia*, because each would have been a but-for cause of part of the loss that resulted. In fact, at least if each potential injurer should assume that the others would act as sovereign maximizers if he avoided, the decision of the first potential injurer not to avoid would be wrongful since, regardless of where he is placed in the time-ordering, the loss would not occur if he avoided and *ex hypothesis* the prevention of the loss' occurring at any time was allocatively efficient. I should add that in this situation there would also be no loss-division-injustice problem: all the loss would be and should be allocated to the actor whose failure to avoid was a but-for cause of its generation (i.e., to the initial non-avoider).

The second type of information whose imperfect availability can make the resolution of a common-law tort case that is correct as a matter of law allocatively inefficient also relates to the identity of the putative injurer who was the but-for cause of the loss. Assume that in a non-simultaneous-causation case the party who has suffered a loss (1) can demonstrate that two or more actors who had a relevant duty toward him made duty-violating, allocatively-inefficient choices that more probably than not caused some individuals to suffer the kind of loss the victim in question suffered but (2) cannot prove that, more probably than not, any particular injurer had caused his loss. In some cases of this kind (e.g., when the loss was asbestositis that was caused by the inhalation of one unit of asbestos and asbestos was wrongfully put into the air that the victim breathed by two or more polluters, none of whom was more likely than not the source of the asbestos the victim inhaled[45]), at no point in time would it have been possible to identify the particular wrongdoer who harmed the victim. In other cases of this kind (e.g., cases in which the victim's illness was caused by his ingestion several years earlier of a medicine that was wrongfully produced by two or more pharmaceutical companies none of which was more likely than not his ultimate supplier[46]), it would have been possible at an earlier point in time to identify the particular manufacturer-wrongdoer who harmed the victim in question (*viz*., at the time at which the prescription-filling record was recoverable) but was no longer possible to do so at the time at which the victim's symptoms appeared, the cause of his illness was identified, or the

45. *See, e.g.*, Rutherford v. Owens-Illinois, Inc., 941 P.2d 1203 (Cal. 1997).
46. *See, e.g.*, Sindell v. Abbott Lab., 607 P.2d 924 (Cal. 1980).

suit was brought. In both these kinds of cases, there are wrongdoers whose allocatively inefficient wrongdoing has caused harm and individual victims who have been harmed by the allocatively inefficient wrongdoing of individual wrongdoers, but it is not possible to match any individual victim with the particular individual wrongdoer whose wrongdoing harmed him. In this type of case as well, it would be wrong as a matter of law for a court in a common-law tort suit to require injurers to pay the victims compensation that would provide potential injurers with allocatively-efficient avoidance-incentives if I am correct that judges in common-law cases are authorized to make only those awards that the relevant society's corrective-justice commitments warrant.

However, I do not want to proceed without referring to another possibility. In my judgment, even though no corrective-justice-based claim lies in this sort of case, I do think that the government of a liberal, rights-based State has an obligation to pass legislation that would require such wrongdoing possible injurers to compensate such victims of tortious wrongdoing—perhaps by making each such possible injurer liable for the share of each such victim's loss that equals the probability that he caused that loss. Even if common-law courts are not authorized to secure this result by announcing and applying retrospectively and/or prospectively something like a market-share-liability approach to these cases,[47] the victims in question may have a constitutional right that the legislature of their liberal, rights-based State give them a statutory right to recover such amounts from the wrongdoers in question and a related constitutional right to recover damages from the State if it fails to fulfill this legislative duty. Hence, a court that was not authorized to resolve a common-law tort suit against such wrongdoing possible injurers by requiring them to compensate these victims might well be authorized—indeed, obligated—to respond to a joined constitutional claim by victims in this category to whom the State had granted no statutory right of recovery to recover their loss from the State.

The third type of information whose imperfect availability can make the resolution of a common-law tort case that is correct as a matter of law allocatively inefficient is also causation information and is similar to the second. Assume that (1) the trier-of-fact knows that a loss might have been caused by Mother Nature alone or by a combination of Mother Nature and the choice of a particular human being or human organization and that (2) if human choice did play a role in the relevant loss's generation, the choice in question was wrongful and allocatively inefficient. Assume in addition that the trier-of-fact has imperfect information about whether human choice did play a role in the generation

47. For a detailed discussion of the situations of this kind in which courts have and have not adopted this type of market-share-liability approach, see DAN B. DOBBS, THE LAW OF TORTS 430–32 (2000). *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), § 28 (Tentative Draft No. 2, 2002) cmts. at 103–34, Reporters' cmts. at 185–90.

of the loss in question—indeed, that the only information it has on this issue is information about the contribution that the defendant's activity made to the ex ante probability that the loss would occur. In an otherwise-Pareto-perfect world, the allocatively efficient way for the court to respond to this sort of situation would be to hold the possible injurer liable and require him to pay the victim that percentage of the victim's loss that the possible injurer's activity contributed to the ex ante probability of the loss' occurring. However, that solution is inconsistent with the binary conception of corrective-justice rights to which we seem to be committed and which I think is consistent with if not required by liberal commitments. Under this binary conception, the possible injurer will be liable for the whole loss if his activity contributed more than 50% of the ex ante probability of its occurring and liable for none of the loss if his activity contributed 50% or less than 50% to the ex ante probability of the loss' occurring.[48] In an otherwise-Pareto-perfect world, this binary response will cause misallocation in two ways:

> (i) by deterring possible injurers in this position from making allocatively efficient avoidance-moves that would reduce the contribution their activity made to the ex ante probability of the loss's occurring from some higher probability not above 50% to some lower probability not above 50% and
>
> (ii) by inducing possible injurers in this position to make allocatively inefficient avoidance-moves that reduce their activity's contribution to the ex ante probability of the loss's occurring from some probability above 50% to a probability of 50% or below.

Some illustrations may be helpful. I start with the first possible type of misallocation. Assume that (1) the loss in question is $100,000, (2) the probability that the loss would have incurred if the possible injurer did not avoid was 40%, (3) the probability that the loss would have occurred had the defendant shut down his operations was 30%, (4) all relevant parties are risk-neutral, and (5) the economy is otherwise-Pareto-perfect. In this initial situation, the defendant will not be liable for any loss that occurred because his activity contributed (10%/40%) = 25% < 50.01% of the ex ante probability of the loss' occurring—i.e., will have to reckon with paying no damages. Now assume that by spending $1,000 the possible injurer could have eliminated his contribution to the ex ante probability of the loss's occurring. Since this avoidance-move would have reduced the weighted-average-expected loss by 10%($100,000) = $10,000, it would have increased allocative efficiency by $9,000. However, because the defendant's failure to make this avoidance-move would not have rendered him liable (because—even if it would have been detected—it could not have been shown to have been more than 50% likely to have

48. The case law and *Restatement* discussion of this issue is admittedly confused and confusing. *See* RESTATEMENT (SECOND) OF TORTS § 328D; DOBBS, *supra* note 47, at 419.

been a but-for cause of the loss), the move would have reduced his profits by $1,000.

The following example illustrates the second misallocative possibility. Assume that (1) the loss in question is $100,000, (2) the probability that the loss would have occurred if the possible injurer had not avoided was 80%, (3) the probability that the loss would have occurred had the possible injurer shut down his operation was 30% so that the possible injurer's activity would have contributed (50%/80%) = 62.5% > 50.01% of the ex ante probability of the loss's occurring if he had not avoided, (4) all relevant parties are risk-neutral, (5) the economy is otherwise-Pareto-perfect, and (6) the possible injurer could have made an avoidance-move that would have cost him $60,000 and would have reduced the absolute amount by which his activity increased the probability of the loss's occurring from 50% to 30%—i.e., that would have reduced the percentage-contribution his activity made to the ex ante probability of the loss' occurring from (50%/80%) = 62.5% > 50.01% to (30%/60) = 50% < 50.01%.

On these assumptions, the avoidance-move in question would have increased the possible injurer's profits by $20,000 because it would have cost him $60,000 and eliminated his liability, which he would have valued at 80%($100,000) = $80,000 prior to his making the avoidance-move in question. Unfortunately, on these assumptions, the avoidance-move in question would have reduced allocative efficiency by $40,000 because its allocative (as well as its private) cost was $60,000 and its ex ante allocative benefits were $20,000 (the product of the 20% reduction in the probability of the loss it would effectuate and the loss in question—$100,000): the associated $60,000 inflation in the profitability of the avoidance-move in question equals the amount by which it increased the uncompensated loss the potential victims must reckon with bearing (from $0 of $80,000 in weighted-average-expected losses to $60,000 of $60,000 in weighted-average-expected losses).

As I have already indicated, the court response that would prevent these two types of misallocation by eliminating the distortion in avoidance-incentives the current binary approach generates in these two types of situations—a rule that would hold the possible injurer liable for that percentage of the loss that his activity contributed to the ex ante probability of its occurring and thereby equate the amount by which the possible injurer's avoidance would reduce the damages he should expect to have to pay on the weighted average with the amount by which it would reduce the weighted-average expected loss—is incompatible with the binary concept of corrective-justice rights with which liberalism seems to be at least compatible.[49]

49. In essence, then, I am arguing that the various "lost chance" or "lost opportunity" decisions are incorrect as a matter of law because they are inconsistent with our binary conception of corrective justice (for which I admit I cannot provide a satisfactory normative grounding). The canonical "lost

The fourth type of information whose imperfect availability can render the resolution of a common-law tort case that is correct as a matter of law allocatively inefficient is information that relates to the wrongfulness of an injurer's and/or victim's conduct. I will illustrate this possibility with three increasingly-complex examples.

The first example assumes that the trier-of-fact knows that (1) the situation in question is either an individual-care situation (one in which the most-allocatively-efficient response to the accident-or-pollution-loss contingency in question is for either the potential victim or the potential injurer to avoid) or a no-care situation (one in which the most-allocatively-efficient response to the relevant contingency is for no one to avoid) and (2) there is a 30% probability that the potential injurer could have increased ex ante allocative efficiency while conferring a net equivalent-dollar gain on others by avoiding while there is no chance that the victim could have increased allocative efficiency by avoiding. In such a situation, transaction-cost considerations aside, it would be ex ante allocatively efficient to find the potential injurer liable because doing so would tend to induce his future counterparts to engage in allocatively efficient avoidance when they could do so without deterring his victim's future counterparts from engaging in allocatively efficient avoidance because *ex hypothesis* they could do so. However, in a common-law case of this kind in a liberal, rights-based State, it would not be proper for the trier-of-fact to find the injurer liable since the probability that the injurer had behaved wrongfully was not over 50%—specifically, was only 30%. Of course, in this kind of situation, the legislature could provide potential injurers with allocatively efficient avoidance-incentives by granting such victims a legal right to recover from their injurers.

The second wrongfulness-information example extends the first to a situation in which (1) the imperfectly informed trier-of-fact knows that the situation was either a no-care or an individual-care situation, (2) the imperfectly informed trier-of-fact knows that there is some possibility that the victim might have been the most-allocatively-efficient potential avoider and some probability that the injurer might have been the most-allocatively-efficient potential avoider, and (3) the relevant probabilities enable the trier-of-fact to divide the loss in a way that guarantees that the most-allocatively-efficient avoidance-move will be made, regardless of whether the potential injurer or the potential victim is the party in a position to make it. Assume, in particular, that the trier-of-fact knows that (1) the loss is $100,000, (2) the avoidance-moves the injurer and victim in question could have made would not have affected the sum of tort-loss-related risk costs that would be generated, (3) the economy is otherwise-Pareto-perfect, (4) if the potential injurer can prevent the $100,000 loss

chance" case is *Falcon v. Mem. Hosp.*, 462 N.W.2d 44 (1990). For discussions of the developing case-law on this issue, see RESTATEMENT OF THE LAW OF TORTS: LIABILITY FOR PHYSICAL HARM, (BASIC PRINCIPLES) § 26 (Tentative Draft No. 2, 2002) Reporters' cmt. n; DOBBS, *supra* note 47, at 435.

allocatively efficiently, he can do so for less than $80,000, and (5) if the potential victim can prevent the $100,000 loss allocative efficiently, he can do so for less than $15,000. In this instance, any division of the loss between the potential injurer and potential victim that future counterparts of these parties can anticipate between ($80,000 to the injurer and $20,000 to the victim) and ($85,000 to the injurer and $15,000 to the victim) will insure that allocatively efficient avoidance-decisions will be made. By way of contrast, a loss-division of $100,000 to the injurer and $0 to the victim—the division that a common-law judge will be obligated to order if the trier-of-fact concludes that the probability that the injurer was negligent was higher than 50% and that the probability that the victim was contributorily negligent was not higher than 50%—will fail to induce the victim to avoid when he is the potential most-allocatively-efficient avoider, and a loss-division of $100,000 to the victim and $0 to the injurer—the division that a common-law judge will be obligated to order if the trier-of-fact concludes that the probability that the injurer was negligent was not higher than 50%—will fail to induce the injurer to avoid when he is the potential most-allocatively-efficient avoider.

The third wrongfulness-information example generalizes the second still further to situations in which no loss-division could guarantee allocative efficiency in an otherwise-Pareto-perfect world because (if we assume for simplicity that the most-allocatively-efficient avoidance-moves that might have been available respectively to the potential injurer and to the potential victims would have generated the same reduction in weighted-average-expected accident-or-pollution losses) the sum of (1) the highest cost that the potential injurer would have had to incur to generate that weighted-average-expected loss-reduction in the most-allocatively-efficient way it could manage and (2) the highest cost that the potential victim would have had to incur to generate that weighted-average-expected loss-reduction in the most-allocatively-efficient way it could manage was not lower than (3) the weighted-average-expected loss-reduction either's most-allocatively-efficient avoidance-move would generate.

If in such a case I assume optimistically but in no way critically (1) that the judge has information about the probability that each party will be able to generate a $100,000 reduction in weighted-average-expected losses by incurring avoidance costs within each $1,000 interval between $0–1,000 and $99,000–100,000 and (for convenience) (2) that any actor who will be able to avoid at a cost within a given $1,000 interval will be able to do so at the $500 mid-point of that interval, the judge could determine the ex ante most-allocatively-efficient loss-division by starting with a loss-division of $100,000 to the victim and $0 to the injurer and asking whether, ex ante, weighted-average-expected allocative efficiency would be increased or decreased (a) by a shift from a $100,000/$0 to $99,000/$1,000 victim/injurer loss-division, (b) by a shift in the loss-

division from a $99,000/$1,000 victim/injurer loss-division to a $98,000/$2,000 victim/injurer loss-division and so on and so forth.

If for illustration we assume that there is a one-in-a-million chance—a (.0001)% probability—that the potential victim will be able to increase ex ante allocative efficiency by $99,500 by reducing the weighted-average-expected loss by $100,000 at an avoidance cost of $500 and a one-in-a-hundred chance—a 1% probability—that the potential injurer will be able to increase *ex ante* allocative efficiency by $500 by reducing the weighted-average-expected loss by $100,000 by incurring $99,500 in avoidance costs, the net allocative-efficiency effect of shifting from a $100,000/$0 victim/injurer loss-division to a $99,000/$1,000 victim/injurer loss-division will be a gain of ([1%][$500]-[.0001%][$99,500] = $5-$.995 = $4.005).

The judge would then repeat this calculation for each additional shift about which he had information and pick the loss-division that involved the total shift associated with the highest net gain. Although the loss-division that this approach reveals to be *ex ante* most-allocatively-efficient might be the $100,000/$0 or $0/$100,000 victim/injurer loss-division that corrective justice would warrant in this kind of case, I suspect that this will be true only rarely.

So far, this discussion of the possibility that imperfections in the information that is available to the trier-of-fact may make the decision in a corrective-justice-based tort suit that is correct as a matter of law allocatively inefficient has assumed that courts that are authorized solely to secure corrective justice (e.g., in my view, common-law courts) cannot do anything to increase the information that is available to them. In fact, this assumption is not accurate. Even given the constraints under which such courts operate, they could (indeed, I think may be obligated to) reduce relevant information-imperfections by (1) revising their own trade-secret, confidential-business-information, and business-privacy doctrines to reduce the ability of possible tortfeasors to prevent private plaintiffs (or the government) from securing relevant information that is in these defendants' possession, (2) declaring invalid as *contra bones mores* provisions in litigation-settlement agreements that require plaintiffs to seal or destroy relevant evidence they have collected against the defendants, (3) developing a doctrine that would make an injurer liable if he wrongfully failed to do research that he was morally obligated to do when his failure to do that research (and to use any discoveries it yielded that he would be obligated to use) more probably than not was a but-for cause of the loss that eventuated—a doctrine that, admittedly, given the courts' inability to discover much of the information that would be relevant to its application, would not often make a difference, (4) declaring invalid as *contra bones mores* non-disclosure clauses in contracts between potential defendants and employee or independent-contractor researchers that prohibit the researchers from revealing information that is adverse to the

potential defendant's tort-liability position, (5) declaring unconstitutional as applied certain provisions of national-security legislation that potential defendants use to deny private plaintiffs or the State access to information about toxin-generation or harm-causation, (6) imposing a positive duty on those companies who know or should know that they have engaged in tortious wrongdoing to publicize that fact and make every reasonable effort to identify and compensate the victims of their wrongdoing—a duty to be enforced by the imposition of punitive damages on its violators, (7) imposing a positive duty on the individual managers, employees, and independent contractors who know or should know that they have engaged in tortious wrongdoing to publicize that fact and make every reasonable effort to compensate their victims,[50] (8) enforcing libel, slander, and defamation doctrines against potential tort defendants who irresponsibly criticize scientific research and researchers whose work is adverse to their position,[51] and (9) making tort defendants who frivolously defend justified tort suits against them or unreasonably run up the cost the State and the plaintiffs in such suits reasonably incur in the litigation pay the relevant court and opponent litigation fees.[52] I realize that all these possible moves need to be discussed in more detail and that some may prove to be undesirable on further investigation. My point here is that even courts that are restricted to securing corrective justice can do (indeed, may be obligated to do) many things to increase the information at their disposal that would be both allocatively efficient and desirable from a liberal perspective.

50. Although I do not think that courts that have only corrective-justice jurisdiction would be authorized to do so, it might be desirable or perhaps even obligatory for the legislatures of a liberal, rights-based State to pass "innocent-whistleblower" statutes that would impose a legal duty on innocent managers, employees, and independent contractors of tort-committing companies and perhaps on innocent observers as well who have no relationship to the wrongdoer to report tortious wrongdoing to the State. Instead of, or in addition to, imposing such a duty, the State could offer rewards to innocent whistleblowers who supply valuable information. Unlike the duty-imposition, the awards do not run the risk of undermining the potential whistleblower's feeling that he is the author of his own life. Admittedly, when the whistleblower works for the offending company, both the duty-imposition and the award may be thought to create liberal costs by inducing the whistleblower to "betray" an "intimate." My use of quotation marks reflects my doubts about this objection.

51. Courts that have non-corrective-justice-oriented jurisdiction might also encourage independent scientific researchers to generate additional information (1) by interpreting statutes that impose an obligation on regulatory agencies to consider all objections to possibly relevant independent research before publicizing or relying on it to impose less burdensome duties on the agencies than they might otherwise be interpreted to impose and (2) by interpreting the requirement that all such evidence that courts admit (or agencies make use of) must be relevant and reliable in a way that is more compatible with accepted scientific practice. *See* Thomas O. McGarity, *On the Prospect of "Daubertizing" Judicial Review of Risk Assessment*, 66 LAW & CONTEMP. PROBS. 155, 155 (2003). Both these interpretations might be justified as "saving constructions" occasioned by the possibility that government statutes that militate against tort victims' securing corrective justice by deterring research that would tend to help them prove their cases would be unconstitutional if the statutes could not be justified in rights-related terms.

52. I am indebted to my colleague Wendy Wagner for highlighting the salience of this general issue and suggesting the possible desirability of several of these possible judicial moves. *See* Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, 53 DUKE L.J. 1619, 1734–36 (2004).

However, for current purposes, a different and considerably less positive point is more relevant. There are certain things that might well be allocatively efficient for courts to do to reduce the imperfectness of the information that is available to them that would be morally impermissible for them to do if they were required to resolve cases in the way that corrective justice in the instant case required. The most obvious such maneuver that would be impermissible for such a court would be to relieve from liability or reduce the damages awarded against a defendant who had himself came forward and admitted his wrongdoing, pointed out the harm it did, and perhaps identified his victims in situations in which this information would be relevant to other cases as well because other actors engaged in similar conduct with the same deleterious effects and neither the victims of these other wrongdoers nor anyone else could supply the information the self-reporter revealed.

Even it would be morally legitimate as well as allocatively efficient for the legislature of a liberal, rights-based State to offer such an inducement to self-reporting (at least if it combined such a policy with one of compensating the self-reporter's victims for that portion of their loss that they were precluded from recovering from him and those victims did not have a right that the wrongdoer not profit from his wrong) or to secure such information by offering a straightforward bribe to self-reporters or whistleblowers, it would not be morally permissible for a court to free self-reporters from liability or reduce the damages awarded against them if the courts were authorized solely to resolve cases in the way that would secure the parties' corrective-justice rights. In part, this conclusion reflects the fact that the courts are not authorized to and do not have the wherewithal to pay compensation to the victims in the cases in question.[53] And in part (perhaps redundantly), it reflects my assumption that—although legislatures are authorized to (indeed, are obligated to) take into consideration the systematic corrective-justice-securing effects of such a program, courts are not authorized to do so ("perhaps redundantly" because this "reality" may reflect the courts' inability to combine such decisions with payments to the relevant victims).

* * *

We have just seen that, for eleven reasons, the decision that would be correct as a matter of law in corrective-justice tort cases may not be the most-allocatively-efficient decision that a court could make and that, for another reason, the most-allocatively-efficient decision a court could make in some corrective-justice tort cases will not constitute the most-allocatively-efficient response the State could make to the underlying tort contingency. Of course, this demonstration does not prove that it would be morally illegitimate for a liberal, rights-based society to secure

53. I am implicitly assuming that courts that made such decisions would not be authorized to order the State's legislature to compensate the victims of the wrongdoing in question.

allocative efficiency when a body of law that is exclusively oriented to securing the plaintiff's tort-related corrective-justice rights cannot do so by supplementing such a body of corrective-justice-securing law with a variety of other types of law and policies that do not disserve the corrective-justice interests of its members and participants. However, it must be admitted that—even if the government of a liberal, rights-based State did maximize tort-related allocative efficiency, given the corrective-justice and corrective-justice-related tort-rights constraints it faced, by supplementing its corrective-justice-securing common law or statutory law with non-corrective-justice-oriented, judicially applied or administratively applied law that legally obligated injurers who were not wrongdoers or who could not be found liable in a corrective-justice suit to compensate certain classes of victims and/or that created a system of civil fines, positive subsidies, or criminal penalties to supplement tort-suit damages awards—such a package of corrective-justice-securing law and other State policies might not be as allocatively efficient as a less divided approach to tort-related contingencies.

CONCLUSION

This article (1) articulates the fundamental normative premise of the kind of liberalism to which I think the United States is committed—*viz*., that individuals' having and seizing the opportunity to lead a life of moral integrity is more valuable than anything else, (2) explains how this premise informs the basic obligation of a liberal, rights-based society's members, participants, and governments (the obligation to treat all moral-rights holders for whom they are responsible with appropriate, equal respect and appropriate, equal concern)—*viz*., by implying both that moral-rights holders are creatures that have the neurological prerequisites for leading a life of moral integrity and that, although the required concern includes concern for the relevant rights-holders' utility, it is pre-eminently addressed to their having the opportunity to lead a life of moral integrity, (3) delineates the implications of liberalism for the primary and secondary (corrective-justice-related) tort-related moral rights and obligations of a liberal, rights-based society's members and participants, (4) delineates the implications of liberalism for the tort-related obligations of the government(s) of a liberal, rights-based society, (5) states the conditions under which the members and participants of a liberal, rights-based society will have a corrective-justice right to redress against a particular chooser, (6) explains why the common law of a liberal, rights-based society can legitimately be directed only at securing the corrective-justice rights of tort plaintiffs, (7) defines the concept of "the impact of a choice or event on allocative (economic) efficiency," and (8) delineates and explains eleven reasons why a body of tort law that is exclusively directed at securing the corrective-justice rights of tort plaintiffs in a liberal, rights-based society may not be allocatively efficient and one

reason why in some cases the most-allocatively-efficient tort-law decision a court could make will not be as allocatively efficient as the most-allocatively-efficient policy-package the State could adopt.

Some of the first set of eleven reasons reflect three incommensurabilities that liberalism recognizes that economists will find uncongenial—*viz*., (1) the fact that liberalism places a lexically higher value on increasing the opportunity of individuals to lead lives of moral integrity than on anything else, (2) the fact that liberalism distinguishes the satisfaction choices give the chooser and others by degrading, controlling, or inflicting losses on their victims from the satisfaction choices generate for other reasons, and (3) the fact that liberalism distinguishes harming others from failing to benefit others. Other members of this set of eleven reasons why the response to a tort-related corrective-justice claim that is correct as a matter of law may be allocatively inefficient reflect liberalism's position on various moral agents' equivalent-dollar evaluations of various private and government decisions, the existence of Pareto imperfections that distort the profitability of various choices, human errors that are not caused by imperfections in the information available to human choosers, various ineliminable features of corrective justice, some features of the corrective-justice concept our law employs that are not ineliminable but are consistent with liberalism, and various types of imperfections in the information that is available to tort injurers and victims on the one hand and triers-of-fact in tort cases on the other. The reason why in some cases the most-allocatively-efficient decision a court could make will not constitute the most-allocatively-efficient response the State could make to the relevant tort contingency is that courts are not authorized to use certain types of policy instruments and that in the cases in question the number of policy instruments available to the courts is lower than the number of types of actor-choices the most-allocatively-efficient response to the relevant contingency would have to control or influence.

This article's argument and conclusions should be of interest to at least the following two sets of potential readers: (1) individuals who (A) favor, oppose, or want to consider the desirability of liberalism who also (B) either themselves believe or recognize that others believe that a choice's economic efficiency is relevant to its moral desirability and (2) individuals who (A) believe (i) that the United States and/or one or more other members of the common-law family of nations may be liberal, rights-based States and (ii) that the common law of torts of a liberal, rights-based society can legitimately be concerned only with the tort-related corrective-justice rights of tort-case plaintiffs and who (B) are interested in the claim that so-called judge-made law (paradigmatically, the common law) is in some ill-specified sense economically efficient. Members of both these groups should find this article's central conclusion salient: for a wide variety of reasons, any body of tort law (such as the le-

gitimate common law of torts of a liberal, rights-based society) that is exclusively concerned with securing the liberal-corrective-justice rights of tort plaintiffs may not be—indeed, almost certainly will not be—allocatively efficient.