## Harry Potter and the Purposes of Tort Law

## Scott Hershovitz

University of Michigan Law School

Tort scholars are divided over what would seem a simple question: What is tort law for? The leading answer is that tort law promotes efficient behavior by giving people incentives to take account of costs they impose on others. Another familiar answer is that tort law aims at corrective justice, enforcing a moral requirement that "wrongdoers . . . repair the wrongful losses their conduct occasions." For many years, those answers set the terms of debate, but a third contender has emerged. Tort law, according to civil recourse theorists, empowers individuals to seek redress from who have wronged them.

There is no reason to think that the question "What is tort law for?" admits only one answer. Tort is an ancient institution, and it is possible, even likely, that it serves many purposes and has been repurposed many times. But efficiency, corrective justice, and civil recourse are in deep tension with one another. On the economic view, tort law allocates accident costs according to forward-looking principles. A plaintiffs loss is to be shifted to the defendant only if doing so would minimize the costs of future accidents. In contrast, for corrective justice theorists, the past is the point. Tort law assigns costs on the basis of backward-looking principles that address the question who, among the parties, is responsible for the plaintiff's injury. Proponents of civil recourse theory reject both views, in part because they reject the idea that tort law is centrally concerned with cost allocation.

I think we should go a step further and reject all three accounts. Tort law is a richer institution than the prevailing theories portray it. Both the economist and the corrective justice theorist aim to explain the substantive rules of tort; they generate theories that explain who gets money and under what circumstances. But there is more to tort than transfer payments. Plaintiffs are motivated by money, but not always and not only. Plaintiffs also sue to get answers about how they were injured. They sue to force defendants to explain their behavior, in a public forum, where they stand accused of wrongdoing. They sue to get the vindication of a court judgment in their favor. For their part, defendants litigate to avoid liability. But they also go to court to reestablish their good name, or to vindicate their belief that their behavior was justified. On the older accounts of tort law, the non-monetary aspirations that tort litigants bring to the courtroom are peripheral, if they are visible at all. Civil recourse theory is potentially more congenial to these concerns. But as we shall see, civil recourse theorists tend to paint a partial picture of tort law too.

In the opening sections of the Essay, I present three iterations of a thought experiment (starring Harry Potter), in which tort is reimagined to exemplify as far as possible the purposes posited by economics, corrective justice, and civil recourse. The thought

experiments highlight features of tort law that the standard accounts overlook. In the sections that follow, I argue that an adequate account of tort law will give these features a central role.