

**Wrongs, not Accidents:  
Civil Recourse and Civil Wrongs in the Law of Torts**

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**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 in the world that can be owned and alienated – land, chattels, and patents, for example. Criminal Law concerns rules so important that their violation elicits from the state its harshest action: punishment. Contracts is basic to a system in which individuals are empowered to create legal relations with one another. Civil Procedure introduces students to the entire litigation process. Constitutional Law is about guarding the guardians. Each of these subjects stands out for being both ancestral and essential.

Torts, it seems, is the odd man out. What is its subject matter? As it is studied today in most top law schools, tort law is “accident law-plus.” Tort’s chestnuts – *Brown v. Kendall*,<sup>1</sup> *Rylands v. Fletcher*,<sup>2</sup> *Palsgraf v. Long Island Railroad Co.*,<sup>3</sup> *Escola v. Coca Cola Bottling Co.*,<sup>4</sup> *U.S. v. Carroll Towing Co.*,<sup>5</sup> *Summers v. Tice*,<sup>6</sup> *Dillon v. Legg*,<sup>7</sup> *Sindell v. Abbott Labs.*<sup>8</sup> – address liability for accidents. When other torts are covered they tend to be addressed through cases like *Vosburg v. Putney*<sup>9</sup> and *Garratt v. Dailey*,<sup>10</sup> in which judges ponder the application of ‘intentional’ tort law to practical jokes with unintended outcomes, or cases like *Vincent v. Lake Erie Transportation Co.*,<sup>11</sup> which serve as a platform for discussions of moral-philosophical or policy puzzles. Does accident law, along with the occasional battery or trespass case, really hang together as a core subject?

The basis for an affirmative answer to this last question is often thought to reside in a tangible feature of tort litigation. In every tort case, it seems, a person comes to court seeking relief for a *loss*. Accordingly, each case raises the question of whether the law is going to leave the loss where it lies, or to shift it to someone else. Tort law, on this view, consists of rules or guidelines for judges and jurors to follow in allocating losses. Given

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<sup>1</sup> 60 Mass. 292 (1850).

<sup>2</sup> [1868] All E.R. 1.

<sup>3</sup> 162 N.E. 99 (N.Y. 1928).

<sup>4</sup> 150 P.2d 436 (Cal. 1944).

<sup>5</sup> 159 F.2d 169 (2d Cir. 1947).

<sup>6</sup> 199 P.2d 1 (Cal. 1948).

<sup>7</sup> 441 P.2d 912 (Cal. 1968).

<sup>8</sup> 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980).

<sup>9</sup> 50 N.W. 403 (Wisc. 1891).

<sup>10</sup> 279 P.2d 1091 (Wash. 1955).

<sup>11</sup> 124 N.W. 221 (Minn. 1910).

the centrality to tort of accidents and negligence, tort law is thus best understood as *law for the allocation of the costs of accidents*.

Now that we have a better sense of the supposed subject matter of first-year Torts, we can revisit our initial question: Does a course about “The Allocation of Accident Costs by Courts” deserve a place at the core of the legal curriculum? We think not. Why offer an introductory class that focuses on losses for which other persons are potentially responsible, but not losses incurred as the result of illness or natural disaster? And why attend only to the loss-shifting achieved by *courts*? If one is interested in teaching how our legal system provides compensation to those in need, instruction in programs such as Medicare and Medicaid surely would be more relevant. Likewise, if we really think it critical to train first-year students to represent accident victims, they ought to be learning much more than they do about workers’ compensation schemes and various forms of first-and third-party insurance.<sup>12</sup> If there really is a point to putting Torts at the core of legal education, it cannot be because the law of loss allocation following accidents is so important. Somewhere, our thinking about torts as a subject has gone off track.

The goal of this Article is to put Torts back on track. Tort law, we will argue, is indeed basic, but not because it is a law for reallocating the costs of accidents. Rather, as its name indicates, tort law is about *wrongs*.<sup>13</sup> The subject of tort law is legal wrongs to others for which those others can sue. To use Blackstone’s apt formulation, the law of torts is a law of private wrongs.<sup>14</sup>

Of course tort law is in many ways public. It sets public standards of conduct. It is developed and applied by officials who have their eyes on policy concerns as they render judgments in particular cases. And its operation can advance or interfere with various policy goals. 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*. Torts are private wrongs, as opposed to wrongs to the world. Second, precisely because torts are wrongs of this sort, they provide the basis for a private response. For a wrong to be a tort it must in principle generate 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 belongs as a cornerstone of legal education along with criminal law (the law of public and publicly redressable wrongs) and contract law (the law of consensually defined duties). Looked at through the lens of litigation, tort is about the definition of the wrongs that a private litigant must establish to entitle her to a court’s assistance in obtaining a remedy, and what sorts of remedies will be made available. It is to private law what crimes are to public law. Looked at through the lens of daily life, tort is about which duties of conduct owed to others are counted as legal duties and what sorts of remedial obligations a person will incur for failing to conduct oneself in accordance with one’s duties. In this sense, tort is to duties set by law what contract is to duties set by agreement.

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<sup>12</sup> On the other hand, if the course is meant to introduce students to judicial reasoning, there is no explanation for why that inquiry is limited to reasoning about the allocation of accident losses.

<sup>13</sup> The noun “tort” means “wrong.” BLACK’S LAW DICTIONARY 1526 (8th ed. 2004).

<sup>14</sup> WILLIAM BLACKSTONE, 3 COMMENTARIES \*1 (“Of Private Wrongs”); *id.* at \*115-43 (treating causes of actions under the trespass and ‘case’ writs as articulating private wrongs for which the law provides to victims a remedy).

It follows that the places to look for contemporary extensions of tort law are *not* worker's compensation programs, no-fault insurance schemes, or disaster relief programs. Rather, they are found in the law 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 wrongful and injurious toward another such that, when committed, the victim is entitled to exact a remedy. 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. Understood as such, tort is a basic and entirely relevant legal category.

To assert that tort law is about wrongs is not to deny that it is often concerned with accidents and with losses. In its typical instantiation, the wrong of negligence consists of carelessness toward another causing physical harm. Because of the human toll taken by the machines of the industrial revolution and the chemicals of the post-industrial economy, negligence-causing-physical-injury has played a starring role in modern courtrooms and classrooms. But negligence is no more the essence of tort law than is summary judgment is the essence of civil procedure or the First Amendment is the essence of constitutional law. One must not mistake the incidents of syllabus star-power for the conceptual core of a subject.

The pronounced tendency among modern torts scholars has been to dismiss the language of wrongs as old-fashioned and unhelpful to the enterprise of understanding and evaluating modern tort law. Many will also be irritated by our emphasis on a bankrupt distinction between "public" and "private." And they may be inclined to dismiss as a mere rehash of corrective justice theory an effort to cabin the squishy notion of a "wrong" within the rigidities of a formal conception of "private law."

We see no reason to believe that talk of wrongs is inherently less meaningful than talk of cognitive biases or marginal costs. However, we grant that it is essential for tort to be understood in terms of a positivistic notion of legal wrongs, rather than an unadorned notion of moral wrongs. In addition, while we conceive of torts as private wrongs, we grant 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. Finally, although we do embrace certain ideas developed by corrective justice theorists, we reject the notion that tort law is an instantiation of a moral principle of corrective justice, and we think pragmatism, not formalism, is the right methodology for sound tort theory.

As the preceding paragraph perhaps already suggests, our critique is aimed quite broadly. This is because members of each of the three leading schools of modern tort theory – efficient deterrence theory, corrective justice theory, and pluralist compensation-deterrence theory – have all tended to be drawn to the idea that the tort system allocates costs. Our claim is that a new line must be drawn by which to orient academic debates about tort. The line is not between consequentialist and deontological theories, or between justice-based and welfarist theories, or between top-down and bottom-up theories. It is between theories that cast tort law as wrongs-based and those that cast it as loss-based.

Part I describes the move made in torts scholarship away from the idea of torts as wrongs in favor of a conception of torts as humanly caused losses. In doing so, it

demonstrates the pervasiveness of this mistake, which cuts across standard divides in tort theory. Part II posits that tort scholars have placed losses at the center of tort theory because of modern jurisprudential, moral, and political concerns that together create a challenge for those who wish to retain a tort theory centered on wrongs, and it sets forth that challenge. The challenge is met in Part III. Building upon the wrongs and recourse theory we have developed over the past decade, we set forth a cogent framework for understanding torts as a special sort of legal wrong.

Having established the availability of a notion of torts as wrongs, Part IV argues that tort theories based on a loss-allocation model cannot work. Doing so generates interpretive embarrassments that are easily avoided by a wrongs-based view. Tort law does not trigger a plaintiff's right to recover upon a showing of loss, but instead on a showing of *injury* – a distinct concept. Relatedly, tort law provides remedies that have nothing to do with loss allocation. Other basic features of tort are inexplicable from within a view of tort as law for allocating losses, yet are perfectly intelligible if one understands torts as a special kind of wrong.

In Part V, we explain that there is in fact 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 VI briefly identifies ways in which a wrongs-and-recourse approach to tort law can illuminate contemporary and enduring debates while also providing an agenda for further research.

## I. Torts, Losses, and Accidents

Many 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>15</sup> At the least, they 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 – are about 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, why it is a field of law at all, or what its point is. These scholars are similarly wont to suppose that the inability of the concept of a wrong to shed any light suggests that one must focus instead on certain ‘observable’ features of tort law – when it tends to be invoked and what tends to happen when it is invoked. Doing so, they suppose, allows us to see that tort law is law for the allocation of costs, especially the costs of accidents.

Holmes's writings on torts are commonly taken to mark the birth of modern tort theory.<sup>16</sup> That they are so regarded is itself significant. Holmes's writings are accorded this status *because* they provide one of the first efforts to offer a comprehensive account of the field in terms of losses and accidents rather than wrongs.<sup>17</sup> This effort was itself

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<sup>15</sup> W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS § 1, at 2 (5<sup>th</sup> ed. 1984).

<sup>16</sup> Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1230, 1256-81 (2001).

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

part of Holmes's larger thesis that the transition from ancient and medieval law to modern law was one marked first and foremost by the law's de-moralization.<sup>18</sup>

In The Common Law, Holmes commences his treatment of torts by focusing on liability for unintentionally caused harms. This was a carefully considered choice. Acknowledging that the "law of torts abounds in moral phraseology ... of wrongs, of malice, fraud, intent and negligence,"<sup>19</sup> Holmes starts with accidents because it gives him a 'hook' by which to induce readers to concede that tort law's moralistic appearances must be deceiving. With respect to unintended harms, Holmes says, the "far more popular opinion" among his readers is that liability had always been *strict* – without regard to wrongdoing.<sup>20</sup> How can torts be about wrongs if strict liability has been the norm? Of course Holmes was also determined to rebut "popular opinion" and to establish instead the historical dominance and conceptual propriety of fault-based liability.<sup>21</sup> The baseline rule, he insisted, was that "loss from accident must lie where it falls."<sup>22</sup> Still, he credited those who argued for strict liability with having a point, even if they had overstated it. Though fault-based, tort liability for unintended harms turns on *legal* rather than moral fault – a failure to meet the law's standard of reasonable conduct rather than a moral failure.<sup>23</sup>

Holmes next addressed torts such as deceit, which seem not to be about accidents, and to be all about "actual wickedness."<sup>24</sup> Re-tracing Lecture I's argument for a demoralized understanding of criminal law, he again insists 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.<sup>25</sup> For example, liability for deceit turns on "what known circumstances are enough to throw the risk of a statement upon him who makes it, if it induces another man to act, and it turns out to be untrue."<sup>26</sup>

In this manner, Holmes decoupled tort 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>27</sup> What, then, did he suppose the subject matter of tort law to be? On this Holmes is stunningly clear: "The business of the law of torts is to fix the dividing

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<sup>18</sup> OLIVER W. HOLMES, JR., THE COMMON LAW 37-38 (47<sup>th</sup> Printing 1923) (1881).

<sup>19</sup> *Id.* at 79.

<sup>20</sup> *Id.* at 80.

<sup>21</sup> 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. DAVID ROSENBERG, THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY 5 (1995). Holmes did believe that the propriety of imposing liability in tort turns on the foreseeability and the avoidability of the plaintiff's loss. Rosenberg is mistaken, however, to suppose that these aspects of Holmes' 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 18, at 121 (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").

<sup>22</sup> *Id.* at 94.

<sup>23</sup> *Id.* at 110 ("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.")

<sup>24</sup> *Id.* at 130.

<sup>25</sup> *Id.* at 130-31.

<sup>26</sup> *Id.* at 135.

<sup>27</sup> Grey, *supra* note 16, at 1232.

line between those cases in which a man is liable for harm which he has done, and those in which he is not.”<sup>28</sup> Tort law, in other words, is law that specifies when a liberal state will depart from its default rule of non-intervention and force one person to indemnify another for a loss caused to that other.<sup>29</sup>

Now fast-forward to the mid-Twentieth Century and the massively influential Prosser treatise.<sup>30</sup> It offers a view of tort 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 unilluminating.<sup>31</sup> Instead, Prosser hesitantly offers that “the common thread woven into all torts is the idea of unreasonable interference with the interest of others.”<sup>32</sup> Then again, he is anxious to note that almost anything can count as unreasonable interference – the test being whether an act is unreasonable “from the point of view of the community as a whole, rather than the sole matter of individually questionable conduct ....”<sup>33</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 might do better by considering tort law’s function. Distinguishing tort from crime, he observes that “a 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>34</sup> Although his referent is not entirely clear, it appears that Prosser has accidents in mind when he adds that, “in 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>35</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’ sense of what counts as unreasonable – whether to let those losses lie where they fall or to shift them to others.

Holmes in 1881 and Prosser in 1941 had before them a body of case law that, though substantially constituted by negligence cases, probably also routinely featured claims for trespass, battery, defamation, and fraud. By the mid-1960s, with scholarly attention squarely on automobile accidents, the linkage of the idea of tort as a law for loss-allocation to the idea of tort law as accident law was transformed from a strong tendency to an axiom. This much is clear in three important works from this period.

First up is John Fleming’s Introduction to the Law of Torts.<sup>36</sup> It opens with the following passage:

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<sup>28</sup> Holmes, *supra* note 18, at 79.

<sup>29</sup> *Id.* at 144 (“[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 wrongs, 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.”)

<sup>30</sup> WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (1941).

<sup>31</sup> *Id.* §1, at 3.

<sup>32</sup> *Id.* at 8.

<sup>33</sup> *Id.* at 10.

<sup>34</sup> *Id.* §2, at 10.

<sup>35</sup> *Id.* at 11 (emphasis added).

<sup>36</sup> JOHN G. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS (1967).

... the economic costs of accidents represents a constant and mounting drain on the community's human and material resources .... The principal, nay, paramount task of the law of torts is to play in an important regulatory role in the adjustment of these losses and the eventual allocation of their cost.<sup>37</sup>

Equally representative is Patrick Atiyah's Accidents, Compensation and the Law.<sup>38</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>39</sup> Later, 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>40</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>41</sup> His premise, like Atiyah's, is that tort law is one of several possible means by which government might address the problem of accident costs.<sup>42</sup> Also like Atiyah, Calabresi concludes that tort law – particularly negligence law – is not well-designed to achieve accident-cost reduction. 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.<sup>43</sup> 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.<sup>44</sup> For a system of civil litigation effectively 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 in the future.<sup>45</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 to the law of negligence. In challenging the propriety of the law's setting fault as the trigger of liability, Calabresi, like Fleming James, Jr. before him,<sup>46</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 scholars just mentioned accepts that, when it comes to understanding tort law, the path to enlightenment begins by dissociating the concept of a

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<sup>37</sup> *Id.* at 1.

<sup>38</sup> PATRICK S. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW (1970).

<sup>39</sup> *Id.* at 6.

<sup>40</sup> *Id.* at 17. In a later discussion of negligence, Atiyah emphasizes that he regards negligence law as a scheme for "decid[ing] if compensation should be paid to an innocent accident victim...." *Id.* at 116-17.

<sup>41</sup> GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970).

<sup>42</sup> *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).

<sup>43</sup> *Id.* at 239-65 (criticizing as inefficient negligence law's 'artificial' focus on the narrow question of whether a loss is better born by the defendant or plaintiff).

<sup>44</sup> *Id.* at 239-87 (treating negligence law as a "mixed system" that simultaneously pursues multiple strategies for reducing accident costs, yet thereby does a poor job of reducing primary, secondary and tertiary costs).

<sup>45</sup> *Id.* at 43-44.

<sup>46</sup> See John C. P. Goldberg, *Misconduct, Misfortune and Justice Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2045-47 (1997) (summarizing James's views).

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. At best, it tells us nothing about why individuals – in the various instances called “torts” – are entitled to obtain relief. In reality, tort liability always begins with a loss, the cost of which the plaintiff aims to shift. Even granted that modern tort law has mostly been unwilling to shift losses absent proof they were caused by another’s fault, this is a far cry from saying that a tort plaintiff sues for the wrong the defendant has committed against her. In Holmes’s thought, for example, tort law’s attention to fault does not demonstrate that torts are wrongs, or that tort suits provide recourse for wrongs. Rather, it shows that a liberal state is one that is prepared to command *A* to indemnify *B* for *B*’s losses only after *A* has failed to take advantage of a fair chance to avoid causing them.

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 as opposed to policy and utility. Did not this resurgence correspond with a revitalization of the idea of torts as wrongs? For the most part, no.

That the revival of deontological thinking did not translate into a revival of the notion that tort law is wrongs-and-recourse law owes something to the fact that fairness- and justice-oriented scholars were predominantly concerned with ‘public law’ topics such as civil rights and distributive justice. This sort of thinking dovetailed quite naturally with loss-based conceptions of tort. Illustrative is George Fletcher’s influential 1972 effort to craft a fairness-based conception of tort.<sup>47</sup> Fletcher argued that tort law calls on judges to shift losses in accordance with a principle of reciprocity.<sup>48</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. Thus, one of Fletcher’s main goals was to defend certain forms of strict liability.<sup>49</sup>

What about corrective justice theory? Many would suppose it to be precisely the school that has re-established the centrality of wrongs to tort. Indeed, among the leaders of this school is Jules Coleman, whose most important book in tort theory is titled Risks and Wrongs.<sup>50</sup> 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. 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 (early) Richard Epstein, Arthur Ripstein, and Stephen Perry.<sup>51</sup> Among corrective justice theorists, only Ernest Weinrib unequivocally embraces the idea of torts as wrongs.<sup>52</sup>

Coleman himself goes out of his way to insist that tort law is fundamentally about *losses*, not wrongs. For him (as for Perry), tort law distinguishes itself from criminal law

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<sup>47</sup> George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

<sup>48</sup> *Id.* at 550.

<sup>49</sup> *Id.* at 544-49 (fairness requires the imposition of strict liability for activities that impose non-reciprocal risks of loss).

<sup>50</sup> JULES L. COLEMAN, *RISKS AND WRONGS* (1992).

<sup>51</sup> ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY AND THE LAW* (1999); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151 (1973); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992).

<sup>52</sup> ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 134-35 (1995).

precisely on this score. If law is going to respond to wrongs *qua* wrongs, they say, it should be in the business of punishment. Tort law, by contrast, shifts losses.<sup>53</sup> It is true that, for both Coleman and Perry, as for Epstein and Ripstein, the determination of when a loss is to be shifted hinges on identifying grounds for holding the defendant *responsible*, where responsibility is cast in terms of a notion of moral responsibility. Still, the type of responsibility that generates tort liability is the responsibility for a loss one has caused, rather than responsibility for having committed a wrong; a point that Stephen Perry makes crystal clear by utilizing the term “outcome-responsibility” and distinguishing it from responsibility for actions. Instantiating the principle of corrective justice, tort law specifies that an actor’s having acted wrongfully in a manner that is appropriately connected to another’s loss is a sufficient reason for deeming the loss to be the defendant’s 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>54</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>55</sup> Yet it, too, is fairly depicted as an allocative view of tort; 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 mere ‘distributional’ issue, irrelevant in itself to the question of whether resources are being used efficiently.<sup>56</sup> Moreover, Posner embraces in some form the idea that tort law designates certain kinds of conduct as legally proscribed. In this sense, too, his account seems to overlap in emphasis with a wrongs-based framework.

And yet a broader look at Posner’s theory shows that it is a loss-allocation theory after all. True, the question of when the legal system should compensate an injury victim is of no moment. However, the related question of when an accident cost should be assigned to a defendant is fundamental. If the lifting of a loss from the plaintiff is the focus of compensation theorists such as Prosser and Atiyah, its placement on the defendant is what concerns Posner. 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>57</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.” Yet Posner insists that torts are wrongs only in the sense that they display wastefulness: a failure to use scarce resources efficiently.<sup>58</sup> Given Posner’s idiosyncratic account of what makes conduct

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<sup>53</sup> COLEMAN, *supra* note 50, at 314-18 (criticizing “relational” views that treat tort law as responding to wrongs, as opposed to losses); Perry, *supra* note 51, at 486-87.

<sup>54</sup> Jules L. Coleman, *Second Thoughts and Other First Impressions*, in *ANALYZING LAW* 257, 302 (Brian Bix, ed. 1998).

<sup>55</sup> See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987).

<sup>56</sup> *Id.* at 16-17 (arguing that tort law operates to achieve Kaldor-Hicks rather than Pareto efficiency).

<sup>57</sup> *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).

<sup>58</sup> Richard A. Posner, *A Theory of Negligence*, 1 *J. LEG. STUDIES* 29, 31 (1972).

tortious, as well as his eagerness to disconnect the ‘wrong’ of waste from ordinary conceptions of wrongdoing,<sup>59</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 shown, Posner utterly fails to explain why tort law is essentially about aggrieved individuals making claims.<sup>60</sup> Insofar as Posner’s theory is about wrongs at all, it is about conduct that is wrongful to society – a misuse of the resources in principle available to us all. In this, his theory provides a variation on Prosser’s earlier notion that torts always involve unreasonable interferences with others,<sup>61</sup> though the latter is a much more capacious concept. Indeed, one of Posner’s theoretical goals was to bring rigor to, and thereby limit the reach of, amorphous notions of reasonableness of the sort invoked by Prosser.

Trained at Harvard Law School by professors inclined to assert that all law is public law, trained as a government antitrust lawyer alert to the social value of private actions, and trained as an academician at the intellectual center of microeconomics and laissez-faire, Posner’s attraction to a view of tort law as non-criminal public law enforced by private attorneys general is quite understandable. The appeal of his approach to legions of followers is equally easy to grasp. At a time when compensation theories of tort – often despite the intentions of their adherents – seemed to be making a case for replacing tort law with insurance schemes, Posner’s view of torts as non-criminal public wrongs, and tort suits as private-attorney-general actions, brilliantly re-connected accidents and loss-allocation to a variation on the idea of ‘wrongs.’ Moreover, in an era increasingly enthralled with a Reaganite vision of smaller government, he has presented tort law as a well-established and salient model of decentralized safety regulation.

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Allocative views of tort come in many shapes and sizes. Some assert that a defendant is 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 an efficient form of 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, insurance-providing, or efficiency enhancing. Corrective justice theorists, by contrast, tend to see tort law as enforcing a duty of the defendant to take responsibility for certain losses.

Not all of these allocative views need depict tort law as accident law. For at least five reasons, however, contemporary tort theories that see their subject as essentially one about allocating losses tend also to see it as essentially about accidents. First, quite obviously, the expansion of tort liability for losses occurred in part because of the

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<sup>59</sup> *Id.* at 31-32.

<sup>60</sup> JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 13-24 (2001); WEINRIB, *supra* note 52, at 46-48.

<sup>61</sup> *See supra* text accompanying note 33.

increase in accidental injuries from our industrialized and then post-industrial economy. Indeed, the expansion of tort liability in the twentieth century was led by the United States, which has lacked a state-provided insurance program for responding to the medical costs that flow from accidents. Second, one's perception of the importance of an area of law, and the source of its 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>62</sup> Third, when the fundamental question in tort is posed as the question of when to shift losses, instances of intentional infliction of physical harm seem trivially easy. Virtually everything interesting in the subject, involves cases where a loss has been imposed by a defendant 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 tort as the realm of accident law.

## II. Torts as Wrongs: the Challenge

Tort scholars did not always think of tort law as fundamentally concerned with accidents or with loss-allocation. Blackstone plainly conceived of torts as private wrongs,<sup>63</sup> as did influential nineteenth-century American jurists.<sup>64</sup> A handful of important theorists – most notably Professor Weinrib (Toronto) – offer wrongs-based view of torts; Professor Robert Stevens (London) holds a view that is closer to wrongs-based than loss-based; perhaps the same can be said of Professor John Gardner (Oxford). Overwhelmingly, however, allocative models 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 idea of “wrongs” has proved itself to be conceptually bankrupt, nor that our law has dissociated itself from notions of wrongdoing. If anything, the last half century has seen in the area of criminal law a rebirth of moralistic theories, and a concomitant rejection of therapeutic understandings of criminals as not-to-be-blamed.<sup>65</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

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<sup>62</sup> See, e.g., LANDES & POSNER, *supra* note 55, at 2-3 (suggesting that tort law was an unimportant field until the rise of litigation over railroad accidents).

<sup>63</sup> See *supra* note 14.

<sup>64</sup> John C. P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VALP. U. L. REV. 1221, 1237 (2008) (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) (discussing the adoption of a Blackstonian view of torts by Nathan Dane, Zephaniah Swift and Simon Greenleaf) [hereinafter Goldberg, *Two Conceptions*].

<sup>65</sup> 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).

behind us,<sup>66</sup> and there is no question that non-instrumentalist tort theory has gained significant ground.

So we are left with something of 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 de-emphasizing 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 attach to any one tort theorist or philosopher and do not fit easily into any pre-set pattern. With those caveats, it will be useful to examine three kinds of problems that have led theorists to abandon the notion of torts as wrongs. Each of the problems is, roughly speaking, associated with an important aspect of the notion of a wrong as at figures in tort law.

The first we will call the *normative* aspect of the notion of a wrong, and it presents a range of different problems that come to a head in a dilemma: should we try to understand torts as *moral* wrongs or as *legal* wrongs? For reasons flowing from the body of tort law itself, tort theorists have understandably been disinclined to cast torts as moral wrongs. For a different set of jurisprudential reasons rooted in Nineteenth Century legal positivism, they have instead treated torts as “legal wrongs,” yet in doing so have felt compelled to concede that this choice necessarily drains the normative aspect of the idea of a wrong, leaving only an empty conceptual shell. We call this “The Moral/Legal Dilemma” and outline it in Part A.

The second problem arises from the fact that if torts are wrongs, then they are *civil* wrongs that 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, tort scholars from Holmes to Coleman have been troubled by the idea of a tort as a wrong because they would have expected to find the legal system to respond very differently torts if they were really a kind of wrong: they would have expected that *the state would respond to this sort of wrong by punishing the wrongdoer.*; But tort law, of course, ‘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 call this problem “The Character of Tort Liability” and explain it more fully in Part B.

The third problem derives from the fact that if torts are wrongs, they are *injury-inclusive* wrongs in the following respect. A defendant is not considered to have committed a tort unless his potentially injurious conduct has actually ripened into an injury. Put differently, potentially injurious conduct must actually be realized in an injury if there is to be tort. From the point of view of a dominant way of thinking about morality, the notion of injury-inclusive wrong simply makes no sense. So if torts cannot be treated as wrongs without being treated as injury-inclusive wrongs, then we should abandon the notion of torts as wrongs. We call this problem “The Realization Requirement” and set it forth in Part C.

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<sup>66</sup> See 1 REPORTER'S STUDY, ENTERPRISE LIABILITY FOR PERSONAL INJURY (1991).

### A. The Moral/Legal Dilemma

Telling a lie is a moral wrong but not a legal wrong, except in special circumstances. Failing to save a drowning child, though it can easily be done, is a moral wrong but usually not a legal wrong. More than a hundred years ago, Cooley insisted on the importance of these simple observations for an understanding of the law of torts: “An act or omission may be wrong in morals, or it may be wrong in law. It is scarcely necessary to say that the two things are not interchangeable.”<sup>67</sup> For very different reasons, Holmes, Prosser, Calabresi, and Posner have emphasized this same point. Paradoxically, when it comes to understanding tort law, the distinction between legal wrongs and moral wrongs 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 distinction between moral and legal wrongs to cause mischief owes in part to the difficulty of isolating what is left of the concept of a wrong once one drops the modifier “moral.” It seems odd to suppose that a *moral wrong* is simply one of kind of wrong among several. 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 at all. 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” is functions like the phrase “fool’s gold” – i.e., the adjective in the phrase does not qualify the kind of wrong, but makes clear that it is not a wrong at all, but merely carries a superficial resemblance to one.

How did this come to be a dominant instinct among tort theorists? We conjecture that part of the answer lies in the fact that the most popular way of thinking about legal wrongs as genuinely a form of wrong was not really available in torts, due partly to the influence of a certain form of legal positivism. On one familiar rendition of this understanding of law – call it Austinian positivism – legal wrongs are conceived of as acts that breach of a command or dictate issued by a political superior or sovereign.<sup>68</sup> As soon as the sovereign issues the sort of command that specifies for its subjects that which is wrong to do or not do, 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>69</sup> By the same token, it renders awkward the idea of common law torts as wrongs. When the careless acts of a *Menlove*<sup>70</sup> or a *Buick Motor Co.*<sup>71</sup> are deemed ‘wrongful,’ they are so deemed notwithstanding the absence of an *ex ante* command that is later violated. Instead, there

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<sup>67</sup> THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS, OR WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 3 (1888).

<sup>68</sup> JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 11 (Hackett Pub. 1998) (1832).

<sup>69</sup> Of course, Austin himself thought that his jurisprudence could account for the common law. JOHN AUSTIN, 1 LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 204-05 (Robert Campbell, ed. 1875) (accounting for common law as a judicial exercise of law-making authority delegated to courts by the sovereign).

<sup>70</sup> *Vaughan v. Menlove* (1837) 132 Eng. Rep. 490 (C. P.).

<sup>71</sup> *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1915).

is a judicially recognized norm incorporating a standard of ‘ordinary prudence’ that itself lacks any pedigree to warrant its authoritativeness. In what sense, then, is careless conduct culminating in injury the violation of a *sovereign command*? And if careless conduct is not the violation of a recognizable legal command, isn’t calling it a “wrong” simply admitting that negligence is a wrong only insofar as it allows judges to sanction conduct that is wrongful because it violates morality’s commands? In this way, a command-based conception of law’s normativity tends to eliminate the possibility that legal wrongs are distinctive, at least for a common-law area such as tort. In turn, it pushes tort theorists toward the idea that there are really only two options: tort law is a law of wrongs only because it attaches official sanctions to the commission of conduct that is morally wrongful, or tort law is not really about wrongs at all.

Some who accept this framing of the dilemma have considered it so important to depict torts as wrongs that they have accepted the “moral wrongs” option. Unfortunately for them, too many tort doctrines counsel against 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, and indeed has acted reasonably and blamelessly.<sup>72</sup> Even in negligence, the breach standard is judged from an objective point of view, and this drives a principled wedge between those actors one would deem to have acted immorally and those who can be held liable for negligently injuring someone.

In sum, the effort to see torts as wrongs seems to present only two options, both of which are unacceptable: either torts are moral wrongs (which appears unacceptable because tortfeasors are often blameless) or torts are legal wrongs (which appears untrue because there is no sovereign command such that a tort is the violation of that command). It follows that torts must be defined in some other way, such as failures to take a suitably available opportunity to avoid harming others (Holmes), or as conduct thought to unreasonably interfere with the interests of others (Prosser).

## B. The Character of Tort Liability

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 sharply criticized both by Jules Coleman and Stephen Perry, who have expressly argued that losses, not wrongs, are more basic to corrective justice and to tort law. Their fundamental objection is 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. 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 state’s 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 the state might think it a matter of justice to respond to a wrong that one person has done to another. Sticking with language that he developed as part of corrective justice theory, he recognizes the idea that the state might want to respond to a “wrong” by “annulling” the wrong. However, he argues further that the business of annulling wrongs is a matter of retributive justice, not corrective justice. “There is a legal institution that, in some

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<sup>72</sup> RESTATEMENT (SECOND) OF TORTS § 164, at 296 (1965) (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).

accounts anyway, is designed to do retributive justice, namely, punishment.”<sup>73</sup> On this basis, he abandons the possibility that the form of justice involved in tort law is responding to *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) 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. We agree with the first two premises. The third has plausibility, but is ambiguous. It is highly plausible that retributive punishment is in some sense a form of 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 to do justice in responding to wrongs. Coleman does not come right out and make this claim; the 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. So understood, 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 adopts 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, fundamentally involves the imposition of a duty of repair upon a tortfeasor, a duty that runs to the plaintiff. Weinrib argues that the duty of repair flows from the defendant’s having committed the wrong. The wrong is depicted as the breach of a primary duty of conduct; the duty of repair is depicted as a secondary duty that exists because the primary duty was breached – i.e. – the wrong was performed. The problem, according to Perry, is that there is a non-sequitur here. A duty of repair rectifies a loss, not a wrong. Wrongs are defined by Weinrib in a manner that abstracts from interests, and is quite detached from the notion of a loss, assuming a loss is understood as a setback to interests. 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, the problem resides in the idea of a body of law that purports to regulate conduct on the ground that it is wrongful, but then responds to the commission of a wrong by ordering payment of compensatory damages to the victim. 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. Although these two corrective justice theorists have added great sophistication to this critique, the critique itself has a long and distinguished pedigree in tort scholarship, dating back at least to Holmes.

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<sup>73</sup> Coleman, *supra* note \_\_\_, at 325.

### C. The Realization Requirement

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 one in which the wrongfulness of the tortfeasor's conduct resides. Conversely, the injury component, though essential to liability, is not regarded as 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 which 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 the very 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 warrants 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 always duties of *non-injury*.<sup>74</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 both fails to act with ordinary prudence toward someone and, in doing so, causes them injury. Act and injury are each a component of the wrong. It follows, from this perspective, that the commission of torts allows for and indeed warrants a different kind of evaluation and response than incomplete wrongs. In turn, we arrive at an explanation as to why torts render tortfeasors vulnerable to actions for recourse by victims, whereas wrongful acts that do not ripen into injuries do not. We call this *the injury-inclusive conception of wrongs*.

As the foregoing description already suggests, we believe that if torts are to be analyzed as wrongs, they must be understood as injury-inclusive wrongs, rather than pure-conduct wrongs. Overwhelmingly, however, modern tort theorists have taken the opposite view and insisted that injury-inclusive conceptions of wrongs are incoherent. This inclination derives from many sources. The influence of a command-based view 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, or else!" "Follow standard medical protocol, or else!" The idea is that law commands certain acts in certain circumstances, thereby identifying for subjects the point

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<sup>74</sup> Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 214, 222-23 (G. Postema, ed. 2001).

at which they – without doing anything more – have rendered themselves eligible for sanction. True, 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. Such, at least, was Holmes’s view: “All the rules that the law can lay down beforehand are rules for determining the conduct which will be followed be liability if it is followed 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.”<sup>75</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 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 consequence. For Utilitarians, it is said, the wrongfulness of conduct hinges on the probability that the conduct will produce net disutility (more pain than pleasure). For example, if we assuming that 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 consequences. 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 consequences 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: (a) wrongful conduct, and (b) certain results, morally neutral in themselves, that flow from that conduct.

### III. Restoring Torts as Wrongs

#### A. Legal Directives and Legal Wrongs

To recapture the sense in which torts can really be wrongs without being moral wrongs, it will be helpful to draw upon work by the twentieth-century positivists, especially H.L.A. Hart.<sup>76</sup> Hart argued that certain rules of conduct contain a sort of 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). While their force is injunctive, their grammatical form need

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<sup>75</sup> HOLMES, *supra* note 18, at 79.

<sup>76</sup> H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994). For an analysis of 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 *FORD. L. REV.* 1563, 1572-81 (2006); see also, Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 *VAND. L. REV.* 1 (1998).

not be imperatival. 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 shall call such rules “directives.” When uttered, such rules are typically meant to guide conduct, at least in part. Hart’s account did not depend upon treating such rules as utterance tokens or utterances 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 a certain way. 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 in a certain way.<sup>77</sup>

For certain families of social practices, according to Hart, the kind of pressure putatively imposed by the directive, in combination with other features of the entrenchment of the practice in institutions and in language, lead the directives to have a special quality; he called these “duty-imposing” rules. Moral directives and legal directives both have this quality, according to Hart. 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. It 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 relies on that misrepresentation to his detriment. The court is articulating a norm of conduct that requires certain actors to refrain from making misrepresentations 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 moral rules and the legal rules, 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 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 is critical to its authority.

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<sup>77</sup> Despite our utilization of a Hartian framework for thinking about the place of rules within a legal system, we do not accept a social-facts based form of legal positivism of the form put forward by Hart. See HART, *supra* note 76, at . For an articulation of this position, see Benjamin C. Zipursky, *The Model of Social Facts*, in HART’S POSTSCRIPT (J. Coleman, ed., Oxford Univ. Press, 2001) (accepting Dworkin’s critique of Hart in *The Model of Rules* and *The Model of Rules 2*, but salvaging aspects of Hart’s analytic framework); Benjamin C. Zipursky, *Pragmatism, Positivism, and the Conventionalistic Fallacy*, in LAW AND SOCIAL JUSTICE, J. Campbell, M. O’Rourke, & D. Shier, eds. (MIT Press 2005) (rejecting Coleman’s inclusive positivism, as still relying upon discredited social-facts framework).

Legal wrongs are acts that violate legal directives. 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 has done so in a manner that conveys approbation for the 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>78</sup> Although it was of course concerned to resolve the dispute before him, and to distinguish the domains of tort and contract, his opinion was no less keen to establish two related ideas. First, it announced unequivocally a duty of conduct embedded in the law of negligence. Whatever the ambiguities of prior case law, thenceforth the manufacturer of a product posing non-trivial 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>79</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>80</sup> The failure of a manufacturer to take care to prevent its product from causing harm to users, so as to cause them harm, was thereby identified as one important instantiation of the broader legal wrong of negligence.

Although subsequent sections will explain what is special about torts as a kind of legal wrong, the important point for the moment is simply that torts are a subset of legal wrongs. In this sense, torts are like moral wrongs; they involve conduct that is not to be done (or that must be done), and that merit some form of accountability when done (or not done). However, the statements and principles so categorizing them 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 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>81</sup> Once one recognizes all three of these points, there is no obstacle to seeing tort law as a domain of duty-imposing legal

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<sup>78</sup> 111 N.E. 1050 (N.Y. 1915).

<sup>79</sup> *Id.* at 1053.

<sup>80</sup> *Id.*

<sup>81</sup> For a methodological and jurisprudential approach that aims to sidestep debates between positivism and its critics, but nevertheless takes both moral and non-moral concepts to be central to the content of the common law of torts, see Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457 (2000); see also Goldberg & Zipursky, *supra* note \_\_ .

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 in light of their interests – yet generate liability for conduct that is not immoral. 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 of conduct set by tort law. 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. 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 morality – “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>82</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>83</sup> and the doctrine of strict liability for harms caused by abnormally dangerous activities.<sup>84</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 it pains to say are entirely permissible. 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 the 'strict liability' doctrine of statutory rape rests uneasily at the edges of criminal law, and just as certain 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 'patch' or 'fudge' 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>85</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 plaintiff's

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<sup>82</sup> John C. P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1143-63 (2007).

<sup>83</sup> [1868] All E.R. 1.

<sup>84</sup> 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).

<sup>85</sup> 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. GRANT GILMORE, *THE DEATH OF CONTRACT* (1974). 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. 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.

lawyers to expand the category of abnormally dangerous activities.<sup>86</sup> Thus it remains entirely viable, from both a doctrinal and a jurisprudential perspective, to treat torts as legal wrongs.<sup>87</sup>

#### B. Accountability, Relational Wrongs, and Civil Recourse

As Coleman, Perry and many others have rightly observed, the nature of accountability in torts is quite distinct from the nature of accountability seen in criminal law. Yet this tells us nothing about whether torts should be understood as legal wrongs. Criminal wrongs are punished and wrongs in torts are (typically) not, but that just forces us to ask whether there is a form of accountability for legal wrongs that is different from a prosecutor, on behalf of the People, seeing to it that punished is imposed. In fact, there is. But before explaining this form of accountability, it is crucial to develop further our account of torts as legal wrongs.<sup>88</sup>

As we have argued extensively in prior work, torts are a special kind of legal wrong in that they are *relational wrongs*. Some crimes or regulatory infractions are wrongs *tout court* or 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. A *simple legal wrong* is a violation of a simple legal directive.

Torts are violations of legal directives with a different analytic structure, which we call *relational directives*. They are of the form: For all x, for all y, x shall not do A to y.<sup>89</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 tort of trespass involves interfering with a *possessor's* right to exclusive possession. Battery involves an intentional harmful or offensive touching *of another*. Medical malpractice (usually) involves *harming a patient by treating her incompetently*. Legal wrongs that are violations of relational legal directives are *relational legal wrongs* or “relational wrongs.” Torts necessarily have this relational structure; they are all relational wrongs.

One of the special features of relational wrongs is that they are defined in such a manner that if there was a relational wrong, then there was at least one person who counts as having done the wrong and at least one 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. If the tort of fraud has occurred

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<sup>86</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 20, Reporter's Notes, at \_\_\_ (Proposed Final Draft No. 1 April 6, 2005) (identifying numerous instances in which courts have declined to apply the rule of strict liability for abnormally dangerous activities).

<sup>87</sup> 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.

<sup>88</sup> See Zipursky, *Rights, Wrongs, and Recourse*, *supra* note \_\_\_, at .

<sup>89</sup> See *id.* 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 that the second relatum is 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).

then there is a person who committed the fraud and someone who has been defrauded. If a car accident turns out to have involved the tort of negligence, then there is someone who negligently injured someone else.

It is not hard to see that relational legal directives, so understood, simultaneously confer both primary legal duties and primary legal rights. The relational legal directive enjoining libel confers a legal duty not to libel others and a legal right not to be libeled; the relational legal directive enjoining fraud confers a legal duty not to defraud others and a legal right not to be defrauded; the relational legal directive enjoining negligent injuring confers a legal duty not to injure others through negligent conduct and a legal right against being injured by careless conduct. These are duties not to mistreat others and rights not to be mistreated.

With this framework in place, it should now be clear how and why tort law's response to legal wrongs is distinctive from that of the criminal law. Tort permits victims of recognized relational wrongs to come to court and obtain the court's assistance in redressing the wrong that has been done to them. It gives people a right of action, through the civil legal system, to obtain a remedy – usually, but not always, money damages. 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 legal wrongs upon them.

Tort law is plainly private law in the sense that it is about empowering private parties to hold torfeasors accountable. This marks one of a number of fundamental differences between tort law and criminal law, which empowers the state to hold wrongdoers accountable. 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. 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 legal wrong. Punishment and civil liability to a victim are different forms of accountability that figure in our legal system's response to legal wrongdoing.

*Contra* Coleman and Perry, it is quite straightforward to explain why a legal system keyed to private wrongs would frequently offer a remedy linked to the plaintiff's loss. In a large number of cases, particularly within accident law, the wrong alleged is the careless infliction of physical harm. 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. Of course, a longstanding principle of remedies for non-willful wrongs is that a plaintiff will normally be limited to a make-whole remedy. This does not mean that the legal system has somehow reallocated the loss of the victim; it means that victim's loss is normally the measure of the outer boundary of the remedy that courts provide to victims of wrongs when they successfully sue those who wrong them.

### C. Realized Wrongs and Duties of Non-Injury

We suggested above that it is more natural for lawyers and moral philosophers to think of wrongs purely in terms of conduct, not results. The wrong of negligence, for example, is often depicted as the wrong of acting carelessly, as opposed to the complex wrong of injuring-someone-through-careless-conduct. Yet even from within an Austinian framework, which is in so many ways strongly slanted against comprehending torts as wrongs, the idea of wrongs built on duties of non-injury can sometimes be intuitive. Consider an Austinian rendition of the injunction that lies at the core of the tort of battery: “Don’t touch, or else!” For this tort it is quite difficult, perhaps impossible, to render the relevant command in language that focuses only on conduct and not on consequence: the wrong to be avoided is a consequence-inclusive wrong. The same is true for trespass to land or chattel.

Perhaps one could strain to capture the wrong of battery in purely conduct-related terms. One sees such an effort in Holmes’s convoluted attempt to reduce the tort of deceit – built around a ‘command’ not to deceive another – to the idea of making a misrepresentation under circumstances in which one can expect that another will be deceived.<sup>90</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, deceit, and trespass 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 “Don’t touch,” why is it so preposterous 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, not consequences, lest mere happenstance be allowed to infect what should be non-contingent 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>91</sup> We have elsewhere addressed the significance of moral luck for torts, and of torts for philosophical discussions of moral luck.<sup>92</sup> Here, four points will suffice. First, tort law plainly involves legal luck in a sense analogous 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. 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 positivistic 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

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<sup>90</sup> *Id.* at 132-38.

<sup>91</sup> See Goldberg & Zipursky, *supra* note 82, at 1128-32 (briefly explicating Williams’ and Nagel’s arguments).

<sup>92</sup> See generally *id.*

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 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 typically 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 prior one. One may want to ascertain whether some untoward event – the burning down of a house, for example – is so connected with human agency of some kind that it should be understood not merely as something that occurred, but ought to be understood as a doing or action of an individual: someone's burning down of the house.<sup>93</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 negligently burning down his neighbor's house is asking whether the chain of doings and results and the character of those doings, results, and linkages among them were such as to constitute the moral wrong of burning down the neighbor's 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 by another. 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. 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 that of having mistreated her. More importantly, the court's obligation to provide an avenue of civil recourse against the defendant hinges on the defendant having wronged the plaintiff in a manner that renders her a victim entitled to respond to the wrongdoer.

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<sup>93</sup> 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 INQ. 97 (2007).

#### IV. Interpretive Failings of Loss-Shifting Accounts

It is one thing to show (as we have now done in Part III) that a conception of torts as wrongs is available; it is another to show that it is better than its main rival. 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 both old and new,<sup>94</sup> its explanation of the structure of tort law,<sup>95</sup> and its integration of core tort concepts in a manner that permits clear-eyed analysis of issues ranging from the liability to shooting victims of gun manufacturers to constitutional limits on tort reform and punitive damages.<sup>96</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. 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 no mere semantic quibble. It 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>97</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. In nuisance, the injury is an unreasonable interference with plaintiff's right to enjoy her property. 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* decision, the Wisconsin Supreme Court ruled, soundly, that the defendant had trespassed by driving across the plaintiff's snow-covered field without permission – this even

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<sup>94</sup> See, e.g., JOHN C. P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 783-90 (2d ed. 2008) (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 (2002) (reconciling the facially puzzling holdings of *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997)); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005) (interpreting *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), as articulating a line between punitive damages imposed as redress for egregious wrongs and punitive damages imposed for regulatory purposes); Benjamin C. Zipursky, *Rights, Wrongs and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998) (demonstrating the centrality of *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928), to tort law, understood as a law of wrongs) [hereinafter Zipursky, *Rights*].

<sup>95</sup> Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003).

<sup>96</sup> 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); 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. \_\_\_\_ (forthcoming 2009).

<sup>97</sup> Assault, libel, and slander per se also are defined so as not to require loss as a condition of recovery.

though the presence of the snow prevented harm even to a blade of grass.<sup>98</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. A groping or kicking can be offensive, and that is enough. An intentional confinement that causes no physical harm, no pain, no anxiety, and no loss of opportunity can be a false imprisonment. This much is clear from the chestnut of *Huckle v. Money*,<sup>99</sup> in which a confinement under pleasant conditions was deemed actionable.

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

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, is not difficult to envision responses that loss-allocation theorists might offer.<sup>100</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 as against the criticism we are levying. A central point of this Article is to challenge the intellectual framework that treats tort law as co-extensive with negligence law, and to explain what has been lost because of scholars' attraction to such a framework. In this context, it is non-responsive simply to assert that negligence is the essence of tort. 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>101</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? In fact, 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 it, 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>102</sup> Of course, this alternative conception of compensation as fair redress does not suggest that redress is or should be determined without regard to whether 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. But to say that reimbursement will tend to figure in the determination of what counts as fair

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<sup>98</sup> *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wisc. 1997).

<sup>99</sup> [1763] 95 Eng. Rep. 768 (C.P.).

<sup>100</sup> 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.

<sup>101</sup> See *In Re Simon II Litigation*, 211 F.R.D. 86 (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).

<sup>102</sup> Goldberg, *Two Conceptions*, *supra* note 64, at 438-45.

redress is not to say that tort damages just are 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-variety torts such as trespass instantly 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>103</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. 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>104</sup> Suppose *D* knowingly drives his car across *A*’s land without permission. In doing so *D* is mindful that he has sometimes 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

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<sup>103</sup> Zipursky’s original label for this concept. See Zipursky, Rights, *supra* note 94, at 3-5.

<sup>104</sup> *Id.* at 25.

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 driving carefully.) Although *P* was a perfectly foreseeable victim of *D*'s trespass, *P* has no claim because *D*'s conduct was not a trespass with respect to property that *P* owned, leased, etc.

Similarly, a plaintiff in a common law fraud case must prove that she relied upon the defendant's misrepresentation, or at least its content.<sup>105</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>106</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. 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>107</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>108</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 a duty to another."<sup>109</sup>

Allocationists of all stripes often have ignored the substantive standing requirement. Others have critically advocated that it be rejected. Apart from denial or critical concession, two other strategies have been 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, knows full well that her 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. 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

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<sup>105</sup> *Id.* at 18.

<sup>106</sup> *Id.* at 17.

<sup>107</sup> *Id.* at 7-14.

<sup>108</sup> *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928).

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

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: even though their losses were foreseeable to the defendant and caused by his wrong as to his patient, there was only a breach of a duty owed to another, not a breach of any duty owed to them.

This last example will 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. 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 floodgates 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, 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 worrying about floods of litigation or excessive 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, not a mere add-on designed to control the ill-effects of allowing valid claims to go forward. 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 sub-standard conduct as the appropriate trigger for loss-shifting. As we have seen, substantive standing rules exclude liability even for foreseeably caused losses. Third, as candid pluralists and legislators often admit, there are many options for floodgates 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 solved the 'mystery' 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 anti-social 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 as 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*. 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 treated in a manner the law designates as a wrong.

### 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. Moreover, tort law operates in conjunction with 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, factfinders 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. 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 others 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 involve 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 efficient 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>110</sup> The same goes for accounts of punitive damages which cast them as compensatory of losses suffered by persons not before the court.<sup>111</sup> Finally, tort law of course makes available other remedies, including declaratory and injunctive relief, that allocative theories simply overlook.

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<sup>110</sup> See *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7<sup>th</sup> 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, Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005) (criticizing allocative theories of punitive damages).

<sup>111</sup> See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347(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 be in the business of awarding punitive damages absent evidence that the defendant's mistreatment of the plaintiff caused harm to others. By the same token, they would not insist on grave misconduct as a threshold for a punitive

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's being permitted to extract some money from the defendant because of what the defendant did to her,<sup>112</sup> and in many cases, the plaintiff exacts 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. 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.

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." Although "make whole" is the default measure for monetary damages, courts in cases like *Jacque v. Steenberg Homes* and *Huckle v. Money* have seen fit to relax the default rule and permit the plaintiff to go beyond that limit because of the egregious way in which the defendant wronged her.

In nuisance, trespass, fraud, and libel, courts often grant injunctive relief. 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 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. 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* and *Ayers*

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award. (After all, merely careless conduct that causes harm to others who are not pursuing claim creates a basis for awarding extra-compensatory damages.)

<sup>112</sup> 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. (Medieval law appears to have given litigants this option.) 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.

decisions.<sup>113</sup> *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 can also recover for fear that she will develop cancer from the same asbestos exposure that caused the physical injury.<sup>114</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>115</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. 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. Hence, there is no cause of action for negligence, and no recovery 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>116</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>117</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. Permitting fear-of-cancer claims would threaten to bankrupt defendants and leave persons who later develop serious physical illnesses no possibility of recovery.<sup>118</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

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<sup>113</sup> *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003); *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997). Of course *Buckley* and *Ayers* are applications of a statute – the Federal Employers Liability Act – 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.

<sup>114</sup> *Ayers*, 538 U.S. at 158.

<sup>115</sup> *Buckley*, 521 U.S. at 436.

<sup>116</sup> *Ayers*, 538 U.S. at 148-49.

<sup>117</sup> 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 (Wisc. 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 non-actionable, being neither an offensive-contact battery nor an instance of negligence. 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.

<sup>118</sup> *Buckley*, 521 U.S. at 435-36.

in *Ayers* either, because 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 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 non-instrumental 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>119</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. 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>120</sup> Under this approach, to determine whether a defendant "owns" a plaintiff's fear of cancer requires 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 section. 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 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 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

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<sup>119</sup> RIPSTEIN, *supra* note 51, at 53-58.

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

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>121</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 the principle that there is no duty to rescue, and more generally to the principle that the duty to be careful not to cause others reasonably foreseeable physical harm through one’s own conduct is very broad, while (with certain exceptions) there is no duty to be careful to protect or save someone from harm that comes from another source, even reasonably foreseeable harm. 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*, 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 court justifiably wary of recognizing new affirmative duties.<sup>122</sup>

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<sup>121</sup> Goldberg & Zipursky, *supra* note 94, at 1676-1700. The eggshell skull rules 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 was not itself a wrong.

<sup>122</sup> See, e.g., *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972) (in 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, at \_\_\_ (1965) (adopting a rebuttable presumption that a consumer suing for a failure to warn would have heeded the warning had it been given).

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>123</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>124</sup> Punitive damages are generally available against intentional tortfeasors but not those who are negligent.<sup>125</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>126</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>127</sup>

The contribution of actors other than the defendant herself to a plaintiff's injury – including the plaintiff – has also received special treatment in tort law. In some instances, it has been prepared to treat multiple wrongdoers as 'concurrent' causes of a victim's injuries. 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.

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. 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 plaintiff is partly at fault, it seems both equitable

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<sup>123</sup> RESTATEMENT (SECOND) OF TORTS § 481, at 537 (1965).

<sup>124</sup> RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY §1, reporter's notes to cmt b, at 13 (2000) (describing the majority rule); *but see id.* (arguing for a departure from the majority rule); *id.* § 3, cmt d, at 37-38 (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).

<sup>125</sup> RESTATEMENT (SECOND) OF TORTS § 908(2), at 464 (1977) (requiring conduct that is "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."); *id.* cmt. b, at 465 (no punitive damages for mere inadvertence).

<sup>126</sup> *See, e.g., Ultramares Corp. v. Touche*, 174 N.E. 441, 447 (N.Y. 1931) (accountant malpractice causing economic loss not actionable absent privity or near-privity between plaintiff and defendant, whereas fraud would be actionable without privity or near-privity).

<sup>127</sup> RESTATEMENT (SECOND) OF TORTS § 866A(3), at 337 (1977).

and efficient to permit the intentional tortfeasor to diminish her liability by proving that that the plaintiff's fault contributed to his injury.

The obvious reply of allocationists on this last point is that intentionality ups 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 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 the simplistic all-or-nothing rules such as contributory negligence and superseding cause, courts would have permitted all of these issues to go to the factfinder, which could then have apportioned greater liability to intentional tortfeasors, somewhat less to 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 difficult issues of directness, superseding cause, and (in many cases) affirmative duties.<sup>128</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 suffering a tort 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* decision from the Texas Supreme Court.<sup>129</sup> A manufacturer's carelessly made product started a fire at an industrial facility. After the fire was extinguished, the plaintiff's supervisor was directed to block off a certain valve. Plaintiff was asked to accompany him. Upon reaching the site of the valve, however, the two were informed that it did not need to be blocked off. They then left the scene by means of a short cut along a slippery elevated pipe rack, rather than walking around it. 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

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<sup>128</sup> See Goldberg & Zipursky, *supra* note 96, at \_\_\_ (explaining and criticizing the Restatement's position).

<sup>129</sup> *Union Pump Co. v. Allbritton*, 898 S.W.2d 773 (Tex. 1995).

plaintiff's harm that it no longer made sense to treat the defendant's conduct as *inflicting* a harm upon the plaintiff. The defendant's carelessness was a necessary condition of her harm, but not one of its proximate (or "legal") causes.<sup>130</sup>

Superseding cause is a variation on the same idea. Sometimes, the agency of a third party alters the sequence of events running from defendant's conduct to 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 foreseeable cause in fact of the plaintiff's 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. 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. 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>131</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 accidents at sea; *Kinsman* offers a famous contemporary example.<sup>132</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 any wrongdoing by another.<sup>133</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 self-injuring 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. Our system does not depict the event of a plaintiff's being injured as

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<sup>130</sup> *Id.* at 776. Even one who agrees with the Allbritton dissent that the defendant's carelessness was a proximate cause of the plaintiff's injury 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 her office, then, because she was tired from fighting the fire, accidentally burned her hand on a hot stove.)

<sup>131</sup> *Port Authority of NY & NJ v. Arcadian Corp.*, 189 F.3d 305 (3d Cir. 1999).

<sup>132</sup> *Petitions of the Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964), *cert denied*, 380 U.S. 944 (1965).

<sup>133</sup> *See Goldberg & Zipursky, supra* note 96, at \_\_\_ (explaining the distinctive nature of 'concurrent cause' cases).

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 it. That is a wronging by the intentional actor, and the injuries that flow from it are the actor's responsibility and no one else's, including the at-fault plaintiff. 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 to determine 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.

## V. Wrongs and Recourse

Part III 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 IV 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 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>134</sup> A modern state should concern itself with 'real' problems, such as the delivery of compensation to those in need, or the deterrence of anti-social 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 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. Tort law, he insists, can only be understood for what it is, not what it does.<sup>135</sup> That the leading wrongs-based theory

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<sup>134</sup> See, e.g., Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387 (2003) (articulating this criticism).

<sup>135</sup> WEINRIB, *supra* note 52, at 46.

claims as one of its chief virtues a complete indifference to the point of having tort law suggests that there really is nothing much to be said for any such theory.<sup>136</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.

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 defamed, assaulted, or carelessly injured them. But of course 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 which comes near to being captured by the hoary common law maxim: "where there's a right, there's a remedy." By recognizing relational duties of non-injury, 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 self-help. However, self-help is for the most part forbidden by the modern state, which maintains a 'monopoly' on the legitimate use of force. 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

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<sup>136</sup> See, e.g., Robert L. Rabin, Book Review: *Law for Law's Sake*, 105 YALE L.J. 2261 (1996) (dismissing Weinrib's treatment of tort law as pointless).

entitled to, and therefore shall have, a remedy against the wrongdoer.” Courts providing rights of action to 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>137</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 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, of course, 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 right.

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 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 even with regard to wrongs that are crimes or infractions, enforcement by the state 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.

It will be tempting for critics to suppose that the principle of civil recourse – like the maxim that embodies it – is a mere hollow shell, given that its implementation will vary according to what a given jurisdiction counts as a wrong. The premise of this supposition is true, but its conclusion is unduly skeptical. The ground of a right of action is having been wronged, and what counts as having been wronged will of course be determined by how legal wrongs are defined. But so long as courts and legislatures are in the business of identifying duties to refrain from acting in ways that are injurious to

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<sup>137</sup> Goldberg, *supra* note 96, 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).

others – a business likely to continue given its close ties to other aspects of law that we take to be of great importance, including law that defines the rights that individuals enjoy – there will be a legitimate expectation on the part of victims of such wrongs to a legal avenue of recourse. No doubt, this expectation will sometimes be disappointed or defeated, but it nonetheless present and legitimate, given the degree to which it is rooted in an historic commitment of our common law system to link the identification of certain kinds of wrongs to the provision of redress to victims of those wrongs.

## VI. Implications

In this final section, 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 accident law. 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 of accident-inducing conduct. If achieving important compensatory and regulatory goals is really what a state 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 reduce the potential harmfulness of their conduct, it is a 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. 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 defect products.<sup>138</sup> Not only did they have deeper pockets, they also had the capacity to pass on the costs of injuries through higher product prices. 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.

It is also far from clear that products liability does a good job of safety regulation. As manufacturers understandably complain, juries on the whole tend to be less capable regulatory decisionmakers than expert administrative agencies, and it is entirely 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. 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 as to 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 product 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

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<sup>138</sup> See *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring).

misplaced reliance upon tort law as accident 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 tort 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. 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. Meanwhile, anti-reform forces argue that tort is not significantly affecting the cost or availability of goods and services, and is a needed mechanism by which citizens can invite courts to regulate and tax powerful industries that the other branches or government have failed to control. It follows, they say, that there is no need for legislatures to adopt curbs or caps on liability.

Ignored in these arguments is a question brought to the fore by a wrongs-and-recourse view of tort: 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 refute and 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>139</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. 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.

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 duties not to mistreat others in various ways and rights not to be so mistreated. 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 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 as obligated to provide an avenue by which to exercise this right. 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 – 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 this right simply as they might wish. But in doing so, government is at the same time obligated to recognize this right. 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,” whether wise or

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<sup>139</sup> Goldberg, *supra* note 96, at 535.

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 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.” Usually this question is framed in terms of a question as to whether lay judges and jurors are better or more appropriate policymakers than legislatures or bureaucrats, or whether and when an ex post form of regulation is superior to ex ante mechanisms. 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 recently become enthralled with the ‘discovery’ that norms shape behavior in ways that depart from rational actor models. 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. Products liability law, in some iterations at least, keys the finding of a product defect to consumer expectations. Certain non-harmful touchings will count as batteries – namely those that are widely understood to be inappropriate or offensive, such as an uninvited grope. The wrong of intentional infliction of emotional distress requires an outrageous departure from ordinary standards of acceptable conduct. 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 extra-legal 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 sub-standard. 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 non-blameworthy in ordinary life. Courts and legislatures can declare new wrongs (gender discrimination in the workplace) or refuse to recognize as tortious long-recognized wrongs (seduction of another’s spouse).

Are courts relatively good at finding the line between articulating and ignoring 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 articulating 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 bring 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. The dogma of American legal theory over the past half century is that, apart from the incremental developments of judges pushing case law, it is legislatures that announce new legal duties and new legal wrongs, and that interpersonal wrongs are likely to implicate community values in a manner that points toward states’ power, rather than federal power. 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 by courts. Notice further that all but the first have been the work primarily of federal courts. We offer this observation not by way of criticism, but merely to suggest that our legal system has hardly given up its commitment to courts as a flexible forum for the articulation of legal wrongs and the provision of civil recourse.

Relatedly, there is an important set of questions 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. As we have noted, 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 have done so in ways that grant ‘standing’ to sue to persons who would not be authorized to sue under common law principles.<sup>140</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, but has yet to receive, careful consideration.

## 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

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<sup>140</sup> John C. P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1015-18 (2006).

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*. It is the law of private wrongs. By recognizing torts as wrongs, civil recourse theory 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 distinctly modern accident 'epidemics,' scholars have convinced themselves that torts are really about *losses*, not wrongs, and that the central task of tort law is to reallocate 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: crafting a philosophically comfortable conception of legal wrongs and thinking seriously about the idea of a 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 in the familiar *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.