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Tort Law for Cynics

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Tort Law for Cynics

Dan Priel*

Abstract. Various tort scholars have in recent years come to the defence of a 'traditional' or 'idealist' view of tort law. In the context of negligence this view implies that having a duty of care means that the law considers violating this duty as something that the duty-holder must make an effort not to do. Idealists contrast this view with a 'cynical' view according to which having a duty of care implies a legal requirement to pay damages for breach of the duty of care. In this essay I defend the cynical view against its critics. Descriptively, I argue that the cynical view can easily explain doctrines supposedly only explicable from an idealist perspective, and that in fact many aspects of tort law are hard to reconcile with idealism. I argue that various empirical constraints often make idealism, even if it were desirable, unattainable, and in this regard cynicism is a more honest view than idealism. But I further argue that cynicism is not merely a concession to reality, that idealism is often undesirable. Idealists ignore the fact that opting for idealism has costs (both pecuniary and non-pecuniary), and that when those are taken into account, idealism is often normatively unattractive.

Introduction

Back in 1949 Lord Justice Denning had an occasion to consider the rules imposing tort liability on the actions of people of unsound mind. He wrote there:

I am aware that these rules of law have been criticized by some jurists who would make...liability in tort depend on blameworthiness, but I venture to think that this criticism is somewhat out of date. Recent legislative and judicial developments show that the criterion of liability in tort is not so much culpability, but on whom should the risk fall.¹

In recent years this 'out of date' view has been making something of a comeback. A recent spate of writings has asked us to 'rediscover' negligence law which 'has been forgotten',² to return it to its 'traditional' roots, to go back to views that 'until about 40 years ago...had *always*' been accepted and according to which 'tort law is all about protecting people who had suffered a wrong, people whose rights had been violated'.³ In this essay I wish to challenge one aspect of this new-old view, namely the nature and role of duty of care in the tort of negligence.

In an essay published a few years ago Nicholas McBride vigorously defended what he called an 'idealist' view that affirms the existence of duties of care, against what he called the 'cynical'

* Associate Professor, Osgood Hall Law School, York University. An earlier version of this paper was presented at the LSE, and I thank participants there for their comments and questions. I also thank Vincent Chiao, Chris Essert, David Howarth, and two anonymous referees for their helpful comments. Their comments have led to many changes, large and small, to the essay.

¹ *White v White*, [1950] P 39, 58–59. Denning held on to these views. See *Spartan Steel v Martin & Co* [1973] 1 QB 27, 37; *Lamb v Camden London Borough Council* [1981] 1 QB 625, 634, 636–637.

² See A. Beever, *Rediscovering the Law of Negligence* (Oxford: Hart, 2007) 512.

³ N.J. McBride & R. Bagshaw, *Tort Law* (Harlow: Pearson Longman, 3rd ed, 2008) xiv (hereinafter McBride & Bagshaw (3rd ed)). The historical claim is unfounded. See notes 33, 92. Here and below I cite from the last two editions of this book, the last one being N.J. McBride & R. Bagshaw, *Tort Law* (Harlow: Pearson, 4th ed, 2012) (hereinafter McBride & Bagshaw (4th ed)). Since my discussion seeks to challenge a view rather than a particular book, and since, as far as I can tell, the authors have not changed their views on tort law, I believe this usage is justified. Another scholar espousing this view is R. Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007). In the US John Goldberg and Benjamin Zipursky have defended this view in many (joint and several) writings. See in particular J.C.P. Goldberg & B.C. Zipursky, 'The Restatement (Third) and the Place of Duty in Negligence Law' (2001) 54 Vand L Rev 657; J.C.P. Goldberg & B.C. Zipursky, 'The Moral of MacPherson' (1998) 146 U Pa L Rev 1735; J.C.P. Goldberg & B.C. Zipursky, 'Torts as Wrongs' (2010) 88 Tex L Rev 917.

position that denies their existence.⁴ Not only do duties of care exist, McBride insisted that every one of us has ‘millions’ of them.⁵ Along similar lines, John Goldberg and Benjamin Zipursky have defended an ‘anti-reductionist’ view of tort law according to which there are special relations in the interactions of ‘manufacturer–consumer, business–business, business–customer, doctor–patient, lawyer–client,...landlord–tenant, host–guest’, and that ‘there is no reason to suppose that these diverse norms are really just expressions of a deeper reality’ such as individuals’ ‘capacities as autonomous, self-interested agents or citizens of a polity subject to regulation’.⁶ Pushing this idea to its logical conclusion Robert Stevens has argued that we should stop speaking not just of ‘tort law’ as though it reflected a unified ground for liability, but even of ‘the tort of negligence’.⁷

McBride’s essay prompted a response from David Howarth.⁸ While agreeing with McBride that the cynic’s position is ‘clearly untenable’,⁹ he favoured the view which McBride dubbed ‘ultra-idealism’ and hastily dismissed as a view ‘no serious lawyer would nowadays endorse’.¹⁰ As Howarth defined it, this ultra-idealist view is ‘that there is only one duty of care—a duty not to harm others by faulty conduct’.¹¹ The purpose of this essay is to say something in support of the view both McBride and Howarth rejected. Even though McBride’s labels could hardly have been more partisan (‘duty nominalism’ or ‘duty minimalism’ would have been more neutral alternatives), I have decided to stick to his terminology and make the case for the cynical approach to tort law, and especially negligence. That may not seem like a very promising endeavour; it is tempting to agree with Howarth that at least in the English context, the cynical view cannot be true because of the central place duty of care plays in negligence liability. At least since *Donoghue v Stevenson*,¹² courts have on many occasions dismissed a negligence claim on the basis of a finding of no duty of care, and that seems difficult to reconcile with the cynical view.

Despite such an unpromising starting point, I will try to show that this fact (which I do not dispute) is not enough to dispose of duty cynicism. One aim of this essay is to present a clearer and fairer picture of this view, one that corresponds to views actually held by certain people. I hope to show that tort cynicism, or at least a version of it, is far more powerful a position than presented by its critics. To that end I begin by presenting what is at stake between idealism, ultra-idealism, and cynicism. I then turn in section II to evaluating arguments put forward by McBride and others against cynicism and argue that they are unconvincing and that some of them actually support the cynical view. In section III, I outline some of the positive reasons in favour of cynicism. I conclude in section IV by explaining the practical significance of the debate.

⁴ N.J. McBride, ‘Duties of Care—Do They Really Exist?’ (2004) 24 OJLS 417; cf R. Stevens, ‘Torts’ in L. Blom-Cooper et al (eds), *The Judicial House of Lords: 1876–2009* (Oxford: Oxford University Press, 2009) 629, 652 (‘The Law itself is compromised if a cynical or ‘realist’ view is allowed to take hold’).

⁵ McBride, n 4 above, 432.

⁶ J.C.P. Goldberg & B.C. Zipursky, ‘Accidents of the Great Society’ (2005) 64 Md L Rev 364, 389–390.

⁷ Stevens, n 3 above, 291–292, 301–303.

⁸ D. Howarth, ‘Many Duties of Care—Or a Duty of Care? Notes from the Underground’ (2006) 26 OJLS 449.

⁹ *Ibid* 450.

¹⁰ McBride, n 4 above, 437.

¹¹ Howarth, n 8 above, 450.

¹² [1932] AC 562.

I. Idealism, Ultra-Idealism, and Cynicism

With the story about medieval scholars concerned with the number of angels who can dance on a pin probably a myth,¹³ concern with the number of duties of care people have may seem like a good real-life example of a pointless academic debate. How are we to tell whether there are many duties of care, just one, or none at all? Why does it even matter? The duties in question are, as idealists themselves claim, legal duties, not moral ones;¹⁴ and as law is a human creation, the answer to this question should not depend on what we have ‘reason to suppose’,¹⁵ but on what people think about the matter. And since most people, including most lawyers, have not thought about the matter at all, it is tempting to reply that the number of duties of care is not a matter susceptible to any determinate answer.¹⁶ Or we might say that from one perspective the duty of, for instance, an employer to her employees is distinct from the duty a driver owes to pedestrians; and from another perspective, we can see them as reflecting different instantiations of one general duty. There is no logical basis for deciding between the two views, and it looks as though little hangs on deciding one way or the other.

But the life of the law has not been logic, and experience tells us that the distinction may have practical effects. To idealists, Lord Atkin’s words that ‘in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances’,¹⁷ bolstered later by Lord Reid’s statement in *Dorset Yacht* that Lord Atkin’s neighbour principle ‘ought to apply unless there is some justification or valid explanation for its exclusion’¹⁸ are dangerous. A general duty of care may encourage courts to think that one needs to find reasons *not* to apply it to novel situations.¹⁹ By contrast, when the different duties found in particular relations are not thought to reflect a more general duty, courts may find it more difficult to infer the existence of a duty of care in novel cases. Add to this the injunction to develop the law ‘incrementally and by analogy with recognized categories’,²⁰ and the practical effect of the many-duties view is likely to be narrower liability in negligence.

As the scope of negligence liability has distributive effects, I believe this debate has a political undercurrent,²¹ but I will not explore this issue here. Instead, I will focus on other questions raised by the competing views. Many defenders of idealism seem to favour it because they wish to limit the

¹³ See E.D. Sylla, ‘Sweter Katrei and Gregory of Rimini: Angels, God, and Mathematics in the Fourteenth Century’ in T. Koestler & L. Bergmans (eds), *Mathematics and the Divine: A Historical Study* (Amsterdam: Elsevier, 2005) 249, 251–256.

¹⁴ McBride, n 4 above, 417 note 1; Goldberg & Zipursky, ‘Torts as Wrongs’, n 3 above, 919; J.C.P. Goldberg & B.C. Zipursky, ‘Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties’ (2006) 75 *Fordham L Rev* 1563, 1580–1581.

¹⁵ See the quoted text accompanying note 6.

¹⁶ Cf D. Priel, ‘The Boundaries of Law and the Purpose of Legal Philosophy’ (2008) 27 *L & Phil* 643, 656–661.

¹⁷ *Donoghue*, n 12 above, 580. Lord Atkin’s warning ‘against the danger of stating propositions of law in wider terms than is necessary’, *ibid* 584, has received less attention.

¹⁸ *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, 1027. Denning provided an early statement of this idea when, already in 1949, he said that Lord Atkin in *Donoghue* ‘implicitly adopted’ the principle that ‘all injuries done by one person are actionable unless there is some justification recognised by law’. Lord Justice Denning, ‘The Universities and Law Reform’ (1949) 1 *JSPTL* 258, 263.

¹⁹ One tort idealist called this the ‘disaster’ of *Anns v Merton London Borough Council* [1978] AC 728. See Stevens, n 4 above, 637.

²⁰ *Murphy v Brentwood District Council* [1991] 1 AC 398, 461, following *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481.

²¹ See D. Priel, ‘Torts, Rights, and Right-Wing Ideology’ (2011) 19 *Torts LJ* 1. In the exchange between McBride and Howarth the political lines are not difficult to see. Howarth’s political views are known. For McBride’s, see the sources cited in McBride, n 4 above, 440–441, notes 81–85.

role of policy in tort law and they believe that one could glean our reciprocal rights and obligations to each other when the question of duty of care is analysed at the level of fairly narrow categories like doctor and patient. By contrast, because of its generality the ultra-idealist view almost inevitably requires appeal to policy in addressing the question of duty of care in particular cases. Those who think that courts should refrain from relying on policy are therefore typically unsympathetic to attempts to unify tort (or negligence) law under one general principle. Those who want courts to take such considerations into account are more likely to favour seeing the different duties converging into one. Thus, even without appealing to left- or right-wing politics, what emerges is that at stake here—masquerading as conceptual claims about what tort law ‘is’—are subtle normative arguments on what shape the law should take, how far should negligence protection extend, and how judges should decide cases.

If this is true, then, contrary to what the labels might suggest, ultra-idealism turns out to be much closer to the cynical view than the idealist view. From the view that ‘[e]veryone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others’,²² it is but a small step to the cynical view that the duty concept is an unnecessary ‘fifth wheel’,²³ that it plays no real role in determining whether liability should be imposed. The cynic can readily accept that courts sometimes make categorical decisions on whether tort liability should be imposed in certain types of events and will not be particularly troubled if these determinations are labelled ‘duty of care’. But she will insist that the concept of ‘duty’ is not likely to play any determinative role in these categorical determinations. On this I think the cynic and the ultra-idealist will hold similar views, which is why many of those McBride classified as ultra-idealists could just as well be described as cynics.²⁴

I therefore agree with McBride that the real stakes are between the idealists and the cynics, not between the idealists and ultra-idealists. However, McBride and other idealists are not sufficiently precise in their characterisation of idealism and therefore in explaining what is at stake between them and the cynics. There are in fact two related but distinct views under the umbrella of ‘idealism’. One view, which may be called ‘generation-idealism’, claims that it is only by analysing individuals’ rights and duties that we should understand the scope of tort liability. Proponents of generation-idealism will thus deny any role for policy considerations, by which I mean broad societal considerations and in particular considerations pertaining to the potential consequences of decisions one way or the other.²⁵ For them the question of duty of care amounts to the question of what we owe to each other, a question they believe can be answered by an assessment of our interpersonal relationships without any appeal to present social context or the possible future effects of deciding the matter one way or the other. A second type of idealism may be called ‘implications-idealism’.

²² *Palsgraf v Long Island Railroad Company* (1928) 162 NE 99, 103 (Andrews J, dissenting), quoted in McBride, n 4 above, 436 n 64, as an example of ultra-idealism.

²³ W.W. Buckland, ‘The Duty to Take Care’ (1935) 51 LQR 637, 639; see also P.H. Winfield, ‘Duty in Tortious Negligence’ (1934) 34 Colum L Rev 41, 61–65.

²⁴ Howarth himself is not far from cynicism when he says that ‘negligence law deals not in rights to compensation but in judging the reasonableness of conduct’. Howarth, n 8 above, 472. For completeness’s sake I should mention that there are scholars who expressed views that somewhat resemble ultra-idealism, but will (correctly) deny that their view is close to cynicism. See Beever, n 2 above, 122–123. I cannot address Beever’s views here, but it is notable that in his view ‘[t]he task of legal principle is to discover the conceptual boundaries of liability’. Ibid 122. This is different from answering specific questions on liability in particular cases.

²⁵ Generation-idealism comes in both idealist and ultra-idealist versions. For the former see e.g. Stevens, n 3 above, *passim*, especially ch 14; for the latter see e.g. E.J. Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) ch 2.

This view accepts that the determination of what legal rights and duties we have cannot be determined purely 'internally' by an assessment of interpersonal relationships on their own; nonetheless, this view insists that once a legal duty has been recognised we can draw from that certain *conceptual* implications about what that duty requires and how those subject to it should act. As far as I can tell, all generation-idealists are also implication-idealists, but not the reverse. Thus, for instance, in their defences of idealism Goldberg, Zipursky and McBride give room for policy in determining (or at least limiting) duties of care,²⁶ and their arguments against cynicism mostly purport to show only the superiority of implications-idealism to cynicism.

Against this, cynicism (as I understand it) stands for the rejection of both idealist claims. It recognises that the law creates categories of no-liability, but that these determinations are (and should be) based on analysis of the social impact of such determinations. It further argues that as a matter of fact negligence law does not always (of even often) treat violations of duties of care as behaviours that should be avoided, but rather as behaviours for which one should pay damages; even more contentiously, it argues that there are good reasons for that.

As generation-idealism is the stronger view, all criticism of implications-idealism will apply to the former view as well. For this reason, and because of limits of space, I will largely confine myself here to implications-idealism, but it is important to note the connection between the two. Much of the appeal of idealism comes from the fact that it posits that tort law deals with 'wrongs', and that therefore violating tort law duties *is* wrong and therefore something one should refrain from doing. There is, however, one great difficulty with this story and it is that the wrongs in question are described by idealists themselves as *legal* wrongs, not moral ones.²⁷ If that is the case, one needs further argument for the move from the idea that tort law deals with wrongs to the conclusion that they should not be violated. Cynics may accept that what tort law protects can be, and often is, called 'legal rights' and when those are violated one commits a 'legal wrong'. What they deny is the immediate analogy between legal and moral wrongs in terms of what they require. Here, Holmes's warning from more than a century ago of the potential for confusion due to the similarity between legal and moral language, is particularly apt:²⁸ It may be that to think of a duty as something one should try to never breach is uncontroversial in the context of *moral* rights and duties, but one cannot both insist that the rights and duties in question are legal (and as such distinct from moral rights and duties) and rely on the fact that both are called 'wrongs' to draw the conclusion that, like moral wrongs, legal wrongs should not be violated.²⁹

²⁶ See Goldberg & Zipursky, 'The Moral of *MacPherson*', n 3 above, 1842 n 418; McBride & Bagshaw (4th ed), n 3 above, 103. In both sources the authors argue that policy should only be used to deny duty of care, but never to recognise it. They do not explain why.

²⁷ See note 14.

²⁸ O.W. Holmes, 'The Path of the Law' (1897) 10 Harv L Rev 457, 458–462.

²⁹ Goldberg & Zipursky, n 14 above, 1575–1577, building on Hart's distinction between 'being obliged' and 'being under an obligation' argue that what is true of moral obligation is true of legal obligation as well. There are three problems with this argument. First and least important, in the same place Hart develops his ideas Hart expounds a public law view of private law: he talks of 'civil law' duties as 'entrusted by the group to a private individual'. H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 3rd ed., 2012) 87. Second, Hart's linguistic distinction is relevant to *social* obligations, which are 'valid' only so long as they are followed; on the other hand, legal obligations in the Hartian framework are valid *even if not followed at all*. It is therefore a mistake to use Hart's linguistic point (developed in the context of social duties) for an analysis of legal duties when they are different on a matter so central to the question under consideration. Third and most important, Hart's theory is completely oblivious to the type of legal rules we now call 'regulation'. Much of modern regulation acts not through 'thou shalt not's' but through incentives ('nudges'), which are not easily incorporated into Hart's typology of rules. One may thus admit that Hart's account is correct as far as it goes, but that it is incomplete as it does not consider what we may call 'incentivising rules'. (One possible way of incorporating

To support the claim for a similarity between moral and legal duties on this score, one might argue that though legal duties are distinct from moral duties, all tort legal duties *are also* moral duties.³⁰ For this claim to have any relevance in this context it has to be the case that the identity is not coincidental but conceptual, that tort law *can only* be concerned with moral rights. Leaving aside sceptical questions about the existence or nature of moral rights, this is an odd claim: first, this view implies that there is a supra-constitutional limit on lawmakers' ability to determine the content of tort law. Second, on the reasonable assumption that morality consists not just of rights, it is unclear why tort law *as a conceptual matter* is *only* concerned with that part of morality (and cannot also be concerned with promoting non-rights-based moral goals). Even then, i.e. even if tort law is exclusively in the business of enforcing pre-existing moral rights, it is unclear whether the desired conclusion follows. It may be that morality demands that people fulfil all their moral duties (although familiar examples about justified breaches of promises or justified lies suggest that even within morality the picture is more complex). It is still the case that because of various competing institutional or moral constraints that law must take into account, the meaning of legal duties is different the meaning of moral ones.

To say that tort law is concerned with 'legal duties' thus leaves open the question of what those duties require, and the rest of the essay is an attempt to answer it. Before proceeding to my answer, I must briefly address a preliminary methodological question, namely how this question is to be answered. To the extent that we are trying to say something about tort law as it is, the answer must be based on examining it in practice, not by divining abstract conceptual truths. Even when examining the practice, however, I suggest we look more at what the law does rather than what it says. By speaking of what the law does, I refer to the real-world consequences of the workings of legal institutions.³¹ What 'the law says', on the other hand, is often (and especially so in the context of tort law) just shorthand for what certain judges have written in their judicial opinions. While not insignificant, judges have an almost free hand to write what they want in their opinions with most constraints self-imposed and reputational rather than controlled or edited from the outside. It is thus unsurprising that we can find judicial statements going in different directions, including some (as the quote from Denning at the beginning of this essay demonstrates) clearly cynical ones.

Examining such pronouncements is thus significant because they provide evidence on the attitudes of some of those engaged in the practice; such pronouncements may also have influence others, and so help push a legal doctrine in one direction rather than another. Nevertheless, the ultimate test is what legal systems 'do', i.e. the actual effects of judicial decisions. We do not judge people who talk idealistically but act cynically as idealists; we think of them as cynics (and hypocrites as well). In this regard, the law is the same.

The following sections therefore attempt to look at what the law does. I first examine closely various legal doctrines that have been said to show that tort law is best understood in idealist terms and I show that none of them supports this claim. I then turn to a more positive case for cynicism. I first argue that there are numerous doctrines that show that the law in fact adopts the cynical view.

such rules within Hart's framework is in terms of a disjunctive obligation to either act in a certain way or pay damages.) When this sort of rule is acknowledged, the cynic can argue that these days tort law is made up (in whole or in part) of incentivising rules.

³⁰ Cf *Blackburn, Low & Co v Vigors* (1886) 17 QBD 553, 558, where Lord Esher MR said: 'every general proposition laid down by judges, as a principle of law, as distinguished from an enactment by statute, is the statement of some ethical principle of rights and wrong applied to circumstances arising in real life'.

³¹ On this I am in agreement with McBride: 'there is...no point in discussing whether the cynics or idealists are right if it does not actually make a difference who is right'. McBride, n 4 above, 419.

This leaves it open to argue that despite all this, it would be better for the legal system to become more idealistic. I then take up that question and explain why tort cynicism may be a good thing.

II. What the Cynical View Can(not) Explain

So far I have suggested that a defender of implications-idealism must either also defend generation-idealism (and address the difficulties with this view, not least of which is that it does not seem to correspond with what the courts are doing), or provide an argument to explain why we should understand the implications of legal rights to be similar to the implications of moral rights. The defenders of idealism I consider below have adopted a third strategy. They seek to show that more than any other competing account, implications-idealism comports with legal practice. In this respect their willingness to countenance policy considerations in the determination of duty of care (i.e. their rejection of generation-idealism and willingness to limit themselves to implications-idealism), may reflect their recognition of the courts' syncretism, a position that the more purist generation-idealist would reject.

While this approach by itself does not amount to a normative argument in favour of implications-idealism, if the claims of its defenders are true, they constitute a significant finding about positive law that is also of normative significance. The burden of this section is to show that the claims of idealists about the shortcomings of cynicism are unconvincing. I hope to show that none of the examples adduced in support of implications-idealism support it, and that some of them are actually an embarrassment for the implications-idealist.

Punitive Damages. McBride claims that the cynical view cannot explain the fact that punitive damages are awarded in some common law jurisdictions against those who commit torts. His argument here runs as follows: he first claims that only the idealist view can explain punitive damages, and then seeks to show that *English* tort law is premised on idealism despite the fact that punitive damages are largely unknown in English tort law. How so? McBride answers that punitive damages are part of *American* tort law and that 'it would be strange if there existed such a fundamental divide between England and the other common law jurisdictions that duties of care actually existed in those other jurisdictions, but not in England. When did the divide arise? And how?'³²

As arguments go, this one is rather odd. It seeks to tell us something about the nature of English tort law by appealing to a doctrine that is not part of it. This might be thought enough to set this argument aside, but let us probe it a bit more to see what it presupposes. First, the suggestion that one can learn something about English tort law on the basis of a doctrine found in another legal system just because they both belong to the 'common law' can only make sense if we assume that all common law systems share some fundamental principles. McBride clearly thinks that non-common law jurisdictions follow a different philosophy, which is why he objects to French law influences on English law.³³ He therefore disapproves of the idea of a 'common law of Europe'³⁴ but endorses the

³² Ibid 426.

³³ Ibid 439–440. McBride suggests there that the popularity of tort cynicism is in part a consequence of the influence of French law. I do not know of a single tort cynic in the common law world who based his views on French law. Perhaps this is because the rights-based conception of tort law favoured by McBride has actually come to the common law from civil law. See J. Gordley, 'The Common Law in the Twentieth Century: Some Unfinished Business' (2000) 88 Cal L Rev 1815, 1823 ('The civil law approach...says [tort] liability depends on whether the plaintiff has been harmed in violation of his rights'). It is actually the common law where the claims we now classify as 'torts' historically had nothing to do with a violation of right. Ibid 1823–1824.

³⁴ McBride, n 4 above, 439.

common law of the entire common law world, even though the UK has formal political ties with other European nations (including France), but none with the United States. More importantly, his rejection of French law influences shows that his argument for idealism does not rest on some universalistic idea of tort law. By insisting on the difference between English and French tort law he acknowledges that it is possible to have a coherent albeit different conception of tort law. But if that is the case, it is hard to see the basis for assuming (rather than showing) that all common law jurisdictions, despite clear political and cultural differences, must have the same underlying philosophy for their law of torts.³⁵ Less abstractly, there is in fact no difficulty whatsoever in answering the questions McBride posed. American law is part of the American polity and exists in the environment of American social and political culture, which is quite different from the British one. These differences have shaped English and American tort law in different ways. Three of those ways which are particularly relevant in this context are the widespread (but not universal) rejection among American lawyers of the idea that there is a distinct area of law called 'private law';³⁶ the idea that any part of American law should be considered as belonging to some abstract supranational legal system of the kind McBride imagines; and closer to the issue at hand, the enormous influence of economic analysis of law on American law. Since economic-influenced scholarship on tort law is quite thoroughly and unabashedly cynical, an American shift towards cynicism is not difficult to explain.³⁷

These differences are implicitly acknowledged by Commonwealth lawyers who discuss American tort cases and scholarship much less frequently than they do cases and scholarship from other common law jurisdictions (and not for lack of either). McBride's reliance on American law in this context is particularly odd, given the widely (though not universally) received view that *duty of care has, at best, a minimal role in most negligence claims in American law!* In an essay written twenty five years ago (an essay that concluded that the differences between English and American tort law are 'great'), Patrick Atiyah wrote that in American courts 'the law of negligence began to expand dramatically' as 'limits on the duty of care were swept aside as archaic nonsense'.³⁸ More recently this impression was confirmed in what may be the most authoritative account of American tort law, the third Restatement on tort, in which duty is relegated to the kind of filter mechanism that can be used to limit liability, not a positive requirement for imposing liability.³⁹ As Stephen Perry succinctly summarised the American position, '[f]or all intents and purposes, modern American tort

³⁵ On the political assumptions underlying this view (assumptions that are largely not shared by Americans) see D. Priel, 'The Law and Politics of Unjust Enrichment' (2013) 63 U Toronto LJ 533, 553–556. Based on this I argue there that on many private law issues English law is now much closer to European civil law countries than to American common law. See *ibid* 568–569.

³⁶ This is the traditional attitude of English law as well. But recently the (ironically) civilian distinction between private and public law has garnered support in England. See D. Priel, 'The Political Origins of English Private Law' (2013) 40 JL & Soc 481.

³⁷ For more detailed historical accounts of the development of twentieth century tort law and tort scholarship in the US that answer McBride's queries see G.E. White, *Tort Law in America: An Intellectual History* (New York: Oxford University Press, expanded ed. 2003); G.L. Priest, 'The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law' (1985) 14 J Legal Stud 461 (emphasising the influence of Fleming James); Goldberg & Zipursky, 'The Moral of *MacPherson*', n 3 above, 1752–1777 (emphasising the significance of Holmes and Prosser).

³⁸ P.S. Atiyah, 'American Tort Law in Crisis' (1987) 7 OJLS 279, 291–292 & n 24.

³⁹ See *Restatement of the Law, Third, Torts: General Principles: Liability for Physical Harm* (2010) §§6–7, and in particular the numerous cases discussed in *ibid* 84–88. These confirm that as far as physical harm goes American law, *at best*, adopts the ultra-idealist view, which as explained earlier, is not very different from the cynical view.

law has abandoned [the] traditional understanding of the duty of care'.⁴⁰ Of course, to speak of 'American' law in this context may be a bit misleading, as each state has its own tort law and there are differences among them; but Perry seems to present the prevailing understanding in American law. At least in California, the US's most populous state (and one whose state courts have often influenced other states), one easily find there judicial statements that are unquestionably cynical.⁴¹

When we turn to the specific point McBride raises—punitive damages—a *New York Times* article that was part of a series on what might be called American legal exceptionalism pointed out that '[d]istinctive features of the American legal system—civil juries, class actions, contingency fees and the requirement that each side bear its own lawyers' fees—all play a role in amplifying punitive damages'.⁴² It is *these* features (largely absent from English tort law), that explain why punitive damages are frequent in American law, not American courts' supposed commitment to idealism. Consequently, punitive damages are more common in American law across the board, not just in tort claims. This point should also put the lie to McBride's claim that only a duty-based account of tort law can explain punitive damages. If American law is cynical and yet awards punitive damages much more frequently than English law, then the claim that only idealism can explain punitive damages looks suspect. If anything, it suggests that the correlation goes in the opposite direction: the more cynical is the approach to tort law, the more sympathetic it is likely to be to punitive damages, exactly because it takes a broader, social, view of (the goals of) tort law.

This point can be substantiated beyond mere speculation. Academic commentary on punitive damages is something of an American obsession, and yet McBride does not mention, let alone examine, any of the arguments that have been put forward in support of them. Had he done that, he would have seen that there are numerous defences of punitive damages that give little place to duty. There are, for example, various arguments explaining punitive law from an economic perspective, which (consistent with the general approach of legal economists) largely dispense with the question of duty. Probably the best known and simplest of them is the idea that punitive damages are economically justified as a means for dealing with the less-than-perfect enforcement of tortious behaviour, which can lead to under-deterrence.⁴³ One finds in the American literature also non-economic arguments for punitive damages, but they too are unlikely to appeal to McBride as they emphasise the role of punitive damages in serving societal goals that criminal law cannot adequately fulfil,⁴⁴ and as such are likely to appear, from McBride's perspective, as 'attempts to twist and distort tort law's basic rules and doctrines...to achieve collective goals'.⁴⁵

⁴⁰ S. Perry, 'Torts, Rights, and Risk' in J. Oberdiek (ed), *The Philosophy of Tort Law* (forthcoming 2014), manuscript at 7; see also S. Perry, 'The Role of Duty of Care in a Rights-Based Theory' in *The Goals of Private Law*, in A. Robertson & T.H. Wu (eds), *The Goals of Private Law* (Oxford: Hart, 2009) 79, 80–91.

⁴¹ See *Dillon v Legg* (1968) 441 P2d 912, 916–917; *Rowland v Christian* (1968) 443 P2d 561, 568.

⁴² A. Liptak, 'Foreign Courts Wary of U.S. Punitive Damages' NY Times, 26 March 2008, A1.

⁴³ A.M. Polinski & S. Shavell, 'Punitive Damages: An Economic Analysis' (1998) 111 Harv L Rev 869. There are other economic arguments, e.g. in R.D. Cooter, 'Economic Analysis of Punitive Damages' (1982) 56 S Cal L Rev 79. Goldberg & Zipursky, 'Torts and Wrongs' n 3 above, 961, dismiss this explanation as inconsistent with the law. Contrary to what they say, however, there are cases that explicitly embraced this rationale, e.g. *Mathias v Accor Economy Lodging Inc* (2003) 347 F3d 672, 677. In any case, the criticism is irrelevant to the point I make in the text, which is that cynical views have no difficulty account for punitive damages.

⁴⁴ See M. Galanter & D. Luban, 'Poetic Justice: Punitive Damages and Legal Pluralism' (1993) 42 Am U L Rev 1393, 1440: 'punitive damages are the only practical method of exercising social control over economically formidable offenders, especially organizational offenders, because criminal penalties are no substitute'.

⁴⁵ N.J. McBride, 'Rights and the Basis of Tort Law' in D. Nolan & A. Robertson (eds), *Rights and Private Law* (Oxford: Hart, 2011) 331, 361.

McBride ignores not just relevant academic discussion on punitive damages, but also important aspects of the law itself, which in many American states requires a substantial part of those damages (in some cases, seventy five per cent) to go to the state.⁴⁶ Such a rule can be accommodated within the economic approach (it can prevent the distorting effects on optimal behaviour that massive damage awards can have on potential victims) or on the view that sees punitive damages are awarded in response to a communal harm. If there is one view that has difficulty with such rules, it is the idealist one. On the idealist account the award of punitive damages is explained exclusively in terms of the bilateral relations that exist between tortfeasor and victim. As such, punitive damages are, quite simply, none of the state's business.

So it turns out that the way American law actually deals with punitive damages lends little support for the idealist view. Given that I do not think one can learn about English tort law by examining doctrines that are not part of it, this finding provides little support for the question regarding English tort law. But we reach similar conclusions by looking at English law itself. We must first distinguish between aggravated and punitive damages. To the extent that the former are concerned with humiliation or other dignitary harms, they are compensatory in nature, and as such do not pose any special trouble for the cynical view. It is only damages that are not meant to compensate for any harm to the claimant with which we are concerned.⁴⁷ McBride suggests that punitive damages may be used on the idealist view to punish a defendant who egregiously violated another person's right. The problem is that if English tort law had been indeed concerned with something like this idea, one would have expected to see the development of an elaborate doctrinal framework concerned with the question of the severity of infringement of right instead of the law's current concern with the size of the loss the defendant inflicted on the claimant. In such a regime, punitive damages would not have been an anomaly for which one has to turn to foreign jurisdictions for examples, but a routine occurrence. Furthermore, though logically it is possible to limit considerations of fault only to cases of egregious violations, there seems to be no good reason (and definitely no reason is provided) for limiting the evaluation of the severity of the breach only to increase damages. On McBride's rationale, it would make sense to say that punitive damages are one end of a spectrum of damages awards; at the other end of the spectrum, corresponding to punitive damages, we would have seen lower damages awarded *just as regularly* in cases of only slight infringements of the claimant's duty, even if the resulting loss had been significant. None of this reflects present doctrine on damages, although, interestingly, it reflects what the law used to be in the past.⁴⁸ To try to fit current law within this view, one has to argue that the size of the claimant's loss is a proxy for the severity of the defendant's infringement. But we know that this is often not the case, and there is no indication that the courts have taken such a view.

⁴⁶ See A. Sebok, 'Punitive Damages in the United States' in H. Koziol & V. Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Vienna: Springer, 2009) 155, 176–178.

⁴⁷ Incidentally, exactly for this reason an opponent of tort cynicism has argued that unlike aggravated damages, punitive damages 'are necessarily out of place in private law'. See A. Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 OJLS 87, 105–110.

⁴⁸ See J.C.P. Goldberg, 'Two Conceptions of Tort Damages: Fair v. Full Compensation' (2006) 55 DePaul L Rev 435, 447–462. Goldberg argues that this was Blackstone's view as well. See *ibid* 442. As Zipursky explicitly grounds his views on punitive damages on the 'original role of punitive damages in English law' (B.C. Zipursky, 'Palsgraf, Punitive Damages, and Preemption' (2012) 125 Harv L Rev 1757, 1779) it is surprising he does not address the fact that this view also required reducing damages in the case of minor infringements.

*Injunctions.*⁴⁹ Injunctions are another example of a doctrine McBride claims can only be explained by idealism. Lacking in English cases to support his case, he once again turns to American law as evidence about the nature of English tort law, using the same refrain: 'it would be strange if the law of England and the law of the United States differed on whether duties of care really existed'.⁵⁰

I will not repeat what I said earlier on this form of argument; I will, however, add some points relating specifically to injunctions. Whatever one thinks of injunctions in English law, McBride's importation from American law is, once again, very selective and fails to mention the cases that do not support his view. I will only mention one, the famous case of *Boomer v Atlantic Cement*,⁵¹ where the New York Court of Appeals allowed for a nuisance to continue so long as the defendant paid compensation. This case reflects the broader doctrine of 'undue hardship' according to which even when it is found that a defendant violated the claimant's legal rights, the court may still take into account the hardship that the imposition of an injunction may have on the defendant and choose to award only damages instead.⁵² Though this is a nuisance case, it is relevant in this context. Idealists usually think that the idealist view is true of all of tort law, and if even in nuisance, the decision to award an injunction involves broad societal considerations, it is hard to see how the very rare instance of injunction in the context of negligence could support idealism.

Matters are not better when we turn to English law. There are no cases of injunction for negligence and there are some judicial statements suggesting that injunctions are never an appropriate remedy for negligence.⁵³ The plausible conclusion to draw from all this is that contemporary tort law does not follow idealist strictures. The most one could say is that a broadly cynical framework contains a few minor tokens of idealism.

Is the cynical view paradoxical? McBride contends that cynicism is paradoxical, because it asserts that 'the common law does not actually impose a duty on A to take care not to run B over: it merely imposes a duty on A to pay B damages if he carelessly runs her over'. That, says McBride, is odd: 'why would the common law seek to protect B *after* she has been run over but not *before*'?⁵⁴ The idealist view, says McBride, has no difficulty with this situation: it consistently demands that A not wrong B in advance, and that A pay damages after the fact if A actually wronged B.

There is inconsistency here only if one already presupposes idealism. If it is *legal* wrongs we are talking about, we should not assume that there has to be something wrong (in the everyday sense of the word) with an activity to require payment for certain costs associated with it.⁵⁵ Taxes are levied after the fact for certain activities (say, purchasing property) without any suggestion that act in question is wrong. The idealist will, of course, reply that the difference between torts and taxes

⁴⁹ Here, I only discuss the paucity of injunctions as a challenge to McBride's argument. In section III.B I make the opposite point, namely that tort cynicism has no difficulty in accounting for injunctions.

⁵⁰ McBride, n 4 above, 429; McBride & Bagshaw (4th ed), n 3 above, 14.

⁵¹ (1970) 287 NY2d 219.

⁵² See D. Laycock, 'The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in *Boomer v. Atlantic Cement*' (2011) 4(3) J Tort L, article 2. As the title of his essay indicates, Laycock criticises *Boomer*, but he does so for its inconsistency with the doctrine of undue hardship, not for its inconsistency with the nature of tort law.

⁵³ *Miller v Jackson* [1977] 1 QB 966, 980 ('If the plaintiff seeks a remedy in damages for injury done to him or his property, he can lay his claim either in *negligence* or *nuisance*. But if he seeks an injunction to stop the playing of cricket altogether, I think he must make his claim in *nuisance*').

⁵⁴ McBride, n 4 above, 425. Here I only deal with the question of inconsistency. In section III.A I challenge the assumption that tort law tries to prevent wrongs from happening in advance.

⁵⁵ It may be that in morality too we distinguish between activities that should be engaged in because they are wrong, and those that are wrong when not accompanied by payment. There is nothing wrong with employing someone else so long as one pays for the work; it becomes wrong when one withholds pay for the work done.

is that the former are concerned with wrongs while the latter are not; that, however, is exactly the contested question. The cynic can consistently reply that it is possible, and *sometimes* desirable, to think of tort liability as something like a tax. This is no mere academic talk. There are judicial statements, and correspondingly legal doctrines, that support the view that *some* tort damages should be considered as 'a hidden cost of running a given system',⁵⁶ a fee that needs to be paid for engaging in an otherwise useful activity.

Even without invoking taxes McBride's conclusion is not warranted, because it is the result of his serious misunderstanding of the nature of the cynic's interpretation of tort law. He presents the cynical view as 'an option to be careless so far as [the claimant] is concerned', and then wonders on behalf of the cynic: 'why would the courts go out of their way to deprive him of that option?'⁵⁷ This, of course, is not what the cynical view, on any description of it, is. The option the cynic alleges is between complying with a certain standard of care and then being free from liability if harm occurs, or not doing so and then paying compensation if someone is injured as a result. It is therefore clear there is no inconsistency in saying to someone in advance: 'you may choose between complying with a standard set by the law or not; if you do, you will be free from liability; if you do not and harm occurs as a result, you will have to pay damages'. This may be a *bad* message for a legal system to send, but it is not paradoxical.

Causation. McBride argues that 'courts will sometimes distort the law on causation in order to ensure that people who are subject to a particular duty of care are not allowed to breach that duty of care without incurring some kind of sanction'.⁵⁸ He goes on to describe three cases in which he thinks the courts did just that. One reason to doubt McBride's claims that cynicism cannot explain the relaxation of causation rules *and* that it is idealism that motivated them to do that, is that the judges who led the House of Lords in two of the three cases he mentioned, Lords Reid and Bingham, were supporters of a more minimal role for the duty question in negligence.⁵⁹ Of course, it is possible that they were inconsistent, but McBride has not shown that.

More to the point, McBride's argument again ignores the fact that the cynical view puts considerable weight on the question whether the defendant's behaviour was careless. In all the cases McBride mentions in this context, the defendant fell below a certain required standard of behaviour. The source of the difficulty was in deciding whether this failure to comply with a standard of care caused the claimant's injury, or whether it was some other cause (someone else's carelessness, the claimant's own carelessness, or an 'innocent' natural cause) that brought about the injury. *This* question, which has nothing to do with the debate between the cynic and the idealist (which concerns the question of duty of care), is one that the idealist has to answer no less than the cynic. In other words, to the extent that indeterminate causation raises difficulties for the cynical view, it raises the

⁵⁶ *Tock v St John's Metropolitan Area Board* [1989] 2 SCR 1181, 1201 (La Forest J, concurring); *Escola v Coca-Cola Bottling Co* (1944) 24 Cal 2d 453, 462 (Traynor J, concurring) ('the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business'); cf *Brand v Hammersmith and City Railway* (1867) LR 2 QB 223, 231 (Bramwell, B). For an experimental study showing the blurry boundaries between fines paid for the commission of a wrong and price paid for a service see U. Gneezy & A. Rustichini, 'A Fine Is a Price' (2000) 29 J Legal Stud 1.

⁵⁷ McBride, n 4 above, 431.

⁵⁸ *Ibid* at 430; McBride & Bagshaw (4th ed), n 3 above, 121.

⁵⁹ For Reid's view see note 18; for Bingham's see *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373 at [49]. The third case McBride mentions, *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, is irrelevant. The case rests on the idea that when one's duty is to prevent someone from behaving in a certain way, the latter's acting in exactly that way cannot be the basis for exoneration from liability. *Reeves* thus did not require 'distorting' of the rules on either causation or remoteness any more than *Dorset Yacht* did.

same difficulties for the idealist view. In fact, quite possibly the idealist faces greater difficulty. The idealist either has to say that duty and breach alone constitute a legal right violation (in which case, the causation requirement in most cases is inexplicable), or else she has to explain how imposing liability when it is not clear whether there was a violation of a legal right promotes the view that insists that a rights-violation is the heart of negligence liability.⁶⁰ The cynic, on the other hand, can rely on societal considerations like preferring an innocent party to a careless one, or on the policy of inducing more careful conduct from a party that was unquestionably careless, to explain the imposition of liability.

III. Why Cynicism

I have focused so far on the weakness of the case for idealism. This does not yet amount to an argument in favour of the cynical view. But the question ‘why cynicism?’ is ambiguous. In one sense it seeks to explain why cynicism provides a superior explanation of current tort law; in another it is concerned with the question of justification. Though the questions are related, the first subsection focuses on the explanatory question while the second on the normative one.

A. *The Reality of Tort Law Supports Cynicism*

My assumption is that determining whether tort law is closer to the idealist or the cynical model depends on what tort law is in practice. In doing that we should look at what tort law is like today. Idealists sometimes talk as though tort law has some unchanging nature such that its ‘nature’ in the late nineteenth century (let alone before) must be the same as it is today. But as a human practice it is perfectly possible that though idealism once adequately explained tort law, the law changed to such a degree that it no longer does.⁶¹ Undaunted, idealists sometimes treat cynicism as the view of ivory tower academics, out of touch with actual legal practice. We are thus told that ‘[t]he loss compensation model of tort law simply does not fit the way we think and speak about tort law’, and even more strongly that ‘at the very deepest level, we *must* subscribe to the idea that committing a tort involves doing something wrong to someone else’.⁶² Along similar lines, we are told that ‘the law presents itself as a normative institution—as an institution that tells people how they ought to behave.... There are rules specifying that contracts should be performed, that no one should enter another’s property without permission, that money paid by mistake should be returned and so on’.⁶³

Such statements are taken to be so self-evident that no evidence for them is ever given. But, so I will argue, these statements are in fact not true. Starting with how the law ‘presents itself’, there are no doubt some judicial statements that support this view, but there are others that do not. At most we can say that at the level of judicial rhetoric *some* judges on *some* occasions adopt idealist language. Idealists conveniently ignore the fact that Bramwell, Holmes, Denning, Posner, Traynor, Bingham, La Forest, and many others from all over the common law world have not only been observers offering their interpretations of what the law is, but that as judges (and in some cases influential commentators as well), they have helped shape it. There is something odd about the claim that idealism reflects actual practice when this requires us to ignore some of the best known, most

⁶⁰ It is thus unsurprising that some idealists disapproved of decisions that favoured claimants in cases of indeterminate causation. See Stevens, n 3 above, 149–151; E.J. Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, rev ed, 2012) 155–158.

⁶¹ See notes 29, 48, 88, all hinting at such changes. But see text accompanying notes 96–97.

⁶² McBride & Bagshaw (4th ed), n 3 above, 14 (emphasis added).

⁶³ S.A. Smith, ‘The Normativity of Private Law’ (2011) 31 OJLS 215, 221, also *ibid* 238.

cited judges of the last two centuries. (These names also show that the origins of cynicism are much older than is sometimes suggested.) Furthermore, even if idealism reflected accurately tort law at the appellate level, it ignores the reality of the more run-of-the-mill tort case, the one that typically does not even reach trial, where the cynical view is even more clearly dominant.⁶⁴

If we wish to look beyond judicial rhetoric to see what tort law does, we must first separate the normative requirements imposed by tort law from those created by other branches of the law. McBride's discussion at times sounds as though tort law is the only area of law that exists;⁶⁵ but if there is an area of law that typically deals with prohibitions of the kind he talks about it is criminal law, where public authorities typically do make an active effort to prevent wrongs from happening. Idealists pass over this striking difference between criminal law and tort law. Therefore, to distil the message sent by tort law alone, we need to find instances of civil wrongs that do not give rise to any other kind of legal response. It is in these cases that we can identify the message sent by tort law unadulterated by the potential message coming from other areas of law. It is here that we can test the hypothesis McBride poses, namely that 'the courts will go out of their way to ensure that [a defendant] is not given an *option* to be careless so far as [the plaintiff] is concerned'.⁶⁶

The reality is that in such cases of 'pure' civil wrong this is exactly what the courts do *not* do. The clearest example comes not from tort law itself, but from breach of contract, which idealists treat as a legal wrong similar on a par to the commission of a tort.⁶⁷ I have quoted the idealist claim that '[t]here are rules specifying that contracts should be performed'. But where *are* these rules? Unsurprisingly, no such rule is cited, because, definitely in the canonical form he presents it, no such rule exists. There are rules that specify what happens if contracts are not performed; to say that these rules mean that contracts should be performed is an idealist *interpretation* of these rules. How convincing is this interpretation? To examine this question assume for a moment that the law takes the idealist view about the matter, and now imagine that it changes from idealism to cynicism. What would change? The answer is, very little, except perhaps some judicial rhetoric. People would still mostly perform, because they prefer the performance of a contract to its non-performance, or because they fear the reputational effects of non-performance. But if they breach, the legal effects of non-performance would be the same. For all of the scorn for Holmes's view on breach of contract 'enjoys little popularity nowadays',⁶⁸ Holmes's simple point was that when one examines what

⁶⁴ Some pertinent information on this is found in R. Lewis & A. Morris, 'Tort Law Culture: Image and Reality' (2012) 39 JL & Soc 562, 564–578; cf S. Halliday et al, 'Street-Level Tort Law: The Bureaucratic Justice of Liability Decision-Making' (2012) 75 MLR 347.

⁶⁵ Consider this: 'It is as well that tort textbooks and articles [espousing the cynical view] do not enjoy a wide circulation outside legal circles. For example, would we really want doctors and nurses to think that the law does not actually require them to treat their patients with a reasonable degree of care and skill; that the *only* thing the law requires them to do is to pay their patient damages if they fail to treat them properly?' McBride & Bagshaw (3rd ed), n 3 above, 16–17 n 13. See also the words quoted from them in text to note 87 below. The answer is that there may be other relevant laws outside tort law that explain why it is false to think that tort cynicism implies that the 'only' thing required of doctors is to pay damages if they fail to treat properly.

⁶⁶ McBride, n 4 above, 431.

⁶⁷ Ibid 417; P. Birks, 'Rights, Wrongs, and Remedies' (2000) 20 OJLS 1, 5.

⁶⁸ McBride, n 4 above, 417. This is, of course, not true. Holmes's view is supported by virtually *all* of the (very many) proponents of economic analysis of contract law. See e.g. L. Kaplow & S. Shavell, *Fairness versus Welfare* (Cambridge: Harvard University Press, 2002) 166–169; R.A. Posner, 'Let Us Never Blame a Contract Breaker' (2009) 107 Mich L Rev 1349. It also has non-economic supporters. See D.J. Markovits, 'Making and Keeping Promises' (2006) 92 Va L Rev 1325, 1345–1346. It even has some judicial support in England. See *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152, 165: 'The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies...'

actually happens, one finds that in effect one has a choice between performing and breaching (and paying damages). Moreover, even if one were to find legal *texts* that specified in no uncertain terms that the law considers it wrong (even morally wrong) to breach a contract, that would not yet establish the existence of a legal *rule*,⁶⁹ because for the most part these texts would have no practical effect, just as the cynic says. This may be due to the fact that legal proceedings are so slow that by the time contractual disputes are resolved specific performance is no longer possible or practical, but this does not undermine the cynic's point, it confirms it. (Note that I can say all this without saying anything on the question of whether breach of contract is morally wrong. One can easily find statements, including judicial statements, proclaiming that breach of contract is sometimes desirable.)

When we turn back to issues more commonly discussed under the heading of 'tort law', we can identify a similar pattern. For all the trumpeting of the odd injunction for negligence or the rare case of punitive damages, by far the most typical tort remedy is compensatory damages awarded after a tort has been committed. On the idealist view this means that the legal system allows wrongdoing on a massive scale to happen on a daily basis so long as the wrongdoer is willing to pay for her actions after the fact. McBride may reply that there are practical difficulties with preventing most wrongs in advance; but while at some level this is true, criminal law shows that there is more the law could do. And in any case, as already mentioned, whatever practical difficulties exist with maintaining the idealist view, they are part of any realistic account of what tort law does. Even if judges say they adopt the idealist stance, and even if they genuinely support it, practical constraints may make idealism an unattainable ideal.

To see this consider McBride's hypothetical case of a car manufacturer who discovers that due to a fault in their brakes one car in 50,000 will 'fail catastrophically', and consequently endanger the lives of people in the car.⁷⁰ He argues that what the law requires in such a situation will be different whether tort law is understood in idealistic or cynical way. If it is the former, the law imposes a duty on the manufacturer to 'do [its] best to warn [users of the car] of the danger they are in so that they can avoid it by ceasing to drive [its] cars or by having the brakes looked at',⁷¹ but on the cynical interpretation such a situation only means that if the car manufacturer does not warn drivers of the car of these dangers, and harm results from not warning people, the car manufacturer will be liable to pay compensation.

This case is ambiguous between two scenarios, one in which the risk in question could have been eliminated cheaply, the other in which the costs of elimination exceed the expected loss from the risk. On the first reading, liability would be imposed on the cynical, but perhaps not on the idealist view. If we follow Lord Reid's opinion in *Bolton v Stone*,⁷² a view often preferred by idealists,⁷³ it is not clear whether liability would be imposed in this case. Since on this view we should not consider the costs of eliminating a risk, the only relevant factor is the expected harm, and as the probability of harm is small, it may not warrant liability.

⁶⁹ For more on this, especially on the difference between texts and rules see D. Priel, 'Trouble for Legal Positivism?' (2006) 12 *Legal Theory* 225, 231–34.

⁷⁰ McBride, n 4 above, 420. The example is based on *Grimshaw v Ford Motor Co* (1981) 174 Cal Rptr 348, better known as the 'Ford Pinto case'. McBride acknowledges that his hypothetical is not a good description of that case. See McBride, n 4 above, 427 n 31. Of course, McBride may set his hypothetical case any way he wishes, but the reality of the case weakens the force of the conclusion McBride drew from it on punitive damages.

⁷¹ *Ibid* 420.

⁷² *Bolton v Stone* [1951] AC 850, 867.

⁷³ Weinrib, n 60 above, 149–152.

To translate a risk of failure in 1 in 50,000 manufactured cars to a risk to individuals I will assume that all faulty cars will fail within four years of purchase. That means that on my assumptions any buyer of this model has a 1 in 200,000 chance of being in a malfunctioning car in any of the four subsequent years. This is a small risk compared to other road risks. In any given year an average Briton is exposed to the risk of about 1 in 20,000 of dying in a traffic accident; this translates to a lifetime risk of about 1 in 240.⁷⁴ (This example shows that Reid's approach, usually considered a rejection of cost-benefit analysis in favour of a more duty-protecting approach, may exonerate some defendants that cost-benefit analysis would find liable.) If this is the case, the defendant in McBride's example will not have to do anything.

It is unclear, however, whether Lord Reid's position in *Bolton* reflects English law. The significance of this comes out in the more realistic alternative, in which the carmaker decided not to eliminate the risk because it was costly to do so. On this reading of the scenario, it is possible that English tort law would not find a carmaker negligent in the case McBride envisages, because English courts have often embraced a test of carelessness not very different from Judge Learned Hand's famous formula. Only a few years after *Bolton* Lord Reid himself stated that

it is the duty of an employer, in considering whether some precaution should be taken against a foreseeable risk, to weigh, on the one hand, the magnitude of the risk, the likelihood of an accident happening and the possible seriousness of the consequences if an accident does happen, and, on the other hand, *the difficulty and expense and any other disadvantage of taking the precaution.*⁷⁵

While courts cannot usually make precise assessments of costs and benefits of eliminating risks, the prevailing view seems to be that both factors are relevant. If it were shown that the risk McBride envisaged was expensive to eliminate, the law would seem to favour the cynical view.

This shows that whatever intuitive appeal McBride's example may have does not come from anything derived from tort idealism, but from the highly visible image that the catastrophic failure of the brakes creates in our minds, a scenario we can easily imagine and we expect never to happen. Such reactions, however, stand in the way of rational discussion.⁷⁶ Rational discussion in this context will avoid anecdotes and focus instead on traffic accidents statistics and try to learn from them whether 'the courts will go out of their way' to prevent torts from happening.

One of the most robust empirical findings about risk analysts is that the marginal costs of reducing risks rise extremely steeply,⁷⁷ and in line with that, if we know anything about cars, it is that they are not perfectly safe: thousands of people die as a result of car accidents every year as a result of others' negligence. We also know, although we prefer not to admit it, that virtually all these deaths are preventable. Whether the source of the accident is negligent mechanical malfunction or negligent human error, we could avoid car accidents by banning cars (and expanding public

⁷⁴ These statistics (for the years 2004–05) are taken from <http://www.medicine.ox.ac.uk/bandolier/booth/Risk/trasnsportpop.html>. The UK is safe in comparison with countries such as France (lifetime risk of 1 in 158) or the US (1 in 82).

⁷⁵ *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552, 574 (emphasis added); see also his view in *Overseas Tankship (UK) Ltd v Mill Steamship Co Pty* [1967] 1 AC 617, 642. For a detailed discussion see S.G. Gilles, 'The Emergence of Cost–Benefit Balancing in English Negligence Law' (2002) 77 *Chi-Kent L Rev* 489.

⁷⁶ Cf G.F. Loewenstein et al, 'Risk as Feelings' (2001) 127 *Psychological Bulletin* 267, who argue that people's reaction to risk is often affected by their emotional reaction to it. They further contend that the 'vividness' with which certain outcomes 'are described or represented mentally' is of great significance in affecting reaction to risk. *Ibid* 275. More generally on the tendency to ignore probabilities in the assessment of risks that evoke 'emotional' reactions and focus in these cases only on the harms see Y. Rottenstreich & C.K. Hsee, 'Money, Kisses, and Electric Shocks: On the Affective Psychology of Risk' (2001) 12 *Psychological Science* 185, 188–90.

⁷⁷ See S.R. Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Cambridge: Harvard University Press, 1993) 11–14.

transportation), or alternatively by limiting their speed to five miles per hour.⁷⁸ That we do not, suggests that as a society we deem the costs associated with such alternatives as too high.⁷⁹ It may sound extremely cynical to say that (and not just in the sense McBride used the term), but the reality is that human society has chosen the convenience and benefits that come from owning private cars over the protection of thousands of lives. It is McBride's own example that forces the idealist to explain how to reconcile tort idealism with the apparent cynical way the law treats the legal rights to life and bodily integrity of virtually everyone.

That does not mean that for whatever reason society may not choose to set a minimum safety level for cars, thereby making them safer but more expensive. Government regulation has done just that and this has resulted in considerable improvement in car safety. It is notable, though, that tort law has contributed very little for the establishment of such standards.⁸⁰ Virtually all efforts on the part of the state to prevent accidents from happening—by means of education, car safety regulation, driving licensing, mandatory car inspections, road traffic rules, criminal law, and mandatory insurance—have not been the work of common law courts in tort cases.⁸¹ Tort law may have contributed to these efforts through its deterrent effect,⁸² or even more indirectly by inculcating certain social norms. Furthermore, to the extent that there are differences in the level of safety provided by different cars, tort law is unconcerned about them. Tort law does not consider it negligent for individuals to make precisely the sort of choice McBride claims it forbids: within the limits set by regulation it allows carmakers to manufacture cheaper *but less safe* cars, allowing buyers to trade cost for safety. The less safe cars expose their users to risks of death that may be less dramatic but no less real (and possibly more probable) than McBride's hypothetical example. In fact, the law permits carmakers to manufacture cars that impose greater risks on *others*,⁸⁵ and it does not stop people from driving them.

Based on his hypothetical, McBride should be very troubled by these facts, for what they show is that tort law, which purportedly takes the idealist view, does not concern itself with the negligently-caused deaths and injuries of thousands every year, all for the sake of convenience. What he focuses on—a requirement to inform buyers of a small manufacturing risk—seems in comparison almost trifling in significance. Even here, however, it is not clear that the law takes McBride's view. If the issue in question is disclosure of potential risks, it resembles the question of

⁷⁸ Cf. *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333, 336: 'if all the trains in this country were restricted to a speed of five miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down'.

⁷⁹ R. Stevens, 'The Conflict of Rights' in *The Goals of Private Law*, n 40 above, 139, 152, considers the idea of excessive precautions 'barmy'. But there is nothing barmy about that: constant washing of hands or not leaving the house fear of accidents are everyday examples of excessive precautions with highly deleterious consequences. More to the point, it is exactly the idea that excessive precautions have high costs (such as those involved with banning cars) that explains aspects of our everyday life and uncontroversial aspects of tort liability (e.g. complaints about defensive medicine).

⁸⁰ See J.L. Mashaw & D.L. Harfst, *The Struggle for Auto Safety* (Cambridge: Harvard University Press, 1990) 39–46.

⁸¹ This is particularly ironic in the case of McBride, someone whose writings expresses unhidden dislike for state institutions. For a discussion see Priel, n 21 above, 18–22.

⁸² The law's impact here is unclear, especially when individuals are concerned. See W.J. Cardi et al, 'Does Tort Law Deter Individuals? A Behavioral Science Study' (2012) 9 J Empirical Legal Stud 567.

⁸³ Many studies show that sport-utility vehicles impose significantly greater risks to pedestrians than other cars. See e.g. D.E. Lefler & H.C. Gabler, 'The Fatality and Injury Risk of Light Truck Impacts with Pedestrians in the United States' (2003) 36 *Accident Analysis and Prevention* 295; L.J. Paulozzi, 'United States Pedestrian Fatality Rates by Vehicle Type' (2005) 11 *Injury Prevention* 232; C.K. Simms & D.P. Wood, 'Pedestrian Risk from Cars and Sport Utility Vehicles—A Comparative Analytical Study' (2006) 220 *Journal of Automobile Engineering* 1085.

informed consent to medical treatment. The attitude taken by English law is that potential victims need not be informed about such tiny risks as the one in his example. For comparison, a risk of slightly less than one per cent was deemed too small to require disclosing.⁸⁴ And indeed, I do not know of a case that imposed tort liability on carmakers for not providing comparative statistics on car safety to prospective buyers.

If motor vehicles are a known means for repeated and severe wrongs on a huge scale, why have courts done so little about that? McBride's idealism has led him to the view that negligence is committed whenever one creates an excessive risk of physical harm even if no harm actually occurred.⁸⁵ Leaving aside the fact that this is not the prevailing view in the courts, what follows from it, as anyone who has been in a car will acknowledge, is that there are in fact many more instances of negligence committed on the road every day than there are road accidents.⁸⁶ This fact is very difficult to reconcile with the claim that tort law courts will go out of their way to make sure legal rights are not violated.

There are two idealist answers I can envisage. One of them—that individuals' freedom to own and drive a car should not be curtailed for those who do not commit torts while driving—I will address in the next section. The other is that unlike the enforcement and prevention mechanisms provided for the criminal law, common law courts have no resources to prevent torts from happening beyond the creation of duties of care. And if they did, the idealist would add, tort law would become part of public law. This response does not vindicate the idealist view, it shows that within the institutional constraints in which tort law operates, it cannot be *anything but* cynical. This suggests that even when 'going out of their way' common law courts cannot do anything but say that duties should not be breached. Consequently, even if the law purports to be idealistic a carmaker with a duty to disclose risks in its products can either disclose the risk and thus 'insure' itself against liability, or not do so and risk liability if harm occurs. If the law is candid about this fact, it is cynical; if it is not, it may be idealistic in what it says, but cynical (as well as hypocritical) in what it does.

A different kind of difficulty for idealism is the fact that tort law permits tortfeasors not to pay themselves for their breaches. We are told by idealists that if tort law were abolished, the legal system would lose a means of 'satisfying the victim of a tort's perception that *the person who committed that tort* must be made to pay for the fact that he has ridden roughshod over the victim's rights'.⁸⁷ This quasi-retributivist conception of tort law is part and parcel of the idealist conception of tort duties as wrongs, but, once again, reality is quite different. Tort law is concerned that those who suffered certain losses get compensated, not with who pays for them. If I get my rich uncle to pay the damages for a tort I committed (either before or after a tort claim in court) this is not something that tort law has any concern about. (Contrast this with the criminal law's reaction to my uncle's offer to serve time in prison instead of me after my conviction of a crime.) In fact, the law sometimes even *demand*s that individuals not personally pay for the torts they committed by requiring them to acquire liability insurance for certain activities.⁸⁸

⁸⁴ *Sidaway v Board of Governors of Bethlem Royal Hospital* [1985] AC 871.

⁸⁵ McBride & Bagshaw (4th ed), n 3 above, 121, explicitly say so.

⁸⁶ For some sobering statistics see P. Cane, *Atiyah's Accidents, Compensation, and the Law* (Cambridge: Cambridge University Press, 8th ed, 2013) 174–175.

⁸⁷ McBride & Bagshaw (4th ed), n 3 above, 902 (emphasis added).

⁸⁸ In earlier times, when ideas of moral fault played a more prominent role in tort liability, liability insurance was considered illegal. See *Delanoy v Robson* (1814) 128 ER 827, 827 ('It would be illegal insurance to insure against what might be the consequences of the wrongful acts of the assured'); W.R. Cornish & G. De N. Clark, *Law and Society in England 1750–1950* (London: Sweet & Maxwell, 1989) 513–514.

Though much of what I have said has focused on negligence, let me add one more example from a different part of tort law. It is worth mentioning because idealists typically claim the idealist view is true not just of negligence, but of all torts. Defamation law for the most part allows individuals to publish whatever they want and then pay damages if the publication is found defamatory. Here, once again, American law is particularly inhospitable to idealism. Because of worries about the chilling effect that prior restraint may have on freedom of speech, it is rare to have an allegedly defamatory publication enjoined before trial.⁸⁹ Though freedom of speech is not as stringently protected in English law, English courts have adopted a fairly similar stance.⁹⁰ If such a cynical view is conceptually tenable in defamation, it is hard to see why it is not in negligence. Defamation, however, is a particularly useful example, because it helps to introduce the point to which I turn now, namely that tort cynicism may not just be a second-best compromise, but rather a desirable feature of the law.

B. *The Case for Cynicism*

The idealist's last stand may be that reality indeed fits the cynical view, but this is to be regretted. As there are two idealist views, there are two corresponding arguments for two aspects of tort cynicism, one that focuses on the question of the determination of duty of care, the other that focuses on the implications of a finding of a duty of care. Again, I will largely limit myself here to the second question. What I hope to show is that there is little to dislike and much to like in the view that it does not automatically follow from the fact that there are tort duties of care that one should never breach them. But before presenting my argument, it is important to correct one fundamental error about tort cynicism that is relevant also for understanding the cynic's view of the first question, namely how the law comes to classify those harms not compensable through tort law for lack of 'duty of care'. On any plausible account, the cynical view of tort law is not *only* concerned with compensation for losses. Economic theories of tort law that typically offer the most thoroughgoing cynical perspective on the law are concerned with loss compensation only indirectly, as a means for setting the optimal level of risk (and loss) people may cause each other. Nor is it concerned with compensation for *all* losses.⁹¹ To take the most familiar example, cynics may readily agree that economic competition is permissible, perhaps desirable, even though it causes losses to some. Importantly, cynics may even be willing to identify in advance general categories of no liability, and those may be called 'no duty' areas. Where cynics differ from idealists is on how to distinguish between those activities condemned by tort law and those that are not. Generation-idealists think that the analysis of rights and duties people owe to each other is up for the task; cynics find this language too vague and

⁸⁹ See e.g. *Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc v Sullivan*, (1997) 559 NW2d 740, 745–746. For the generally restrictive attitude towards injunctions (interim or permanent) limiting speech see *Alexander v US* (1993) 509 US 544, 550.

⁹⁰ See e.g. *Bonnard v Perryman* [1891] 2 Ch 269; *Greene v Associated Newspapers Ltd* [2004] EWCA Civ 1462, [2005] 1 QB 972. Incidentally, there was a time when injunction against a defamatory publication was not available *even after a successful suit*. See P. Mitchell, *The Making of the Modern Law of Defamation* (Oxford: Hart, 2005) 79–80. This view still has its defenders in the US and it has found favour with some courts there. See E. Chemerinsky, 'Injunctions in Defamation Cases' (2007) 57 Syracuse L Rev 157. Even today there are no *quia timet* injunctions for defamation. Mitchell, this note, 91. None of this is consistent with idealism.

⁹¹ Nevertheless, one frequently encounters tort cynicism described as 'loss-based'. See McBride & Bagshaw (3rd ed.), n 3 above, 722; McBride & Bagshaw (4th ed), n 3 above, 13–16; Stevens, n 3 above, 20; Goldberg & Zipursky, 'Torts as Wrongs' n 3 above, 953.

conclusory for deciding most of these questions, and that it is broad ‘policy’ considerations that determine (more or less consciously) this question.⁹²

On the question of the difference between cynicism and implications-idealism, the analysis is slightly different: implications-idealists think that if an activity is classified as a ‘tort’, the legal system should *always* aim to ensure that the activity in question never occurs. Cynics respond that for various reasons this may not always be desirable *when the goals of tort law (and other goals pursued by society but not through tort law) are taken into account*. The implication-idealist accepts that policy considerations may be relevant for determining whether something should be a tort, or whether a duty of care should be imposed, but then holds that once something has been defined as a ‘tort’, preventing it from happening is *always* the best strategy to protecting and promoting the values underlying tort law.⁹³ From this we immediately get to the idealist interpretation according to which the message by the legal system regarding tort ‘duties’ should always be ‘don’t do it!’

There are, however, strong reasons for doubting this view. At an abstract level this view has the odd implication that the same policy considerations that implications-idealists think are relevant for determining what legal rights and duties we have, have no relevance whatsoever in determining the optimal way of protecting them. That would be surprising, but it is a view for which implications-idealists do not typically offer any argument. There is, however, a more positive case to be made for tort cynicism. Idealism is intended to be more than just an attitude: it is said to be a view with real-world implications for how tort law actually operates. If this is so, its defenders must take into account that maintaining these implications have costs. To be more concrete, for courts to ‘go out of their way’ to make sure that torts are not committed, they must do more than merely act, not just speak, and acting typically is not without costs.

Even those who do not think that tort law is concerned with welfare might balk at the law’s trying too hard to prevent negligence from occurring in advance, because this may prove too intrusive of individual freedom. The cynical approach is more realistic about such cases, because it highlights rather than hides the fact that society faces a tragic choice between ‘going out of the way’ to prevent torts from happening in advance (with an inevitably larger number of desirable activities affected and with less overall freedom) and letting more torts happen and dealing with them only after the fact (with fewer curbs on desirable activities and more freedom). It also highlights the fact that in that choice society has largely opted for the latter option.

This presents, as it were, a less cynical view of the cynical view. Tort cynicism on the question of remedies is not the view that one can always do whatever one wishes as long as one pays for the costs of the activity. It is the view that there is a whole range of responses the law may offer for the commission of, or the prospect of, a tort.⁹⁴ There may be some instances in which tort law will make an effort to prevent torts from happening, but in (many) others, it may *with good reason* prefer a

⁹² For a classic statement see O.W. Holmes, Jr., ‘Privilege, Malice, and Intent’ (1894) 8 Harv L Rev 1, 3. I think this is the prevailing view these days in the courts, even if it is not always stated quite so explicitly. At times, however, it is, e.g. in *Dutton v Bognor Regis United Building Co* [1972] 1 QB 373, 397; *Hercules Management v Ernst & Young* [1997] 2 SCR 165, 187 (‘the term “proximity” itself is nothing more than a label expressing a result’). One factor that is central to courts’ reasoning in these questions but that is particularly hard to square with generation-idealism is the prevalence of process-based considerations (floodgates, difficulty of proof and so on) in determining the question of duty. See generally J.A. Henderson, Jr., ‘Process Constraints in Torts’ (1982) 67 Cornell L Rev 901.

⁹³ Some generation-idealists balk at the idea that tort law is there to promote any values—it is simply there to protect the rights people have—and it is ridiculous to suggest that one really protects those rights when it countenances their violation. For reasons I have not space to discuss here, I believe this view is mistaken. In any case, it is irrelevant when considering implications-idealism.

⁹⁴ On this see also Howarth, n 8 above, 467–468.

different response. This may sound odd, but because preventing torts from happening has costs (both monetary and non-monetary), there are cases in which it is preferable to have some duties breached and some torts happen (and compensated after the fact) than prevent them from happening. Sometimes, the downsides of idealism can even be seen within the confines of tort law itself. Anyone who thinks it is a virtue of a tort system that it aims that those who have been victims of torts are *actually* compensated, will have to acknowledge that insisting that 'the person who committed [the] tort' is the one made to pay for it,⁹⁵ implies fewer people will be compensated.

It is recognition of this reality that has led cynics to reverse the relationship between rights and remedies: not from rights follow remedies, but rather from the scope of remedial protections we learn the scope of our legal rights. (Interestingly, this was the common law's historical attitude to the determination of the scope of rights,⁹⁶ and it was writers influenced by civilian ideas such as William Blackstone, John Austin, and more recently Peter Birks, who have argued for its reversal. Despite idealists' claim to adhere to the 'traditional' approach of the common law, in this regard the legal realist slogan 'precisely as much right as remedy'⁹⁷ may actually better reflect that tradition.) One of the cynical view's strengths is that it broadens the scope of remedial responses for the protection of legal rights, and encourages the development of new ones, and so, in turn, expands the range of types of protected legal rights. The starting point for much of the contemporary discussion is the classic article by Calabresi and Melamed. That article proposed a framework for classifying six different ways in which a legal system may protect legal entitlements. Two of those were what they called 'inalienability rules', entitlements that cannot be given up even with their holder's consent,⁹⁸ thus recognising the possibility of legal protection even stronger than the one favoured by idealists. They considered two additional rules they called 'property rules', i.e. rules that give the entitlement holder the power to determine whether to give up their entitlement or not and at what price.⁹⁹ As it happens, Calabresi and Melamed's starting point was that all entitlements should be protected by 'idealist' property rules, but they noted various reasons why property rule protection might not always be possible or desirable.¹⁰⁰ Contrary to McBride's assertion that '[t]he *only* possible reason why [injunctions] might be awarded...is that the defendant proposes to commit a civil wrong',¹⁰¹ there are many reasons why *sometimes* injunctions might make sense, even for the cynic.¹⁰² That

⁹⁵ See note 87.

⁹⁶ See e.g. F.W. Maitland, *Equity, also The Forms of Action at Common Law* (Cambridge: Cambridge University Press, 1909) 372 ('This dependence of right upon remedy it is that has given English law that close texture to which it owes its continuous existence despite the temptations of Romanism'); cf *Davy v Spelthorne Borough Council* [1984] AC 262, 276 ('typically, English law fastens, not upon principles but upon remedies').

⁹⁷ K.N. Llewellyn, 'Some Realism about Realism—Responding to Dean Pound' (1951) 44 Harv L Rev 1222, 1244.

⁹⁸ See G. Calabresi & A.D. Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 Harv L Rev 1089, 1092–1093, 1111–1115.

⁹⁹ *Ibid* 1092.

¹⁰⁰ *Ibid* 1106–10; see also R. Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974) ch 4, for a related discussion.

¹⁰¹ McBride & Bagshaw (3rd ed), n 3 above, 722 n 3. The view that cynicism cannot explain injunctions is also made in McBride & Bagshaw (4th ed), n 3 above, 14; Goldberg & Zipursky, 'Torts as Wrongs', n 3 above, 963.

¹⁰² The question of desirability of property rules is contested among economic-oriented writers, with some favouring more use of liability rules while others preferring more property rules, but no economic perspective rules out injunctions. For the former view see e.g. L. Kaplow & S. Shavell, 'Property Rules and Liability Rules: An Economic Analysis' (1996) 109 Harv L Rev 713; R.C. Ellickson, 'Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls' (1973) 40 U Chi L Rev 681, 738–748. For the latter view see H.E. Smith, 'Property and Property Rules' (2004) 79 NYU L Rev 1719; R.A. Epstein, 'The Clear View of the Cathedral: The Dominance of Property Rules' (1997) 106 Yale LJ 2091. Furthermore, among legal economists there is much discussion of the place of ex ante regulation that often

property rules are part of the cynics' scheme also answers one familiar charge against tort cynicism, namely that it cannot explain *per se* torts like trespass to the person.¹⁰³ The advantage of the cynical view is that it does not treat this question as something to be answered by a priori reasoning on 'conceptual' grounds, but rather seeks to identify the circumstances in which preventing a tort from happening will be preferable and those in which it will not.

Recently, Stephen Smith has offered an argument that might be thought to offer a limited response against the problem of the costs of idealism. Smith has argued that it would be good for the legal system to always send an idealist ('don't do it!') message even on consequentialist (cynical) grounds, because there is empirical evidence that people often obey the law just because it is the law. Consequently, merely sending the idealist message is an almost costless way of getting people to refrain from undesirable activity.¹⁰⁴

This argument is limited in scope: it does not go as far as to vindicate the claim that courts 'go out of their way', i.e. act in certain ways, to prevent torts, but if successful, it gives good reason to want the legal system to send an idealist message. Unfortunately, even in this limited scope, the argument is faulty. To begin, Smith's empirical claim is questionable. Smith's claims are based on survey data, which is likely, especially in a context such as this, to result in skewed findings. Reality shows different behavioural patterns, especially in the area responsible for much tort litigation—traffic—where law-breaking is rampant. This is hard to reconcile with Smith's view (mentioned above) that the law presently adopts the idealist view.¹⁰⁵ One possible reason for this discrepancy may be precisely the fact that it is not easy to get the idealist 'goods' for free: when people come to see that a legal system sending an idealist message does not accompany it by idealist actions, i.e. that those who ignore the message are not in any way penalised, the idealist may come to doubt the point of her loyalty to the law.

Second, it is not clear whether an idealist message would always be a good one. Much of modern tort liability is focused on torts like nuisance and negligence, which for the most part are concerned with undesirable by-products of an otherwise beneficial activity. The message sent by the legal system therefore cannot simply be 'don't pollute', but rather 'don't pollute (terms and conditions apply)'. The problem is that, because of the diversity and complexity of such situations, those terms and conditions are difficult to specify in advance. Consequently, a simple and cheap message ('don't pollute!') will not necessarily have an overall desirable effect, as it might lead people to refrain not just from undesirable activities but also from desirable ones.

It is illuminating in this context once again to compare tort law with criminal law (or at least the part of criminal law concerned with so-called 'mala in se' crimes). The paradigmatic mala in se crimes—murder, rape, theft, and so on—are activities society wishes to have none of, and as they are fairly clearly defined, it is relatively easy to target them. Things are different with negligence, the

results in the award of injunction within the legal framework. See S. Shavell, 'Liability for Harm versus Regulation for Safety' (1984) 13 *J Legal Stud* 357.

¹⁰³ For this claim see Goldberg & Zipursky, 'Torts as Wrongs', n 3 above, 954–955; Stevens, n 3 above, 3; McBride & Bagshaw (4th ed), n 3 above, 14. I believe reality is more complex even with regard to these torts. See D. Priel, 'A Public Role for the Intentional Torts' (2011) 22 *King's LJ* 183. In any event, the intentional torts are irrelevant to the present discussion, which focuses on the question of duty of care within negligence. It is perfectly possible (and consistent with the argument in the text) that the law will adopt a cynical approach to some torts and an idealist to others.

¹⁰⁴ S.A. Smith, 'Duties, Liabilities, and Damages' (2012) 125 *Harv L Rev* 1727, 1732–1734. Smith developed this argument in a different context, so I cannot be certain he would approve of the way I use it here, but I think it is faithful to his overall view of private law as reflected in Smith, n 63 above.

¹⁰⁵ For a challenge to the validity of the conclusions drawn from the studies on which Smith relies see F. Schauer, *The Force of Law* (forthcoming, Harvard University Press, 2014) ch 5.

most common form of contemporary tort liability. Sending a message of 'be careful', or even a somewhat more specific message like 'don't commit medical malpractice' is not going to be much help. More significantly, negligently caused harm is typically a side-effect of an otherwise beneficial activity.¹⁰⁶ We would prefer, of course, to have no medical malpractice, but we recognise that with humans being what they are, we cannot (at least for now) have medicine without it. The danger is that an idealist message aimed at eliminating the bad (medical malpractice) we will also hinder the good (valuable medicine).

IV. The Broader Significance of this Debate

I began this essay by warning that the debate between idealists and cynics may appear scholastic and irrelevant to real-life concerns. Moreover, I have suggested that it may not matter much what people think about tort law, because in practice for the most part, it cannot be anything but cynical. If that is the case, what difference does it make what some legal academics think? I wish to conclude by explaining why this matters, even in the real-world. Views more-or-less like McBride's have become more prominent in recent years and they often have a similar structure: we are first told on conceptual grounds what the real structure of tort law is, from which the theorist then derives various normative conclusions. Duty idealism is but one example of this broader attempt to explain what tort law is on the basis of conceptual analysis. The problem with this form of argument is that its proponents try to win normative victories on the cheap. Instead of arguing, on the basis of considerations of justice, fairness, or welfare (or any other normative consideration they believe should govern human interactions) on the desirable scope of, say, negligence liability of public authorities, or on when liability should be based on fault and when on strict liability, they seek to answer these questions by conceptual analysis. In effect they argue, you either have to abolish tort law and adopt a New Zealand-style social insurance scheme (something proponents of these conceptual arguments invariably oppose) or accept tort law as the conceptualist understands it, because that is what tort law truly is.

One way of challenging this view is to show that the premise on which such arguments rest—that the current structure of tort law resembles these views—is simply not true. That was one aim of this essay. Conceptualists sometimes regretfully concede that tort law as practiced does not actually match their account, to which they respond by lamenting judges' and scholars' failure to understand the True Nature of tort law.¹⁰⁷ But this claim rests on the same false dichotomy between 'real' tort law and no tort law at all. In reality, tort law does not descend on us from heaven to adopt it 'as is'; it is a practice that has been shaped and reshaped by changing societal needs, available technology, and political ideologies. Conceptualists are welcome to argue against the expansion of negligence liability, but they cannot base their argument on the claim that doing so would 'twist and distort' the

¹⁰⁶ To be more precise, there is a tragic choice in the context of criminal law as well, but it often operates somewhat differently. In criminal law the worry often is not so much with eliminating a desirable activity, but with the costs involved in preventing undesirable activity taking place. (There are, of course, cases in which the worry may be about deterring desirable behaviour as well: think of concerns that criminalising sexual harassment will hurt romance.) This may require intrusiveness into the lives of those who are not engaged in criminal activity, and hence the familiar conflict between 'law and order' and 'freedom', 'security' and 'privacy'. The point in the text still stands: because of the relative ease of separating in many instances criminal from non-criminal activity, there will be greater effort to prevent those activities from happening in advance.

¹⁰⁷ See McBride, n 45 above, 332; E.J. Weinrib, 'Does Tort Law Have a Future?' (2000) 34 Val U L Rev 561.

law, as if tort law has some fixed nature, set in stone for eternity.¹⁰⁸ What they must do is explain why such a change would be a 'twist' for the worse. Without such an argument the conceptualists' view rests on a non sequitur. For even if we are convinced by conceptualists' arguments that tort law as it currently is concerned with the protection of rights, it does not follow that tort law is *necessarily* concerned *only* with the protection of rights. There is therefore no incoherence with having some torts concerned with the protection of moral rights and other torts concerned with (say) the promotion of welfare, equality, or any other social goal. There is also no incoherence in saying that though tort law used to be concerned with rights, such a conception is simply incapable of dealing with the problems of contemporary society (large-scale risks, many interactions among strangers, new technologies), and so it has (to be) changed to accommodate these problems.

This highlights one of the more pernicious problems with conceptualism, namely that by presenting its arguments as conceptual, it obscures the real matters at stake. In a recent essay McBride denied the charge that conceptualism is motivated by a certain political outlook, saying that 'there is nothing distinctively left-wing or right-wing in recognising that there are limits to what we should be allowed to do to each other, and allowed to refuse to do for each other'.¹⁰⁹ That may be so, but it is also true that people of different political persuasions strongly disagree on where those limits should be placed, a debate that is completely obscured by conceptual claims about what tort law really is. Proof of this is found on the very same page of McBride's essay: properly understood, he says, tort law is inconsistent with 'collective goals'. For those concerned that tort law conceptualism hides the normative issues at stake, such a statement will confirm their worries with a vengeance. Many critics of the shape of certain tort doctrines presently say that *right now* the law is often structured in such a way that it favours certain values or groups; they then proceed to argue why and how the law should be reformed to address this problem. McBride's response is, in effect, that such critics are correct—tort law is indeed inconsistent with certain goals—but because of what tort law 'genuinely'¹¹⁰ is, there is nothing (short of abolishing tort law) that can be done about it!

It is here, I think, that one can see the most fundamental difference between cynicism and idealism. The cynical view insists that very few of the questions about the foundations of tort law can be answered by appeal to what a certain concept—be it tort law, negligence, right, duty, or wrong—'genuinely' is. It insists that such questions are primarily normative questions, and that it is our normative answers to these questions that shapes our legal concepts, not the other way around. If this is called 'cynicism', so be it.

¹⁰⁸ See note 45 and accompanying text. This is not merely an academic concern. Arguments of this sort were prominent in the opposition to suggestions to reform the law on negligence liability of public authorities. See Law Commission, *Administrative Redress: Public Bodies and the Citizen* (No 322, 2010) 8–9.

¹⁰⁹ McBride, n 45 above, 361.

¹¹⁰ *Ibid* 365.