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Colloquium in Legal, Political, and Social Philosophy

**Conducted by
Sophia Moreau and Liam Murphy**

**Speaker: Gregory Keating, University of Southern California
Paper: Tort is Basic Justice**



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Tort is Basic Justice

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I. Tort and Justice

Tort obligations specify the extent to which essential interests that we have as persons—in physical and psychological integrity, in privacy, in reputation, in not being deceived and manipulated, in economic expectancies—are protected against impairment and interference at each other’s hand, and what kinds of impairment and interference they are protected against. And it backs those specifications with the coercive power of the state. Because tort law seeks to spell out what we owe to one another in the way of coercively enforceable responsibilities not to impair and interfere with each other’s urgent interests as we go about our lives in civil society, tort law plays a central role in establishing our security as members of civil society. And security, as John Stuart Mill observed, is the “very groundwork of our existence.” We depend on it “for all our immunity from evil and for the whole value of all and every good . . . since nothing but the gratification of the instant could be of any worth to us if we could be deprived of everything the next instant.”² Surely, an institution which helps to establish people’s security by articulating and enforcing duties they owe to one another with respect to their physical and psychological integrity (and other urgent interests) helps to secure the background conditions under which free and equal persons may lead their lives, and pursue their ends, on terms that are both favorable to doing so and mutually acceptable. Tort, surely, does “basic justice.”³ A decent measure of security against impairment of our fundamental interests by others is essential if we are to pursue our conceptions of the good over the course of complete lives.

Influential voices in contemporary tort theory, however, reject the idea that tort law speaks to matters of basic justice. Leading tort theorists both champion the idea that tort law is about justice—not welfare or efficiency—and distance themselves from the proposition that tort is a matter of basic justice. Theorists of tort as “private law” insist that tort law governs a domain of *private* justice, a domain distinct from the *public* justice that is the principal domain of basic justice. Arthur Ripstein, for instance, asserts that “the point of tort litigation is to resolve the specific dispute between the parties currently before the court, based entirely on what transpired between them.”⁴ This suggests that tort law is private in the strong sense of dealing with matters that are not of public concern, full stop. The justice of tort law, it seems, is independent of, and exempt from supervision by, principles of justice that govern basic social and political institutions. The justice of tort is private justice done between parties to a private lawsuit. The relations among persons with which the law of torts is concerned constitute their own separate sphere of justice.

The view that tort is a *sui generis* domain of justice whose metaphysical essence is to be found in the fact that it is “private” law, not “public” law—private justice, not public justice—is an organizing

¹ William T. Dalessi Professor of Law and Philosophy, USC Gould School of Law. I am grateful to Gillian Norton for research assistance and editing and to participants in the USC Law and Philosophy Conference in Fall 2024 for comments on an earlier draft.

² John Stuart Mill, *Utilitarianism*, 67 (Oskar Piest ed., 1957)

³ The terms “background justice” and “basic justice” originate with John Rawls. [cite to Rawls, maybe Freeman & Scheffler]

⁴ Arthur Ripstein, *Private Wrongs*, 23 (2016).

idea for Professor Ripstein, and even more so for his Toronto colleague Ernest Weinrib. According to Weinrib, the institution's governing principles of right and responsibility tumble out of the field's characteristic legal form. "Private law" is the Kantian "idea of reason" that enables us to recognize that the law of torts spells out what it is that equal and independent persons—pursuing their private purposes in civil society—owe to one another in the way of obligations of mutual non-interference.⁵ Weinrib's formalism is stark, elegant, and uncompromising. These qualities are central both to its allure and to its substance. Particularly in the United States, tort scholarship has long been dominated by instrumentalist ideas. Both Weinrib's thesis that tort is private law, and Ripstein's thesis that tort law is the instantiation of the principle that everyone is in charge of himself or herself—and no one is in charge of anyone else—reject instrumentalism root and branch. Tort law, Weinrib and Ripstein argue, is constitutive of just relations among persons, not an instrument for the pursuit of independently valuable ends—optimal deterrence of accidents or optimal spreading of losses, for example.

In Weinrib's articulation of the "idea of private law," the bipolar form of the traditional tort lawsuit is the master key which unlocks the mysteries of the field.⁶ That form relates plaintiff and defendant as opposite poles of the same wrong and instantiates a backwards-looking morality of interpersonal responsibility. In the standard tort lawsuit, the plaintiff claims to have suffered the very wrong that the defendant has committed and demands that the defendant repair the harm that their wrong has inflicted. On the one hand, the bipolar form of the traditional tort lawsuit reflects an inescapable metaphysical truth about human agency: in a world chock full of other people, one person's doing may be another person's suffering. When I squeeze my way onto a packed New York City subway car, I may knock the valuable vase you are carrying out of your hands. On the other hand, the mold imposed by tort law's bipolar form forges a substantive morality of right and responsibility that constitutes persons as juridical equals. Tort law's dominant substantive principle of responsibility that persons are responsible for wrongs that they commit by failing to exercise reasonable care falls out of its form. According to Weinrib, negligence liability puts substantive flesh on the formal bones of the parties' equality by staking out a just middle ground between the unlimited license to injure conferred by a regime of no liability, and the denial of any freedom to act imposed by a regime of pure strict liability. In Ripstein's presentation, the spare political principle that "each of us is in charge of ourselves and none of us is in charge of anyone else" holds pride of place.⁷ Both the content and the form of the law of private wrongs lie immanent within that one principle of right, and the form that the principle prescribes is the unity of right and remedy realized by and in the "private law" of torts.⁸

The idea of tort law as a realm of equal right and responsibility is a deeply attractive alternative to the economic theory of tort as a waste-minimizing, wealth-maximizing mechanism for managing the costs of accidents. For one thing, this general idea connects more immediately and directly with tort law as it presents itself to us. Tort law presents itself to us as an institution that articulates what it

⁵ Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 Colum. L. Rev. 472, 478 (1987) ("For Kant, law is a unity that can be articulated through its doctrines and institutions. Kant calls this unity an idea of reason."). Ripstein develops his similar view "in terms of the thought that no person is in charge of any other person. This idea, I will contend, explains both the structuring features of the rights to bodies, reputations, and property to which the law of tort affords protection, and also why the form of that protection must be specifically remedial—why rights, so understood, survive their violation, and so must be given effect, however imperfectly, through remedies." Ripstein 2016, *supra* note 4, at ix.

⁶ Ernest J. Weinrib, *The Idea of Private Law* (rev. ed. 2012). In the literature on this subject, the terms "bipolar" and "bilateral" tend to be used interchangeably. The terms pick out the fact that normal tort suits involve two poles or sides, namely, a plaintiff and a defendant contesting whether the defendant has wronged the plaintiff.

⁷ Ripstein 2016, *supra* note 3, at 6, 12, 18, 33, 35, 105, 131, 295 (2016).

⁸ Ripstein 2016, *supra* note 3, at ix.

is that we owe to one another in the way of coercively enforceable obligations not to interfere with or impair each other's urgent individual interests. Preeminent among the interests that tort law safeguards is our urgent interest in avoiding, and recovering from, physical harm. The physical integrity of our persons—our safety—is a primary good in John Rawls' sense of the term.⁹ A decent measure of security against serious physical harm is an essential condition of effective agency. Realizing such security through our legal institutions is one of the things that we owe to one another as a matter of basic justice. Responsibility for avoiding and repairing accidental harm is at the center of modern tort law, and tort law therefore appears to be an institution which plays a fundamental role in establishing just relations among equal and independent persons.

Theorists of tort as “private law” are thus right to connect tort both to justice and to basic conditions of human agency. They undermine their own insight, however, when they present the legal category of tort as its own sovereign kingdom, walled off both from principles of basic justice and from surrounding legal fields. We have both persuasive normative reasons, and persuasive legal reasons, to reject the idea that tort is a highly autonomous institution, accountable only to its own internal logic. For Ripstein and Weinrib, the “private law” of torts is highly autonomous in two ways. First, they assert that tort law embodies its own special principles of interpersonal justice. In Ripstein's view, the foreground justice of tort law presupposes the background justice of the basic structure of society, but the operation of tort law's distinctive principles of right and responsibility is not fettered by principles of justice that govern the basic structure of society. Tort law incarnates the more local principle that “everyone is in charge of themselves, and no one is in charge of anyone else.” That principle, in its turn, has two basic implications: (1) that no one may use their own means in ways that interfere with the equal right of others to use their means; and (2) that no one has the authority to determine the purposes for which others may use their means. For Ripstein, our “means” are, principally, our physical persons and our property. By unifying right and remedy, tort law protects *the means that each of us has*.¹⁰ Remedies restore what wrongs take away. They mitigate the material effects of wrongs by placing the victim in the position that they would have occupied had the wrong “never happened.”¹¹ Tort as “private law” thus treats the law of torts as a highly autonomous domain of interpersonal justice because tort law simply accepts that we are entitled to the means that we happen to have, even if the justice of our claims to those means is debatable as a matter of basic, background justice. Our entitlements may, in fact, reflect the impact of distributive injustice, or of class, gender, or racial injustice, but tort as “private law” treats the “means that each of us have” as securely and unproblematically ours. This sharp separation of tort law from background justice is elegant but mistaken. In our imperfectly just world, the means that we have are unavoidably infected by background injustices. Whatever it makes of, and does with, these infections, tort law cannot simply deny their existence.

Just as theorists of tort as “private law” conceive of the law of torts as a normatively autonomous realm, so too they conceive of it as a legally autonomous one. For Ripstein and Weinrib, tort law is a self-sufficient legal domain, sealed off from contamination by any legal field whose form identifies the field as “public law.” The theory of tort as “private law” conceives of the common law

⁹ For Rawls, “primary goods” are goods that we need, whatever else we need, to exercise our powers of agency and pursue our conceptions of the good over the course of our lives. See *e.g.*, John Rawls, *Social Unity and Primary Goods*, in *Utilitarianism and Beyond* (Amartya Sen and Bernard Williams eds., Cambridge University Press, 1982). For discussion of safety as a primary good see Gregory C. Keating, *Reasonableness and Risk*, 193-199 (2022).

¹⁰ Ripstein 2016, *supra* note 3, at 9; Chapter 2, “What You Already Have, Part 1: Your Body and Property.”

¹¹ Ripstein 2016, *supra* note 3, at 23 (“the purpose of damages is to make it as if a wrong had never happened.”); Chapter 8, “Remedies, Part 1: As if It Had Never Happened.”

of torts as a set of practices and principles of right and responsibility wholly distinct from direct statutory regulation of risk and administrative alternatives to tort. This insistence on the autonomy and impermeability of tort is also a mistake, and it breeds misunderstanding. Administrative alternatives to tort arise, in important part, in response to the limitations of the common law of torts. Direct, *ex ante*, regulation of safety, for example, arises in part out of the inadequacies of *ex post* repair as an institutional response to harms that deal out death and irreparable injury. “Public” environmental law emerges in part in response to the inability of tort liability rules to respond to harms which arise out of a critical mass of uncoordinated actions. “Public law” regulatory and administrative regimes arise in part because the “private law” of torts is incomplete or inadequate. They are as much continuous with, as alternative to, the private law of torts. Our law of torts is best understood as part of a family of institutions—some “private”, some “public”—which share responsibility for protecting people’s urgent interests, especially their interest in safety, from impairment at each other’s hands.

Legal institutions are social artifacts that we construct to realize certain values and to protect certain interests. No single legal institution is everywhere and always the institution best suited to realize the values—and protect the interests—that the law of torts protects and seeks to realize. Our law of torts is intimately interwoven with administrative schemes, such as workers’ compensation, and with statutory regimes, such as zoning and direct risk regulation. These diverse legal institutions share and divide the labor of governing an important domain of basic justice centered on securing the physical and psychological integrity of our persons. The intrinsic limitations of the private law of torts—the adjudicative, backward-looking, reparative character of the private law of torts is one source of this institutional heterogeneity. The heterogeneity of threats to our urgent interests is another. It is sometimes best to understand and address unjustified interference with the urgent interests of others as we and they go about our lives in civil society as matters of individual misconduct. The “private law” of torts is the legal instrument of choice for understanding unjustified interference when it is understood in this way. But it is only *sometimes* right to understand unjustified interference in this way. In other circumstances, such interference is best addressed as a social problem. Pollution, for instance, is best understood as a social problem not as an individual wrong.

It is thus a family of overlapping institutions that bears responsibility for specifying and enforcing what it is that we owe to one another in the way of mutual responsibilities not to interfere with or impair each other’s essential interests. The private law of torts is an important member of this family, but not the only member. Sometimes, the law of torts assumes primary responsibility for the articulation and enforcement of our rights and responsibilities. Sometimes, it cedes responsibility to other members of the family. To invoke the Rawlsian framework from which Ripstein takes his talk of “background justice,” this family of institutions is part of the basic structure of society. Security against various forms of unacceptable interference and impairment at each other’s hands is an essential background condition if people are to have favorable conditions for pursuing their aims and aspirations over the course of their lives. Whether product accidents should be governed by a tort regime that imposes special responsibilities for product safety on sellers and manufacturers—or be ruled by a regime of contract that aims to restrict the reach of the obligations owed by product manufactures and to tailor those obligations to the tastes of customers—is a question of what we owe to each other in the way of safety. Whether and to what extent the obligations of owners of property to entrants onto their land should be set by reference to the status of the entrant under the law of property—or be governed by tort law’s default duty of reasonable care—is also a question of what we owe to each other in the way of coercively enforceable obligations to safeguard persons’ physical safety.

Because safety is a kind of Rawlsian “primary good,” these questions are questions of basic justice and tort law, broadly understood, is as much a part of the basic structure of society as are “the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family.”¹² To be sure, like other parts of the basic structure, the law of torts has its own distinctive role and concerns. Because tort law is concerned with what we owe to one another in the way of obligations not to impair or interfere with each other’s urgent interests, whereas the law of real and personal property is concerned with dominion over and use of external objects, the central concerns and governing principles of the two legal fields differ. But these distinctive concerns do not turn either tort law or property law into autonomous domains disentangled from larger questions of justice and injustice.¹³

II. Ideas of “Private Law”

The thesis that the key to understanding tort law is its taxonomic classification as “private law” runs so contrary to the conventional wisdom of the American legal academy that it is often both dismissed out of hand and badly misunderstood. It is dismissed out of hand because—in ordinary American legal usage—references to private and public law merely flag the difference between bodies of law concerned with the relations between citizens and the state (public law) and bodies of law concerned with relations among persons in civil society (private law). The only use of the terms is to slot legal subjects into handy file folders. Their invocation does not bring a cloud of connected normative conceptions to mind. This thin understanding of the distinction between public and private bodies of law may itself express a substantive claim: namely, that the public-private distinction has been both rightly discredited and badly eroded over the course of the past century.¹⁴ For most contemporary American legal academics, invoking the idea of “private law” brings to mind the idea of a realm where power may be exercised without any public accountability. Private realms are domains where some people may exercise unchecked power over other people.¹⁵ The very idea that, say, domestic relations are beyond the reach of public oversight is rightly regarded as pernicious, and that perniciousness is thought to attach to any robust version of the public-private distinction. Whether or not present American usage is the residue of this discrediting of the private-public distinction, the present usage of the term “private law” in the American legal academy invokes a watered down concept unsuited to serve as the master idea of any powerful legal theory.

¹² Rawls, *A Theory of Justice* 6 (Harvard, rev. ed., 1999).

¹³ Broadly speaking, my view is sympatico with those of Freeman and Scheffler. See S Samuel Freeman, *Private Law and Rawls’ Principles of Justice*, in *Liberalism and Distributive Justice* 167-202 (Oxford, 2018); Samuel Scheffler, *Distributive Justice, the Basic Structure and the Place of Private Law*, 35 *Oxford J. Legal Stud.* 213 (2015). The relation of basic justice to tort in particular, and private law in general, is a matter of dispute. See *e.g.*, Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 *Yale L.J.* 472 (1980); Liam B. Murphy, *Institutions and the Demands of Justice*, 27 *Phil. & Pub. Aff.* 251 (1998); Kevin A. Kordana & David H. Blankfein Tabachnick, *Rawls and Contract Law*, 73 *Geo. Wash. L. Rev.* 598 (2005); Kordana & Blankfein Tabachnick, *The Rawlsian View of Private Ordering*, 25 *Soc. Phil. & Pol’y* 288 (2008). J. Colin Bradley, *Corrective Justice Beyond Private Law*, in Paul B. Miller & John Oberdiek, eds. *Oxford Studies in Private Law Theory: Volume III*, 23 (2025). This paper does not grapple with this literature directly. It argues its view.

¹⁴ See *e.g.*, Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 *U. Pa. L. Rev.* 1349 (1982).

¹⁵ Reva Siegel’s summary of the legal status of agreements between spouses illustrates the relevant sense of “private” as denoting a realm beyond law’s jurisdiction. “Married couples may collaborate, bargain, and bicker over household affairs, but any agreements they arrive at are paradigmatically ‘private’—not formalized at law or subject to judicial oversight. Spouses do not look to the courts to interpret or enforce such agreements, and if they did, no aid would be forthcoming . . .” Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings 1860-1930*, 82 *Geo. L.J.* 2127, 2209 (1994).

In contemporary American legal thought, the stigma that attaches to the “public-private” distinction is compounded by an understanding of “private law” that arises out of the appropriation of the protean ideal of a “private” legal realm by libertarian legal and political thought. Libertarianism articulates a philosophical position very different from the Kantian position that Ripstein and Weinrib embrace. Contemporary libertarian political philosophy has rejected the stigma attached to the idea of a “private realm” beyond the reach of public accountability and has taken ownership of that idea as an appropriate conception of human relations. Libertarianism celebrates the idea of a “private” legal realm in which people are empowered to order the legal relationships in their lives as they choose, fixing the terms on which they interact with others through contractual agreement.¹⁶ Freedom of contract is the central institution of political ordering as libertarianism conceives it, and “free contract” is to be shielded from diverse state intrusions such as anti-discrimination law, antitrust law, and consumer protection law. Such intrusions constitute impermissible public interferences with interactions whose terms should be specified solely by the parties to those interactions.

This libertarian celebration of “private” legal relations beyond the reach of public scrutiny is rich enough to serve as a rallying cry for a theory. But the libertarian idea of “private law” is radically different from the idea that marches under the banner of tort as “private law.” For one thing, the libertarian idea of a realm of private freedom is identified with contract and property, not with tort. Among the three major fields of private law, tort stands out as the domain of collectively imposed obligations. The duties imposed by the law of torts are fixed by law and normally independent of the will of the parties. For libertarians, contract—not tort—is the institutional embodiment of a private realm of freedom. Libertarianism asserts that individual freedom is most fully realized when people determine the terms of their own legal relations through private contractual agreement. That vision assigns pride of place to contract. Property law claims second place, and tort is a distant third. Contract is the institution through which people exercise their wills by entering into binding forms of cooperation with others, and property is the institution that enables people to extend their wills and their powers through the acquisition and use of external resources. Insofar as property is usually acquired through some form of labor or transfer, it not only extends our powers but also arises out of their exercise. Tort, by contrast, is a law of collectively imposed constraints. It obligates us not to interfere with or impair others in various ways. Therefore, libertarians hold that tort should govern only when neither contract nor property can take hold of a problem—only when parties who are legal strangers to one another collide in a harmful way.¹⁷

The contemporary champions of “private law,” though, are philosophical critics of libertarianism, not allies. Ripstein and Weinrib would almost surely agree with Rawls’ pointed remark that “[i]f the so-called private sphere is a space alleged to be exempt from justice, then there is no such thing.”¹⁸ Indeed, Ripstein is the preeminent contemporary defender of Kant’s view that people can be *coerced* out of the state of nature and compelled to join civil society in the name of equal freedom.¹⁹ Kant’s belief that civic freedom must be equal freedom—and that equal freedom can be established

¹⁶ Robert Nozick, *Anarchy, State, and Utopia* (Basic, 1974) is the preeminent philosophical exposition of this position.

¹⁷ See *e.g.*, Nozick, *Prohibition, Compensation, and Risk*, in Nozick, *Anarchy, State, and Utopia* 54-87 (Basic Books, 1974); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973). Instructively, both Nozick and Epstein support strict liability for accidents among strangers because people’s natural rights require that they not be made worse off through harms arising out of risks imposed by others unless they have consented to the imposition of the underlying risks. See *e.g.*, Epstein, *The Unintended Revolution in Product Liability Law*, 10 Cardozo L. Rev. 2193 (1988).

¹⁸ John Rawls, *Justice As Fairness: A Restatement* 166 (Harvard, 2001).

¹⁹ Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Harvard, 2009). See also the criticism and rejection of libertarian accounts of private law in Ripstein 2016, *supra* note 3, at 288-89.

only through the creation of a state—is celebrated by Ripstein and repudiated by libertarianism. Freedom, for libertarians, is realized through agreements that are actual and individual, not through agreements that are hypothetical and collective. For Ripstein, by contrast, equal freedom can be realized only through a regime of public right, only in a civil condition governed by a general will.²⁰ For Ripstein, tort is a law of correlative rights and duties that *constitutes* persons as free and equal. Without the private law of torts, people are not, and cannot be, juridical equals possessed of civic freedom.

A. “Private Law” as Form—and Substance

Perhaps the best way to grasp, more concretely, the “the idea of private law” championed by Weinrib and Ripstein is to begin with the public law understanding of tort that it challenges. In his early and now classic paper on negligence, Richard Posner presents the private law of torts as public law in disguise. By this, he means that the law of torts is public regulation of safety through private means. “We are,” he writes “apt to think of regulation as the action of executive and administrative agencies. But the creation of private rights of action can also be a means of regulation. The rules are made by the judges aided by the parties.”²¹ For Posner, tort lawsuits are a way of pursuing the socially optimal level of safety. Accidents among strangers are economic externalities. Therefore, the invisible hand of the market will not work to ensure that accidental injury is inflicted only when the costs of preventing the accident in question exceed the costs of bearing the injuries that the accident inflicts. Some state intervention is required. Negligence law is well suited to the task because, economically conceived, negligence consists of failing to take cost-justified precautions against risks of accidental harm. The nominally private form of the normal tort lawsuit is an appropriate procedural mechanism for enforcing the efficient level of safety because tort plaintiffs are private attorney-generals—in substance if not in name. They seek damage judgments in their own names, but they are entitled to succeed only when the losses for which they seek redress are the consequence of failures on the part of those against whom they claim to take cost-justified precautions. Cost-justified precaution are efficient precautions. By minimizing the costs of accidents and their prevention, efficient precautions maximize wealth and promote social welfare. In short, tort lawsuits enlist private parties in the production of the cost-justified level of safety, and that level of safety serves the general good.

Contemporary champions of “the idea of private law” have rallied around the phrase in part as a retort to Posner’s economic conception of torts as essentially an instrument of public law objectives. Posner’s public law conception dispenses entirely with the idea that tort lawsuits do justice between the parties by redressing a wrong that one of them has done to the other. The “idea of private law” turns toward form to remind us that the private form of the tort lawsuit does not match the public substance that Posner cites as the form’s *raison d’être*. The form of the normal tort lawsuit suggests that such suits are about justice between persons—that they vindicate the rights of plaintiffs and defendants against each other. The economic approach rejects this idea in part because it rejects the larger idea that persons are, as Rawls puts it, “self-originating sources” of moral and legal claims. For economic analysis, welfare is the only thing of intrinsic value, and the role of tort law is to promote states of the world with as much welfare as possible. Persons are merely places where welfare alights. Theories that march under the banner of “private law” reject the regulatory, market-mimicking account of the law of torts offered by law and economics and find in the form of the normal tort

²⁰ Ripstein 2009, *supra* note 19, at 159-60, 183, 283, 306.

²¹ Richard A. Posner, A Theory of Negligence, 1 Journal of Legal Studies 29, 31 (1972). See also *id.*, at 73 (“The set of negligence rules constituted not an ambiguous moral imperative but a comprehensive code of safety regulation . . .”).

lawsuit a substantive morality of right and responsibility. “Private law” names the form of justice that governs the relations between parties to a bilateral wrong.

The law of torts is fertile ground for this alternative conception. For one thing, tort plaintiffs claim in their own names for harms wrongly inflicted upon them by the parties against whom they proceed. For another, tort law is preoccupied with physical harm to persons (and their property). Physical harm acquires its special moral significance not from any distinctive role it plays in a calculus of social welfare, but because significant physical impairment deprives persons of normal powers through which they form and exert their wills.²² Serious damage to our physical capacities significantly impairs our ability to lead our lives and pursue our purposes as we see fit. Physical harm is especially bad *for persons* concerned with pursuing their ends as independent agents working their wills on the world. And what is true of tort’s attention to physical harm looks to be true of tort more generally. It is concerned with relations among persons. Tort articulates and vindicates rights persons have that others not interfere with them in various ways, and it does so by placing people under reciprocal responsibilities to respect those rights.

By placing the form of the field at the center of its conception, the theory of tort as “private law” gives the general idea that tort is a law of right and responsibility a very particular twist. Ernest Weinrib’s development of his normative position begins with the structure of a traditional tort lawsuit and moves backwards to articulate a system of rights to one’s person and property. The bilateral form of the traditional tort lawsuit mirrors the timeless metaphysics of human agency. It is an inescapable feature of our world that, sometimes, one person’s doing is another person’s suffering. In the crowded conditions under which we live, some people’s elbows are bound to collide with other people’s ribs. Private law is the legal institution that responds to this “unity of doing and suffering” the same wrong.²³ Tort adjudication’s bilateral form institutes bilateral principles of responsibility. Ripstein, too, assigns fundamental importance to bilaterality insofar as he asserts that “the unity of right and remedy is the key to understanding tort law.”²⁴ That unity is realized in and through the normal tort lawsuit, which requires those who commit tortious wrongs to make reparation to those they have wronged. Remedies replace and restore rights when rights are violated. The unity of right and remedy is severed when tort law is displaced by administrative schemes such as workers’ compensation or the New Zealand accident scheme.²⁵ These administrative schemes combine direct regulation of risk with “social insurance.”

Ripstein’s starting point, however, is not the form of the traditional tort lawsuit, but an abstract principle of Kantian legal philosophy. He begins with “the moral idea that no person is in charge of

²² Keating 2022, *supra* note 9, at 11-15, 63-65.

²³ Weinrib 2012, *supra* note 6, at 72-75, 145; Martin Stone, The Significance of Doing and Suffering, in *Philosophy and the Law of Torts* 131 (Gerald J. Postema, ed., Cambridge, 2001). The idea is that the unity of doing and suffering of the same wrong lies at the heart of the Aristotelian idea of corrective justice. See Danielle S. Allen, *The World of Prometheus: The Politics of Punishing in Democratic Athens* 287-88 (Princeton, 2000).

²⁴ Ripstein 2016, *supra* note 4, at ix.

²⁵ The scheme was established in 1972 by Accident Compensation Act 1972 and subsequently refined and adjusted by successor statutes: the Accident Compensation Act 1982, Accident Rehabilitation Compensation and Insurance Act 1992, Accident Insurance Act 1998, and Injury Prevention, Rehabilitation, and Compensation Act 2001 (later renamed the Accident Compensation Act 2001). The most significant feature of the scheme was that it abolished “the right to bring a civil action in tort for damages” when a person suffered “injury by accident” and replaced that right with an entitlement to specified benefits (e.g., medical and rehabilitative expenses, compensation for a percentage of lost earnings, a capped lump-sum payment for non-economic losses) without requiring any proof of fault on the part of someone else for inflicting the accidental injury. The scheme has been revised several times, but its core has endured: victims of personal injury by accident receive entitlements under the scheme and cannot recover compensation from wrongdoers through the civil law. Regulation becomes the primary legal instrument for promoting safety.

another” and develops that idea so that it “generate[s] distinctions between the different types of private wrongs, each of which, except for defamation, is organized in terms of the use of means.”²⁶ This sequence sounds like an attempt to impose a normative theory on a preexisting and freestanding body of law, but that is not what Ripstein intends. “Rather than importing content from some more general moral or economic theory,” Ripstein argues “that the rights enforced by tort law are specific to the form of interaction appropriate to free beings.”²⁷ Tort law “is a system that not only protects but *constitutes* each person’s entitlement to use their bodies and property as they see fit” consistent with the equal right of others to do the same.²⁸ The theory’s movement from abstract to concrete mirrors in thought what the law does in time—namely, work its way from general moral principles, which are articulable even in a state of nature, to positive legal rights, which can exist only in civil society and which can be specified only by legal institutions.²⁹

Ripstein’s theory thus purports to work its way from a single spare moral premise through to the concrete wrongs recognized by the law of torts. It supplements the principle that “no person is in charge of another”³⁰ with the “simple idea [that] “human beings are active beings who are entitled to set and pursue their own purposes, restricted only by the like entitlement of others to do the same.”³¹ The entitlement that we all have is the entitlement to use our means as we see fit, so long as we do not interfere with the equal right of others to do so. Importantly, Ripstein tells us that he means for “means” to be understood in a particular way:

Your means are just those things about which you are entitled to decide the ends for which they will be used. The means that you have, then, are whatever it is that you are entitled to use for setting and pursuing purposes. . . . The means that you have, in the first instance, are just your body—your ability to decide what to do and to manipulate objects in space—and your property, that is, the things outside of your body that you are entitled to use for pursuing purposes.

[T]he law of torts focuses on means in three interrelated ways. First, it protects the means that each person has for setting and pursuing purposes. Second, it restricts the means that each person can use by precluding one person from using means that belong to another without that other’s authorization. Third, it restricts the ways in which each person can use his or her own means, to those ways that are consistent with everyone else being able to do the same. The first and third come together in prohibiting interfering with another’s means by using yours in dangerous or defective ways; the second generates the prohibitions on trespasses against persons and property.³²

“Private law” is thus an idea incarnated in an institution. This idea helps define appropriate terms of interaction for equal, independent persons engaged in pursuing their purposes as members of civil society. The private law of torts specifies what it is that persons owe to one another in the way of

²⁶ Ripstein 2016, *supra* note 4, at 6.

²⁷ *Id.*, at 8.

²⁸ *Id.*, at 7-8.

²⁹ *Id.*, at xii, 4, 13-14, 263, 289.

³⁰ *Id.*, at 6.

³¹ *Id.*, at 8. Further ideas are that “the rights to which this norm of interaction gives rise survive their own violation” and that “no person ever needs to clear his or her own name.” *Id.* This political morality is taken directly from Kant, as Ripstein understands him. Compare Ripstein 2009, *supra* note 19, at 33 (“a system of equal freedom is one in which each person is free to use his or her own powers, individually or cooperatively, to set his or her own purposes, and no one is allowed to compel others to use their powers in a way designed to advance or accommodate any other person’s purposes.”).

³² Ripstein 2016, *supra* note 4, at 9.

coercive obligations of non-interference in a social and legal world where everyone is in charge of themselves, and no one is in charge of anyone else.

B. Tort Law and Basic Justice

Philosophically, Ripstein's view defies familiar pigeonholes. On the one hand, he rejects the libertarian ideal of a realm of private ordering beyond the reach of public justice. Tort is, for Ripstein, an important part of public justice. In the Rawlsian terms that he explicitly embraces, tort law is a part of the basic structure of society—but with a caveat.³³ The caveat is that tort answers to principles of justice different from Rawls' principles of equal basic liberties, fair equality of opportunity, and the difference principle.³⁴ The "foreground justice" of private law is co-equal with, and reciprocal to, "background justice." Private law governs the voluntary interactions of persons in civil society, whereas Rawls' principles of justice govern inescapable relations between citizens and the state. For Rawls, principles of justice must take as fundamental the fact that we are born into the encompassing institutional frameworks of existing states, not into states of nature. Joining or abstaining is not a choice that we are ever in a position to make. We can forego participation in society only at extraordinary cost. If the terms of our participation are to be fair—and if our interactions are to be reasonably free—the basic structure of society must satisfy appropriate principles of justice.³⁵

For Ripstein, tort must exist within a framework of "background justice" if it is to be just, but tort itself is a matter of "foreground justice." The two realms are reciprocal. "[T]he idea of background justice presupposes what could be called 'foreground justice,' that is, the system in which cooperation is voluntary rather than mandatory, in which the purposes pursued are determined by individuals . . . [T]he foreground justice with which background justice contrasts supposes that individual citizens are in charge of themselves" and free to pursue the purposes they choose to pursue as long as they do so on terms consistent with everyone else's entitlement to do the same. Private law "regulates the relations and interactions among private individuals as they take responsibility for trying to realize their respective conceptions of the good."³⁶ Ripstein couples this thesis that private law governs the "foreground justice" of voluntary interactions among persons in civil society with the corollary claim that private law and private lawsuits address matters that are of concern only to the parties to the lawsuit at hand. "I will unashamedly maintain that *the point of tort litigation is to resolve the specific dispute between the parties currently before the court, based entirely on what transpired between them.*"³⁷

This account of the relation of tort law to the basic structure of society and to distributive justice is right to assert that distributive justice and the principles of responsibility that govern civil wrongs are fundamentally distinct domains. Distributive justice is concerned with the specification of basic rights and liberties, the distribution of wealth and income, and with the general distribution of the burdens and benefits of social cooperation. Distributive justice is, as Samuel Scheffler has put it,

³³ Ripstein 2016, *supra* note 4, at 290.

³⁴ The difference principle requires that inequalities in the basic structure of society be to the maximum advantage of the least advantaged representative person. As with all of Rawls' principles of justice, it applies to the operation of institutions, not to individual actions. So, if we take the case of income inequality and imagine a society divided between a working and an entrepreneurial class, the difference principle requires that the higher incomes of the entrepreneurial class be more to the advantage of the less advantaged working class than any other distribution. Rawls 2001, *supra* note 18, at 61-66.

³⁵ Ripstein writes that "[c]reating and sustaining a social world in which no person is in charge of another—in which interpersonal cooperation is voluntary—requires mandatory cooperation in providing the necessary institutions and resources to achieve these public purposes." Ripstein 2016, *supra* note 4, at 290.

³⁶ Scheffler, Samuel, Distributive Justice, the Basic Structure and the Place of Private Law, 35 Oxford J. Legal Stud. 213, 231 (2015).

³⁷ Ripstein 2016, *supra* note 4, at 23 (emphasis mine).

“holistic.” Its allocation of a benefit to a particular person depends on the place of that allocation in an overall distributive scheme.³⁸ Distributive justice is also concerned with our collective responsibilities. Collectively, we are responsible for bringing into existence and sustaining just background conditions for persons to pursue lives that answer to their aspirations on fair terms with others. The principles of responsibility that govern civil wrongs, by contrast, are concerned with our responsibilities as individuals (and also as participants in private and public firms and associations) not to injure or interfere with each other in certain ways. But the account goes wrong both in insisting that the foreground justice of tort law is coequal with the background justice that governs the basic structure of society, and in insisting that the foreground justice of tort law is entirely about what has transpired between plaintiff and defendant. Justice in tort is not, and cannot be, entirely independent from the justice of the basic structure of society. In part, this is because the law of torts is part of the basic structure of society. And in part, it is because the injustices of existing non-ideal societies bear on justice in tort.

Speaking generally, distributive justice and the principles that govern right and responsibility in tort have distinct, but complementary, domains.³⁹ Both have to do with rights, but they have different things to do with rights. Torts are, as Ripstein and others insist, wrongs, and wrongs are violations of rights.⁴⁰ Because it is concerned with wrongs, tort law is concerned with individual and collective accountability for respecting other people’s rights. Tort law’s core principles of fault and strict liability are principles of responsibility for avoiding and repairing harm wrongly done. People’s rights to the physical and psychological integrity of their persons (and their rights to such goods as a measure of privacy) ground those principles of responsibility, but the principles govern conduct not distribution. Distributive justice is also concerned with rights, but its concern is with what rights people have. Whether or not we have a right to the physical integrity of our persons is a question of distributive justice. The two domains are thus complementary because the rights we have as a matter of distributive justice are foundational for the responsibilities that others owe to us—and we to them. We have a right that others exercise reasonable care for our protection when they engage in risky conduct because we have a right to the physical integrity of our persons. That right grounds a general, default obligation of due care on the part of others. The two domains remain distinct because the questions of what rights people have—and what those rights require in the way of coercively enforceable, reciprocal obligations not to impair or interfere with each other—are different questions.

The upshot of this is that tort law, done properly, is not, in a direct sense, an instrument of distributive justice. For example, it would be opportunistic and objectionable to use the difference principle to determine the size of damage awards in private lawsuits. The primary role of damage awards is to repair harm wrongly done. Realizing that end should be their basic, if not their only, concern. Converting damage awards in private lawsuits into instruments of society-wide distributive justice would both impair them as instruments of reparative (or corrective) justice and be a haphazard way of pursuing social justice. This, however, does not mean that the law of torts is not a part of basic justice. It is. Because security against various forms of unacceptable interference by others is an essential institutional condition for people to be able to pursue their conceptions of the good as they

³⁸ Samuel Scheffler, *Justice and Desert in Liberal Theory, Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*, 191 (2001).

³⁹ As Erin Kelly has said about criminal justice. Erin I. Kelly, *Desert and Fairness in Criminal Justice*, 40 *Phil. Topics* 63 (2012).

⁴⁰ See *e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 *Tex. L. Rev.* 917 (2010); Jules Coleman, *Risks and Wrongs* (Oxford, rev. ed., 2002).

see fit, the law of torts forms part of the basic structure of society.⁴¹ To be sure, the law of torts has its own distinctive role and concerns, but so, too, do other parts of the basic structure.

In a just society, the answers that tort law may permissibly give to the questions that lie distinctively in its domain must be constrained by the principles of background justice. Tort law, in this respect, is like any other body of law. Within Rawls' theory, particular legal fields should be governed primarily by principles appropriate to their particular concerns, but these field-specific principles must respect the constraints set by basic principles of justice. Ripstein's thesis that tort law is free to follow its own principles of "foreground justice" wherever they may lead assigns too much autonomy to tort law. For one thing, many of the interactions governed by tort share the inescapable quality of the interactions governed by principles of background justice. Although Ripstein is correct to assert that the domain addressed by the law of torts is one in which people pursue purposes that they set for themselves, his claim that tort pertains to interactions that are "voluntary" is unpersuasive. Many of the interactions governed by the law of torts are woven into the basic fabric of modern life; they are interactions that can be avoided only on pain of foregoing full participation in society. For most people, working, or driving, or using public transportation, or being exposed to the hazards of electrical power or natural gas transmission, or getting vaccinated, or purchasing at least some mass-produced products, are not voluntary activities. These are the kind of unavoidable activities that are properly governed by principles of basic justice.⁴² The harm threatened by these activities jeopardizes the physical and psychological integrity of persons, an interest urgent enough to be protected against state interference by Rawls' first principle of justice. That interest is equally urgent when it is threatened by private persons and firms in civil society.

Moreover, the "foreground justice" of tort law must be constrained by the principles of background justice. Just as property law's principles of acquisition, ownership, and transfer must respect the constraints of distributive justice, so too tort law's principles of responsibility and repair must respect those constraints. The influence of background justice faces in two directions. On the one hand, reasons that support the principles of basic justice also imply that tort—and related institutions such as direct statutory or administrative regulation of risk—should accord proper weight to people's interests insofar as the protection of those interests is essential for the exercise of effective agency. Principles of risk-regulation that demand more than cost-justified precaution to ensure the safety air, water, food and workplaces may be called for because the stringent level of safety that they prescribe properly safeguards the physical integrity of persons, and that integrity is an essential condition for the pursuit of a conception of the good over the course of a complete life.⁴³ On the other hand, the background injustices endemic to non-ideal social circumstances may affect claims to recovery in tort. If someone's entitlements are debatable as a matter of basic justice, tort law cannot simply assume that they are entirely just as far as the "foreground justice" of tort is concerned. If my wealth and income are the product of injustice, I may well not be justified in demanding that you fork over the full cost of restoring my heirloom Piaget watch to pristine condition when you carelessly damage it by pinning my arm against a subway pole as you squeeze into the subway car. When my "means" are the product of class or gender or racial injustice, it is not indisputably clear that the

⁴¹ See *supra* notes 12 & 13, and accompanying text.

⁴² Ways in which tort's location within the basic structure of society bears on its governing principles are discussed in Section IV of this paper, *infra*.

⁴³ I have in mind the "safety" and "feasibility" norms of American statutory risk-regulation law. See Keating 2022, *supra* note 9, at 185-228.

application of correct principles of justice requires that I be made whole when my means are diminished by your wrongdoing of me. What justice requires in such a case is eminently debatable.⁴⁴

The idea of tort as “private law” is philosophically problematic because it conceives of tort law as an autonomous realm of “private” justice. It is interpretively suspect because it regards the choice for tort—and against regulation or administration—as marking a radical division between a regime of right and responsibility on the one hand, and regimes that simply secure people against diverse bad outcomes in the manner of insurance on the other hand.⁴⁵ Our modern law of torts arose in response to the emergence of accidents as a *social* problem. The history and structure of the field suggests that the problem of accidental injury may be understood in two fundamentally different ways. One way is to understand accidental wrongs in terms of individual misconduct. The other is to understand accidental injury as a basic, if unfortunate, side effect of activities in an industrial and technological world. The first understanding expresses itself in private law and, for the most part, in individual fault liability. The second understanding expresses itself in the more collective (or enterprise) forms of responsibility found in some tort doctrines and in important administrative alternatives to tort law. Both approaches are extant in our law of torts and in companion legal fields. To cleave the approaches apart by asserting that they occupy watertight independent domains is to tear the fabric of modern tort law in two. When we sever the domains in this way, instead of making the “characteristic modes of reasoning” extant in our law of torts “intelligible,” we obscure conceptions of responsibility that are shared by diverse domains of law.

The truth of these objections is not, of course, self-evident. The next section of this paper therefore sketches reasons for thinking that the architecture of modern tort law confounds the idea of “private law” in important ways. Modern tort law is intimately entangled with—and often displaced by—law that “private law” scholars would call “public.” This is for good reason: because the problems that tort law addresses are collective matters of basic justice, “public law” instruments are often appropriately brought to bear on them.

III. The Permeability of Modern Tort to “Public Law”

Especially, perhaps, in the United States, modern, accident-centric, tort law developed hand-in-hand with two other institutions—namely, direct risk regulation by statute or administrative edict, and administrative schemes such as workers’ compensation. These schemes compensate victims of accidental harm if and when they suffer injury while engaging in an activity to which the scheme applies. In New Zealand, these two institutional instruments displace the private law of torts almost entirely when it comes to accidental harm.⁴⁶ The orthodox view of these schemes in the American legal academy takes them to be part of the same family of institutions as the private law of torts because they respond to the same pressing social problem, namely, the emergence of accidental harm as a basic feature of industrial and technological activities. Sometimes these institutions compete, and sometimes they cooperate. Workers’ compensation schemes, for instance, both displace the common

⁴⁴ See the discussion in the text *infra*, at ns. 77-89.

⁴⁵ Ripstein 2016, *supra* note 4, at 292-95 draws this contrast.

⁴⁶ “Almost” is an important qualifier here. Importantly, under the New Zealand scheme “a victim is *not* precluded from bringing a civil tort action for damages with respect to injuries not covered by the scheme; therefore, a rule or court decision of no coverage opens the door to a possible claim for damages under the common law of torts.” Richard S. Miller, An Analysis and Critique of the 1992 Changes to New Zealand’s Accident Compensation Scheme, 52 Md. L. Rev. 1070, 1072 (1990). The fact that tort law steps up to address gaps in, and limits of, the New Zealand scheme nicely illustrates the point that administrative schemes are part of the same larger whole as the law of torts. Even the most extensive scheme is a carve-out from the law of torts.

law of torts and serve as an inspiration for modern strict liabilities within tort law.⁴⁷ Theorists of tort as “private law,” however, insist that direct risk regulation and administrative compensation schemes have nothing to do with the law of torts. Recall Ripstein’s declaration on the first page of the Preface to *Private Wrongs*: “The central claim of this book will be that the unity of right and remedy is the key to understanding tort law.”⁴⁸ That unity is severed by administrative schemes. Claimants recover from funds, not from the individual wrongdoers responsible for their harms.

Taxonomically, the distinction that Ripstein draws between the “private law” of torts and the “public law” of administrative alternatives is unobjectionable, but his insistence on radical discontinuity in conceptions of responsibility is mistaken. In fact, severing the two domains seriously impedes an adequate understanding of tort law. It is impossible, for instance, to recount the history of assumption of the risk in American law without discussing workers’ compensation. When it was imposed at the turn of the twentieth century, workers’ compensation directly repudiated the principles of responsibility—namely, fault on the employer’s side and assumed risk on the employee’s—that the common law of torts brought to bear on workplace accidents. Strict liability replaced fault on the employer’s side, and assumption of the risk on the employee’s side was banished entirely.⁴⁹ Reduced damages were the gain on the employer’s side of the ledger. By displacing tort law from the domain of workplace accidents, workers’ compensation schemes deprived an important, well-articulated doctrine of its principal domain of application. After “assumption of the risk” was deprived of its principal domain of workplace application, it was eventually reconstructed as a less important—and dramatically different—doctrine centered on recreational activities.⁵⁰ Contemporary assumption of the risk doctrine prescribes that the “inherent” risks of some recreational activities are assumed (not reduced) because they are essential to the enjoyment of those activities. The risks that were assumed in the nineteenth century workplace, by contrast, were to be regretted, not welcomed. They were assumed by workers because employers insisted that workers bear them. The emergence of workers’ compensation schemes thus reshaped a basic tort doctrine.

Workers’ compensation did more than utterly upend the doctrine of assumption of risk. It also effected a seismic shift in the landscape of tort law more generally. Writing in 1914, Jeremiah Smith argued that, by repudiating the fault liability around which the common law of torts had been constructed in the latter half of the eighteenth century and embracing strict liability, the Workers’ Compensation Acts made the law of accidents a house divided against itself. The Acts were therefore bound, in Smith’s view, to initiate a revolution in the common law of torts.⁵¹ Smith’s predictions were eerily prescient. Just as he foretold, strict liabilities expanded within the common law of torts, and forms of fault liability were rebuilt in ways that narrowed the gap between strict and fault liability.⁵² To this day, interpretations of the scope of employment under the doctrine of *respondeat superior* show the explicit influence of the enterprise conception of responsibility embodied in workers’

⁴⁷ Gregory Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 Vand. L. Rev. 1285, 1303-17, 1323-29 (2001).

⁴⁸ Ripstein 2016, *supra* note 4, at ix.

⁴⁹ Jeremiah Smith, *Sequel to Workmen’s Compensation Acts*, 27 Harv. L. Rev. 235, 344 (1914). See also Smith, *Tort and Absolute Liability – Suggested Changes in Classification*, 30 Harv. L. Rev. 241, 319, 409 (1917).

⁵⁰ *Farwell v. Boston & Worcester Rail Road Corp.*, 45 Mass. 49 (1842) (Shaw, C.J.) and *Lamson v. American Ax & Tool Co.*, 177 Mass 144 (1900) (Holmes, C.J.) illustrate the way in which the doctrine worked to deprive workers of their rights to safe workplaces in the nineteenth century. *Scott v. Pacific West Mountain Resort*, 834 P.2d 6 (Wash. 1992) is a representative modern application of the doctrine in a recreational context. For a judicial discussion of the nineteenth century doctrine which characterizes the consent that it invokes as fictional and the result as a stripping of the right to a safe workplace, see *Tiller v. Atlantic Coast Line Railroad Co.*, 318 U.S. 54 (1943) (Black, J.).

⁵¹ Smith 1914, *supra* note 49; Smith 1917, *supra* note 49.

⁵² Keating 2001, *supra* note 47, at 1292-1303.

compensation law.⁵³ In both cases, legal doctrines attempt to articulate the zone of harm for which *firms* are responsible. A non-fault conception of enterprise responsibility transcends the boundary between the “private law” of torts and a “public law” administrative scheme and binds them through a common principle of responsibility.

It helps here to recall that our modern law of torts arose in the second half of the nineteenth century, when the writ system was cast aside and substantive law stopped being subservient to the procedural pigeonholes of the forms of action. Once liberated, the law of torts underwent a profound transformation. It ceased to be a collection of discrete and heterogeneous wrongs sorted into separate boxes and became a field ruled by general principles of responsibility. The tort law that emerged from this reconstruction was preoccupied with the accidental infliction of physical harm and dominated by the fault principle.⁵⁴ This reconfiguration of the field was so sweeping and successful that we tend to experience the architecture that it imposed more as fact than as construct. That architecture is part of our pre-theoretical sense of what tort law is. We assume that tort has a core of accidental wrongs governed by negligence liability. That core is flanked by the competing, but subordinate, principle of strict liability on one side, and by the still-heterogeneous intentional torts on the other. The standard first-year torts class instantiates this configuration. After a few classes on selected intentional torts—assault, battery, and trespass, perhaps—the course turns to accidental harms and to intense immersion in the structure of fault liability. Sections on strict, and perhaps product, liabilities follow. Accidents are where the action is.

This organization of the field is not, of course, pre-theoretic fact. It is a construct, and one that obscures as well as illuminates. Whatever its faults, this construct has the considerable virtue of placing two fundamental features of modern tort law front and center: it is preoccupied with accidental physical harm and dominated by a general principle of negligence liability. Modern tort law was born out of the emergence of accidental physical harm as a pressing *social* problem. It is “a body of law created when the industrial revolution and industrial accidents began to wreak havoc on the bodies of workers and passengers.”⁵⁵ Oliver Wendell Holmes’ famous aphorism that “[o]ur law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like,” whereas “the torts with which our courts are kept busy today are mainly the incidents of certain well-known businesses . . . railroads, factories, and the like”⁵⁶ epitomizes the point. Pre-modern tort law was a law of nominate, mostly intentional, wrongs whereas modern tort law is mostly a law of accidental harms that are recurring byproducts of basic activities in an industrial and technological society. The twin preoccupations that gave birth to modern tort law—preoccupation with accidental wrongs instead of intentional ones and with the general social problem of accidental harm instead of with isolated individual wrongs—had, and continue to have, large implications for torts as a legal field. Because the accidents with which it is preoccupied are characteristically associated with activities, responsibility for those accidents may be lodged *either* with individuals or with activities. Administrative schemes instantiate the activity alternative. For its part, our common law of torts contains both individual and enterprise forms of responsibility. These alternatives are competitive, but not wholly independent of

⁵³ Id., at 1323-29.

⁵⁴ Tom Grey, *Accidental Torts*, 54 Vand. L. Rev. 1225, 1260-75 (2001).

⁵⁵ Sarah A. Seo & John Fabian Witt, *The Metaphysics of Mind and the Practical Science of Law*, 26 L. & Hist. Rev. 161, 164 (2008) (Modern tort law is “a body of law created when the industrial revolution and industrial accidents began to wreak havoc on the bodies of workers and passengers.”). See generally John Witt, *The Accidental Republic* (Harvard, 2006).

⁵⁶ Oliver Wendell Holmes, *The Path of the Law*, in *Collected Legal Papers* 167, 183 (1920) (originally delivered 1897). The points made through the end of this section are developed in Keating 2022, *supra* note 9, at 285-88.

one another. Enterprise forms of responsibility often emerge from the canonical common law process of writing larger and larger once modest principles of individual responsibility.⁵⁷

The origins of modern tort law help to explain why the contemporary revival of the idea that tort is “private law” goes too far. “Private law,” as Ripstein and Weinrib articulate it, is insufficiently attentive to the way in which the modern law of torts is entangled with bodies of law that the theorists of “private law” count as public—with statutory and administrative risk regulation and with administrative compensation schemes. The relations among these diverse legal institutions are complex, but tort’s location within a web of institutions is a basic fact about modern tort law. Negligence works hand in hand with statutes regulating risky activities; nuisance works hand in hand with zoning; product liability sometimes defers to, and sometimes does battle with, pharmaceutical regulation. The negligence and nuisance examples are particularly instructive. Proponents of tort as “private law” take the bipolar relation of the plaintiff and the defendant as the most important relationship in the law of torts. Primary obligations, however, are omnilateral, not bilateral. As far as negligence law is concerned, the general modern rule is that everyone owes everyone else a duty of reasonable care.⁵⁸ In many circumstances, a reasonable measure of safety can be secured only if participants in an activity—or various activities—coordinate their conduct. The adjudicative practice of the common law of torts, though, is not well-suited to the task of prescribing comprehensive schemes of coordinate precaution. Tort turns to the traffic code to help determine the duties of care that people owe to one another as owners and operators of vehicles, and as drivers and pedestrians on roads, because it lacks the institutional competence to spell those duties out by itself. So, too, the law of nuisance is not well-tailored to coordinating a diversity of incompatible uses of property across a neighborhood. Zoning codes are designed to perform that very task. Just as the “private law” of torts draws on the “public law” of traffic regulation to articulate standards of reasonable care, so too the “private law” of nuisance draws on the public law of zoning to articulate the boundaries of unreasonable interference. Private law and public law work hand-in-hand to articulate primary rights and responsibilities.

More broadly, health and safety regulations are often needed because the law of torts is not up to the task of addressing some emerging forms of harm. It is, for example, perfectly intelligible to say that we need environmental law only because the private laws of tort and property are incomplete. If the private law of property could specify and institute entitlements to external objects completely and perfectly—and if the law of torts could specify and redress impermissible interferences with, and impairments of, property and physical health with equal completeness—we would not need environmental law. As it happens, a phenomenon like pollution eludes the grasp of tort law. Pollution in its most characteristic form is a critical mass phenomenon, and it therefore presents tort law with intractable causal problems. The relation between those who pollute the air in the Los Angeles basin and those who suffer its effects is not a bipolar relation between discrete persons. A critical mass of automobiles creates the pollution that they and everyone else in the basin then suffer. Regulation must be brought to bear to combat the harms that arise from the combination of innumerable discrete acts, each of which is, by itself, harmless. New technologies, too, can burst the seams of existing law. The impending arrival of driverless cars may require a revision of our tort law as sweeping as the one

⁵⁷ See, e.g., Robert Rabin’s tracing of modern “enabling torts” to the relatively narrow tort of negligent entrustment. Robert Rabin, *Enabling Torts*, 49 DePaul L. Rev. 435, 438-46 (1999).

⁵⁸ See e.g., *Cabral v. Ralphs Grocery Co.*, 51 Cal. 4th 764, 768 (2011) (interpreting Section 1714 of the California Civil Code, first enacted in 1872); Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm §7(a) (2010) (“An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”).

brought about by the emergence of industrial accidents and the subsequent creation of workers' compensation schemes at the turn of the twentieth century.⁵⁹

Overemphasizing tort law's "private law" status also obscures the fact that accidental harm is a basic and systemic feature of a technologically advanced society. The private law of torts is one—but only one—institutional instrument available to address this basic fact of our social life. Because accidental harm is the byproduct of basic and enduring productive activities, how we respond to accidents is a matter of public concern. Because we have diverse institutional devices at our disposal, we have choices to make. Preferring the "private law" of torts to some combination of direct risk regulation and social insurance expresses a collective judgment about how to institute responsibility for avoiding and repairing harm in some sphere of social life. To choose one of these approaches over the other is to choose to emphasize one set of relations among persons over other relations. Private law adjudication puts the relation of individual persons as doer and sufferer of the same wrong at its center. Administrative regimes pick out diverse communities of risk and responsibility—workplaces, industries (e.g., nuclear power), activities (e.g., vaccination or driving)—as the locus of the important relations. Of course, when we choose among these diverse institutional instruments, our choice of instrument implicates value judgments as well as an interest in efficacy. Workers' compensation, for instance, departs from the morality of the common law of torts by making workplace accidents more a matter of collective responsibility and less a matter of individual responsibility. Implicitly, workers' compensation asserts that the relations among participants in a particular enterprise are the relations that matter for determining rights and responsibilities. The private law of torts, by contrast, implicitly asserts that the relations that matter are the relations among individual wrongdoers and their victims. This is a disagreement over the relevant relations of responsibility.

Workers' compensation differs from the private law of torts not only in lodging responsibility at an enterprise level instead of an individual one, but also in trading rights of recourse for assured protection. Workers relinquish the private power to call their employers to account through civil lawsuits in exchange for greater assurance of recovery for harm suffered. The value implications of preferring private law to direct regulation of risk, or an administrative scheme to private law, are real and important. Even so, it makes sense to see tort and workers' compensation as alternatives on the same institutional menu, battling for dominion over the same legal domain. That is how our law characteristically sees them, as applications of "remedy clauses" in state constitutions to statutory reforms of common law tort doctrine show.⁶⁰ Private law is a central feature of the domain of our law that addresses responsibility for avoiding and repairing accidental physical harm, but it is not the whole of the field. The law of torts is one member of a larger family of institutions. The choice between tort and workers' compensation should not be made simply by classifying one as private and the other as public—and then declaring an allegiance to private law. Doing so short circuits the normative analysis that ought to precede any choice. The right first question to ask and to answer is, "in the circumstances at hand, which institution is more appropriate, in light of the relations among those who impose risk and those on whom it is imposed?"

Stepping back even further from the various corners of the subject and turning our eyes toward the whole reminds us that it is a singular, and striking, feature of tort law that—alone among

⁵⁹ See Kenneth S. Abraham & Robert L. Rabin, *Automated Vehicles and Manufacturer Responsibility for Accidents: A New Legal Regime for a New Era*, 105 Va. L. Rev. 127 (2019).

⁶⁰ See e.g., *Horton v. Oregon Health and Science University*, 373 P.3d 1158 (Or. 2016) (interpreting, *inter alia*, Oregon's constitutional requirement that every person has a right to "remedy by due course of law for injury done him in his person, property, or reputation"). See generally, John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 Yale L.J. 524 (2005).

the major fields of law—tort is vulnerable to near total eclipse. The tort law of accidents can be all but erased by direct risk regulation and “social insurance”—as it has been in New Zealand. We would think differently about the criminal law if we knew, through existing institutional proof, that it could be replaced entirely by a regime of therapeutic treatment. We would think differently about property if some modern legal system had reconfigured it as an institution composed only of use-rights, and differently about contract if we had to grapple with an instance of it being wholly displaced by a scheme consisting only of unilaterally imposed private obligations. Yet modern tort law is vulnerable to just this sort of eclipse. Partial eclipse by regulatory preemption and by administrative schemes such as workers’ compensation, no fault liability for vaccination-related injuries, occupational diseases such as black lung, and nuclear accidents, is familiar and commonplace in American law. Near total eclipse exists elsewhere—in New Zealand.

The vulnerability of our law of torts to such eclipse casts doubt on the thought that tort law is an autonomous realm of “private law,” governed by its own *sui generis* internal principles. When it comes to grappling with accidental injury, tort is one institutional contender among several. Other, alternative institutions might—and sometimes do—take its place. Our institutions do not have to lodge responsibility for accidental harm primarily with individuals. They might lodge primary responsibility with activities, as both administrative schemes and forms of enterprise liability within tort law proper do. Lodging responsibility primarily with enterprises, not individuals, responds to the distinctive characteristic of modern risk as the byproduct of basic productive activities. The form of private law is not forced upon us as the only institution capable of constituting right relations among equal and independent persons.

The fact that modern tort law took shape as a response to the emergence of accidental harm as a fundamental social problem—and modern tort law’s entanglements with the institutions of the modern administrative state—underscore the point that theorists of tort as pure “private law” drastically to underrate the extent to which modern tort law is an aspect of the “background justice” that governs interactions which can be avoided only on pain of foregoing a normal life. For Ripstein, the private law of torts both is and is not a matter of what John Rawls’ called “background justice.”⁶¹ On the one hand, it is a matter of basic justice insofar as basic justice encompasses the justice of society’s main political, social, and legal institutions. Tort is a basic legal institution, whose rights and responsibilities are backed by the coercive power of the state. On the other hand, for Ripstein, tort law’s distinctive domain is the “foreground justice” of Holmes’ “isolated, ungeneralized wrongs.” Tort law governs interactions among individual persons in civil society whose paths happen to run afoul of one another as they go about their separate lives and pursue their distinct ends. Persons, in this picture, are independent agents pursuing their own distinctive, private purposes. When persons and their pursuits collide, the question is whether their collision is a case of one person wronging the other through faulty conduct.

This vision of the social world that our law of torts governs is misleading. Modern tort law arose to address the basic productive activities of the industrial revolution—mining, milling, railroading, and the construction of reservoirs and waterworks of unprecedented size and scale, among other activities—and it now addresses basic productive activities of our technological society—driving, flying, consuming mass-produced products, mass vaccination, nuclear power, autonomous vehicles, artificial intelligence and the like. Moreover, even when accidental injuries attributable to basic productive activities are not at issue, the law of torts remains a full member of the family institutions which fall under the purview of background justice. Tort obligations protect persons

⁶¹ Rawls 2001, *supra* note 18, at 10, 54, 118.

against various forms of impairment and interference by others as they go about their lives as members of civil society. The responsibilities that it imposes, and the rights that it recognizes, play central roles in establishing the security necessary for people to shape their own lives; those rights and responsibilities are enforced through the coercive powers of the state. Modern tort law is not centered on a distinctive domain of “foreground justice” constituted by the voluntary interactions of persons in civil society. It is preoccupied with interactions that are woven into the basic fabric of modern life and which can be avoided only on pain of foregoing a normal life.

IV. Tort and the Domains of Justice

Philosophically speaking, Ripstein’s theory is proudly and distinctively liberal. It is therefore unsurprising that he has taken pains to situate his theory within and against the most famous liberal theory of justice of modern times—namely, John Rawls’ theory of “justice as fairness.” In his 2004 engagement with Rawls, Ripstein zeros in on the fact that justice as fairness takes the basic structure of society as its subject.⁶² The “basic structure of society,” as Rawls conceives it, consists of a society’s “main political and social institutions and how they fit together into one unified system of social cooperation.”⁶³ It encompasses institutions and practices as fundamental and diverse as “the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family.”⁶⁴ For Ripstein, tort law is a part of the basic structure because protection against various forms of interference is necessary for individuals to freely form and pursue their conceptions of the good. “If what is mine is not subject to my choice, but to yours . . . then it is not mine to use in setting and pursuing my own conception of the good.”⁶⁵ Securing my means against interference by others requires not only a system of criminal law, but also a body of tort law. Rawls’ principles are not, however, suited to govern the law of torts because Rawls’ arguments from the original position are consequentialist and, therefore, preclude recognition of the deontological principles of duty and right that govern private law. “The parties in the original position,” Ripstein writes, “attach value only to states of affairs.”⁶⁶ They cannot, therefore, make sense of a body of law preoccupied with who did what to whom—with rights, wrongs, and responsibilities. The deontological structure of tort law “will always be invisible from the point of view of the contract argument.”⁶⁷

Ripstein’s location of the law of torts within the basic structure of society appears to distinguish his view from Weinrib’s. In Weinrib’s hands, the “idea of private law” might be read to suggest that tort law is an essentially autonomous realm of social life, answering only to its own internal ideals. “[P]rivate law,” Weinrib remarks, is “just like love” in that it needs no independent justification.⁶⁸ Ripstein has the better view. Tort obligations specify the extent to which our essential

⁶² Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *Fordham L. Rev.* 1811 (2004). Ripstein revisits the matter in Ripstein 2016, *supra* note 4, at 288-95. Other scholars concerned with the application of Rawls’ theory to private law have also focused on private law’s relation to the “basic structure.” See Freeman 2018; Kronman 1980; Kordana & Blankfein Tabachanik 2005; Kordana & Blankfein Tabachanik 2008; Murphy 1998; and Scheffler 2015, all cited *supra* note 13.

⁶³ Rawls 2001, *supra* note 18, at 39-40.

⁶⁴ Rawls 1999, *supra* note 12, at 6.

⁶⁵ Ripstein, *supra* note 62, at 1839.

⁶⁶ *Id.*, at 1822-23.

⁶⁷ *Id.*, at 1821. Both this and the preceding quotation from Ripstein are quoted in Freeman 2018, *supra* note 13, at 185.

⁶⁸ Weinrib 2012, *supra* note 6, at 6 (“Explaining love in terms of extrinsic ends is necessarily a mistake, because love does not shine in our lives with the borrowed light of an extrinsic end. Love is its own end. My contention is that, in this respect, private law is just like love.”). Professor Weinrib elaborates, and modifies, his position in Ernest Weinrib, *Reciprocal Freedom* (Oxford University Press, 2022). For a judicious appraisal, see Sandy Steel, *Private Right and Public*

interests—in physical and psychological integrity, in privacy, in reputation, in economic expectancies—are protected against interference by each other, and what kinds of interference they are protected against. The questions that tort law is concerned with are questions of basic justice because some institution must secure people against diverse forms of interference and impairment for them to be able to pursue their ends and purposes as equal and independent members of civil society. Tort’s domain is a domain of private justice, not public justice, simply because tort is concerned with what we owe *to one another* and not with our relations to the state as citizens and subjects. But this does not remove tort law from the domain of basic justice. Part of what we owe to each other in the way of justice is to devise and uphold institutions that protect our essential interests against unwarranted interference as we go about our lives in civil society.⁶⁹ Here, Ripstein and Rawls are on the same page.

Ripstein departs from Rawls in part because he agrees with Thomas Pogge’s argument that the methodology of the original position is “unavoidably consequentialist and aggregative . . . [because] it focuses only on outcomes. The self-interest of the parties leads them to compare alternative principles and the states of affairs they result in, and to choose the one that best guarantees a maximum share of primary goods and conditions that enable them to most effectively pursue their conceptions of the good.”⁷⁰ No attention is paid, Pogge believes, to how these states of affairs are brought about. Consequently, there is no room in Rawls’ apparatus for the kinds of deontological principles of duty and right that govern tort law. Those principles are concerned with what people owe—and do—to each other. Tort law distinguishes between affirmative duties to aid and negative duties not to harm, between bringing harm upon ourselves and inflicting harm on others, between violating other people’s rights and merely imposing losses upon them, and so on. Because the parties’ reasoning in the original position is (Ripstein thinks) consequentialist and concerned only with end states of affairs, Rawlsian justice cannot recognize these distinctions and principles.

In *Private Wrongs*, Ripstein recasts his argument. As we have seen, *Private Wrongs* frames the key distinction as one between “background justice” and “foreground justice.” And he explicates that distinction in terms of vertical and horizontal social relations. The basic role of the state is to provide “the background conditions for a social world of which everyone is a full member To be entitled to act on behalf of everyone, [the state] must stand in the right relation to each citizen over whom it exercises power. This vertical relationship is different in kind from the horizontal relations between private persons that are governed by the principle that no person is in charge of another.”⁷¹ *Private Wrongs* thus refines Ripstein’s earlier discussion of the division of responsibility between the law of torts and background justice:

Creating and sustaining a social world in which no person is in charge of another—in which interpersonal cooperation is voluntary—requires mandatory cooperation in providing the necessary institutions and resources to achieve these public purposes.

...

Right, Canadian Journal of Law and Jurisprudence (forthcoming 2025). Professor Weinrib’s position in *The Idea of Private Law* has been enormously influential and remains independently interesting.

⁶⁹ Compare Scheffler 2015, *supra* note 13, at 19.

⁷⁰ Freeman 2018, *supra* note 13, at 185-86, discussing Ripstein 2004, *supra* note 6262, and Thomas Pogge, Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions, 12 Soc. Phil. & Pol’y 221, 258 (1995).

⁷¹ Ripstein 2016, *supra* note 4, at 289.

[P]roviding people with the conditions of full membership in society is a matter of what John Rawls once described as “background justice,” that is providing conditions for free persons to set and pursue their own purposes.

...

[T]he idea of background justice presupposes what could be called “foreground justice,” that is, a system in which cooperation is voluntary rather than mandatory, in which the purposes pursued are determined by individuals . . . the foreground justice with which background justice contrasts supposes that individual citizens are in charge of themselves.⁷²

In the abstract, there is nothing particularly objectionable about the distinction between background and foreground justice, but, as Ripstein applies it, the distinction leads to misunderstanding both Rawls’ theory and the relation of tort law to basic justice.

Ripstein’s view of Rawls goes awry because—whatever the best characterization of the reasoning of the parties to the original position may be⁷³—Ripstein is mistaken to maintain that Rawls’ framework prevents the recognition of deontological principles of justice and morality. The first principle of justice is a principle of equal freedom, and the difference principle itself is a principle of reciprocity among equal, independent persons. It does not prescribe an end-state of affairs but, instead, governs ongoing social cooperation. The natural duties that the parties to the original position recognize—duties to uphold justice, of mutual respect, to not injure others or harm the innocent, and so on, are all deontological.⁷⁴ To be sure, Rawls’ principles of justice do not speak directly to the problems with which the law of torts grapples. Rawls’ principles are fundamentally concerned with questions of distributive justice, and torts are, as Ripstein thinks, wrongs. However, the two domains are complementary in a way that Ripstein resists. The rights that people have as a matter of distributive justice are fundamental to the responsibilities imposed by the law of torts. The right to the physical and psychological integrity of one’s person grounds obligations on the parts of others to exercise reasonable care, not to touch others in harmful or offensive ways, to avoid inflicting emotional distress by outrageous conduct, and so on. The right brings reciprocal principles of responsibility into play. Tort is like crime in this respect. Both bodies of law embody principles requiring people not to mistreat one another in various ways, and both bodies of law ground their core responsibilities in the rights that people have. And there is a larger lesson here: the principles of justice that govern the law of torts are not exempt from the requirements of basic justice.

V. Background Justice and the Law of Torts

The background principles of justice for the basic structure of society establish a framework that constrains the law of torts, just as those principles constrain other legal institutions. Nothing in those principles, though, requires “foreground justice” in the form of private law as Ripstein conceives

⁷² Id. At 290.

⁷³ Ripstein’s interpretation appears to misunderstand the reasoning of the parties to the original position. They are fiduciaries whose task is to select principles of justice that are best for those they represent, in whatever social position they may turn out to occupy. They select from a menu and make pairwise comparisons of principles. Some of these principles (e.g., principles of utility) specify desirable end states of the world, but others (equality or opportunity) specify conditions that are essentially procedural. See Rawls 2001, *supra* note 18, at 83, 95. In doing this, they consider the application of the principles from the points of view of different representative persons (e.g., working class and entrepreneurial). It is difficult to see why anything in this procedure commits the parties to reasoning in aggregative and consequentialist terms. Moreover, the principles chosen are not end-state ones. The difference principle, for example, prescribes a relation of reciprocity, not an end-state of the world.

⁷⁴ Freeman 2018, *supra* note 13, at 184-85 (citing Rawls 1999, *supra* note 12, at 97). See also Rawls 2001, *supra* note 18, at 57 (describing the difference principle as a principle of “pure background procedural justice”).

it. “Private law”, as Ripstein conceives it, embodies the particular morality that it does because it has as its master principle that everyone is in charge of himself or herself, and no one is in charge of anyone else. And it ties that principle to the unity of right and remedy. Remedies restore what wrongs take away, mitigating the material effects of wrongs by placing the victim in the position that they would have occupied had the wrong “never happened.” Tort as “private law” thus treats the law of torts as a highly autonomous domain of interpersonal justice because tort law simply accepts that we are entitled to the means that we happen to have, even if the justice of our claims to those means is debatable as a matter of basic, background justice.⁷⁵

This severing of tort from background justice goes too far. First, as we have already noted, Ripstein’s characterization of private law as “foreground justice” implies that tort law’s domain consists of essentially voluntary interactions. This is unpersuasive. In our world, the principal preoccupations of the law of torts are basic social activities, avoidable only on pain of foregoing a normal life—activities like driving, or taking public transportation, or walking, or bicycling, or being vaccinated. Participation in these activities is not easy to escape. The law of torts and related institutions therefore play important roles in establishing (or failing to establish) the *background* justice necessary for persons to pursue independent lives as equal members of society. They are a basic part of basic justice. In an ideally just world, the principles governing the basic social activities responsible for the infliction of serious harms on persons would be conducted in accordance with principles of precaution and responsibility that secured for everyone the fullest feasible protection against physical impairment and death.

Second, Ripstein’s uncompromising insistence that “the point of tort litigation is to resolve the specific dispute between the parties currently before the court, based entirely on what transpired between them,”⁷⁶ also overstates the matter. For one thing, this thesis requires tort law simply to accept that everyone is entitled to the means that they happen to have, even if the justice of their claims to those means is debatable as a matter of background justice. For another, this thesis implies that tort law is not just private in the sense of involving relations among persons in civil society in contrast to relations between persons and the state, but private in the sense of dealing with matters that are not of public concern, full stop. Matters that are private in this second sense are autonomous from larger social and political questions and therefore exempt from governance by basic principles of justice. Yet, even in civil society, the relations among persons are always entangled with larger questions of justice and injustice. Gender discrimination, past and present, may infect damage awards in tort lawsuits, for example. Reliance on earnings tables to project what a plaintiff would have earned had the defendant not injured her may introduce and reproduce gender- and race-based earnings differentials. Those differentials reflect histories of injustice and discrimination.⁷⁷ Background injustice may thus play an important role in conferring upon people the means that they have. To simply exclude this fact from consideration because those social injustices are not actions that “transpired between” the parties is to beg the question. Whatever one ultimately makes of the contamination of the tables that courts use to compute tort damages by past and present injustice, it is a mistake to claim that the existence of such contamination is irrelevant to how tort law should proceed. Justice between the parties to a civil wrong cannot be unquestionably entitled to reinforce larger injustices.⁷⁸

⁷⁵ Ripstein 2016, *supra* note 4, at 23–24.

⁷⁶ *Id.*, at 23.

⁷⁷ See Ronen Avraham & Kimberly Yuracko, Torts and Discrimination, 78 Ohio St. L.J. 661 (2017).

⁷⁸ Indeed, departures from the tort norm of full compensation are quite common and quite commonly rooted in the perceived injustice of full compensation in tort, because full compensation in tort reproduces background injustices. See e.g., Migdal Insurance Company v. Abu-Hana (Israeli Supreme Court, sitting as Court of Civil Appeals, 2005) [improve

Third, Ripstein distinguishes sharply between interfering with someone else's use of their means by violating their rights, and "failing to provide that person with a favorable context in which to use those means."⁷⁹ The former is an impermissible wrong; the latter is unobjectionable. This distinction is too crude; it overlooks the fact that private interactions can cumulate in systemic injustice. When tort law is treated as an autonomous realm of voluntary individual interaction, it is vulnerable to "the tendency of individual transactions to erode the background conditions necessary for everyone to be a full participant in society."⁸⁰ That is one of the lessons of the struggles over assumption of risk and workplace safety in the latter half of the nineteenth century. In a world in which employers require employees to waive their rights to safe workplaces as a condition of employment, the cumulative effect of each worker "choosing" to waive their right to a safe workplace may be to strip all workers of the right to a safe workplace. In such a world, no single worker has the bargaining power to insist that their right to a safe workplace be honored. Only a critical mass of workers (a union) has that power. Individual workers must choose between not working and waiving the right. For anyone who is not independently wealthy, that choice is no choice at all. Holding a paying job is necessary, not optional. In short, to be put to a choice between having a job and having a right to a safe workplace is to be deprived of one's right to a safe workplace. Yet that right is itself one of the conditions of effective agency as an equal, independent, and fully participating member of society.

Moreover, the problem of individual contractual choices cumulating in systemic injustices that undermine the "background conditions necessary for everyone to be a full participant in society" is not peculiar to the workplace. The history of product liability law in the first half of the twentieth century is another case in point. Contractual disclaimers of warranty protection in contracts of adhesion left product users with little or no legal assurance of protection against harm at the hands of defective products.⁸¹ Economic analyses of how free contractual choice can lead to "races to the bottom" in terms of product quality and safety show why the threat of contractual agreement cumulating in injustice is a standing and pervasive one.⁸² History and theory teach the same lesson: contractual waivers of rights to safety can cumulate into systematically unjust institutional arrangements. Systems of voluntary cooperation must be policed by principles of justice to avoid these pitfalls.

Next, it is unclear why we should regard the choice for tort—and against regulation or administration—as marking a radical division between the domains of background and foreground justice. Here, we need to recall, once again, that modern tort law took shape as a response to the rise

cite]) (holding that damages for an injured minor's loss of earning capacity should be computed according to the presumption that the minor would have earned the equivalent of the national average wage, regardless of sex, religion, ethnicity, etc.). California has recently enacted legislation that prohibits incorporating gender, race, and ethnicity in calculations of lost earning capacity. See Cal. Civ. Code § 3361. Administrative schemes routinely depart from the tort norm of full compensation, partly because the tort norm is regarded as unjust. See e.g., Mike Steenson & Joseph Michael Saylor, *The Legacy of the 9/11 Fund and the Minnesota I-35w Bridge- Collapse Fund: Creating A Template for Compensating Victims of Future Mass-Tort Catastrophes*, 35 Wm Mitchell L. Rev. 524 (2008-2009) (describing and advocating for such departures).

⁷⁹ Ripstein 2016, *supra* note 4, at 94.

⁸⁰ Id., at 291 (citing to John Rawls, *Political Liberalism*, 267 (1993)).

⁸¹ See *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960); *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring).

⁸² See George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. Econ. 488 (1970). For a brief, incisive discussion of the phenomenon in the context of product safety see Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563, 597-603 (1982).

of accidental injury as a pressing *social* problem. The forms of liability that Ripstein rejects are misunderstood when they are represented purely as forms of social insurance. These schemes characteristically combine social insurance in some form with direct regulation of risk. By doing so, they construct communities of collective *responsibility*. They respond to the fact that “the torts with which our courts are kept busy today are mainly the incidents of certain well-known businesses . . . railroads, factories, and the like”⁸³ by lodging responsibility at the activity or enterprise level. The insight captured by Jeremy Waldron’s tale of “Fate” and “Fortune” at the outset of his defense of the New Zealand accident compensation scheme in Rawlsian fairness terms is fundamental to these forms of responsibility:

Two drivers, named Fate and Fortune, were on a city street one morning in their automobiles. Both were driving at or near the speed limit, Fortune a little ahead of Fate. As they passed through a shopping district, each took his eyes off the road, turning his head for a moment to look at the bargains advertised in a storefront window. (The last day of a sale was proclaimed, with 25 percent off the price of a pair of men’s shoes.) In Fortune’s case, this momentary distraction passed without event. The road was straight, the traffic in front of him was proceeding smoothly, and after a few seconds he returned his eyes to his driving and completed his journey without incident. Fate, however, was not so fortunate. Distracted by the bargain advertised in the shoe store, he failed to notice that the traffic ahead of him had slowed down. His car ploughed into a motorcycle ridden by a Mr. Hurt. Hurt was flung from the motorcycle and gravely injured. His back was broken so badly that he would spend the rest of his life in a wheelchair. Fate stopped immediately of course to summon help, and when the police arrived he readily admitted that he had been driving carelessly. When Hurt recovered consciousness in [the] hospital, the first thing he did was instruct his lawyers to sue Fate for negligence. Considering the extent of his injury, the sum he sought was quite modest—\$5 million. . . . But modest or not, it was sufficient to bankrupt Mr. Fate. . . .⁸⁴

For Waldron, the injury that Fate inflicted on Hurt is characteristic of the activity of driving. We are all prone to lapses. In any individual instance, it is merely a matter of luck whether a lapse results in devastating injury—or not. It misses the point to pin individual responsibility on Fate just because he inflicted the injury in question—and it is unfair to boot. Fate did not *do* anything different from Fortune, he was just unlucky. Ripstein’s view is that Fate and Fortune *did* two very different things. Fortune committed “negligence in the air” whereas Fate negligently wronged Hurt.

Both Ripstein’s and Waldron’s *descriptions* of Fate and Fortune’s respective actions are plausible. The choice between their positions cannot be made merely by asking which better describes the situation. For our present purposes, though, no choice between them needs to be made. The important point is that—because accidents in our social world are mostly the incidents of organized activities—accidents can be described *either* in terms of individual responsibility or in terms of collective responsibility at the activity or enterprise level. Descriptions like Ripstein’s very strongly dispose us to see the matter in terms of individual responsibility. Descriptions like Waldron’s very strongly dispose us to see the matter in terms of collective responsibility. Both descriptions, and both

⁸³ Holmes 1920, *supra* note 56, at 183. **[To Do: check my edition of Holmes for pinpoint cite]**

⁸⁴ Waldron, Moments of Carelessness and Massive Loss, in *Philosophical Foundations of Tort Law* 387, 387 (David G. Owen, ed., Oxford, 1995). Waldron’s example is fiction, but not fantasy. A 1970 U.S. Department of Transportation Study reported: “In Washington, D.C., a ‘good’ driver viz., one without an accident within the preceding five years, commits on average, in five minutes of driving, at least nine errors of different kinds” U.S. Department of Transportation: Automobile Insurance and Compensation Study 177-78 (1970) (quoted in Tony Honoré, *Responsibility and Fault*, at (?) 36–37 (Hart, 1999))**[To Do: Check this]**.

forms of responsibility, are present in our law. Individual fault liability is the heart of private law as Ripstein conceives it and is the dominant principle of responsibility in our own common law of torts. Collective responsibility is evident in forms of enterprise liability within and outside the law of torts. Within the law of torts, enterprise responsibility manifests itself in aspects of vicarious liability, products liability, abnormally dangerous activity liability, and nuisance liability. Beyond the law of torts, enterprise responsibility manifests itself in workers' compensation schemes, in no-fault automobile insurance, and in statutory schemes for vaccination-injuries, black lung disease, and nuclear accidents. Most expansively, it expresses itself in the New Zealand Accident Compensation scheme, which takes the relevant community of responsibility to be society at large.

Ripstein's presentation of enterprise responsibility alternatives to tort casts them as purely a matter of (social) insurance. They are not. Insurance is normally one piece of the package—with some form of risk-regulation being the other major piece. As this combination of institutional instruments suggests, these schemes govern forms of human agency. They are concerned with the harmful effects of basic social activities. Broadly speaking, these schemes are relational. They are concerned with responsibilities among persons as participants in dangerous but beneficial activities, and toward those whom the activities injure. Social insurance, as Ripstein conceives it, characteristically addresses harms qua harms—injury and illness, whatever their origins. Harms inflicted by natural forces (famines, floods, earthquakes, and epidemics) are as much the province of social insurance as harms arising out of human agency are. Yet, enterprise responsibility only governs harmful human agency.

Finally, Rawls' theory of justice is compatible with either enterprise responsibility schemes or the individual responsibility of "private law" as Ripstein conceives it. Rawls' theory no more chooses between these alternative forms of responsibility for human agency which is harmful, wrongful, or both, than it settles the choice between capitalism and socialism as an economic matter. Waldron, pithily, makes the basic Rawlsian case for the New Zealand approach:

Both schemes [individual fault liability and a New Zealand style accident scheme] treat equals equally, and in that sense both of them satisfy principles of fairness. So how are we to choose between them? The question seems to be one for the drivers, since the victims should receive exactly the same (full) compensation, provided each scheme is perfectly administered (on its own terms). Which scheme would the drivers choose—particularly if they did not know in advance (how could they?) whether their negligence was actually likely to cause injury or not?

The answer seems to me to be obvious: if there was ever a case for maximin, this is it. If people opt for the liability lottery, drivers face a non-trivial chance of complete ruin if they lose—all for the hope of a gain which consists simply of not losing anything if they win.⁸⁵

We do not need to come to a settled conclusion on the ultimate, respective merits of New Zealand's accident compensation scheme and fault liability in tort as regimes for governing automobile accidents. To form such a judgment, we would need to know not just what these schemes aspire to as a matter of normative prescription, but also how they work in practice. For our purposes, it is sufficient to note that both sides of the debate can draw on Rawlsian ideas to support their positions. Ripstein, for his part, makes the case that a "foreground justice" account of "private law" can be integrated with a Rawlsian (or other liberal) account of "background justice." With the caveat that "private law" must be properly constrained by principles of background justice so that it does not, for instance, permit individual actions to cumulate in social injustice or allow reparation in private law to do gender or racial injustice, Ripstein is right. The mistake would be to think that Rawls' framework—or some other

⁸⁵ Waldron 1995, *supra* note 84, at 406-07.

liberal theory of justice—mandates either “private law” or a New Zealand scheme, or some intermediate arrangement, as a matter of first principles of justice. It does not. To choose between these institutional alternatives, we need to supplement basic principles of justice with additional considerations and information.

VI. Larger Lessons

Theorists of tort as “private law” are right to argue that tort plaintiffs are not mere conduits through which social costs and benefits pass. Tort plaintiffs claim in their own names, asserting their own rights against defendants who they say have wronged them. And they seek to hold these defendants responsible for repairing the harm that they have done. More generally, civil recourse and corrective justice theorists are right to argue that the law of torts is a law of right and responsibility, governing the relations among persons in civil society. Ripstein’s version of the theory is also right to insist that the law of torts is an institution which governs an important domain of basic justice. The kind of security from diverse forms of unjustifiable interference and impairment that the law of torts seeks to establish is one of the background conditions necessary for people to be able to pursue their ends and purposes as free and equal members of civil society. But Ripstein betrays his own insight when he subscribes to the idea that “private law” is an autonomous domain of justice, governed solely by its own distinctive principle of justice that “each of us is in charge of ourselves and none of us is in charge of anyone else.”

Unlike love in Weinrib’s telling, tort law is not a mode of valuing illuminated only by its own internal light. Tort law is embedded in a larger political morality. Its primary obligations specify ways in which we may and may not interfere with, or impair, each other’s interests. By doing so, tort law’s primary obligations help to establish the security against various forms of unacceptable interference by others that is an essential background condition for people to be able to pursue their conceptions of the good as they go about their lives. And security is a primary good, if anything is. “[S]ecurity no human being can possibly do without; on it we depend for all our immunity from evil, and for the whole value of all and every good . . . since nothing but the gratification of the instant could be of any worth to us, if we could be deprived of everything the next instant.”⁸⁶ Tort law’s secondary powers of recourse, and obligations of reparation, for their part, support the ends and values pursued by its primary norms. They create reasons for people to honor their primary obligations not to interfere with and harm others in various ways, and they seek to repair and set right the harm done by failures to discharge those primary obligations. But it is a mistake to regard tort law’s secondary powers of recourse and duties of repair as the heart and soul of the institution. They are essential aspects of the institution, but the primary obligations that they serve are the institution’s heart and soul. For it is the primary obligations that take the lead in establishing the security that people need to lead decent lives as equal and independent members of civil society. It is the primary obligations that do the most to establish basic justice. The most important single development in twentieth century tort law was the repudiation of privity of contract and the subsequent conquest by tort law of the domain of product accidents. That extension of tort law “fixed . . . responsibility . . . where[] it w[ould] most effectively reduce the hazards to life and health inherent in defective products that reach the market.”⁸⁷

For present purposes, the fact that tort and related institutions regulating safety and administering compensation for harm at the hands of others are institutions of basic justice has three important implications. First, internal questions of tort law—what torts to recognize, whether product accidents should be controlled by contract law or tort law, what duties owners of real property owe

⁸⁶ John Stuart Mill, *Utilitarianism*, 67 (Oskar Piest, ed. 1957).

⁸⁷ *Escola v. Coca-Cola Bottling Co. of Fresno*, 150 P.2d 436, 440(1944) (Traynor, J., concurring).

to entrants on their land, and so on—are important questions of justice. To choose contract over tort to govern product-related risks of physical harm may jeopardize the safety of those who can only bring to bear relatively limited purchasing power or sophistication. Preferring contract to tort may undervalue the urgency of our interest in the physical integrity of our persons and overvalue our interest in tailoring our product purchases to our tastes. In the context of landowner liability, to prefer the old regime of the status categories over the new regime with its default duty of reasonable care may overvalue our interest in the free use of our real property and undervalue our interest in the safety of our persons. To leave our privacy wholly unprotected may deprive us of one of the conditions essential to our psychological development as beings whose sense of self is not wholly exhausted by our presentations of our persons to others. To deny any protection to our psychological integrity is to leave undefended an interest that is, in its core, as urgent as our physical integrity. Because security against various forms of unacceptable interference by others is an essential institutional condition for us to be able to pursue our conceptions of the good as we see fit, tort is an important institution.

Second, treating tort as “private law”—governed by its own unique principle or distinctive form, and radically discontinuous with adjacent regulatory and compensatory institutions—deforms both tort theory and our broader thinking about institutional revision and reform. The arc of history and economy may make a once justifiable tort regime unjustifiable. The emergence of a mass industrial economy, for instance, may have made a previously acceptable contractual regime for product accidents unjust and undesirable.⁸⁸ The rise of systematic industrial accidents may likewise have undermined the justice and desirability of a workplace liability regime of fault on the employer’s side and assumed risk on the employee’s side. Tort theory ought to help us grapple with such transformations. Can we manage them by rebuilding the common law, plank by plank and over time, as *MacPherson*, *Henningsen*, *Escola*, §402A of the *Second Restatement*, and their progeny do for product accidents? Or must we displace tort law with some mix of direct risk regulation and reparation? If so, what community of risk should we select as the proper community of responsibility? So, too, tort theory ought to provide some guidance when we face new forms of harm. Environmental harm is, or was once, a case in point. Can we adapt the torts of trespass and nuisance to respond to environmental harm? Or must we also invent new regulatory institutions? These are hard questions to ask, much less to answer, if we are in the grip of a tort theory that teaches us that the law of torts is autonomous and complete, perfect on its own terms once we comprehend those terms correctly. Modern statutory environmental law arises because environmental harms could not be adequately addressed within the common law of property and tort. Similar questions are now being raised by the emergence of autonomous vehicles and artificial intelligence. Can we treat these as “products” or “agents” of a certain sort and wedge them into existing legal regimes, remaking the regimes as we do so? Or must we invent new legal frameworks? Conceiving of tort as “private law”—and of tort theory’s primary task as making manifest the normative logic of private law—has had the, perhaps unintended, effect of placing these questions outside the boundaries of tort theory’s domain and concerns. Tort law, broadly conceived, is a necessary legal institution because the phenomenon of doing and suffering *is* inherent in the metaphysics of human action. But tort law is also a historically contingent, ever-changing institution, which grapples imperfectly with different threats to our safety and security over time. To orient us toward an ever-changing world in a helpful way, tort theory must also bring this fundamental aspect of tort law clearly into view.

Third, in an imperfectly just society, tort law’s norms of repair, celebrated by Weinrib and Ripstein, are double-edged swords. They may rightly restore to people means that have been wrongly

⁸⁸ “Precedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day.” *MacPherson v. Buick*, 217 N.Y. 382, 391 (1916) (Cardozo, J.).

taken from them, but because the means that people have may be the product of present and past injustice, duties of repair may also reinforce enduring social injustices. When one person owns a Rolls-Royce and another can afford only a bike, justice requires that the bike owner exercise reasonable care to avoid scratching the paint of the Rolls-Royce. Requiring the wealthy to suffer wrongful harm at the hands of others without recourse is itself unjust. Those who benefit from distributive injustice do not forfeit their rights that others respect the integrity of their persons and their property. Distributive justice is a collective responsibility. We all share responsibility for combating injustice and building a more just world. But when the bike owner fails to exercise due care and scratches the Rolls-Royce, it is hardly obvious that justice unambiguously commands complete repair of the damage done.⁸⁹ Those who are disfavored by distributive justice are not obviously obligated to devote their lesser holdings to restoring the greater holdings of the more favored. In a world where wealth and means are unjustly distributed, tort reparation often implicates what Henry Sidgwick called the “paradox of conservative injustice.” In the circumstance that paradox contemplates ideal justice requires reform, but conservative justice requires respect for the reasonable expectations to which existing institutions and entitlements give rise.⁹⁰ The result is a moral dilemma, and a pervasive one:

Every reform of an imperfect practice or [an unjust] institution is likely to be unfair to someone or other. To change the rules in the middle of the game, even when those rules were not altogether fair, will disappoint the honest expectations of those whose prior commitments and life plans were made in genuine reliance on the continuance of the old rules.⁹¹

We have *prima facie* obligations *both* to reform unjust institutions *and* to honor the reasonable expectations to which existing institutions give rise. When these obligations conflict—as they commonly do—we cannot discharge both obligations fully. We must balance the injustice of the existing institutions against the extent of justified reliance upon those institutions. We are likely to treat someone unfairly, no matter how we strike the balance. Lesser injustice may be the best that we can hope for.

In the case of tort reparation, this dilemma manifests itself in recent debates over the construction and use of damage tables. Tables that reproduce the effects of discrimination, past and present, may do a good job of estimating a victim’s lost earnings, but run afoul of the precept that we should mitigate, not reproduce, systemic injustices.⁹² Our tort practices in fact respond to dilemmas of this kind. Systematic reform efforts such as California’s statutory reform of damage calculations in tort lawsuits to promote “fairer” awards for members of groups that have historically suffered from discrimination is one attempt to reconcile the competing demands of reform and reliance more

⁸⁹ See Diego M. Papayannis, *The Morality of Compensation through Tort Law*, 36 *Ratio Juris* 3 (2023). Papayannis’ paper contains a penetrating discussion of why tort law’s secondary norm of reparation may be more likely to work injustice than its primary norms of non-interference and harm-avoidance.

⁹⁰ Joel Feinberg, *Duty and Obligation in the Non-Ideal World*, in *Rights, Justice, and the Bounds of Liberty*, 252-64 (1980). Feinberg is following Henry Sidgwick, *The Methods of Ethics*, 271–74, 293–94 (Hackett Publ’g Co., 7th ed. 1981) (1907). For discussion of this problem in the context of tort damage awards that tend to reproduce gender and racial injustice, see Gregory C. Keating, *Torts and the Paradox of Conservative Justice: A Response to Avraham and Yuracko*, 78 *Ohio State L.J.* 29 (2017). To put the matter in Rawls’ terms, we live under conditions of “partial compliance” with justified principles of justice. See Rawls (1999), *supra* note 12, at 8, 308-09. In our world of partial compliance, it may well be less unjust (a) not to require a tortious wrongdoer whose means are significantly less than they should be as a matter of justice to compensate a victim they have wronged whose means are significantly more than they should be as a matter of justice so fully as to make it “as if the wrong never happened,” than it is (b) to deny the wronged victim the compensation required to do so.

⁹¹ Feinberg, *supra* note 90, at 252.

⁹² See *supra*, note 78, and accompanying text.

satisfactorily.⁹³ But statutes are not the only tool available. A settled practice of not pursuing “blood money” partially reflects concerns with the injustice of impoverishing tortfeasors⁹⁴; and juries may often engage in their own *ad hoc* equitable balancing of competing precepts of justice.⁹⁵ Messy as that may be, it is the consequence of the fact that principles of justice other than those specific to the institution of tort law itself have something to say about the justice of reparation in tort.

The morality of tort law is thus less pure than theorists of tort as “private law” suppose. But tort law itself may also be more important. Tort law’s morality is complex because tort is an institution of basic justice, operating in a non-ideal social world.

⁹³ Cal. Civ. Code § 3361.

⁹⁴ See Tom Baker, Blood Money, New Money, and the Moral Economy of Tort Law in Action, 35 Law & Society Review 275 (2001). Indeed, the moral defensibility of tort law as we know it may depend on the presence of insurance. See ADAM SLAVNY, WRONGS, HARMS, AND COMPENSATION (2023) at 46-47 (noting that the interests of tortious wrongdoers put limits on the reparation that may be demanded of them and that insurance is essential to making such demands justifiable) and at 63 (suggesting that, in an important range of cases, the availability of insurance “makes the difference between the justified and unjustified enforcement of corrective duties.”)

⁹⁵ In *Li v. Yellow Cab Company of California*, 532 P.2d 1226, 1231 (1975), overturning the rule of contributory negligence and replacing it with a rule of pure comparative negligence, the California Supreme Court approvingly cited William Prosser’s assertion that “juries often do in fact allow recovery in cases of contributory negligence, and that the compromise in the jury room does result in some diminution of the damages because of the plaintiff’s fault.” Equitable adjustment of principles seems to be one of the things we expect from juries.