

THE AUTONOMY OF LEGAL NORMS

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In the American legal academy, the view that legal norms are autonomous has long been in disgrace. In this paper I make a beginning on the larger project of rescuing this view from its current state of infamy. A full vindication of the thesis that legal norms are autonomous would include within its purview an examination of a variety of legal norms drawn from diverse legal fields. My present aim is more modest; it is simply to cast plausibility upon the thesis for one area of the law, namely: tort law.¹ As we shall see, this area is not chosen at random. A number of theorists whose own approach to legal theory involves a repudiation of the thesis defended here have taken tort law to be a particularly promising field for demonstrating the fecundity of their approach. Tort law thus provides a useful laboratory space for testing the philosophical credentials of these opposing conceptions of how to do legal theory. In the first two sections of the paper, I situate this contest of opposing conceptions within a larger philosophical context. In the third section of the paper, I offer an overview of the basic concepts of tort law for the benefit of those to whom this area of the law may be unfamiliar. In the fourth section, I will survey the analysis of this stretch of the legal landscape which has been offered by Richard Posner, one of America's most prominent legal theorists. Finally, in the fifth section, I will offer a contrasting analysis of this same area of the law, one which respects the autonomy of its norms. This analysis will take its lead from an old and venerable source: namely, Aristotle's discussion of corrective justice in the *Nicomachean Ethics*.

1. A Parallel Between Philosophy of Action and Philosophy of Law

Before turning to the task of arguing for the autonomy of certain legal norms, it might help to bring out the broader philosophical significance of the sort of theoretical perspective on our legal practices advocated in this paper, if we first pause to consider how the structure of some of the fundamental problems that arise in philosophy of law parallels that of some of the fundamental problems

¹ The vast majority of cases arising under tort law involve allegations of negligence. It is to this area of tort law that I will confine my attention in this paper.

that arise in various adjacent areas of philosophy. In this section of the paper, I will try briefly to bring out one aspect of such a parallel as it arises in the area of philosophy of action. Even a very cursory overview of such a parallel ought to suffice to make us aware of what the costs are of an overly insular approach to problems in the philosophy of law.

As Frederick Stoutland has shown, there has long been a tendency among philosophers of action to bring to the task of giving an account of reasons for action a certain set of presuppositions as to the form these reasons must take. Taken together, these presuppositions make up what Stoutland calls “the Belief-Desire model of reasons for action” (or more simply “the B-D model”).² This model accords a role in the rational explanation of action to a variety of concepts which also figure in our ordinary understanding of action – concepts such as “belief”, “desire”, and “motivation”. As Stoutland shows, however, these ordinary concepts undergo a radical distortion when they are made to do the work the model requires of them. For example, the B-D model presupposes a conception of desire according to which for a subject to have a desire is *eo ipso* for her to have a reason to bring about the object of her desire. On our ordinary understanding of desire, however, this is not so; for we mark a distinction between those desires which are normal and those which are pathological. If what a subject is possessed of is a pathological desire, such as the desire to drink a can of paint, then her possession of the desire does not provide a reason for her to do as the desire bids. Her possession of the desire may well stand as a reason for her to take some action or other (such as to see a psychiatrist, whether or not she desires to do so), but, in such cases, it emphatically does not provide a reason for her to act so as to realize the object of the desire (in this case, to drink the can of paint).

In the thrall of a particular model of explanation, we may be led to have a peculiarly high tolerance for this kind of distortion of our ordinary concepts. Indeed, we may even come to celebrate the distortion, viewing it not as a distortion but as a mark of the gain in understanding the model allows us to make, enabling us to replace our ordinary concepts with ones that putatively have a greater explanatory power. In this case, we may continue to use the ordinary

² Stoutland sums up the central presuppositions of this model as follows:

The B-D model of reasons for action is defined by two core claims: first, that all (valid) explanations of action in terms of the reason for which an agent acts must be in terms of the agent’s ends and what she takes to be means those ends. All acceptable explanations of action are, in other words, essentially *instrumental*. Second, that all (valid) explanations of action must either be, or depend on explanations which are, in terms of the agent’s own beliefs (about means) and desires (for ends.). [Frederick Stoutland, *The Belief-Desire Model of Reasons for Action*, Uppsala Prints and Preprints in Philosophy, 2002, Number 4., p. 5.]

concepts in the course of our daily lives, but we will regard them as woefully inadequate for theoretical purposes, as crude stand-ins for the more technically precise formulations which accord with the demands of the model. We find an example of this in the attitude taken by defenders of the B-D model toward an entire category of our ordinary explanations of action, namely: those which give as the reason for an agent's action some feature of her environment, for example, the fact that it is hot out or the fact that the agent has just come upon a stop sign. As Stoutland points out, proponents of the B-D model must maintain that:

If an agent claims she opened a window because it was too hot, what she really means is that she opened it because she believed it would relieve the heat and because she wanted that end. Explanations of action which appeal to objects or situations in the environment are always elliptical; making them explicit shows that their explanatory power depends on the beliefs and desires which are inner states of the agents of the actions.³

For proponents of the B-D model of the rational explanation of action, ordinary explanations of action which make reference to features of an agent's surroundings cannot be taken at face value. They can serve as explanations only if they are translated into (or shown to rest upon) the conceptual apparatus approved by the model.

A parallel pattern of theorizing can be detected in the philosophy of law. Here the dominant model of rational explanation is given by the assumption that the reason-giving force of a given law (or set of laws) must derive from that of some non-legal goal which the law serves to promote. This model rests upon the assumption that, as I will put it in what follows, all rational explanation of the law is *reductive*. Different legal theorists arrive at their different explanatory projects by joining to this basic assumption about the proper form of legal theory their own particular story about the nature of the non-legal goal the law exists to promote. For example, Richard Posner contributes the proposal that the function of the law is to promote economic efficiency, and on this he founds his famed "economic analysis of law." Ronald Dworkin counters that the real function of the law is to implement the demands of moral theory, and on this substitution he founds his famed "moral reading of the law".

For most areas of the law, when they are subjected to reductive explanation the result is a distortion of our ordinary legal concepts. Different reductive projects make for different kinds of distortion. What I focus on in this paper are the

³ Stoutland, "Why are Philosophers of Action so Anti-Social?" in *Commonality and Particularity in Ethics*, eds. Alanen, Heinamaa and Wallgren, p. 60 (St. Martin's Press, 1997).

distortions wrought in the familiar concepts of tort law by Posner's economic analysis.

Like his counterpart in the philosophy of action, the legal reductionist does not count it as a defect in his theory that it does violence to our ordinary concepts. Or if he does, he stands ready with the defense that this is simply the cost of doing theory in this particular domain. But to give this defense is just to reassert the necessity of the reductionist's preferred model of explanation. It is just to deny the possibility of giving an explanation in the relevant domain which does not conform to that model and which, nonetheless, is able to make good sense of why our legal practices should assume the particular forms that they do. The aim of this paper is to shift the burden by showing that it is by no means obvious that this preferred model of legal explanation is either necessary or to be preferred.

In order to undermine the appeal of a particular kind of legal reductionism which attracts theorists such as Posner, we can make use of some of the same resources which are available for undermining the appeal of the B-D model. This is because these two frameworks for rational explanation share a common element, namely: the insistence that explanation be *instrumental*. As Stoutland points out, we are prone to slide from the observation that all action has a teleological dimension to the conclusion that all action has an external purpose or goal. As he says,

It is an important fact about intentional action that it always has an instrumental, that is, a teleological, *dimension*: if an agent responds to a stop sign by intentionally stopping, then he intends his behavior, whatever it is (the diverse movements of his feet, hands, head, torso, etc.), to be or result in his car stopping. In that sense there is an end (an intention) *in* his act – some description he intends his behavior to satisfy – as there is *in* every intentional act, and that is what I mean by the teleological *dimension* of action. But that end is not part of some purpose (or goal) the agent aims to achieve by stopping (*it is* his stopping), and hence it plays no role in any teleological or instrumental *explanation* of his action. Indeed, if it is a normal case of stopping for a stop sign, there is no purpose (or goal) for which he acts. That there is an end (an intention) *in* every action does not entail that there is an end (intention) *of* every action: the teleological *dimension* of intentional action lends no support to the view that all explanation of action is (or depends on) teleological, that is, instrumental *explanation*. Even an action done for no reason, idly whistling, for example, has a teleological dimension in that the whistler intends his behavior (whatever it is) to be a whistling (he intends it to satisfy the description “my whistling now”), but since it is purposeless activity, it has no teleological (or instrumental) explanation – it is not done as a means to any end.”⁴

⁴ Stoutland, *The Belief-Desire Model of Reasons for Action*, pp. 21-22. For a further elaboration of this crucial distinction between the intention *in* an act and the intention *of* an act, see

One of my goals in this paper is to make a similar claim on behalf of the law: That it is always and everywhere purposive does not entail that it has always and everywhere an external goal. This means that in legal explanation as in the explanation of action the correct explanation of a course of action need not take the form of an account of how that action promotes an end to which the action is a mere means; and, in certain cases, insistence upon such a form of explanation can only distort our understanding of the goods we aim at in so acting.

2. *Legal Skepticism*

In this paper, I enter into an ongoing dispute about the nature of the law. But I mean to intervene at that level which Wittgenstein teaches us is the one which will allow us to make progress in philosophical disputes. At *Philosophical Investigations* §308, Wittgenstein writes “The decisive movement in the conjuring trick has been made, and it was the very one that we thought quite innocent.”⁵ The proximal aim of this paper is to show how this remark applies to the dominant theory of tort law in America. The distal aim of the paper is to suggest that what I try to do here for tort law can be done for other branches of law as well.

For those who are not already familiar with the term, tort law is a branch of private law. It concerns what private (that is, non-governmental) parties owe to one another apart from any contractual commitments they may undertake. Thus,

Stoutland, “Von Wright’s Theory of Action”, in *The Philosophy of Georg Henrik Von Wright*, eds. Schilpp and Hahn, (Open Court, 1989), p. 308.

⁵ On the basis of a particular reading of certain of his remarks, Wittgenstein is often interpreted as being anti-theory, as being suspicious of theory of every kind. So there are some who seem to think that in order for Wittgenstein’s philosophical procedures to have a proper application to a particular domain, call it *x*, the upshot must be that no theory of *x* is possible. Those who read Wittgenstein in this way attribute to him a kind of “quietism”, as if the goal of his own work in philosophy were to leave us literally silent. (Wittgenstein is read as being anti-theory both by critics (e.g. Robert Brandom and Crispin Wright) and by admirers (e.g., D.Z. Phillips).) Since I invoke Wittgenstein in this paper, I want to make clear here at the outset that this is not my reading of him. As I read Wittgenstein, what he is opposed to is only a certain kind of theory (namely, theory which is skeptical in its motivation).

Even if the assumption were correct that Wittgenstein’s (later) philosophizing has a purely reactive or negative aim (I do not mean to suggest that I think this assumption is correct, but nothing in my paper turns on this exegetical claim), that would still leave open the question whether there are forms of theory and ways of doing philosophy that are not open to Wittgenstein’s criticisms. If Wittgenstein’s negative aim is, as I think it is, to parry and (temporarily) to defeat the recurring impulse to philosophical skepticism, this leaves open the possibility of non-skeptical forms of theorizing. Thus, to take seriously the need for legal theory, as I do, does not preclude one from looking to Wittgenstein for help in untangling some of the knots that contemporary legal theory has tied itself up in.

for example, if my cow wanders over to your field and eats your crop, you can sue me under tort law.

In America at least, practically all of the legal scholars who work on tort law (and not only tort law) share a common conception of what a theory of law is for. According to this standard conception, what a theory of law is supposed to do is to discover a different kind of reasoning, one which stands behind legal reasoning⁶ and serves as its foundation.⁷ When Wittgenstein surveyed the philosophy of mathematics of his day he found a similar conception of what it would be to provide mathematics with a foundation. In response to this conception he wrote, and here I quote *Investigations* §124:

Philosophy may in no way interfere with the actual use of language; it can in the end only describe it. For it cannot give any foundation either. It leaves everything as it is. It also leaves mathematics as it is; and no mathematical discovery can advance it. A “leading problem of mathematical logic” is for us a problem of mathematics like any other.

In this paper, I will maintain that a theory of tort law which is free of skeptical assumptions leaves tort law as it is. Hence we can say that a “leading problem of justification in tort law” is for us a problem of tort law like any other. In other

⁶ All I mean by “legal reasoning” here is reasoning which proceeds via legal concepts (an example would be the concept of “negligence” as it is understood within the context of tort law). By speaking of “legal reasoning”, I do not mean to imply the existence of some special exercise of the faculty of reason which is the exclusive possession of those with legal training. (The phrase “legal reasoning” is sometimes used to pick out this latter view. See, for example, Richard Posner’s “The Jurisprudence of Skepticism” (Michigan Law Review, Vol. 86, 1988, p. 827), where Posner singles out for attack the idea that there is “a distinctive legal-analytic methodology (‘legal reasoning’)”.

⁷ A minority voice (one which opposes this powerful trend) is emerging. In recent years, a number of legal scholars (Ernest Weinrib, Martin Stone and Arthur Ripstein, among others) have set their face against the search for external foundations in legal theory. See, in particular, Ernest J. Weinrib, *The Idea of Private Law*, (Harvard, 1995); “Understanding Tort Law”, *Valparaiso Law Review*, 1989, Volume 23, Number 3, pp. 485 ff.; Martin Stone, “On the Idea of Private Law”, *Canadian Journal of Law and Jurisprudence*, 1996, Vol. IX, Number 2, pp. 235ff.; “The Significance of Doing and Suffering” in *Philosophy and the Law of Torts*, ed. Postema (Cambridge, 2001); and Arthur Ripstein, *Equality, Responsibility, and the Law*, (Cambridge, 1999).

My own work in this area is indebted to that of both Weinrib and Stone, both in respect of their delineation of (what I call) the problem of foundationalism and in respect of the analysis they offer of the fundamental concepts of tort law. Weinrib and Stone have differences from one another, and despite my indebtedness, there are significant points of divergence between my own views and each of theirs. However, considerations of space prevent me from exploring these differences on this occasion.

words, the normative resources for thinking through even the most difficult problems of tort law are to be found within tort law itself.⁸

This is a paper about skepticism in the law. Before I embark upon an examination of this topic, I need to make clear what I take the topic to be. In the very broad sense in which I will employ the term in this paper, a *legal skeptic* is anyone who is skeptical about the self-standing normativity of the law, and who therefore either (a) seeks to argue that there is no such thing as legal normativity or (b) seeks to account for legal normativity through a *reductive analysis of the law*.⁹ By a “reductive analysis of the law” I mean one that identifies the normative force of the law with some form of non-legal normativity¹⁰, be it economic, moral, political, etc..¹¹ What these two species of legal skepticism have in com-

⁸ This claim should not be understood as insulating tort law from external criticism. To say that tort law is a self-standing normative structure (i.e. that it is not in need of an external foundation) is not to say either (1) that we cannot find the specific provisions of tort law wanting as judged by the lights of some external standard (say a moral or an economic one), or (2) that we cannot find tort law as a whole wanting as judged by the lights of such a standard. Thus to say that the status of tort law is that of an autonomous normative structure is not to say that, as presently constituted, it is the best it can be. Nor is it to say that the norms of tort law should always be deferred to. It is merely to say that tort law gives expression to one species of non-reducible norms among others. This leaves open the question of what we should do when the norms of tort law come into conflict with other norms, as they inevitably will.

⁹ In giving such a broad definition of “legal skepticism”, I am following the lead of Stanley Cavell’s discussion of skepticism in *The Claim of Reason*, (Oxford, 1979). See especially p. 46.

¹⁰ To say that a form of normativity is “non-legal” is merely to say that its original home lies outside of the law, in some other conceptual field. It is not to deny that the norm in question can be incorporated into law. (This can happen in either of two ways: either the non-legal norm can simply be transposed into the law without thereby being in any way affected, or it can be appropriated within a given legal context in such a way that it receives a distinctively legal specification.) A non-legal norm is one which can be fully articulated in the absence of any reference to specifically legal concepts. The economic norm of wealth maximization, to be discussed below in section two, is one example of such a norm. Dworkin’s favored conception of equality (where this principle is understood as demanding “equality of resources”) is another.

Thus, on my usage, a non-legal norm can play a role in law; it can help to give the law (derivative) normative content. But I reserve the term “legal norm” for a norm that is *distinctively* legal in the sense that there is some specification of its content that couldn’t take place outside of the context of some juridical frame or other. Thus, for example, we can think of many different conceptions of equality or of justice which are perfectly valid moral concepts, but I will take such a concept to be a *legal* norm only if it gets some distinctive elaboration within a given juridical frame. Accordingly, I will not apply the term “legal norm” to a norm which is just transported into the law, where that relocation does not affect the norm’s substantive content.

¹¹ I use the singular here, in defining “a reductive analysis of the law” as one which purports to derive the normative force of the law from *some form of* non-legal normativity, only for the

mon is that both regard the apparent normativity of the law (the normativity it seems to have on its face) as an illusion. What distinguishes them is that whereas the former, more radical, species of legal skepticism (what we might call “legal eliminativism”) maintains that this apparent normativity is illusion *all the way down* (such that once the illusion is exposed nothing of a normative character remains), the latter species of legal skepticism (what we might call “legal reductionism”) maintains that the taint of illusion attaches only to the particular normative language in which the law is traditionally expressed. To speak metaphorically, we can say that both species of legal skepticism begin with the presupposition that the familiar surface of the law, its traditional form, is really only a mask. But whereas the eliminativist maintains that behind the mask, there is nothing at all (that is, no animating force save that of the raw power of those who wield the law), the reductionist maintains that behind the mask he can discern a hidden normative structure, a “face” if you will, but one whose contours are only to be discerned with difficulty beneath the contours of the mask.¹²

In the body of this paper, I will be directly concerned only with (one example of) legal reductivism. However, as we contend with this one form of legal skepticism, it is worth bearing in mind the generic resemblances which obtain between it and legal eliminativism, its **currently unfashionable** near relative.

For both species of legal skeptic, the work to be performed by legal theory is that of dispelling the air of mystery with which the law is surrounded. But the reductionist has his own distinctive strategy for achieving this shared skeptical goal. His strategy for demystifying the law is to attempt to show that, superficial appearances notwithstanding, it rests upon a secure, non-legal, foundation. In the course of prosecuting this skeptical project, the reductionist makes heavy use of one particular kind of explanation of the law: namely, one which attempts to show that the normative force of a given law (or set of laws) derives from its

sake of simplicity of exposition. Of course, some legal reductionists aim to trace the normative force of a given set of laws to a *multiplicity of* external sources (for example, a mix of efficiency and political concerns). This local pluralism, however, in no way lessens their commitment to the skeptical project of reductionism.

¹² One way of bringing out the aptness of characterizing such positions as *skeptical* is to observe what they have in common with the philosophical project of David Hume. According to Hume, we are not entitled to the use of many of our most basic concepts because these concepts are merely the result of our mistaking a subjective necessity for an objective one. Thus, for example, according to Hume, our concept of *cause* rests on nothing more than a felt compulsion in the mind, a compulsion to associate one idea with another. For Hume, then, what it means to *explain* the concept of causal connection is to expose its pretensions by showing that it rests upon a different (and humbler) species of connection that it appears to.

tendency to promote one or more non-legal goals. I will call this kind of explanation of the law an “external explanation”, in virtue of its exclusive reliance upon explanatory resources which are fully available outside of specifically legal discourse. As a tool of legal analysis, external explanation, in and of itself, is entirely unobjectionable. Indeed, it is indispensable -- for there are countless cases in which, in order to better understand the purpose of a given law, an external explanation is precisely what we need. Consider, for example, a traffic law that sets the maximum legal speed at 55 miles per hour. We better understand this law when we observe that it serves certain external goals: namely, to decrease the number of fatal motor accidents and to decrease fuel consumption. To acknowledge that legal rules of this kind exist does not make one a legal reductionist.¹³ Legal reductionism comes in with the presupposition that, in so far as they are genuinely normative, *all* legal rules must conform to this model. For the reductionist, it is an article of faith that *all* legal rules have at best a borrowed normativity, that is, a normativity which derives from the normative status of the non-legal goals they promote. Thus the reductionist does not regard external explanation as one tool among others in his analytical toolbox. Rather, he elevates this one tool to a criterion of the contentfulness of a legal rule. For the reductionist, either a legal rule must eventually succumb to this mode of analysis (thereby disclosing its external purpose), or else it stands revealed as a mere form of words, one which is normatively empty.¹⁴

¹³ For the sake of clarity of exposition, prior to this point in the paper I have been speaking as if all law had a uniform appearance and that this appearance was one of (at least) seeming to possess normative autonomy. However, as should be apparent from the preceding sentences, this is far from being the case. In many instances, it will be transparent that a given law derives its normative force from considerations which are not specifically legal. (The traffic law discussed above is one such law. The Constitutional provision that in order to be eligible for the office of President a person must be at least 35 years of age is another.) However, it is appropriate for present purposes to focus in on those laws which *do* appear to possess normative autonomy because it is here that one joins issue with the skeptic. Where the skeptic goes to work is where he perceives there to be a gap between the real normative content of a law and its superficial conceptual clothing. Transparently derivative laws such as those mentioned above do not provide the skeptic with any opportunity for his particular brand of sleuthing.

It is not my contention that when a law does exhibit the appearance of normative autonomy, this appearance is always genuine. I do not want to rule out the possibility that some legal concepts could be shown to be merely epiphenomenal upon a structure of non-legal concepts. My aim is only to contest the legal skeptic’s presupposition that a law’s appearance of normative autonomy can *never* be genuine.

¹⁴ The category of “legal reductionism” is not homogeneous. This species of legal skepticism can itself be subdivided into two subspecies, according to the nature of the norms to which, in a given reductionist program, legal norms are to be reduced. To be a legal reductionist is already, in a sense, to take up an instrumental attitude to the law. It is to ask: What is the law good for? and to answer: It is to be valued purely as an instrument for the realization of cer-

Whenever the demand for an explanation of the law surfaces, the legal skeptic stands ready with a program which purports to satisfy this demand. **Unlike its ancient forebears, modern legal skepticism is not averse to theory building.**¹⁵ On the contrary, it supplies a distinctive motive for the construction of theory, namely, that given by the obligation to explain the trick behind what it claims to be an illusion. Accordingly, what the skeptic offers by way of an explanation of the law is a very particular species of theory. It is a kind of theory which purports to “see through” the law’s deceptive form to the heterogeneous reality that lies beneath. I will refer to this species of explanation as a “skeptical explanation”.

In the American legal academy, it has become a truism that the only possible kind of explanation of the law is one which fits the description of what I am calling a skeptical explanation.¹⁶ Indeed, it is commonly assumed that to achieve

tain external goods, that is, goods which can be fully understood in isolation from any juridical context. In so far as a theorist holds the view that he can supply a fully adequate specification of the ends of law (or what the law is for) independently of the specifically legal concepts that play a role in the implementation of those ends, he will count, by my lights, as a legal reductionist. What all legal reductionists have in common, therefore, is that they view the relationship between the ends of the law and the legal provisions by means of which those ends are accomplished as being purely *external* in nature. However, legal reductionists can be divided into two fundamentally different sorts: (a) those who would reduce legal norms to norms which are themselves instrumental in their character, and (b) those who would reduce legal norms to non-instrumental norms. Examples of the former species of norm are the economic norms that are held to promote the goal of wealth maximization (these are the norms which hold that it’s rational to *such-and-such* because this will promote the goal of wealth maximization). There is no internal relation between this goal and the means which, depending on various contingencies about the world, will conduce to its realization. An example of a non-instrumental norm is Dworkin’s principle of “equality of resources”. Fidelity to this master norm will place (non-empirical) constraints on what will count as a legitimate means of meeting the requirements of the norm.

¹⁵ The ancient skeptics conceived of skepticism not as a doctrine but as a way of life. Their aim was to induce an across-the-board suspension of judgement and belief. In their view, happiness consists in a perfect tranquility of spirit. Hence the anecdotal reports which tell us, for example, that Pyrrho was “so indifferent to pain that he could tolerate the hackings of the surgeons”. For this and similar reports, see Julia Annas and Jonathan Barnes, *The Modes of Skepticism, Ancient Texts and Modern Interpretations* (Cambridge University Press, 1985).

¹⁶ This is not to say that all legal academics subscribe to the tenets of legal skepticism. Many do not. However, among legal skeptics (and their numbers are legion) it is common practice to proceed as if their skeptical point of departure required no special justification, as if to explain a stretch of the law (or to give a theory of it) just *is* to provide that area of the law with an external foundation (or to show that such a foundation is lacking). As we might expect, legal skepticism is especially prevalent at the level of “grand theory”. Indeed, I would argue, all of the major schools of legal theory which feature as headliners in standard courses on the history of jurisprudence in America are identifiable as so many variants of skeptical legal theory. (Included on this list are: Realism, Critical Legal Studies, the Law and Economics

intellectual maturity in one's thinking about the law is necessarily to embrace legal skepticism.¹⁷ On this view, to attempt to hold on to a philosophically more naive conception of the law by persisting in the attempt to take legal forms at face value is to reveal oneself to be intellectually backward; it is to invite comparison with the worshippers of idols. It is this assumption about the inevitability of skepticism that I want to contest in this paper. As I will argue, it is possible to meet the demand for an explanation of the law without going the route of skepticism. If we can agree that what we want from a theory of law is a more reflective, intellectually rigorous understanding of what is grasped (albeit comparatively unreflectively) by the competent (but theoretically unsophisticated) practitioner of the law, then my aim can be expressed this way: it is to argue for the availability of a non-skeptical theory of law.

If such a claim can be established at all, it must be made out with respect to one specific area of law at a time. For what must be shown is what it would be like to develop a theory which takes a certain set of legal norms at face value. In this paper, my focus will be on one branch of private law: namely, the law of torts as it applies in cases of negligence.

3. Tort Law

In order to prevail in a negligence case, the plaintiff must show (1) that the defendant acted negligently and (2) that the defendant's negligent conduct caused him harm. I will take these two elements in order. In the US, it is typically left to a jury to decide whether what the defendant did constitutes negligence. However, the law does not leave the jurors without guidance as to how to make this determination. Rather, they are supplied by the judge with instructions which

Movement, the most prominent forms of Feminist Legal Studies, and the most prominent forms of Marxist Legal Studies.)

¹⁷ One of the more outlandish versions of this view is found in Jerome Frank. As a recent convert to psychoanalysis, Frank suggested that the only thing holding his fellow legal scholars back from acknowledging the truth of various skeptical theses about the law is a childish desire to have the law fulfill their fantasy of the father-figure. Frank writes:

Although the law is a more patently human construction than, say, physics, yet in the calm reconsideration of the value of inherited truths, law is decades behind physics. Why? Because in law, the father is more deeply entrenched. The law is a near substitute for that father, a belief in whose infallibility is essential to the very life of the child. And in the life of the adult that authority now no longer usefully, but still potently, holds sway. (Frank, *Law and the Modern Mind*, excerpted in *American Legal Realism*, eds. Fisher, Horwitz, and Reed (Oxford University Press, 1993), p. 209

contain a gloss on the legal concept of negligence. Here is the relevant part of a typical jury instruction:

“Negligence is the *doing* of something *which a reasonably prudent person would not do*, or the failure to do something a reasonably prudent person would do, under circumstances similar to those shown by the evidence.”

We tend to think of the ideal moral assessment of a person as infinitely subjective, in that everything that is true of a person would be taken into account. (On this view, only God would be in a position to assess our true merit.) By contrast, for the purposes of assessing legal liability many features of the person are intentionally set aside or bracketed as being without legal significance. We can illustrate how this works under tort law by focusing on two features of the jury instruction. The first is that “negligence is the *doing* of something”. A person is shown to be negligent by their actions, not by their state of mind or their general character. Thus, if a person is charged with negligence, it is no defense to claim either that no harm was intended or that this kind of behavior is a departure from one’s general good character. As far as the *definition* of negligence is concerned, these features of the person are set aside as irrelevant. Of course, it may well be that a well-intentioned person of good character is empirically less likely to commit negligent acts than is a person who is his moral opposite. But the empirical correlations are not perfect, as being morally upright is no proof against engaging in negligent acts.

Thus the negligence standard is non-subjective in that the object of its judgment is the quality of the defendant’s *act*. It is interested in what the defendant *did* then and there. It is, as a matter of principle, not interested in either his “internal” condition or the pattern of his past behavior. This gives us one sense in which the negligence standard is properly considered as being an “objective standard”. But it is “objective” in a further sense as well, as can be seen by returning to the jury instruction.

As this instruction specifies, “Negligence is the doing of something *which a reasonably prudent person would not do*”. Thus, what counts as negligence is indexed, not to the qualities of the individual defendant, but to the qualities of a *standard* person, where this means a person who is possessed to an ordinary degree of the various capacities, mental and physical, which enable us to avoid causing accidental harm to others. Thus, in tort law, one is in general neither penalized for the possession of above-average abilities, nor excused from liability on account of having abilities which are below average. In ethics, we often want to know what it was in someone’s power to do, given all of the individuating tal-

ents and limitations which characterize him. By contrast, the form of inquiry proper to tort law is a more impersonal one.

The second element the tort plaintiff must prove is that of causation. It is not enough for him to show that the defendant was negligent *and* that he suffered a loss. Rather, he must show that his loss is traceable to the defendant's wrongful conduct as its cause. Moreover, it is not enough for him to demonstrate what we might call "but for" causation, in other words: that but for the defendant's negligent conduct his loss would not have occurred. Rather, tort law relies upon a "thicker" notion of causal connection. In legal language, what it asks is whether the defendant's conduct was the "proximate cause" of the plaintiff's loss. We can illustrate the contrast between these two notions of causal connection by looking at a real example.

The Palsgraf case arose out of Long Island in 1928. The facts of the case were as follows: An employee of the defendant railroad pushed a passenger onto a departing train in order to help him board. In the process, he caused the passenger to drop an unmarked package he was carrying. As it turned out, this package contained fireworks and when it hit the ground there was a major explosion. This explosion caused a heavy object (a scale) at the other end of the platform to fall over. The falling object struck a woman and injured her. She then sued the railroad, claiming that its employee's negligent conduct was responsible for her losses.¹⁸

If we were to approach this case equipped only with the concept of "but for" causation (but with the rest of the relevant legal apparatus intact), the correct legal result would be a foregone conclusion. The plaintiff would necessarily prevail, since all she would have to show is that the employee's act and her suffering represented appropriately situated nodes in the ever-expanding web of world history. On this theory of liability, the defendant railroad would have to pay damages, not only to the injured woman, but (to embroider on the actual case) also to the owner of a dog which happened to be run over by the ambulance carrying her to hospital.

Not surprisingly, tort law does not in fact countenance the possibility of such open-ended liability. Rather, it draws a distinction between (a) the consequences of the negligent act considered *in itself* and (b) those losses which are downstream from the negligent act but which are not directly attributable to it. Naturally, among the cases that end up in a court of law, there will be some in which it is difficult to determine exactly how this distinction is to be applied. Nevertheless, the point of the distinction is clear. Moreover, this distinction derives

¹⁸ Palsgraf v. Long Island Railroad, 162 N.E. 99 (N.Y. 1928)

from one of the most fundamental ideas of tort law: namely, that for an act to be considered negligent, it is not enough that it issue in unforeseen negative consequences. *Every* act has the potential to do this. Rather, a negligent act is a particular *kind* of act. It is one which creates an unreasonable degree of risk of harm to others. (This is what it means for an act to be *wrongful* by the lights of tort law.) Moreover, the logic of risk creation is such that the negligent act has, as it were, a determinate reach. In acting negligently, I do not create a risk for the world at large. Rather, the risk attaches to a particular person or set of persons (i.e. those whom I endanger or “put at risk”. According to the conceptual framework of tort law, if this risk or potential for harm is materialized, meaning that it results in actual injury, then my negligent act is deemed to be the “proximate cause” of such injury. And I am accordingly judged to be liable for it.

It follows from this conceptual apparatus that it is at least logically possible that some persons will in fact be harmed by my negligent act (in the “but for” sense of causal connection) who were not in the relevant sense endangered (or put at risk) by it. In the *Palsgraf* case, it was decided that this was in fact the situation of the plaintiff. According to the majority decision, the employee’s conduct was indeed negligent in that it endangered certain persons, namely: the passenger who was negligently shoved (and perhaps some of the passengers standing near him). However, the injured woman was not a member of this class of endangered persons. Thus, the employee’s conduct was not the “proximate cause” of her injuries and she was not entitled to collect from the railroad.

We have now covered the principal features of the conditions of liability in tort law. In order to justify a finding that a particular defendant bears legal liability for the losses suffered by another, it must be shown (1) that the defendant acted negligently (i.e. as a “reasonable person” would not do) and (2) that his negligent conduct was the “proximate cause” of injury, not just to *someone*, but specifically *to the plaintiff*. I turn now to the issue of remedy under tort law. If a court finds that the above conditions have been satisfied, then it will order that the defendant pay to the plaintiff an amount of money equal to the value of her losses. In other words, the defendant is required to “make the plaintiff whole”, that is, to restore her to the position she would have been in had she not been damaged through the defendant’s negligent conduct.

4. Posner’s Economic Analysis of Tort Law

I turn now to a particular skeptical analysis of tort law: namely, that given by the well-known American judge and legal scholar Richard Posner.

Posner's commitment to the defining premise of legal skepticism is a unifying thread which runs through his many writings on the law. But this commitment becomes most conspicuous in such passages as following. In his famous course book, which has been used to introduce generations of students to the law, Posner writes:

[M]any areas of the law, especially the great common law fields of property, torts, and contracts, bear the stamp of economic reasoning. Few legal opinions, to be sure, contain explicit references to economic concepts and few judges have a substantial background in economics. *But the true grounds of decision are often concealed rather than illuminated by the characteristic rhetoric of judicial opinions.* Indeed, legal education consists primarily of learning to dig beneath the rhetorical surface to find these grounds. It is an advantage of economic analysis rather than a drawback that it does not analyze cases in the conceptual modes employed in the opinions themselves.¹⁹

In this passage, Posner performs upon the law the classical skeptical maneuver. He postulates a gap between the law's "surface rhetoric" and a hidden logic which lies concealed beneath. Thus, for Posner, as for his fellow skeptics, the conceptual terms in which the law is traditionally expressed are not to be trusted. If we are to understand what is really driving the law, we must turn to some more reliable, transparent conceptual order.

This much is common ground for *all* legal skeptics. Posner, however, belongs to that class of legal skeptics who want to "save" the law by showing that, while it lacks any normative force of its own, it is funded with genuine normativity from outside. In other words, it draws what normative force it has from some non-legal normative order, one which is presumed to be free of the defects which (according to skeptic) beset the law. Posner's choice for what to cast in this role of "privileged conceptual framework" is that which belongs to the science of economics.²⁰ For Posner, there is one economic concept in particular that has special relevance for understanding the deep structure of the common law of torts. This is the concept of "economic efficiency" or the maximization of

¹⁹ Richard Posner, *Economic Analysis of Law*, (1972), p.6 (my emphasis). We find a similar passage in the treatise on tort law Posner co-authored with the economist William Landes. Here Posner and Landes write:

"We think that economic principles are encoded in the ethical vocabulary that is a staple of judicial language, and that the language of justice and equity that dominates judicial opinions is to a large extent the translation of economic principles into ethical language." (*The Economic Structure of Tort Law*, (Harvard, 1987), p. 23.)

²⁰If we are being careful, we should say that what Posner privileges is really only *a version of* the science of economics. (Contrast his understanding of this science, for example, with that found in Amartya Sen.) For the sake of simplicity of exposition, however, I will follow Posner's own usage and refer to his project simply as "the economic analysis of law".

social wealth. According to Posner, the function of tort law as it applies to cases of negligence is to contribute to the goal of wealth maximization by creating an incentive system which will work to deter “economically inefficient accidents”. Under the terms of the economic analysis, an accident is inefficient just when the costs of prevention are less than the expected costs of the injury.

We can get a clearer idea of how the economic analysis of tort law works with the help of an example.²¹ Suppose the defendant is a farmer who has piled up a haystack near the border between his property and his neighbor’s. The haystack is in a dangerous condition and may at any moment burst into flames. Assume that the cost of removing the danger presented by the haystack is \$9, the cost of the damage to the neighbor’s field if the haystack catches fire is \$100, and the probability that the haystack will catch fire is 10%. Applying the economic analysis, the defendant is negligent if and only if the cost of preventing the accident, in this case \$9, is less than the real cost of the injury discounted by its probability (here the relevant figures are \$100 and 10% respectively, giving as the expected cost of the injury: \$10). In this case, the economist’s formula tells us that the defendant *was* negligent because for a cost of \$9 he could have prevented an accident valued ahead of time at \$10.

Recall that in tort law, negligence is defined by reference to the ‘reasonable man’ standard. (As the jury instruction tells us, “negligence is a doing which a reasonably prudent person would not do”). For Posner, the economist’s formula captures the essence of what this standard is getting at. Thus when we cash out the normative content of the negligence standard, we find that the wrongfulness of a negligent act consists exclusively in the fact that it wastes society’s resources. As an analysis of the conditions of liability in tort law, this account has an element of plausibility. For surely the reasonably prudent person will not simply ignore economic costs and benefits when he deliberates upon a course of action. For instance, he may determine that it would be unreasonable to expend a vast sum in order to avert a trivial loss. This suggests that the determination of liability under tort law is not as a rule insensitive to considerations of economic efficiency. To say this, however, is to leave unanswered the further question of whether the economic analysis can perform as advertised. Can it, as promised, provide the key to the law’s hidden inner logic? This is a question, not about the local usefulness of the economic analysis, but about whether it can achieve its philosophical ambition.

One way to cast doubt upon this latter proposition is to note what becomes of the familiar remedy in tort if we try to take seriously Posner’s claim that the

²¹ This example is adapted from the 19th century English case *Vaughan v. Menlove*.

wrong which is of interest to tort law is simply that of wasting resources. According to Posner, the function of tort law is to reduce the incidence of this form of waste. How? By altering the incentives of the prospective agent of waste. Tort law is there, according to Posner, to threaten this agent with a penalty. If he is proven in a court of law to have created an inefficient risk, then he will be punished for this antisocial behavior by being obliged to pay a fine. Knowing this, the rational agent will seek to avoid such punishment by taking care that he generate only risks that are economically efficient.

But if this is the essential rationale behind the structure of tort law, why should the defendant who has been found guilty of negligence have to pay a fine *in the amount of the actual costs of the accident*? If the point of tort law is to deter economically inefficient behavior, shouldn't the task of those responsible for framing a punishment under tort law be to discover what level of fine would serve as an effective deterrent? For example, the administrators of tort law might discover that most defendants would have been deterred from their economically inefficient behavior if they had faced the threat of having to pay twice the prevention costs. Thus, a defendant who could have spent \$10 in order to avert an inefficient accident would be assessed a fine of \$20. There is clearly something *ad hoc*, and therefore unsatisfactory, about this proposed rule. However, from the point of view of Posner's economic analysis, there is, at least *prima facie*, no reason to regard this made-up rule as in any way inferior to the traditional one (which requires the defendant to pay a sum equal to the cost of the damage.) The economic analysis is therefore faced with a problem. It set out to provide a rationale for the structure of tort law, but if we were to found a system of law on the rationale it offers, there is no reason to think it would retain this time-honored feature.

It is in order to address this problem that Posner brings the plaintiff onto the scene. According to Posner, the law attaches no immediate significance to the plaintiff by virtue of her status as the injured party. However, the law is alert to the fact that, as the bearer of this status, she is likely to be particularly well-placed to perform certain services for the legal system. For example, she can be expected to be well-positioned to identify the negligent actor and to provide evidence against him. Accordingly, in order to secure her contribution toward the enforcement of the law, the injured party is offered a monetary reward for these services, where the payment of this reward is contingent upon the defendant's being found guilty. In short, she is offered a sort of bounty -- of the sort familiar from the American Old West -- which she can collect only if she helps to secure the defendant's conviction.

The plaintiff was brought on stage to help with the problem of connecting the deterrence function of tort law with its familiar remedy. And for a moment her introduction can look like progress. For now Posner has attributed to tort law both (a) the ultimate aim of deterrence and (b) the subsidiary aim of enlisting the injured party's cooperation. And he can argue that we can serve both aims at once by requiring a transfer of funds from the defendant to the injured party. In fact, however, bringing the plaintiff in this way only multiplies Posner's difficulties. For now he is faced with the problem of bringing two mutually unrelated terms into line with the traditional requirement that the defendant pay the plaintiff *a sum of money equal to her losses*. And there is no reason to believe that either of these terms -- either (1) the level of fine necessary to provide effective deterrence, or (2) the size of the bribe necessary to secure the injured party's cooperation -- bears any significant relation to (3) the value of her losses.

Ever-resourceful in the defense of his project, Posner offers various unproven empirical postulates which are designed to bring these three terms closer together -- quantitatively at least. One may suspect, however, that no amount of such tinkering can turn what Posner offers into a plausible picture of tort law. The reason he faces this problem of reintegration is because he has severed the fundamental relationship of interest to tort law: namely, that between the defendant and the plaintiff conceived as doer and sufferer of the same wrong. On the naive understanding of this relationship, the parties are in court because the defendant is charged with having done an injustice *to the plaintiff*. On Posner's analysis, by contrast, the only injustice in sight (namely, that of diminishing society's aggregate wealth) is one which is committed against the state, or against society at large. And given this conception of the injustice at issue in tort law, the defendant and the plaintiff can only come together as objects of the state's attention: the defendant being punished as an example to others who might copy his antisocial behavior, and the plaintiff being paid as a hireling of the legal apparatus. Perhaps we can fare better and arrive at a more plausible account of the structure of tort law if we begin by respecting the naive understanding of the connection between the defendant and the plaintiff. As we will see in the next section of the paper, his willingness to do precisely this is the great merit of Aristotle's discussion of corrective justice.

5. Understanding Tort Law as a Modern Specification of the Ancient Norm of Corrective Justice

In the *Nicomachean Ethics*, Aristotle distinguishes between "distributive justice" (or that form of justice which pertains to the distribution of goods by the

state) and “corrective justice” (or that form of justice which pertains to the rectification of private wrongs). Each form of justice is, he says, concerned with fairness or equality. But what counts as fairness or the equal treatment of persons in the one context is different from what counts as this in the other.

According to Aristotle, distributive justice is a matter of the government’s faithfully adhering to a given distributive scheme. A government is free to decide what principles it will employ to determine how much of each kind of good is owed to each category of person, but once it has settled upon a given set of principles, considerations of justice require that it consistently adhere to them. Thus, for example, in an oligarchy (which has determined that the goods are to be divided proportionately among the wealthy, with the most wealthy receiving the largest share), distributive justice requires that this scheme be consistently implemented. Thus distributive justice requires the equal treatment of persons in the special sense that it requires that everyone in a given distributive class (e.g. the class of the most wealthy) receive what the principles of distribution declare to be his fair share.

Aristotle’s discussion of corrective justice comes directly on the heels of his discussion of distributive justice because the former is best understood when set in contrast to the latter. In order to determine what is owed to a person under a distributive scheme, one must know what distributive class he belongs to. For instance, in an aristocracy (the form of government Aristotle himself favored), the criterion of distributive merit is not one’s level of wealth, but rather one’s “excellence”. Thus, in order to know what a person is owed under an aristocratic distributive scheme, it is first necessary to ascertain the quality of his character - or, as Aristotle expresses it, whether he is “decent or base”. For the purposes of *corrective* justice, however, precisely these sorts of features of the parties -- that is, the features which determine their desert under a distributive scheme -- are to be set aside as having no weight. Here is how Aristotle expresses this point about the restrictive focus of corrective justice:

For here [in corrective justice] it does not matter if a decent person has taken from a base person, or a base person from a decent person, or if a base or decent person has committed adultery. Rather, the law looks only to the distinctive character of the injury, and treats the people involved as equals, when one does injustice while the other suffers it, and one has done the harm while the other has suffered it. Hence, the judge tries to restore this unjust situation to equality, since it is unequal. (NE 1132a)

As Aristotle indicates, corrective justice is concerned, not with how the parties to a lawsuit stand with respect to various government-approved criteria of merit, but only with the immediate relationship between these parties, that is, the

relationship which is constituted by the one's having done an injustice to the other. What Aristotle sees (and Posner misses) is that this bi-polar relationship of injurer and injured has a juridical significance of its own. Aristotle gives expression to this idea -- that one person's injuring another opens up a distinct juridical frame -- by describing the situation prior to the injury as one of "equality". As Aristotle says, the doer of injustice disrupts this equality, and it is the role of the judge to restore it. In my view, the point of the modern practice of awarding "damages" (in the remedy phase of a tort proceeding) is well-described by this Aristotelian language. In more contemporary terms, the point of this practice is to "make the plaintiff whole", that is, to restore him to the condition he was in prior to his being injured by the defendant.

According to Aristotle, the context of corrective justice calls for a distinct norm of equality. As he says in the preceding passage, in a proceeding under corrective justice, the law "treats the people involved as equals". Further down in the same paragraph from which this passage is taken, he spells out what this equal treatment comes to:

...This is why, when people dispute, they take refuge in the judge; and to go to the judge is to go to justice; for the nature of the judge is to be a sort of animate justice; and they seek the judge as an intermediate, and in some states they call judges mediators, on the assumption that if they get what is intermediate they will get what is just. The just, then, is an intermediate, since the judge is so. [NE, 1132a 19-26]

For Aristotle, then, the role of the judge who looks out upon a situation in which one party is accused of having injured another is to act as a *mediator* between them. It is to treat the parties as equals by regarding each as a source of legitimate claims, while refusing to privilege the self-interested perspective of either.

As I will argue, the several provisions of modern tort law laid out above as belonging to the *guilt* phase of the lawsuit can all be understood as aiming to implement this norm of equality. I will begin with the "reasonable man" standard of negligence. Recall that according to the standard jury instruction a negligent act is one which a "reasonably prudent person" would not do. In my view, the function of this concept of "the reasonably prudent person" is to mediate between two opposing perspectives: that of the standard agent or doer and that of the standard recipient of harm or sufferer. The standard person has an interest in being able to act freely, that is, without undue concern for distant consequences. But the standard person also has an interest in being free from whatever harm might flow from other people's endeavors. The idea of the "reasona-

bly prudent person” is that of a person who can make a reasonable judgment as to how to balance these competing interests.

I turn next to the requirement that a negligent act be a “*doing*” and to the related requirement that in order for the defendant to be held liable, his conduct must be shown to have been the *proximate cause* of the plaintiff’s suffering. As we have seen, the context of corrective justice is one in which one party, the defendant, stands accused of being the cause of another’s party’s suffering. This being the context, the judge is faced with a particular problem: namely, how is he to identify “what the defendant has done” for the purposes of corrective justice. In other words, what act is attributable to the defendant for these purposes and what are its proper consequences?

If they are actuated purely by self-interest, the defendant and the plaintiff will take opposite positions on this question. It is in the defendant’s interest to confine “the act” as closely to his person as possible. Indeed, in the present context, namely, that of a court of law, it would be infinitely to his advantage if it were to be held that the only acts properly attributable to him are his acts of mind. At the opposite extreme we have the plaintiff. It is in her interest that, taken together, “the act” and its proper consequences extend as far out from the person of the defendant as possible. Indeed, it would be infinitely to her advantage if the defendant were to be held responsible for any event which would not have happened “but for” his act.

There are multiple branches of tort law, but within that branch which is concerned with the legal wrong of negligence, the concept of “proximate cause” purports to offer the appropriate compromise between these two competing strategies for how to identify what the defendant did. This concept favors the plaintiff in drawing the defendant’s act out beyond the confines of his person and some distance into the world, where it can do legally cognizable damage. But it favors the defendant in preventing his act from reaching to an infinite chain of consequences. Among judges and lawyers it is commonly argued that the force of the concept of “proximate cause” can adequately be captured by speaking of an act’s “reasonably foreseeable consequences”. Using this gloss, we can say that limiting the defendant’s liability by requiring that his conduct be the “proximate cause” of the plaintiff’s suffering has the following effect: It means that he can be held legally liable only for those events which figure among the “reasonably foreseeable” results of his conduct.

Naturally, it is arguable that the concept of “proximate cause” does not give the correct specification of the “midpoint” which the judge is meant to discover if he is to treat the parties to a lawsuit as equals in the sense required by correc-

tive justice. One may have reason to regard the resulting standard of liability as too generous either to the defendant or to the plaintiff. Alternatively, one may be dissatisfied with how far the adoption of this standard gets us. After all, the correct application of the standard is in many cases open to dispute. In the Palsgraf case, for instance, there may be more than one plausible answer to the question of whether the woman's injury was among the "reasonably foreseeable consequences" of the employee's action.

In my view, this fact about the norms of tort law -- namely, that they do not always compel agreement among those seeking to follow them -- should not be taken as a sign that they are somehow defective. Rather, this is how it is with norms whose implementation requires the exercise of practical reason. You cannot get from the formal requirement that one must treat persons as equals to the correct specification of this requirement for the particular context in which one party is accused of having injured another by a series of deductive steps. Thus, reasonable people can disagree as to whether a given specification of this abstract norm is the correct one. This is how it is with most legal rules: you cannot get from the rule to its correct application in a given case by a series of deductive steps. Thus the correct legal resolution of a given case may be open to dispute. But to wish to do away with this so-called form of "indeterminacy" in the law is to wish to turn the law into something else altogether -- a branch of applied economics, for instance.

For Posner, as for many legal skeptics, the unavailability of deductive demonstration in the law is an intolerable embarrassment to the field. Accordingly, he seeks to reinforce the law by recasting its norms into the form of a decision procedure. My hope is to have said enough in this paper to cast plausibility upon my claim that to "rationally reconstruct" tort law in this way is not to discover its hidden logic. It is rather to do violence to its apparent logic by distorting it beyond all recognition. It is to substitute a form of justification utterly alien to the law for the law itself.²²

²²The parts of this paper that are about tort law are indebted in various ways to the work of Ernest Weinrib and Martin Stone. The parts of the paper that touch briefly on Wittgenstein are indebted to the work of Hilary Putnam and Stanley Cavell. I am also indebted to comments on this work from members of the audience at the ASCA conference, "Skepticism and Interpretation", held at the University of Amsterdam in June, 2000. I would like to thank Martha Nussbaum and Richard Posner for comments on a previous draft. Finally, I would like to thank James Conant and Martin Stone for encouragement and for conversation on these topics.