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As If It Had Never Happened

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> *[The logical positivists of] [t]he Vienna Circle made certain apparently very damaging criticisms of the kind of philosophy that was current in their day.... We ... share with the critics a basis of discussion such as neither of us shares with those who have chosen to ignore these important developments and to carry on in their old ways as if nothing had happened.*
>
> R.M. Hare[1]

[T]he injured right lives on in a claim for damages.[2]

Law students are usually told that the purpose of damages is to make it as if a wrong had never happened.[3] Although torts professors are good at explaining this idea to their students, it is the source of much academic perplexity. Money cannot really make serious losses go away, and it seems a cruel joke to say that money can make an injured person "whole." Worse still, if money could make an injured person whole, injuring someone and then paying them seems just as good as not injuring them at all.

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1. Hare continues, "[W]e therefore find it hard to discuss philosophy with, or to read the books of, people who do not seem to be *worried* about the problem of convincing the sceptic that their philosophical propositions mean something." R.M. Hare, *A School for Philosophers*, 2 RATIO 107, 117 (1960), *reprinted in* R.M. HARE, ESSAYS ON PHILOSOPHICAL METHOD 38, 49 (1972) [hereinafter HARE, METHOD].

2. WALTER VAN GERVEN ET AL., COMMON LAW OF EUROPE CASEBOOKS: TORT LAW 753 (2000).

3. *See, e.g.*, FOWLER V. HARPER & FLEMING JAMES, JR., 2 THE LAW OF TORTS 1301 (1956) ("If defendant is a wrong doer and he is to pay damages to an innocent plaintiff, it seems eminently fair that these damages should (at least) put the plaintiff as nearly as may be in the same position he would have been in if defendant's wrong had not injured him.").

My aim in this Essay is to redeem the common sense idea that damages really do make it as if a wrong had never happened. I do so by focusing on the normative structure of private rights to person and property. I first show how such rights are best understood in terms of an entitlement to have certain means subject to your choice. I then go on to argue that although wrongdoing can cause a factual loss, it does not change what a person has a right to. I will then show how money can be understood as restoring to the wronged party the means he or she is entitled to. I will close with some broader reflections about the relation between law and morality.

I. THE TRADITIONAL CONCEPTION OF PRIVATE LAW AND THE "MODERN" OBJECTIONS

There is a familiar way of thinking about the law of private remedies, both loss-based and gain-based, according to which the purpose of a remedy between two private parties is to make it as though the wrong in question had never occurred.[4] So, for example, in the most familiar case of compensatory damages, defendant is made to repair plaintiff's loss, so that plaintiff will be in the situation in which she would have been, if defendant had not wronged her.[5] In the equally important, if less familiar, context of gain-based damages, the defendant is made to surrender the benefits she gained through wronging the plaintiff. Thus *defendant* is put back into the position in which she would have been, if she had not wronged plaintiff.[6] Law students accept something like this picture in the first week of their torts course, as do experienced lawyers trying to settle a case, asking what it would take to make a problem "go away." My aim is to defend this familiar wisdom.

The supposed difficulties are almost as familiar as the view itself: First of all, a sum of money, even a huge sum of money, does not really make it as though someone has not suffered terrible bodily injury, or lost a loved family member. Personal injuries are not fungible, and so no amount of money can make them "go away." In

4. *See id.*
5. *See id.*
6. *See id.*

cases of property damage, if injurer is made to compensate victim, it may be that, from the point of view of the victim, it is as though things had never happened; but, it might be said, it is hardly so from the point of view of the injurer, who is left worse off as a result. So, the argument continues, we cannot undo the harm but can only transfer it, and the cost of making the transfer exacerbates the problem.

The conclusion usually drawn from this line of thought, at least since Holmes's *The Common Law*, is that the "moral phraseology" in which the law "abounds" cannot be taken at face value.[7] The real inquiry is not about making wrongs go away, indeed, not about wrongs at all, but rather about when we should call upon the "cumbrous and expensive machinery" of the state to transfer a loss from one person to another.[8] Sophisticated people take old-fashioned talk about making a plaintiff "whole," or making it as though a wrong had never happened, as a sort of smokescreen to disguise the difficult questions of social policy that judges are forced to confront.[9] Patrick Atiyah further laments the fact that compensatory damages are a "lottery," and that their payment results in higher consumer prices.[10] Like the philosophers on whose behalf Hare speaks in the opening quote, people such as Atiyah doubt these familiar claims about damages mean anything.

This line of thought is not limited to damages. Guido Calabresi describes "causation" as a "weasel word" behind which judges hide their policy choices.[11] Lord Denning asserts that

> the truth is that all these three duty, remoteness and causation—are all devices by which the courts limit the range of liability for negligence or nuisance.... [I]t is not every consequence of a wrongful act which is the subject of compensation.

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7. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 79 (Little, Brown & Co. 1951) (1881).

8. *Id.* at 96.

9. *See* P.S. ATIYAH, THE DAMAGES LOTTERY 9-21 (1997). For a review of that book, see Arthur Ripstein, *Some Recent Obituaries of Tort Law*, 48 U. TORONTO L.J. 561 (1998).

10. *See* ATIYAH, *supra* note 9, at 143.

11. GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 6 n.8 (1970).

> The law has to draw a line somewhere.... [U]ltimately ... it is a question of policy which we, as judges, have to decide.[12]

The common sense view is also said to run into difficulty in circumstances in which the injured party ends up better off as a result of the wrong against her. In cases of "waiver of tort," plaintiff declines to make the claim in tort for the wrong she has suffered, demanding instead that defendant disgorge the gains he garnered by wronging her. As a matter of legal strategy, as well as self-interest, a plaintiff will only waive her tort rights when the defendant's gain exceeds her loss. In such cases, she ends up doing better for having been wronged. How can two remedies that differ in their magnitude—the feature that is of immediate interest to the parties—each serve to make it as though the wrong in question had never happened? If that is not enough of a puzzle, how can they do so solely at the election of the plaintiff?

The solution to all of these problems can be found in other ideas that are both as familiar and unpopular as the problems themselves: the legal distinction between harm and wrongdoing, and the dependence of remedies on primary rights. It is a commonplace of legal analysis that not all harms are legal wrongs, and not all legal wrongs are harms. If I cut across your lawn without your consent, I commit a trespass against you, but any harm that I do to you is well below the *de minimis* range. I wrong you nonetheless, even if it is not worth your while to do anything about it. Another commonplace of private law is that not all harms are wrongful. If you lure customers away from my business, you harm me, but as a matter of legal doctrine you do not wrong me. Again, if you damage property that I depend on, but have no legal right to, you harm me without wronging me. I have no legal grounds for complaint. It is equally a commonplace that private law remedies follow rights: the plaintiff in a tort action comes before a court claiming that defendant has wronged her, and seeking a remedy to address that wrong. None of the puzzles arise if these basic ideas stay in focus.[13]

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12. Lamb v. London Borough of Camden, [1981] Q.B. 625 (A.C.).

13. The misunderstandings that arise once people move away from these familiar ideas are not inconsequential, for they have come to carry weight outside of the Academy as well as within it. For example, the Virginia tort reform statute sets a flat cap for medical malpractice damages. *See, e.g.*, Pulliam v. Coastal Emergency Serv., 509 S.E.2d 307, 310 (Va.

If the common sense idea is to be redeemed as an interpretation of the law of damages, exactly what *has* happened and how things would stand if it *had not* happened need to be specified. That is what I propose to do. I will argue that we can understand the idea that damages give expression to underlying rights by focusing on the idea of a wrong, and so on the idea that damages serve to make it as though the wrong had never happened.

These conclusions may strike you as bizarre, callous, or both. There are *many* important respects in which money damages can never undo terrible things that have happened. Most significantly, I do not mean to deny the tremendous human significance of suffering or loss. My claim is that despite these important dissimilarities, the sole rationale for granting damages at all—for bringing the coercive and cumbrous machinery of the state to bear on a particular defendant to require him to compensate the plaintiff he has injured—is the respect in which damages make it as if the wrong had never happened. It also does not follow that the wrong does not matter if it can be made good: the remedy serves to repair the damage, not to license it. The point of repairing it, I shall argue, is to restore to plaintiff the means to which he or she had a right.

The claim that damages serve to make it as if a wrong had never happened is not a factual prediction about the effects of a payment of damages, but rather a normative claim about the relation between wrongdoing and repair. Private law enforces the rights that private persons have against each other. Those are not rights against harm, as such, but rather rights against injuries brought about in certain specified ways. The rights in question cannot be identified apart from a specification of the wrongs that would violate them. Thus, they are not rights against harms in the sense in which Mill's "harm principle" has become a mainstay of debates about the

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1999) (upholding damages cap as consistent with the Virginia and U.S. Constitutions); Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525 (Va. 1989); *see also* Gourley v. Neb. Methodist Health Sys., Inc., 663 N.W.2d 43, 70 (Neb. 2003) (per curium) (upholding NEB. REV. STAT. § 44-2825(1) (Reissue 1998) of the Nebraska Hospital-Medical Liability Act, which in 2003 limited recoverable damages in medical malpractice actions to $1,250,000). If damages are a tool for shaping conduct, or for granting satisfaction to angry victims, flat caps make sense. If, however, they are the vindication of preexisting rights, and serve to make it as though the violation of those rights had never happened, then the measure of damages must always be the measure of that in which plaintiff had a right.

criminal law.[14] Instead, they are rights that others forbear from injuring interests in particular ways. In the same way, the repair of a wrong is not simply a matter of the causal annulment of its factual effects but of the repair of the rightful claims of the person who has been wronged.

In order to make this point, I will offer an interpretation of the distinction between wrongs and harms. That distinction provides the starting point for my analysis, because it highlights the sense in which the central focus of private law is on norms of conduct and the wrongs that consist in violations of those norms, rather than on harms or benefits, considered simply as such.[15] I do not mean to deny that many familiar torts are "harm-based" in the sense that the wrong complained of injures plaintiff or damages plaintiff's goods. In the familiar context of a negligence action, the measure of damages is tied to the magnitude of plaintiff's loss. Indeed, I will also explain how a focus on wrongs rather than on harms can explain the significance that attaches to the harm plaintiff suffers, even though the same harm would not merit legal attention if not brought about wrongfully. Recent torts scholarship has seen a move away from the sort of instrumental accounts favored by Holmes, Denning, and Calabresi, in favour of a much more nuanced examination of the distinctive relation between plaintiff and defendant in a tort action. In much of this recent noninstrumentalist scholarship, however, the bifurcation between wrongs and remedies at the heart of instrumentalist analysis has been preserved. My two copanellists and sometime coauthors will serve as examples. Jules Coleman has argued that tort law is a matter of corrective justice, charged with

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14. JOHN STUART MILL, ON LIBERTY (1859), *reprinted in* 18 COLLECTED WORKS OF JOHN STUART MILL 223 (John M. Robson ed., 1977) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."). Joel Feinberg, in his monumental work on the moral limits of the criminal law, explicitly defines harm as to "set back an interest." 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 34 (1984). Feinberg goes on to narrow his conception when he writes that his aim is to analyze the idea of harm "without mentioning causally contributory actions." *Id.* at 31. On this understanding, although interests may be complex, it must be possible to identify them independently of what violates them. The deficiencies of the harm principle in the context of the criminal law can be seen in Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215 (2006).

15. Economic analyses of law, which focus on the incentive effects of various legal rules, deny the connection between rights and remedies. *See, e.g.*, Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1178 (2001).

repairing a wrong as between two persons; but he also maintains that the idea of a wrong is merely a placeholder, requiring some independent analysis and defense.[16] Coleman compares the principle of corrective justice to the retributive principle in criminal law, arguing that each principle of redress requires some independent account of primary norms of conduct, but is compatible with a wide range of such accounts.[17] Benjamin Zipursky has argued that the core of tort law is the specification of duties governing interactions between private parties, but also that the remedial stage awarding damages to plaintiff who has established that defendant has wronged her must be understood as an independent social practice designed to give "satisfaction" to the victims of wrongdoing.[18] Both of these approaches avoid the bifurcation characteristic of instrumental approaches to private law, because both suppose that plaintiff and defendant must be analyzed in relation to each other.[19] Yet they each fall into a different and equally unacceptable bifurcation by supposing that norms of conduct and duties of repair can be analyzed independently of each other. The debate between them as to what makes up the "core" of tort law turns out to be a fruitless verbal dispute, into which others have been drawn. Peter Cane insists that

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16. *See* JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY 32 (2001).

17. Coleman writes that

> no one regards it as an objection to retributivism that it fails to provide a theory or a list of the kinds of conduct that ought to be criminalized. Retributivism is not a theory of criminality; it is a theory about what ought to be, or of what may legitimately be done by the state in those cases where a criminal misdeed has been committed. Of course retributivism thereby presupposes that there will be some means of picking out the relevant class of misdeeds.... [O]r at least a list of what the crimes are.

Id. at 32-33.

18. *See* Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 82-86 (1998). In a more recent piece, Zipursky puts the point this way: "The courts in tort law do not stand ready to facilitate the rectification of wrongdoing, or to restore a normative equilibrium, as corrective justice theorists maintain. Instead, they empower individuals to obtain an avenue of recourse against other private parties." Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 755 (2003) [hereinafter Zipursky, *Civil Recourse*].

19. The classic criticism of the instrumentalist bifurcation between plaintiff and defendant is ERNEST WEINRIB, THE IDEA OF PRIVATE LAW (1995).

> [t]here is a world of difference between a litigation-focused concept of correlativity of remedial rights and obligations, and an account of private law ... cashed out in terms (for instance) of a reasonable balance between the interests we all share in freedom of action, on the one hand, and security of person and property, on the other.[20]

Contrary to Coleman, Zipursky, and Cane, there is *no difference whatsoever*. In the account that I will offer, duties of conduct and duties of repair are inseparable. Duties of conduct protect each person's entitlement to such means as he or she happens to have against interference by others; duties of repair require that wrongdoers restore equivalent means to those that have been wronged. The state only has standing to empower plaintiffs to demand that it "correct" a certain set of wrongs, and the only thing it can do about those wrongs is correct them. Anything else is an arbitrary use of force, inconsistent with the freedom of the citizens.

II. ENTITLEMENT TO MEANS AS BASIS FOR PRIVATE RIGHTS

In order to make good on my claim that we can understand the law of damages in terms of the idea of obligations and wrongs, I must explain how losses—and, in certain cases, gains—are significant to measuring the violation of a right. A good deal of confusion has surrounded this issue, almost all of it generated by the fact that harms and losses have a magnitude, in a way that neither "deontological"[21] obligations nor wrongs consisting in the violation of those obligations do. The criminal law might punish theft below $1000 less seriously than it punishes theft above $1000, but it is artificial to say that there is somehow a different *obligation* to respect property depending on whether it is worth more or less than $1000. It is no less artificial to imagine that determining which

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20. Peter Cane, *The Anatomy of Private Law Theory: A 25th Anniversary Essay*, 25 OXFORD J. LEGAL STUD. 203, 212 (2005).

21. Strictly speaking, the wrongs at issue in private law are dikaeological, not deontological, as they involve rights and their correlative relational duties, rather than duties alone. *See* Peter Glassen, *The Classes of Moral Terms*, 11 METHODOS 223, 224-27, 238-44 (1959); Michael Thompson, *What Is It To Wrong Someone?, A Puzzle About Justice*, *in* REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ 333, 336 (R.J. Wallace et al. eds., 2004).

obligation has been breached depends on the magnitude of the resulting injury. Fortunately, my analysis does not depend on anything so unintuitive. The *nature* of a wrong does not depend on its magnitude at all. The obligation is to avoid violating the rights of another. Your entitlement to security of person and property constrains the activities of others in exactly the same way, regardless of the actual magnitude of a particular injury. Although the *obligation* makes no reference to a magnitude, a wrong in violation of that obligation will always have a magnitude, and can only be addressed by the transfer of powers of choice equivalent in magnitude.

The core idea is that tort law protects people in the means that they already happen to have. One person wrongs another by either depriving him of means that he has at his disposal, or using means that belong to him in ways that he has not authorized.

The distinction between means and ends is a philosophical commonplace, but like many such commonplaces it requires a precise formulation. It is sometimes said that choice is a matter of taking up a means in order to achieve whatever ends you have. And although this formulation is not false, in a sense it is misleading. For the philosophical tradition originating in Aristotle and running through Kant to Rawls, means are not simply tools a person uses to pursue an already determinate end, but rather are essential to setting your own purposes at all. You can only decide to do something—make it your end—if you take it to be in your power to do so. You might be mistaken about whether it is in your power. It is certainly possible to pursue something that, as a matter of fact, you will never succeed in. Thomas Hobbes sought to square the circle, believing himself to have everything he needed—a compass, a straightedge, and one of the greatest minds of the seventeenth century. He was wrong, but if he did not have a compass or straightedge, or if he thought that the problem was mathematically beyond him, he could not have so much as tried to square the circle. It could not have been one of his ends. Other choices that people make have better prospects for success, but the same structure. You can make it your purpose to pursue more ordinary ends, provided that you take yourself to have the means with which to achieve them. Otherwise all you can do is wish or hope for those results, but you cannot make them your purpose. Wishing is always easier—and in

certain ways, more satisfying—than choosing, because your wishes do not need to form a consistent set, let alone one that can be fully achieved. As you choose, you need to figure out which of the many things you wish for you will actually use the means that you have to achieve, and so your choices must form what you take to be an achievable set.

My central contention will be that the law of torts protects each person's means against other persons, so that each person is secure in the means that he or she has. The law of torts does this by articulating each person's private rights, as against other private persons, to the means that they happen to have. Your ability to wish is in some sense already secure from the actions of others. With your ability to choose, things are otherwise. If there are many separate persons, each can only have his or her means securely, provided that everyone is subject to reciprocal limits on the ways in which they use what is theirs. You must use your means in a way that is consistent with everyone else being able to use what is, in turn, theirs. Achieving that consistency requires limits on the side effects of one person's activities on the means that others have, and also restrictions preventing people from using means that belong to others. If such consistency is achieved, then everyone is secure in their capacity to choose, because it is up to each person to decide what purposes his or her means will be used for. As objects in the natural world, the means that you have are subject to generation and decay, so they may become more useful or stop being useful, with the passage of time. Your rights in private law simply guarantee their security against the actions of other persons, not against the ravages of time.[22]

Having means is antecedent to any particular purpose you might set for yourself. Your entitlement to the means that you have does

22. On this understanding, the law of torts is of no help to those who have limited means at their disposal. The much-discussed absence of a tort duty to rescue is just a special case of tort law's indifference to questions about the adequacy of any particular person's means to any purpose whatsoever. From that perspective, need is no different from any other wish. Other departments of a liberal state must see to need, but tort law's focus on the means each person has prevents it from doing so. *See* Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 FORDHAM L. REV. 1811, 1833-37 (2004) [hereinafter Ripstein, *Division of Responsibility*]; Arthur Ripstein, *Private Order and Private Justice: Kant and Rawls*, 92 VA. L. REV. 1391 (2006) [hereinafter Ripstein, *Private Order*]; Arthur Ripstein, *Three Duties to Rescue: Civil, Moral, and Criminal*, 19 L. & PHIL. 751 (2000).

not depend upon the particular purposes to which you might wish to put them. You might have a field that you wish to leave fallow, or a piece of jewelry that you leave in a locked cabinet in your basement. The sense in which they are yours is that you are free to determine for yourself what purposes you will use them for, and others are not permitted to interfere with your freedom to do so, either by destroying the means that you have or by using them for purposes you have not authorized. The structure of your entitlement stays the same even if, as it turns out, the particular means that you have are pretty much useless for any purpose that anyone can think of. Your means are valuable because of their relation to your ability to set your own purposes, not only because of the particular purposes to which you put them. Those particular purposes may be relevant to your claim to have wrongfully suffered consequential losses as a result of being deprived of your means—the income you would have generated with them, for example. Your means, however, are more than a capital asset or stream of future income. If the person who deprives you of them could show that you would not have used them, you are not entitled to lost income, but you are entitled to have them back, so that their subsequent nonuse is once again an instance of *your* purposiveness rather than that of your injurer.

It is sometimes said that the law of torts protects persons and property as a result of the particular values or priorities that a society happens to have, so that it might instead protect other things, or decline to protect property, or protect other interests that people have.[23] My own view is very different: the law of torts protects persons and property because your bodily powers as a person, and the property you hold, exhaust the set of means that you have available to you with which to set and pursue your own purposes. The only way to secure your capacity to choose is by securing the means that are at your disposal, and those means are exhausted by your person and property. I choose the word "secure" here carefully, because many other normative regimes, legal and otherwise, might *improve* your capacity to choose by giving you additional means or depriving you of means you are likely to use in

23. *Cf.* 1 FEINBERG, *supra* note 14, at 35 ("Legal wrongs then will be invasions of interests which violate priority rankings.").

a way that will eventually subvert your own capacity to choose. Economic redistribution normally enables choice, and laws prohibiting the use of certain drugs are sometimes defended on the grounds that they extend a person's global capacity to choose by limiting specific, local choices. The law of torts takes what you have as given.

The law of torts takes the abilities that you have as its starting point. In the first instance, you have your bodily powers, including both your physical ability to do various things, like climb a tree or lift a rock, and your mental abilities to make plans. You also have whatever external means are at your disposal—if you have property, whether in land or chattels, you can use it as you see fit, in order to pursue whatever purposes you want to.

I do not mean to suggest that it is appropriate for anyone to think of his or her own body merely as a tool, as a sort of tradable, expendable piece of property that he or she has. My claim is only that there is the most consistent and plausible way of thinking about the law of damages that suggests that *it* takes exactly this attitude towards bodily injury, because it supposes that other people must take that very attitude towards your body. Recent "philosophical" writing about the law of torts has often taken personal injury as the starting point for analysis, talking either about the natural duty of persons to respect the bodily integrity of others,[24] or, alternatively, talking about the way in which bodily health and integrity are fundamental to a person's ability to make his or her own way in the world.[25] So understood, the safety of others is a pressing interest that takes priority over any competing interest: personal injury is presented as an outrage that must be addressed. Without meaning to deny either of these uplifting pieces of moral analysis, I do want to deny their significance to understanding the law of torts and thus the law of damages. Damages are not awarded to compensate for the awful things that people do to each other, but rather to make it as if the persons had the means that they would have had if others had not wrongfully deprived them of them.

The legally significant way to secure each person in the means he or she has as against others is to limit the conduct of others. That

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24. *See* Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, *in* OXFORD ESSAYS IN JURISPRUDENCE 237, 239 (Jeremy Horder ed., 4th series 2000).

25. *See* Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 342 (1996).

is why the law of torts is part of the broader law of obligations: it sets limits on the ways in which people may interact with each other. Its secondary mode of securing what each person has is through the law of damages. The law renders those entitlements, not in the sense of making it more likely that they will be secure across time, but in the more direct sense of making them be entitlements: you are entitled to the means that properly belong to you, as against all others; that is, you, and you alone, are entitled to fix the purposes for which they will be used. Protecting each in his or her person and property creates a regime of equal private freedom, in which each person's capacity to set his or her own purposes is secure against the equally protected freedom of others to pursue their own affairs. The "cumbrous and expensive machinery of the state"[26] serves as guarantor of this equal freedom provided that it both articulates the appropriate standards of conduct and, should those standards be violated, it makes it as if the wrong had never happened.

Before turning to the law of damages, however, I must say something, albeit too briefly, about the general structure of the obligations in the law of torts.

III. PERSONAL RIGHTS, LOSSES, AND OTHER WRONGS

Most theoretical writing about the law of torts has focused on negligence.[27] In part, it is because the law of negligence makes up such a large proportion of the business of courts. It is also a function of its doctrinal complexity: standard negligence analysis has many elements to it, and each of them raises interesting questions, both conceptual and normative. Unfortunately, the law of negligence has probably also drawn so much attention because it fits easily with the emphasis of post-Holmesian legal scholarship on benefits and burdens.[28] In a negligence action, plaintiff is always complaining of the harm he or she has suffered, and so, in analyzing negligence, the temptation to analyze in terms of benefits and burdens is ever present.[29] For the same reason, when negligence is displaced from

26. *See* HOLMES, *supra* note 7, at 96.
27. *See, e.g.*, CALABRESI, *supra* note 11.
28. *See* Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999 (2007).
29. *See id.*

center stage, the focus too often passes to strict liability torts that look harm-based.[30]

Despite these merits of negligence as a central theme in tort analysis, an exclusive focus on harm-based torts distracts attention from the generic structural features of tort law considered more generally. Torts include intentional wrongs as well as negligent ones, but that is the wrong place to draw the contrast because it makes it seem as though all torts must be harm-based, and differ only in the state of mind that they require on the part of defendant. Instead, the right way to understand the broader structure of tort law is to focus on what it is to have something as your means. To have something as your means is to have it subject to your choice—that is, for you to be the one who decides how it will be used. This entitlement is subject to two, and only two, types of violation.

Someone can interfere with your secure entitlement to your means by depriving you of those means, or by using those means for purposes that you have not authorized. The first of these is the basis of all damage-based awards, from negligence, through nuisance, to the various forms of product liability that have emerged in recent decades. In each case, plaintiff comes before the court, complaining that defendant has deprived him or her of something to which he or she had a right. And, in each case, plaintiff demands to get back what he or she was deprived of. The second type of interference does not necessarily deprive plaintiff of anything, though it often does. This second type of interference is the basis of the law of trespass against land and chattels, and also, when applied to persons, of the law of battery. In cases of both trespass and battery, one person uses something belonging to another, whether property or that person's body, for a purpose that has not been authorized by that person. I use the word "use" here broadly, because the idea that your means are subject to your choice carries with it the entitlement to exclude all others from subjecting those means to their purposes, even in the trivial sense of touching you without your permission.

Some torts, such as conversion, both deprive plaintiff of something and also use it for purposes plaintiff has not authorized. Many

30. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 883 & n.3 (1998) (discussing strict liability with reference to benefits and burdens).

trespasses also damage the thing trespassed upon, as in Coase's famous example of the wandering cattle.[31] The overlap between these wrongs, however, should not distract attention from their differing analytical structure: there is a difference between being deprived of means and having those means used in ways that you did not authorize. That is why a battery, as an unauthorized touching, is still wrongful even if it does no harm.

IV. RIGHTS SURVIVE WRONGS: NEGLIGENCE

If someone deprives you of your powers, they deprive you of part of your ability to choose, in the sense of the ability, to use those powers to set and pursue your own purposes. But they do not deprive you of your entitlement to have those powers at your disposal. This is particularly obvious in the case of theft. Suppose you have a car, and I take it. Who does the car now belong to? There is one sense in which someone might be prepared to say that it now belongs to me, if I am in physical possession of it. But the law is not interested in that question, but rather in the question of whom it *properly* belongs to. The answer to that question is that it belongs to you. My depriving you of it does not make it stop belonging to you. That is why the law can compel me to give it back, and can compel me to do so even if I took it as a result of a completely innocent mistake. Now suppose that I deprive you of it in a different way—rather than taking it, I damage or destroy it. If I damage it, you are in the same position as you would be in if I destroyed it: you would not have the car you are entitled to have. The law of damages makes it as though my wrong against you had never happened, by giving you back the thing you were entitled to have. If I destroy the car, I cannot literally give it back. What I can do is give you back equivalent means, that is, I can give you a sum of money equivalent to the replacement cost of the car. Not only does that sum of money put you in a position where you can go out and purchase the car if you like, it also enables you to liquidate your interest in the car if you so choose. The law of damages views any assets you have as something that can be used for pursuing your purposes, both directly, by using them to accomplish particular purposes, as when

31. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2-3 (1960).

you use your car to drive to visit friends; or indirectly, as when you sell your car in order to buy new appliances for your kitchen. When you had the car in the first place, you could have sold it, and used the proceeds for other purposes; by compelling me to give you that amount of money, the law compels me to put you back in the position you would have been in—you can either acquire another car, or do something else. Your ability to pursue your purposes is the same as it always was. It is as if it had never happened.

I will go through each of the parts of this analysis in more detail: what it is to have means at your disposal; what it is to be deprived of those means; how a right to them survives the deprivation; and how money reverses the deprivation, thereby restoring the right that you had. I will begin with negligence, but then move on to consider trespass. I will assume the role of wrongdoer, and you the role of plaintiff. As I work through the analysis, I will take it that you have established all of the traditional elements of negligence analysis, and the only remaining question concerns damages.

At no point in the analysis will I focus on what happens to *my* holdings in the process of making it as though you had never been wronged. There is a natural misunderstanding that leads people to suppose that where there is a net loss that must either lie where it falls or be shifted to some other person, the only issue is where to place it. On the account I will defend, the "allocation" of a "burden" is the conclusion of the analysis, not the problem the analysis is supposed to solve. Just as an ordinary negligence action is structured by the question of whether the defendant owed plaintiff the duty to avoid injuring her in that way, whether defendant breached that duty, and whether the injury she suffered fell within the ambit of defendant's duty, so the analysis of whether defendant must pay for plaintiff's loss depends upon the same set of questions: did defendant wrongfully deprive plaintiff of something to which she had a right? The law of damages requires a remedial transaction so that the net effect of the involuntary transaction and the compelled transaction is to make it as though plaintiff had never been wronged. Defendant will often end up with a loss, because the effect of the remedy is to make it as though defendant had never wronged plaintiff but has used up some of the powers at his disposal.[32]

32. This problem is particularly pressing if we suppose that the sort of "corrective" or

A. Having Means at Your Disposal

Using the word "means" here, I intend to make explicit the idea contained in such colloquialisms as "a person of means" or "living beyond your means," that is, the idea that the means you have are relevant to your ability to achieve whatever you happen to want to achieve. A person of means has lots of money, because, although money cannot buy everything, it can buy many things. The person who lives beyond his means is trying to achieve things that he cannot afford to achieve. Among the means a person has, first and foremost, of course, are that person's mental and physical powers, because they are the things that are used to pursue whatever purposes he or she has. But, equally obviously, one can have other things as means, including, prominently, property.

Talk about each person having his or her own body merely as "a means" may strike many as misleading, offensive, or both. So too may parallels between personal injury and property damage. Advocates of economic analysis of law have been happy to regard all injuries as fungible, and this is the aspect of economic analysis that seems most at odds with ordinary understandings. The difficulty with economic analysis is not the equivalence itself but rather that it has presumed such an equivalence without offering any explanation of it, because economic analysis generally supposes that tort liability serves to deter future offenders, so that any role it has in undoing the effects of a wrong is merely incidental.

If you have certain means, you have them in a way that is, to borrow a phrase from the philosopher John Rawls, "all-purpose."[33] Your means are at your disposal. Although the only way you can use them is by using them for some particular purpose, they are, as a general matter, useful, because they can be used for a variety of

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rectificatory justice involved in these cases is a matter of restoring some prior distribution, a distribution which was thought to be just on its own merits. On such an understanding, the prior distribution has not been restored, so they have been rectified for some, at the expense of others, and, if this expense is borne by the wrongdoer, that may be appropriate, but how is it returning things to a *status quo*? Indeed, it does not even seem to be returning the relation between the parties to the situation in which it would have been without the wrong. For further general discussion regarding the relation between private law and distributive justice, see Ripstein, *Division of Responsibility*, *supra* note 22, and Ripstein, *Private Order*, *supra* note 22.

33. JOHN RAWLS, POLITICAL LIBERALISM 187 (Columbia Univ. Press 1996) (1921).

purposes. This will be important to what follows, because it is the key to understanding consequential damages. If you have something as your means, you thereby also have whatever further means follow from having them. So, if you have something that can be used as a way of generating more useful things—property on which you can earn income, for example—then you have that income as your means also. You do not have them with the same certainty that you have the property itself, however, which is why future income is discounted in the familiar way that it is.

B. Being Deprived of Your Means

Which means are yours depends upon your legal relations to other persons. *Your* means are the ones that you can use without seeking permission from others, and others may not use without your permission.

If I damage or destroy means that you have, I interfere with your ability to decide what to do because I deprive you of the wherewithal to do those things. But not everything I do that narrows your range of choices does so by depriving you of means you had a right to. I might buy the last lettuce at the supermarket, effectively preventing you from making a salad. My act prevents you from acquiring something that you could have used to do something, but it does not deprive you of any powers you had. It just stops you from using the powers you have—in this case, money—to acquire new ones. If I pick the last wild lettuce in a wilderness area, I do not deprive you of means either. Here too, I simply eliminate an opportunity for you to use your powers—in this case, your hands—to acquire something useful. Although I could have produced the very same effect by pushing you out of my way, I produced it without interfering with your possession of your means. You can still use your money or hands to do other things. All I have done is change the world in which you can now decide what to do.

This distinction between what you already have and what you are trying to get by using what you already have is familiar from the doctrine of first acquisition in the law of property. In the famous fox capture case of *Pierson v. Post*,[34] a disputed fox went to the "saucy

34. 3 Cai. 175, 175 (N.Y. Sup. Ct. 1805).

intruder" who captured it,[35] not the plaintiff who had tired it out by giving chase.[36] The reason is simple: plaintiff had not yet acquired the fox; he had only used his powers—in this case, his legs, horses, and hounds—to try to capture it.[37] He had no right against defendant that he succeed in his efforts, any more than you have a right against other shoppers that a lettuce be in place when you arrive in the produce aisle. The saucy intruder may turn out to be better off as a result of the plaintiff's efforts, in a way that you make it no easier for me to acquire the lettuce. This difference is merely incidental to the issue of wrongdoing, because the problem in both cases is that nobody has a right that others provide an environment suited to the uses to which she hopes to put her means.

The same structure animates the celebrated *Fontainebleau* case,[38] in which plaintiff was refused an injunction to prevent defendant from erecting a tower that would cast a shadow that made plaintiff's pool and cabana unattractive to tourists.[39] The court held that plaintiff had no right to passage of light, not because the light was of no value to the plaintiff—it was of great value—but because plaintiff was not entitled to require defendant to use his land to accommodate plaintiff's preferred use of his.[40] The court took it for granted that defendant's property right was, in the first instance, the right to occupy the airspace on and above his land.[41] Some might wish to question the wisdom of this as a matter of social policy, but the court simply took the settled law of property as given. With the idea that defendant has the right to occupy his own space, it follows straightforwardly that plaintiff may not encumber part of that space to create a path for light to flow through, because that would mean that plaintiff was entitled to use part of defendant's space for a purpose that defendant had not chosen. Thus the harm suffered by plaintiff is irrelevant, as plaintiff's claim that he has a right to be free of defendant's shadow is equivalent to the claim that defendant's space must be used to suit plaintiff's specific purposes. This

35. *Id.* at 182.
36. *Id.* at 175.
37. *Id.*
38. Fontainebleau Hotel Corp. v. Forty-five Twenty-five, Inc., 114 So. 2d 357 (Fla. Dist. Ct. App. 1959).
39. *Id.* at 358-61.
40. *Id.* at 359-60.
41. *See id.* at 359.

claim is inconsistent with the idea that each is entitled to use his or her means as he or she sees fit, but not entitled to use means belonging to another. The same structure applies to the familiar English case of *Bradford v. Pickles*, in which defendant diverted percolating water from running under his land into plaintiff's reservoir.[42] Although the reservoir owner relied on the water, he did not have a right to have defendant arrange his affairs so as to provide a suitable path for it.[43] Defendant's conduct was motivated by the hope that plaintiff would be forced to purchase his interest in the land, but the court held that this was of no consequence.[44] Defendant is free to use his means—in this case, his land—as he sees fit, provided only that he does not interfere with plaintiff's use of his means as he sees fit. The only way to reconcile their separate claims to use what is theirs for their own purposes is to relieve defendant of any obligation to use what is his in a way that accommodates plaintiff's preferred use of his own property.

In both *Pierson v. Post* and *Fontainebleau*, plaintiff was unable to use his powers—his ability to give chase and his land, respectively—in the way he chose—catching foxes and attracting guests. In each case, the action of others changed the environment in which he used his means, making it pointless to give chase or build a luxury hotel, because the fox was unavailable and the tourists uninterested. Yet neither plaintiff was deprived of means he had, or even deprived of the ability to use them in the preferred way. Defendant in *Pierson v. Post* did not break plaintiff's legs, and defendant in *Fontainebleau* did not destroy plaintiff's pool or cabana. The first remained free to chase other foxes, the second free to try to attract guests. The right to use your means as you see fit is the right to try to do various things, not the right to succeed or the right to a favorable environment where you are more likely to succeed at some particular purpose.[45]

This specification of what it is to have means provides a simple account of why pure economic loss is generally not recoverable in

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42. [1895] A.C. 587, 587 (H.L.).

43. *Id.* at 587.

44. *Id.*

45. The subsequent history of the plaintiff hotel in *Fontainebleau* makes this clear: concerns about skin cancer subsequently made a shaded pool area attractive to guests. Which environments are favorable for which purposes depends in part on the choices of others.

tort, even when it is foreseeable. The standard explanation for this exclusion is that permitting recovery for economic loss would open up the floodgates of litigation, because the amount of economic loss foreseeable in the case of a wrong is almost without limit. A focus on a person's right to particular means, in the form of a property right, puts a finger in the dyke of the floodgates argument. There is no liability in negligence for pure economic loss because the plaintiff has no proprietary right to the economic interest that was injured. Put in the vocabulary of means, plaintiff was not deprived of means to which he or she had a right against defendant. As a result, although defendant may have behaved badly, and plaintiff may have suffered, there is no wrong to make up. No damages are awarded, because from the point of view of plaintiff's claim to those means, nothing happened.

Not everything that a person benefits from, or uses to his advantage, counts as his means in the relevant sense. The paradigmatic examples of economic loss that is not recoverable involve users of a bridge that is owned by somebody else. Defendant destroys a bridge that plaintiff's customers use to get to and from his place of business. Such examples illustrate the sense in which someone can use something without it being at that person's disposal. The drivers who cross the bridge are, in legal language, "licensees" who are permitted to use the bridge in a particular way, but not to use it however they see fit. They would not be entitled to close the bridge down, to exclude others from it, to demolish it, or to sell it and have it moved to another location.[46] The owner of the bridge, as a matter of private law, presumably has all of those powers over it, even if legislation limits his exercise of them. Insofar as a wide variety of public law régimes limit those private powers, they do nothing to change the basic legal relationship between the owner and the person who damages it, or between the owner and those who are licensed to use the bridge.

Similarly, cases in which a wrong is suffered by an employee do not normally give her employer a cause of action against the injurer, even though the injurer causes the employer to suffer a loss. Employment contracts give the employer rights against the

46. *See* Peter Benson, *The Basis for Excluding Liability for Economic Loss in Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 427, 434-35 (David Owen ed., 1995).

employee, but no right *to* the employee as against third parties. Any public law regulations of the employment relationship do not change this basic structure. The relationship between employer and employee is fundamentally different from the relation that the owner of a domestic animal has to that animal. The owner can complain of being wronged if the animal suffers injury. That is because, as a matter of private law, the animal is entirely at the owner's disposal, even if, as a matter of public law, there are statutes governing health and cruelty to animals that limit the owner's powers.[47] It is the ability to dispose, not the vulnerability to disadvantage, that is significant here. The key employee may be much more significant to a corporation's ability to do business than any piece of property. Because private law focuses on rights rather than on the mere fact of disadvantage, the loss to the employer is insufficient to generate a cause of action.[48]

The cases of economic loss and failure to provide a favorable environment contrast with the cases in which someone does deprive you of your means. In those cases, you are no longer able to pursue purposes because your means are no longer available to you. The hunter with broken legs cannot even chase foxes (with his legs); the hotelier whose pool is full of toxic wastes cannot invite people to swim.

C. Rights Survive Wrongs

If I deprive you of something to which you have a right, I wrong you. The very idea that I could do that to you depends on the fact

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47. Again, in Roman law, if one person injured the slave of another, the loss was recoverable, on grounds that it was property damage. We can nicely encapsulate one aspect of what is wrong with slavery by noting the differences between the way wrongs against employees are treated and the way in which wrongs against slaves were treated. No employer has another person at his disposal in this way.

48. Perhaps worth noting in this context is that economic analysis will always have difficulty explaining the exclusion of economic loss, because it focuses only on harms and benefits. As a result, the likely effects of this type of vulnerability must be the only measure. Other factors may or may not be proxies for the basic distinction, notably Richard Posner's claim that economic loss is not likely to involve the net loss of wealth in the economy, because others are likely to simply take their business elsewhere in a functioning market economy. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 251-52 (1987). If this is ever true, it is just as much true of economic loss that is consequential on property damage, so it cannot be the real explanation of the exclusion.

that by wronging you I do not extinguish your right. Just as the person who steals or converts the property of another does not acquire good title in the object because the original owner retains it, so the person who damages or destroys means belonging to another does not disturb the other's right to those means. The normative situation is unchanged, because a person can only lose a right to something through a voluntary act of abandonment or transfer, and not always even that way. An involuntary transaction in which someone else takes, damages, or destroys something that is yours does not change your rights. It only changes your ability to exercise them.

The idea that how things should be is not changed by any event that should not have happened sounds puzzling, but it is actually familiar from other contexts. Suppose you make a mistake adding a column of figures; the correct sum is not changed by the fact that you wrote down the wrong one. I copy a quotation down incorrectly, and the correct quotation remains correct, no matter how many further copies are made of my mistaken transcription. Someone makes a common mistake in reasoning; whether the conclusion follows from the premise is fixed by the rules of sound reasoning, not by the way they were mistakenly applied. In each of these cases, the things should not have happened, as identified by the rules of addition, transcription, or reasoning, but these do not change the result those rules require. If someone then corrects the mistake, it does not undo the fact that the mistake really happened, but in a perfectly serviceable sense we know exactly what the result was supposed to be, and so we cannot go back and correct it. The relevant norm takes priority over what factually happened.

Rules governing legal entitlements are less sharply defined than rules governing addition or transcription. They are more like rules for translating from one language to another. Despite the mass of unclear or controversial issues of translation, many things are still uncontroversial *mis*translations. The mistake does not change the correct answer—you still should have translated the Latin "lege" as "by law," not as "law."

What happens as a matter of fact is irrelevant to legal requirements in another familiar context: the appellate court. A case can only be appealed on questions of law, and the finding of law by the court below, although it is the starting point for the appeal, counts

for nothing if the competent court decides that the appellant was entitled to a different legal rule. If the court below held that plaintiff and defendant had a valid contract and ordered completion of it, the appellate court can reverse that finding, because the conclusive application of the legal rules, rather than what actually happened —in this case of the decision of the court of first instance— determines the rights of the parties. When the holding of a trial court is overturned, from the point of view of the rights of the parties it is as if it had never happened, from which it does not follow that, in fact, it never happened. It is a datable event in the history of the world, but one that does not shape the rights of parties.

In a parallel way, if I break your vase, all you have are shards. But you have a right to the intact vase. Only deeds to which you are a party can change your private rights; a deed of which you are simply the victim cannot. The deed is a datable event in the history of the world, but one that is entirely without normative significance.[49] Kant makes this point in terms of what he calls "intelligible possession."[50] He notes that rights to property involve an entitlement to a thing that persists even when you are not holding it, so that you can be wronged in relation to it without being wronged in your own person.[51] If I grab an apple out of your hand, I perform a battery against you as I displace your fingers from it. The wrong of theft or conversion is fundamentally different, because I can wrong you with respect to an apple that you have put down, or left at home, or as it sits on your tree, hundreds of miles away from you. This idea of rightful possession explains the sense in which your claim to a thing persists, even after another has taken it from you or destroyed it. The apple is still yours as a matter of right if it is physically separated from you; it continues to be yours as a matter of right even if I am now holding it or if it no longer exists because I have eaten it.

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49. Public law operates differently: the state can place you under an obligation without you being a party to it in any apparent sense. The social contract tradition has sought to articulate a sense in which citizens are always parties to legitimate actions of their governments, but the possibilities of that approach are not my concern here.

50. IMMANUEL KANT, METAPHYSICS OF MORALS (1797), *reprinted in* PRACTICAL PHILOSOPHY 408 (Mary Gregor trans., 1996).

51. *Id.* at 404.

There is perhaps something counterintuitive in the suggestion that you could have a right to something that no longer exists. The idea that your right survives the wrong against it underscores the fact that the entitlement to damages does not depend on anything other than the underlying right. The counterintuitive nature of the formulation is merely verbal: If I owe you $100, due last Thursday, but I failed to pay, my obligation does not disappear. I still owe you the money, even if, as it turns out, I have not earned it yet, and so it does not yet exist. In both cases, making me pay simply gives effect to the underlying obligation that I breached. In neither case is it a way of achieving something else, which, through some remarkable coincidence, is most effectively achieved by my giving you means equivalent to what you were already entitled to. Instead, both the *basis* of your right to repair and its *content* derive from the primary right I invaded. You are entitled to be made whole because I have interfered with your right to your means; you are entitled to equivalent means because the right I violated was to those very means.

Your surviving right is the basis of your cause of action against me in court: you have standing to sue me. The state does not directly compel me to pay you, because the surviving right is *yours*: it is up to you to decide whether to enforce it, so you must take me to court to satisfy it. Like any other private right you might have, you are entitled to stand on your rights but not compelled to. If I owe you money but fail to pay, you can take me to court, but you do not have to, and the state will not effect a transfer unless you assert your right. If I ask to come into your home, you can let me in or refuse. The state will only keep me out if you ask it to. If I mistakenly take your raincoat, you can go to court to compel me to give it back, but the state will not act unless you do.

Thus the central facet of a tort action that Zipursky seeks to use to distinguish civil recourse from corrective justice—the power the *private plaintiff* has to come before a court to press *her* case against defendant, as opposed to some *public agency* making either the determination of wrongdoing or the correction of wrongs *its* business[52]—turns out to be a direct implication of the idea that tort law protects each person's entitlement to have her means subject to

52. Zipursky, *Civil Recourse*, *supra* note 18, at 733-35.

her exclusive choice. Her entitlement to determine when she will stand up for her rights has the same basis as her claim to damages.

The idea that your right survives the wrong committed against it does not entail that the remedy makes the wrong rightful, so that the wrongdoer has a choice between refraining from wrongdoing or wronging and paying you.[53] Some defenders of economic analysis have sought to explain familiar aspects of tort law in just this way, as a pricing system, or, as Guido Calabresi once described it, a private power of eminent domain.[54] The paying of damages does not serve to retroactively make the wrongdoing permissible, because the wrong is a violation of the plaintiff's right. If defendant could decide to violate plaintiff's right to person and property, plaintiff would be subject to defendant's choice. The primacy of plaintiff's right precludes that possibility. That right does not expire once he is wronged, and so damages serve to restore the plaintiff to the situation he was in, so that plaintiff's freedom, as measured by the means at his disposal for doing as he sees fit, can be restored. Having received means equivalent to what he lost, from the point of view of the plaintiff's ability to set his own purposes, it is as if it had never happened.

D. Give Them Back

If someone takes your means, the way to correct the imbalance between what you are entitled to have and what you have—or what you have and what you can use—is by giving them back. If the means no longer exist, then in order to give you what is yours, you need to receive equivalent means. I probably cannot put your vase back together again, and even if I could, the most I could give you is a repaired vase, not an intact one. Your right is to have the means you had a right to all along.

In cases in which one person accidentally injures another, the way to set things right is to focus on the injury. The injurer must repair the injury; that is, to use the language introduced earlier, the injurer must provide the injured party with means equivalent to

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53. *See* John C.P. Goldberg & Benjamin Zipursky, *The Moral of* Macpherson, 146 U. PA. L. REV. 1733, 1810 (1998).

54. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1122 (1972).

those that he lost through the injury. For example, if I injured you and you are unable to work, I have deprived you both of the use of your body during your period of recovery and also of the uses to which you would have put your body during that period, and so of any further means that you can show that you would have accrued in the process. That is, I must make up your lost income. If I damage your property, I must pay for both the cost of repairing or replacing it and for its lost income. If you can show that there are uses to which you would have put it for earning money, I have deprived you of the further means that you would have acquired had I not interfered with your property. As a result, the loss is shifted to me.

In what sense, then, have things been put back where they were, when all that we really seem to have done is, as Holmes put it, use the "cumbrous and expensive machinery" of the state[55] to shift a burden from one person to another? A burden has not disappeared, and things will never be the same. What's done is done.

Yet if we think about wrongdoing in terms of an interference with the means plaintiff was entitled to have with which to set and pursue his or her own purposes, rather than in terms of benefits and burdens, the fact that a loss remains after damages have been paid is of no significance. Although defendant ends up bearing the loss, the claim that the damages restore the prior condition is not a claim about damages restoring a prior distribution.

People bear losses all the time without the freedom of others being implicated. If I had damaged my own property instead of yours, I would be left bearing the loss. If I had injured myself rather than injuring you, I would be left bearing the loss. In each of these examples, from the standpoint of our respective rights to secure possession of our means as against each other, nothing has taken place because there has been no interference with any person's use of a thing to which he has a right. Although the physical loss does not go away after either of these things occurs, the holdings people have changes, but people continue to interact with their rightful holdings. So, too, after a wrongful loss is shifted to the wrongdoer, the holdings people have changes, but people continue to interact with their rightful holdings. The situation can be redescribed as one

55. HOLMES, *supra* note 7, at 96.

in which people have the holdings they are entitled to. Through my carelessness, I have used up some of my means, by injuring you and needing to restore your means.

E. Money

Money is something that can only be used by being exchanged. It is also a universal means, in that it can be exchanged for (almost) any other means. As Kant puts it, money is the "universal means by which men exchange their industriousness."[56] Although few people would be indifferent between being free of injury and being injured and receiving compensation, adequate compensation can enable a person to have (almost) the same range of options. The qualification "almost" is important here. The claim is not that life can be just as enjoyable or easy. Compensation does not aspire to place a person on the same indifference curve she would have been on had she not been injured. My sentimental attachment to my property, and my experiential connection to my body are not things that can be replaced, so they cannot be compensated.[57] Courts frequently award damages for pain and suffering, and critics of corrective justice are right to wonder whether they do anything at all to make plaintiffs "whole." They may make plaintiffs less unhappy, and that is not a crazy thing for a court to try to do. But damages do not restore or correct anything. Compensatory damages give you back the means you had. Your happiness, considered as such, is not among the means you use to set and pursue your purposes, even if, for example, your mental health could be described as something you use in that way. That is why someone who makes you unhappy without injuring your person or property is not liable, even if you are more successful at whatever you do when you are happy.[58]

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56. KANT, *supra* note 50, at 435.

57. *See* Bruce Chapman, *Wrongdoing, Welfare and Damages: Corrective Justice and the Right To Recover for Non-pecuniary Loss*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 409, 420 (D. Owen ed., 1995).

58. But if you require counseling to regain your focus as the result of a wrong, you recover the cost of it because the wrong deprived you of your most important power, the ability to decide how to use your other powers. I remember being told as a law student that the real point of pain and suffering damages was to cover lawyer's fees. I have no idea whether they correlate with fees, but the explanation is striking in its desperation to find something that they accomplish, because they so plainly do not make tort victims whole.

In the first instance, your entitlement to your person and property does not depend on the particular purposes you pursue with it. If I negligently destroy a box of philosophy books that sat in your basement, you are entitled to their replacement cost even if you had forgotten you had them and purchased new copies, lost interest in the subject, or forgotten (or never knew) how to read the languages they were written in.

Consequential damages are just a further application of the same set of ideas. They are a further application, because your entitlement to your person and property does not depend on your intention or ability to use them in any particular way. Consequential damages focus on how you would have used the means to which you have a right. One of the things you can use your means to do is produce more means. If I deprive you of means you could have used, I thereby deprive you of the further means you could have generated. The precise quantity you could have generated may be uncertain, so that some discount factor may apply.[59] But the core idea is the same: I have deprived you of means to which you would have had a right.

If I wrongfully damage or destroy your car, a court can easily determine what would make it as if the wrong had never happened: a car of the same color, model, mileage, and condition. There is a functioning market in used cars, so the court can determine exactly what it would take to get one. In other cases, no replacement will be available:[60] in cases of bodily injury, a prosthesis may not be available, and even if one is, it will not fully make up the loss. The difficulty of replacement makes the court's task much more difficult, precisely because your body is so closely connected to your purposiveness that your purposiveness is limited by bodily injury. If you lose a toe, your ability to achieve the various purposes to which you in fact aspire may remain largely unchanged. If so, you will have no claim to consequential damages if you lose a toe through another person's wrongdoing. You are still entitled to damages for the loss of the toe, precisely because part of your ability to set your own purposes includes the right to decide what to do with your toe, even if through most of your life you decide to do nothing with it. Because there is no market in toes, the precise quantum of damages will be

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

60. *See* Chapman, *supra* note 57, at 423.

nominal, not in the sense that it is small, but rather because it requires a decision by a competent court, one based on some conception of the typical case.[61]

The example of losing your toe is unrepresentative, because in many cases of bodily injury plaintiff can make some claim about what he would have been able to do had he not been injured. The general point still holds, however. Your claim to have your means, including your own person, subject to your own choice is not a claim to the stream of income that those means would generate, because your claim to have your purposiveness protected is not simply a claim to have your ability to engage in market transactions protected. You are the one who gets to decide what to do with your own means, and earning income is only one of the things you might decide to do.

F. Redescription

The general strategy for making it as though a wrong had never happened is to make it as though something else had happened instead. If I damage your property and pay for the cost of repairs and any consequential losses, you have all of the means you would have had if it—the wrong—had never happened. I have fewer means, because it is as if I had damaged my own property. As a result of my deed, I end up with less than I would have had. But the change in my holdings that results from the initial transaction and the one that corrects it is no more significant than the same change would have been if it was the result of a single incident in which I damaged my own property. Damages do not restore a prior distribution; once something has been damaged, that cannot be done, because there is less after the injury than there was before. Instead, they restore to the aggrieved party the things she had a right to. She had no rights with respect to the size of the holdings of others,

61. Sometimes the loss is impossible to quantify. In defamation, plaintiff often recovers "general damages," which make up the loss of a very important asset—his or her reputation—the costs of which may be difficult to measure. *See, e.g.*, Walsh v. Trenton Times, Inc., 10 A.2d 740, 741 (N.J. 1940) (specifying some elements that help determine the appropriate level of damages in libel and slander per se cases).

just as nobody has a right that their holdings remain the same even if they damage them.[62]

G. A Further Illustration: Duplicative Causation

I want to illustrate these general points by focusing on a series of familiar puzzles about duplicative causation in torts. The puzzles arise in those cases in which defendant behaves negligently towards plaintiff, or commits a nuisance interfering with a property right plaintiff has, but some other factor, human or otherwise, produces or would have produced the same injury. Ordinarily, the burden lies with plaintiff to show that, were it not for defendant's action, plaintiff would not have been injured. In these cases, plaintiff faces a special difficulty because the duplicative cause seems to show that she would have been injured anyway. A favorite example is *Corey v. Havener*, in which two defendants drove their motorized tricycles on the two sides of plaintiff's carriage.[63] The noise startled plaintiff's horse, as a result of which plaintiff was injured.[64] The two defendants were not each allowed to avoid liability by pointing out that the other one would have startled the horse and caused plaintiff's injury.[65]

The result seems obvious, but the source of the obviousness is not. Some contend that the causation is significant for reasons of administrative convenience, and where the ordinary standards of proof fail, some other convenient way of providing injurers with appropriate incentives or of guaranteeing compensation to injured parties must take priority. I take this to be the general thrust of the economic analysis, including Guido Calabresi's work.[66] Again, some have offered broadly moralistic explanations, according to which there is something wrong with the way in which each of the parties is able to point to the other that requires that we change our basic understanding of causation and its relevance in these cases.

A focus on administrative convenience or incentives simply disregards the significance of the transaction between the parties,

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62. Except by contract with an insurer.

63. 65 N.E. 69, 69 (Mass. 1902).

64. *Id.*

65. *Id.*

66. *See* CALABRESI, *supra* note 11, at 174-75.

and singles out defendant to pay plaintiff purely as a matter of administrative convenience. The moralistic explanation fares no better, because it is also unable to preserve the relation between the two parties: plaintiff recovers in the two-wrongdoer case because of the relation between the wrongdoers, to which plaintiff seems to be little more than a bystander—or what Cardozo might have called a "vicarious beneficiary"[67] of the distaste a court rightly has for wrongdoers' claim of advantage from each other.

Two leading English causation cases point to a better explanation of these issues. In the first of these, *Baker v. Willoughby*, plaintiff was injured by defendant's negligent driving.[68] He sued for the income he would have lost because an injury to his leg prevented him from working at his normal job.[69] Before the case went to trial, plaintiff was the victim of an unrelated attempted robbery, during which he suffered further damage to the injured leg and lost it.[70] Defendant sought to avoid liability for plaintiff's lost income after the robbery, but the House of Lords rejected the argument.[71] In the second case, *Jobling v. Associated Dairies Ltd.*, plaintiff suffered a back injury that limited his ability to work.[72] Before trial it was discovered that he was suffering from an unrelated spinal disease that made him unable to work.[73] Defendant sought to avoid liability for plaintiff's lost income on the grounds that he would have lost it anyway.[74] The House of Lords accepted defendant's argument, and insisted that it was consistent with the holding in *Baker*.[75]

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

68. [1970] A.C. 467, 467 (H.L. 1969).

69. *Id.*

70. *Id.*

71. *Id.* at 467-68.

72. [1982] A.C. 794, 794 (H.L.).

73. *Id.*

74. *Id.* at 800.

75. *Id.* at 795. American courts largely parallel the approach outlined in *Baker*. *See* David A. Fischer, *Successive Causes and the Enigma of Duplicated Harm*, 66 TENN. L. REV. 1127, 1129 n.7 (1999) (citing cases). The *Third Restatement of Torts* reads as follows:

> After a person suffers harm, another causal set may exist that, had the initial cause not existed, would have caused the same harm. Thus, this might occur when one hunter negligently fires a rifle, killing a hiker, and, shortly thereafter, another hunter negligently fires, and the second shot would have been sufficient to cause the hiker's death, except that the death had already occurred. An act or omission cannot be a factual cause of an outcome that has already occurred. The first hunter's negligence is a cause of the hiker's death and preempts any

This combination of results may seem puzzling, because in each case it seems that, as a matter of natural fact, it can easily be said that plaintiff would have suffered the loss anyway, and so defendant did not cause it. The important difference, which seems to distinguish the two cases, is the fact that the second cause in *Baker* was tortious. Yet it is not a problem of the two wrongdoers each being able to point at each other; the result would have been the same if the robber had dropped out of sight, and so there was nobody for the other injurer to point to.

In *Jobling*, Lord Keith of Kinkel declined to formulate "a precise juristic basis" for distinguishing supervening torts from supervening illnesses, noting only that it might be said that a supervening tort is not "one of the ordinary vicissitudes of life, or that it is too remote a possibility to be taken into account, or that it can properly be disregarded because it carries its own remedy. None of these formulations, however, is entirely satisfactory."[76]

If rights survive wrongs, however, we have a simple and straightforward explanation of why the wrongdoer can point to a subsequent natural event but cannot point to a subsequent tort. Plaintiff's entitlement is to have his means *free* of wrongdoing by others. That is the basic principle of damages under which plaintiff recovers from defendant for his loss. Defendant can say that plaintiff would have lost what he had to natural causes, because plaintiff has no entitlements in relation to natural causes. Everything plaintiff has is subject to natural deterioration, because all material objects are subject to such deterioration. Thus defendant can appeal to the fact that what plaintiff had would have been less valuable or less useful in any variety of ways, due to natural wear and tear or surprising natural accidents. Plaintiff's right against defendant is a right to

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> causal role in the hiker's death of the second hunter's negligence. A duplicative factor, such as the second hunter's shot, need not arise after harm has occurred. Thus, if the hiker had terminal cancer at the time the first hunter's bullet killed the hiker, the hunter's negligence is a factual cause of the hiker's death, while the cancer is not. However, the hiker's cancer may be relevant to the measure of damages for which the hunter is liable, as courts may, when equitable and appropriate, adjust the damages recoverable to reflect that defendant has deprived plaintiff of less than a full measure of damages for the harm.

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26 cmt. k (Proposed Final Draft 2005); *see also* RESTATEMENT (SECOND) OF TORTS § 924 cmt. e (1979) (discussing how to determine the length of life "[i]n the case of permanent injuries or injuries causing death").

76. *Jobling*, [1982] A.C. at 815.

have the means he would have, that is, subject to natural deterioration. If plaintiff's parked car is destroyed by a meteorite moments after defendant negligently damages it, defendant can truly say not just that plaintiff would have had only the remains of the car, but, further, that plaintiff would only have had a *right* to the remains of his car and not to an intact car. Defendant wronged plaintiff, but deprived her of nothing. On the other hand, if plaintiff's car is vandalized after defendant wrongfully damages it, and the vandalism is unconnected to the accident, defendant cannot appeal to it. Plaintiff's entitlement to her car is an entitlement to a car against which no wrongs have been committed.

Although the first tortfeasor cannot reduce liability by pointing to subsequent tortfeasors, a second tortfeasor can reduce liability by pointing to earlier ones. The second tortfeasor can truly say that plaintiff had already lost some of her means. The asymmetry follows from the fact that the principle that rights survive wrongs applies as between any plaintiff-defendant pair, rather than somehow surviving in the abstract, apart from a particular transaction between the parties. If plaintiff is already injured, second defendant deprives plaintiff only of what plaintiff still had, because the sense in which plaintiff's right against first defendant survived was just in the sense of plaintiff's entitlement to damages from first defendant. Second defendant has not interfered with that entitlement, so plaintiff only has a claim against second defendant for those means with which second defendant interfered.

In the case of simultaneous torts, including *Corey* itself, each defendant is liable because the only respect in which either one can point to the other is as a subsequent wrongdoer. Defendant cannot say that plaintiff's horse already was startled, but only that it would have been startled anyway—that is, that plaintiff would have been wronged anyway. That is exactly the claim that plaintiff's right does not survive wrongdoing.

I now want to bring this point to bear on a more general issue about money damages: a tort deprives plaintiff of means to which she is entitled. Money damages make up the value of those means. That value can only be calculated against the background of the assumption of properly functioning markets, that is, against the background of the assumption that nobody wrongs anybody else. Things only have prices on the assumption that people will enter

into honest contractual relations with each other. If they do not, the magnitude of the loss is indeterminate.[77]

V. AN INTENTIONAL TORTS ILLUSTRATION: GAIN-BASED DAMAGES

John Goldberg has recently bemoaned the fact that the law of torts is "unloved" in contemporary legal scholarship.[78] If the law of torts is unloved, then intentional torts in particular are the neglected child of that scholarship. I do not have the space here to fully repair that neglect, or even to take them into protective custody. Nonetheless, I want to reintroduce them to show the significance they have to the claim that the law of damages makes it as though wrongs had never happened.

Intentional torts often involve intentional wrongdoing, but they are puzzling from many perspectives because they seemingly are also torts of strict liability that involve no apparent wrongdoing. Goldberg describes the tort of trespass as normatively complex, because it can be done innocently yet intentionally.[79] Trespass against land is an intentional tort, but so is battery; doctrinally, a common trespass against minerals is a central case, as is conversion.

I want to suggest, however, that intentional torts are normatively simple, for the very reasons that Goldberg finds them complex. An intentional tort involves using means that belong to another person for purposes that person has not authorized. The intention is required because, based on the Aristotelian conception of action introduced earlier, someone must intentionally use means that properly belong to another. You cannot use means except intentionally, because, on this analysis, to act intentionally is simply to take up means in order to pursue an end. The element of intention requires using means in order to pursue your ends.

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77. The same point applies to other types of wrongs to which defendant might seek to appeal. If women are unjustly paid less than men for the same work, a defendant should not be allowed to reduce liability by pointing out that plaintiff would have suffered from wage discrimination, because the right to use her powers to earn income is a right to use it in the absence of wrongs by others.

78. *See* John C.P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1502-03 (2002).

79. *See* 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, 597-98 (2005).

Far from being in tension with this understanding of intention, the combination of strict liability and intention is an immediate consequence of it: If I use something for my purposes, I may not know who properly gets to decide how it will be used. I can use a piece of land for setting up my tent, without knowing whose land it is. For that matter, I may not even be reflectively aware that I am using it—perhaps I am so tired, or setting up my tent is so routine, that I do it without thinking about it at all. I still act intentionally, because I act on the rule "use land to set up your tent." But I may not realize I am doing so on *your* land, because the minor premise, as Aristotle would call it, of my action is "here is some land." Like Aristotle's example of the man who says "[d]ry food is good for every man" and "[this sort of] food is dry,"[80] and proceeds to eat it, I identified my means without reference to their title. The description under which I take them focuses on their usefulness for my particular purpose, rather than their situation from the standpoint of rights. Nothing is objectionable about my thinking in this way. The wrong of trespass is not my indifference to the rights of others, but rather my use of some thing for a purpose its owner has not authorized.[81] Lack of due care on my part is not part of the wrong. Duties of noninjury are qualified to reconcile our respective interests in liberty and security. I have a liberty interest in using *my* means in ways that pose a small risk to you, even if they sometimes cause injury. I have no parallel interest in being able to use *your* means, so my duty to avoid doing so is unqualified, that is, strict.[82]

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80. *See* ARISTOTLE, ETHICA NICHOMACHEA Book VII, ch. 3 (350 B.C.E.), *reprinted in* 9 WORKS OF ARISTOTLE 1147 (W.D. Ross trans., 1925).

81. The sense of intention at issue in intentional torts is thus significantly different from the role of intention in the criminal law. In both cases, an intention is best analyzed in terms of the use of the means to achieve a particular purpose: "I will use this land to graze my cattle on." An intentional tort violates the landowner's private right by using it for a purpose that he has not authorized, but I can use it without realizing that the land belongs to somebody else. Thus an intentional tort can be committed innocently. In the criminal law, the intention is also analyzed in terms of the means that a criminal uses in order to achieve his purpose, but in the most familiar cases of crimes *mala in se*, the criminal uses means that are inconsistent with the very existence of a legal system, such as property belonging to another. Thus the intention is to be analyzed as "I will use what belongs to another for achieving my own purposes." I examine these issues in more detail in my forthcoming book on Kant's *Doctrine of Right*.

82. I discuss this issue in more detail in Arthur Ripstein, *Tort Law in a Liberal State*, 1

The remedy reflects this wrong: plaintiff's property is to be used only for her purposes. If it is used for a purpose she has not authorized, the law must make it as if the wrong had never happened. It cannot undo the fact of defendant's use of the property, but the law can treat it as if it were plaintiff's own use by requiring defendant to disgorge his gains.[83] At the highest level of abstraction, it is as if the wrong had never happened: plaintiff's property is used to create additional means for plaintiff. Those new means are then subject to plaintiff's choice.[84]

J. TORT L. (forthcoming 2007).

83. In *Jacque v. Steenberg Homes, Inc.*, the Wisconsin Supreme Court upheld a jury verdict of $1 in nominal damages for a trespass, and reinstated an award of $100,000 in punitive damages against defendant company. 563 N.W.2d 154, 166 (Wis. 1997). Plaintiffs refused to grant defendant permission to cut across their land to deliver a mobile home to a neighboring lot, even after defendant offered to pay. *Id.* at 157. Defendant proceeded to cut across anyway, so as to save itself considerable expense in using a steep snow-covered road. *Id.* On the analysis offered here, the punitive damages can be understood as legitimate insofar as they approximate defendant's gain from the unauthorized trespass. For detailed discussion of *Jacque*, see Thomas W. Merrill and Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1871-74 (2007).

84. If the wrong is intentional in a more robust sense, and defendant willfully wrongs plaintiff, for example, by using plaintiff's property for his own purposes, he is made to disgorge any gains he might make and, in some cases, is not allowed any offset for expenses that he might have incurred in making those gains. And so, it would appear, plaintiff receives a windfall. Even if we can understand why defendant should not be allowed to keep his profit, it is not obvious, in terms of making things as they would have been had the wrong never occurred, why plaintiff should be entitled to a positive gain. So in one case defendant is worse off than he would have been, and in the other plaintiff apparently is better off than she would have been. In what sense have things returned to normal?

In other cases, however, the way in which I wrong you is not by damaging your property—that is, I do not interfere with your use of your person or property, but only with your possession of it. Here too, the remedy can be understood as justified in terms of a redescription of the situation. If I use what is yours, without your consent, I wrong you. The problem is coming up with the way in which that wrong can be righted, and the only way it can be righted is turning it into a situation in which nobody does wrong after all. The proper way to do so, when I use your property without your consent but without recognizing that it is your property, is to bring about the results that would have occurred had I been acting on your behalf. And so I must surrender any profits I have, because, having acted on your behalf, you are entitled to the profits that accrue from my action. The leading cases of this sort involve accidental trespass against minerals. For example, I discover coal that is under your land and has been disoriented by the tunnels that I dug beginning under my own land. Of course, getting the coal out from under your land requires effort on my part, and if I am innocently but mistakenly acting on your behalf, I must be understood as having acted as your agent. As would be the case with any agent acting on your behalf in this way, I am entitled to deduct reasonable expenses that I incur, as I acted for your benefit. So I must give you the profits from the coal, but I need not give you the full price of the coal, because I can deduct the cost of removing it and taking it to market. Again, the crucial point here is that my act is

redescribed in a way so that it is not wrongful.

By contrast, if I willfully take what is yours without your consent, and mean to appropriate it for purposes of my own, a different analysis must be made to apply. If I wrong you intentionally, I cannot simply be taken to be acting on your behalf. If I were so taken, then I could, through my wrong, force you to hire me as your agent—that is, I could decide unilaterally that you will use my services to get your coal out of the ground. But I cannot do that unilaterally: allowing me to do so would be incompatible with equal limits on freedom, because I would be able to enlist you into a purpose that you did not share. Of course, I may accidentally so enlist you, as when I accidentally use what is yours, but if I do, it can be turned into your purpose. By contrast, to force you to use my services for removing your coal is something that cannot be turned into your purpose.

In this example, we need a different redescription of the situation, which allows us to say that you are entitled to the benefits of your property, but also that I am not able to claim the fruits of my efforts. This may seem puzzling, because seemingly a regime of equal freedom always entitles me to claim the fruits of my efforts. But that conclusion rests on a misunderstanding, one that goes to the heart of the focus on benefits and burdens. As a general matter, I am not, as a matter of right, entitled to the fruits of my efforts. I am only entitled to the fruits of my efforts if I manage to retain them. I might retain the fruits of my efforts by putting my efforts into things that have no side effects on others. This turns out to be remarkably difficult to do; I can harvest most of the fruits of my efforts if, for example, I work on my own land, but some fruits of my efforts may spill off of my land and benefit others. I am entitled only to those fruits of my efforts provided that I negotiate with others to keep them. So, if I know that you are benefitting from the shade cast by my fence, I can tell you that I will tear down my fence if you do not pay me a certain fee. But I cannot claim that you have been unjustly enriched by the past existence of my fence and demand a share of your profits. I cannot do that because I do not have a right to exclude others from side benefits of my activity, except, in the sense that I can change my activity unless they agree to pay me.

Again, if, for example, I leave a basket of flowers on your doorstep, and, as a result, a potential purchaser of your house comes away with a particularly good impression and buys the house for a higher fee than you might otherwise have been able to fetch, I cannot claim a share in your profits. I can only reclaim my basket of flowers. To vary the example in a way that will perhaps make it more obvious, if we are neighbors and I keep a beautiful garden, the result of which your house looks better to prospective purchasers, I cannot claim a share of your profits, because you did not ask me to go into business with you, and you did not in any way acquiesce in the benefit. You did not really have much choice in the matter; you just kept your house where it was. As Baron Pollock put it in a nineteenth-century English case, "one cleans another's shoes; what can the other do but put them on?" Taylor v. Laird, (1856) 25 L.J. Ex. 329, 332. Even if you set out to confer a benefit on me, you cannot then claim the benefit unless I have freely accepted it, precisely because you cannot unilaterally force me into a contractual arrangement with you. If I cannot force you into a contractual arrangement by conferring a benefit on you, and so cannot force you to use my services in such a case, I certainly cannot force you to use my services in the case in which I set out to take your property as my own. Instead, I must be understood as having done something from which you benefit, but for which I have no right to demand payment.

Returning to our example, then, although I am acting on your behalf in bringing your coal to market, I am not allowed to force you, through my unilateral choice, to pay me for my efforts. Instead, what had appeared to be your windfall turns out to be no different from the windfall you receive if I shine your shoes in the hope that you will pay me, or the windfall you receive if I beautify my garden in a way that increases the value of your home. In each case,

Not every trespass produces a gain for defendant. Some produce a loss for plaintiff, in which case plaintiff is entitled to be put back where she would have been if the trespass had never happened. That is the result if my cattle wander onto your land and flatten your crops. Coase's famous claim that the harms are the reciprocal effects of ongoing activities[85] is true but beside the point: your *claim* to damages in trespass is not based on the harm I cause you, but on my using your land for a purpose you have not authorized. The relationship of trespass is not reciprocal: I have used your land, but you have not used mine. Because I have wronged you, you are entitled to be put back in the situation you would have been in if the wrong had never happened. The harm you suffered only appears as the magnitude of the means my trespass deprived you of.[86]

CONCLUSION

I want to close with some broader observations about the broader theme of this Symposium, that is, the relation between law and morality. Explanatory and interpretive tort theory developed in the wake of the collapse of legal realism in American law schools in the middle part of the twentieth century. Unfortunately, the collapse of legal realism did not completely change the broader conception of what it is to be properly tough-minded and focused on the facts. One aspect of this residual tough-mindedness was a readiness to assume,

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I could offer to do these things for you in return for a fee, and if you accept my offer you would thereby be bound to pay for the benefits received. But because I did not offer to do these things for you, I cannot force you to pay for the benefit. I must be understood instead as having squandered my efforts, and you, as it turned out, received a benefit. The benefit is a windfall, in the sense that you, having been wronged by me, end up with more than you would have received had we negotiated an agreement. But there are many ways in which you can benefit from my activities to a greater degree then you would have had we negotiated an agreement with respect to those activities. But that is simply my loss, and your gain.

The criminal law will have a different description of the same facts, for it will label me a thief. But its interest in punishing me for theft is not an interest in setting things right between the two of us.

85. Coase, *supra* note 31, at 2.

86. Some trespasses produce neither gains nor losses. In such cases, plaintiff is entitled to "nominal" damages, that is, damages that articulate the nature of the wrong without quantifying it. Such damages are nominal by name, but not by nature, because they are based on the existence of a wrong.

almost by default from the lack of a suitably tough-minded alternative, that the law of torts *must be* concerned with reducing harm. Harm and loss are real events in the world in a way that rights and duties might be thought not to be. Holmes's statement is characteristic: "[T]he general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms."[87] Familiar types of harm can be identified without reference to how they come about,[88] so when harm is in view it is a short step to the conclusion that the familiar landscape of legal doctrine is comprised of a series of tools designed to prevent or reduce unwelcome outcomes. From these premises, it is almost inevitable that law would be understood as an instrument, to be understood and evaluated in terms of its actual reduction of the target outcomes.

Instrumental analysis of tort law has lost some of its luster, as critics have pointed to its inability to make sense of core doctrinal ideas such as duty,[89] or the relational nature of liability in tort.[90] Half a century ago, ideas now prominent in torts scholarship might have been charged with failure to mean anything, and so made "hard ... to read the books of, people who do not seem to be *worried* about the problem of convincing the sceptic that their ... propositions mean something."[91] But the broader assumption that tort law must have some sort of function, that it must be called to account for its success or failure at delivering some set of goods that can be specified outside of it—be they harm prevention, wealth maximization, or civil peace and the sublation of the desire for revenge—keeps reasserting itself.

Instrumentalism no longer seems inevitable when the focus is shifted from harms to wrongs. The ordinary and familiar ways of thinking and talking about wrongs and remedies do make sense. Damages make it as if a wrong had never happened. The example of damages also reveals a broader point with respect to the supposed lessons of supposedly sophisticated talk about the "purposes"

87. HOLMES, *supra* note 7, at 145.
88. FEINBERG, *supra* note 14, at 31.
89. *See* WEINRIB, *supra* note 19, at 170; Zipursky, *Civil Recourse*, *supra* note 18, at 707-08.
90. *See* WEINRIB, *supra* note 19, at 10-11.
91. *See* HARE, METHOD, *supra* note 1, at 49.

of law, and their related urge to unmask or otherwise discipline legal language: we can carry on in our old ways as if nothing had happened.