

# Tort Law and Responsibility

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## I. Introduction

When a court enters a judgment for a pedestrian who has sued a driver for negligence, it holds the driver responsible to the pedestrian. The basis of the driver's being held responsible, obviously, is the driver's careless injuring of the pedestrian. The same is true for a judgment entered against a manufacturer on a claim by a consumer who is injured by a poorly designed product, for a plaintiff defamed by a magazine, for an investor defrauded by a swindler, and for a child molested by a caretaker: in all these cases, the plaintiff has suffered an injury because of the defendant's wrongful conduct, and she demands that the court hold the defendant responsible and therefore force him to compensate for the injury. In ordinary parlance, the defendant must pay the plaintiff because the plaintiff's injury was the defendant's fault.

Tort law is in the foregoing senses a law of responsibility. It allows for persons to be held responsible (or accountable) for having wrongfully injured others. When lawyers say that tortfeasors are "subject to liability," they mean that, in light of what the tortfeasor did and the injury suffered by the plaintiff, the tortfeasor is vulnerable to being held responsible or accountable to the victim through the court system.

Much of the debate in contemporary tort theory has pitted corrective justice theory against efficient-deterrence theory. Among the problems with this framing is that it deflects attention away from what should be the main contenders in this domain, namely, *responsibility-based* theories of tort law. To be sure, there are many overlaps between responsibility-based theories and corrective justice theories. But the responsibility view is not best described as a version of corrective justice theory. This is for both positive and negative reasons. As to the positive: responsibility and accountability are the concepts at work on the face of the law, "justice" is not. As to the negative: it is frequently untrue in a tort judgment that any kind of correction really occurs, and it is frequently the case that the judgment better conforms to a notion of who is *responsible* than it does to the more

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aspirational idea that the defendant must pay in order for justice to be achieved.

Responsibility-based views take many forms. Particularly influential versions have been offered by scholars from the U.K., including Honoré and Hart<sup>1</sup> as well as Strawson.<sup>2</sup> (Contemporary corrective-justice theory, by contrast, has been developed most fully by North American scholars including Epstein, Coleman, and Weinrib, who in turn have relied on Lockean, Aristotlean, and Kantian political and moral theory.<sup>3</sup>) A wide range of contemporary theorists probably are rightly treated as responsibility theorists, including self-proclaimed members of the corrective justice camp such as Coleman, Arthur Ripstein,<sup>4</sup> and Stephen Perry,<sup>5</sup> but also Peter Cane,<sup>6</sup> William Lucy,<sup>7</sup> Martin Stone,<sup>8</sup> and ourselves.

In what follows, we first outline Perry's impressive effort to craft a responsibility-based account of tort law. We invoke it to demonstrate the ability of responsibility theories to capture basic features of, and important modern developments in, tort law. Along the way, we contrast it briefly with views of tort that are problematic either because they fail to give responsibility a central place, or because they draw too close a connection between holding persons responsible and doing justice.

Having invoked Perry's theory to establish the plausibility and value of viewing tort law in terms of responsibility, we next argue that the account that we have developed under the banner of "civil recourse theory" provides a better version of responsibility theory. Tort law is best understood as law that defines duties not to injure others, and that holds those who have breached such duties vulnerable to their victims' demands for responsive action.

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<sup>1</sup> See, e.g., H.L.A. Hart & Tony Honoré, *Causation in the Law* 130-307 (Oxford: Clarendon Press 2d ed. 1985); Tony Honoré, "Responsibility and Luck," 104 *Law Q. Rev.* 530 (1988).

<sup>2</sup> Peter Strawson, "Freedom and Resentment," 48 *Proceedings of the British Academy* 1 (1962). Obviously Strawson was not a tort theorist. His philosophical discussion of responsibility nonetheless has been broadly influential among moral and legal theorists interested in exploring legal responsibility.

<sup>3</sup> Richard A. Epstein, "A Theory of Strict Liability," 2 *J. Legal Stud.* 151 (1972); Jules L. Coleman, *Risks and Wrongs* (New York: Oxford, 1992), 197-385; Ernest J. Weinrib, *The Idea of Private Law* (Cambridge: Harvard, 1995).

<sup>4</sup> See, e.g., Arthur Ripstein, "As if it Never Happened," 48 *Wm. & Mary L. Rev.* 1957 (2007).

<sup>5</sup> Stephen R. Perry, "Responsibility for Outcomes, Risk, and the Law of Torts," in Gerald Postema (ed.), *Philosophy and the Law of Torts* (Cambridge: Cambridge, 2001), 72-130 [hereinafter Perry, *Responsibility for Outcomes*]; Stephen R. Perry, "The Moral Foundations of Tort Law," 77 *Iowa L. Rev.* 449 (1992) [hereinafter Perry, *Moral Foundations*].

<sup>6</sup> Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart, 2002).

<sup>7</sup> William Lucy, *Philosophy of Private Law* (Oxford: Oxford, 2007).

<sup>8</sup> Martin Stone, "The Significance of Doing and Suffering," in Gerald Postema (ed.), *Philosophy and the Law of Torts* (Cambridge: Cambridge, 2001), 131-82.

By way of conclusion, we offer some thoughts on why it is especially important today to recognize the central place of responsibility in the law of torts.

## I. RESPONSIBILITY THEORIES OF TORT LAW

### A. *Perry on Responsibility in Tort Law*

Responsibility theories of tort make two basic claims. First, for any successful tort claim in which a defendant is deemed liable to a plaintiff, the court is *holding the defendant responsible to the plaintiff*. Second, the defendant's responsibility rests on the defendant's *being responsible* for having injured the plaintiff.<sup>9</sup> Obviously these claims are quite general, which

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<sup>9</sup> John Finnis has urged us to discuss how our usage of “responsibility” and its cognates relates to Hart’s famous taxonomy, which identifies four iterations of the concept: (a) role-responsibility, (b) causal-responsibility, (c) liability-responsibility, and (d) capacity-responsibility. H.L.A. Hart, *Punishment and Responsibility* (Oxford: Oxford, 2d ed. 2008), 210-30.

Hart had relatively little to say about iterations (a), (b) and (d). As he defined it, the term “role-responsibility” refers to substantive duties that attend certain reasonably well-defined roles. To use his example, a ship’s captain incurs a responsibility for the safety of his ship by virtue of assuming the position of captain. Tort law’s duties of non-injury (and with them, the possibility of liability for injury) are often role-dependent or relationship-dependent. For this reason, any plausible account of tort law will incorporate notions of role-responsibility. However, these kinds of duties are not our primary focus here.

“Causal-responsibility” refers to uses of the term “responsibility” that provide normatively spare or agnostic descriptions of cause-effect relationships, as in the sentence: “Wilt Chamberlain was responsible for the National Basketball League changing its rules for free throws.” A great deal of confusion stems from conflating causal-responsibility with the normatively richer notion of a person *being responsible for having caused* some state of affairs. (Indeed, Hart in his work on causation with Honoré was arguably guilty of such conflation.) To avoid these problems, we try to avoid using “responsibility” and its cognates as synonyms for “causation” and its cognates, and we follow that practice here.

“Capacity-responsibility” refers to characteristics that render a person eligible for attributions of responsibility, including faculties of reason, self-control, and the like. Any account that depicts tort law as law that holds actors responsible for injuries caused to others presupposes some conception of capacity-responsibility. It is not our present concern to specify that conception.

Hart gave a bit more attention to the idea of “liability-responsibility.” To the extent it is helpful to situate this Article and our work in relation to his, it is fair to say that our main concern is also with this form of responsibility. This is hardly surprising. As its label suggests, Hart argued that liability-responsibility is closely connected to concepts of legal liability and moral blame. Determinations of liability-responsibility, he argued, require attention to the elements or components of liability and blame, including the mental or psychological attributes of an actor’s actions, the possible causal connection between the conduct of the actor and the injury for which the actor is potentially liable or blameworthy, and the relationship between the actor and whomever or whatever brought about the injury in question.

As we note below, Stephen Perry’s account of responsibility, on which we will focus in this Article, builds directly on the work of Tony Honoré, who, famously, was Hart’s co-author, and who developed an account of liability-responsibility roughly along these Hartian

is why responsibility theories can take different forms, depending on how they describe the terms on which the defendant is held responsible to the plaintiff, and the grounds on which the defendant is deemed eligible for bearing that responsibility.

In his superb article on “The Moral Foundations of Tort Law,”<sup>10</sup> Stephen Perry offered a powerful version of responsibility theory. Building on the work of Honoré, Coleman, and Weinrib, Perry maintained that tort law holds a defendant responsible to the plaintiff in the particular manner of enforcing the defendant’s moral duty to repair the plaintiff’s loss. That duty is ultimately grounded, in significant part, in the defendant’s being “outcome-responsible” for that loss.

Roughly speaking, a person is outcome-responsible for a loss if the person’s volitional action is necessary for the loss to occur, and if the loss was avoidable, in that the person could reasonably foresee that his action might cause the loss, and that the person was capable of acting so as not to cause it.<sup>11</sup> Critically, on this account, there can be more than one outcome-responsible actor for any given loss, including the victim herself.<sup>12</sup>

Perry calls this a “volitionist” conception because it centers on the idea that volitional action connects a person to certain outcomes, and that this connection through one’s agency generates agent-relative reasons for action.<sup>13</sup> More is needed, however, to travel the full distance from the notion of outcome-responsibility to a defendant’s being made, though tort law, to heed his moral duty to repair another’s loss. Outcome-responsibility generates moral reasons for action in relation to an outcome. But it is a relatively thin conception of responsibility. Again, one is outcome-responsible for a loss merely by virtue of having caused it where it was avoidable. Fault is not required. (Indeed, as Perry notes, Honoré originally invoked the concept of outcome-responsibility as part of an effort to provide a moral justification for strict liability.<sup>14</sup>)

Correspondingly, outcome-responsibility often generates moral reasons for action falling short of reparation. If I carefully back my car out of my

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lines. We, like Perry, suppose that there is a familiar notion of “responsibility” in the vicinity of what Hart called liability-responsibility; one that alludes to or connotes a connection between actor, action, and injury, and does so as part of an inquiry into the propriety of deeming an actor liable or to blame. What those connections are (on our view), and how this view of these connections relates to the ideas of Perry (and, to a lesser extent, Honoré and Hart) are sketched below.

<sup>10</sup> Perry, *Moral Foundations*, *supra*, note 5. We recognize that Perry has developed his account of torts in subsequent writings. *See, e.g.*, Perry, *Responsibility for Outcomes*, *supra*, note 5. We nonetheless focus on this articulation as a particularly clear and powerful statement of a responsibility-based account of tort.

<sup>11</sup> Perry, *Moral Foundations*, *supra*, note 5, at 505.

<sup>12</sup> Perry, *Moral Foundations*, *supra*, note 5, at 498.

<sup>13</sup> Perry, *Moral Foundations*, *supra*, note 5, at 507, 513.

<sup>14</sup> Perry, *Moral Foundations*, *supra*, note 5, at 491.

driveway, but nonetheless strike my neighbor's trashcan, I am outcome-responsible for its being knocked over and dented. My having been the one who collided with it gives me a moral reason to do *something* with respect to that outcome. However, given that I was driving carefully, it may be that I incur nothing more than a responsibility to pick up the can and place it in an appropriate spot. Making a difference in the world gives rise to reasons to take further actions, but the particular actions I have reason to take will depend on additional considerations.

According to Perry, to move from outcome-responsibility to a moral duty of repair requires the invocation of a distinct set of "distributive" considerations.<sup>15</sup> Suppose a pedestrian is crossing a residential street and a driver runs into him, knocking him over and breaking his arm. Because collisions of this sort are unfortunately commonplace, the scenario was reasonably foreseeable both to the driver and the pedestrian, each of whose actions (we can suppose) were necessary for the loss to occur. Thus the pedestrian's loss is one for which both the pedestrian and the driver are outcome-responsible. If the pedestrian were to sue the driver in negligence, she would be seeking the state's assistance in holding the driver responsible. The law of negligence, however, will require the pedestrian to establish that the driver was at fault. It does so, Perry maintains, as a way of answering the question of which of these two outcome-responsible persons should, in fairness, bear the cost of the broken arm. The plaintiff's assertion that the defendant was driving carelessly (and that she was crossing carefully) establishes that the defendant is not only outcome-responsible for the loss, but morally responsible, such that he now has reason to respond to the loss by indemnifying the plaintiff.

In other words, when we assess whether an actor is morally responsible for a loss, we are seeking to ascertain the answer to a question of "localized distributive justice"—of who in fairness should bear a given loss—by reference to the relative faultiness of the conduct of all outcome-responsible persons.<sup>16</sup> When tort law determines legal liability by reference to this criterion, it is doing so because it is a scheme for holding actors to the moral responsibility to repair that they incur by virtue of being both outcome-responsible and at fault for a given loss.

It is worth noting one other aspect of Perry's analysis. He argues that an appreciation of the precise role that fault plays in the legal analysis of a claim such as the pedestrian's enables one to grasp why legal "fault," though a moral concept, departs to some degree from notions of culpability or blame that tend to attach to notions of fault. Because fault is being invoked to resolve the distributive question of who should bear a given loss, and because the universe of candidates eligible to bear that loss is determined by outcome-responsibility, it is appropriate, Perry argues, for negligence law to focus on

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<sup>15</sup> Perry, *Moral Foundations*, *supra*, note 5, at 509-10.

<sup>16</sup> Perry, *Moral Foundations*, *supra*, note 5, at 513.

the nature of the defendant's action, rather than on the defendant's blameworthiness for having acted in that manner. When we are looking for a reason to distribute a loss among outcome-responsible persons, the failure to meet negligence law's "objective" standard is a good enough reason, even if the person who fails to live up to the standard cannot be blamed for failing to do so.<sup>17</sup>

Perry's particular responsibility theory of tort is powerful because of its ability to order in an intuitive manner a complex set of considerations that bear on moral responsibility, and to do so in a manner that likewise makes sense of well-established features of tort law, particularly negligence law. In assigning a critical role to foreseeability, in isolating the importance of causation and injury, in permitting the recognition of multiple responsible actors (including the possibility of victims being partly responsible for their own injuries), and in creating room for the use of a less-than-full-blooded version of fault, it captures a set of widely held moral judgments and a parallel set of tort concepts and doctrines. In turn, it offers the promise of explaining the contours of tort law by reference to moral judgments, and of thereby legitimizing key features of tort law. In this respect, the project is cheering to those of us who believe we should have reason to suppose a domain of law is justifiable before we are willing to stand by it.

*B. Responsibility in the Real World: Products Liability, Comparative Fault, and Affirmative Duties*

Although moral-philosophical theories of tort law are criticized for being unrealistic, responsibility theories are often more grounded and more helpful than supposedly down-to-earth instrumental theories in making sense of settled law and important modern doctrinal developments. Here, we briefly discuss three such developments: the emergence of strict products liability, the adoption of comparative fault, and the recognition of new affirmative duties in negligence.

Strict products liability is typically defended on overtly instrumental grounds. Some say it provides an insurance-like mechanism for spreading losses. Others say that it incentivizes those in the best position to avoid product-related accidents to take appropriate steps to prevent those accidents. Yet products liability law contains fundamental limitations on liability that are difficult to justify by reference to these instrumental considerations.

Courts continue to demand of a products liability plaintiff that she come prepared to show a causal connection between the defendant's product and her injury. Moreover, causation is not enough. For the product must also be "defective."<sup>18</sup> While there has been much debate over how to define "defect," it is clear that courts require a products liability plaintiff to identify a problematic feature of the defendant's product in order to recover.

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<sup>17</sup> Perry, *Moral Foundations*, *supra*, note 5, at 509-10.

<sup>18</sup> RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, § 2 (1998).

In this respect, products liability law resembles negligence law. One can reject (as we do) the claim made by the reporters for the Third Restatement's products liability provisions that, for cases of design defect and failure to warn, proof of "defect" amounts to proof of seller carelessness.<sup>19</sup> Still, they were right in recognizing that courts have rejected the notion that products-related liability should be divorced entirely from notions of wrongdoing and responsibility. Even in "strict" products liability, tort liability involves holding an actor responsible for having wrongfully injured another.

Responsibility theory on the model of Perry's helps us to see how this can be the case. A seller can cogently be deemed morally responsible for its product having caused an injury when that injury was an avoidable consequence of selling the product. And the seller becomes accountable in tort law when the seller is not only outcome-responsible, but when it acted in a wrongful (even if not particularly blameworthy) manner by sending out into the world a product containing a defect. So far as modern tort law is concerned, it is the seller's responsibility to ensure that its products are safe for ordinary use, and sellers are held responsible to injury victims when they fail to do so and that failure culminates in injury.

The widespread replacement in the 1970s and 1980s of the all-or-nothing contributory negligence regime with comparative fault is hailed as a signature progressive development in modern tort law. It is sometimes explained and defended on essentially political grounds—for example, as an instance of judges being less determined to protect businesses from liability. But the abandonment of contributory negligence is in many respects the recognition in law of common sense notions of responsibility. When a person is knocked down as a result of a sidewalk collision, or one child accidentally injures another while playing, we often and unproblematically think that each was partly responsible for the bad outcome. An observer of such an incident might instinctively judge that both the injurer and victim should have been paying more attention and, as part and parcel of that judgment, conclude that each is properly deemed partially responsible for the ensuing injury.

Perry's notion of localized distributive justice among outcome-responsible persons captures these moral intuitions and their legal counterparts. We start with all persons appropriately connected to a loss, and then ask who among them should bear which portion of the loss. Whether liability and loss is apportioned on a *pro rata* basis or in proportion to each actor's relative fault need not be resolved at the level of tort theory. Likewise, one can grant that apportionment is appropriate in many cases, yet also maintain that there are some instances in which the victim is blameless, or conversely, that the victim's contribution to her injury is so significant relative to the defendant's that there is reason to deny her recovery altogether (as is done in "modified" comparative fault systems and systems

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<sup>19</sup> RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, § 2 (1998), comment a.

that still recognize implied assumption of risk). It is enough to observe that comparative fault often tracks ordinary notions of responsibility and fault, so much so that it is now difficult to grasp why courts were once attracted to an across-the-board rule of contributory negligence. Today we think it obvious that, on many occasions, each of the parties responsible for an injury is partly responsible. Everyday notions of moral responsibility thus help explain why comparative fault seems like an obvious improvement over contributory negligence.

A third modern doctrinal development of note concerns the increased willingness of courts to allow plaintiffs to look past an immediate injurer (such as an assailant) to a background actor whose carelessness is alleged to have set the stage for the injury (e.g., the owner of a parking garage or apartment building who fails to provide adequate security)<sup>20</sup> Fifty years ago, courts were, on the whole, more willing to accept defense arguments that the immediate injurer's wrong—often involving intentional and criminal misconduct—functioned as a bar to the imposition of liability on the background actor. (The immediate injurer's actions were said to constitute a “superseding cause” that blocked the attribution of responsibility to the background actor, even assuming that the injuring would not have occurred but for the actor's carelessness.) Today, property owners are, to varying degrees, held liable for injuries that would not have occurred had they not been careless in failing to prevent criminal attacks on their properties. Likewise, the adult host of a party for high school students is subject to liability if an underage guest gets drunk at the party, drives while intoxicated, and injures another driver.

It is not hard to identify instrumental concerns that might seem to explain this pattern. Often the immediate injurer is judgment-proof, whereas the background actor can pay for the plaintiff's losses. Thus one might suppose that this doctrinal trend is another testament to the strength of the plaintiff's bar and the willingness of judges to let plaintiffs search for deep pockets. But this account flounders on the fact that the expansion of this form of liability has been quite circumscribed. Courts in the United States have thus rejected shooting victims' efforts to hold liable gun manufacturers on ‘negligent marketing’ theories. More generally, they have rejected product liability claims where the alleged defect is that an over-the-counter product can too readily be put to criminal use. They have likewise overwhelmingly rejected ‘social host’ liability for cases in which the drunk driver is an adult rather than a minor guest.

One can fashion an instrumental explanation for these limits too, but the more plausible account of the overall pattern is that courts are looking to

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<sup>20</sup> See John C. P. Goldberg & Benjamin C. Zipursky, “Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligent Enabling,” 44 *Wake Forest L. Rev.* 1211 (2009) (discussing the judicial adoption of, and limits on, remote actor liability for injuries inflicted more immediately by another).

distinguish instances in which the background actor can plausibly be deemed *responsible* for the victim's injury. It is common ground in such cases that there is quite a lot to be said, from the point of view of prudent conduct and foresight, in favor of requiring the background actor to act so as to reduce the probability that a direct injurer (e.g., a burglar in a crime-infested neighborhood, an illegal gun-toting assailant, a drunk driver) would severely injure a person in the position of the plaintiff. Thus, for example, one can argue that a welfare-conscious landlord in a dangerous neighborhood should ensure that there are working locks on a building's doors, a welfare-conscious manufacturer of handguns should refuse to sell to downstream commercial gun distributors with a record of illegal retail sales, and a welfare-conscious social host should be vigilant about guests' sobriety. The question in such cases is whether, after a victim has actually been injured by the wrongful conduct of the immediate actor (burglar, assailant, drunk driver), the victim should prevail in a negligence claim against the background actor on the ground that his injuries were a foreseeable result of the actor's failure to take steps like those outlined above. Overwhelmingly, the courts seem to be moved by the question: Even granted that it would have been appropriate and praiseworthy for the background actor to take the sort of precaution that he or she failed to take, does it make sense to say that the background actor is therefore *responsible* for the tenant's being attacked by an intruder, *responsible* for the criminal assailant's shooting of an inner-city teen, or *responsible* for the drunken guest's careless injuring of others on the road? When it comes to commercial owners of property, courts routinely say that the safety of tenants from intruders *is* in part the responsibility of a property owner. Conversely, courts say that the safety of ordinary persons from the attacks of criminals who have illegally purchased handguns is not the responsibility of gun manufacturers. Similarly, courts deny that adults are required to treat their adult guests as children who need to be minded, and hence refuse to deem hosts responsible to persons injured by their adult guests' drunk driving. In other words, they hold strong views concerning whether a background actor is appropriately deemed *morally* responsible for an injury inflicted wrongfully by a third party, and from there attempt to determine when there might sensibly be legal responsibility and, with it, liability.

### *C. Corrective Justice Theory and Responsibility Theory*

Most corrective justice theorists believe that a defendant who has wronged a plaintiff is properly vulnerable to the plaintiff's claim against her. At least in the sense that the defendant is deemed properly answerable to a plaintiff, the defendant is deemed legally responsible for having injured the plaintiff. To the extent that corrective justice theorists derive the claim that a defendant is properly vulnerable to the plaintiff's claim from the defendant's having breached a duty to the plaintiff, there is a substantial

isomorphism between the structure of responsibility theories and the structure of corrective justice theory. Where, as has been the case in the work of Coleman, Ripstein, and Perry himself, the putative corrective justice theorist actually describes his view in terms of the defendant's responsibility for the plaintiff's injury or loss, it is more than an isomorphism.

Nonetheless, there is at least one idea that is central to corrective justice theories that need not be any part of responsibility theories. Corrective justice theorists deploy a notion of *rectification* or *correction* that is said to be central to the normative structure of tort law. Tort law, in requiring that the defendant pay compensation to the plaintiff for injuring the plaintiff, is said to see to it that the wrongful injuring of the plaintiff is corrected. The payment of compensation is in this sense the doing of justice. The notion of correction here is teleological (the legal system aims to realize some valued state of affairs – the rectification); it is dynamic (something happens over time – an injustice is rectified); and it imports the notion of an equilibrium (a state of affairs that once obtained is restored – the plaintiff is returned to the *status quo ante*).

There is no obvious reason why a responsibility theorist is required to *reject* the core claims of corrective justice theories. Indeed, Coleman in *Risks and Wrongs* seemingly aims to be both a responsibility theorist, in the sense described above, and a corrective justice theorist.<sup>21</sup> (So too does Perry, though he seems less insistent that his moral reconstruction of tort renders tort a scheme of corrective justice.) On the other hand, there is no reason why a responsibility theorist is required to *accept* any of the above. One could, for example, take the position that what is demanded of a tortfeasor, in light of his having wrongfully injured the plaintiff, is to take responsibility by apologizing, and that tort law, by requiring that damages be paid, is requiring something akin to an apology rather than requiring the defendant to correct the wrong or the loss. Some corrective justice theorists—including perhaps Scott Hershovitz—might want to say that, even on this understanding, tort law would be treating the payment of damages as “making things right,” and would, in that sense, be seeing to it that corrective justice is done.<sup>22</sup> Perhaps. The point is that a theorist need not take this position; he might think nothing will make things ‘right’ between the parties (even in an extended sense of ‘right’) but that tort law nonetheless requires the responsible party to own up to what he has done to the plaintiff. Being a responsibility theorist permits being a corrective justice theorist; it does not require it.

As is clear from our prior work, we think there are reasons to stick to responsibility without a corrective justice gloss. Indeed, we are skeptical about all three aspects of the concept of correction or rectification described

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<sup>21</sup> Coleman, *Risks and Wrongs*, *supra*, note 3, at 345-47.

<sup>22</sup> Scott Hershovitz, “Corrective Justice for Civil Recourse Theorists,” 39 *Fla. St. L. Rev.* 107 (2011), 118-25.

above. Because we believe the state, in tort law, empowers a plaintiff to seek redress, but does not itself have the power to bring a victim's tort claim, we do not conceive of the state itself as *aiming* to see to it that compensation is paid by tortfeasors to victims. The normativity of liability-imposition lies in the empowerment of plaintiffs to obtain redress if they choose. Because we believe myriad reasons lie behind a plaintiff's choice to seek redress, and myriad circumstances lie behind a defendant having legally wronged the plaintiff, and a range of variables typically characterize the relative positions of defendant and plaintiff, we are skeptical of the claim that justice is done whenever damages are paid (though no doubt it is sometimes done). Because we reject the reduction of tort law's wrongs to interference with property or goods, and we do not understand how to stretch the idea of an equilibrium to the notion of wrongs detached from goods, we find the use of the notion of equilibrium either unpersuasive, mysterious or both.

### III. CIVIL RECOURSE THEORY AS A RESPONSIBILITY THEORY OF TORT LAW

#### A. *Civil Recourse Theory*

The theory we have developed over the past fifteen years to make sense of the structure and substance of tort law belongs to the family of responsibility theories we have sketched above. For a variety of reasons, we often use the phrase "civil recourse" to denote our overall view, and others have found that label convenient too. We will continue to do so, but we note here that the distinctiveness of the term "civil recourse" was never intended to convey a rejection of the normative concepts that are pervasive in tort law and tort theory.<sup>23</sup> Indeed, we maintain that our theory gives us a better purchase on the ways in which concepts of duty and right are at work in tort law. Still, we have not always succeeded in conveying the centrality of responsibility to our view. We aim to remedy that deficiency here.

As we have noted elsewhere,<sup>24</sup> civil recourse theory maintains that Anglo-American tort law is best understood in terms of three interlocking features: (1) *wrongs*, (2) *rights of action*, and (3) *remedies*. The theory

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<sup>23</sup> The title of our Torts casebook, co-authored with Tony Sebok and first published in 2004, makes this connection explicit. See John C. P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *Tort Law: Responsibilities and Redress* (New York: Wolters Kluwer, 3d ed. 2012). Likewise, in a recent book chapter, we argued that one must tease apart the different notions of rights at work in tort precisely in order to grasp the particular form of responsibility that tort law instantiates and implements. John C. P. Goldberg & Benjamin C. Zipursky, "Rights and Responsibility in the Law of Torts," in Donal Nolan & Andrew Robertson (eds.), *Rights and Private Law* 251 (Oxford: Hart 2012), 271-73.

<sup>24</sup> The following outline of civil recourse theory borrows substantially from a description we have offered elsewhere. See John C. P. Goldberg & Benjamin C. Zipursky, "Civil Recourse Theory Defended: A Reply to Posner, Calabresi, Rustad, Chamallas and Robinette," 88 *Ind. L.J.* \_\_ (2013).

maintains that these features hang together to form a body of law that provides recourse through law to victims of a certain kind of wrong.

Torts are wrongs. Each recognized tort stems from a norm of conduct that enjoins us not to mistreat others in certain ways. Because these norms are legal norms, torts are legal wrongs. Though the wrongs of tort tend to track the wrongs of ordinary morality, conduct's being a moral wrong is neither necessary nor sufficient for it to be a tort. For each tort, the norm enjoining conduct is a legally authoritative directive or rule, even if a directive or rule only implicit in precedent.

Within the category of legal wrongs, torts are further distinguished because the substance of tort law's directives tends to be set by law rather than by agreement – a familiar way of separating tort from contract. Torts are also distinctive as legal wrongs in that they are *injury-inclusive* and *relational* wrongs. Absent an injury to someone, there is no tort, and even where there is an injury connected to wrongful conduct, there is still no tort unless the conduct was not merely wrongful in a generic sense but wrongful *as to* the injury victim.

Civil recourse theory further identifies as critical to tort law a particular linkage between the wrongs identified as torts and the idea of a *right of action*. The commission of a tort, we claim, confers on the tort victim a particular legal power, namely, a power to demand and (if certain conditions are met) to obtain responsive action from the tortfeasor. Liability is the Hohfeldian flipside of this legal power. The commission of a tort leaves a tortfeasor vulnerable to a claim initiated by the victim and backed by the power of the state. Because the vulnerability is to the victim, the wrongdoer's fate is to a substantial degree in the victim's hands. The victim, not a government official, decides whether to press her claim or not, and the victim in principle also decides whether or not to accept a resolution of the claim short of judgment. If the claim is successful, of course, the victim can enlist the state's aid in her effort to enjoin ongoing wrongful conduct, or to demand responsive action from the wrongdoer in recognition of the wrong done to her.

It is hardly coincidental that courts and legislatures have seen fit to connect wrongs and rights of action in the way that our tort law does. For the provision of tort law, we have argued, is itself a political duty that the state owes its citizens. Following Locke and others, we have suggested that this duty is rooted in the natural privilege of individuals to respond to mistreatment by others. Insofar as individuals delegate such privileges to governments, and insofar as governments justifiably deny individuals the privileges of self-help and self-assertion in the name of civil peace and justice, it becomes governments' duty to provide alternatives. By granting to individuals who have been injuriously wronged a legal power to exact a remedy from the wrongdoer through the courts, a government complies with the *principle of civil recourse*—the principle that a person who is wronged is entitled to an avenue of civil recourse against the wrongdoer.

The third level at which our theory operates is at the level of *remedies*. Civil recourse theory asserts that the question of remedy in a tort case turns on the question of what a person who has proven that she has been wronged is entitled to demand of the wrongdoer. This, we insist, is a question apart from the question of what sort of response the defendant is duty-bound to provide. It is about the victim's right to redress for the injurious wrong done to her.

To be sure, the idea of "making whole" figures centrally in modern tort practice, a fact that has misled scholars of various stripes to suppose that tort law is all about making whole. We argue instead that "making whole" is but one remedial rule, albeit one that is in many instances a perfectly reasonable one to adopt, and that has in fact become quite salient (although less than sometimes assumed) in tort law. In other words, it is a rule that reflects a judgment regarding what constitutes reasonable redress for the victim of a tortious wrong. Redress is a capacious concept that is compatible with judicial provision of remedies ranging from injunctions to nominal damages. This is why the civil recourse account can address more satisfactorily than competitor theories pressing contemporary questions about punitive and non-economic damages

Thus defined, civil recourse theory can rather plainly be seen to carry the hallmarks of responsibility theory that we identified above. First, it emphasizes the significance for tort of a notion of accountability. It starts with a political-theoretic picture according to which, as a default matter, each person enjoys an immunity against certain demands by others. By prevailing in a tort suit, a plaintiff surmounts this default immunity and establishes that the defendant is properly subject to a legally enforceable demand for redress. In legal terms, we say that the defendant is subject to liability to the plaintiff because the defendant committed a tort upon the plaintiff, or tortiously injured her. This is but a legally institutionalized version of the more general idea that a person is properly subject to a demand from the victim for compensation or conduct ameliorating her injury where the defendant wronged her.

Second, the ground for the defendant's answerability to the plaintiff resides in the defendant's having wrongfully injured the plaintiff. Each tort is a wrongful injuring of another. An instance of negligence, for example, is an instance in which an actor injures another by failing to heed a duty owed to the other to take care not to cause such an injury. The defendant is subject to liability because it was the defendant's wrong that brought about the plaintiff's injury, and the notion of a "wrong" is akin to that of a blameworthy moral wrong, while not being identical to it.

Third, understood as civil recourse law, tort law formalizes and institutionalizes non-legal notions of wrongfulness, injuriousness, and redress. A tort defendant is deemed liable to the plaintiff on the basis of having committed a legally defined injurious wrong against the plaintiff.

Tort law's definitions of wrongdoing departs to some degree from 'full-blooded' moral wrongs. However, this scheme of responsibility runs parallel to, and, in this sense still implements, notions of moral responsibility. Hence, it is fair to explain why tort law imposes liability on certain people by saying that it is deeming them responsible for having injured certain others, and infers from this responsibility a right in those others to demand compensatory damages.

In sum, civil recourse theory understands responsibility in tort law as accountability or answerability for what one has done to another. It is, in part, because there are certain acts upon others that count as wrongs upon them that it makes sense to regard some persons as accountable for having injured another. To say they are "responsible" is not necessarily to say yet what they should do. It is, however, to say that they are fairly treated as vulnerable to a claim by the plaintiff.

### *B. Civil Recourse Theory Contrasted With Perry's Responsibility Theory*

Like Perry's, then, ours is a responsibility theory of tort. There are, however, at least two major differences between our view and his. Ours is not dependent, as is his, on the claim that there is a general moral duty of repair. And ours is dependent on a notion of wrongs, whereas his is dependent on a notion of responsibility for loss. Unsurprisingly, we believe that these differences count in favor of civil recourse theory.

#### 1. Rights of Redress without Duties of Repair

A critical question for any responsibility theorist is why the defendant's action in bringing about an injury should generate in the victim a claim against the defendant. Perry's answer is this: because the at-fault defendant is outcome-responsible for the plaintiff's harm, and more fairly bears the plaintiff's loss in light of his fault, the defendant owes a duty of repair to the plaintiff. The defendant's outcome-responsibility for bringing about the loss, combined with the defendant's fault, generates a moral duty of repair, which in turn generates a moral right in the plaintiff to claim that compensation is owed. The legal duty of repair is an institutionalized version of the moral duty of repair, stemming from the defendant's responsibility for the loss, and the legal right to be paid damages flows from the legal duty of repair.

We reject Perry's account for reasons that, even though basic and far-reaching, are concededly nuanced. First, it relies on an indefensible picture of the structure of tort liability. There are many areas of law in which the state empowers an individual or entity to prevail in a claim against another for payment because the defendant has a legal duty to make that payment. Classic examples involve the federal government, through the Internal Revenue Service, bringing an enforcement action against a taxpayer who has

not paid taxes owed, and a party to a contract who has delivered goods under the contract but has not yet been paid. Defendants in tort cases are not in this position. One of us (Zipursky) made this argument more than a decade ago against a variety of tort theorists, and it has never received a serious reply.<sup>25</sup> There has, moreover, been significant scholarship by others strengthening this critique.<sup>26</sup>

The second cluster of reasons for rejecting Perry's view assumes *arguendo* that there are moral duties of repair stemming from outcome-responsibility for a loss combined with fault, but observes that the domain of tort liability is poorly matched in substance to the domain of moral duties of repair. The mismatch occurs across several dimensions.

Whereas the make-whole norm serves as a kind of default rule of remedy in tort law, we doubt that there is a comparable default rule in ordinary morality. Few, we suspect, would sign on to the idea that one who carelessly knocks over a fellow pedestrian incurs a *moral* duty to make the victim whole, at least if that entails paying millions of dollars to cover lost wages, pain and suffering, and the like. Whatever may be required from the careless injurer by way of repair, compensation of this sort is more than ordinary morality seems to demand. Indeed, the contrast between plausible conceptions of the moral duty to repair and the redress afforded by tort law is precisely what renders the thin-skull rule such a jarring feature of tort law.

Similarly, whereas moral judgments of others' conduct tends to take account of certain kinds of excuses, there is no comparable leniency in tort law. Again, negligence law is quite unforgiving of a person who is incapable of consistently meeting the objective standard of ordinary care. As matter of formal doctrine, the law's commitment to objectivity is so stark as to entail a willingness to hold accountable even persons who, at the time of acting, suffer from a serious mental illness or defect that renders them incapable of appreciating the dangerousness of their actions.<sup>27</sup> The irrelevance of this sort of excusing condition to tort liability contrasts sharply with ordinary moral intuitions that the duty of repair in such a case is at least diminished. The obligatory quality of acts of repair, within ordinary morality, springs in part from the full-fledged wrongfulness of the injurer's conduct. The fact that tort liability springs from acts that might be wrongful in only a thin sense is yet another reason to think a moral duty of repair does not provide the key link between an actor's commission of a tort and the imposition of liability. If the payment of damages were conceived as a sort of concrete *mea culpa*, we

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<sup>25</sup> Benjamin C. Zipursky, "Civil Recourse, Not Corrective Justice," 91 *Geo. L.J.* 695 (2003).

<sup>26</sup> Peter Jaffey, "Liabilities in Private Law," 14 *Leg. Theory* 233 (2008); Nathan Oman, "Why There Is No to Pay Damages: Powers, Duties, and Private Law," 39 *Fla. St. L. Rev.* 137 (2011); Stephen A. Smith, "Duties, Liabilities, and Damages," 125 *Harv. L. Rev.* 1727 (2012).

<sup>27</sup> See, e.g., *Burch v. American Family Mut. Ins. Co.*, 542 N.W.2d 277 (Wis. 1996).

would expect tort doctrine to be anchored in a different, and more robust conception of culpability than it actually is.

Finally, tort notions of redress contrast sharply with otherwise comparable moral notions in treating victim need, third-party need, and the injurer's capacity to pay as essentially irrelevant. In ordinary morality, we would suppose, the magnitude and gravity of a wrongful injurer's duty of repair is sensitive to how badly it is needed by the victim, to the needs of others to whom the wrongdoer may have duties, and to the wrongdoer's wherewithal. If a single parent who is struggling to provide a decent life for his children carelessly injures an affluent victim, we might well count the parent's obligations to the children, and the disparity between the economic situation of the parent and the victim, as bearing on the question of what the parent owes the victim. One might, say, for example, that the parent owes it to the victim to make amends in a manner that is consistent with her situation. Tort law, of course, invites no such inquiry. In this respect, as in the two respects previously noted above, tort law seems to demand of the injurer far more than any plausible rendering of the injurer's moral duty of repair.

The third cluster of reasons for questioning Perry's effort to make sense of tort law as a means of holding wrongful injurers to their moral duty of repair is more affirmative than the other two. Simply put, *there is no need* to rely on a putative moral duty of repair to explain why tort victims enjoy a legal right of action against tortfeasors. In tort, the defendant's responsibility for having brought about the injury through tortious conduct generates a moral right in the plaintiff to demand compensation of the defendant. This right stems from having been wronged, much the way a moral right to use force to defend oneself against another person stems from being threatened with imminent harm by that person. Just as one's freedom from the aggression of others is conditioned on one not presenting that person with threats, so one's freedom from the compensatory demands of others is conditioned on one's not having wronged others. The law of torts renders concrete, enforceable, and legal the right of a victim to demand compensation for having been wronged. The legal right to make an enforceable demand for compensation therefore arises from the defendant's responsibility for having injured the plaintiff. It does so in a way that makes no reference to a moral duty of repair.

It is worth noting that there is nothing in this account that involves denying that responsibility for an injury normally gives rise to a prima facie moral duty of repair. We need not take a position on this issue. The point is that it is neither necessary nor especially helpful in explaining tort law to say that it does. Our own inclination is to suppose that under a range of circumstances, which is not nearly as broad as that which is found in tort, injuring another through morally wrongful conduct does give rise to some form of a duty, which again is typically substantially less robust than the

matching right to compensation would be in tort law. More importantly, perhaps, we also think that in a range of circumstances where others have a right to demand compensation because of one's responsibility, it is a display of virtue to offer to provide compensation, and in some, it is a display of vice to fail to offer to provide compensation.

Part of the lure of the responsibility view, we believe, is that it offers an appealing moral ideal of a person who takes responsibility for the damage he has inflicted on others. One might spell out this view by imagining one who is willing to admit when she is responsible for having brought about another person's injury, and willing to compensate the victim for the harm inflicted. This sort of scenario is often what one has in mind when describing someone as "taking responsibility" for what one has done. Even in this view, one typically imagines a victim asserting that an injurer has caused damage and the responsible person responding by providing compensation if he or she believes the victim's claim is true. The notion of "responsible" at work in the claim "you are responsible for my injury!" connotes "you are fairly subject to a claim by me to account for this!" The "responsible" of the statement "Pat is a responsible person; she will pay" connotes that Pat has the attribute of responding accordingly to sound demands based on what she has done; she will pay.

Our view is thus that "responsible," like its moral cognates "accountable," and "answerable," like its legal cognate "liable," ends up denoting, in tort law, what might be called a *normative vulnerability*. If a person has wrongfully injured another, that person is, in the standard case, properly vulnerable to a demand for a certain kind of response.

## 2. Wrongs, Not Outcome-Responsibility plus Fault

Perry treats foreseeability, loss-causation, and fault as a set of conditions, the sequential satisfaction of which generates a moral duty of repair: first foreseeability, then causation, then fault. At the last stage, fault is used as a distributive criterion—as providing a reason why the defendant's moral responsibility takes the particular form of a duty to repair.

On our view, Perry's effort to utilize fault as a distributional tie-breaker is untenable. His conception of fault goes simply to the assessment of the defendant's conduct as measured against some standard of conduct; fault is an attribute of an act or set of acts or behaviors of the defendant, standing on its own, that marks the defendant as an appropriate loss-bearer. Wrongfulness in tort law, by contrast, is not an attribute of acts per se. It is instead an attribute of acts *qua* injurious interactions. A trespass to land, a careless running down of a pedestrian, a defrauding of a retiree out of his life savings: these are all wrongs in the sense that tort law use the term "wrongs." They involve the violation of norms directing people *not to mistreat others in certain ways*—norms enjoining certain kinds of wrongs against others. (Other torts involve the violation of legal norms directing people *to treat one*

*another appropriately in certain ways*, that is, norms demanding the protection of others against certain kinds of injury.) It is in the nature of these wrongs that if they have occurred, someone has been injured. Conversely, it is in the nature of the injuries associated with these wrongs that the injuries are, so to speak, at the victim-end of the wrong.

In a meritorious tort claim, the plaintiff holds the defendant responsible for having legally wronged him or her. The responsibility for the legal injury and the responsibility for having legally wronged her are one and the same. We understand these legal wrongs to have the same general form as a certain subset of moral wrongs: they are relational, injury-inclusive wrongs. One is responsible for having committed a legal wrong upon another just as one is responsible for having committed a moral wrong upon another. “You hit me!” “You lied to me!” “You damaged my car” “You stole my boyfriend” “You ruined my party” “You killed my dog” “You scared the living daylights out of me!” These are all very natural protestations; complaints of a sort that are often followed by a demand for responsive conduct.

It is true that in both ordinary life and in law, an injured person will often begin a discussion of responsibility by identifying some loss or harm suffered, and then attribute responsibility for that loss or harm to another person. (“My car is destroyed! You are responsible for this!”) Often the assertion both in and outside of law is that, because of a causal link between the conduct and the harm, and because of certain attributes of the conduct, the person engaging in that conduct is responsible for the loss. In this sense, it is natural, understandable, and unobjectionable to speak of responsibility for outcomes. However, there is not necessarily any inconsistency between speaking of responsibility for outcomes, in this sense, and speaking of responsibility for wrongs.

Consider an example in which the plaintiff leaves her car parked on the street, and the defendant carelessly smashes into it as he backs his car out of his driveway. The plaintiff, upon discovering the damage, might exclaim: “Who is responsible for this!?” In identifying “the defendant” as the answer to this question, one arguably invokes a notion of outcome-responsibility. But typically one is also inquiring whether a wrong has been done by focusing on the injury-end of the wrong and then seeking to identify the author of the wrong. In other words, one is asking whether the injury is part of, or appropriately connected to, misconduct by someone. Note also that a person can be connected to an injury not by causing it, but by failing to protect the victim against it. An ambassador is dead. Who is responsible? Terrorists may be responsible for his death because his dying is part of an act of killing him for which the terrorists are responsible. But the President may also be responsible for allowing the ambassador to be killed by terrorists, and the ambassador’s death may be part of the President’s wrongful failure to protect the ambassador against being killed. In this scenario, the President

is perhaps not outcome-responsible, in Perry's sense, but he is still responsible.

There are many reasons why it is important to our account of tort law that it be wrongs-based rather than loss-based. Many torts, such as harmless trespasses, involve no loss. A loss-based view also fails to explain the diversity of remedies in tort law, including punitive damages. It also fails to explain tort law's "substantive standing" requirements, the distinction between predicate injuries and parasitic damages, and various agency-related doctrines that are core to tort law. Or so we have argued previously.<sup>28</sup> Here we want to address two narrower and somewhat more defensively framed questions: (a) insofar as tort law is about responsibility, isn't it more naturally understood as being about holding people responsible for *losses*?; and (b) isn't it an advantage of Perry's approach that it makes room for strict liability in a way that a wrongs-based account cannot? In other words, isn't Perry's blend of foreseeability, causation, and fault—lying, as it does, between Honoré's broad defense of strict liability and a wrongs-based approach—much closer to the interpretive sweet spot? We will answer these questions in reverse order.

As noted from the outset of this paper, one of the advantages of responsibility theories of tort law is their capacity to make sense of tort law's not requiring full-blooded fault or culpability as a condition of liability. This is just where a tort theory ought to be, from an interpretive point of view, for it is quite clear that this is how lawyers and courts have long understood the terms on which liability is imposed. Perry's account quite interestingly accommodates this aspect of tort law by depicting the ultimate judgment of who is responsible by reference to a comparative inquiry about fault for purposes of resolving the question of localized distributive justice. Fault is normally the basis for allocating a loss to the defendant, he says. But, in the absence of subjective fault, objective fault provides a sufficient reason for the law to shift a loss from an innocent victim to the at-fault actor.

Our approach finds a middle ground between strict liability and full-fledged moral culpability by a different route, one that we believe is more powerful and systematic. To say, as we do, that torts are wrongs, is to say that they are violations of relational directives of conduct that prohibit (or require) certain ways of treating others. Again, the wrongs of tort and the directives in connection with which they are defined are *legal*. Only where the directive can be said to have the status of belonging to the legal system does the wrong in question count as a legal wrong. Members of the legal community understand the law to include such directives of conduct and understand them to enjoin, prohibit, and render "not to be done" certain ways of interacting with others. The addressees of these directives owe relational duties to certain others to refrain from injuring them in certain ways. These

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<sup>28</sup> John C. P. Goldberg & Benjamin C. Zipursky, "Torts as Wrongs," 88 *Tex. L. Rev.* 917 (2010).

duties correspond to rights in potential victims, in the sense of a set of interests that are not to be interfered with. Given that we are dealing here with legal directives, not moral directives, potential victims' rights are legal rights, just as defendants' duties are legal duties.

Obviously the content of relational legal directives can vary among legal systems. But there is nothing that prevents them from being defined in such a way—and in our system they are in fact often defined in such a way—that they can be violated even when a person who is subject to them acts in a diligent manner. This is plainly true of the torts of trespass to land and battery, as well as to libel and slander, at least as defined at common law. Likewise, once one understands the senses in which the standard of care in negligence law is objective, or what it means (and doesn't mean) to deem a product "defective," one sees that lack of diligence is not a condition of liability in the law of negligence or products liability. And yet a person who injures the plaintiff in the requisite way, by engaging in action that falls below what the directive requires has still committed what can cogently be described as a legal wrong. It makes perfect sense to conceive of the norm "Do not invade or occupy another person's land without permission" as designating such conduct as wrongful. And it makes perfect sense to imagine members of a community internalizing the norm that this is conduct one is duty-bound to refrain from engaging in, and that this form of interference is one that others have a right to be free from. Nonetheless, a person might act diligently and yet reasonably, through a mistake, end up violating the directive. To do so is to commit the wrong of trespass to land.

For a number of reasons, tort law tends to include legal directives that closely resemble customary norms of conduct—socially accepted moral directives. Nonetheless, the norms of tort are sharper in some places and duller in others, and more structured in certain respects, too. The result is that there is a reasonably good match between legal liability in tort and moral responsibility, but also overinclusiveness (for example, the imposition of battery liability for an intentional touching in which the person doing the touching genuinely meant no harm or offense) and underinclusiveness (for example, the absence of liability for blatant breaches of uncontroversial affirmative moral duties).

In sum, our wrongs-based framework is quite capable of capturing at least as well as Perry's how and why the wrongs of tort law are both related to moral wrongs yet defined in ways that depart from the dictates of morality, including by allowing liability without genuine blameworthiness. Now, focusing on cases in which wrongdoing is accompanied by loss, let us consider whether the framework captures the terms on which tort law imposes liability for losses as well as (or better than) Perry's view.

It states the obvious to say that, in a broad swath of tort cases involving losses, a principal motivation for the plaintiff is to recover an award of compensatory damages for the harm she has suffered. From the

perspective of the plaintiff and her lawyer, the thought that is first and foremost in their minds may well be that the defendant is *responsible* for causing this harm, and thus should pay. Is this not clearly outcome-responsibility in action, *i.e.*, an effort to hold an actor who has caused harm responsible for having caused the harm, as opposed to an effort to hold an actor responsible for a wrong?

Our answer is “no.” To assert, in a case like this, that the defendant should be held liable for the harm because he is responsible for it, is to maintain that the harm was brought about by the defendant’s breach of a duty to not to harm her through careless conduct. Take the case of a simple accident between strangers. The plaintiff in such a case demonstrates that the defendant is responsible for the harm by showing that her being harmed was the realization of a risk that defendant carelessly took with respect to her physical well-being by behaving as he did. In other words, the allegation that the defendant is responsible for the plaintiff’s harm links the harm suffered by the plaintiff to the defendant’s breach of a duty to be careful not to harm her. The plaintiff’s case for outcome responsibility, in a successful negligence claim, is built upon her case that the defendant not only failed to avoid causing her loss, but wronged her. Making the case for outcome responsibility actually requires drawing upon a notion of wrong. It is because the defendant is answerable for having wronged the plaintiff that he is responsible for the harm suffered.

#### IV. CONCLUDING THOUGHTS: THE IMPORTANCE OF RECOGNIZING RESPONSIBILITY-BASED ACCOUNTS OF TORT LAW

In our conclusion we want to return to the primary aims of this paper: recognition of the similarity of responsibility theories of tort law to one another, of their superiority to a variety of other theoretical approaches to tort law, and of their strength at both an interpretive and a normative level.

Initially, it is worth reiterating the essentials of a responsibility-based conception of tort law. The basic idea is that tort law is built upon widely accepted moral principles according to which one person is sometimes responsible for another’s injury because she brought it about through action that is wrongful. In a tort claim, the injured person is empowered to hold the injurer to account for having injured her. The simplest way to understand tort liability is that it is a concrete, institutionalized, and practical form of moral responsibility for having wrongfully injured someone. Infighting among philosophical theorists of tort law notwithstanding, there is actually very substantial agreement on these core ideas. And critically these ideas provide an entirely different perspective on tort law than efficient deterrence theory or compensation-deterrence theory, the latter of which is probably still today the dominant account of tort law among judges and jurists.

An irony of responsibility theory is that, like some other parts of jurisprudential theory and philosophical work generally, it is a surprisingly short step from the obvious to the rarified. Few normative ideas are more basic than the thought: “This is your responsibility!” It is a huge advantage of responsibility theories over other approaches that it engages the language of the participants in the legal system, and engages the quotidian discourse of lawyers and judges about what they are doing when they structure and resolve a battle over tort liability: they are determining who shall be held responsible.

Although this paper has not principally aimed at explaining or justifying particular areas of tort doctrine, much of our prior work has done so, as has the work of Perry and numerous other responsibility theorists. From Hart and Honoré, to Perry, to work by ourselves and John Gardner, it is clear that the responsibility-rooted analysis of causation at the center of Honoré’s work has a real capacity to illuminate causation doctrine in the law of torts. On foreseeability, duty, fault, and strict liability, responsibility theories have a great deal to offer. Civil recourse theory, as a form of responsibility theory, has addressed all of these, as well as a range of issues pertaining to defenses, liability limitations, remedies, and beyond.

Responsibility theories, including Perry’s and our own, tend to adopt an interpretive stance that straddles the sharp divide that is sometimes posited between description and prescription. In our case, as in Perry’s and Dworkin’s, the methodological straddling is by design, not the result of ambivalence. One especially important role of the common law legal theorist involves articulation of the law’s rules and principles in a manner that displays them as normatively justifiable but that is also consistent with what might be termed their “normative defeasibility.” Tort law, on our view, hangs together as a largely coherent scheme for holding wrongful injurers responsible to their victims, and in doing so it sits well with values that law and morality tend to regard as important, such as liberty of action, security against injury, attention to the interests of fellow-citizens, and the like. However, it may be that, at least in certain applications, tort law ought to give way to a scheme ordered on different principles that better permits the realization of these values, or permits the realization of other important values. This is the sense in which the case for tort law, understood as a law of responsibility, is defeasibly normative. Responsibility theories of tort law—far more than efficient deterrence, instrumentalist, teleological, or purely deontological accounts—sit well with this kind of interpretivism.

Finally, responsibility theories usefully depict tort on terms that cut across another familiar yet unhelpfully stark divide: the divide between the public and the private. Tort law, according to these theories, is fundamentally private because, even if a defendant is being held responsible through the courts and therefore through the state, it lies within a private person’s discretion whether to exercise the power to have the defendant held

responsible to her. Yet the empowerment of individuals to bring a claim—to have one’s injurer held responsible to one—in turn expresses and realizes important political or public values. For example, tort instantiates a notion equality by imposing duties upon each not to mistreat others and by conferring upon each rights not to be mistreated, regardless of status. Among the most important of the many ways our political system treats people equally is by empowering each to hold others accountable on the same terms.<sup>29</sup>

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<sup>29</sup> See Jason Solomon, “Civil Recourse as Social Equality,” 39 *Fla. St. L. Rev.* 243 (2011). Although we share Solomon’s view that tort law instantiates a notion of equality, we are less inclined to suppose that any such notion is rightly characterized as providing the normative foundation for tort law. John C. P. Goldberg & Benjamin C. Zipursky, “Civil Recourse Revisited,” 39 *Fla. St. L. Rev.* 243 (2011), 356-58.