

## TORTS RATIONALES, PLURALISM, AND ISAIAH BERLIN

*Christopher J. Robinette\**

“The fox knows many things, but the hedgehog knows one big thing.”<sup>1</sup>

### INTRODUCTION

The torts hedgehogs in the academy have engaged in considerable theorizing. Most modern torts scholars know “one big thing.” Instead of theorizing about multiple rationales in the tort system, these scholars seek a unified theory of torts. In other words, they seek the “one big thing” that draws all strands of tort law together.

What is the one big thing in torts? There are currently two or perhaps three contenders: deterrence, corrective justice and, in some circles, compensation.<sup>2</sup> According to the deterrence rationale, tort law is designed to prevent accidents by threatening potential wrongdoers with civil liability or the inability to recover damages.<sup>3</sup> In contrast, the corrective justice rationale posits tort law as a way to vindicate individual moral rights between parties.<sup>4</sup> Scholars advocating one of these rationales frequently ignore or deride scholars advancing the other perspective.<sup>5</sup> Additionally, both deterrence and corrective justice scholars attack the importance of compensa-

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\* Visiting Associate Professor, Widener University School of Law. B.A. 1993, College of William and Mary; J.D. 1996, University of Virginia. I am grateful to Tom Galligan, John Gedid, Rick Greenstein, Henry Hardy, Jeffrey O’Connell, Sheila Scheuerman, Larry Solum, and Dag Einar Thorsen for their perceptive comments and suggestions. Jeni Pilgrim provided excellent research assistance, and Sara Sharp contributed helpful background information. Errors and omissions are mine alone.

<sup>1</sup> ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY’S VIEW OF HISTORY* 3 (Elephant Paperbacks 1993) (1953) (quoting Archilochus).

<sup>2</sup> See, e.g., Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997) (referring to deterrence and corrective justice as “two major camps of tort scholars”); DON DEWEES ET AL., *EXPLORING THE DOMAIN OF ACCIDENT LAW* 5-10 (1996) (describing deterrence, compensation, and corrective justice as “the three major normative perspectives on tort law”).

<sup>3</sup> See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 143 (2d ed. 1977); George Priest, *Modern Tort Law and Its Reform*, 22 VAL. U.L. REV. 1, 20-21 (1987).

<sup>4</sup> See, e.g., Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992).

<sup>5</sup> See Schwartz, *supra* note 2, at 1806-11.

tion,<sup>6</sup> a third goal many scholars deem crucial to tort law.<sup>7</sup> Compensation theorists emphasize collectively absorbing personal injury losses and focus on the need of victims to cover basic medical bills and lost wages.<sup>8</sup>

I have argued that, in spite of the awesome talent of the scholars seeking the one big thing, the search is quixotic.<sup>9</sup> None of the three traditional rationales fully explains or justifies the entire tort system. Rather, the tort system is based on multiple rationales.<sup>10</sup> In short, it is pluralistic. Because so much scholarly energy has been spent in search of the one big thing, the “perennially unsuccessful quest to articulate a unified theory of torts,”<sup>11</sup> the nature of a pluralistic tort system is unclear. Few foxes have put forward a view as to how the torts rationales interact. Do the plural rationales work together as a seamless whole? Do the rationales conflict? If they conflict, how does one choose among them? Does the entire system devolve into adjudicative relativism, whereby a judge has no rational basis for choosing among the rationales in the case of a conflict? To summarize, if a pluralist theorized about the tort system, what would he or she say?

Perhaps no thinker is as closely identified with the concept of pluralism as the late English philosopher, Sir Isaiah Berlin. In this Article, I argue that Berlin’s value pluralism provides the framework (theory is too strong a word) in which the torts rationales interact. A Berlinian understanding of tort law would consist of four propositions. First, the torts rationales are truly distinct and independent; they are not collapsible into each other. Each of them conveys a different idea about the purpose of tort law. Second, these rationales are objective, each exemplifying a legitimate purpose for human beings to pursue. Third, the torts rationales have the potential to be incompatible; the theories often entail opposing conclusions. Finally, the

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<sup>6</sup> See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33-34 (1972); JULES L. COLEMAN, RISKS AND WRONGS 376-82 (1992); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 36-38 (1995). These scholars acknowledge the importance of the plaintiff receiving money, but only to deter unreasonable behavior or to correct an injustice. Compensation, in their eyes, is not an *independent* tort rationale.

<sup>7</sup> See, e.g., DEWEES ET AL., *supra* note 2; MARK C. RAHDERT, COVERING ACCIDENT COSTS (1995).

<sup>8</sup> See DEWEES ET AL., *supra* note 2, at 6.

<sup>9</sup> Christopher J. Robinette, *Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine*, 43 BRANDEIS L.J. 369 (2005). See also John C. P. Goldberg, *Twentieth Century Tort Theory*, 91 GEO. L.J. 513 (2003) (reviewing five unified theories from both a positive and normative perspective and finding shortcomings in each of them).

<sup>10</sup> See Robinette, *supra* note 9.

<sup>11</sup> Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 663 (1997).

torts rationales are incommensurable—incapable of being ordered in a timeless hierarchy.<sup>12</sup>

This leaves torts judges, in any given case, in the position of having to select among three traditional torts rationales, which cannot be arranged in a consistent hierarchy and may be incompatible. Berlin offers little advice about the issue of choosing among options as a general matter. However, two themes emerge from his comments on choice, both of which are contrary to current trends in torts scholarship.

First, context is by far the most significant factor in making decisions. The parties, nature of the injuries, and complexity of the evidence (among other things) are very different in, say, medical malpractice and automobile accidents. If the torts rationales are unrankable in the abstract,<sup>13</sup> then context allows judges to rationally choose among them. This contradicts the current search in torts scholarship for the one big thing that explains or justifies all of torts, with its concomitant de-emphasizing of the particular. Yet the emphasis on context is completely consistent with the common law itself. As Dag Einar Thorsen notes, “In essence, value pluralism changes the focus of normative reasoning from the formulation of ultimate theories—algorithms that purportedly always give us a final, correct answer to every conceivable normative question—to the disentangling of concrete moral dilemmas in the world we live in and on.”<sup>14</sup> Torts, like most areas of law, consist of the disentangling of concrete moral dilemmas. Thus, the Berlinian lesson for torts scholars is to shift their efforts from attempting to find the one big thing to a study of the context of torts. Such a shift would be more likely to aid judges in their job of deciding cases, each of which has its own particulars.

The second theme Berlin emphasized in his comments on choice was the importance of avoiding extremes of human suffering. Of the three torts rationales, this idea is most closely conveyed by compensation. Compensation theorists base their view of the tort system on responsiveness to the needs of victims; their focus on loss spreading and equality leads them to the view that losses should be borne collectively so as not to destroy any particular victim. Again, this runs counter to the trend in torts scholarship, which dismisses compensation as an independent torts rationale. Berlin’s comments suggest this should be reconsidered.

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<sup>12</sup> Incommensurability is a topic that has led to considerable disagreement. *See infra* notes 55-90 and accompanying text. However, in the context of torts rationales, the Berlinian understanding would be that no single rationale is always the most important for any particular torts doctrine.

<sup>13</sup> *See* GEORGE CROWDER, LIBERALISM AND VALUE PLURALISM 51-54 (2002).

<sup>14</sup> Dag Einar Thorsen, *Value Pluralism and Normative Reasoning*, at 23 (2004), available at <http://folk.uio.no/daget/Value%20Pluralism%20and%20Normative%20Reasoning.pdf>.

To that end, in Part I of this Article, I describe Berlin's pluralism. I define it and respond to several critical objections against it. In Part II, I apply Berlin's pluralism to the tort system and address its implications, both for judges and scholars. Adopting a Berlinian perspective on torts would not allow a judge or scholar a cohesive understanding of the entire tort system. However, it would provide a significant starting point.

## I. THE THOUGHT OF ISAIAH BERLIN

### A. *The Hedgehog and the Fox*

In 1953, Berlin drew a distinction between two types of thinkers: hedgehogs and foxes. Hedgehogs tend to systematize their world according to a "universal organising principle in terms of which alone all that they are and say has significance."<sup>15</sup> Foxes, on the other hand, "pursue many ends, often unrelated and even contradictory, connected, if at all, only in some *de facto* way, for some psychological or physiological cause, related by no moral or aesthetic principle."<sup>16</sup> According to Berlin, foxes have the more practical point of view, for they "seiz[e] upon the essence of a vast variety of experiences and objects for what they are in themselves, without, consciously or unconsciously, seeking to fit them into, or exclude them from, any one unchanging, all-embracing, sometimes self-contradictory and incomplete, at times fanatical, unitary inner vision."<sup>17</sup>

Berlin offers as examples of hedgehogs Dante, Plato, Lucretius, Pascal, Hegel, Dostoevsky, Nietzsche, Ibsen, and Proust.<sup>18</sup> As examples of foxes, Berlin offers Shakespeare, Herodotus, Aristotle, Montaigne, Erasmus, Molière, Goethe, Pushkin, Balzac, and Joyce.<sup>19</sup>

If Berlin's schema is applied to him—is he a hedgehog or a fox?—it is not at all difficult to answer. Berlin is a fox. His vision is of the many, not the one.<sup>20</sup> Berlin rejected a single, unitary system that provides only one correct answer for every question. According to Berlin, "[e]very situation

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<sup>15</sup> BERLIN, *supra* note 1, at 3.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 3-4.

<sup>19</sup> *Id.* at 4.

<sup>20</sup> This is true on more than one level. Methodologically, Berlin tended to write essays. This allowed him to cover considerably more topics than if he had written longer works. He took advantage of that opportunity by covering a stunningly diverse array of material. A casual glance at his bibliography reveals subject matters as disparate as Machiavelli, Romanticism, and the dichotomy between the sciences and humanities.

calls for its own specific policy, since out of the crooked timber of humanity, as Kant once remarked, no straight thing was ever made.”<sup>21</sup>

Instead of “more faith, or stronger leadership, or more scientific organization,” Berlin called for “less Messianic ardour, more enlightened skepticism, more toleration of idio-syncracies, more frequent ad hoc measures to achieve aims in a foreseeable future.”<sup>22</sup> In essence, Berlin advocated “a less mechanical, less fanatical application of general principals . . . a more cautious and less arrogantly self-confident application accepted, scientifically tested, general solutions to unexamined individual cases.”<sup>23</sup> For Berlin, the “craving for unity and symmetry at the expense of experience” is “naïve.”<sup>24</sup> In short, Berlin is a pluralist.

### B. *Value Pluralism*

But, what was Berlin’s vision of pluralism? The term “pluralism” and an explanation of the concept came together<sup>25</sup> with Berlin’s seminal 1958

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<sup>21</sup> ISAIAH BERLIN, *Political Ideas in the Twentieth Century*, in *FOUR ESSAYS ON LIBERTY* 39-40 (Oxford University Press 1969).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> ISAIAH BERLIN, *Historical Inevitability*, in *FOUR ESSAYS ON LIBERTY*, *supra* note 21, at 43.

<sup>25</sup> Value pluralism, as the theory is often labeled to emphasize it is about values and not facts, did not originate with Isaiah Berlin. Scholars have attributed a pluralist view to several notable theorists, including Aristotle and Max Weber. However, pluralism appears to have been first proposed as an ethical doctrine by American philosophers Sterling Lamprecht and A.P. Brogan. See Sterling P. Lamprecht, *The Need for a Pluralistic Emphasis in Ethics*, 17 J. PHIL., PSYCHOL. & SCI. METHODS 561 (1920); Sterling P. Lamprecht, *Some Political Implications of Ethical Pluralism*, 18 J. PHIL. 225 (1921); A.P. Brogan, *Objective Pluralism in the Theory of Value*, 41/3 INT’L J. ETHICS 287 (1931). Despite the similarities in Berlin’s theory and these articles, there is no evidence that Berlin knew of them. The three likely developed their theories independently. See Thorsen, *supra* note 14, at 8 (“It is of course possible, and even likely, that all three developed their theories independently of each other as neither Brogan nor Berlin seem to recognise Lamprecht’s earlier articles . . . Berlin himself seems to say so when he in a letter to his friend Jean Floud stated that pluralism was ‘[t]he only truth which I have ever found out for myself . . .’”). In fact, Berlin was more likely to credit his own ideas to others than to claim their work as his own. See Joshua Cherniss & Henry Hardy, *Isaiah Berlin*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* § 4.4 (Edward N. Zalta ed., 2006), available at <http://plato.stanford.edu/archives/sum2006/entries/berlin/> (“[T]here is no evidence that Berlin knew Lamprecht’s work, and Berlin’s tendency was more often to credit his own ideas to others than to claim the work of others as his own.”). Although Berlin did not originate the theory, he “developed pluralism and removed it from obscurity.” Thorsen, *supra* note 14, at 4. Now the idea of value pluralism is “most closely identified with the work of Sir Isaiah Berlin.” Maimon Schwarzschild, *Pluralism, Conversation, and Judicial Restraint*, 95 NW. U.L. REV. 961, 966 (2001).

essay, *Two Concepts of Liberty*.<sup>26</sup> In the essay, Berlin condemns monism in the strongest terms. Labeling it “a final solution,” he states it is, “responsible for the slaughter of individuals on the altars of the great historical ideals—justice or progress or emancipation of a nation or race or class, or even liberty itself, which demands the sacrifice of individuals for the freedom of society.”<sup>27</sup> In contrast, Berlin offers pluralism, which is a “truer and more humane ideal.”<sup>28</sup> In explaining why pluralism is truer, Berlin offers the basic concept of pluralism in a single sentence: “It is truer, because it does, at least, recognize the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another.”<sup>29</sup>

Statements of the basic elements of value pluralism have remained similar over time, whether made by Berlin or by others about his theory. Thus, in 1980, Berlin stated pluralism was, “the incommensurability and, at times, incompatibility of objective ends.”<sup>30</sup> George Crowder explained that value pluralism is a theory about moral values, “associated in particular with the late Isaiah Berlin, that fundamental human values are irreducibly plural and ‘incommensurable’, and that they may, and often do, come into conflict with one another, leaving us with hard choices.”<sup>31</sup> According to John Gray, value pluralism is the view “that fundamental human values are many, that they are often in conflict and rarely, if ever, *necessarily* harmonious, and that some at least of these conflicts are among incommensurables—conflicts among values for which there is no single, common standard of measurement or arbitration.”<sup>32</sup>

From these statements, one can derive the basic elements of value pluralism.<sup>33</sup> First, human values and goals are irreducibly many. Second, these values and goals have the potential to conflict; they may be incompatible. Third, these values and goals may be incommensurable. Fourth, these values and goals are objective.

First, that human values and goals are irreducibly many, may, at first blush, seem like an unnecessary statement. After all, does not pluralism, by

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<sup>26</sup> ISIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY*, *supra* note 21, at 118-72. In addition to the contribution to Berlin’s development of pluralism, this essay introduced Berlin’s significant dichotomy of positive and negative liberty. It is Berlin’s “most famous essay.” Chandran Kukathas, *What’s the Big Idea?*, *REASON MAGAZINE*, Nov. 1996, at 67, available at <http://204.200.197.158/9611/bk.kukathas.shtml>.

<sup>27</sup> BERLIN, *supra* note 26, at 167.

<sup>28</sup> *Id.* at 171.

<sup>29</sup> *Id.*

<sup>30</sup> ISIAH BERLIN, *Alleged Relativism in Eighteenth-Century European Thought*, in *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* 87 (Henry Hardy ed., 1990).

<sup>31</sup> CROWDER, *supra* note 13, at 2.

<sup>32</sup> JOHN GRAY, *ISIAH BERLIN* 6 (1996).

<sup>33</sup> *See, e.g.*, Thorsen, *supra* note 14, at 5-7.

definition, involve multiple items, in this case values and goals? Berlin invokes the word “irreducible” in opposition to the theory that all values are really parts of one “super value.” Under classic utilitarianism, all values can be collapsed together and judged by the scale of “utility.”<sup>34</sup> Berlin, however, denies the proposition that values are collapsible: “To say that in some ultimate, all-reconciling, yet realizable synthesis duty *is* interest, or individual freedom *is* pure democracy or an authoritarian state, is to throw a metaphysical blanket over either self-deceit or deliberate hypocrisy.”<sup>35</sup> For Berlin, the multiple goals and values are truly distinct; they do not just appear that way to those of us not sophisticated enough to understand the commonalities.

Second, multiple human values and goals have the potential to conflict. For Berlin, “[t]he notion of the perfect whole, the ultimate solution, in which all good things coexist, seems . . . to be . . . conceptually incoherent.”<sup>36</sup> Indeed:

It is a commonplace that neither political equality nor efficient organization nor social justice is compatible with more than a modicum of individual liberty, and certainly not unrestricted *laissez-faire*; that justice and generosity, public and private loyalties, the demands of genius and the claims of society, can conflict violently with each other. And it is no great way from that to the generalization that not all good things are compatible, still less all the ideals of mankind.<sup>37</sup>

Berlin concludes that “[s]ome among the Great Goods cannot live together.”<sup>38</sup>

Third, Berlin asserts that some of the conflicts are between or among incommensurable values or goals. Incommensurability is, perhaps, the most significant aspect of pluralism, and has led to heated debates over how it should be interpreted. The best interpretation of what Berlin meant by incommensurable is not measurable on a common scale. In describing Herder’s ideas, Berlin stated, “[v]alues, qualities of character, are not commensurable: an order of merit which presupposes a single measuring-rod.”<sup>39</sup> Berlin’s editor, Henry Hardy, stated that Berlin’s concept of incommensur-

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<sup>34</sup> See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 14-15 (Kitchener ed., Batoche Books, 2000) (1781), available at <http://www.efm.bris.ac.uk/het/bentham/morals.pdf> (proclaiming that “utility” is a scale that can be used to judge “every action whatsoever.”).

<sup>35</sup> BERLIN, *supra* note 26, at 171.

<sup>36</sup> ISAIAH BERLIN, *The Pursuit of the Ideal*, in THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS, *supra* note 30, at 13.

<sup>37</sup> BERLIN, *supra* note 26, at 167.

<sup>38</sup> BERLIN, *supra* note 36.

<sup>39</sup> ISAIAH BERLIN, *The Decline of Utopian Ideas in the West*, in THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS, *supra* note 30, at 39.

ability is that values or goals are, “not jointly measurable on a common scale . . . Each value is its own yardstick, and there is no independent measuring rod that can be used to referee clashes between them.”<sup>40</sup> Incommensurability assures difficulty in choosing between or among incompatible values or goals. There is no common value rod or scale with which to weigh one value against another in order to assist in making a principled choice between or among them.

Finally, Berlin contends that the values and goals that form part of his pluralism are “objective.”<sup>41</sup> By that, Berlin means that the values and goals are part of what it means to be a human being. “Objective” for Berlin does not mean that God or other causes outside of human beings determine the values, but rather “that we cannot help accepting these basic principles because we are human, as we cannot help (if we are normal) seeking warmth rather than cold, truth rather than falsehood, to be recognized by others for what we are rather than to be ignored or misunderstood.”<sup>42</sup>

### C. *Significant Issues in Value Pluralism*

Value pluralism, of course, raises numerous questions, many of which have been debated at length in scholarly literature. Three issues are most relevant to our present purpose. First, multiple theorists have charged Berlin with the dreaded specter of relativism. Second, and perhaps most significantly, what, exactly, does the concept of “incommensurability” entail? Finally, the ultimate question: How does one choose among alternatives?

#### 1. Alleged Relativism in Berlinian Pluralism?

Relativism is a charge that has been leveled at Berlin’s pluralism for decades.<sup>43</sup>

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<sup>40</sup> Henry Hardy, *Isaiah Berlin’s Key Idea*, 11 *PHILOSOPHERS’ MAG.* 15, 15-16 (2000).

<sup>41</sup> See, e.g., ISAIAH BERLIN, *European Unity and its Vicissitudes*, in *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS*, *supra* note 30.

<sup>42</sup> *Id.* at 204. Henry Hardy elaborates:

[H]uman nature sets certain definite limits to what is desirable, and makes certain key requirements that any decent, civilised culture will need to satisfy. Cruelty is out, for instance, as is the arbitrary use of force. So, probably, although this is more controversial, is the kind of neglect of basic human rights characteristic of some modern regime . . . Berlinian pluralists also believe that the values between which we make choices are a real part of human nature, not subjective inventions unrelated to our shared needs . . .

Hardy, *supra* note 40, at 15.

<sup>43</sup> See, e.g., Leo Strauss, *Relativism*, in *RELATIVISM AND THE STUDY OF MAN* (Helmut Schoeck & James Wiggins eds., 1961).

He consistently rejected that label.<sup>44</sup> For Berlin, relativism seems to entail people or groups with such radically subjective values or goals that understanding and communication with others is impossible. Each person or group (perhaps distant in time from other people or groups) is so ensconced in their various wholly self-created values or goals that they cannot understand one another.<sup>45</sup> As a result, communication (even if it were physically an option) would not be possible.

The radically subjective values and goals that constitute relativism come about because, “the ideas and attitudes of individuals or groups are inescapably determined by varying conditioning factors, say, their place in the evolving social structures of their societies, or the relations of production, or genetic, psychological or other causes, or combinations of these . . . .”<sup>46</sup> Thus, for Berlin, the epitome of a relativist statement is, “I prefer coffee, you prefer champagne. We have different tastes. There is no more to be said.”<sup>47</sup> Or, more to the point because partially in an ethical context, “I like my coffee with milk and you like it without; I am in favor of kindness and you prefer concentration camps”—each of us with his own values, which cannot be overcome or integrated.<sup>48</sup>

In these examples, there are two opposing viewpoints, and because the viewpoints are entirely subjective, there is no point in discussing them. Berlin held that relativism was a doctrine that “the judgment of a man or a group, since it is the expression or statement of a taste, or emotional attitude or outlook, is simply what it is, with no objective correlate which determines its truth or falsehood.”<sup>49</sup> If so, “[i]t follows that to speak of truth or falsehood on these assumptions is literally meaningless.”<sup>50</sup>

Berlin defends pluralism from this charge by asserting that the values and ends that constitute his pluralism are not radically subjective, but objective. Berlin posits a common core of human values and goals based on our fundamental human nature:

What has emerged from the recent holocausts? Something approaching a new recognition in the west that there are certain universal values which can be called constitutive of human beings as such.

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<sup>44</sup> See, e.g., BERLIN, *supra* note 36, at 10-12; BERLIN, *supra* note 30.

<sup>45</sup> BERLIN, *supra* note 36, at 10-11.

<sup>46</sup> BERLIN, *supra* note 30, at 77.

<sup>47</sup> BERLIN, *supra* note 36, at 11.

<sup>48</sup> ISAIAH BERLIN, *My Intellectual Path*, in *THE FIRST AND THE LAST* 50 (1999).

<sup>49</sup> BERLIN, *supra* note 30, at 80.

<sup>50</sup> *Id.*

... What is [the essential nature of man]? Physically it is not too difficult to say ... But there are also certain moral properties which enter equally deeply into what we conceive of as human nature. If we meet someone who merely disagrees with us about the ends of life, who prefers happiness to self-sacrifice, or knowledge to friendship, we accept them as fellow human beings, because their notion of what is an end, the arguments they bring to defend their ends, and their general behaviour, are within the limits of what we regard as being human. But if we meet someone who cannot see why (to take a famous example) he should not destroy the world in order to relieve a pain in his little finger, or someone who genuinely sees no harm in condemning innocent men, or betraying friends, or torturing children, then we find we cannot argue with such people, not so much because we are horrified as because we think them in some way inhuman—we call them moral idiots. They are as much outside the frontiers of humanity as creatures who lack some of the minimum physical characteristics that constitute human beings.<sup>51</sup>

Thus, not every subjective value or goal that happens to enter into a human being's mind qualifies to take part in Berlin's pluralism. Only those goals that are part of human nature are acceptable: "That is why pluralism is not relativism—the multiple values are objective, part of the essence of humanity rather than the arbitrary creation of men's subjective fancies."<sup>52</sup> It is not the case that any moral value or goal is just as good as any other. Some moral values and goals are simply beyond the "frontiers of humanity." Thus, a core of human values and goals, moral understanding and

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<sup>51</sup> BERLIN, *supra* note 41, at 202-04. There are two potential problems with Berlin's use of a fundamental human nature to defend pluralism. First, his conception of human nature was not that it is fixed and unalterable, as it is for many theorists who use the term. Instead, Berlin believed that human nature was somewhat malleable. This could lead to the objection that a malleable human nature cannot lead to objective values and goals. However, at the same time, Berlin held that common ground between human beings must exist. Thus, he thought, "that there is not a fixed, and yet there is a common, human nature." Isaiah Berlin, *A Letter on Human Nature*, 51 N.Y. REV. BOOKS 14, 26 (Sept. 23, 2004). Therefore, even if there are variations, there is always commonality as well. This allowed Berlin to find something "objective" in human nature:

The need for food is universal, but the way I satisfy it, the particular foods I crave, the steps I take to obtain them will vary; so with all the other basic needs—my mythology, metaphysics, religion, language, gestures will widely vary, but not the fact that these are attempted ways of trying to explain myself, to find myself at home in, a puzzling and possibly unfriendly environment, or, indeed, world.

*Id.* The second potential problem is practical, not theoretical. How does one determine what basic human needs are? In other words, what is inside, and what is outside, of "the frontiers of humanity"? Berlin was certainly aware of this issue:

I do believe that there is a plurality of values, which men can and do seek, and that these values differ. There is not an infinity of them: the number of human values, of values which I can pursue while maintaining my human semblance, my human character is finite—let us say 74, or perhaps 122, or 26, but finite, whatever it may be.

BERLIN, *supra* note 48, at 50-51. The difficulty in determining what is included in fundamental values or goals, though significant, does not undermine Berlin's basic theoretical point that his pluralism consists of values and goals that are based on fundamental human nature and, thus, objective.

<sup>52</sup> BERLIN, *supra* note 48, at 52.

conversation (and, importantly, reasoning) are possible because certain values and goals are excluded.<sup>53</sup>

Therefore, Berlin does not believe, as does the relativist, that “anything goes.” Thorsen contrasts the pluralist and relativist view of morality as follows: “It is perhaps worth noticing that the main difference between the pluralist and the relativist is that the former does not translate his scepticism towards grand theories of morality into scepticism towards morality proper.”<sup>54</sup>

Nevertheless, Berlinian pluralism could be seen as indistinct from relativism, and it all depends on the meaning of the word “incommensurable.”

## 2. What Does Berlin Mean by “Incommensurability”?

Incommensurability has been labeled “one of the knottiest dimensions of Berlin’s pluralism . . . which has been open to diverging interpretations.”<sup>55</sup> Part of the difficulty in understanding Berlin’s concept of incommensurability results from the format in which he wrote—typically short essays about other theorists. Berlin did not generally write systematic accounts of his own theories.<sup>56</sup> Additionally, Berlin used the concept, “not

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<sup>53</sup> Henry Hardy summarizes Berlin’s defense against relativism:

This doesn’t mean that we must go to the other extreme and say that any aspirant code of values is as respectable as any other: a position of that kind is sometimes called ‘relativism’, though this is a dangerously slippery and ambiguous word. Pluralists are natural advocates of the maximum of toleration and variety, certainly, but they also recognise that human nature sets certain definite limits to what is desirable, and makes certain key requirements that any decent, civilised culture will need to satisfy. Cruelty is out, for instance, as is the arbitrary use of force.

.....

Berlinian pluralists also believe that the values between which we make choices are a real part of human nature, not subjective inventions unrelated to our shared needs (which is the strong relativist view). That is why Berlin himself sometimes described his view as ‘objective pluralism’, to make clear that it occupied a genuine third position between monism and relativism.

Hardy, *supra* note 40.

<sup>54</sup> Thorsen, *supra* note 14, at 10.

<sup>55</sup> Cherniss & Hardy, *supra* note 25, § 4.4.

<sup>56</sup> On this issue, the late philosopher Bernard Williams, in his eulogy of Berlin, is instructive: Analytic philosophy has been much taken up with defining things. But as Nietzsche said—not actually one of Isaiah’s favorite thinkers—“one can only define things that have no history.” Because that is true, all the things that Isaiah found most interesting—liberty and other political ideals, Romanticism, nationalism, ideas of individual creativity—such things do not have definitions or analyses but only complex and tangled histories, and to say what these things are, one must tell some of their history. This was what Isaiah believed, and it was expressed straightforwardly in the style of his work, in which he offered narration rather than dialectic, preferred tendencies to laws, and, in many cases, liked illustrative details best of all. This was not just a manner or an idiosyncrasy, but expressed a quite basic idea, and it may be because of this that people have been frustrated in trying to get hold of some essence

without a certain degree of recklessness.”<sup>57</sup> Finally, it is entirely possible that Berlin’s idea of incommensurability changed, at least slightly, during the course of his life. Nevertheless, it is possible to reach a general comprehension of Berlin’s concept of incommensurability.

During the course of his various essays, Berlin made many statements about the concept of incommensurability. For example, he explained that “[v]alues, qualities of character, are not commensurable: an order of merit which presupposes a single measuring rod.”<sup>58</sup> Or: “incommensurability, the differences in the criteria by which they could be understood and judged.”<sup>59</sup> Or alternatively: “These visions differ with each successive social whole—each has its own gifts, values, modes of creation, incommensurable with one another: each must be understood on its own terms—understood, not necessarily evaluated.”<sup>60</sup> Or in another description: “Each phase is incommensurable with the others, since each lives by its own light and can be understood only in its own terms, even though these terms form a single intelligible process, which is not wholly, or, perhaps, even largely, intelligible to us.”<sup>61</sup>

What is one to make of this? Fortunately, Joshua Cherniss and Henry Hardy provide a helpful taxonomy of the potential versions of incommensurability in Berlin’s value pluralism. According to Cherniss and Hardy, three versions of incommensurability exist: weak, moderate, and radical.<sup>62</sup> Weak incommensurability “holds that values cannot be ranked quantitatively, but can be arranged in a qualitative hierarchy that applies consistently in all cases.”<sup>63</sup> Moderate incommensurability “holds that there is no single, ultimate scale or principle with which to measure values—no ‘moral slide-rule’ or universal unit of normative measurement.”<sup>64</sup> Finally, radical incommensurability holds “that it is impossible to make judgments between values on a case-by-case basis, or that values, just because they can’t be

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of his thought. Coming to his writings, still more to Isaiah himself, with an academic or journalistic receptacle in which they hoped to pack his principal ideas, they usually found that they had come out with too little to fill it, or too much to get into it. He, and the myriad images in his head of past worlds, of people living and dead and their thoughts, were not the right shape for the receptacles.

BERLIN, *supra* note 48, at 122-23.

<sup>57</sup> Thorsen, *supra* note 14, at 6.

<sup>58</sup> BERLIN, *supra* note 39, at 39.

<sup>59</sup> ISAIAH BERLIN, *Giambattista Vico and Cultural History*, in *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS*, *supra* note 30, at 55.

<sup>60</sup> BERLIN, *supra* note 36, at 9.

<sup>61</sup> BERLIN, *supra* note 30, at 75.

<sup>62</sup> Cherniss & Hardy, *supra* note 25, § 4.4.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

compared or ranked in terms of one master-value or formula, can't be compared or deliberated between at all."<sup>65</sup>

Cherniss and Hardy opine that Berlin clearly goes beyond weak incommensurability, but find evidence in Berlin's writing to support both the moderate and radical versions of incommensurability.<sup>66</sup> The best understanding of Berlin is that he adopted the moderate version of incommensurability, under which there is no single ultimate scale or principle with which to measure values. No single value or goal is always paramount; one value or goal does not always trump others: "values . . . [are] incapable . . . of being ordered in a timeless hierarchy."<sup>67</sup> As George Crowder notes, the moderate version of incommensurability holds that values are unrankable in the abstract.<sup>68</sup> For example, in Berlin's understanding, neither liberty nor equality, as an abstract principle, was universally preeminent: "Equality had to give way often to liberty, but so did liberty sometimes to equality."<sup>69</sup> Yet, selecting when, say, equality trumped liberty was not a random act. Berlin noted that the selection between or among the options is not irrational: "[I]n the end, it is not a matter of purely subjective judgment."<sup>70</sup> What allowed one to rationally choose when one value was more significant than the other was the presence of context—the circumstances surrounding the decision.

But could Berlinian pluralism be viewed as adopting radical incommensurability? Oxford philosopher John Gray famously argued that Berlin embraced radical incommensurability. Gray attributes to Berlin the view that incommensurability means that reason is not applicable: "Such choice is, for Berlin, choice among goods that are not only distinct and rivalrous but sometimes incommensurable: it is radical choice, ungoverned by reason."<sup>71</sup> Thus, Berlin's value pluralism leaves one with "only a groundless decision as to how to act[.]"<sup>72</sup> Gray concludes, "By incommensurability, then, is meant incomparability—the incomparability of valuable cultural objects, activities, reasons for action or forms of life."<sup>73</sup>

If this indeed is Berlin's conception of incommensurability, it is difficult to see how his value pluralism is distinct from relativism, despite his

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> BERLIN, *supra* note 30, at 79.

<sup>68</sup> CROWDER, *supra* note 13, at 52.

<sup>69</sup> Noel Annan, *Eulogy*, in *THE FIRST AND THE LAST*, *supra* note 48, at 85 (discussing Berlin's understanding of the relationship between liberty and equality).

<sup>70</sup> BERLIN, *supra* note 36, at 18.

<sup>71</sup> GRAY, *supra* note 32, at 23.

<sup>72</sup> *Id.* at 49.

<sup>73</sup> *Id.* at 53.

many protestations.<sup>74</sup> If reason has no place in deciding among incommensurable values or goals, then the choice is governed by mere whim or taste. “I like this option, so I will choose it.” The decision is not based on anything beyond my subjective desires, and there is nothing to appeal to outside of those subjective desires.

If Gray is correct, then Berlin’s pluralism is not founded on reason and is unworthy as a proper theory to use in analyzing the tort system.<sup>75</sup> Fortunately, “Isaiah Berlin interpreted by John Gray may tell us more about Gray than about Berlin.”<sup>76</sup> In reaching the conclusion that Berlin’s incommensurability is radical, Gray cites not Berlin, but Joseph Raz. Gray states, “We may begin with Raz’s observation that to say of two values that they are incommensurable is to say that they cannot be the subject of comparison.”<sup>77</sup> For Raz (and Gray claims for Berlin), “if two options are incommensurate then reason has no judgment to make concerning their relative value.”<sup>78</sup> Thus, incommensurability “marks the inability of reason to guide our action

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Gray’s case that Berlin adhered to the radical view of incommensurability is flawed. First, Gray relies on Raz, as opposed to Berlin, in discussing Berlin’s theory of incommensurability. Second, Berlin did not believe that incommensurability led to relativism: “nor does incommensurability entail relativism.”<sup>80</sup>

However, by far the most significant piece of evidence against Gray is the fact that Berlin explicitly repudiated a view of incommensurability almost identical to the view Gray attributes to him. In 1994, George Crowder wrote, “Choices among incommensurable values are ‘underdetermined by reason’ or contain an element of rational ‘indeterminacy.’”<sup>81</sup> He acknowl-

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<sup>74</sup> Gray, however, did not concede that interpreting Berlin’s idea of incommensurability as radical made value pluralism indistinct from relativism. *Id.* at 62, 149-50.

<sup>75</sup> A chief feature of law is the necessity of justifying decisions with reason. Incomparability removes that possibility. See Matthew Adler, *Law and Incommensurability: Introduction*, 146 U. PA. L. REV. 1169, 1172 (1998). On February 6 and 7, 1998, the University of Pennsylvania Law School hosted a symposium on “Law and Incommensurability.” The presenters did not agree about much, but they did agree that incomparability was not consistent with rational choice: “[A]s I read the articles, each of us believes in, or at least takes as plausible, a comparativist view . . . that comparability is a necessary condition for justified choice. On this view, justified choice between incomparables is impossible . . .” *Id.*

<sup>76</sup> Kukathas, *supra* note 26, at 66.

<sup>77</sup> GRAY, *supra* note 32, at 49 (citing JOSEPH RAZ, *THE MORALITY OF FREEDOM* 335-45 (1986)).

<sup>78</sup> *Id.* at 50.

<sup>79</sup> *Id.* at 52.

<sup>80</sup> BERLIN, *supra* note 30, at 85.

<sup>81</sup> George Crowder, *Pluralism and Liberalism*, 42 POL. STUD. 293, 295 (1994).

edged in a footnote his reliance on Joseph Raz and Gray's earlier work.<sup>82</sup> Berlin, writing with Bernard Williams, responded:

In his talk of 'underdetermination by reason', Crowder seems unsure of which of two quite different views about potentially conflicting values he is ascribing to the pluralist: that it is not a requirement of reason that there should be one value which in all cases prevails over the other; or that in a particular case, reason has nothing to say (*i.e.*, there is nothing reasonable to be said) about which should prevail over the other. Pluralists—we pluralists, at any rate—see the first of these views as obviously true, and the second as obviously false.<sup>83</sup>

Thus, it is not the case that Berlin's view of incommensurability is equivalent to incomparability. Reason does have a role in deciding between or among values or goals. Thorsen argues, "the choice between abstract values (for instance compassion and personal want-satisfaction) is 'underdetermined by reason,' it does not follow that choices between alternative courses of action in specific settings are always irrational."<sup>84</sup> Choices between alternatives representing different values do not occur in a vacuum, but are rather guided by context.<sup>85</sup> For example:

My choice between donating a sum of money to charity and spending the same sum on myself could, for instance, be resolved by examining what situation I find myself in. If I really need the money to satisfy some basic need of my own, it would not be as bad to keep it to myself, than if I instead use it to obtain some ridiculous luxury item.<sup>86</sup>

Based on Berlin's reply, Crowder appears to have modified his view. He states, "Reasoned ranking of plural values is impossible in the abstract, but apparently unproblematic in particular cases. What makes the difference is evidently the presence in particular cases of a concrete context for choice."<sup>87</sup> Crowder arrives at the conclusion that incommensurable values are not incomparable, but only unrankable in the abstract.<sup>88</sup> In Berlin's thinking, context is the link that enables ranking of plural values in particular cases.

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<sup>82</sup> Thorsen, *supra* note 14, at 17.

<sup>83</sup> Isaiah Berlin & Bernard Williams, *Pluralism and Liberalism: A Reply*, 42 POL. STUD 306, 307 (1994).

<sup>84</sup> Thorsen, *supra* note 14, at 18. *See also* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 811 (1994) ("Both people and societies do make choices among incommensurable goods, and they do so on the basis of reasons. Indeed, this is a principal task for practical reason, especially in law.").

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> George Crowder, *Communications*, 44 POL. STUD. 649, 650 (1996).

<sup>88</sup> CROWDER, *supra* note 13.

Thus, it appears Berlin held the moderate view of incommensurability. There is no single, ultimate scale or principle with which to measure values; there is no “moral slide-rule” or universal unit of normative measurement. One value or goal does not always trump other values or goals. Values are “incapable . . . of being ordered in a timeless hierarchy.”<sup>89</sup> On the other hand, choices among values or goals are not a matter of pure subjective preference. For, “in the end, it is not a matter of purely subjective judgement.”<sup>90</sup> Reason has a role to play. This, of course, raises the question of how, under Berlinian pluralism, one chooses.

### 3. How to Choose Among Options?

If one is faced with a decision between genuinely different, incompatible paths (the road, indeed, diverges), both of which are valid, fundamentally human pursuits and incommensurable (there is no common unit of measurement), what is to be done? How does one choose between being a priest or a husband and father? Certainly, Berlin anticipated that his readers would want to know his conception of how to choose. He even raised the question himself: “How do we choose between possibilities? What and how much must we sacrifice to what? There is, it seems to me, no clear reply.”<sup>91</sup>

However, he does offer further guidance:

But the collisions, even if they cannot be avoided, can be softened. Claims can be balanced, compromises can be reached: in concrete situations not every claim is of equal force—so much liberty and so much equality; so much for sharp moral condemnation, and so much for understanding a given human situation; so much for the full force of the law, and so much for the prerogative of mercy; for feeding the hungry, clothing the naked, healing the sick, sheltering the homeless. Priorities, never final and absolute must be established.

So we must engage in what are called trade-offs—rules, values, principles must yield to each other in varying degrees in specific situations. Utilitarian solutions are sometimes wrong, but, I suspect, more often beneficent. The best that can be done, as a general rule, is to main-

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<sup>89</sup> BERLIN, *supra* note 30, at 79.

<sup>90</sup> BERLIN, *supra* note 36, at 18.

<sup>91</sup> *Id.* at 17. Berlin’s remarks on this issue are strikingly similar to Cass Sunstein’s in his description of “Choices Among Incommensurable Goods”:

How are choices made among incommensurable goods? How can those choices be assessed? The first point is that there is no algorithm or formula by which to answer this question. If we are looking for a certain sort of answer—the sort characteristic of some believers in commensurability—we will be unable to find it. Relatively little can be said in the abstract.

Sunstein, *supra* note 84, at 856.

tain a precarious equilibrium that will prevent the occurrence of desperate situations, of intolerable choices . . . .<sup>92</sup>

For Berlin, in establishing priorities, one must consider all factors: “All we can ask for is that none of the relevant factors be ignored.”<sup>93</sup>

Two themes emerge from Berlin’s comments on choosing between or among alternatives. First, he emphasizes the importance of the concrete situation: “in concrete situations not every claim is of equal force;”<sup>94</sup> “principles must yield to each other in varying degrees in specific situations.”<sup>95</sup> And most significantly: “The concrete situation is almost everything.”<sup>96</sup> This explains, at least partially, Berlin’s statement that there is no clear reply to the question “what is to be done?” The question is abstract. The question can only be answered in a specific context.

Second, Berlin placed a great deal of importance on the avoidance of human suffering. In discussing the issue of choice, Berlin stated, “The first public obligation is to avoid extremes of suffering.”<sup>97</sup> He also stated that the best that could be done was to “prevent the occurrence of desperate situations, of intolerable choices.”<sup>98</sup> This reflects Berlin’s enormous sensitivity.

In summary, one is left with no clear guidance about how to choose among options in the abstract, the idea that the concrete situation is “almost everything,” and that a priority should be given to avoiding extreme suffering. Berlin is aware that this is not particularly exciting or provocative: “This may seem a very flat answer, not the kind of thing that the idealistic young would wish, if need be, to fight and suffer for, in the cause of a new and nobler society.”<sup>99</sup> Moreover, Berlin acknowledges that unified theories are very appealing: “There is little need to stress the fact that monism, and faith in a single criterion, has always proved a deep source of satisfaction both to the intellect and to the emotions.”<sup>100</sup>

However, Berlin defends his theory against this potential lack of excitement: “Yet if there is some truth in this view, perhaps that is sufficient.”<sup>101</sup> Quoting an “eminent American philosopher,”<sup>102</sup> Berlin states, “[t]here is no *a priori* reason for supposing that the truth, when it is discov-

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<sup>92</sup> BERLIN, *supra* note 36, at 17-18.

<sup>93</sup> *Id.* at 18.

<sup>94</sup> *Id.* at 17.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 18.

<sup>97</sup> *Id.* at 17.

<sup>98</sup> BERLIN, *supra* note 36, at 18.

<sup>99</sup> *Id.*

<sup>100</sup> BERLIN, *supra* note 30, at 170.

<sup>101</sup> BERLIN, *supra* note 36, at 19.

<sup>102</sup> He appears to be referring to C.I. Lewis. *Id.*

ered, will necessarily prove interesting.”<sup>103</sup> Thus, Berlin concludes, “[i]t may be enough if it is truth, or even an approximation to it; consequently I do not feel apologetic for advancing this.”<sup>104</sup>

## II. THE TORT SYSTEM

The most significant difficulty facing a torts pluralist is how to conceive the tort system. How do the rationales fit together? What is the relationship among them? Based on his value pluralism, a Berlinian framework for torts would consist of four propositions. First, the torts rationales are irreducibly diverse. It is not possible to collapse the rationales together because each of them represents a truly distinct idea. Second, the torts rationales are objective or fundamentally human. The traditional torts rationales correspond to basic human needs and none of them are outside the “frontier of humanity.” Third, the torts rationales have the potential to be incompatible, or conflict with each other. Finally, the torts rationales are incommensurable: not jointly measurable on a common scale. The first two propositions seem neither complex nor controversial, so I will address them briefly before turning to the significant issues: the potential incompatibility and incommensurability of the torts rationales and how to choose among them.

### A. *Diverse, Objective Rationales*

That the torts rationales are irreducibly diverse seems axiomatic. In all of the scholarly work on tort theory, I am not aware of any argument that the selection among torts rationales is irrelevant because they are really the same. Instead scholars explore in great detail, the differences among the theories (often coupled with arguments about how a favored theory is the best).

And the theories are different. Scholars advance three principal rationales for the tort system: deterrence, compensation, and corrective justice.<sup>105</sup> The deterrence rationale holds that tort law’s function is to prevent accidents by threatening potential wrongdoers with civil liability or the inability to recover damages. For example, a potential tortfeasor will drive more carefully because she wants to avoid paying money for harm she might

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> DEWEES ET AL., *supra* note 2, at 5-10 (describing deterrence, compensation, and corrective justice as “the three major normative perspectives on tort law”). See also GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 24-28, 44 (1970).

otherwise cause. Proponents of the deterrence rationale seek to ensure that liability rules and defenses induce both efficient levels of care and efficient levels of activity.<sup>106</sup>

According to the compensation rationale, tort law is designed to compensate victims of tortious injury. The compensation theory is based on the needs of the victims. Proponents of compensation often view tort law as a type of insurance. As such, it is sometimes referred to as “loss spreading,” “loss distribution,” or even “distributive justice.”<sup>107</sup> Proponents argue “accident costs should be borne collectively, not individually, and that the tort system should be evaluated in terms of its capacity to spread risk and provide meaningful, expeditious, and low-cost compensation or insurance to the victims of these activities.”<sup>108</sup>

According to the corrective justice rationale, the tort system’s purpose is not to deter accidents or compensate victims whose injuries were not caused by the morally culpable acts of another moral agent. The focus of corrective justice is in the past, on the moral obligation of the tortfeasor to rectify the victim’s injury. Proponents of corrective justice argue that the law requires “a person whose morally culpable behavior has violated another’s autonomy to restore the latter as nearly as possible to his or her pre-injury status.”<sup>109</sup>

Thus, there are several fundamental differences among the competing rationales. Deterrence and compensation are consequentialist rationales. A consequentialist justification focuses on how tort law can be used to further an independent social or public policy goal. On the other hand, corrective justice is a deontological rationale, focusing on the vindication of individual moral rights. Corrective justice is not concerned with consequences or effects, as are deterrence and compensation. It is based on the idea that an act is right or wrong “in itself.”<sup>110</sup> Deterrence and compensation are concerned with the good of society as a whole. Corrective justice scholars, on the other hand, focus on doing justice between the parties, viewing anything further as illegitimate. There are differences between deterrence and compensation as well. Deterrence theorists are concerned with preventing accidents from occurring while compensation theorists focus on ameliorating the consequences of accidents once they occur. These three theories do not collapse into one another.

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<sup>106</sup> DEWEES ET AL., *supra* note 2, at 5.

<sup>107</sup> For a brief discussion of this terminology, see Jeffrey O’Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137, 146 n.58 (1999).

<sup>108</sup> DEWEES ET AL., *supra* note 2, at 6.

<sup>109</sup> *Id.* at 8.

<sup>110</sup> The distinction between consequentialism and deontology is familiar from the subject of ethics. See, e.g., JAMES RACHELS, *THE ELEMENTS OF MORAL PHILOSOPHY*, chs. 7-10 *passim* (1986).

Additionally, to be a legitimate part of Berlin's pluralism, values and goals must be "objective" or "fundamentally human." In Hardy's elaboration on this concept, he mentioned several examples that were beyond the "frontier of humanity:" cruelty, arbitrary use of force, and possibly the neglect of basic human rights "characteristic of some modern regimes."<sup>111</sup> None of the traditional torts rationales seem problematic from this perspective. The three traditional torts rationales are nothing like the examples of cruelty, arbitrary use of force, and neglect of human rights. The rationales seem to (at least loosely) correlate with very benign human impulses. Deterrence is an impulse toward security, the prevention of bodily harms. Compensation is an impulse toward mercy (and perhaps equality), the provision of relief for human suffering. Corrective justice is an impulse toward fairness, penalizing some for wrongful behavior and providing just desserts to others. These impulses, far from being beyond the frontier of humanity, are among humanity's most noble. All three rationales may be a legitimate part of Berlinian pluralism.

#### B. *The Potential Incompatibility of Torts Rationales*

The potential incompatibility of torts rationales is a more complex topic.<sup>112</sup> As a threshold matter, for Berlin, values and goals have a potential, but not a necessary, incompatibility: "And, of course, we must not dramatise the incompatibility of values—there is a great deal of broad agreement among people in different societies over long stretches of time about what is right and wrong, good and evil."<sup>113</sup> Indeed, in the torts context, there is a considerable amount of harmony among the rationales. At a general level of abstraction, in particular, the torts rationales work together very well. A tort judgment in favor of a plaintiff takes money away from a defendant (often

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<sup>111</sup> Hardy, *supra* note 40, at 16.

<sup>112</sup> Ronald Dworkin argues that values and goals may not be incompatible after all. Using the example of liberty and equality, Dworkin posits that the conflict may be nothing more than a misconception based on faulty definitions. He uses this example to call into question the idea of incompatibility generally. See Ronald Dworkin, *Do Liberal Values Conflict?*, in *THE LEGACY OF ISAIAH BERLIN* 73-90 (Mark Lilla, Ronald Dworkin & Robert Silvers eds., 2001); Ronald Dworkin, *Do Values Conflict? A Hedgehog's Approach*, 43 *ARIZ. L. REV.* 251 (2001); and RONALD DWORKIN, *JUSTICE IN ROBES* 105-26 (2006). Several scholars contend Dworkin's argument is based on a misinterpretation of Berlin. See Avery Plaw, *Why Monist Critiques Feed Value Pluralism: Ronald Dworkin's Critique of Isaiah Berlin*, *SOC. THEORY & PRAC.*, Jan. 2004, at 105-26; Bernard Williams, *Liberalism and Loss*, in *THE LEGACY OF ISAIAH BERLIN*, at 91-103 (Mark Lilla, Ronald Dworkin & Robert Silvers eds., 2001). Regardless of Dworkin's success with one set of values, other sets of values and goals can still be incompatible. The torts rationales are a good example.

<sup>113</sup> BERLIN, *supra* note 36, at 18.

a corporation and/or an entity covered by insurance<sup>114</sup>) and provides that money to an injured victim. In so doing, the court provides a safety incentive to the defendant (in the form of a monetary penalty) not to behave in a particular manner, as well as an incentive to other potential defendants not to behave in a similar manner. The court provides compensation to an injured plaintiff, often from a large corporation or insurance company. Finally, this transfer of money is used to correct the wrongful behavior of the defendant toward the plaintiff.

Based on this harmony, one of the few pluralists in torts scholarship, Gary Schwartz, advocated what he called a “mixed theory” of torts.<sup>115</sup> Schwartz rejected a monistic understanding of torts rationales and urged scholars to focus on the common ground between deterrence and corrective justice.<sup>116</sup> For instance, Schwartz noted that the Hand formula interpreting the negligence standard has long been championed by economic (deterrence) scholars.<sup>117</sup> Schwartz stated that the formula could be seen as designed to encourage efficient investments in safety and risk reduction. Yet, Schwartz argued the Hand formula also makes sense from a justice perspective:

Take the defendant whose conduct creates a risk to others that can be measured as \$100—a risk which the defendant could prevent by incorporating a \$50 precaution. If the defendant fails to adopt this precaution and hence acts negligently, the defendant’s choice shows that he attaches a greater weight to his own interests than to the interests of others. By ranking his

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<sup>114</sup> See, e.g., Robert L. Rabin, *Law for Law’s Sake*, 105 YALE L.J. 2261 (1996) (citing STEVEN K. SMITH ET AL., BUREAU OF JUSTICE STATISTICS, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: TORT CASES IN LARGE COUNTRIES 4 (1995)) (“Organizations are defendants in 96% of toxic substance cases; 99% of products liability cases; 86% of premises liability cases; and 73% of medical malpractice cases.”); Elihu Inselbuch, *Contingent Fees and Tort Reform: A Reassessment and Reality Check*, 64 L. & CONTEMP. PROBS. 175, 190 (2001) (“[M]ost tort defendants are insured”).

<sup>115</sup> Schwartz, *supra* note 2. Other interesting pluralist theory pieces exist. See, e.g., Mark Geistfeld, *Economics, Moral Philosophy, and the Positive Analysis of Tort Law*, in PHILOSOPHY AND THE LAW OF TORTS 250-75 (Gerald J. Postema ed., 2001); Bruce Chapman, *Pluralism in Tort and Accident Law*, in PHILOSOPHY AND THE LAW OF TORTS, at 276-321 (Gerald J. Postema ed., 2001). Although Alan Calnan is more of a monist, his concept of corrective justice has an intriguing overlap with distributive justice. See, e.g., Alan L. Calnan, *Litigation and Compensation: Distributive and Corrective Justice Issues in Contemporary Tobacco Litigation*, 27 SW. U. L. REV. 577, 601 (1998) (“While distributive and corrective justice are different forms of justice, they are not necessarily applied independently of each other. In fact, insofar as the law is concerned, the two forms substantially overlap.”).

<sup>116</sup> Schwartz dismissed compensation as an independent rationale of the tort system. See Schwartz, *supra* note 2, at 1818 n.128. However, he accepted compensation as being instrumental in achieving the tort system’s other purposes. *Id.* at 1817-18. (“As far as the status of the plaintiff is concerned, affording him a compensation right indeed gives him an incentive to bring the suit that serves the purpose of deterring injurers . . .”).

<sup>117</sup> *Id.* at 1819 (citing *United States v. Carroll Towing Co.*, 159 F.2d 169, 173-74 (2d Cir. 1947)).

own welfare as more important than the welfare of others, the defendant's conduct can correctly be reproached as ethically improper.<sup>118</sup>

Schwartz then briefly sketched a theory in which, “tort law imposes or assigns liability for proper deterrence reasons—unless this result is not compatible with the criterion of corrective justice.”<sup>119</sup> Conversely, Schwartz presented a “theory that would regard corrective justice as the criterion guiding liability-rule choices, subject to the constraint that these choices be compatible with proper deterrence policy.”<sup>120</sup> Schwartz acknowledged that neither mixed theory could account for all of tort law. However, he argued that being able to employ multiple rationales for certain doctrines (e.g., negligence), increased the system's justifiability:

If . . . deterrence and corrective justice benefits can be aggregated, it becomes far more likely that benefits exceed costs—that negligence law is on balance worthwhile. The ability, then, to affirmatively deploy two rationales rather than one . . . may well play a crucial role in the evaluation of those portions' overall value.<sup>121</sup>

Schwartz then argued that deterrence and corrective justice were not only harmonious, but shared an interrelated purpose. To the extent the deterrent function of tort law prevents accidents from occurring, it minimizes the injustice that corrective justice scholars address. Indeed, it is preferable to avoid injury than correct it after the fact. Additionally, despite the threat of liability, many parties continue to behave negligently and inflict injuries. In considering those victims' situations, deterrence theorists should consider Richard Posner's evaluation that, because squandering resources is bad, “a judgment of negligence has inescapable overtones of moral disapproval . . . [I]ndignation has its roots in inefficiency.”<sup>122</sup> Thus, for Schwartz, the deterrence and corrective justice rationales could coexist beneficially.

The enterprise of determining how multiple torts rationales are harmonious is both valuable and provocative. The less friction there is among the rationales, the easier it is to administer the (pluralist) tort system. However, the supreme challenge for the pluralist arises when the rationales are incompatible. And, indeed, the torts rationales can conflict: “[p]art of the

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<sup>118</sup> *Id.* at 1819-20.

<sup>119</sup> *Id.* at 1824.

<sup>120</sup> *Id.* at 1825.

<sup>121</sup> *Id.* at 1827. One might observe that including compensation would further increase tort law's justifiability.

<sup>122</sup> See Schwartz, *supra* note 2, at 1827 (quoting Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972)) (alteration in original).

problem is that the various tort theories often entail opposing interpretations and prescriptions.<sup>123</sup>

For example, vicarious liability, the practice of holding an employer liable for the torts of its employees committed during the “scope of employment,”<sup>124</sup> is consistent with deterrence and compensation, but inconsistent with corrective justice.<sup>125</sup> Holding an employer liable for acts of its employees provides employer incentives to hire and train employees with care, in theory leading to reduced accidents.<sup>126</sup> Additionally, vicarious liability is consistent with compensation. Allowing a plaintiff to obtain a judgment against an employer provides the plaintiff much better opportunity to actually recover damages than a suit against the (possibly judgment-proof) employee alone. The employer is, “better able to absorb [costs], and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.”<sup>127</sup> On the other hand, corrective justice, based as it is on correcting the moral imbalances between parties, is inconsistent with vicarious liability—liability imposed for the acts of someone else.<sup>128</sup> There is no moral imbalance to correct between the plaintiff and the *employer*.

Premises liability presents another conflict. Although landowners owe a traditional duty of care to their invitees (generally people on the premises for the economic benefit of the landowner), they owe a reduced duty to licensees (like social guests), and almost no duty to trespassers.<sup>129</sup> These rules are not consistent with efficient deterrence. There are certainly some accidents that could be easily prevented by a landowner, having knowledge

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<sup>123</sup> Goldberg, *supra* note 9, at 580.

<sup>124</sup> See, e.g., Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 22 (2002) (“Under the doctrine of respondeat superior, masters could be liable for their servants’ misdeeds within the scope of their duties. This doctrine later evolved into vicarious liability of the corporation for its employees’ wrongdoing in the scope of duties.”).

<sup>125</sup> See Schwartz, *supra* note 2, at 1821-22 for a discussion of vicarious liability, concerning deterrence and corrective justice, but not compensation.

<sup>126</sup> See *id.* at 1822 n.149 (citing Gary T. Schwartz, *The Hidden and Fundamental Issue of Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1754-64 (1996)).

<sup>127</sup> W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 69 at 500-01 (5th ed. 1984) (citations omitted).

<sup>128</sup> E.g., Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417, 476-77 (2005) (“Corrective justice seems inconsistent with the essentially strict liability that is imposed on a vicariously liable defendant.”); see also Schwartz, *supra* note 2, at 1821 (stating that Schwartz, *supra* note 126, “reviews the justifications offered on behalf of vicarious liability by corrective justice scholars—and concludes that they are essentially ineffective.”).

<sup>129</sup> See, e.g., Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 933 (1981).

of, say, hidden dangers, that would require minimal effort (like posting a warning sign).<sup>130</sup> Nor are the rules consistent with compensation; in certain cases, the rules make it considerably more difficult for an injured plaintiff to recover, even though many landowners have homeowner's insurance.<sup>131</sup> However, corrective justice seems perfectly consistent with premises liability rules. Schwartz notes:

Much more satisfactory is the ethical perception that when the plaintiff's encounter with the defendant's danger has been a consequence of the plaintiff's flouting of the defendant's rights as landowner, the plaintiff cannot claim that the injury he ends up suffering is a result of any injustice imposed on him by the possibly negligent defendant.<sup>132</sup>

Still another conflict raised by Schwartz involves tort law's causation requirement: "tort law's causation standard (given its retrospective character) is an essential component of a corrective justice account of tort law; but that standard fits somewhat awkwardly into deterrence accounts, given their own *ex ante* interests."<sup>133</sup> In other words, because corrective justice seeks to right moral imbalances, it is first necessary to determine that such imbalances exist. If a defendant has not caused harm to a plaintiff, no moral imbalance exists; no wrong has been done by the defendant to the plaintiff. Thus, the causation requirement is a necessary part of corrective justice.

On the other hand, deterrence is concerned with *ex ante* incentives, incentives that prevent accidents from occurring. For deterrence theorists, causation is not necessary. In fact, it can impede the law's ability to deter accidents. Without the causation requirement, liability could be imposed any time a defendant *risked* injuring others, whether the injury came about or not: "The whole point of imposing tort liability in order to deter unreasonable behavior is to give potential injurers the incentive to compare the amount of liability that they *anticipate* they will incur from taking a particular risk with the cost of reducing that risk by taking safety precautions."<sup>134</sup> Schwartz asserts that in the majority of tort situations, the causation requirement "produces results that are roughly acceptable for deter-

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<sup>130</sup> Schwartz rejects Landes and Posner's explanation that the cost of avoiding the injury-producing activity by the trespasser is normally very low, much lower than the landowner's cost of adopting precautions. Schwartz notes this explanation is unsatisfactory because in many cases the trespasser neither knows nor has reason to know of the particular hazard on a landowner's property. Schwartz, *supra* note 2, at 1822.

<sup>131</sup> 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 201, at 814 (6th ed. 2006) ("liability insurance for homeowners and businesses has become the norm").

<sup>132</sup> Schwartz, *supra* note 2, at 1822-23.

<sup>133</sup> *Id.* at 1822.

<sup>134</sup> KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 104-05 (2d ed. 2002).

rence purposes.”<sup>135</sup> However, he also notes the requirement “can produce results that seem economically unwise.”<sup>136</sup>

Nor is the causation requirement consistent with compensation theory. Causation has no inherent link to providing money to injured plaintiffs or spreading losses. In fact, the necessity of proving causation reduces the number of plaintiffs who will receive compensation and increases the amount of time it will take for the system to provide compensation. The degree of denial and delay of compensation rises with the amount of complexity in the underlying suit. For example, in medical malpractice cases, proving causation is extremely difficult,<sup>137</sup> and almost always requires hiring expensive experts.<sup>138</sup> There are many victims who will not be able to receive compensation because they cannot prove causation, either because it is too difficult or because they are unable to afford pursuing a malpractice action.

Interestingly, there may be instances in which the theories are in conflict with themselves (just as Berlin noted that liberty could conflict with itself<sup>139</sup>). As noted, causation is essential to a corrective justice account of tort law. However, in the medical malpractice context, the causation requirement, almost inevitably, must be proved by hiring expensive experts. Schwartz notes, “unless the victim’s damages are well in excess of \$100,000, developing a malpractice claim is not economically sensible on the part of the lawyer whom the malpractice victim might consult.”<sup>140</sup> Thus,

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<sup>135</sup> Schwartz, *supra* note 2, at 1817.

<sup>136</sup> *Id.*

<sup>137</sup> See, e.g., Jeffrey O’Connell & James F. Neale, *HMO’s, Cost Containment, and Early Offers: New Malpractice Threats and a Proposed Reform*, 14 J. CONTEMP. HEALTH L. & POL’Y 287, 307-08 (1998) (“Comparing a person’s physical health prior to an automobile or industrial accident, and determining which injuries were caused by that accident is relatively easy. Normally, all the accident victim’s injuries are demonstrably caused by the workplace or auto accident itself. Medical malpractice victims are, however, in a very different situation. Prior to suffering any negligently inflicted injury, most suffer from a condition serious enough to warrant complicated treatment or invasive surgery. Many would suffer some lingering infirmity, regardless of whether their health care providers were negligent. Most complicated treatment (and all invasive surgery) necessarily produces subsequent “injuries,” even absent negligence. It is therefore necessary to distinguish between the injuries caused by negligent treatment, and those caused by the “presenting complaint,” which are simply unavoidably attendant to medical treatment.”).

<sup>138</sup> Gary T. Schwartz, *Empiricism and Tort Law*, 2002 U. ILL. L. REV. 1067, 1071 (noting the total cost to a plaintiff of a malpractice action in 2002 was at least \$50,000).

<sup>139</sup> ISAIAH BERLIN, *Introduction*, in *FOUR ESSAYS ON LIBERTY*, *supra* note 21, at lvi (“One freedom may abort another; one freedom may obstruct or fail to create conditions which make other freedoms, or a larger degree of freedom, or freedom for more persons, possible; positive and negative freedom may collide; the freedom of the individual or the group may not be fully compatible with a full degree of participation in a common life, with its demands for co-operation, solidarity, fraternity.”).

<sup>140</sup> Schwartz, *supra* note 138, at 1071.

there is a category of small and moderate medical malpractice claims for which there is no meaningful opportunity of redress. According to one group of scholars, at most, only twenty percent of negligently injured patients initiate malpractice claims, with only forty percent of those resulting in payment.<sup>141</sup> Schwartz noted that this poses a problem for the corrective justice rationale.<sup>142</sup> The majority of people injured by medical negligence do not initiate a claim to correct the injustice. Many of them appear to be prohibited from so doing by the cost of access to such justice, which is inflated by corrective justice's mandated causation element.<sup>143</sup>

Other examples might be discussed, but there is no need to belabor the point. Just as Berlin would have suspected, the torts rationales have the potential to be incompatible.

### C. *The Incommensurability of Torts Rationales*

Recall the taxonomy of incommensurability proposed by Cherniss and Hardy.<sup>144</sup> They divided the concept into three versions: weak, moderate, and radical. Weak incommensurability would entail that "values cannot be ranked quantitatively, but can be arranged in a qualitative hierarchy that applies" in all cases.<sup>145</sup> With regard to the torts rationales, weak incommensurability would mean that it would be possible to determine a specific order of preference. For example, one could hypothesize corrective justice is always the most important rationale, followed by deterrence, followed by compensation. Thus, for any conflict that arose in the course of operating the tort system, a judge or scholar could always prioritize one rationale before moving on to the other two. As discussed, Berlin rejected this version of incommensurability.

On the other extreme, under radical incommensurability, it is impossible to make judgments between or among values on a case-by-case basis; the values cannot be rationally deliberated about at all. In the torts context, a judge or scholar faced with a choice among the three traditional torts rationales would follow her own preference and nothing else. A roll of the dice would be as defensible as any other method of selection. This is the version of incommensurability that John Gray attributes to Berlin and it

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<sup>141</sup> DEWEES ET AL., *supra* note 2, at 425.

<sup>142</sup> Gary T. Schwartz, *Medical Malpractice, Tort, Contract, and Managed Care*, 1998 U. ILL. L. REV. 885, 895.

<sup>143</sup> For a more thorough discussion of this issue, see Robinette, *supra* note 9, at 405-07.

<sup>144</sup> See *supra* text accompanying notes 62-65.

<sup>145</sup> Cherniss & Hardy, *supra* note 25, § 4.4.

leads to relativism. As explained earlier, Berlin also rejected this understanding of incommensurability.<sup>146</sup>

Berlin adopted the moderate version of incommensurability, under which there is no single ultimate, abstract scale or principle with which to measure values. His approach was contextual. One value or goal does not always trump others: “[V]alues . . . [are] incapable . . . of being ordered in a timeless hierarchy.”<sup>147</sup> As George Crowder notes, the moderate version of incommensurability is that values are unrankable “in the abstract.”<sup>148</sup> For Berlin, neither liberty nor equality was universally preeminent: “Equality had to give way often to liberty, but so did liberty sometimes to equality.”<sup>149</sup> In the torts context, that means it is not possible to establish a consistent hierarchy of the rationales. It is not the case, for example, that corrective justice is always the most important rationale. Yet, the selection among the rationales is not irrational: “we in ‘each particular case’ have much more to guide us than the abstract deliberation between values, namely a ‘context’ of conventions, expectations, related problems and probable outcomes which might facilitate a rational decision.”<sup>150</sup>

According to the three traditional torts rationales, the tort system is a mechanism to restore the moral imbalance between the parties, deter accidents by offering safety incentives, and respond to the need of victims by providing compensation, often by spreading losses to insurance companies and corporations. If these rationales are incommensurable, in Berlin’s moderate understanding of the term, it will not be possible to order them hierarchically in the abstract.

Can we rank corrective justice as the most important rationale? Is it always better to correct the moral imbalance between the parties than to, say, prevent the imbalances (and injuries) from occurring? What if the moral imbalances are small or nonexistent (as is the case in most issues of strict liability)? What if there is unequivocal evidence of a strong deterrent effect? What if the moral imbalances are small or nonexistent *and* there is unequivocal evidence of a strong deterrent effect? Someone championing corrective justice under these circumstances must make the formalist claim that the system is an end “in itself.”<sup>151</sup> Yet the state does not set up a tort system because it is an intrinsic good.<sup>152</sup> The state desires to accomplish something—under the conditions described above, it would not.

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<sup>146</sup> See *supra* text accompanying notes 71-90.

<sup>147</sup> BERLIN, *supra* note 30, at 79.

<sup>148</sup> CROWDER, *supra* note 13, at 52.

<sup>149</sup> Annan, *supra* note 69, at 85.

<sup>150</sup> Thorsen, *supra* note 14, at 18 (discussing Berlin’s version of incommensurability).

<sup>151</sup> For a thoughtful critique of this position see Rabin, *supra* note 114.

<sup>152</sup> *Id.* at 2270.

Examples from torts doctrines reinforce the point.<sup>153</sup> If corrective justice was always the most important rationale, one cannot explain the existence of vicarious liability.<sup>154</sup> For “[c]orrective justice seems inconsistent with the essentially strict liability that is imposed on a vicariously liable defendant.”<sup>155</sup> There is no moral imbalance to restore because the *employer* has not wronged the plaintiff.<sup>156</sup> On the other hand, the deterrence and compensation rationales support vicarious liability. The doctrine provides safety incentives to employers (for example, to train employees) to deter accidents and a source of recovery for plaintiffs to aid in compensation. Regarding the incompatibility of corrective justice and deterrence/compensation, the law favors the latter. Vicarious liability is a significant torts doctrine regardless of the fact that no moral imbalance is being restored.

Alternatively, then, can we view deterrence as the paramount rationale? Is it always better to deter accidents than to, say, correct the moral imbalance between the parties? What if there is unequivocal evidence of no deterrent effect?<sup>157</sup> What if the level of moral blame attached to the defendant’s conduct was extreme?

Again, examples from tort law refute this idea of some paramount rationale. If deterring accidents were always paramount, tort law would not, for example, include the premises liability categories discussed by Schwartz.<sup>158</sup> Under traditional premises liability analysis, a landowner has almost no duty to a trespasser; basically, she must refrain from willful harm.<sup>159</sup> The relaxation of the traditional negligence standard in this situation removes incentives for landowners to make their property safe for outsiders. In many cases, making the property relatively safe for such users would not be especially onerous. In other words, it would not be inefficient to require a landowner to, say, post a warning sign. The reason that landowners receive a lower standard for trespassers cannot be justified by deterrence reasoning, but it is supported by the moral notions underlying corrective justice. As Schwartz noted, if the plaintiff’s encounter with the defen-

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<sup>153</sup> Berlin would approve, for “he offered narration rather than dialectic, preferred tendencies to laws, and, in many cases, liked illustrative details best of all.” Bernard Williams, *Tribute*, in *THE FIRST AND THE LAST*, *supra* note 48, at 123.

<sup>154</sup> See *supra* text accompanying notes 124-28.

<sup>155</sup> King, *supra* note 128, at 477.

<sup>156</sup> If the employer was directly negligent (say, negligent hiring, negligent retention, or negligent supervision), that, of course, takes us outside of vicarious liability.

<sup>157</sup> See Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 *UCLA L. REV.* 377, 379 n.9 (1995) (“Yet what does it mean to say that legal rules ‘create incentives’ for efficient conduct if there is no evidence that they in fact bring that conduct about?”).

<sup>158</sup> See *supra* text accompanying notes 129-32.

<sup>159</sup> See Rabin, *supra* note 129, at 933.

defendant's danger has been a consequence of the plaintiff's violating defendant's rights as a landowner, plaintiff cannot claim her injury is the result of any injustice imposed on her by the negligent defendant.<sup>160</sup> In short, there is no moral imbalance to restore.

Finally, then, can we rank compensation as the primary rationale for the tort system? Is it always better to compensate people for injuries than to, say, deter accidents? What if the financial hardship caused by the injuries is not severe? What if there is a high level of affordable private first party insurance coverage for the injuries? What if the money paid by the defendant would be paid by a private individual and not an insurance company or large corporation? What if there is unequivocal evidence of a strong deterrent effect?

But if compensation were always the paramount torts rationale, tort law would not, for example, provide punitive damages. The Supreme Court characterizes punitive damages solely as serving the goals of deterrence and punishment.<sup>161</sup> Punishment is not widely regarded as a rationale of tort law.<sup>162</sup> Deterrence, of course, is so regarded and that rationale supports punitive damages for tort actions. In theory, requiring a defendant to pay additional damages to a plaintiff because of (really) bad conduct will prevent her from engaging in similar conduct in the future and serve as an example to other potential defendants. However, compensation theorists regard helping plaintiffs who need money to cover their injuries as the crux of tort law. Paying more money to a plaintiff that could be spent covering other plaintiffs' basic losses is inconsistent with this idea.<sup>163</sup>

Thus, none of the traditional rationales seems consistently paramount, as would be required for them to be commensurable in Berlin's understanding. The problems with establishing a consistent hierarchy among the plural torts rationales mirror the problems with establishing a unified theory of torts based on a single rationale.<sup>164</sup> The basic problem is that "torts" is comprised of so many different types of actions:

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<sup>160</sup> Schwartz, *supra* note 2, at 1822-23; *see supra* text accompanying notes 129-32.

<sup>161</sup> David C. Searle, Note, *Keeping the "Civil" in Civil Litigation: The Need for a Punitive Damage-Actual Damage Link in Title VII Cases*, 51 DUKE L.J. 1683, 1686 (2002).

<sup>162</sup> *See, e.g.*, Anthony J. Sebok, *The Fall and Rise of Blame in American Tort Law*, 68 BROOK. L. REV. 1031, 1049 (2003) (describing the criminal law point of view applied to torts as "not merely nonobvious" but "contradict[ing] the dominant tradition of modern tort theory").

<sup>163</sup> Punitive damages are arguably inconsistent with corrective justice as well. From a corrective justice perspective, the purpose of compensatory damages is to correct the moral imbalance between the parties. Thus, prior to the payment of punitive damages, the moral imbalance has already been corrected. Further payment may be seen as reestablishing an imbalance in the other direction. *See, e.g.*, WEINRIB, *supra* note 6, at 135 n.25 (stating that damages in excess of actual compensation are inconsistent with corrective justice).

<sup>164</sup> For a more thorough discussion of this topic, *see* Robinette, *supra* note 9.

Remember what torts are: those various heterogeneous instances where the law has sought to impose liability on people for real or supposed reasons of policy, without much regard to their consent. These instances cover the spectrum of human affairs. They touch matters of individual privacy, things that happen within a family; uses of neighboring land that interfere with each other; the incidents of public and private transportation; fights, affrays and brawls; competition among business; police activities; the content of newspapers and broadcasts; industrial and other work accidents, and so on. Why should we not expect the agencies of the law—courts and legislatures—to have many different reasons for imposing liability under so many different circumstances, stressing deterrence here, compensation there; expediency here, morals there; concern for the individual here, subordinating it there?<sup>165</sup>

These various actions, not considered a discrete branch of law until the late nineteenth century, were the common law's residual category.<sup>166</sup> The lack of a connection among torts was emphasized when Blackstone referred to the subject as, "all actions for trespasses, nuisances, assaults, defamatory words, *and the like*."<sup>167</sup>

Furthermore, the actions were developed on an *ad hoc* basis as problems arose throughout communities in medieval England. Tort law "did not embody any ideal of justice; it did not exemplify any rational conception of what the law should be."<sup>168</sup> As Schwartz acknowledged, "It is certainly possible that tort law has developed haphazardly over time, drawing on deterrence on some occasions and corrective justice on others. If this has happened, then tort law in its current form might be quite eclectic."<sup>169</sup> As such, it is not surprising that no rationale is always the most significant.

#### D. *Choice*

Thus, the judge or scholar is left in the following position: how to choose among three traditional torts rationales that cannot be consistently hierarchically arranged and that are, at times, incompatible. By now, the reader will doubtlessly be prepared to receive a minimal answer to the general question. "There is, it seems to me, no clear reply," Berlin would say.<sup>170</sup> Cass Sunstein would echo the sentiment, "The first point is that there is no algorithm or formula by which to answer this question. If we are looking for a certain sort of answer—the sort characteristic of some believers in commensurability—we will be unable to find it."<sup>171</sup>

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<sup>165</sup> Fleming James, Jr., *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFF. L. REV. 315, 320 (1959).

<sup>166</sup> See G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 3 (2003).

<sup>167</sup> WILLIAM BLACKSTONE, 3 COMMENTARIES \*117 (emphasis added).

<sup>168</sup> John Hasnas, *What's Wrong with a Little Tort Reform?*, 32 IDAHO L. REV. 557, 562 (1996).

<sup>169</sup> Schwartz, *supra* note 2, at 1826.

<sup>170</sup> BERLIN, *supra* note 36, at 17.

<sup>171</sup> Sunstein, *supra* note 84, at 856.

However, Berlin's rather modest advice on choosing does provide some guidance, and it is guidance directly opposed to current trends in torts scholarship. Two themes emerge from Berlin's comments on selecting among options. First, context is paramount: "The concrete situation is almost everything."<sup>172</sup> If incommensurability is the state of being unrankable in the abstract,<sup>173</sup> it is only the inclusion of context, the particularized situation, that allows creation of a hierarchy—rational choice. This can be seen in the doctrinal examples from the last section. What allows a judge to choose among corrective deterrence, compensation, and corrective justice? Context. The fact that, for example, in a premises liability case the victim is a trespasser—someone flouting the moral rights of the landowner, helps a judge choose corrective justice.<sup>174</sup> As Marshall Shapo noted, "tort rationales can only be meaningful in application to particular doctrines."<sup>175</sup>

Yet the current scholarly trend is toward monism—knowing one big thing—making all torts fit a single, unified theory.<sup>176</sup> Instead of relying on context, monistic scholars, devoted to a single rationale from the outset, must fit all torts into that mold. As a result, context is ignored or distorted for the sake of cohesion. Indeed, Berlin warned against "distort[ing] the moral facts by artificially ordering them in terms of some one absolute criterion."<sup>177</sup>

The Berlinian lesson for scholars would be to shift their efforts from trying to unify tort law in order to focus on its context. It is more instructive to examine its particulars; in essence, to analyze torts on a case-by-case basis to determine which rationale best suits each tort. The contexts of torts claims present considerable differences in terms of the parties, the nature of the injuries, the complexity of the evidence, etc. These contexts influence what tort law can and should accomplish in a particular area of torts.<sup>178</sup> By emphasizing context, instead of ignoring it for the sake of cohesion, schol-

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<sup>172</sup> BERLIN, *supra* note 36, at 18. Sunstein concurs: "Relatively little can be said in the abstract." Sunstein, *supra* note 84, at 856.

<sup>173</sup> CROWDER, *supra* note 13, at 52-54.

<sup>174</sup> See *supra* notes 129-32 and accompanying text.

<sup>175</sup> Marshall S. Shapo, *On First Looking Into General Principles of Torts: Ruminations on Restating for an Ex-Dean*, 78 NEB. L. REV. 891, 893 (1999).

<sup>176</sup> See, e.g., Schwartz, *supra* note 2, at 1801-11; Robinette, *supra* note 9, at 369-90.

<sup>177</sup> BERLIN, *supra* note 24, at 102.

<sup>178</sup> This analysis may be based on various theories. See, e.g., Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988) (pragmatism); ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* (1999) (aretic theory); Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003) (same); MORAL PARTICULARISM (Brad Hooker & Margaret Little eds., 2000) (moral particularism). Those issues are beyond the scope of this Article.

ars may be able to determine under what circumstances a particular torts rationale should be paramount.<sup>179</sup>

This focus on context would bring scholars back into line with the real world aspects of law confronted by judges and could greatly aid judges in making their decisions. After all, the common law is based on a profound sensitivity to context: “The common law is the analysis of the particular because common-law legal rules derive from a series of unique life experiences, by definition not amenable to exact repetition.”<sup>180</sup> As Karl Llewellyn noted, “the concrete instance, the heaping up of concrete instances, the present, vital memory of a multitude of concrete instances, is necessary in order to make any general proposition, be it a rule of law or any other, *mean* anything at all.”<sup>181</sup>

The second theme Berlin stressed was the avoidance of extreme human suffering: “The first public obligation is to avoid extremes of suffering.”<sup>182</sup> Berlin was most concerned about the occurrence of “desperate situations, of intolerable choices.”<sup>183</sup> This emphasis, when applied to torts rationales, is most clearly aligned with compensation. It is compensation theorists, more so than deterrence or corrective justice advocates, who are conscious of the need of the victim when analyzing the tort system. It is compensation theorists, with a focus on loss spreading and equality, who

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<sup>179</sup> Yet emphasizing context cannot devolve into lacking all predictability. The great danger of pluralism is that it will eviscerate the rule of law. *See, e.g.*, Goldberg, *supra* note 9, at 580 (“Must we, or ought we, concede that all we can say of any given tort decision, or any given tort doctrine, is that, if well-rendered, it will reflect the attainment of an unarticulated and unarticulable balance among various considerations—including some that are diametrically opposed? I suggest that, to make such a concession, is to give up on the idea of law.”) The problem, Goldberg notes, is that every case cannot become a series of “isolated dooms.” *Id.* (citing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 126 (1921)). This is a significant issue, beyond the scope of this Article, and worthy of separate treatment. However, preliminarily, sometimes the context may require limiting the importance of context. Because tort law, and law generally, cannot accept every case being *sui generis*, the law must group cases together. The dispute between monists and pluralists regarding torts rationales is over the level of abstraction at which this grouping takes place—for instance, “torts” versus “medical malpractice”—and, perhaps, the rigidity with which the favored rationale is accepted. From a pluralist torts scholarship perspective, the lesson is to examine each torts *doctrine* to determine which rationale is most appropriate (so, for instance, it can be articulated). This differs from monists because pluralists should look to the particulars of each doctrine. On the other hand, pluralists must acknowledge that there is a stopping place for context, just as Berlin notes that some values are “beyond the frontiers of humanity.” BERLIN, *supra* note 41, at 204.

<sup>180</sup> Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 75 (2001).

<sup>181</sup> KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 2 (1930).

<sup>182</sup> BERLIN, *supra* note 36, at 17.

<sup>183</sup> *Id.* at 18.

argue losses should be borne collectively so as to reduce the extreme suffering of any particular victim.<sup>184</sup>

Yet many modern scholars reject compensation as a rationale for torts.<sup>185</sup> The “two major camps of tort scholars”<sup>186</sup> are deterrence and corrective justice. Even Schwartz, a torts pluralist, refused to include compensation in his mixed theories of tort law.<sup>187</sup> The second Berlinian lesson for torts scholars is to reconsider this recent trend.

## CONCLUSION

In contrast to the torts hedgehogs, few torts foxes have advanced a framework for understanding the tort system. Part of the reason is that the ideas we would offer would not correspond to an “algorithm or formula”<sup>188</sup> that is “the sort characteristic of some believers in commensurability.”<sup>189</sup> Regardless, we should begin to explain (or attempt to) the pluralistic nature of torts. Berlin’s value pluralism provides an excellent framework for understanding how the torts rationales relate to each other.

Each of the rationales has much to offer. Yet, at some time or another, torts theorists have gone too far in claiming complete explanatory or justificatory power for each of them. Berlin may not agree with these assessments, but I suspect he would be understanding: “[F]ew new truths have ever won their way against the resistance of established ideas save by being overstated.”<sup>190</sup>

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<sup>184</sup> See, e.g., PETER A. BELL & JEFFREY O’CONNELL, ACCIDENTAL JUSTICE 55 (1997):

[T]he compensation objective of tort law calls for reasons for compensation beyond a simple desire to help the needy. Frequently, lawmakers justify tort law’s injury-shifting in terms of reducing the total amount of injury. They argue that compensating injured plaintiffs in tort cases in fact ameliorates the total amount of suffering in society because it spreads intense suffering of the plaintiff over a larger group of people, namely those who share the defendant’s tort liability costs, either as consumers of the defendant’s goods or services . . . or as members of the defendant’s liability insurance pool. The theory is that it is better that many people suffer a small deprivation than that an individual suffer a major one.

<sup>185</sup> See sources cited *supra* note 6 and accompanying text. These scholars argue that compensation should be administered entirely outside the tort system. For a critique of that view see, for example, O’Connell & Robinette, *supra* note 107, at 137.

<sup>186</sup> See Schwartz, *supra* note 2, at 1801.

<sup>187</sup> See *supra* note 116.

<sup>188</sup> See Sunstein, *supra* note 84, at 856.

<sup>189</sup> *Id.*

<sup>190</sup> ISAIAH BERLIN, *The Philosophical Ideas of Giambattista Vico*, in THREE CRITICS OF THE ENLIGHTENMENT 102 (1961).