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### Torts as Wrongs

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## Articles

### Torts as Wrongs

John C.P. Goldberg\* & Benjamin C. Zipursky\*\*

#### I. Introduction

All of the standard substantive first-year law courses seem to address a basic legal category. All, that is, save one. Property is about the relationship of persons to things that can be owned and alienated—land, chattels, and patents, for example. Criminal Law, at its core, concerns rules so important that their violation elicits from the state its harshest action: punishment. Contract Law introduces students to the ways in which law can empower individuals to enter into mutually advantageous transactions. Civil Procedure provides students with an overview of the litigation process. Constitutional Law is about guarding the guardians. Each of these subjects stands out for being ancestral, essential, or both.

The odd man out, it seems, is Torts. As it tends to be taught today, Torts is “accident-law-plus.” Its most noted chestnuts involve claims for negligence or strict liability.<sup>1</sup> Accidents—in the sense of unintended outcomes—are even at the center of the most commonly taught intentional tort cases.<sup>2</sup> The “plus” comes from decisions that serve as a platform for

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1. *E.g.*, *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); *Sindell v. Abbott Labs*, 607 P.2d 924 (Cal. 1980); *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968); *Summers v. Tice*, 199 P.2d 1 (Cal. 1948); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944); *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850); *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928); *Rylands v. Fletcher*, (1868) 3 L.R.E. & I. App. 330 (appeal taken from Eng.) (U.K.).

2. *E.g.*, *Garrat v. Dailey*, 279 P.2d 1091 (Wash. 1955); *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891).

discussions of economic or moral theory.<sup>3</sup> In sum, Torts seems often to be conceived as a course that teaches students how common law allocates the costs of accidents, while also providing some instruction on law and economics, or law and philosophy. So defined, the course seems ad hoc and esoteric, not basic. Somehow law professors have lost their grip on its subject matter.

The goal of this Article is to put us back on track, not just pedagogically but theoretically. Tort is indeed a basic category of law. To see this, however, one must abandon the notion, now deeply entrenched, that tort law is law for allocating the costs of accidents. As its name indicates, tort law is about *wrongs*.<sup>4</sup> The law of torts is a law of wrongs and recourse—what Blackstone called “private wrongs.”<sup>5</sup>

Of course tort law is in many ways public. It sets generally applicable standards of conduct.<sup>6</sup> It is developed and applied by officials who may have in mind various policy concerns as they render judgments in particular cases. And its operation can advance or interfere with the operation of other public institutions. But tort is private in two basic senses. It defines duties to refrain from injuring (or to protect from injury) that are owed by certain persons to others: duties that, when breached, constitute *wrongs to those others*, as opposed to wrongs to the world.<sup>7</sup> Second, precisely because torts are private wrongs, they provide the basis for a private response.<sup>8</sup> For a wrong to be a tort it must in principle generate for its victim *a private right of action*: a right to seek recourse through official channels against the wrongdoer.

As the law of private and privately redressable wrongs, tort law is rightly treated as a cornerstone of legal education along with criminal law (the law of public and publicly redressable wrongs) and contract law (the law

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3. See, e.g., *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (inviting discussion of when entitlements should be protected by injunction rather than liability); see also *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 221–22 (Minn. 1910) (raising the issues of whether and why it might be just or efficient to impose liability for injurious acts taken out of “necessity”).

4. The noun “tort” means “wrong.” See BLACK’S LAW DICTIONARY 1626 (9th ed. 2009) (defining “tort” as a civil wrong, other than breach of contract, for which a remedy may be obtained).

5. See 3 WILLIAM BLACKSTONE, COMMENTARIES \*2 (describing “private wrongs” as “an infringement or privation of the private or civil rights belonging to individuals”); *id.* at \*115–19 (treating causes of action for infringing the rights of persons or property as articulating private wrongs for which the law provides a remedy to victims).

6. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1915) (observing that the duties recognized by negligence laws are duties of conduct grounded in law rather than defined by agreement).

7. See, e.g., *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 101 (N.Y. 1928) (“Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all. Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right . . .”).

8. See Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 85 (1998) (explaining the centrality to tort of the private right of action).

of consensually defined duties). Looked at through the lens of litigation, Torts is about the wrongs that a private litigant must establish to entitle her to a court's assistance in obtaining a remedy and the remedies that will be made available to her. Looked at through the lens of daily life, Torts is about which duties of noninjury owed to others are counted as legal duties and what sorts of remedial obligations one will incur for failing to conduct oneself in accordance with those duties.<sup>9</sup> In turn, the places to look for contemporary extensions of tort law are *not* the compensation systems with which tort law is frequently coupled.<sup>10</sup> Rather, they are found in the rules governing 10b-5 suits, civil RICO actions, Title VII claims for workplace discrimination, constitutional tort claims, and intellectual-property-infringement actions. To study torts is to learn what sort of conduct our legal system defines as wrongfully injurious toward another such that, when committed, the victim is entitled to exact something from the wrongdoer. This is the domain of law that was born centuries ago with the recognition of the writ of *trespass vi et armis* and that today is defined by state and federal common law, as well as state and federal statutory and constitutional law.

How is it that academics have lost their feel for this basic legal category? The dominant tendency among modern scholars has been to dismiss the language of wrongs as dated, squishy, and inapt, and to dismiss as bankrupt any distinction between “public” and “private.”<sup>11</sup> Although we see no reason to suppose that talk of “wrongs” is inherently less meaningful than talk of “cognitive biases” or “marginal utility,” we grant that it is essential for torts to be understood as *legal wrongs* rather than moral wrongs. In addition, while we conceive of torts as private wrongs, we also concede that government is central to the tort system's operation in a manner that many scholars have overlooked and that a challenge for tort theory is to explain what is distinctively “private” about tort, given the state's role. In short, there is a need for a cogent and doctrinally grounded account of two distinct concepts and the connection between them: *tortious wrongdoing* (“wrongs”) and *civil recourse* (“recourse”). This Article begins to fill that need.

Part II describes the move in torts scholarship away from the idea of Torts as a law of private wrongs in favor of a conception of Torts as law for the allocation of accidentally caused losses. In doing so, it demonstrates the pervasiveness of this mistake, which cuts across standard divides in tort

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9. Needless to say, the wrongs of tort include negligence and other wrongs that can be committed unintentionally. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 3, 20–23 (Proposed Final Draft No. 1, 2005). In this sense, accidents are central to tort law—not because tort is a law of accidents, but because many instances of accidental injury constitute wrongs for which victims are entitled to redress.

10. The section of the American Association of Law Schools devoted to tort law, established in 1972, is titled the “Section on Torts and Compensation Systems.” See generally The Association of American Law Schools, Section on Torts and Compensation Systems, <https://memberaccess.aals.org/eWeb/dynamicpage.aspx?webcode=ChpDetail>.

11. See *infra* Part III.

theory. Part III posits that tort scholars have placed losses at the center of tort theory out of jurisprudential, moral, political, and conceptual concerns that together create a challenge for those who wish to retain a tort theory centered on wrongs, and it sets forth that challenge. This challenge is met in Part IV, in which we set forth a framework for understanding torts as instances of a distinctive kind of wrong.

Having established the availability of a notion of Torts as wrongs, Part V argues for the descriptive superiority of a wrongs-based view: basic features of tort law are inexplicable from within a view of Torts as law for allocating losses, yet are perfectly intelligible if one understands the subject of Torts as covering a special kind of wrong. Part VI explains that there is value to having law that defines private wrongs and provides recourse to victims of those wrongs, and that this value does not reduce down to other values such as enhancing safety, compensating persons in need, or achieving justice. Part VII briefly identifies ways in which a wrongs-and-recourse approach to tort law can illuminate contemporary and enduring debates within and about tort law while also providing an agenda for further research.

## II. Torts, Losses, and Accidents

Most tort scholars would accede to the hornbook definition of torts as “civil wrong[s], other than breach[es] of contract, for which the court will provide a remedy.”<sup>12</sup> At the least, they probably would not deny that the word “tort” means “wrong,” that tort law is on the civil side of the civil-criminal divide, and that torts—while different from breaches of contract—involve individuals bringing lawsuits seeking damages or other forms of relief.

Yet it is equally commonplace for scholars to insist that concepts such as “wrong,” “legal wrong,” “civil wrong,” and “private wrong” do no real work in explaining how the field hangs together, or what its point is.<sup>13</sup> These scholars are also wont to suggest that we would do better to focus instead on certain allegedly observable features of tort law—i.e., when it tends to be invoked and what tends to happen when it is invoked.<sup>14</sup> Doing so, they suppose, allows us to see that tort law hangs together as law for the allocation of costs, especially the costs of accidents.

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12. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 2 (5th ed., Lawyer's ed. 1984); *see also, e.g.*, WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 1 (1941) (“‘Tort’ is a term applied to a miscellaneous . . . group of civil wrongs . . . for which a court of law will afford a remedy in the form of an action for damages.”).

13. *See, e.g.*, PROSSER, *supra* note 12, § 1, at 3–4 (recognizing the great difficulties scholars have faced in trying to give a coherent definition of the field of tort law).

14. *See, e.g., id.* § 1, at 8 (“Enough has been said to indicate that definition or description of a tort in terms of generalities distinguishing it from other branches of the law is difficult, or impossible. It is somewhat easier to consider the function and purpose of the law of torts.”).

Holmes's writings on torts are commonly taken to mark the birth of modern tort theory.<sup>15</sup> That they are so regarded is itself a significant fact. Holmes's writings are accorded this status *because* they provide perhaps the first effort to offer a comprehensive account of the field in terms of losses and accidents.<sup>16</sup> This effort was itself part of Holmes's larger thesis that the transition from ancient and medieval law to modern law was marked by the law's de-moralization.<sup>17</sup>

Determined to get behind or underneath the "moral phraseology . . . of wrongs" that abounds in tort law,<sup>18</sup> Holmes quite consciously chose in *The Common Law* to commence his treatment with accidents.<sup>19</sup> He did so because it permitted him to confront his readers with a view that he believed most of them held, namely, the view that liability under the old trespass writ was *strict*—without regard to fault.<sup>20</sup> How can the moral phraseology be taken at face value, he argued, if trespass liability has always been strict?<sup>21</sup> Of course, Holmes was at the same time determined to rebut a particular version of the claim that trespass liability was strict and to establish instead the historical pedigree and normative superiority of fault-based liability, properly understood.<sup>22</sup> In effect, he credited proponents of the strict-liability claim with having overstated an otherwise sound point. Liability in tort law for accidentally caused harms had always been fault based, not strict. But the

15. See, e.g., Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1256 (2001) (describing Holmes's early writings as the "first serious attempt in the common law world to give torts both a coherent structure and a distinctive substantive domain").

16. See, e.g., *id.* at 1282 ("[Holmes's] approach centered tort doctrine around . . . accidental personal injuries.").

17. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 33 (Mark DeWolfe Howe ed., Harv. Univ. Press 1963) (1881) (arguing that the law "is continually transmuting . . . moral standards into external or objective ones").

18. *Id.* at 65.

19. See *id.* (noting that trespass "affords a fair field for a discussion of the general principles of liability for unintentional wrongs").

20. See *id.* (stating that the historically more popular view of liability was that "a man is answerable for all the consequences of his acts").

21. *Id.* at 65–66.

22. See *id.* at 76 (arguing that the general principle of the common law is that losses from genuine accidents lie where they fall). Here we reject David Rosenberg's provocative argument that Holmes sought only to resist "absolute" forms of strict liability but endorsed strict liability for acts causing losses that could have been foreseen and thus avoided. See DAVID ROSENBERG, *THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY* 5–6 (1995) (concluding that Holmes's "theory held that rules of strict liability qualified by a foresight condition . . . were just and rational"). Holmes did believe that the propriety of imposing liability in tort turns on the foreseeability and the avoidability of the plaintiff's loss. See HOLMES, *supra* note 17, at 45–46 ("[T]here must be actual present knowledge of the present facts which make an act dangerous . . . [and the act] must be made with a chance of contemplating the consequence complained of . . ."). Rosenberg is mistaken, however, to suppose that these aspects of Holmes's theory stood apart from his commitment to the idea that tort liability turns on a failure of the defendant to meet the law's standard for prudent conduct. See, e.g., HOLMES, *supra* note 17, at 97 (endorsing a nonsuit granted in a slip-and-fall case on the ground that the defendant "had done all that it was bound to do in maintaining [its] staircase").

standard for fault was *legal* rather than *moral* fault—i.e., objective rather than subjective.<sup>23</sup> In Holmes's view, tort law was thus fault based in the sense of rejecting strict liability, but was not fault based in the sense of conditioning liability on the commission of a morally wrongful act.<sup>24</sup>

In this manner, Holmes decoupled tort law from notions of wrong and wrongdoing. Yet he did not draw from this effort a skeptical conclusion about the integrity of the field. Quite the opposite, he famously was an early convert on the question of whether Torts is a "proper subject."<sup>25</sup> What, then, did he suppose the subject matter of tort law to be? The answer: law for the allocation of losses. "The business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not."<sup>26</sup> Tort law is law that specifies when a liberal state will depart from its default rule of nonintervention and force *A* to indemnify *B*. Generally speaking, it is prepared to do so for any instance in which (1) *A* causes *B* a loss and (2) such a loss was a foreseeable consequence of *A*'s actions, thus rendering it avoidable in principle through the exercise of what the law defines as ordinary prudence.<sup>27</sup>

Now fast-forward to the mid-twentieth century and the hugely influential Prosser treatise.<sup>28</sup> It offers a view of Torts not very different from Holmes's. Prosser begins with the standard definition of a tort as a civil wrong (other than breach of contract), only to reject it as unhelpful.<sup>29</sup> In its place, he hesitantly offers that "[t]he common thread woven into all torts is the idea of unreasonable interference with the interests of others."<sup>30</sup> It is

23. See HOLMES, *supra* note 17, at 88 ("What the law really forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise.")

24. Holmes next addressed torts such as deceit, which seem not to be about accidents, and to be all about "actual wickedness." *Id.* at 104. Retracing Lecture I's argument for a de-moralized understanding of criminal law, he again insisted that appearances are misleading and that the default rule of tort liability is action causing harm under circumstances that would alert an ordinary person to the risk of harm, in turn permitting him to avoid causing harm through the exercise of prudence. *Id.* at 104–05. For example, liability for deceit rests on the defendant's having uttered a statement in circumstances in which there was a foreseeable likelihood that it might prove to be false and might induce someone to rely on it to his detriment. *Id.* at 109.

25. Grey, *supra* note 15, at 1232.

26. HOLMES, *supra* note 17, at 64; see also *Commonwealth v. Pierce*, 138 Mass. 165, 176 (1884) (Holmes, J.) (characterizing civil liability for negligence as "the redistribution of losses" and contrasting it with criminal law, which sets limits on conduct "in the interest of the safety of all").

27. See HOLMES, *supra* note 17, at 115 ("[T]he general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms . . . . [Fault-based liability] is intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury."). Of course in Holmes's view, the fact that a particular defendant is incapable of exercising ordinary prudence, and hence incapable of taking advantage of the opportunity provided by the state to avoid liability, is not a ground for excusing him from the duty to indemnify. *Id.*

28. PROSSER, *supra* note 12.

29. *Id.* § 1, at 3.

30. *Id.* at 8.

notable that Prosser here superimposes onto the general concept of a tort a distinctive feature of the particular tort of nuisance, in which the adjective “unreasonable” is *not* used to describe the alleged tortfeasor’s conduct but instead the type or degree of loss caused by that conduct.<sup>31</sup> As in nuisance, so in tort law as a whole, Prosser seems to say, the question is not whether an actor has failed to comply with a norm of conduct, but whether his actions have produced a sufficiently serious adverse impact on another. Prosser is also anxious to note that almost anything can count as unreasonable interference—the test being whether it is unreasonable “from the point of view of the community as a whole, rather than the sole matter of individually questionable conduct.”<sup>32</sup>

Having established that the “wrongs” of tort consist of the (nearly limitless) set of acts that might be deemed to generate unreasonable interferences with others, Prosser suggests that we will do better to define tort law by reference to its function. Distinguishing a tort from a crime, he observes that “the civil action for a tort . . . is commenced and maintained by the injured person himself, and its purpose is to compensate him for the damage he has suffered at the expense of the wrongdoer.”<sup>33</sup> Prosser adds that, “[i]n recent years, there has been a growing appreciation that the law of torts is concerned chiefly with the distribution of the losses inevitable in a civilized community, in accordance with the court’s conception of social justice.”<sup>34</sup> The thought seems to be this: one can expect that, in a crowded, industrialized world, injuries will happen and that they will generate losses. Tort law determines—on the basis of judges’ and jurors’ sense of what counts as an unreasonable interference—whether to let those losses lie where they fall or to shift them to others.

By the mid-1960s, with scholarly attention squarely on automobile accidents, the linkage of the idea of Torts as law for loss allocation to the idea of tort law as accident law was transformed from an already strong tendency to an axiom. This much is clear in three important works from this period. First is John Fleming’s *An Introduction to the Law of Torts*,<sup>35</sup> which opens with this passage:

[T]he economic costs of accidents represents a constant and mounting drain on the community’s human and material resources. The task of the law of torts is to play an important regulatory role in the adjustment of these losses and the eventual allocation of their cost.<sup>36</sup>

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31. *Id.*

32. *Id.* at 10.

33. *Id.* § 2, at 10.

34. *Id.* at 11.

35. JOHN G. FLEMING, *AN INTRODUCTION TO THE LAW OF TORTS* (1967).

36. *Id.* at 1.



No less clear on this point is Patrick Atiyah's *Accidents, Compensation and the Law*.<sup>37</sup> Tort law, he says, is best viewed as but one method by which the state deals with "the problem of compensation for misfortunes."<sup>38</sup> He adds that the subject matter of tort law is primarily the rules by which compensation is paid (or not paid) for "road accidents and industrial accidents."<sup>39</sup>

Finally, although pathbreaking in its reliance on economic analysis in the service of a deterrence-based argument for certain forms of liability, Judge Calabresi's *The Costs of Accidents* fits quite comfortably within the tradition we are describing.<sup>40</sup> His premise, like Atiyah's, is that tort law is one of several means by which government might address the problem of accident costs.<sup>41</sup> Also like Atiyah, Calabresi concludes that tort law—particularly negligence law—is not well-designed to achieve accident-cost reduction.<sup>42</sup> For civil litigation to reduce the cost of accidents, it must allocate losses in a way that properly incentivizes those who are in the best position to take cost-efficient precautions against such losses.<sup>43</sup> For this task, a regime of strict liability—and really a form of liability disconnected from backward-looking inquiries into causation and responsibility—would be vastly preferable. In challenging the propriety of the law's setting fault as the trigger of liability, Calabresi, like Fleming James Jr. before him,<sup>44</sup> only further weakened the idea that the right to prevail in a tort suit has any principled connection to the notion of a wrong having been done. Tort law is about shifting losses to achieve policy objectives, not wrongs and recourse.

The work of each of the aforementioned scholars accepts that, when it comes to understanding tort law, the path to enlightenment begins by dissociating the concept of a tort from notions of wrong and wrongdoing. To say that torts are civil wrongs other than those arising from contract is to utter an unhelpful platitude. It tells us nothing about why individuals in the various instances called "torts" are entitled to damages. In reality, tort liability always begins with a loss, the cost of which the plaintiff aims to shift, and

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37. P.S. ATIYAH, *ACCIDENTS, COMPENSATION AND THE LAW* (3d ed. 1980).

38. *Id.* at 6.

39. *Id.* at 239; *see also id.* at 59 (describing negligence law as a scheme for "decid[ing] if compensation should be paid to an innocent accident victim").

40. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

41. *See id.* at 239 (asserting that the "the fault system" is properly assessed in terms of how well it performs as a scheme for minimizing the costs of accidents).

42. For one thing, it asks lay jurors to focus on highly particularized facts rather than conditions that generally obtain and to decide where liability should fall within an artificially constrained universe of potential loss-bearers. *Id.* at 246–49. Worse, it shifts back and forth between the goals of deterrence and loss spreading in a way that undermines its ability to achieve either, while also generating large administrative costs. *Id.* at 274–77.

43. *See id.* at 312 (suggesting that accident costs can be reduced by assigning costs to those that can avoid accidents most cheaply).

44. *See* John C.P. Goldberg, Comment, *Misconduct, Misfortune, and Justice Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2045–47 (1997) (summarizing James's view that tort law has come primarily to serve an insurance function).

hence tort law must be understood as law devoted to identifying the instances in which losses should be shifted.

Of course the enterprise of tort theory did not grind to a halt with the publication of *The Cost of Accidents*. Indeed, it was precisely at this time that the academy witnessed a resurgence of efforts to analyze law by reference to notions of rights and justice. Did not this resurgence correspond with a revitalization of the idea of torts as wrongs? For the most part, no. Fairness- and justice-oriented scholars tended to be concerned with “public law” issues of civil rights and distributive justice. This sort of thinking dovetailed quite naturally with loss-based conceptions of Torts. Illustrative is George Fletcher’s influential 1972 effort to craft a fairness-based conception of Torts.<sup>45</sup> Fletcher argued that tort law calls on judges to shift losses in accordance with a principle of reciprocity.<sup>46</sup> A critical piece of his argument is that the defendant’s having committed a legal wrong against the plaintiff is irrelevant to the fairness of shifting it. Hence, one of Fletcher’s main goals was to defend certain forms of strict liability.<sup>47</sup>

What about corrective-justice theory? Many would suppose it to be precisely the school of thought that has reestablished the centrality of wrongs to Torts. Among the leaders of this school is Jules Coleman, whose most important book to date in tort theory is titled *Risks and Wrongs*.<sup>48</sup> And a central idea in his work and that of other corrective-justice theorists is that tort law holds defendants responsible for injuries they have caused others through wrongful conduct.<sup>49</sup> Yet even in the hands of Coleman, wrongs turn out to be less central than they first seem. Much the same is true, we believe, for the work of other corrective-justice theorists, including the early work of Richard Epstein, as well as that of Stephen Perry and perhaps Arthur Ripstein.<sup>50</sup> In fact, among corrective-justice theorists, Ernest Weinrib has distinguished himself for having unequivocally embraced the idea of torts as wrongs.<sup>51</sup>

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45. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

46. See *id.* at 550 (“All individuals in society have the right to roughly the same degree of risk.”).

47. See *id.* at 544–49 (arguing that fairness requires the imposition of strict liability for activities that impose nonreciprocal risks of loss).

48. JULES L. COLEMAN, *RISKS AND WRONGS* (1992).

49. See *id.* at 329 (“There are two essential components in the concept of corrective justice . . . wrongfulness and responsibility.”).

50. See, e.g., ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 48–58 (1999) (explaining the concept of fault by examining the “fair” allocation of risk); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 151 (1973) (attempting to reconcile tort theory with “common sense notions of individual responsibility” by exploring concepts of causation); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 450 (1992) (identifying outcome-responsibility and fault as the conditions set by tort law for the recognition of a duty of repair).

51. See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 134–35 (1995) (claiming that a tortious act is “an act of wrongdoing”).

Coleman himself goes out of his way to insist that tort law is fundamentally about *losses*, not wrongs.<sup>52</sup> In his mind, tort law distinguishes itself from criminal law precisely on this score. If law is going to respond to wrongs *qua* wrongs, he says, it should be in the business of punishment.<sup>53</sup> Tort law, by contrast, shifts losses.<sup>54</sup> It is true that, for Coleman, as for Perry, Epstein, and Ripstein, the determination of when a loss is to be shifted hinges on the identification of grounds for holding the defendant morally responsible. Still, the type of responsibility that generates tort liability is the *moral responsibility for a loss* one has caused, rather than responsibility for having committed a wrong, a point that Stephen Perry makes clear by invoking Honoré's notion of "outcome-responsibility" and distinguishing it from responsibility for actions.<sup>55</sup> Instantiating the principle of corrective justice, tort law specifies that an actor's having caused a loss to another, and having done so by means of conduct that falls short of an applicable moral standard, is a sufficient reason for deeming the loss to be the defendant's moral responsibility and not the plaintiff's. The fundamental question to which the principle of corrective justice provides an answer is thus: Whose mess is it?<sup>56</sup>

Among broadly influential approaches to modern tort theory, the one that may sit least comfortably within the loss-allocation framework is Judge Posner's efficient-deterrence account.<sup>57</sup> Yet even this view is fairly depicted as an allocative one, in which judges, at the behest of private litigants, shift the costs of certain losses or harms in order to promote the efficient expenditure of resources on accident prevention. That Posner's view does not present itself as a loss-allocation theory stems partly from the fact that it attributes no inherent value to providing compensation to an injured plaintiff; that a loss has fallen on one person rather than anyone else is a distributional issue according to Posner, and, as such, is irrelevant to the question of whether resources are being used efficiently.<sup>58</sup> And yet the related question of when an accident cost should be assigned to a defendant is fundamental.

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52. See COLEMAN, *supra* note 48, at 330–32 (arguing that tort law is concerned to correct wrongful losses, not wrongs per se).

53. See *id.* at 222–24 (distinguishing risk allocation by tort law and punishment by criminal law).

54. See *id.* at 314–18 (criticizing "relational" views that treat tort law as responding to wrongs, as opposed to losses); Perry, *supra* note 50, at 486–87 (criticizing Weinrib's characterization of torts as wrongs).

55. Perry, *supra* note 50, at 489–96. See generally Tony Honoré, *Responsibility and Luck*, 104 L.Q. REV. 530 (1988) (creating the concept).

56. See Jules L. Coleman, *Second Thoughts and Other First Impressions*, in ANALYZING LAW 257, 302 (Brian Bix ed., 1998) ("Tort law is about messes. A mess has been made, and the only question before the court is, who is to clean it up?").

57. See generally WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987) (arguing that tort law is best understood as a means of inducing cost-effective precaution taking).

58. See *id.* at 16–17 (arguing that tort law operates to achieve Kaldor–Hicks efficiency).

The challenge for courts is to figure out when, given the goal of efficient deterrence, an accident victim's costs should be imposed on someone else.<sup>59</sup>

It is also true that, in Posner's view, the trigger for loss allocation is the defendant's having engaged in conduct that is "wrongful."<sup>60</sup> Yet Posner insists that torts are wrongs only in the sense that they involve a failure to use scarce resources efficiently.<sup>61</sup> Given this account of what makes conduct tortious, as well as Posner's efforts to disconnect the "wrong" of waste from ordinary conceptions of wrongdoing,<sup>62</sup> one may question whether Posner's account, in the end, really is about wrongs. Regardless, it is quite clearly not about *private wrongs*. As both Weinrib and Coleman have emphasized,<sup>63</sup> Posner is concerned with conduct that is (on the most charitable reading) wrongful to the world—a misuse of the resources in principle available to us all—which is why, on his view, tort suits must be understood as enforcement actions brought by plaintiffs acting in the capacity of private attorneys general.

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Loss-allocation views of tort come in many shapes and sizes. Some assert that a defendant is morally responsible for a harm he has caused and therefore can be held liable for the costs associated with it. Some say that it is fairer for a defendant who has caused a loss to bear it, and that is when and why tort law reallocates a loss. Some focus on the better capacity of certain risk creators to pay for and to insure against such costs. Some say that loss shifting will permit efficient deterrence. Perhaps the most notable difference is not about *which values* are realized through tort law's shifting of losses but *how* values are realized through its operation. Progressives and Posnerians alike view tort law as carrying out one or more of several public goals, be they egalitarian, libertarian, insurance providing, or efficiency enhancing.

Not all of these allocative views depict or need to depict tort law as coextensive with accident law. For several reasons, however, contemporary tort theories that see Torts as loss-allocation law tend also to see it as law for allocating losses arising out of accidents. First, the most notable expansions of tort liability for losses in the modern era have occurred in part because of

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59. See *id.* at 6–8 (tracing the roots of positive economic analysis of tort law to the work of Coase and Calabresi, and arguing that judicial decisions in fact impose liability when doing so furthers the goal of efficient deterrence).

60. See Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972) (acknowledging that harm caused through negligence arouses indignation).

61. See *id.* at 31–32 (suggesting torts are "wrongs" in the particular sense of being failures to take cost-justified precautions).

62. *Id.*

63. See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 13–24 (2001) (criticizing economic analysis of tort law for its inability to capture adequately the structure of tort law); WEINRIB, *supra* note 51, at 48 (criticizing economic analysis for presuming the plaintiff's suit is "not to secure redress for wrongful injury but to claim a bounty for prosecuting inefficient economic activity").

the increase in accidental injuries.<sup>64</sup> Second, one's perception of the importance of an area of law, and the source of that importance, is related to what one thinks it does. If tort law is fundamentally about permitting persons to shift the costs of their injuries to others, then those areas in which there is a pronounced need to have the costs of injuries shifted will figure especially prominently in thinking about what the law is.<sup>65</sup> Third, when the fundamental question in Torts is posed as the question of when to shift losses, instances of intentional infliction of physical harm seem trivially easy and thus really require no attention: virtually everything interesting in the subject area involves cases in which a loss is caused accidentally. Finally, when one focuses upon losses caused by accidents, one tends to focus upon a certain feature of conduct, namely, the creation of *risks* of physical harm. In a contemporary legal culture understandably eager to avoid moralism in describing legal wrongs, the idea that we should focus on the degree to which individuals can impose risks on others has been highly appealing to all of these theorists. But once risk creation is the analytical lens through which one assesses conduct, one is thinking very much in terms of Torts as the realm of accident law.

### III. Torts as Wrongs: Four Challenges

Torts scholars did not always think of tort law as fundamentally concerned with accidents or with loss allocation. Blackstone plainly conceived of Torts as the law of private wrongs,<sup>66</sup> as did influential nineteenth-century American jurists.<sup>67</sup> A handful of important modern theorists—most notably Professor Weinrib—offer wrongs-based views of Torts. Robert Stevens holds a view that is closer to being wrongs based than loss based; perhaps the same can be said of John Gardner and Arthur Ripstein's recent work.<sup>68</sup> Overwhelmingly, however, allocative models

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64. See John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 694 (2001) (asserting that the common law of torts expanded in the late nineteenth century as an alternative institutional mechanism for dealing with "an accident crisis like none the world had ever seen," stemming largely from industrial accidents).

65. See, e.g., LANDES & POSNER, *supra* note 57, at 2–3 (suggesting that tort law was an unimportant field until the rise of litigation over railroad accidents).

66. See *supra* note 5.

67. See John C.P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1237 & n.40 (2008) [hereinafter Goldberg, *Ten Half-Truths*] (noting that early U.S. treatises by Hilliard and Addison defined torts, respectively, as "Private Wrongs" and "Wrongs"); John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 444–45, 456–59 (2006) [hereinafter Goldberg, *Two Conceptions*] (discussing the adoption of a Blackstonian view of torts by Nathan Dane, Zephaniah Swift, and Simon Greenleaf).

68. See ROBERT STEVENS, *TORTS AND RIGHTS* 2–3 (2007) (arguing that the "rights model" of tort law, which analyzes torts as a "species of wrong," is clearly preferable over the "loss model" for torts actionable per se). Gardner clearly takes wrongs to be central to tort law. See John Gardner, *What Is Tort Law for? Part 1: The Place of Corrective Justice* 19 (Oxford Legal Stud. Research Paper Series, Paper No. 1, 2010), available at <http://ssrn.com/abstract=1538342> (describing tort law

dominate tort theory, and the idea of torts as wrongs is mentioned only as a matter of form or etymology.

The fading of an idea is sometimes warranted: it is good that scientists no longer talk of phlogiston. Yet it is not as if the general idea of a wrong has proved itself to be conceptually bankrupt, nor has our law generally dissociated itself from notions of wrongdoing. If anything, the last half-century has seen in the area of criminal law a rebirth of theories of punishment dependent on moral concepts and a concomitant rejection of therapeutic understandings of criminals as not-to-be-blamed.<sup>69</sup> Likewise, the last great wave of enthusiasm in tort law and tort theory for broad forms of “enterprise liability” is now almost twenty years behind us,<sup>70</sup> and there is no question that noninstrumentalist tort theory has gained significant ground.<sup>71</sup>

So we are left with a mystery. With hindsight, one can see how an obsession with accidents prompted mid-twentieth-century jurists to emphasize tort law’s potential as a source of compensation while deemphasizing its foundation in a notion of wrongs. But great resistance to wrongs-based theories of tort law remains. Why?

Our diagnosis is that a cluster of powerful jurisprudential, moral, and political ideas have exerted—and continue to exert—tremendous force on American legal thought, and have done so in a way that has made the notion of Torts as private wrongs appear unavailable. These ideas do not attach to any one tort theorist or philosopher and do not fit easily into any pre-set pattern. Thus, it will be useful to instead examine in the abstract four kinds of problems that seem to have led theorists to abandon the notion of torts as wrongs.

The first problem concerns what might be called the *normative* aspect of the notion of a wrong, and it presents a range of different problems that come

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as requiring those who commit legal wrongs to pay reparative damages “in respect of” those losses occasioned by their wrongs). Yet he is also inclined to describe tort law as implementing corrective justice and to maintain that corrective justice is a matter of allocation. *Id.* at 59–60. Ripstein’s book *Equality, Responsibility, and the Law* is fairly read as being at least equivocal about how central a role losses should play in tort theory, for the concept of risk-ownership carries substantial weight in that work, and it surely resonates deeply with the loss-orientation of Coleman’s work from the late 1980s and early to mid-1990s. Compare RIPSTEIN, *supra* note 50, at 53–58 (discussing how “the person who exposes another to a risk ‘owns’ the risk, and if the risk ripens into an injury, that person owns the injury”), with COLEMAN, *supra* note 48, at 253 (“[I]f a victim can show that her loss is wrongful in the appropriate sense, the burden of making good her loss falls to the individual responsible for it.”). However, Ripstein’s work over the past several years has become increasingly wrongs based. See Arthur Ripstein, *As If It Had Never Happened*, 48 WM. & MARY L. REV. 1957, 1960 (2007) (linking legal remedies to wrongs).

69. See, e.g., James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 87 (2003) (noting, critically, the renewed emphasis in criminal law theory on retributive rather than therapeutic conceptions of criminal law).

70. See generally 1 REPORTERS’ STUDY, ENTERPRISE LIABILITY FOR PERSONAL INJURY (1991). The study “never received the imprimatur of the ALI, and the project was subsequently abandoned by the ALI Council.” Jerry J. Phillips, *Comments on the Reporters’ Study of Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 241, 241 (1993).

71. See *supra* notes 45–56 and accompanying text.

to a head in a dilemma: Should we understand torts as *moral* wrongs or as *legal* wrongs? For sound doctrinal reasons, tort theorists have been disinclined to cast torts as moral wrongs. For a different set of jurisprudential reasons, they have instead treated torts as legal wrongs. Yet in doing so, they have felt compelled to concede that this choice necessarily drains the normative aspect of the idea of a wrong from torts, leaving only an empty conceptual shell. Let us call this “The Moral–Legal Dilemma.”

The second problem arises from the fact that torts generate a specific kind of response from the legal system: the imposition of liability when a private plaintiff successfully asserts a claim against the defendant. At a theoretical level, many tort scholars have been troubled by the idea of a tort as a wrong because they would have expected the legal system to respond very differently to torts if they were really a kind of wrong. Specifically, they would have expected that it would respond to this sort of wrong by punishing the wrongdoer. Instead, tort law “responds” by shifting the cost of the loss imposed upon the plaintiff back to the defendant. Both the absence of a punishment and the presence of a financial liability for a loss render the notion of a tort as a legal wrong unhelpful at best and incoherent at worst, the argument goes. We refer to this as “The Inaptness-of-Liability Problem.”

The third problem that has pushed theorists away from wrongs-based conceptions of Torts derives from the fact that torts are defined in an *injury-inclusive* manner. A defendant is not considered to have committed a tort unless his potentially injurious conduct has actually ripened into an injury. From the point of view of dominant ways of thinking about morality, however, the idea of an *injury-inclusive wrong* makes no sense—*acts* are the proper subject of moral evaluation, not *consequences*. So if torts cannot be deemed wrongs without being treated as injury-inclusive wrongs, then we must abandon the notion of torts as wrongs. We label this “The Realization Problem.”

Finally, scholars have supposed that, even if coherent, the idea of private wrongs is unhelpful. The notion that Torts can be organized as a field around the concept of a wrong is no more useful—and hence no less ripe for abandonment—than the medieval practice of organizing Torts around the writs of trespass and case. What we end up with is an essentially random catalogue of the types of acts that, if they cause certain types of harms, subject an actor to liability. We call this “The Hodgepodge Problem.”

#### A. *The Moral–Legal Dilemma*

Killing an innocent person is both a moral wrong and a legal wrong, while chewing gum is neither. But the two categories are by no means coextensive. Failing to save a drowning child, though it can easily be done, is a moral wrong but usually not a legal wrong. Using the land of another person, while reasonably believing it to be one’s own land, is a legal wrong but not a moral wrong. For very different reasons, Holmes, Prosser, Calabresi, and Posner have emphasized this point. Paradoxically, it turns out

that an appreciation of the distinctively *legal* aspect of tortious wrongdoing is both the beginning of all wisdom and a source of profound confusion—the basis for grasping the particular sense in which tort law is a law of wrongs and the basis for failing to do so such that one is led down a false path toward loss-allocation theories.

The capacity for the phrase “legal wrong” to cause mischief derives in part from the implied suggestion that perhaps there is no moral (or immoral) aspect at all to the term “wrong” within that phrase. Simply put, many find it odd to suppose that a moral wrong is simply one kind of wrong among several, and yet the replacement of “moral” by “legal” in the phrase “legal wrong” tends to suggest just that. To say of a certain pair of earrings that they are gold, but not yellow gold, allows for the possibility that they are made of white gold, which is really a kind of gold. By contrast, to say of them that they are gold, but contain no precious metal, is to say that they are not really gold earrings. To the modern lawyerly ear, a description of torts as wrongs, but not moral wrongs, is akin to describing earrings as gold, but without precious metal. The supposition is that the phrase “legal wrongs” functions like the phrase “fool’s gold.” The adjective “legal” purports to identify the kind of wrong at issue but ends up signifying that torts are not genuine wrongs at all and instead bear only a superficial resemblance to them.

How did this come to be a dominant instinct among tort theorists? We conjecture that the answer rests partly in the influence of a positivistic conception of law traceable back to Holmes and ultimately Austin. According to this conception, legal wrongs are those acts that violate a command or dictate issued by a political superior or sovereign.<sup>72</sup> It is only when the sovereign issues the sort of command that specifies for its subjects what is wrong to do or not do that the category of legal wrongs is created.

Significantly, this model of law much more comfortably accommodates legislation issued within a parliamentary system than common law.<sup>73</sup> By the same token, it renders awkward the idea of common law torts as wrongs. When the careless acts of an imprudent person<sup>74</sup> or a car manufacturer<sup>75</sup> are deemed “wrongful,” they are deemed so notwithstanding the absence of a readily located *ex ante* command that has been violated. Instead,

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72. See generally JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 11–13 (Hackett Publ’g Co. 1998) (1832) (defining laws to include only rules passed “by persons exercising supreme and subordinate *government*” and placing norms set only by public opinion in a separate category of “positive morality”).

73. Of course, Austin himself thought that his jurisprudence could account for the common law. See 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE, OR, THE PHILOSOPHY OF POSITIVE LAW 102 (Robert Campbell ed., 5th ed. 1885) (“Now when judges transmute a custom into a legal rule (or make a legal rule not suggested by custom), the legal rule which they establish is established by the sovereign legislature. A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at his disposition is merely delegated.”).

74. *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490 (C.P.) (U.K.).

75. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1915).



“wrongdoing” is determined by the application of a judicially recognized norm that incorporates a standard of ordinary prudence that itself is not traceable to a clear sovereign directive. And if careless conduct does not violate a government-issued prohibition, the only meaningful sense in which it can be a wrong is if it amounts to the violation of a *moral* (rather than a legal) prohibition against it. In this way, the Holmes–Austin notion that law’s normativity—its directive force—resides in the issuance of a command by a political authority tends to eliminate the possibility that legal wrongs are distinctive, at least for a common law area such as Torts. In turn, it pushes toward the idea that there are really only two options: either Torts is a law of wrongs only in the sense that it happens to attach official sanctions to the commission of conduct that is wrongful in the sense of morally wrongful, or Torts is not really about wrongs at all.

Some who accept this dilemma have considered it so important to depict torts as wrongs that they have tried to equate torts with moral wrongs. But too many well-settled doctrines stand in the way of this move. There are several torts, such as trespass to land, that deem an actor to be a tortfeasor notwithstanding that he has not acted immorally—indeed, has acted reasonably and blamelessly.<sup>76</sup> Even in negligence, the breach standard is judged from an objective point of view, and this drives a wedge between those actors one would deem to have acted immorally and those who can be held liable for negligently injuring someone. Thus, the effort to see torts as wrongs seems to present only two options, both of which seem unacceptable: Either equate torts with moral wrongs, which runs afoul of settled doctrine, or categorize torts as legal wrongs, which is doubly unacceptable because there are no commands of which tortious conduct can be violative and because there is no independent content to the concept of wrongfulness—whatever government prohibits is by definition wrongful. A proper understanding of the subject of Torts must therefore eschew reference to wrongfulness and instead define torts as not-necessarily-culpable failures to take opportunities to avoid harming others (Holmes); or as conduct that can be deemed to interfere unreasonably with the interests of others (Prosser); or as conduct that wastes resources (Posner).

### *B. The Inaptness-of-Liability Problem*

Our effort to reclaim the notion of wrongs for tort law has been motivated in part by the work of leading corrective-justice theorist Ernest Weinrib. Weinrib, however, has been criticized by Jules Coleman and Stephen Perry, who have expressly argued that losses, not wrongs, are more basic to corrective justice and to tort law.<sup>77</sup> Their fundamental objection is

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76. See, e.g., RESTATEMENT (SECOND) OF TORTS § 164 (1965) (stating that an intentional physical invasion of another’s land is a trespass even if made in the reasonably mistaken belief that the land was not owned by the other).

77. See *supra* notes 48–52 and accompanying text.

that the legal system has a particular response to torts, and it is quite different than it would be if torts were really a kind of wrong.<sup>78</sup> We shall look at Coleman's account of what the state's response *should be* if torts are wrongs, turning then to Perry's account of what the response to a tort *is* and why a conception of torts as wrongs is ill-suited to explaining this.

Coleman is, at least in principle, sympathetic with the idea that government might think it a matter of justice to respond to a wrong that one person has done to another. Invoking language from some of his earliest attempts to articulate a notion of corrective justice, he argues that it might want to respond by "annulling" the wrong.<sup>79</sup> However, he insists that the business of annulling wrongs is a matter of retributive justice, not corrective justice: "There is a legal institution that, in some accounts anyway, is designed to do retributive justice, namely, punishment."<sup>80</sup> On this basis, he rejects the possibility that tort law identifies and responds to wrongs *qua* wrongs.

Coleman's argument can be depicted as relying upon three premises: (a) if torts are wrongs then tort liability will have to be understood as—in some sense—the legal system's effort to do justice in responding to wrongs; (b) the imposition of tort liability for wrongs is not the imposition of retributive punishment for conduct deemed worthy of criminal punishment; (c) the imposition of retributive punishment for conduct deemed worthy of criminal punishment is the way the legal system tries to do justice in responding to wrongs.<sup>81</sup> We agree with the first two premises. The third has plausibility but is ambiguous. It is quite plausible that punishment is in some sense about responding to wrongs. The argument is not complete, however, unless the third premise states that retributive punishment is the legal system's *only* (systematic) way of doing justice in responding to wrongs. Coleman does not explicitly make this claim; his point is more that punishment is the only well-developed legal institution that has been understood as responding to wrongs (as opposed to losses)—and that tort liability is plainly not punishment. Thus interpreted, this part of Coleman's argument poses a challenge to a wrongs-based theory of tort law that has not been met: How is tort liability a response to wrongs, given that it is not punishment? Because he sees no good answer to this challenge, yet he is able to provide an answer when tort law is understood as responding to losses, Coleman opts for the latter approach.

Perry, like Coleman, also offers a more particular critique of Weinrib's effort to depict tort liability as a response to torts as legal wrongs. Tort liability, on Perry's view, involves first and foremost the imposition of a duty

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78. See *supra* notes 53–54.

79. COLEMAN, *supra* note 48, at 325.

80. *Id.*

81. See *supra* text accompanying notes 49–53.

of repair upon a tortfeasor, a duty that runs to the injured plaintiff.<sup>82</sup> Weinrib argues that the duty of repair flows from the defendant's having committed a wrong.<sup>83</sup> The wrong is depicted as the breach of a primary duty of conduct owed to the victim; the duty of repair is depicted as a secondary duty that the defendant incurs upon breaching the primary duty.<sup>84</sup> The problem, according to Perry, is that there is a nonsequitur here: A duty of *repair* rectifies a loss, not a wrong.<sup>85</sup> Wrongs are defined by Weinrib in a manner that abstracts from interests and are quite detached from the notion of a loss, assuming a loss is understood as a setback to interests.<sup>86</sup> Hence, there is simply no basis for understanding the assignment of responsibility for a loss (which is what the duty of repair involves) as flowing from the commission of a wrong.

In short, for both Coleman and Perry, there is a fundamental mismatch between a body of substantive law that purports to regulate conduct on the ground that it is wrongful and a body of remedial law that typically requires the payment of compensatory damages. If the law of torts were truly a law of wrongs, they reason, its characteristic remedy would not be an award of damages keyed to the *losses* caused by a wrong. Instead, it would be a penalty keyed to the gravity of the wrong itself. A genuine law of wrongs must go hand in hand with a law of punishment, not a law of damages.

### C. *The Realization Problem*

Careless driving that harms no one is in a sense negligent, but it does not amount to the commission of the tort of negligence. Likewise, the writing of a defamatory statement that remains unread is not a libel. In each case there is conduct that might ripen into an injury, but the conduct is not tortious because the ripening never occurs.

Generally speaking, there are two ways of thinking about how conduct and injury come together in the definition of each tort. The first is to treat the conduct component of a tort as the component in which the wrongfulness of the tortfeasor's conduct resides. Conversely, the injury component, though essential to liability, is not part of what makes a tort wrongful. On this view, a tort consists of an act that, taken on its own, meets the legal test for wrongfulness, and that also happens to cause a certain kind of result. To the extent the commission of a tort deserves condemnation, it deserves the same condemnation as does identical conduct that does not harm anyone. Two identically careless drivers, only one of whom hits someone, have committed

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82. See Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in OXFORD ESSAYS IN JURISPRUDENCE 237, 237–38 (Jeremy Horder ed., 4th ed. 2000) (characterizing corrective justice, which is concerned with the moral duty of repair, as the foundation of tort law).

83. *Id.* at 479–80.

84. See *id.* at 479 (“Weinrib’s version [of the volitionist argument for fault liability] claims that accompanying the *primary* duty not to act wrongfully . . . is a *secondary* duty to compensate for harm that results from one’s wrongful conduct.”).

85. *Id.* at 480, 483.

86. *Id.* at 484.

the same wrong—the wrong of careless driving. That the legal system authorizes different responses to misconduct causing injury and misconduct not causing injury does not reflect a notion that one merits a different kind of response. Instead, it stems from the fact that, in the vast run of cases, there is simply nothing for tort law to do until an injury and a loss has occurred. We call this the *pure-conduct conception of wrongs*.

The alternative view holds that the wrongfulness of torts resides in conduct and result together. Torts, in other words, are defined by the law as wrongs that are only wrongs when completed or realized. Until the injury pregnant in an actor's misconduct occurs, there is no wrong in the tort sense of "wrong," though there might be grounds for condemning the actor or for subjecting him to sanction via criminal or regulatory law. This is because the duties imposed by tort law are duties of *noninjury*.<sup>87</sup> For example, the duty of care in negligence, on this view, is not correctly described as a duty to act with ordinary care toward others. It is instead a *duty not to injure others by conduct that is careless as to them*. By definition, this duty cannot be breached until an actor causes injury to another by failing to act with ordinary prudence toward that other. We call this *the injury-inclusive conception of wrongs*.

Overwhelmingly, modern tort theorists have assumed or insisted that the idea of an injury-inclusive wrong is incoherent.<sup>88</sup> This inclination derives from many sources. The influence of a command-based view of law can once again be detected. In thinking of legal wrongs as sovereign commands, it is quite natural to think of commands that enjoin *conduct* rather than consequences—"Drive carefully!"; "Follow standard medical protocol!"—and that carry with them a sanction for disobedience. The idea is that law identifies for subjects when they have rendered themselves eligible for sanction: They may be lucky enough to avoid a penalty, but the point at which they commit an act meeting the legal definition of a tort is the point at which they have ceded their ability to control this aspect of their fates.<sup>89</sup>

Those inclined to treat torts as moral wrongs to which the law has attached penalties may also have other grounds for being attracted to conduct-based (or will-based) conceptions of wrongdoing. Utilitarianism and Kantianism are the two leading contemporary frameworks for thinking

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87. See Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 214, 222–23 (Gerald J. Postema ed., 2001) (explaining that a tort plaintiff seeks recourse for the breach of a duty of noninjury).

88. See, e.g., *id.* at 221–22 (outlining the views of scholars who argue that holding defendants responsible only when they breach a duty of noninjury is morally arbitrary).

89. Such was Holmes's view:

All the rules that the law can lay down beforehand are rules for determining the conduct which will be followed by liability if it is followed by harm,—that is, the conduct which a man pursues at his peril . . . . [I]f he escapes liability, it is simply because by good fortune no harm comes of his conduct in the particular event.

HOLMES, *supra* note 17, at 64.

about moral wrongs. Rightly or wrongly, they have generally been interpreted by legal scholars in such a way as to render opaque the idea of a moral wrong that is not a wrong absent a certain kind of result. For Utilitarians, it is said, the wrongfulness of conduct hinges on the probability that the conduct will produce net disutility (more pain than pleasure). If the ascription of “negligence” to someone’s driving means that it is the sort of driving that, on balance, will probably cause more pain than pleasure, it makes sense to condemn the driving as wrongful in and of itself, irrespective of its actual results. For Kantians, the moral quality of someone’s conduct turns on the quality of the will of the person who performs it. If a person disregards others’ deservingness of respect and acts in a way that is inconsistent with such respect—by, for example, not taking seriously the risks to others’ health stemming from one’s conduct—then the person has acted immorally. Whether the conduct is wrong is again independent of what happens as a result of the conduct.

On any of the foregoing views, the wrongfulness of tortious conduct must reside in the qualities of the actor’s will or her acts, not in the results for the person suing. It makes no sense, on these views, to talk about torts as injury-inclusive wrongs. Every tort involves two qualitatively different components: wrongful conduct and certain results, morally neutral in themselves, that flow from that conduct.

#### *D. The Hodgepodge Problem*

Even if the various problems already identified can be overcome, there is a remaining concern associated with the idea of conceptualizing torts as wrongs. It is best captured in a deficiency commonly attributed to the nineteenth-century system under which the various tort causes of action were organized under the writs of trespass and trespass on the case. This practice was deemed unsatisfactory because it seemed to be committed to the incoherent project of organizing a set of substantively defined wrongs by reference to the characteristic remedy available to those who successfully complained about their having been committed.<sup>90</sup> This concern seems to have been the source of Holmes’s early disparagement of tort law as a non-subject: “The worst objection to the title Torts, perhaps, is that it puts the cart before the horse, that legal liabilities are arranged with reference to the forms of action allowed by the common-law for infringing them,—the substantive under the adjective law.”<sup>91</sup>

Conceived of as wrongs, the various torts seem not to have any common characteristics. Some involve intentional injurings, others concern accidents.

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90. See G. Edward White, *The Intellectual Origins of Torts in America*, 86 YALE L.J. 671, 678–83 (1977) (explaining the factors contributing to the demise of the writ system, including dissatisfaction with its emphasis on remedies and procedure over substantive wrongs).

91. Oliver W. Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 659 (1873), reprinted in 1 THE COLLECTED WORKS OF JUSTICE HOLMES 326, 331 (Sheldon M. Novick ed., 1995).

Some arise out of bodily harms, others out of property damage, and still others out of interferences with intangibles such as the interest in maintaining one's good name or using and enjoying one's property. Given the array of conduct and consequences recognized by the law as "tortious," it would seem to be the mere fact of actionability that unites the field: The only thing that one can say of all torts is that their commission generates the potential for liability. Because there is no conceptual integrity to the idea of tortious wrongdoing, it is unhelpful to think of torts as wrongs.

#### IV. Meeting the Challenges: Torts as Wrongs

Having identified and elaborated four significant challenges to the intelligibility or usefulness of the idea of torts as wrongs, we will rebut each of them. In doing so, it will help to address each in the reverse order of its initial presentation.

##### A. *Tort Law's Wrongs*

The wrongs of tort law are diverse. Some involve atrocious misconduct, others do not. In some instances, immoral actions that harm give rise to no liability at all. The sorts of injuries that give rise to tort claims range from fatal physical injuries to interferences with intangible property rights. If one were to rank conduct from the most to the least wrongful, and to rank injuries from the most to the least serious, tort law would not map onto these indices in any straightforward way, such that torts correspond to the most serious forms of misconduct and injury.

And yet, as we have explained in a recent book, the wrongs recognized by tort law hardly make for an eccentric or random collection.<sup>92</sup> Tortious wrongdoing always involves an interference with one of a set of individual interests that are significant enough aspects of a person's well-being to warrant the imposition of a duty on others not to interfere with the interest in certain ways, notwithstanding the liberty restriction inherent in such a duty imposition.<sup>93</sup> In part out of a sense of the limitations as to what sorts of interferences and injuries are justiciable, and in part for policy considerations that have changed over time with changes in social norms and economic and political circumstances, courts and legislatures have never sought to render interferences with all such interests actionable. (There is no tort for interference with one's ability to obtain a good education or a decently well-paying job.) Instead, it is to say that tortious wrongdoing is always about interference with some such interests and that tort law can hardly be accused of idiosyncrasy in focusing on the set of interests on which it does focus. It is also to say that tort law does not vindicate public or communal interests,

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92. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* ch. 3 (forthcoming 2010).

93. See *id.* (discussing tort law's "gallery of wrongs").

though of course those might be served indirectly by its operation. A brothel might well be a blight on a neighborhood, and an obstruction of a public way might create a big headache for those to whom it would otherwise provide a convenient route.<sup>94</sup> But both are classic examples of public nuisances: They are not wrongs to anyone in particular and are appropriately addressed through executive-branch action.

Unsurprisingly, many torts are concerned to protect and vindicate an individual's interest in her bodily integrity. Thus, it is *prima facie* actionable for one person to intentionally touch another's body in a manner that is harmful or offensive (battery),<sup>95</sup> to act carelessly toward them so as to cause them physical injury (negligence),<sup>96</sup> or to place a dangerously defective product in the stream of commerce so as to injure someone (products liability).<sup>97</sup> For centuries, it has been actionable to invade physically another's land (trespass),<sup>98</sup> to steal or intentionally destroy property (conversion),<sup>99</sup> to temporarily deprive or carelessly damage or destroy property (trespass to chattel, negligence),<sup>100</sup> and to create an unreasonable interference with another's use and enjoyment of her real property (nuisance).<sup>101</sup> Though statutory in origin, acts that infringe another's copyright, patent, or trademark today form an increasingly important class of legal wrongs that generate private rights of action.<sup>102</sup> As such, they might well be denominated "property torts."<sup>103</sup>

Although tort law often is concerned to address conduct that causes physical harms or property damage, it is a mistake to suppose that these forms of injury have a special claim to being central to the subject of torts. (Indeed, it is a serious defect of courses that teach tort law as "accident-law-plus" that they tend to convey the misimpression that physical harm and property damage are privileged in this way.) Even battery is not precisely concerned with physical harm. Rather, it is the wrong of invading another person's personal space by an unwelcome or inappropriate touching,

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94. See KEETON ET AL., *supra* note 12, § 90, at 643–46 (discussing examples of public nuisance and the available remedies).

95. RESTATEMENT (SECOND) OF TORTS § 13 (1965).

96. *Id.* § 281.

97. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (1998).

98. RESTATEMENT (SECOND) OF TORTS § 158; *see also id.* cmts. j, l (citing examples of trespass to land from the 1800s).

99. *Id.* § 222A; *see also id.* cmt. d, illus. 1 (citing case examples of the tort of conversion from the 1800s).

100. *Id.* §§ 217–218; *see also id.* § 218, cmts. d, e (citing case examples from the 1800s).

101. RESTATEMENT (SECOND) OF TORTS § 821D (1979); *see also id.* cmt. f (citing case examples of nuisance from the 1800s).

102. See GOLDBERG & ZIPURSKY, *supra* note 92 (discussing intellectual property torts).

103. See RESTATEMENT (SECOND) OF TORTS § 871 (defining a property tort and providing examples).

irrespective of whether the touching causes harm.<sup>104</sup> One's interest in maintaining one's "personal space" as against intrusions by others is equally central to other torts, including battery's longtime-partner assault, as well as false imprisonment.<sup>105</sup> Claims for intentional and negligent infliction of emotional distress are not vindications of a right to happiness. Rather, they are rooted in the notion that one takes a significant hit in one's ability to live well when placed in the sort of oppressively difficult situation that is sufficient to cause an ordinarily constituted person to fall apart.<sup>106</sup> Malicious prosecution and abuse of process involve a special form of harassment through the spiteful invocation of the legal system.<sup>107</sup>

It takes but a short step to move from the vindication of individuals' dignitary interests via battery, assault, and false imprisonment claims (among others) to the recognition as torts of workplace sexual harassment, civil rights violations, and human rights violations. The latter quite clearly count as torts, unless one supposes that a wrong cannot be a tort unless it is grounded in precedent rather than statute or constitution: Each involves an assertion that the defendant has committed a legal wrong against the plaintiff, for which she or he is now entitled to recourse. (In fact, sexual-harassment claims began as common law tort claims,<sup>108</sup> as did false-arrest claims that now, along with other claims against government actors, fall under the entirely apt heading of "constitutional torts."<sup>109</sup>)

We turn next from constitutional torts to contemporary commercial litigation. At the heart of the latter are claims for fraud, a basic tort that protects one's interest in being able to transact with others in an environment unpolluted by false information.<sup>110</sup> Thanks to Section 10(b) of the Securities

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104. See RESTATEMENT (SECOND) OF TORTS § 15 cmt. a (1965) ("A contact which causes no bodily harm may be actionable as a violation of the right to freedom from the intentional infliction of offensive bodily contacts."); *id.* § 18 (defining the tort of battery to include "offensive contact with the person of the other").

105. See KEETON ET AL., *supra* note 12, § 10, at 43 (observing that assault protects the individual's interest in being free of threats of touchings); *id.* § 11, at 47 (observing that false imprisonment protects the interest in being free of restraints on bodily movements imposed by others).

106. See RESTATEMENT (SECOND) OF TORTS § 46 (requiring that the emotional distress inflicted by reckless or intentional outrageous conduct must be "severe"); *id.* § 312 & cmt. d (noting that negligent infliction of emotional distress is actionable only if it is serious enough to result in illness or bodily harm).

107. RESTATEMENT (SECOND) OF TORTS §§ 653, 682 (1977).

108. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 165 (1979) ("Sexual touching that women do not want has historically been considered tortious under a variety of doctrines . . .").

109. See SHELDON H. NAHMOD ET AL., *CONSTITUTIONAL TORTS* 1 (2d ed. 2004) ("Constitutional torts are actions brought against governments and their officials and employees seeking damages for the violation of federal constitutional rights, particularly those arising under the Fourteenth Amendment and the Bill of Rights.").

110. See RESTATEMENT (SECOND) OF TORTS § 525 (explaining that liability for fraud results from misrepresentations of fact that induce others to rely on that misrepresentation); see also Michael D. Green, *Apportionment, Victim Reliance, and Fraud: A Comment*, 48 ARIZ. L. REV.



Act of 1934 and Rule 10b-5, as interpreted by a Supreme Court once receptive to implied rights of action,<sup>111</sup> federal courts are now the preferred forum for commercial fraud cases, and sales and purchases of securities are the most frequently addressed transactions.<sup>112</sup> But since there is precious little in the statute or the rule to help flesh out what the wrong of securities fraud really is, courts have relied on the common law of fraud as they have articulated this new area of civil recourse for private wrongs.<sup>113</sup> Other common law torts that protect the interest in freely entering into transactions include tortious interference with contract and with prospective economic advantage,<sup>114</sup> injurious falsehood,<sup>115</sup> slander of title,<sup>116</sup> and various forms of unfair competition.<sup>117</sup>

Dignitary torts such as battery and transactional torts such as fraud connect in interesting ways both to the hoary torts of libel and slander, and to the distinctly modern actions for invasions of privacy. The injury for these torts consists of an interference with the victim's ability to interact with others—one that involves the defendant acting so as to alter in a deleterious way how others view the victim. In defamation, the interference typically consists of inducing others to attribute to the victim some act or quality that renders her contemptible, untrustworthy, pitiable, ridiculous, or the like.<sup>118</sup> Invasions of privacy involve the disclosure (or false attribution) of an

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1027, 1036 (2006) (arguing that the tort of fraud protects a person's transactional decision-making interests).

111. See *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971) ("It is now established that a private right of action is implied under § 10(b).").

112. See 3 THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* § 12.4, at 531 (6th ed. 2006) ("Rule 10b-5 has had a tremendous impact on a broad spectrum of securities litigation. This general antifraud rule is the most commonly used basis for private suits charging fraud in connection with the purchase or sale of securities.").

113. See *Basic, Inc. v. Levinson*, 485 U.S. 224, 253 (1988) (White, J., concurring in part and dissenting in part) ("In general, the case law developed in this Court with respect to § 10(b) and Rule 10b-5 has been based on doctrines with which we, as judges, are familiar: common-law doctrines of fraud and deceit.").

114. See *Lumley v. Gye*, (1853) 118 Eng. Rep. 749 (Q.B.) (U.K.) (establishing liability for inducing the breach of a contract); Charles E. Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728, 728 (1928) (arguing that the tort of interfering with contract relations extends beyond mere inducement of breach).

115. See *Gale v. Ryan*, 31 N.Y.S.2d 732, 734 (N.Y. App. Div. 1941) (recognizing the tort of publishing injurious falsehoods, distinct from libel and analogous to slander of title); William L. Prosser, *Injurious Falsehood: The Basis of Liability*, 59 COLUM. L. REV. 425, 425 (1959) ("There is a tort which passes by many names. . . . It consists of the publication, or communication to a third person, of false statements concerning the plaintiff, his property, or his business, which cause him pecuniary loss.").

116. See *Wilson v. Dubois*, 29 Nw. 68, 68 (Minn. 1886) ("False and malicious statements, disparaging an article of property, when followed, as a natural, reasonable, and proximate result, by special damage to the owner, are actionable.").

117. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1(a) (1993) (reporting that one may be liable for unfair competition by causing harm to the commercial interests of another by engaging in practices determined to be actionable).

118. RESTATEMENT (SECOND) OF TORTS § 559 & cmts. b, c (1977).

embarrassing personal fact,<sup>119</sup> or the (unwanted) association of a person with a commercial enterprise.<sup>120</sup>

Bodily integrity, possessory interests, personal space, freedom to transact, the maintenance of one's standing in the eyes of others—each of these is an important interest, interference with which may amount to the commission of a tort. It is thus plausible that the interests protected by tort law are plural and irreducible. Any loss-based account faithful to the content of tort law will therefore need to be similarly capacious. Candor and a refusal to engage in reductive thinking should not count against a comprehensive wrongs-based account of tort law any more than it should against a nonreductive loss-based account. While admitting the plurality of wrongs and types of wrongs may dash the hopes that some theorists have for a certain kind of essentialist theory of Torts, that is far from making a wrongs-based theory of Torts incoherent.

#### *B. Realized Wrongs and Duties of Noninjury*

In responding to the Hodgepodge Problem, we have emphasized the type of interests that are protected by tort law. No doubt this emphasis will invite some readers to accuse us of having switched from a wrongs-based account of torts to an interest-based or injury-based account. What is central to torts, we seem now to be suggesting, is not how the injurer conducted himself but instead what has happened to the victim. This imagined objection is off the mark, for reasons best explained by turning to the Realization Problem. For it is really just a variation on the claim that gives rise to that problem—namely, that the act and injury components of every tort must be set apart for separate appraisal.

Recall that the Realization Problem centers on the putative philosophical insight that wrongfulness can only be an attribute of conduct, not results. On this view, the tort of negligence is properly depicted as the wrong of acting carelessly coupled with a harmful consequence caused by that wrong, as opposed to the complex or compound wrong of injuring someone through careless conduct. Yet even from within the sort of command-centered framework that is so strongly slanted against comprehending torts as wrongs, the idea of wrongs built on duties of non-injury can be perfectly intuitive. If one were to reduce the tort of battery to a command, it would be: “No unwelcome touching!” Whether one has complied with this directive turns on whether one has in fact touched another, or caused a touching.

Perhaps one could strain to capture a wrong such as battery in purely conduct-related terms. One sees a related effort in Holmes's convoluted attempt to reduce the tort of deceit—built around a “command” to refrain

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119. *Id.* § 652D.

120. *Id.* § 652C.

from actually deceiving another—to the idea of making a statement under circumstances in which one can expect it to be false and to deceive another.<sup>121</sup> Even if one is prone to credit such an effort, our point is made by the fact that intellectual artifice of this sort is required. Torts such as battery, trespass, libel, and fraud help us to see that the idea of a completed wrong is neither incoherent nor esoteric. And if the injunction contained in the law of battery is “No unwelcome touching!,” why is it so odd to think that the injunction around which negligence is built is: “Don’t injure another by acting carelessly toward her”?

What about the Utilitarian and Kantian objection that, insofar as one is in the business of identifying genuine wrongs (rather than using the term “wrongs” as an empty placeholder), one must focus on acts and not results, lest mere happenstance be allowed to infect what should be noncontingent judgments of right and wrong? Here we arrive at the difficult topic of “moral luck,” first staked out in modern analytic philosophy by Bernard Williams and Thomas Nagel.<sup>122</sup> We have elsewhere addressed the significance of moral luck for torts, and of torts for philosophical discussions of moral luck.<sup>123</sup> Here, four points will suffice.

First, tort law plainly involves something of a legal analogue to moral luck. Careless driving that results in a running down is a tort; careless driving that injures no one is not a tort. Second, it is common in ordinary moral evaluation to see a moral difference between these two cases, with the first being deemed worse than the second.<sup>124</sup> From this widely embraced perspective, the wrong of negligently injuring someone is not fully captured by the wrong of negligently driving plus the loss it caused. Insofar as ours is a conventionalist or coherentist conception of tort law that aims to characterize the moral principles that our society and legal system have entrenched within the law of torts, the existence of a framework of moral thought that people deploy regularly in their daily lives and that runs along these lines is of great significance.

Third, if it is really true that there is a conflict between certain systematic moral theories and the ordinary mindset just depicted above, it does not follow that the ordinary mindset is the one that needs to be rejected. Instead, with Williams, one might cogently argue that it is so much the worse for a certain kind of moral philosophizing. Or one might suppose, with Nagel, that we should credit each perspective and work back and forth between them. The point is that one cannot simply assume that clear

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121. See HOLMES, *supra* note 17, at 106–10 (arguing that it is sufficient for the tort of deceit that the defendant made a misrepresentation under circumstances where it could be expected to mislead another).

122. See John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1126 n.8 (2007) (briefly describing Nagel’s and Williams’s views).

123. See *generally id.*

124. *Id.* at 1128–29.

thinking requires the elimination of consequences from any standard that purports to be a genuine standard of wrongful conduct.

Finally, an embrace of injury-inclusive wrongs promises to shed light both on tort law and on the problem of moral luck. Appreciating the availability of completed wrongs as one kind of wrong allows us to see that there are many different reasons for using the language of wrongs and many different reasons for using normative concepts in answering practical questions. It is useful to contrast three of these, one prospective and two retrospective. A person deciding prospectively whether to act in a particular manner will want to know if the conduct counts as a wrong, legal or moral, which typically will (and should) count against it. Alternatively, one looking retrospectively at actions that have already been performed might rely on categories of wrongs (or non-wrongs) in assessing the character or quality of another person. A third usage is retrospective, but different from the second. One might want to ascertain whether some untoward event—the burning down of a house, for example—is so connected with human agency that it should be understood not merely as something that just happened, but ought to be understood as another's *doing*: someone's burning down of the house.<sup>125</sup> Within this kind of assessment of injury-inclusive acts, some may be categorized as wrongs and some may not: The deliberate destruction of a house as a public-health measure is different from a loan shark's willful act of arson or a suburban barbecuer's accidental burning down of his neighbor's house. A person considering whether he is morally responsible for burning down his neighbor's house is asking whether acts and results are linked in such a way as to constitute the moral wrong of negligently burning down the house.

Tort litigation typically presents a legal version of the third kind of question: A person who feels aggrieved or injured is attempting to respond to what he or she perceives as a wronging at the hands of another.<sup>126</sup> Indeed, in tort law it is particularly clear that a defendant's vulnerability to an action by the plaintiff should turn on whether the defendant actually injured the plaintiff, for the injury is intrinsic to the wronging of which the plaintiff complains.<sup>127</sup> From the plaintiff's perspective, it is not correct to say that there just happens to have been a conjunction of her loss and wrongful conduct by the defendant: In her eyes the defendant's wrong is mistreating her or interfering with some aspect of her well-being (or failing to protect or assist her in ways that would have prevented her from suffering a certain kind of setback). More importantly, the court's obligation to provide an avenue of civil recourse against the defendant hinges on the defendant having

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125. The distinction between these two dimensions of retrospective examination is explored at greater length in Benjamin C. Zipursky, *Two Dimensions of Responsibility in Crime, Tort, and Moral Luck*, 9 THEORETICAL INQUIRIES L. 97 (2008).

126. See *supra* note 33 and accompanying text.

127. See *supra* subpart III(C).

wronged the plaintiff in a manner that renders her a victim *entitled* to respond to the wrongdoer.<sup>128</sup>

Those puzzling over the relevance of harm to degree of responsibility have always recognized the fact that the victim of the harm will be naturally disposed to feel differently towards the wrongdoer when the wrongful conduct ripens into harm than she would if no harm ensues.<sup>129</sup> What they have wondered about is why it should make a difference to how the wrongdoer's acts are categorized and evaluated from a more objective perspective.<sup>130</sup> As to this question, tort theory helps moral theory. One of the things we are asking about when we evaluate someone's conduct is what acts he has done. And there is no ground for insisting that a classification that abstracts from results carve at the normative joints—often, in fact, the opposite may be true.<sup>131</sup> A morally significant aspect of what an actor has done is whether his acts—described in a result-inclusive way—are ones that another person could fairly demand that he be held accountable for.<sup>132</sup> That is, even assuming that the increased resentment felt by the victim is not itself to be converted into an attribution of greater blameworthiness to the author of the injurious act, tort law helps us to see a distinct but related point. The question of whether a defendant's blameworthiness is greater is a question of whether the degree and nature of the resentment (not improperly) felt by a victim of the result-inclusive wronging is greater than that of a victim of a harmless wronging. A heightened degree of blameworthiness does not necessarily entail an increased level of wrongfulness, but it may reflect an increase in the level of blame by others to which a third party (like the state) would regard the wrongdoer as properly vulnerable. To say that an actor could reasonably be resented to a greater degree is not to say that there was some respect in which the actor's conduct ought to be deemed more wrongful; on the other hand, increased blameworthiness in the sense of increased grounds for resentment may indeed be an attribute of the actor's actions, not simply a reification or projection of the spontaneous or natural reactions of others.

Torts are not wrongful acts that happen to cause certain kinds of injuries. They are wrongings. For every tort, there is an inquiry into the nature of the tortfeasor's actions (whether intentional in some sense or careless), the nature of the setback suffered by the victim, and the connection between the two.<sup>133</sup> A driver who accidentally loses control of his car and slides onto the ice-covered pond of his neighbor without further incident has

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128. See *supra* subpart IV(A).

129. See Goldberg & Zipursky, *supra* note 122, at 1154 (“[V]ictims of these norm violations are likely to regard themselves as having been wronged and tend to have concomitant feelings of resentment and blame in response.”).

130. *Id.* at 1153–54.

131. *Id.* at 1156–59.

132. *Id.* at 1160.

133. *E.g.*, *supra* notes 27–33 and accompanying text.

not committed a trespass or negligence. There is no trespass because the driver did not set out to make contact with this neighbor's land.<sup>134</sup> There is no negligence because there was no damage to the property.<sup>135</sup> As it is with respect to every other tort, so with respect to these: There must be conduct and a result of a certain description for there to be a wrong in the tort sense of "wrong."

### C. *Accountability, Relational Wrongs, and Civil Recourse*

Coleman, Perry, and others have inferred from tort law's distinctive form of accountability that torts cannot be characterized as wrongs.<sup>136</sup> The inference is unwarranted. It is true, of course, that crimes are punished and torts are typically not, at least *qua* torts.<sup>137</sup> But this fact merely forces us to ask whether there is a form of accountability for legal wrongs that is different from punishment imposed at the behest of a public prosecutor. In fact, there is. But before explaining this form of accountability, it is crucial to develop further our account of torts as legal wrongs.

As we have explained elsewhere, torts are a special kind of legal wrong not only because they are injury-inclusive or realized wrongs but also because they are *relational wrongs*.<sup>138</sup> Some crimes or regulatory infractions are wrongs *tout court*—wrongs to the world or to the state. It makes perfect sense for the law to recognize a crime of narcotics possession or of selling alcohol without a license, or to adopt a regulatory law against littering. Each of these is cogently described as a "legal wrong." Notably, the directives that enjoin these kinds of action are of a certain form. Each is what might be called a *simple legal directive*: For all  $x$ ,  $x$  shall not  $A$ . *Simple legal wrongs* are violations of simple legal directives.<sup>139</sup>

Torts are violations of legal directives with a different analytic structure. We call these *relational directives*. They are of the form: For all  $x$  and for all  $y$ ,  $x$  shall not do  $A$  to  $y$ .<sup>140</sup> These are directives that enjoin people not to treat others in certain ways or that require them to treat others in certain ways. For example, the legal directive underlying the tort of trespass enjoins

134. RESTATEMENT (SECOND) OF TORTS § 166 (1965).

135. *Id.*

136. *See supra* notes 48–50 and accompanying text.

137. *See supra* notes 53–54 and accompanying text.

138. *See Zipursky, supra* note 8, at 59–63 (providing an overview of the concept of relational wrongs).

139. *Id.* at 59–60.

140. *Id.* at 59. Some relational legal wrongs are defined in a way that requires the first relatum to be a member of a less-than-universal group (e.g., the class of physicians, not the class of persons) or requires the second relatum to be a member of a less-than-universal group (e.g., the class of patients, not the class of persons), or requires both, or requires that one of the relata be connected in some way (e.g., for all physicians, and all persons who are patients of that physician, the physician shall not injure the patient by failing to take the care she owes him; for all attorneys, and all clients of that attorney, the attorney shall not divulge information provided to him by that client to any other person).

persons from interfering with a *possessor's* right to exclusive possession.<sup>141</sup> Battery involves an intentional harmful or offensive touching *of another*.<sup>142</sup> Medical malpractice (usually) involves *harming a patient by treating her incompetently*.<sup>143</sup>

One of the special features of relational and injury-inclusive wrongs is that they are defined in such a manner that their commission entails that there is a person who counts as having done the wrong and a person who counts as having been the victim of the wrong. If the tort of libel has occurred, then there is a person who libeled someone and there was someone who has been libeled.<sup>144</sup> If the tort of fraud has occurred, then there is a person who committed the fraud and someone who has been defrauded.<sup>145</sup> If a car accident turns out to have involved the tort of negligence, then there is someone who negligently injured someone else.<sup>146</sup>

It is not hard to see that relational and injury-inclusive wrongs, so understood, simultaneously confer both primary duties and primary rights. The tort of libel contains a relational directive that creates a legal duty not to libel others and a legal right not to be libeled.<sup>147</sup> Fraud generates a duty not to defraud others and a right not to be defrauded.<sup>148</sup> Negligence imposes a legal duty not to injure others through conduct that is careless toward them and a legal right against being injured by such conduct.<sup>149</sup>

With this framework in place, it should now be clear how and why the response authorized by tort law to the commission of torts is distinct from the response provided by criminal law to crimes. Tort law permits victims of relational, injury-inclusive wrongs to obtain a court's assistance in redressing the wrongs that have been done to them. It gives each such victim a right of action, the aim of which is to obtain a remedy—usually, but not always, money damages.<sup>150</sup> We have generalized the point and summed it up in a phrase: Tort law provides victims with an avenue of *civil recourse* against those who have committed relational and injurious wrongs against them.

Tort law is thus plainly private law in the sense that it is about empowering *private parties* to initiate proceedings designed to hold

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141. RESTATEMENT (SECOND) OF TORTS § 158 (1965).

142. *Id.* § 18.

143. *Id.* § 299A.

144. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

145. *Id.* § 525.

146. RESTATEMENT (SECOND) OF TORTS § 281 (1965).

147. *See* RESTATEMENT (SECOND) OF TORTS § 558 (1977) (establishing liability from one person to another for libel, thereby creating a duty not to libel and a right not to be libeled).

148. *See id.* § 525 (establishing liability from one person to another for fraud, thereby creating a duty not to defraud and a right not to be defrauded).

149. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1965) (establishing liability from one person to another for negligence, thereby creating a duty not to injure negligently and a right not to be injured negligently).

150. *See* RESTATEMENT (SECOND) OF TORTS § 901 (1979) (explaining how damages are awarded in tort law); *id.* § 902 (defining damages as a monetary payment).

tortfeasors accountable. This marks one of a number of fundamental differences between tort law and criminal law, which empowers *the state* to hold wrongdoers accountable.<sup>151</sup> Another is that both the stigma and the human consequences of what is done to the wrongdoer are very different for criminal wrongs than for tortious wrongs; part of what we do to render tort law civil, and amenable to private dispute resolution, is to cash out the remedy in monetary payments.<sup>152</sup> State prosecutions and punishments are quite different, of course, from tort suits and the exaction by tort plaintiffs of damages. The differences between seeking and obtaining punishment and seeking and obtaining civil liability exist both in consequences and in social meaning. Yet both involve courts responding to a demand to hold a wrongdoer accountable for having committed a wrong. Punishment and civil liability to a victim are different forms of accountability that both figure in our legal system's response to wrongdoing.

Finally, and *contra* Coleman and Perry, it is quite straightforward to explain why a body of law that defines private wrongs would frequently offer a remedy linked to the plaintiff's loss. In a large number of cases, particularly with respect to accidents, the wrong alleged is the careless infliction of physical harm.<sup>153</sup> In these cases, the successful victim will have the right to exact a remedy, and our courts will apply principles of remedies to select the appropriate level of money damages.<sup>154</sup> A longstanding principle of remedies for nonwillful wrongs sets make-whole as the default remedy.<sup>155</sup> This does not mean that the legal system has somehow reallocated the loss of the victim; it means that the victim's loss normally sets the outer boundary of the remedy that courts will provide to victims of wrongs when they successfully sue those who wrong them.

#### D. Torts as Legal Wrongs

Now that we have a better sense of the distinctive features of torts as wrongs, we are in a better position to address the Moral–Legal Dilemma. Recall that, according to it, one cannot characterize torts as moral wrongs without losing the ability to account for large swaths of doctrine, yet one cannot characterize torts as legal wrongs without rendering the concept of

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151. See, e.g., 18 U.S.C. § 2 (2006) (authorizing punishment by the state against anyone who commits a crime).

152. See Zipursky, *supra* note 8, at 82–93 (discussing the link between torts understood as relational wrongs and the asserting of claims by victims against alleged wrongdoers).

153. See Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187, 1188 (2001) (describing the centrality of negligence to modern tort law).

154. See RESTATEMENT (SECOND) OF TORTS § 910 (describing tort victims' default entitlement to "make-whole" compensation).

155. See JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 476, 484 (2d ed. 2008) (comparing "[e]xtra-compensatory" damages that are only available to victims of certain "'aggravated' forms of mistreatment" with "compensatory damage[s]," commonly described as efforts to make "the plaintiff whole," which are available to nearly any tort plaintiff).



“wrong” vacuous (a legal wrong being anything the law defines as a legal wrong). The solution to this dilemma can be found by invoking a set of ideas made famous by H.L.A. Hart, though we should be quick to emphasize that our use of these ideas is not meant to entail, and does not entail, that we embrace all aspects of Hart’s jurisprudence (such as the so-called “social facts” thesis).<sup>156</sup>

Hart argued that certain rules of conduct carry directive or injunctive force, whether they are putative moral rules, legal rules, rules of etiquette, or rules associated with some other sort of social association (e.g., a club) or institution (e.g., a school).<sup>157</sup> While their force is injunctive, their grammatical form need not be imperatival.<sup>158</sup> For example, a parent uttering to his child, “The fork goes to the left of the plate and the knife goes to the right,” is expressing a rule of etiquette but not issuing an imperative. A swimming teacher who utters, “Bathing caps are required,” is similarly issuing (an institutional) rule of conduct. We call such rules “directives.” When uttered, they are typically meant to guide conduct, at least in part. Hart’s account did not depend upon treating such rules as utterance tokens or utterance types: rules of conduct of this form could exist in social settings by virtue of a social practice of complying with the rule and expecting such compliance with others—more generally, by being entrenched in social practice in a certain way.<sup>159</sup> Moreover, at least in the case of legal rules, a legal rule could exist in some sense by qualifying under a meta-rule that was itself entrenched in social practices.<sup>160</sup>

For certain families of social practices, according to Hart, the kind of pressure putatively imposed by the directive, in combination with other

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156. We have previously analyzed Hart’s thought as it bears on tort law. See John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 *FORDHAM L. REV.* 1563, 1572–81 (2006) (applying Hart’s framework to tort law to develop a “duty-accepting” concept of tort); see also Zipursky, *supra* note 8, at 58 (discussing Hart’s influence on modern views of legal rules).

157. See H.L.A. HART, *THE CONCEPT OF LAW* 86 (2d ed. 1994) (arguing that rules are conceived of as “imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great”).

158. See *id.* at 9–10 (explaining that for social rules it is not necessary to use imperatival words such as “must,” “should,” and “ought to,” and that using those words for “mere convergent behaviour” would be confusing).

159. *Id.* at 86.

160. See *id.* at 86–87 (explaining that there may be social pressure to conform both indirectly by appealing to the individual’s feelings, as is common for rules of morality, and directly through physical sanction, as is common for legal rules). Despite our reliance on a Hartian framework for thinking about the place of rules within a legal system, we need not and do not accept a social-facts based form of legal positivism. For an articulation of this “mixed” jurisprudential position, see Benjamin C. Zipursky, *The Model of Social Facts*, in *HART’S POSTSCRIPT* 219, 268–70 (Jules Coleman ed., 2001), accepting certain aspects of Dworkin’s critique of the social-facts thesis but also salvaging aspects of Hart’s analytic framework, and Benjamin C. Zipursky, *Pragmatism, Positivism, and the Conventionalistic Fallacy*, in *LAW AND SOCIAL JUSTICE* 285, 308 (Joseph K. Campbell et al. eds., 2005), rejecting Coleman’s inclusive positivism for relying on the social-facts thesis.

features of the entrenchment of the practice in institutions and in language, leads the directives to have a special quality; he called these “duty-imposing” rules.<sup>161</sup> Moral directives and legal directives both have this quality according to Hart.<sup>162</sup> The statement that it is wrong to lie, spoken by a parent to a child or written by an opinion columnist for newspaper readers, contains injunctive force: it condemns lying and conversely urges refraining from lying. Making such a statement is, moreover, identifying a way of treating other people as unacceptable. The same is true when a court holds liable a broker who has misrepresented a company’s financial condition to an investor who relied on that misrepresentation to his detriment. The court is articulating a norm of conduct that requires certain actors to refrain from deceiving other to their detriment and condemns doing so as wrongful. The first would be said to be a duty-imposing rule of morality, the second a duty-imposing rule of law.

There is a big difference between uttering a rule of conduct as a moral rule and uttering a rule of conduct as a legal rule, however. The parent and the opinion writer are claiming that the norm of truth telling should be complied with *because it is morally sound*. The judge, by contrast, may or may not be referring to the moral soundness of the law’s injunction against misrepresentations. The putative authority that lies behind the judge’s categorization of certain conduct as tortious is the same authority that accompanies all legally justifiable statements within the legal system. Put differently, the “Says who?” challenge to the rule or norm against lying earns a different response in the moral case and the legal case. In the moral case, the speaker might plausibly take the challenge to be off point; the *provenance* of the “no lying” norm is not the issue—its soundness or truth is the issue. In the legal case, things are otherwise. The “Says who?” challenge is answered directly by reference to the *source* of the norm—the legal system. The norm’s provenance (which, again, may not be determinable by a purely “positive” inquiry into “social facts”) is critical to its authority.

To assert that some act is a legal wrong is to assert that it violates a legal directive. To be sure, many legal directives are legislative, constitutional, or regulatory, but not all are. Our common law system has built up precedents that identify certain kinds of acts as grounds for liability, and it has done so in a manner that conveys disdain for those acts and expresses an injunctive message that such acts are not to be performed. This is part of the force of leading opinions, such as Cardozo’s memorable rejection of the privity rule in *MacPherson v. Buick Motor Co.*<sup>163</sup> Although it was of course intended to resolve the dispute before him, and to distinguish the domains of tort and

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161. HART, *supra* note 157, at 81.

162. *Id.* at 86–87.

163. 111 N.E. 1050, 1053 (N.Y. 1916).

contract, his opinion was no less keen to establish two related ideas.<sup>164</sup> First, it announced unequivocally a duty of conduct embedded in the law of negligence.<sup>165</sup> Whatever the ambiguities of prior case law, thenceforth the manufacturer of a product posing substantial risks of physical harm that was to be sent into the stream of commerce without further inspection was unmistakably under a duty to product users to take care to prevent such harm. Injuring a consumer by releasing a product manufactured without sufficient “vigilance” against dangerous defects—a breach of the duty owed to users not to injure them by failing to “make [the product] carefully”—was clearly identified as a legal wrong that, when committed, would subject the manufacturer to liability.<sup>166</sup> Second, Cardozo was equally emphatic as to the source of this duty. It resided neither in promise nor in contract, but “in the law.”<sup>167</sup> The failure of a manufacturer to take care to prevent its product from containing dangerous, harm-causing defects was thereby identified as one important instantiation of the broader legal wrong of negligence.

Many torts are moral wrongs, but to claim that an act is a tort is not to assert that it violates a moral directive but that it violates a legal directive. Even when a particular tort is not also a moral wrong, saying that it is a legal wrong is similar to saying that it is a moral wrong in at least the following respects: it asserts that the act in question is not to be done, and that it merits some form of accountability when done. However, the statements and principles categorizing torts as such are provided from within a legal system that has authority apart from whether its edicts all prove to be sound. Although in New York there was not and is no statutory code that lists these legal directives, there is, embedded in and discernible in New York law, properly interpreted, an answer to the question of which ways of treating others are torts for which an actor may be held legally accountable. In this sense, what is and is not a tort in any particular jurisdiction is a matter of law. Like Hart, we recognize that the normative aspect of a legal duty does not necessarily (or even typically) stem from the threat-like force of a legal command, and its provenance need not be statutory or legislative. Like Dworkin (and to a lesser, but still significant extent, Hart), we recognize that pinning down what the law actually says about some putative duty of conduct will be a process fettered within legal argumentation that uses both moral and non-moral concepts.<sup>168</sup> Once one recognizes all three of these points, there is no

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164. *See id.* (“If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.”).

165. *Id.*

166. *Id.*

167. *Id.*

168. For a methodological and jurisprudential approach that aims to sidestep debates between positivism and its critics but nevertheless takes both moral and nonmoral concepts to be central to the content of the common law of torts, see Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 477–78 (2000).

obstacle to seeing tort law as a domain of duty-imposing legal directives. And then it is straightforward to understand torts—the violations of these directives—as legal wrongs.

Armed with this account of legal wrongs, we can readily explain the conundrum that seems to have skewed tort theory since Holmes's time: namely, how it is that torts are wrongs—i.e., violations of standards of how one must act (or not act) towards others—yet generate liability for conduct that, judged in abstraction from the legal system, is not necessarily blameworthy. The fact that an act falls under an authoritative legal directive that characterizes it as a legal wrong does not entail that such an act, in the circumstances it actually occurred, warrants categorization as morally wrongful. A faultless trespass or a “Menlovean” act of negligence still constitutes the breach of a norm set by tort law.<sup>169</sup> As the tort of trespass to land is defined by judicial decisions, one commits a wrong when one intentionally treads on property that is owned by another, just as one commits negligence by injuring someone through conduct that fails to meet the standard of ordinary prudence.<sup>170</sup> For a variety of reasons internal to the idea of a law of private wrongs, excuses that might carry the day in the domain of positive morality (and properly so)—“But I had no reason to believe the land was owned by another!”; “But I tried my very best to be careful!”—are not recognized in tort.<sup>171</sup> This feature of tort law does not somehow render the dictates of tort unconnected to notions of wrong. A tort, even a blameless trespass, is still a breach of a legal norm of conduct. One is required by law not to invade others' property.

Doctrinally, the sharpest challenge to a wrongs-based theory of torts is found in decisions such as *Rylands v. Fletcher*<sup>172</sup> and the doctrine of strict liability for harms caused by abnormally dangerous activities.<sup>173</sup> These forms of liability, after all, explicitly disavow having anything to do with wrongs. Liability is imposed even though the defendant has caused harm through conduct that the courts themselves are at pains to say is entirely permissible.<sup>174</sup> It is possible that these are true exceptions to the otherwise wrongs-based nature of tort law. To allow as such is hardly to make a substantial concession. For just as “strict liability” versions of the doctrine of statutory rape rest uneasily at the edges of criminal law, and just as certain

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169. See, e.g., *McDonald v. Village of Winnetka*, 371 F.3d 992, 1009 (7th Cir. 2004) (noting that “tortious conduct is by nature a departure from some norm”).

170. See *supra* notes 74, 100.

171. See *Goldberg & Zipursky*, *supra* note 122, at 1143–63 (explaining how and why moral blameworthiness is often not a factor in determining tort liability).

172. (1868) 3 L.R.E. & I. App. 330 (appeal taken from Eng.) (U.K.).

173. See RESTATEMENT (SECOND) OF TORTS § 520 (1977) (articulating a test for when an activity is “abnormally dangerous” so as to generate strict liability for injuries caused by it).

174. See, e.g., *Rylands*, 3 L.R.E. & I. App. at 340 (“If [a person accumulates lawfully anything on his land which] does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.”).

forms of promissory estoppel likewise barely belong within contract, *Rylands* and subsequent decisions identify a genre of case that sits at the margin of tort law. Each of these doctrines represents a precarious patching over of a vulnerable spot that marks the outer boundaries of the domain of law in which it is situated. To be sure, if *Rylands* were emblematic of a broad area of tort law, rather than a narrow exception, it would pose a challenge to the idea that liability for torts is wrongs based.<sup>175</sup> But so long as it remains *sui generis*, its existence does not count as evidence against our general interpretive account. In fact, courts have consistently beaten back efforts by plaintiffs' lawyers to expand the category of abnormally dangerous activities.<sup>176</sup> Thus, it remains entirely viable, from both a doctrinal and a jurisprudential perspective, to treat Torts as the domain of civilly actionable legal wrongs.<sup>177</sup>

Is the account of wrongs we have put forward jurisprudentially partisan, in that it requires embrace of legal positivism? The answer depends on what is meant by "positivism." To the extent that positivism is associated with the idea that the truth of legal claims is dependent on the content of principles, rules, and standards that are linked in an appropriate way to what certain institutionally entrenched sources say, we agree. However, to say this by no means entails rejecting the idea, associated most commonly with Dworkin,<sup>178</sup> that nonlegal moral reasoning—reasoning about rights, duties, and other concepts abstracted from the institutionalized setting of legal sources and legal claims—may or must be employed in interpreting what those sources say. Likewise, we join natural law theorists (and Hart himself) in recognizing that the concepts of wrong, duty, obligation, and right employed within tort law have roughly the same kind of normative force as they do when used outside of law.<sup>179</sup> In this sense, the concept of duty used in deliberating about the scope of duty within negligence law is a moral concept, just as is

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175. Gilmore's argument for the "death of contract"—a manifestation of many of the same intellectual forces we are canvassing here—was of the same form. See GRANT GILMORE, *THE DEATH OF CONTRACT* 97–100 (1974) (arguing that the continued adoption of the promissory-estoppel doctrine could allow contract law to ignore the requirement of consideration in the form of reciprocal obligations). He inferred from what he took to be a trend toward greater judicial reliance on expansive forms of promissory estoppel that it no longer made sense (if it ever did) to think of contract law as being fundamentally about agreed-upon obligations. *Id.* Our sense is that Gilmore's argument was no less overstated than arguments alleging that the presence of certain forms of "strict" liability spell the "death" of torts *qua* wrongs.

176. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20 reporters' note, at 296–328 (Proposed Final Draft No. 1, 2005) (identifying numerous instances in which courts have declined to apply the rule of strict liability for abnormally dangerous activities).

177. Likewise, we think it is erroneous to see in doctrines such as respondeat superior and "strict" products liability a judicial embrace of tort liability without regard to wrongdoing.

178. See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 149 (1978) (arguing for the fusion of constitutional law and moral philosophy).

179. See Goldberg & Zipursky, *supra* note 156, at 1575–77 (illustrating how Hart's concepts of duty within tort law have analogues outside the field of law within the realm of general social expectations).

the concept of duty used in deliberating about interpersonal and nonlegal questions such as whether I have a duty to offer to house my friend's family while they are waiting for their apartment to be repaired after a flood. When one describes an issue as a "moral question, rather than a legal question," the deliberator should ordinarily be understood to be drawing upon "duty" as a web of norms of conduct, not the institutionally entrenched web that we use the term "law" to refer to. Conversely, when a judge makes clear that she is talking about legal duties when she is deciding a case, not moral duties, she is indicating that she is identifying obligations within an institutionally entrenched web. As noted above, the articulation of the terms that constitute this web will often require the use of reasoning of a sort commonly deployed in discerning moral duties.<sup>180</sup>

## V. Interpretive Failings of Loss-Based Accounts

It is one thing to show (as we have in Part IV) that a conception of Torts as wrongs is available; it is another to show that it is better than its main rival. In our Introduction and in the prior Part, we began to articulate reasons for selecting our account over others: understanding Torts as wrongs gives a sense of the breadth of the subject, of its continuity with many areas of law, and of our legal tradition's treatment of Torts as among a handful of fundamental legal categories such as Contracts, Property, and Criminal Law. The subject of wrongs and private redress for those wrongs satisfies these desiderata in a way that "accident-law-plus" simply does not.

Here we turn to more detailed interpretive work. Although detailed, we believe it cuts very deeply on the question of how Torts must be conceptualized. In prior work, we have argued for the interpretive superiority of a wrongs-and-recourse model on numerous grounds. These include its provision of illuminating accounts of leading cases old and new,<sup>181</sup> its explanation of the structure of tort law,<sup>182</sup> and its integration of

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180. Our approach to tort law and law generally recognizes, as do almost all other approaches, that many of the acts categorized as "wrongs" by the law have been conceived as wrongs under the positive morality of the community and that their having been so conceived helps explain how and why they became part of the law of torts. Again like virtually everyone, we think that some wrongs of tort law are not necessarily wrongs of morality or of positive morality, and vice versa. Moreover, those which are often do not have exactly the same contours that they have in positive morality, or that would be appropriately identified as morally wrongful apart from positive morality. Finally, like virtually everyone, we believe that many of the wrongs of tort law are acts that merit description as wrongful quite apart from their entrenchment in a legal system that categorizes them as impermissible or wrongful; intentional physical assaults, injuring someone through careless driving, and deceiving someone out of a thing of value all fit this description.

181. See, e.g., GOLDBERG, SEBOK & ZIPURSKY, *supra* note 155, at 783–90 (explaining Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910), without relying on the ad hoc incomplete privilege of private necessity); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1631–33, 1705–07 (2002) (reconciling the facially puzzling twin holdings of Metro-N. Commuter R.R. v. Buckley, 521 U.S. 424 (1997)); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEXAS L. REV. 105, 105–07, 149–50 (2005) (interpreting BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996), as articulating a line between punitive damages imposed as

core tort concepts in a manner that permits clear-eyed analysis of important contemporary issues of doctrine and policy.<sup>183</sup> In what follows, we build on these prior claims by addressing several basic features of tort law that are anomalous on loss-allocation models of tort, yet quite comfortably explained on a wrongs-and-recourse model.

### A. *Torts Without Losses*

Allocative theories put losses at the center of tort law. A tort suit, they say, is always a plea to shift the plaintiff's loss to a tortfeasor.<sup>184</sup> It follows that a loss must be the predicate to a successful suit. Quite clearly, however, this is not the case. There are many torts that do not require a loss to be actionable. It is true that there is never a tort without an *injury*. But the concept of an injury is distinct from the idea of a loss that is capable of being shifted. This is a basic conceptual and theoretical point. In numerous instances, courts recognize that a tort has been committed and award a remedy to the victim, even though there is no loss to shift from the plaintiff to the defendant.

Trespass and nuisance, as well as battery and false imprisonment, do not set loss as a condition of liability.<sup>185</sup> For trespass to land, the question is whether the defendant physically invaded or occupied the plaintiff's property, thereby violating her right to exclude others.<sup>186</sup> In nuisance, the injury is an unreasonable interference with the plaintiff's right to enjoy her property.<sup>187</sup> Judgment can thus be entered for a trespass or nuisance plaintiff even if she and her land remain utterly unscathed. In its well-known *Jacque v. Steenberg Homes, Inc.* decision,<sup>188</sup> the Wisconsin Supreme Court ruled, soundly, that the defendant had trespassed by driving across the plaintiff's snow-covered field without permission—this even though the presence of the

redress for egregious wrongs and punitive damages imposed for regulatory purposes); Zipursky, *supra* note 8, at 13 (demonstrating the centrality of Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928), to tort law, understood as a law of wrongs).

182. See generally Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003) (arguing that neither the corrective-justice model nor the law-and-economics model capture the structure of tort law, a system based on legal rights and wrongs).

183. See generally John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) (arguing for recognition of an individual's right to seek redress for wrongs as a means of limiting legislative tort reform); John C.P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Third Restatement's Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211 (2009) (applying the same framework to the question of negligence claims against remote actors).

184. *E.g.*, Goldberg, *supra* note 183, at 582.

185. Assault, libel, and slander per se also are defined so as not to require loss as a condition of recovery. See RESTATEMENT (SECOND) OF TORTS §§ 13, 21, 35, 158, 569–570, 822 (1965, 1977 & 1979) (specifying conditions of liability for, respectively, battery, assault, false imprisonment, trespass, libel, slander, and nuisance).

186. *Id.* § 158.

187. *Id.* § 822.

188. 563 N.W.2d 154 (Wis. 1997).

snow prevented harm even to a single blade of grass.<sup>189</sup> The injury consisted of the rights invasion, not a loss incurred as a result of it. Similarly, the tort of battery requires the plaintiff to have been the victim of a harmful or offensive touching.<sup>190</sup> A groping or kicking can be offensive and that is enough.<sup>191</sup> An intentional confinement that causes no physical harm, no pain, no anxiety, and no loss of opportunity can be a false imprisonment.<sup>192</sup> This much is clear from the chestnut of *Huckle v. Money*,<sup>193</sup> in which a confinement under pleasant conditions was deemed actionable.<sup>194</sup>

Needless to say, in many instances trespasses, nuisances, and batteries *do* cause losses for which the victim can obtain compensation.<sup>195</sup> But proof of losses is not necessary. In some cases without loss, nominal damages may be the only remedy available.<sup>196</sup> In others—including *Jacque* and *Huckle*—a court will permit an award of punitive damages.<sup>197</sup> In still others, the plaintiff may obtain declaratory or injunctive relief.<sup>198</sup>

The argument we have just made relies on features of tort doctrine that are obvious to anyone who studies the field. By the same token, it is not difficult to envision responses that loss-allocation theorists might offer.<sup>199</sup> One would be to suggest that the examples we have cited, and the torts that figure in them, are peripheral: that what really matters in tort is negligence, a tort for which loss is a component. This line of response fails to engage the criticism we are levying. A central point of this Article is to challenge the intellectual framework that treats tort law as coextensive with negligence law and to explain what has been lost because of scholars' attraction to such a

189. *Id.* at 160.

190. RESTATEMENT (SECOND) OF TORTS § 13.

191. *Id.*

192. *Id.* § 35.

193. [1763] 95 Eng. Rep. 768 (C.P.) (U.K.).

194. *Id.* at 769.

195. *See, e.g.*, *Neal v. Miller*, 778 F. Supp. 378, 387 (W.D. Mich. 1991) (granting the plaintiff compensatory damages for the physical consequences of a battery); *Miller v. Cudahy Co.*, 592 F. Supp. 976, 1005 (D. Kan. 1984) (compensating plaintiffs for damages to crops caused by the defendant's continuing nuisance); *Wilen v. Falkenstein*, 191 S.W.3d 791, 799 (Tex. App.—Fort Worth 2006, pet. denied) (upholding actual damages based upon diminution in the value of land due to trespass).

196. *See* RESTATEMENT (SECOND) OF TORTS § 218, cmt. d (suggesting that only nominal damages may be available for some trespasses).

197. *See Jacque*, 563 N.W.2d at 161 (“We conclude that both the private landowner and society have much more than a nominal interest in excluding others from private land. Intentional trespass to land causes actual harm to the individual, regardless of whether that harm can be measured in mere dollars. . . . Accordingly, . . . we hold that nominal damages may support a punitive damage award in an action for intentional trespass to land.”); *Huckle*, 95 Eng. Rep. at 769 (upholding an award of “exemplary damages” by the jury for an unlawful detainment by the government, despite no evidence of physical harm).

198. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 933 (setting forth the criteria for enjoining a nuisance).

199. Of course it is open to a purely prescriptive theorist to argue that there should be no torts without losses, but that is a different question.



framework. In this context, it is nonresponsive simply to assert that negligence is the essence of Torts. Relatedly, loss-allocation theorists might concede that there are viable no-loss tort claims but insist that these are special exceptions to the general requirement of loss. As to a certain kind of boundary-pushing decision, this response might have some plausibility.<sup>200</sup> But, again, there is no justification for treating trespass, nuisance, and battery as outliers.

A different response to the presence of torts without losses is to insist that they really do involve losses. After all, the argument might proceed, successful trespass and false-imprisonment plaintiffs stand to recover a monetary payment. And if they are being paid damages, it must be because they have suffered a loss. What else can it mean for a plaintiff to obtain compensation? As we suggested in Part IV, there is an alternative and cogent account of compensatory-damage payments that does not treat them as having a logical or definitional connection to losses. According to that account, a tort award is compensation *for the wrong done to the plaintiff*—damages are what the victim of a tort is entitled to exact from the defendant in light of what the defendant has done to him.<sup>201</sup> This alternative conception of compensation as fair redress does not suggest that redress is or should be determined without regard to whether the plaintiff has suffered losses in connection with having been wronged. Plaintiffs whose injuries are accompanied by losses ordinarily are entitled to reimbursement for those losses.<sup>202</sup> But to say that reimbursement will tend to figure in the determination of what counts as redress is not to say that tort damages are just reimbursements, nor that reimbursable losses must be incurred before a tort can be committed. The governing concept is redress for a wrong done, where appropriate redress will typically include compensation for losses suffered *when there are such losses*.

Lastly, and in a related vein, some allocation theorists might argue that our critique of the centrality of loss presupposes an unduly narrow conception of what can count as a loss. A rights violation, they might say, really is a loss—a “normative” loss, or a debit on the balance sheet of life. The problem with this move is a familiar one. Like a rational-actor model of human behavior in which altruistic acts are accommodated as *really in one’s self-interest*, it salvages the descriptive plausibility of loss-allocation theory only by abandoning what makes the theory distinctive.

When tort law is viewed as a law of private wrongs, the theoretical stresses and strains faced by loss-allocation theory in dealing with garden-

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200. See *In re Simon II Litig.*, 211 F.R.D. 86, 96 (E.D.N.Y. 2002) (Weinstein, J.) (certifying a punitive-damages-only class action for plaintiffs unable to prove that they had suffered losses by virtue of certain tobacco-company misrepresentations), *vacated* 407 F.3d 125 (2d Cir. 2005).

201. Goldberg, *Two Conceptions*, *supra* note 67, at 438–45.

202. See generally DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 16 (3d ed. 2002) (arguing that the basic principle for damages is to restore the plaintiff to “the position he rightfully would have come to but for defendant’s wrong”).

variety torts such as trespass disappear. A private right of action is made available to the victim of one of these legal wrongs because she was wronged, not because she has incurred a loss. There may be some wrongs that are defined in such a way that the doing of the wrong involves bringing about an injury in another person of a sort aptly described as a loss. Negligence is perhaps one such tort; products liability may be another. But many other torts are not defined this way. If tort law is all about shifting losses, these torts become anomalies. But if tort law is about privately actionable wrongs, they do not. It is perfectly understandable why the law might count a certain way of treating another person as a wrong, and might conceive of the plaintiff as having been injured, even if there is no loss that stands in need of being shifted.

### *B. Foreseeably Caused Losses Without Torts*

Allocative theories also face a problem converse to the one just described. Their focus on losses rather than wrongs renders them incapable of explaining why it is that a plaintiff must establish that *she has been wronged*, as opposed to proving that the defendant acted wrongfully toward another.

In prior work we have explained that, for each tort, it is a condition of liability that the defendant's tortious conduct be a wrong relative to the plaintiff. We have sometimes referred to this condition as a "substantive standing" requirement.<sup>203</sup> It is a "standing" requirement because it goes to the issue of whether the plaintiff is an appropriate person to assert a claim against the defendant. It is "substantive" because the rules that determine tort standing are among those that define the wrong(s) for which a plaintiff is suing.

The requirement of substantive standing comes under various guises and names. In trespass it is found in the rule that the plaintiff must have a possessory interest in the land trespassed upon.<sup>204</sup> Absent a possessory interest, there can be no recovery, even if the defendant's conduct constitutes trespass to another, and even if that trespass causes foreseeable losses to the victim.<sup>205</sup> Similarly, a plaintiff in a common law fraud case must prove that

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203. This is Zipursky's original label for this concept. Zipursky, *supra* note 8, at 3–5.

204. *See id.* at 25 (showing that "in defining the contours of the right of exclusive possession, the courts are in fact defining who has substantive standing to sue for wrongs incurred through trespass").

205. *See id.* (expounding the rule that "[o]nly those who have a right of possession in the property trespassed upon have a cause of action for trespass"). Suppose *D* knowingly drives his car across *A*'s land without permission but for a good reason. In doing so, *D* is mindful that he has seen hikers on *A*'s land, and thus drives carefully. Now suppose that *P* is a hiker who, while conscientiously following a trail map that she reasonably believes is accurate, unintentionally strays onto *A*'s land. Even if *D* were to run down and injure *P* while both are on *A*'s property, *P* will not have a trespass claim against *D*. (And this is not because *P* can instead sue for negligence. We have assumed *D* was acting reasonably.) Although *P* was a perfectly foreseeable victim of *D*'s

she relied upon the defendant's misrepresentation, or at least its content.<sup>206</sup> A loss flowing purely from others' reliance on a misstatement will not support a common law fraud claim. A plaintiff in a libel case must prove that the defendant's libelous statement was "of and concerning" her.<sup>207</sup> A loss caused by a libelous statement made exclusively about others does not constitute a wrong that supports a libel claim. A negligence plaintiff must prove that the defendant breached a duty of care owed to the plaintiff.<sup>208</sup> A loss from a breach of a duty of care owed to someone else (and not to the plaintiff) does not constitute an injury that supports a negligence claim.<sup>209</sup>

In sum, a tort plaintiff cannot prevail merely by establishing that the defendant has acted *in some sense* wrongfully so as to cause her a loss under conditions where the causation of such a loss was reasonably foreseeable. As Cardozo memorably put it in *Palsgraf*, she must show "'a wrong' to herself; i.e., a violation of her own right, and not merely a wrong to someone else."<sup>210</sup> To say the same thing, a tort plaintiff "sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another."<sup>211</sup>

Allocationists of all stripes often have ignored the substantive standing requirement.<sup>212</sup> Others have criticized it on normative grounds.<sup>213</sup> Apart from denial or critical concession, two other strategies might be tried. One aims to make sense of substantive standing as a fairness-based limit on the instances in which a court will shift losses from a plaintiff to a defendant. The problem in a case like *Palsgraf*, on this view, is that the plaintiff was asking the court to impose liability on the defendant even though its employees could not have reasonably foreseen that their conduct might injure her. Liability imposed on these terms is unfair.

The most serious problem with this response is that it does not come close to making sense of the substantive standing rules actually in the law. For within each tort, these rules cut off recovery *even when loss to the victim is entirely foreseeable*. A hustler who lies shamelessly to her elderly victim as part of a successful scheme to be named the sole beneficiary of his will, thus depriving his loving children of their inheritances, may know that her

trespass, *P* has no claim because *D*'s conduct was not a trespass with respect to property that *P* owned, leased, etc.

206. *Id.* at 18.

207. *Id.* at 17.

208. *Id.* at 8.

209. *Id.*

210. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928).

211. *Id.*

212. See Zipursky, *supra* note 8, at 4 ("Proponents of the most prominent theoretical approaches to tort law, law and economics and corrective justice theory, have generally neglected the substantive standing rule.").

213. See, e.g., Dilan A. Esper & Gregory C. Keating, *Putting "Duty" in Its Place: A Reply to Professors Goldberg and Zipursky*, 41 LOY. L.A. L. REV. 1225, 1253-54 (2008) (criticizing *Palsgraf*'s relationality requirement on conceptual and pragmatic grounds).

misrepresentations will cause the children to suffer economic loss. Yet she has not defrauded the children, and they will have no claim for fraud against her.<sup>214</sup> Likewise, a physician might readily foresee that his failure properly to treat a potentially fatal illness suffered by the charismatic CEO of a large company will cause economic losses to the company's employees and shareholders. (Perhaps stakeholders will tell him as much.) Yet if he treats the patient incompetently, none of those who suffer economic loss will have an action against him. His duty to provide competent medical care is a duty owed to his patient; its breach is not a breach as to those suffering economic losses. By virtue of the substantive standing rule of negligence, they are therefore barred from recovering: There was only a breach of a duty owed to another, not a breach of any duty owed to them.

This last example may invite a different kind of counterargument from allocationists. It claims that tort law's substantive standing rules exist not to ensure costs are shifted only when it is fair to do so, but to address the administrative concern of preventing what would otherwise be a flood of litigation and liability.<sup>215</sup> It is not difficult to see the appeal of this argument. It matches what courts sometimes say in explaining why they would deny liability in a case such as the malpractice example just provided. It also fits with other tort rules or principles (such as certain proximate-cause limitations) that appear to have a similar rationale. And it creates a set of criteria by which to evaluate whether the rules should be maintained or modified.

The question, however, is whether floodgate rationales succeed in explaining substantive standing rules. They do not, for several reasons. First, while it is true that courts sometimes back their invocation of these rules with floodgates language,<sup>216</sup> such an explanation is often lacking and would not make sense. A judge who reasons that a private figure cannot recover for a libel contained in a club newsletter because she was harmed but not herself defamed is not worried about floods of litigation or excessive

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214. Some courts would on these facts permit a claim for tortious interference with expectancy. See generally Diane J. Klein, "Go West, Disappointed Heir": *Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Pacific States*, 13 LEWIS & CLARK L. REV. 209, 210–11 (2009).

215. See Zipursky, *supra* note 8, at 53 (outlining the argument that "defendants will face crushing liability and courts will be flooded with cases" unless a tortious defendant's liability is limited and "recovery is denied . . . where substantive standing is lacking").

216. See, e.g., *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975, 979–80 (E.D. Va. 1981) ("Perhaps because of the large set of potential plaintiffs, even the commentators most critical of the general rule on indirect damages have acknowledged that some limitation to liability, even when damages are foreseeable, is advisable. Rather than allowing plaintiffs to risk a failure of proof as damages become increasingly remote and diffuse, courts have, in many cases, raised an absolute bar to recovery. The Court thus finds itself with a perceived need to limit liability, without any articulable reason for excluding any particular set of plaintiffs."); *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 38 (N.Y. 1985) (declining to impose liability on the defendant for the plaintiff's injuries on the basis that finding that the defendant owed the plaintiff a duty of care would "violate the court's responsibility to define an orbit of duty that places controllable limits on liability").

liability. The requirement of substantive standing is not simply tacked onto an otherwise indeterminate system for shifting losses. It is integral to the definition of tortious wrongdoing. Second, the idea that courts would set up floodgates precisely at the point at which substantive standing rules block tort claims is inexplicable on the terms of the many allocation theories that deem the foreseeable causing of harm to another through substandard conduct as the appropriate trigger for loss shifting. As we have seen, substantive standing rules exclude liability even for foreseeably caused losses. Third, there are many options for floodgate devices that are clearer and better motivated than substantive standing requirements. Why not instead screen out claims for minor harms? Why not set damage caps for some or all classes of claims?

We saw above that the abandonment of loss-allocation theories in favor of a wrongs-and-recourse view of tort explained the apparent anomaly of torts without losses. The same is true for instances of losses that do not generate successful tort claims because of substantive standing rules. Each such rule is a requirement that the defendant's conduct constitute not merely a wrong in the sense of antisocial conduct, nor a wrong to someone else, but a wrong relative to the plaintiff. To demand that a trespass plaintiff have the requisite possessory interest is to demand that she prove that the defendant *trespassed against her*. The rules of fraud, libel, and malpractice law similarly require the plaintiff to prove, respectively, that the defendant *defrauded her*, *libeled her*, or *committed malpractice on her*.<sup>217</sup> The duty-imposing norms of tort law are relational norms: they enjoin persons from acting toward certain other persons in certain ways. Substantive standing rules ensure that rights of action are generated only in those who have been wronged.

### C. *The Diversity of Tort Remedies*

Allocative views treat tort suits as claims by loss-sufferers to be entitled to off-load their losses onto others. In so doing, they conflate the issue of the plaintiff's *remedy*—to what relief is a successful plaintiff entitled—with the issue of the plaintiff's *right of action*—under what circumstances does a tort plaintiff have a valid claim, such that she is in a position to obtain some sort of relief? Just as many tort plaintiffs can prevail without proving losses, many obtain a remedy that cannot be cogently depicted as one that shifts losses. Even compensatory damages—the cornerstone of loss-allocation theories—often involve something other than the transfer of a loss from plaintiff to defendant.<sup>218</sup> Moreover, tort law operates in conjunction with

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217. See *supra* notes 110–21, 140, 143 and accompanying text.

218. See Zipursky, *supra* note 8, at 88 (“The availability of compensatory damages to one who can establish a rights invasion does not necessarily indicate that harm is the basis of a right to recourse. Rather, it merely reflects acceptance of the view that compensation for the harm caused is typically an appropriate form of recourse for those whose rights have been invaded.”).

remedies apart from money damages. The question of whether a plaintiff has a valid tort claim is distinct from the question of what sort of remedy she is entitled to if she does have a claim.

In tort suits, fact finders are asked to award fair or reasonable compensation in light of the harm suffered by plaintiff, and in so doing, they are guided by the idea of making the plaintiff whole.<sup>219</sup> Thus, they are being asked to select a financial sum that is *in some sense equivalent* to the loss suffered by the plaintiff. But in what sense? Imagine a successful plaintiff who proves she has suffered a broken leg and therefore incurred medical expenses, lost wages, pain and suffering, and lost enjoyment of life. An award of money damages to this plaintiff in principle should cover any monetary debts incurred by the plaintiff in connection with her injuries. She may also have suffered other forms of setback—for example, lost economic opportunities or property damage—that can and ought to be rectified with money. Finally, she will have experienced setbacks that cannot be rectified as such but the impact of which money can help ameliorate. While the first two aspects of compensatory damages are arguably characterized as allocative, the third is not. And yet the third is pervasive in tort law. A lost limb, a damaged reputation, being rendered paraplegic in a car accident—all of these support payments that *compensate for* a kind of harm rather than make good on a debt or loss.

Quite apart from the question of whether allocative theories can accommodate the concept of compensatory damages, they plainly cannot accommodate punitive damages. The standard “under-deterrence” explanation provided by deterrence theorists fails entirely to explain the rules for when punitive damages will be awarded, as well as the amounts in which they are awarded.<sup>220</sup> The same goes for accounts of punitive damages that cast them as compensatory of losses suffered by persons not before the court.<sup>221</sup> Finally, tort law of course makes available other remedies,

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219. See *supra* notes 155, 202 and accompanying text.

220. See *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (Posner, J.) (suggesting that punitive damages are awarded to induce plaintiffs with modest compensatory claims to sue, and to encourage litigants to uncover hidden wrongs, thereby promoting the private prosecution of conduct that would otherwise go unsanctioned). On this theory, one should never see an award of punitive damages in cases of tortious conduct causing substantial harms, nor should courts permit punitive damages in cases of open and obvious misconduct. The law allows punitive awards in both kinds of cases. See generally Zipursky, *supra* note 181, at 106–07 (criticizing allocative theories of punitive damages).

221. See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 392 (2003) (suggesting that punitive damages can help compensate persons injured by the defendant’s conduct but not before the court). If this sort of approach were true to the law, courts would not insist on grave misconduct as a threshold for a punitive award. After all, merely careless conduct that causes harm to others who are not pursuing a claim creates a basis for awarding extracompensatory damages.

including declaratory and injunctive relief, which allocative theories simply overlook.<sup>222</sup>

Once again, features of tort law that cause headaches for loss-allocation theories present no problem for wrongs-based theories. To understand a tort as conduct causing a loss to another under circumstances that call for the loss to be shifted is to draw a definitional linkage between substantive and remedial law: The wrongful causing of a loss entails relief in the form of loss shifting. By contrast, to understand a tort as a wrong that generates a right of action in its victim leaves the issue of remedies open. To be sure, the remedy of compensatory damages is perfectly explicable as the standard way in which the law allows a plaintiff to respond to a wrongdoer. Under tort law, recourse typically takes the form of the plaintiff being permitted to exact some money from the defendant because of what the defendant did to her,<sup>223</sup> and in many cases, the plaintiff stands to exact a quantity of money from the defendant in an amount equal to the financial losses or debts she has incurred or will incur because of the wrong done to her.<sup>224</sup> Yet this is only one aspect, or head, of compensatory damages, and even for negligence cases arising from car accidents and medical malpractice—let alone cases of battery, nuisance, and libel—this purely financial sense of compensation is often secondary to compensation designed to ameliorate pain and suffering and emotional distress.<sup>225</sup>

If compensatory damages make sense as a form of redress, so too do remedies such as punitive damages and injunctive relief. Indeed, there is nothing remotely surprising about the idea that a victim of a particularly malicious or willful wrong would be entitled to ask the court for permission to *be punitive* in her response to the defendant. This is why punitive damages are also called “vindictive damages.”<sup>226</sup> Although “make whole” is the default measure for monetary damages, courts in cases like *Jacque* and *Huckle* have seen fit to relax the default rule and permit the plaintiff to go

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222. See, e.g., *Pardee v. Camden Lumber Co.*, 73 S.E. 82, 85 (W. Va. 1911) (granting an injunction against the defendant’s trespass).

223. See *supra* note 150 and accompanying text. One could conjure up a different default conception of recourse. For example, the law might allow successful tort plaintiffs to demand prison time for tortfeasors even in the absence of a criminal prosecution. On the other hand, it is not difficult to see why the law has tended to favor recourse in the form of monetary compensation. Among other things, it better suits the generally lower threshold for wrongdoing found in tort as compared to criminal law. It also lowers the stakes (as compared to more visceral forms of punishment) associated with the provision of recourse, thereby discouraging further cycles of dispute among tortfeasor and victim.

224. See *supra* note 155 and accompanying text.

225. Goldberg & Zipursky, *supra* note 122, at 1140–41.

226. See, e.g., BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 718 (2d ed. 1995) (naming “vindictive damages” as one of several variants of “punitive damages”).

beyond that limit because of the egregious way in which the defendant wronged her.<sup>227</sup>

In nuisance, trespass, libel, and fraud, courts often grant injunctive relief.<sup>228</sup> In doing so, they are empowering the plaintiff to exact some performance from the defendant through the legal system. If, for example, a defendant has wronged the plaintiff—and continues to wrong the plaintiff—by unreasonably interfering with her use and enjoyment of her land, then the plaintiff can ask for the state's assistance in forcing the defendant to shut down its interfering activity.<sup>229</sup> Here, the remedy is a stopping of the wrong and has nothing to do with the allocation of a loss.

#### D. Predicate Injuries and Parasitic Damages

Tort law has long drawn, and continues to draw, a distinction between predicate injuries and parasitic damages. Consider the Supreme Court's *Buckley*<sup>230</sup> and *Ayers*<sup>231</sup> decisions. *Ayers* holds that a railroad worker who suffers a physical injury such as pleural thickening from exposure to asbestos caused by his employer's negligence can recover from the employer for the injury itself and also for the fear that she will develop cancer from the same asbestos exposure that caused the physical injury.<sup>232</sup> However, *Buckley* holds that a person who has been negligently exposed to asbestos and consequently has fear of cancer without any present physical ailment cannot recover for that fear.<sup>233</sup> The two cases are distinguished as follows: In *Ayers*, the defendant is being held liable for negligently causing pleural thickening, and the measure of compensatory damages is make-whole, which includes compensating for related emotional harm, including fear of cancer.<sup>234</sup> In *Buckley*, the plaintiff suffered no injury that the defendant had a duty not to cause because there is no general duty to take care against causing foreseeable emotional harm.<sup>235</sup> Hence, there is no cause of action for negligence, and no recovery

227. *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160–61 (Wis. 1997); *Huckle v. Money*, (1763) 95 Eng. Rep. 768, 768–69 (C.P.) (U.K.).

228. See DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 4–5, 38, 80, 166–67 (1991) (describing courts' increasing openness to equitable remedies and listing areas of the law where this trend is noticeable).

229. KEETON ET AL., *supra* note 12, § 89, at 640–41.

230. *Metro-N. Commuter R.R. v. Buckley*, 521 U.S. 424 (1997).

231. *Norfolk & W. Ry. v. Ayers*, 538 U.S. 135 (2003). Of course *Buckley* and *Ayers* are applications of a statute—the Federal Employers Liability Act (FELA)—rather than the common law of tort. But the Supreme Court has long emphasized that common law rules inform its interpretation of FELA, and in fact both decisions sit comfortably with state court decisions. See, e.g., *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 568 (1987) (“Assuming, as we have [in prior cases], that FELA jurisprudence gleans guidance from common-law developments . . .”).

232. *Ayers*, 538 U.S. at 158.

233. *Buckley*, 521 U.S. at 436.

234. *Ayers*, 538 U.S. at 135.

235. See *Buckley*, 521 U.S. at 428–30 (explaining that FELA does not recognize a general duty to avoid causing emotional distress, only a limited duty associated with the common law zone-of-danger rule).



at all. In the terminology of tort doctrine, *Ayers* involves recovery for fear of cancer as damages “parasitic” on the “predicate injury” of pleural thickening.<sup>236</sup> Given the absence of a predicate injury in *Buckley*, there is no recovery.

If tort law is about shifting losses caused to innocent (or less culpable) plaintiffs by tortious actors, this familiar distinction is puzzling. In each case, the defendant’s carelessness toward the victim has caused foreseeable losses. The question thus arises: If the fear of cancer in and of itself is a loss that the law appropriately declines to shift, why does tacking this loss on to a distinct compensable loss suddenly render it appropriate for transfer?<sup>237</sup>

*Ayers* permits us to look at various allocative theories in some detail. If we look at tort law as fundamentally serving the needs of plaintiffs who require compensation, it is troubling. The Supreme Court plausibly rejected pure fear-of-cancer claims in *Buckley* in part because there are many potential asbestos claimants whose latent cancer will eventually become actual cancer.<sup>238</sup> Permitting fear-of-cancer claims would threaten to bankrupt defendants and leave persons who later develop serious physical illnesses with no possibility of recovery.<sup>239</sup> This is a powerful policy argument against recovery for fear-of-cancer in this context. Yet, if adopted, it implies there should be no recovery for fear in *Ayers* either: the presence of pleural thickening does nothing to undercut the limited-fund rationale for declining to shift the costs of that fear to the defendants.

Suppose, instead, we look at tort law as fundamentally about forcing actors to internalize the costs of their activities in cases where care should have been taken. This would seem to imply there should be recovery in a case like *Ayers* because fear of cancer is a genuine social cost and the employer’s conduct was careless. But then the same reasons would apply

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236. *Ayers*, 538 U.S. at 148–49.

237. The same distinction is at work in tort law’s embrace of the “eggshell skull rule.” If an actor commits an offensive contact battery against a victim, he is potentially on the hook for all the harms that flow from the battery, even those that could not have been foreseen. *Vosburg v. Putney*, 50 N.W. 403, 404 (Wis. 1891). By contrast, a touching that does not amount to a battery—say, an ordinary tap on the shoulder that happens to cause catastrophic harm—is entirely nonactionable, being neither an offensive-contact battery nor an instance of negligence. See KEETON ET AL., *supra* note 12, § 9, at 39–42 (“Absent expression to the contrary, consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life, such as a tap on the shoulder to attract attention . . .”). Why does a loss that is too unexpected to be one for which an actor can be held responsible suddenly become appropriate for transfer because it is connected with a distinct and actionable loss? None of the principles or policies that determine which losses should be shifted to defendants—compensation, deterrence, or justice—seems to carry with it grounds for different treatment based on the linkage of an unexpected harm to a less unexpected one.

238. See *Buckley*, 521 U.S. at 435 (suggesting that a different outcome could, given “the large number of those exposed and the uncertainties that may surround recovery,” lead to “unlimited and unpredictable liability”).

239. See *id.* at 435–36 (“We do not raise these questions to answer them (for we do not have the answers), but rather to show that general policy concerns of a kind that have led common-law courts to deny recovery for certain classes of negligently caused harms are present in this case as well.”).

equally to *Buckley*. Within an efficient-deterrence framework, the answer to the question of whether the cost of fear of cancer should be shifted to the negligent actor cannot hinge on whether there was or was not pleural thickening. Of course, there might be reasons for thinking that this kind of cost should not be among the accident costs the law should aim to minimize. And so perhaps there should not be recovery in cases like *Buckley*. But then there is no reason to believe that this sort of cost should count when the defendant is being held liable for it on the basis of having caused pleural thickening.

The same problem would seem to arise even for a noninstrumental allocative view, such as Ripstein's variation on corrective-justice theory. He argues that tort law sets a standard of conduct that reconciles liberty and security, imposing upon individuals a duty to take care not to interfere with others' well-being in a manner that deprives those others of primary goods.<sup>240</sup> Tortiously harming someone is interfering with a primary good, and that is why one is obligated not to do it, and why there is a rights invasion if it is intruded upon.<sup>241</sup> Ripstein suggestively asserts that a loss that transpires when a defendant takes an unjustifiably large risk of harming the plaintiff is a loss "owned" by the defendant.<sup>242</sup> Under this approach, to determine whether a defendant "owns" a plaintiff's fear of cancer would require a judgment as to whether the freedom from fear of disease caused by conduct heedless of such fear falls inside or outside the category of primary goods. If it is outside, then *Buckley* is explicable, and the loss should not be shifted because it is not the defendant's responsibility. But then *Ayers* should come out the same way. Conversely, if *Ayers* is rightly decided, that must be because the freedom from such setbacks is inside the package of primary goods, in which case *Buckley* should come out for the plaintiff.

Where loss-allocation theories stumble, wrongs-based theories do not. Indeed, the distinction between predicate injury and parasitic damages flows quite easily from the analysis provided in the prior Part. Whether the plaintiff enjoys a right of action against the defendant in light of what the defendant has done to her is distinct from the question of the remedy to which she is entitled should there be such a right. The former turns on whether the defendant *wronged the plaintiff*. If so, there is a right of action absent any affirmative defense. If not, there is no right of action.

A court can plausibly decide that a duty not to harm someone physically through failure to take care as to their physical well-being is breached by a defendant whose negligent exposure of its employees to asbestos causes one

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240. RIPSTEIN, *supra* note 50, at 53–58.

241. *See id.* at 273 (“[A] focus on primary goods gives priority to protecting the capacities for exercising important liberties. It also demarcates risks that are taken from those that merely arise, by determining which risks are always to be held in common.”).

242. *See id.* at 53–58 (“Unreasonable risks belong to those who create them; as a result, the injuries that result from unreasonable risk imposition belong to the injurers. Since they are the injurer’s problem, the injurer must make them up.”).

of them to suffer pleural thickening. This is because pleural thickening can fairly be regarded as genuine physical harm and as such falls within the scope of the duty of care owed by the employer to employees. That injury therefore qualifies as the ground for a right of action. Once there is such a ground, the question arises as to what remedy should be available, and if the answer is compensatory damages, then typically make-whole is the measure. This means that damages for emotional harm are also available. There is a difference between *the kind of impact upon plaintiff, the causing of which by a defendant is a wrong*, and *the kind of harm that figures into the goal of making whole*. That is precisely the difference between predicate injury and parasitic damage.

To be sure, this explanation presupposes that parasitic losses, standing on their own, are not treated as harms that defendants have a duty of care to avoid causing. But, at least as applied to a case like *Ayers*, this presupposition is doctrinally uncontentious. No one can dispute that tort law as it presently stands has adopted and maintained limited duty rules for negligently caused emotional distress—rules that, among other things, relieve employers from any general duty to take care against causing employees emotional distress. Moreover, it is not as if these rules are unmotivated.<sup>243</sup>

#### *E. The Relevance of Action and Agency*

Among the most difficult topics in negligence law is the misfeasance–nonfeasance distinction. A defendant who carelessly causes a baby to drown by accidentally knocking her out of a boat will be liable in tort for having done so. A bystander who fails to save a drowning baby because he does not want to get his sleeve wet has committed no tort at all. Negligence doctrine deems this result to follow from certain principles. A very broad duty exists to be careful not to cause others reasonably foreseeable physical harm through one's own conduct, yet there is no general duty to be careful to protect or save someone from harm that comes from another source, even reasonably foreseeable harm.<sup>244</sup> In fact, the misfeasance–nonfeasance distinction is but one example of tort law's attribution of great significance to the connection between the exercise by the defendant (or another person) of his agency and a victim's injury. The distinct treatment accorded to intentional wrongdoing is another. Anxiety about causes that are too *indirect*,

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243. See Goldberg & Zipursky, *supra* note 181, at 1676–85 (defending limited duty rules in part on the ground that victims can be expected to handle ordinary stresses without “falling apart”). The eggshell skull rule admits of a similar explanation. So long as the defendant has committed an actionable wrong against the plaintiff, a right of action exists. The extent of damages may go far beyond what was necessary to generate an actionable wrong, but that is because there is a remedial rule calling for victims of completed wrongs to be made whole. The causing of this additional increment of losses is not itself a wrong.

244. See, e.g., PROSSER, *supra* note 12, at 190 (“The law has not recognized any general duty to aid a person who is in peril.”).

often stationed under the proximate-cause and superseding-cause doctrines within negligence, is yet another.

The significance of the misfeasance–nonfeasance distinction itself is not simply expressed in the law under the heading of “duty.” Even where there is liability in a case that does not involve misfeasance, the treatment of the case is different from that of an instance of misfeasance. When the basis of liability is a breach of an affirmative duty to protect the plaintiff, distinctive rules on causation, damages, and rights as to third parties can come into play. For example, victims of breaches of affirmative duties are often treated generously on the issue of causation—a pro-plaintiff feature of the law that, paradoxically, makes courts justifiably wary of recognizing new affirmative duties.<sup>245</sup>

Intentional wrongdoing is likewise treated as categorically distinct from carelessness. When contributory negligence was a complete defense to negligence, it provided no defense to intentional torts.<sup>246</sup> Even with the switch to comparative fault, in most jurisdictions plaintiff carelessness does not provide a ground for reducing the damages payable by an intentional tortfeasor.<sup>247</sup> Punitive damages are generally available against intentional tortfeasors but not those who are merely negligent.<sup>248</sup> Emotional harm and economic harm arising from carelessness are actionable only in special circumstances, yet when the plaintiff depicts the defendant as having acted with an intention to bring about these sorts of harm, courts are much more receptive.<sup>249</sup> Historically, in a case in which a tortfeasor’s carelessness toward the plaintiff combined with another’s intentional mistreatment of the plaintiff, the former could seek contribution and perhaps indemnification from the latter, but the latter was barred from seeking contribution from the former.<sup>250</sup>

The contribution of actors other than the defendant herself to a plaintiff’s injury—including the plaintiff—has also received special

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245. See, e.g., *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153–54 (1972) (holding that in a suit for breach of an affirmative duty to disclose information, it can be presumed that the plaintiff would have relied on the information had it been disclosed); RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965) (adopting a rebuttable presumption that a consumer suing for a failure to warn would have heeded the warning had it been given).

246. RESTATEMENT (SECOND) OF TORTS § 481.

247. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 1 reporters’ notes, at 13 (2000) (describing the majority rule). *But see id.* (arguing for a departure from the majority rule); *id.* § 3 reporters’ notes, at 43 (treating the question of whether to recognize comparative fault as a defense to intentional torts as a “policy” question for courts to decide on a case-by-case basis).

248. See RESTATEMENT (SECOND) OF TORTS § 908(2) (1977) (requiring conduct that is “outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others”); *id.* § 908 cmt. b (acknowledging no punitive damages for mere inadvertence).

249. See, e.g., *Ultramares Corp. v. Touche*, 174 N.E. 441, 447 (N.Y. 1931) (holding that accountant malpractice causing economic loss is not actionable absent privity or near-privity between plaintiff and defendant, whereas fraud would be actionable without privity or near-privity).

250. See RESTATEMENT (SECOND) OF TORTS § 886A(3) (asserting no right of contribution for intentional tortfeasors).

treatment in tort law. In some instances, it has been prepared to treat multiple wrongdoers as “concurrent” causes of a victim’s injuries.<sup>251</sup> In others, however, it deems the intervention of a wrongdoer to relieve the more remote actor of any responsibility for a victim’s injury, even granted that the remote actor’s own wrongful conduct was a necessary condition for the happening of that injury.<sup>252</sup>

Different allocation theorists have different accounts of the misfeasance–nonfeasance distinction, of the distinct treatment accorded intentional torts, and of the role of directness. But for all of them there is a basic problem. Once one decides that a loss is sufficiently foreseeable that a defendant could reasonably have anticipated and avoided or prevented it, it is not clear why features such as the absence of misfeasance or the presence of intentionality on the part of the tortfeasor or some other actor should affect the decision to hold the defendant responsible for the loss. For example, on the issue of superseding cause, the fact that another actor’s intervening misconduct has contributed, along with the defendant’s earlier carelessness, to the plaintiff’s loss seems as if it should merely add a name to the list of potentially liable parties and thereby alter comparative fault allocations. It should not provide a reason to *subtract* from the list of potential loss-bearers the initial tortfeasor. Yet this is precisely what the superseding-cause doctrine calls for, where applicable.<sup>253</sup> Similarly, why should it make any difference to a defendant’s ability to invoke the plaintiff’s fault to diminish recovery that the defendant’s conduct was intentional? If the plaintiff is partly at fault, it seems both equitable and efficient to permit the intentional tortfeasor to diminish her liability by proving that the plaintiff’s fault contributed to his injury.

The obvious reply of allocationists on this last point is that intentionality raises the degree of defendant fault and therefore stands as an equitable reason to place liability on the defendant and not the plaintiff. A similar line could be run on affirmative duties and misfeasance; while negligent misfeasance is less blameworthy than intentional harming, it is more blameworthy than the breach of an affirmative duty to protect someone. The common law, the allocationist might argue, simply took these views to an extreme for reasons of administrative simplicity. If it had operated with our nuanced system of comparative fault, rather than with simplistic all-or-nothing rules such as contributory negligence and superseding cause, courts would have permitted all of these issues to go to the fact finder, which could then have apportioned greater liability to intentional tortfeasors, somewhat less to

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251. See KEETON ET AL., *supra* note 12, at 268 (recognizing that under the law of joint tortfeasors, multiple wrongdoers may be held jointly liable for injuring a victim).

252. See *id.* at 302 (explaining that a defendant may be relieved of responsibility if his tortious conduct is superseded by the subsequent misconduct of an independent actor).

253. KEETON ET AL., *supra* note 12, at 301–02; see also *infra* notes 259–62 and accompanying text.

negligent actors, and less still to those who merely breach affirmative duties. A version of this approach is advocated by the soon-to-be-adopted Restatement (Third) of Torts, which proposes that courts use apportionment to evade issues of directness, superseding cause, and (in many cases) affirmative duties.<sup>254</sup>

Unfortunately, this line of argument amounts to a concession on the part of loss-allocation theorists of their inability to grasp the reasons for the common law to be organized the way it has been organized—and continues to be organized in most jurisdictions—on issues relating to the link between a defendant's agency and his liability. It is clear that the law would require quite dramatic change to conform to the allocationists' views on these issues. Perhaps it should, but that is not our question. The question is whether the allocationists can explain this terrain.

A wrongs view, by contrast, carries with it the analytical resources to understand the ways in which tort law has tended to address these issues. The tort, in negligent-misfeasance cases, is the *doing* of the physical harm through careless conduct. The driver who runs into my car negligently has damaged my car—the wrong is the negligent damaging. The driving instructor who negligently fails to stop his student from crashing his car into mine has *not damaged my car*—he has failed to stop his student from damaging it. He may or may not have a duty to protect me from injury at the hands of the student, but even if he does, he has not inflicted damage on me in the way that his student has. The nature of each of the two wrongs is quite different. The student has done something wrong to me; the instructor has failed to protect me from being wrongfully injured by another.

The significance of indirectness can similarly be accounted for on a wrongs view. Consider the *Allbritton*<sup>255</sup> decision from the Texas Supreme Court. A manufacturer's carelessly made product started a fire at an industrial facility.<sup>256</sup> After the fire was extinguished, the plaintiff's supervisor was directed to block off a certain valve. The plaintiff asked to accompany him. Upon reaching the site of the valve, however, the two were informed that it no longer needed to be blocked off. They then left the scene by means of a shortcut along a slippery elevated pipe rack. The plaintiff fell off the rack and was injured. The majority ruled that so much had happened between the realization of the risk of fire contained in the defendant's carelessness and the plaintiff's harm that it no longer made sense to treat the defendant's conduct as *inflicting* a harm upon the plaintiff.<sup>257</sup> The defendant's

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254. See Goldberg & Zipursky, *supra* note 183, at 1211–12 (explaining and criticizing the Restatement's position).

255. *Union Pump Co. v. Allbritton*, 898 S.W.2d 773 (Tex. 1995), *abrogated in part by Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007).

256. *Id.* at 774.

257. *Id.* at 776.

carelessness was a necessary condition of her harm but not one of its proximate (or “legal”) causes.<sup>258</sup>

Superseding cause is a variation on the same idea. Sometimes, the agency of a third party alters the sequence of events running from the defendant’s conduct to the plaintiff’s injury in such a way as to render it implausible to see the defendant as having wronged the plaintiff, even if the defendant acted negligently and even if such conduct was a cause-in-fact of the plaintiff’s foreseeable injury. The question is not whether the plaintiff has a loss and the loss was foreseeably caused by the tortious conduct of the defendant. The question is whether the conduct–consequence–injury sequence hangs together as a wronging by the defendant of the plaintiff. Intentional intrusions by a third party can sometimes destroy this sequence.<sup>259</sup> Such was the case, according to the Third Circuit, when the owner of the World Trade Center sued the manufacturer of the fertilizer used by the terrorists who bombed it in 1993.<sup>260</sup> Even if it was foreseeable to the manufacturer that its product might be converted by determined terrorists into a bomb, the bombing was their doing, not the manufacturer’s.<sup>261</sup>

As we noted above, tort law today is often prepared to apportion liability among two or more parties, each of whom contributed to a plaintiff’s injury. For an important realm of negligence and products-liability cases—typically accident cases—there is a synergy between independent risks of harm created by multiple defendants. In these cases, the injuring of the plaintiff may be a concurrence of independent wrongs committed by multiple parties. This is the way that maritime law has tended to conceive of

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258. See *id.* (“[T]he forces generated by the fire had come to rest when she [Allbritton] fell off the pipe rack. The fire had been extinguished, and Allbritton was walking away from the scene. . . . [T]he pump fire did no more than create the condition that made Allbritton’s injuries possible. We conclude that the circumstances surrounding her injuries are too remotely connected with Union Pump’s conduct or pump to constitute a legal cause of her injuries.”).

Even one who agrees with the *Allbritton* dissent that the defendant’s carelessness was a proximate cause of the plaintiff’s injury, see *id.* at 785 (Spector, J., dissenting), presumably would allow that some weaker causal linkage of carelessness to injury would defeat the notion that the defendant had done wrong to the plaintiff. Such might be the case, for example, if the plaintiff had safely returned from the attempt to fix the valve to a staff break room, then, because she was tired from fighting the fire, accidentally burned her hand on a hot plate.

259. See, e.g., GOLDBERG, SEBOK & ZIPURSKY, *supra* note 155, at 296–97 (explaining the doctrine of superseding cause and giving examples of situations “in which third-party misconduct intervenes as a necessary step in the sequence of events leading from the defendant’s breach to plaintiff’s injury”).

260. *Port Authority of N.Y. & N.J. v. Arcadian Corp.*, 189 F.3d 305 (3d Cir. 1999).

261. See *id.* at 314 (“[T]he raw ammonium nitrate and urea sold by defendants were not explosive until the terrorists purposefully manipulated and adulterated them by mixing them together with additional chemicals such that they were transformed into energized materials that could be incorporated into an explosive charge. The danger to plaintiff was presented not by the raw materials, but by a bomb that incorporated the raw materials after they had been substantially altered.”).

accidents at sea; *Kinsman* offers a famous contemporary example.<sup>262</sup> The rejection of all-or-nothing liability rules and the application of comparative-fault principles makes sense in these sorts of cases, not because intervening wrongdoing is never a reason to block the imposition of liability on a remote wrongdoer, but because they present a special situation in which two or more actors engage in conduct that is already careless as to the victim irrespective of the prospect of wrongdoing by another.<sup>263</sup> When *D1*'s conduct is careless toward a victim, but just happens to cause injury to the victim by virtue of intervening wrongful conduct by *D2*, the intervention of *D2*'s careless conduct toward the victim provides no reason to deny that *D1* has wronged the victim. In the same vein, the replacement of contributory negligence by comparative negligence can be understood as a recognition that an injuring of a plaintiff can sometimes be simultaneously an instance of the plaintiff negligently injuring herself and the defendant negligently injuring her.

Contributory negligence and comparative fault do not apply to intentional torts for the same reason that superseding cause has been and continues to be a significant force in negligence doctrine. Tort law does not depict the event of a plaintiff's being injured as a careless wronging if there was someone who deliberately set that injury as a target of her plans, set out to reach that target by intentional conduct, and reached that target. In this situation, the victim's injuries are the actor's responsibility and no one else's. Others' fault—including the plaintiff's—may have been a necessary condition for the success of the intervening actor's plan. But the law is not concerned here merely to identify grounds that warrant or cut against the shifting of losses from a plaintiff to others. It instead is concerned with determining when one actor has wronged the plaintiff. In so doing, it plausibly identifies different forms or classes of wrongings, subject to different definitions and defenses.

## VI. Wrongs and Recourse

Part IV argued that it is possible for tort law to be understood in terms of a meaningful concept of private wrongs without falling into various fallacies that jurisprudential scholars had taken to be fatal. Part V went further, arguing that, whereas loss-based accounts of tort law fail to explain many basic tort doctrines, wrongs-based accounts can make sense of them. And yet we suspect that, for many readers, loss-based accounts will retain some appeal. Why?

As we noted at the outset of this Article, a virtue of such accounts is that they have something concrete to say about the point of having tort law. It is, they say, law for shifting losses from persons who should not have to bear

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262. See *In re Kinsman Transit Co.*, 338 F.2d 708, 726–27 (2d Cir. 1964) (applying comparative-fault principles in attributing liability to multiple defendants).

263. See Goldberg & Zipursky, *supra* note 183, at 1236–37 (explaining the distinctive nature of “concurrent negligence” cases).



them to those who (for whatever reason) should. The attraction of this account of tort law's usefulness has been sufficiently strong to encourage aggressive theorists—James and Calabresi, for example—to abandon any effort to defend their theories as interpretively plausible and to shift instead to a forthright call for the revision or elimination of doctrines that prevent tort from operating more satisfactorily as a scheme of loss allocation. But even more interpretively oriented theorists tout as a virtue of loss-allocation theories that they have a story to tell about the role tort law plays in our legal system. By the same token, they will insist or suppose that there is no such case to be made for a law of wrongs. In the absence of a modern bureaucratic state, a law of wrongs perhaps was useful in channeling the passions of those keen to act on their vengeful dispositions and in thereby keeping the peace. But we moderns are well past the point of needing a body of law that indulges base instincts of this sort.<sup>264</sup> A modern state should concern itself with “real” problems, such as the delivery of compensation to those in need, or the deterrence of antisocial conduct, or the shifting of losses to those who are responsible for them.

In light of these concerns and arguments, it surely has not helped the cause of wrongs-based views that their most visible modern proponent—Professor Weinrib—has sometimes tied his particular account of torts as wrongs to a starkly formalist jurisprudence that rejects as off-point any inquiry into tort law's worth.<sup>265</sup> Tort law, he has said, can only be understood for what it is, not what it does.<sup>266</sup> That the leading wrongs-based theory claims as one of its chief virtues indifference to the point of having tort law suggests that there really is nothing much to be said for any such theory.<sup>267</sup>

In contrast to Weinrib, as well as to loss-allocation theorists who criticize him, we believe that a wrongs-based account of Torts connects elegantly to a plausible and appealing account of tort law's place in our legal system. Simply put, it is legitimate and useful for a modern liberal-democratic state to afford the victims of certain wrongs an avenue of recourse against those who have wronged them. *Civil recourse* is what the state delivers by having tort law.<sup>268</sup> Moreover, tort law as a law of wrongs guides conduct and protects individuals against mistreatment by others.<sup>269</sup>

It is perhaps uncontentious to assert that many victims of libel, battery, or negligence wish to have some means of responding to those who have

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264. See, e.g., Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1400 (2003) (articulating this view).

265. E.g., WEINRIB, *supra* note 51, at 45.

266. *Id.* at 45–46.

267. See, e.g., Robert L. Rabin, *Law for Law's Sake*, 105 YALE L.J. 2261, 2263 (1996) (reviewing ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995)) (dismissing Weinrib's treatment of tort law because of its formalism).

268. See *supra* text accompanying notes 125–29.

269. See *supra* note 7 and accompanying text.

defamed, assaulted, or carelessly injured them. But the issue is not whether some people desire redress against those they perceived as having wronged them. Rather, the question is whether the state does well to provide an avenue for such recourse. Moreover, the explanation for why there is value in providing recourse cannot reside principally in the idea that those who suffer injuries are entitled to be made whole. This would just be a reworking of a compensation-driven allocationist view in the language of recourse theory. Nor can the case for the value of providing recourse depend primarily on the idea that it will help deter accidents and injuries. This would be mere rehash of a deterrence-based allocation theory. The same goes for the idea that a system of recourse will allow for a fairness-based or responsibility-based shifting of costs from victims to wrongdoers—a rendition of recourse theory that reduces it to justice-oriented allocation theories.

In fact, the notion that there is value to the state's provision of civil recourse rests on a different idea than any of these, one that comes near to being captured by the hoary common law maxim: "[W]here there's a right, there's a remedy."<sup>270</sup> By recognizing relational duties of noninjury, tort law identifies and enjoins actions that constitute mistreatments of others. In turn, it identifies and confers on each of us a set of rights not to be mistreated. When one of these directives is violated—when a tort is committed—the victim of the mistreatment not only has suffered a setback in the eyes of law but is also recognized as having a legitimate grievance against the wrongdoer. The defendant has violated her legal rights and that violation entitles her to a remedy as against the wrongdoer.

One can imagine this remedy taking various forms, including a legal privilege of self-help. However, self-help is for the most part forbidden by the modern state.<sup>271</sup> Nevertheless, a victim's awareness that responsive aggression is prohibited does not put to rest the grievance. A person rendered paraplegic by the negligent driving of another, beaten by another, or humiliated by a libel has endured a rights violation; the injury and the grievance are real. The principle of civil recourse states that the victim of a legal wrong is entitled to some official avenue of recourse against the wrongdoer.

When courts embrace the *ubi jus ibi remedium* maxim, they tend to be articulating the gist of the principle of civil recourse and articulating it in a performative manner. To assert it is to say something to the following effect: "The plaintiff, having shown that what was done to her was a violation of her right not to be treated in a certain way, is entitled to, and therefore shall have, a remedy against the wrongdoer." Courts providing rights of action to

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270. See, e.g., Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 168 (2008).

271. See Douglas I. Brandon et al., *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 853 (1984) ("Modern courts generally are dubious of or hostile to self-help.").

victims of legal wrongdoing are recognizing themselves as fulfilling a political obligation to provide victims some means of civil response to having been wronged.<sup>272</sup> A plaintiff's entitlement to a right of action against a tortfeasor thus involves obligations of both the tortfeasor and the state. The state recognizes itself as obliged to empower the plaintiff to act in some manner against the defendant and acts on that obligation by permitting the plaintiff to exact damages or have the defendant enjoined against performing certain acts. Once the state has so acted (by entering a judgment), the defendant incurs a legal obligation to the plaintiff.

The normative idea at the root of the principle of civil recourse is not dependent upon social-contract theory, but it is illuminated by it. One can understand the state's obligation to empower the plaintiff who chooses to sue as part and parcel of a larger bargain that exists between the individual and the state. An individual relinquishes the raw liberty to respond aggressively to having been wronged and receives in return a certain level of security against responsive aggression by others, plus the assurance that a civil avenue of redress against wrongdoers will be supplied. At a higher level, this can be depicted as a bargain citizens make among themselves in choosing to have a state at all and reciprocally agreeing to have a state so long as it conforms its exercises of power to certain domains, preserves various domains of liberty, and recognizes certain forms of rights.

When the social-contract metaphor is stripped away, the idea of civil recourse becomes clearer. It is a political commitment to the following effect: Individuals who are able to prove that someone has treated them in a manner that the legal system counts as a relational, injurious wrong shall have the authority to hold the wrongdoer accountable to him. This commitment is not founded, in the first instance, on instrumental concerns but on political and moral ones. Part of the state's treating individuals with respect and respecting their equality with others consists of its being committed to empowering them to act against others who have wronged them. Relatedly, a legal and political order that respects an individual's right not to be treated in a certain manner cannot permit persons to invade such rights with impunity; forbidding responsive aggression without providing any avenue of private redress is a way of permitting rights invasions with impunity. This is particularly true with regard to wrongs that are not crimes or regulatory infractions, but it is even true of wrongs that are crimes or infractions, given that enforcement by the state of criminal and regulatory law is discretionary. Our system affords a victim a civil right to hold a wrongdoer answerable to her. A legal right of action in tort against the wrongdoer is that right.

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272. See Goldberg, *supra* note 183, at 563 (connecting Justice Marshall's invocation of the *ubi jus maxim* in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), to the longstanding notion that a constitutional government is under a duty to afford its citizens the protection of the laws, including laws that provide recourse for wrongs done to them).

By focusing on the significance of civil recourse, we do not mean to overlook another valuable aspect of tort law. As a law of wrongs, it guides conduct by reference to, gives recognition to, and enforces duties not to mistreat others. While the idea of civil recourse helps to explain in what sense tort law is committed to holding actors responsible or accountable to those whom they have wronged (when such a demand is made by the victim), the idea of legal wrongs helps to explain in what sense tort law recognizes responsibilities not to mistreat others in various ways.

We have elsewhere explained why the deterrence model that treats tort law as a set of liability rules does not fully capture the conduct-guiding capacity of the common law of torts.<sup>273</sup> The legal directives of tort law work indirectly. They spring from social understandings, where norms of conduct are to different degrees inchoate. Consider the following three levels at which there are various levels of knowledge of the wrongs of tort and there exists pressure to give definition to the wrongs of tort.

Pushed to adjudicate a plaintiff's demand for redress in a tort action, a judge or jury is often required to determine whether what the defendant did to the plaintiff was a wrong. Members of a community understand that the question answered in such circumstances is a question about whether the defendant's conduct was a wrong of a sort the legal system recognizes—a legal wrong.<sup>274</sup> If the issue is forced through appellate courts, a potentially more general and enduring announcement is made as to whether the conduct in question is a legal wrong, or at least whether it is plausibly regarded as such by a jury. Outside the context of litigation, individuals and companies will ask their lawyers whether a proposed course of conduct is permissible or whether the legal system counts it as an impermissible way of treating others. Can a certain newspaper article be published? Must patients be given certain warnings? If a product with a certain sort of risk inherent in its design were to injure a consumer, would that count as a tort? Must I reveal all the problems of my car or house before I sell it?

Most individuals do not have lawyers for their daily lives, and most decisions of businesspersons and professionals are made without the advice of lawyers, of course. Yet individuals and businesses know a great deal about what they may and may not do and what they can and cannot reasonably expect others to refrain from doing to them, and they use such knowledge

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273. See John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 395–98 (2005) [hereinafter Goldberg & Zipursky, *Accidents of the Great Society*] (arguing that deterrence models that fail to recognize the influence of social norms and institutions are inadequate); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1841–42 (1998) [hereinafter Goldberg & Zipursky, *The Moral of MacPherson*] (arguing that a relational conception of duty—one that incorporates an actor's moral responsibilities and legal duties—will permit law to build on and reinforce ordinary judgments about obligations of care).

274. GOLDBERG, SEBOK & ZIPURSKY, *supra* note 155, at 3.

in deciding what to do.<sup>275</sup> People know not only that it would be wrong to advertise a car for sale as having only 22,000 miles on it when it has 122,000; they know not only that lying is considered a moral wrong under the widely shared morality of contemporary society, but that selling something through deceitful representations is a legal wrong. Companies know that if there is a latent defect in a product that injures someone and that their sale of the product caused the injury, they can be held responsible for the injuring. Individuals know that if they have been subjected to excessive force by a police officer or beaten up by a nightclub bouncer or molested by a boss at work, their legal rights and not just their moral rights have been violated; police officers, bouncers, and bosses know that these are legal wrongs.

It is impossible to articulate how and why a law of private wrongs is of value without taking seriously that the duties and rights that exist under the law of torts figure in the minds of actors both inside and outside the legal system. Although many suppose that it clarifies to say that tort law has deterrent value (we are skeptical of this), it does so at the cost of oversimplification. It certainly does not follow from the fact that tort law has the capacity to influence conduct that a judge deciding a tort case should figure out how she thinks conduct should be deterred and then shape the rule before her to deter maximally or efficiently. The judge's first task is to ascertain whether the system of legal wrongs articulated in the precedent of the relevant area already speaks to the question at hand, and if so, what it says. To the extent that the dimensions of the tort in question remain underspecified, an application of the concepts and principles that are embedded in the precedent is called for. It will usually require a context-sensitive judgment that is attuned to both conceptual and pragmatic considerations.

Our point in this Article is not to set forth a normative theory of adjudication in the common law or to defend a jurisprudential view about how much is already "in" the common law; we have addressed these questions elsewhere.<sup>276</sup> The point is that part of what gives tort law value is that it is a system of rules contained in common law that articulates legally enforceable norms about how one is obligated to treat others. These norms are, at a number of different levels, grasped by members of the community in such a manner as to guide conduct and generate expectations, both directly

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275. Goldberg & Zipursky, *Accidents of the Great Society*, *supra* note 273, at 389.

276. See, e.g., Benjamin C. Zipursky, *Practical Positivism Versus Practical Perfectionism: The Hart-Fuller Debate at Fifty*, 83 N.Y.U. L. REV. 1170, 1211 (2008) ("[T]he conclusion that more just results can be reached . . . by practical perfectionism suffers from an artificial limitation of vision; an advocate of practical perfectionism must be willing to take what he . . . regards as the bad results along with what he . . . regards as the good ones, and must be willing to accept the corresponding alterations in judicial and nonjudicial power.").

and indirectly.<sup>277</sup> We recognize that the point is obvious; the problem is that it is almost blindingly obvious. It has been too easy to overlook the fact that tort law really is about wrongs.

Ironically, it is the pervasiveness and breadth of tort law that partly explains why many tort scholars have failed to countenance the centrality of wrongs to tort theory. When one looks for a theory, one typically wants an account that is unifying and simplifying in various ways; when one looks for a legal theory, one typically wants an account that is able to explain a variety of legal phenomena on the basis of a relatively limited set of values or principles or structures. For this reason, it has been attractive to understand tort law as a system aimed at protecting individuals' bodily integrity and at securing their freedom from accidental physical harm and the enormous financial toll inflicted by such harm. Seeing tort law as accident law permits such an approach. When we add to that—as a vitally important constraint—the need for the law to preserve individuals' liberty to engage in a variety of activities, then (one might think) we have the beginnings of a normative framework for understanding why the law of accidents—primarily negligence law—contains duties not to injure others by taking certain kinds of risks; one begins to understand why damage is an element of the tort of negligence; one starts to generate interesting and (one hopes) fruitful question about how activity levels and bodily security levels are to be accommodated, and how different parts of the law can do so in different ways.

The problem is that the law of negligence pertaining to accidental physical injuries is only one part of tort law. The defamation and privacy torts have nothing to do with this. The same is true of fraud; perhaps even of legal malpractice and the law of nuisance and many other torts. Moreover, the wrong of deceiving (fraud) seems to have little to do with the wrong of interfering with someone's use and enjoyment of property (nuisance), and it is hard to see why the values underlying the shape of the tort of fraud are going to help with nuisance. In other words, it is not as if all one needs to do is handle some other set of torts. Given the diverse array of torts, it is perhaps understandable that many have retreated to an "accidents-law-plus" conception of tort law. The alternative, it would seem, would be along the lines of Jules Coleman's plausible assertion that what counts as "wrongful" in tort law is a matter of convention<sup>278</sup> or Ernest Weinrib's tantalizing (but perhaps unfulfilling) suggestion that the substance of tort law cannot be understood except on its own terms.<sup>279</sup>

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277. See Goldberg & Zipursky, *Accidents of the Great Society*, *supra* note 273, at 395–96 (contending that social norms and institutions play a role in an actors' behavior and expectations).

278. See COLEMAN, *supra* note 48, at 334 (explaining that tort law concerns wrongdoing as defined by the relevant and appropriate norms of conduct).

279. See WEINRIB, *supra* note 51, at 14–15 (arguing that all private law, including Torts, can only be understood internally).

We have offered the idea of civil recourse and the ideas of relational, legal, injury-inclusive wrongs as unifying features of tort law and tort theory, but in doing so we do not suppose that we have relieved ourselves of the need to discuss the substance of tort law. To the contrary, both for torts within the negligence family, for products liability, and for torts from fraud to libel to trespass, we have taken the view that substantive tort theory is possible and valuable. Scholars like Posner on the one hand and Ripstein and Keating, on the other, have said a great deal about the theoretical underpinnings of the wrong of negligence by taking seriously what “reasonable care” means, and why. To a great extent, their accounts of that tort have focused on a set of activities risking physical injury and property damage to others.<sup>280</sup> In numerous places, we have offered accounts of the wrong of negligence pertaining to physical injury, as well as reasons for thinking differently about the wrongfulness of negligent conduct causing emotional harm. What is needed in tort theory is an appreciation that this sort of interpretive account of the wrong of negligence should be developed for all of the wrongs of tort law, at least if the goal is to understand the law of torts. The fact that some torts pertain to reputational attacks, others to property rights, and others still to protection against false imprisonment and malicious prosecution does not show that tort law is incoherent. It shows that there are many kinds of wronging that the legal system has chosen to recognize as legal wrongs.

## VII. Implications

In this final Part, we briefly sketch some of the ways in which a wrongs-and-recourse view can illuminate contemporary debates about tort law.

### A. *Accident Law Revisited*

We have argued that it is a huge mistake to depict tort law as law for allocating accidentally caused losses. The mistake is academic, but not merely so. A case can be made that our society has lost a great deal by wrongly supposing Torts is our legal system’s first line of response to accidents and its first line of prevention for accident-inducing conduct. If achieving important compensatory and regulatory goals is really what a government wants to do, it would do best to give up the presumption that tort law stands ready to deliver on these goals. While tort law does permit injured victims to gain compensation and does provide financial incentives for actors to address the potential harmfulness of their conduct,<sup>281</sup> it is a

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280. See, e.g., RIPSTEIN, *supra* note 50, at 48–64; Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 311–28 (1996); Posner, *supra* note 60, at 29–44 (all discussing negligence through analysis of “reasonable care” with discussion of activities posing risks to physical injury and property damage).

281. See, e.g., LANDES & POSNER, *supra* note 57, at 312 (asserting that tort law provides incentives that generally promote economically efficient behavior).

remarkably inconsistent, blunt, and expensive tool for these tasks. Other forms of public and private legal arrangements are demonstrably superior in a wide range of cases.

As many before us have observed, products-liability law serves as a good example of the weakness of tort law as a compensatory system.<sup>282</sup> California's early embrace of strict liability for products defects was in part motivated by an expressly allocationist argument that manufacturers were better able than injured consumers to bear the burden of the losses suffered by the victims of their defective products.<sup>283</sup> Not only do they have deeper pockets, they also have the capacity to pass on the costs of injuries through higher product prices.<sup>284</sup> However, products liability law will often make for a poor form of insurance given how expensive and slow the tort system is in delivering compensation.<sup>285</sup>

It is also far from clear that products-liability law can be defended simply by virtue of the marginal contribution to safety it provides above and beyond negligence law, although it surely at times helps make up for spotty safety regulation. As manufacturers understandably complain, juries on the whole tend to be less capable regulatory decision makers than expert administrative agencies, and it is unclear why *ex post*, ad hoc, judgments that a particular product design was too dangerous should form the centerpiece of a rational regime by which to protect consumers from dangerous products.<sup>286</sup> In addition, the randomness as to which injured persons choose to sue, the differing abilities of different plaintiffs to endure and succeed at litigation, and the unpredictability of juries' damage awards significantly muddy any deterrent message products-liability law may be sending.

It would be unfair to blame allocationists for the failings of products-liability law as a system of accident compensation and safety regulation, and that is not what we are doing. But it is fair to suggest, as we are doing, that our society's failure to establish better systems of accident compensation and risk regulation stems partly from a misplaced reliance upon tort law as loss-

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282. See, e.g., MARK A. GEISTFELD, *PRINCIPLES OF PRODUCTS LIABILITY* 53–58 (2006) (explaining the inefficiencies of tort compensation compared to first-party insurance in the context of products liability and that the problem of underinsurance does not justify an expansion of tort liability).

283. See *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) (contending that victims suffering injuries from defective products are typically ill-prepared to meet the consequences of injury, while manufacturers are best positioned to prevent and absorb those risks and costs).

284. See RICHARD A. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW: A LEGAL REVOLUTION* 46 (1980) (noting the argument that the manufacturers can pass premium costs of insurance on to purchasers as part of their general cost of doing business).

285. See LANDES & POSNER, *supra* note 57, at 57–58 (asserting that the tort system functions as an “exceedingly costly insurance mechanism” with substantial administrative costs imposed by the time and money spent on litigation).

286. See EPSTEIN, *supra* note 284, at 87–88 (arguing that the judicial process involving layperson jurors provides a particularly poor forum for making the difficult choices of appropriate product design and regulations to protect consumers).



allocation law. More importantly, it is valuable to take stock of the radical shortcomings of tort law *as compensatory and regulatory* when thinking about what forms of law might meet our compensatory and regulatory goals as we move forward. In this respect, the critique of allocationism serves as a springboard for a more progressive and flexible approach toward our system's method of dealing with accidents.

The critique of allocative theories is progressive because it punctures the idea that tort law should be a default for dealing with accidents, and thereby directs attention to alternative schemes for dealing with accidents. Conversely, however, our account counsels a more restrained approach to the reform of tort doctrine itself. For insofar as the arguments for revision of tort doctrine are predicated on the idea that certain features of tort law are ill-suited to the job of shifting losses, our view gives reasons for backing off of such revisions. It is no accident that Part IV's list of doctrinal conundrums generates something of a to-do list for those keen to make tort law fit their misguided sense of what it is. If Torts is going to be a decent system of loss allocation, rules limiting liability for economic and emotional harm will need to be relaxed, and doctrines such as superseding cause and punitive damages would have to be abolished. We have not provided prescriptive arguments demonstrating that, all told, these and other features of tort doctrine are worth keeping. However, we have shown that they are well-motivated features of a law of civil wrongs and recourse.

### *B. Evaluating Tort Reform*

Although they are entering their fourth decade, debates over contemporary tort reform have for the most part lacked an important dimension. Pro-reform forces argue that tort law does not do a good job of providing compensation and deterrence, and that whatever it does do is accomplished at too high a price in terms of over-deterrence, wasteful expenditures, and suppression of productive activity.<sup>287</sup> Thus, the argument concludes, legislation is needed to eliminate joint and several liability, cap damages, and immunize certain actors from certain kinds of tort liability.<sup>288</sup> Meanwhile, anti-reform forces argue that tort law is not significantly affecting the cost or availability of goods and services,<sup>289</sup> and is a needed mechanism by which citizens can invite courts to regulate and tax powerful industries that the other branches of government have failed to control. It

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287. See Joanna M. Shepherd, *Tort Reforms' Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905, 914–19 (2008) (summarizing tort-reform proponents' arguments in favor of reform).

288. *Id.*

289. See, e.g., Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1270–71 (2004) (arguing that medical litigation has not caused an increase in medical-malpractice-insurance costs).

follows, they say, that there is no need for legislatures to adopt curbs or caps on liability.<sup>290</sup>

Ignored in these arguments is a question brought to the fore by a wrongs-and-recourse view of Torts: the extent to which it is important and valuable for our legal system to provide to claimants, as a matter of right, the ability to bring another person into court to answer for an alleged wrong done to her. By focusing on this issue, we may come to appreciate that our system needs both less and more reform than it has been getting. It may need less reform because the value of providing recourse law to the citizenry, once fully appreciated, may counsel caution in the removal or limitation of tort claims. It may need more reform insofar as the tort system fails effectively to identify wrongs and provide victim recourse for them.

One of the most basic themes in the Anglo-American constitutional tradition—one that dates back to the efforts of the common lawyers to resist Stuart absolutism—is the idea that institutional complexity is both a vital bulwark against oppression and a necessary means by which government can accomplish what it is obligated to accomplish.<sup>291</sup> A liberal-democratic government, the thinking goes, has the best chance of functioning well when it is comprised of distinct branches and offices, and when citizens have multiple access points through which to engage government and each other.<sup>292</sup> Membership in a national or local legislative body, the holding of an executive or judicial office, participation on a jury, voting in fair elections, petitioning and freely speaking on matters of public interest, and—yes—suing in courts: Each provides a distinctive form of political participation and with it political power.<sup>293</sup>

The provision by a government to its citizens of a law of wrongs and recourse embodies and furthers several related liberal-democratic values. In multiple ways, it affirms the significance of the individual citizen. It identifies protected interests that each of us possesses—such as the interest in bodily integrity—and with which each of us must refrain from interfering; to say the same thing, it confers upon each of us duties not to mistreat others in various ways and rights not to be so mistreated.<sup>294</sup> It enables individuals to assert claims as a matter of right without first obtaining the permission or blessing of government officials. It renders wrongdoers specifically answerable to victims rather than to a government prosecutor acting on behalf of the

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290. *Id.* at 1313–14.

291. *See* Goldberg, *supra* note 183, at 535 (“The common lawyers argued that each of these complexities was vital to the health of the polity, just as the health of each organ in a complex organism ensures its well-being.”).

292. *See id.* at 538–39 (summarizing the common lawyers’ arguments in favor of maintaining a complex legal system and refraining from consolidating authority in the executive).

293. *See id.* at 601–02 (discussing the empowerment of a litigant who sues for the redress of a wrong).

294. *See id.* at 607–08 (conceptualizing tort law as conferring a right against injury and a corresponding duty not to injure).

state or the people. In holding individuals accountable based on what they have done, irrespective (in principle) of who they are, it embodies and reinforces a notion of democratic equality—the idea that there is not a class or group of persons who are somehow entitled to mistreat another, “lower” class or group.

Of course there are other institutions within our system that, in different ways, embody and further these values. Our point is that once one sees tort as a law of wrongs and recourse, one sees that it is not merely a regulatory or benefits program but part of the architecture of constitutional government. It is no accident that seminal figures in our constitutional tradition, including Coke, Locke, and Blackstone, deemed individuals to enjoy a *right of recourse* against those who wronged them and deemed governments to be obligated to provide an avenue by which to exercise this right.<sup>295</sup> Because it is only natural for individuals to abuse this right—to see themselves as having been wronged when they have not been, or to seek unadulterated vengeance rather than fair recourse<sup>296</sup>—and because it is vital to protect every member of society against the destabilizing effects of individual and family feuds, government can fairly deny individuals the ability to exercise such a liberty simply as they might wish. But in doing so, government is at the same time obligated to recognize some right of response. The most straightforward way of doing so—and the way in which our system for centuries has actually done so—is by providing a law of wrongs and recourse.

We said above that the adoption of a wrongs-and-recourse view was a two-way rather than a one-way ratchet. To note the political significance of tort law in certain ways rather obviously counsels less in the way of modern tort reform. By contrast, procedural and remedial law are areas for which our view might support more reform. If tort law is for the recourse of wrongs, then it will be important to know whether its definitions of legal wrongs are plausible, and if it is providing meaningful recourse to victims of such wrongs. Where necessary to ward off suits that allege nominal wrongs and injuries that seem unlikely actually to be wrongs and injuries, there is room for judges and legislatures to block or raise barriers to suit. For example, the enactment by the Michigan legislature of a bar to claims for “loss-of-a-chance,”<sup>297</sup> whether wise or unwise from a policy perspective, was probably justified given the dubiousness of the idea that a lost chance for health is really an injury.

Finally, note that the cause of more reform need not be limited to defendant-friendly reform. If tort litigants, or some portion of them, consistently report significant frustration or dissatisfaction with the way in which their claims are handled, then we will have occasion to study whether

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295. *Id.* at 534–35, 541, 545–46.

296. *Id.* at 602.

297. MICH. COMP. LAWS § 600.2912a (2000).

streamlined procedures ought to be implemented, perhaps even though it might mean reducing the likelihood that every last piece of relevant information pertaining to the lawsuit will be uncovered during the course of discovery. Likewise, if the expense to plaintiffs of litigation works systematically to make a certain category of claims economically infeasible, then it might be an occasion for legislatures or courts to consider the desirability of measures such as fee-shifting rules.

### C. Responsibility and Institutional Questions About Wrongs

Tort has long been thought to raise issues of “institutional design.”<sup>298</sup> Usually this question is framed in terms of a question as to whether lay judges and jurors are better or more appropriate policy makers than legislatures or bureaucrats or whether and when an *ex post* form of regulation is superior to *ex ante* mechanisms.<sup>299</sup> Buried or lost in these questions is the central role played by social norms and their interaction with legal standards of conduct. A conception of tort law as a law of wrongs and recourse brings them back to the fore.

Economists have been enthralled with the “discovery” that norms shape behavior in ways that depart from rational-actor models.<sup>300</sup> For students of the common law, this is old news. Tort law has always been about a victim’s right to have the state’s assistance in holding a wrongdoer accountable, or responsible, for what he did, and the wrongs of tort law, as a matter of formal law and informal legal practice, have tended to track social norms of acceptable and unacceptable conduct. Negligence law instructs jurors to determine whether defendant and plaintiff have exercised ordinary care—i.e., acted in the manner that one would expect a person of reasonable prudence to act under the circumstances.<sup>301</sup> Products-liability law, in some iterations at least, keys the finding of a product defect to consumer expectations.<sup>302</sup> Certain nonharmful touchings will count as batteries—namely those that are widely

298. See, e.g., Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2061 (2000) (discussing current controversy over the functioning of the tort system).

299. See generally *id.* (discussing current controversies involving the role of judges and juries and of tort law’s approach to the defense of regulatory compliance).

300. See Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 540–43 (1998) (discussing the recent move in law and economics from studying hypothesized rational actors to studying individuals guided by social norms); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1471 (1998) (“Empirical evidence gives much reason to doubt [the] assumptions [of neo-classical economics]; people exhibit bounded rationality, bounded self-interest, and bounded willpower. This article offers a broad vision of how law and economics analysis may be improved by increased attention to insights about actual human behavior.”).

301. RESTATEMENT (SECOND) OF TORTS §§ 281–283, 463–464 (1965) (defining the cause of action for negligence and the standards for negligence and contributory negligence).

302. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. c (1997) (“More distinctly than any other type of defect, manufacturing defects disappoint consumer expectations.”).

understood to be inappropriate or offensive, such as an uninvited grope.<sup>303</sup> The wrong of intentional infliction of emotional distress requires an outrageous departure from ordinary standards of acceptable conduct.<sup>304</sup> As these and many other examples attest, the wrongs of tort are definitionally connected to social norms.

And yet the wrongs that count as torts are also positivistically defined by legislatures, courts, and jurors: Tort law does not simply incorporate extralegal standards in an unadulterated form. Jurors can deem conduct careless even if it meets customary expectations as to the care one ought to take—an entire practice or calling can be declared substandard.<sup>305</sup> As negligence law’s “objective” fault standard attests, judges can push to identify as wrongful forms of conduct that may often be deemed acceptable or at least not blameworthy in ordinary morality.<sup>306</sup> Courts and legislatures can declare new wrongs (gender discrimination in the workplace)<sup>307</sup> or refuse to recognize as tortious long-recognized wrongs (seduction of another’s spouse).<sup>308</sup>

Are courts relatively good at walking the line between articulating and flouting social norms? Would judges who presently think of tort suits as occasions to implement ad hoc solutions to pressing social problems do a better job if they saw themselves as instead interpreting, refining, and fashioning norms of right and wrong conduct? Can jurors be trusted in the theatrical atmosphere of a trial to temper tort rules with common sense? If judges are in fact interpreting social norms when they “make” tort law, are courts in this sense democratic institutions even if the judges are not democratically elected? We do not offer answers to these questions; our point is simply that a wrongs-based theory of tort law demands that these issues be examined and offers a rich theoretical framework for doing so.

A brief look at the development of actionable civil wrongs in American law yields some surprising observations. Under a conventional view of our legal system, it is legislatures that should announce new legal duties and new legal wrongs. Likewise, the fact that interpersonal wrongs are likely to

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303. RESTATEMENT (SECOND) OF TORTS § 18 (1965).

304. *Id.* § 46.

305. *Id.* §§ 519–520.

306. *See* MAYO MORAN, RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD 58 (2003) (“[T]he reasonable person standard’s ‘failure’ to capture only blameworthy behaviour is actually posited as its distinctive strength. . . . [I]n part this is because this ‘failure’ to attend to blame is seen as crucial to maintaining the core of the objective standard. In this way, the reasonable person’s rigidity in the face of the intellectual shortcomings of the defendant is taken to exemplify its distinctively egalitarian conception of fault.”).

307. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. 7, sec. 703, 78 Stat. 241, 255–57 (1964) (codified as amended at 42 U.S.C. § 2000e-2 (2006)); *see also* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (holding that sexual harassment is a form of sex discrimination actionable under Title VII).

308. *See* Veeder v. Kennedy, 589 N.W.2d 610, 614 nn.3–4 (S.D. 1999) (surveying the status of a cause of action for alienation of affection, which the majority of states have judicially or statutorily abolished).

implicate community values arguably points toward the propriety of state-law rather than federal-law innovation in this area. How ironic it is, then, that the most dramatic and notable developments in the law of civilly actionable wrongs—products-liability law, sexual-harassment law, securities fraud, constitutional torts, and international-human-rights wrongs—have been brought about principally not just by courts, but by federal courts.<sup>309</sup> We offer this observation not by way of criticism, but merely to suggest that our legal system has hardly given up on its commitment to courts as fora for the articulation of legal wrongs and the provision of civil recourse.

Relatedly, there is an important set of questions worth noting as to the respective scope of judicial and legislative authority. It is quite clear that legislatures enjoy the authority to fashion statutory torts—relational wrongs that give rise to private rights of action. This is what statutes like Title VII are all about. They can also define different kinds of wrongs that call for different kinds of enforcement. For example, state consumer-fraud statutes have explicitly adopted a private-attorney-general enforcement model, and they have done so in ways that grant standing to sue to persons who would not be authorized to sue under common law principles.<sup>310</sup> What about the converse question? Do courts enjoy the authority to empower persons other than victims of relational wrongs to obtain remedies for those wrongs? At a minimum, it seems clear that courts are operating at the core of their common law authority when they are articulating relational wrongs and providing remedies to victims of those wrongs. Whether, in the absence of an explicit or implicit statutory grant, they also retain a penumbral authority to deputize private citizens to act as private attorneys general is a question that deserves careful consideration.

### VIII. Conclusion

The law of Torts is *not* accident law, nor even accident law plus assault and battery. It is what it purports to be: a law of wrongs. Torts are legal wrongs for which courts provide victims a right of civil recourse—a right to sue for a remedy. There is nothing new or even surprising about these statements; hornbook authors have said it all along. What is newer and more surprising is that it actually means something to say these things. Torts is as basic a subject in our legal system as it purports to be. What stands next to Contracts, Property, and Criminal Law is not accident-law-plus. It is the law of private wrongs. By recognizing torts as wrongs, civil-recourse theory

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309. See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (constitutional torts); *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945 (5th Cir. 1981) (securities fraud); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (international human rights); *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976) (sexual harassment); *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 562 (Cal. 1944) (Traynor, J., concurring) (products liability).

310. See John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1015–18 (2006) (outlining the development of a private right of action for consumer fraud).

permits legal scholars to make sense of and develop further a vast body of concepts and principles central to a general understanding of American law.

Afraid since Holmes's time of the sanctimonious sound of "wrongs," and confronted with modern accident epidemics, scholars have convinced themselves that the subject of Torts is really about accidentally caused *losses*, not wrongs, and that the central task of tort law is to reallocate such losses in the most justifiable manner. Included among them are economists like Calabresi and Posner, corrective-justice theorists like Coleman, and mainstream doctrinal scholars like Prosser and the Reporters for the forthcoming Restatement (Third) of Torts. Without wrongs at the center, however, all of these theories are doomed to fail. Numerous, deeply rooted features of the structure of Anglo-American tort law, as we have shown, render loss-based theories incapable of capturing this body of law. In contrast, a civil-recourse theory that predicates rights of action on wrongs, not losses, comfortably shows how tort law hangs together.

In retrospect, our "retaking" of tort law has required only two simple steps: (1) crafting a conception of legal wrongs and (2) taking seriously the idea of a victim's right to recourse against a wrongdoer. In tort, wrongs are violations of legal norms not to mistreat others in various ways. They are legal wrongs, not moral wrongs. Because the legal norms that set out wrongs are always wrongs as to a particular person or classes of persons, those legal norms go hand in hand with a set of potential victims who will be entitled, in principle, to recourse against their wrongdoers. And the principle of civil recourse is itself familiar, not esoteric, embedded as it is in the *ubi jus* maxim: Where there's a right there's a remedy. Wrongs and recourse run as deep in American law as any of its other elements, and they lie at the core of Torts.