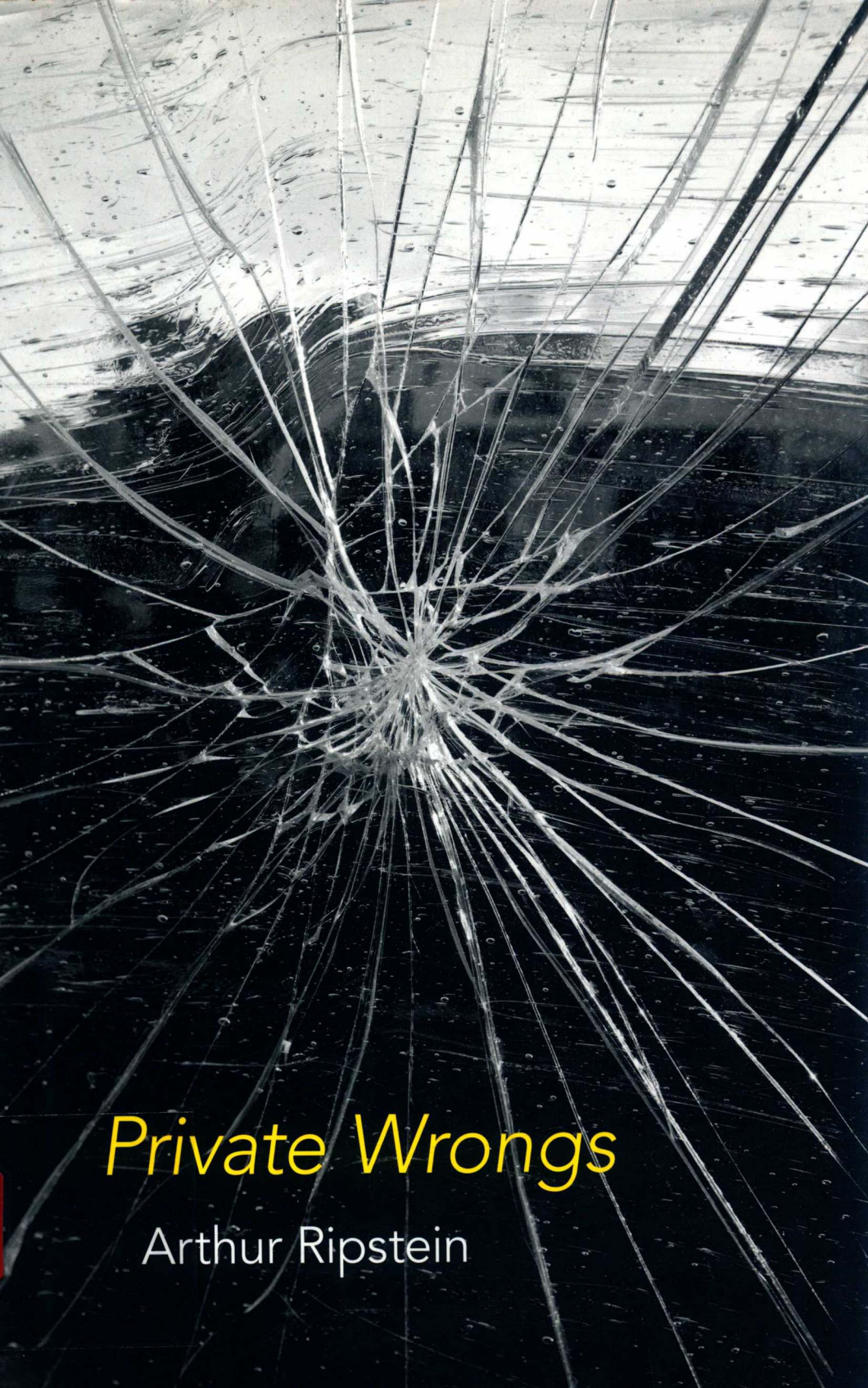
Private Wrongs
Arthur Ripstein

PRIVATE WRONGS

ARTHUR RIPSTEIN

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Preface

Tort law addresses two of the most familiar and most pressing questions of social life: How should people treat each other? Whose problem is it when things go wrong? Other normative systems seek to answer one or the other of these questions. Criminal law and administrative regulation restrict the ways in which people are allowed to treat each other, as do informal social norms and the demands of morality. Schemes of social insurance and disaster relief address unwelcome consequences in one way, private charity in another, and indifference in a third. Tort law is distinctive because it answers both by treating them as a single question, articulating norms of conduct by specifying rights, and fashioning remedies to give effect to those very rights.

The central claim of this book will be that the unity of right and remedy is the key to understanding tort law. In the service of this central claim I will develop a systematic account of the rights to person and property that private persons have against each other. I will both characterize and explain the distinctiveness of those rights in terms of the thought that no person is in charge of any other person. This idea, I will contend, explains both the structuring features of the rights to bodies, reputations, and property to which the law of tort affords protection, and also why the form of that protection must be specifically remedial—why

rights, so understood, survive their violation, and so must be given effect, however imperfectly, through remedies.

At various points in the book, I contrast my view with prominent accounts that treat tort law as an instrument for achieving results—accounts that do not focus on the relations between the parties or the idea that rights survive their own violation. Many of these grow out of Oliver Wendell Holmes's confident announcement that the "moral phraseology" of the law of torts is a façade behind which policy decisions are hidden. For Holmes (at least when he was writing as a scholar rather than a judge) there is no place for the idea that one person is entitled to constrain the conduct of another, nor for the idea that a right survives its own violation. Generations of scholars have followed this approach. Others accept the idea that the norms of tort law focus on rights, but regard remedies as a tool for, or expression of, other social purposes. I do not purport to show that no instrumental account could be made to work, only that a rights-based account can overcome all of the familiar objections to it. In some cases I suggest that something close to the converse of Holmes's claim is true: Arguments cast in the language of interests and balancing actually presuppose rights-based analyses. Because my aim is to show not that instrumentalism is impossible, only that it is not necessary, I focus on showing how tort law could be something other than an instrument of policy. I want to demonstrate that the "moral phraseology" is not a façade: Tort law gives effect to moral ideas that look very similar to the doctrines that give effect to them.

I am not the first person—not even the first person in my hallway—to argue for a noninstrumental understanding of tort law. Beginning with Ernest Weinrib's groundbreaking works, especially *The Idea of Private Law*, noninstrumentalist accounts of tort law have arisen from their Holmesian ashes. The argument of this book builds on Weinrib's arguments. Weinrib's use of the Aristotelian vocabulary of corrective justice and correlativity somehow led some readers to mistakenly suppose that his analysis applies only to cases in which a defendant gains at the plaintiff's expense, that his concern was exclusively with the after-the-fact allocation of losses that had already occurred, that corrective justice could be paired with any specification of rights, or that a noninstrumental account must presuppose that tort law has intrinsic value of a sort that is to

be added to the catalogue of socially desirable outcomes that the modern state should pursue. I hope to avoid these misunderstandings by beginning with an account of the morality of interpersonal interaction, and showing how it manifests itself in the law of private wrongs. This approach may, I realize, invite other misunderstandings. My work also builds on that of other writers who have contributed to rights-based accounts of tort law. Because my central ambition is to articulate a systematic account of the rights tort law protects, I do not engage in extended discussions of many of those contributions.

Much of my other writing in recent years has focused on Kant's legal and political philosophy, and my understanding of private wrongs has been shaped by my engagement with his arguments. A number of people have asked, either in person or in print, about the viability of "turning Kant into a common lawyer." Students of the history of the common law often note its antitheoretical orientation, its practice of developing one case at a time, and some writers have thought it important to point out the great common law judges of earlier centuries did not read Kant. No doubt they did not, but any felt need to point this out betrays a misconception of Kant's, and indeed any, philosophical project of understanding an area of legal doctrine. In a casuistical system such as the common law, doctrine develops as judges decide cases, drawing on precedents and learned authors. I do not put forward a historical hypothesis according to which moral principles invented in Kant's writings are the secret source of the common law of tort, and as yet undisclosed source of judicial authority. Nor do I think citizens need to read Kant to figure out what the law is demanding of them, or that judges must do so in order to resolve cases. To the contrary, I take seriously Kant's own insistence that he would not presume to invent a new moral principle. The point of providing an account of the form of thought in an area of legal doctrine is not to invent that area, or give someone else credit for inventing it. Instead, it is to make it intelligible, to show how the characteristic modes of reasoning, the questions asked, and the inferences permitted or refused fit into an integrated pattern. That pattern is composed of conceptual and normative structures rather than causes and effects. The pattern of reasoning on which I focus is itself an articulation of simple but powerful moral ideas about each person's independence from others. Kant articulates this

idea of independence, but it is not to be confused with the idea of autonomy that figures elsewhere in Kant's moral writings. Autonomy is the idea of a free being's self-determination, which can be understood "apart from any relations" in which it stands. The idea of independence, by contrast, is irreducibly relational. In the hope of keeping this contrast firmly in view, outside of this paragraph and one quotation from a court, the word "autonomy" does not appear in this book.

Readers familiar with Kant's writings about private law will recognize more specific traces of them here—the focus on relations, the idea of setting and pursuing purposes, the claim that each human being has the right to be beyond reproach, and the idea that rights survive their own violation. A broader Kantian perspective also shapes the project as a whole: Kant argues that a central part of interpersonal morality requires institutional instantiation in a body of positive law. This book can be read as an illustration of how this claim applies in a specific instance.

I have been thinking and writing about torts for more than two decades, and would not have started, let alone finished this book, without the advice and assistance of many people. I first became interested in tort law in conversations with my colleague Ernest Weinrib. Since then, Ernie has been a constant source of inspiration, friendship, engagement, and conversation. He will always be the *Rav* for philosophical writing about torts. Around the same time, my summer-camp and graduate school friend Ben Zipursky started law school, and we, too, began what turned out to be many decades discussing torts. I quickly learned that the law has better examples than any that philosophers could come up with—ones that are obvious and baffling in just the right combination. As my interest in the topic deepened, I decided to spend my first sabbatical at Yale Law School, where I had the opportunity to study torts with Guido Calabresi. Although I found myself disagreeing with much of what Guido had to say—beginning with his claim that you can teach someone all of tort doctrine in about twenty minutes, after which you get to the interesting policy questions—I knew I was in the presence of greatness. In addition to learning a great deal about how people respond to incentives, Guido taught me two things of life-changing importance. First, that the intellec-

tual interest of torts is matched only by its fun as a teaching subject, and second, that you are strictly liable for anything you say in print. While at Yale I also learned much talking to Jules Coleman. I articulated my ideas about part of tort law in a 1999 book, *Equality, Responsibility, and the Law*, in the context of another series of debates. I take no position on whether the position developed here is consistent with those earlier views. Just as it appeared, I moved half of my teaching to the Faculty of Law, where I have taught torts regularly since. I am grateful to Ron Daniels, the Dean who exercised the power of eminent domain over my appointment, and to Deans Mayo Moran and Ed Iacobucci for their continuing support. I am also grateful to two of the three Philosophy Department chairs during this time—Cheryl Misak and Donald Ainslie—for their encouragement and support. My role as the third of the three chairs was less conducive to completion of this book.

I am fortunate to hold appointments in two disciplines in which research and teaching can be integrated more or less seamlessly. It has probably been a long time since a mathematician established a research program focused on topics in the first-year curriculum, but in both law and philosophy you can spend your entire career writing about the topics that you teach. I have been privileged in the extraordinarily talented and engaged students that I have taught in my torts classes. Many of the ideas and arguments developed here began as reflections on how to explain a particular case or answer a challenging question. I am grateful to my fellow torts teachers, especially Bruce Chapman, for countless conversations about cases that interested me.

I have been developing and discussing preliminary versions of this material for many years, and am grateful to all of the people who asked questions at talks that I gave or provided comments on earlier papers, and particularly to Hanoch Dagan, Avihay Dorfman, Barbara Fried, Greg Keating, Henry Richardson, and Stephen Smith for extended correspondence. I benefited from conversations with Lisa Austin, Peter Benson, Andrew Botterell, Erika Chamberlain, Abraham Drassinower, David Dyzenhaus, David Enoch, John Gardner, John Goldberg, Alon Harel, Martín Hevia, Tony Honoré, Paul Hurley, Frances Kamm, Greg Keating, Dennis Klimchuk, James Lee, Paul Miller, Mayo Moran, Sophia Moreau, James Penner, Stephen Perry, Stephen Pitel, Irit Samet, Catherine Sharkey, Henry Smith, Lionel Smith, Steve Smith, Daniel Statman,

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As the book neared completion, I got much help and support. Hanoch Dagan and Avihay Dorfman invited me to discuss parts of the book in their Private Law Theory Seminar in March 2015. Members of the law and philosophy discussion group at the University of Toronto—Alan Brudner, Bruce Chapman, Pavlos Eleftheriadis, Timothy Endicott, Chris Essert, Joanna Langille, Ronit Levine-Schnur, Larissa Katz, Michael Kessler, Hillary Nye, Hamish Stewart, Martin Stone, Malcolm Thorburn, Ernest Weinrib, Jacob Weinrib, and Ariel Zylberman—spent a term of weekly meetings discussing a draft of the manuscript. Jason Neyers and Nick Sage each sent me detailed written comments on the entire manuscript. I owe an additional debt to Jason, without whose prompting Chapters 5 and 6 might never have been written. I also received helpful comments from three readers for Harvard University Press, who turned out to be John Goldberg, Martin Stone, and Ben Zipursky. Lindsay Waters of Harvard University Press has supported the project from the start, and his assistant, Amanda Peery, was a model of helpfulness and efficiency. Zachary Al-Khatib provided excellent research assistance; Aleatha Cox assembled everything into a proper manuscript; and Hillary Nye prepared the index.

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My greatest debt is to my wife, Karen Weisman, and our children, Aviva and Noah. I wrote a book about the minimal standards governing the ways in which people can be constrained to treat each other surrounded and encouraged by much more than anyone can hope for—an endless supply of love, intelligence, good humor, and generosity of spirit.

The final text is informed by discussions first advanced in several of my earlier articles:

"Tort Law in a Liberal State," *Journal of Tort Law* 1, no. 2 (2007): 1–41.

"Civil Recourse and the Separation of Wrongs and Remedies," *Florida State Law Review* 39 (2011): 163–207.

"As if It Had Never Happened," *William & Mary Law Review* 48, no. 5 (2007): 1957–1997.

Contents

CHAPTER 1

Introduction

Retrieving the Idea of a Private Wrong

A TORT IS A PRIVATE WRONG that one private person commits against another. The aggrieved party comes before a court on his or her own initiative, seeking a remedy against the alleged wrongdoer. The factual situations that give rise to tort actions are diverse, yet familiar. A pedestrian is hit by a motorist who is texting while driving; a careless waiter spills scalding hot coffee on a customer; a physician fails to close a wound properly, or closes it, leaving an instrument in the patient's abdomen; a perfectly tame circus elephant escapes and tramples someone's home; a dam bursts; a neighbor's barking dog keeps someone awake at night; someone mistakenly enters and collects wood from somebody else's land; a stranded hiker breaks into a cabin in a storm; artworks are looted from the homes of fleeing refugees; a manufacturer calculates that an unsafe product will generate more revenue than the cost of compensating those it injures; an angry neighbor makes a noise so as to disrupt a nearby business he dislikes; a carefully researched but erroneous news report ruins someone's reputation. In each of these examples someone complains, not only of another's wrongdoing, but that she or he in particular has been wronged. The claimant comes before the court to demand a remedy, which is supposed to repair that very wrong.

1. Retrieving the Idea of a Private Wrong

Despite the familiarity of its subject matter, tort doctrine can seem puzzling from the perspective of prominent ideas in legal scholarship and moral and political philosophy. In some of the above examples, such as the hiker in the storm, or the person who mistakenly enters another's property, or the carefully researched news report that ruins someone's reputation, it looks as though a morally innocent person is legally liable. In others, one person is held liable while another, who was equally careless, is not—perhaps the pedestrian hit by the texting driver was injured just before a second, third, or fourth texting driver passed by. Tort doctrine is also puzzling because of the problems that it chooses to ignore: Although the person who suffers discomfort from sunlight reflected from a neighbor's glass roof gets a remedy,[1] the person whose hotel is rendered worthless by a shadow cast over its beach area does not;[2] the person who slips and falls gets a remedy, but someone who dies or is injured while another person stands by and does nothing has no legal complaint against that person.

The past century of legal scholarship has made tort law more, rather than less, puzzling. Oliver Wendell Holmes Jr. set the agenda for most subsequent writing about torts by arguing that the moral language of duty, right, and obligation is really just a misleading cover for concerns about consequences and social policy. For Holmes, the only real question in tort litigation is "who wins?" and that question can be answered only in a resolutely forward-looking way. He remarked that the law "abounds in moral phraseology,"[3] and nowhere does he seem to think that this is more apparent than in the law of torts. Holmes is dismissive of talk of rights and duties, characterizing the Latin maxim *sic utere tuo ut alienum non laedas*—use what is yours in a way that does not injure your neighbor—as "a benevolent yearning."[4] At best, he suggests that such fine phrases

1. Bank of New Zealand v. Greenwood, [1984] 1 NZLR 525.

2. Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357, 1959 Fla. App.

3. Oliver Wendell Holmes Jr., *The Common Law* (Boston: Little, Brown, and Co., 1881), 79.

4. Oliver Wendell Holmes Jr., "Privilege, Malice, and Intent," *Harvard Law Review* 8 (1894): 3.

actually function as a smokescreen for decisions that are made on grounds of something he calls "policy,"[5] in the face of which all juridical distinctions dissolve.

Some academics and judges have followed Holmes's lead. Guido Calabresi describes "right" as a "weasel word" behind which judges hide their policy choices;[6] Lord Denning wrote, "the truth is that . . . duty, remoteness and causation, are all devices by which the courts limit the range of liability for negligence or nuisance . . . The law has to draw a line somewhere. Ultimately it is a question of policy which we, as judges, have to decide."[7] Both Calabresi and Denning suppose that a private dispute provides a judge with a convenient (if not welcome) opportunity to make and implement broad policy judgments about more general societal problems. On this view, both the rights of the parties and the remedies awarded must be understood as instruments, available for whatever purpose officials think best. This idea that judges operate under such a general power-conferring rule[8] and struggle to disguise their choices gets much of its impetus from the supposed impossibility of taking remedies at face value.

A century of Holmes-inspired scholarship has proposed a wide range of policy purposes and postulated even more mechanisms through which the law might be seen to realize them. Often, however, what began as an explanatory enterprise becomes prescriptive or even abolitionist, when the author realizes that tort law is a wasteful or ineffective way of realizing whatever he or she initially contended was its underlying purpose.

I believe that these modes of thinking are the product of losing sight of a simple way of thinking about private wrongs, one that is both morally and legally familiar.[9] When a plaintiff brings a tort action against the

5. Ibid.

6. Guido Calabresi, "Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.," *University of Chicago Law Review* 43 (1975): 92n39. He says the same of causation in *The Costs of Accidents* (New Haven: Yale University Press, 1970), 6n8.

7. Lamb v. London Borough of Camden, [1981] QB 625 (CA).

8. I owe this formulation to Martin Stone, "Focusing the Law: What Legal Interpretation Is Not," in *Law and Interpretation: Essays in Legal Philosophy*, ed. Andrei Marmor (New York: Oxford University Press 1995), 31–97.

9. As Adolf Reinach remarks, "Philosophy begins in marveling at what seems to be obvious." Reinach, *The A Priori Foundations of the Civil Law* (1913), trans. John Crosby

defendant, the basic form of the complaint is "the defendant is not allowed to do that to me," rather than any of "the defendant is not allowed to do that," "this can't be allowed to happen to me," or even "I demand compensation." The plaintiff goes to court seeking a remedy, but the ground of the remedy is what the plaintiff contends is a wrong. On this simple and familiar picture, the point of the remedy is to make up for the wrong; the remedy is meant as a substitute for some right that was infringed.[10] By its nature, a substitute is not an equivalent; a substitute is a deficient version of an equivalent. The point of the substitute is to make up for something, even if that something cannot be made up for completely. What needs to be made up is not an object, but the plaintiff's entitlement to constrain the defendant's conduct. That is, the plaintiff's right is not extinguished by being violated.

These ideas—that a tort is a private wrong, and that the point of a tort action is to correct or remedy a wrong—are very old. Aristotle describes courts in such cases as doing "corrective justice," which he characterizes in explicitly transactional terms: The point of corrective justice is to reverse a transaction. In recent decades scholars have revived this idea. Most prominently, Ernest Weinrib has argued that any policy-based account of tort law cannot explain the most fundamental feature of a tort action—the fact that the court is addressing a dispute between two private parties and asks only about whether the plaintiff currently before the court is entitled to a remedy from the defendant currently before the court.[11] The plaintiff does not come before a court to enforce a general moral norm or assist in the pursuit of a general public policy; the demand for a remedy is against the very person who is alleged to have wronged that very plaintiff. Nor does the plaintiff demand to be put back in the position he or she would have been in, in the service of a policy of seeing to it that people have the objects of their rights. That policy would apply regardless of why

(Berlin: Walter de Gruyter, 2012), 9.

10. See Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007), 59–91.

11. Weinrib first formulated this argument in a series of articles in the 1980s. The developed statement of his position is in *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995). A similar critique is developed in Jules Coleman, *Risks and Wrongs* (New York: Cambridge University Press, 1992).

the plaintiff no longer had it. Both the dispute and its resolution are bipolar: the only issues concern the past transaction between the parties. The remedy depends on the transaction between the parties because the wrong to which it is a remedy must be understood in terms of the relation between them, not in terms of any feature particular to only one of them.

Weinrib argued that any policy purpose being pursued through tort litigation inevitably focuses exclusively on one or the other of the parties. The prominent suggestion that the point of tort liability is to encourage better behavior looks only to the effect on people not currently before the court; the defendant is of interest only to be held up as an example to influence others, and the particular plaintiff is not relevant to the inquiry. Conversely, any concern with compensation for the injured plaintiff has no explanation of why the particular defendant who wronged the plaintiff should be the one to provide it. Any combination of such purposes will at most explain why the defendant before the court should be made to pay damages to some person or organization, and why the plaintiff before the court should be entitled to receive compensation from some source, thereby failing to explain the nexus between this plaintiff and this defendant. The point of the bipolarity critique is that any instrumental account will represent this familiar and fundamental feature of a tort action as merely accidental. Working backward from this feature of a tort action, Weinrib defended the familiar pre-Holmesian thought that the point of a remedy must be understood in terms of the right the violation of which it repairs.

Corrective justice accounts have met with vigorous resistance. One response has been to suggest that the failure of instrumental accounts to explain legal doctrines and processes simply shows that those doctrines and processes should be changed.[12] A different line of objection charges that the idea that a wrong can be remedied is an illusion; what is done is done, and a court cannot change the past.[13] Still another complaint is

12. For an extreme statement of this position, see Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Cambridge, MA: Harvard University Press, 2002).

13. Scott Hershovitz wistfully formulates the point: "We cannot undo what we have done. No matter how hard we wish that we could turn back time when a trigger is pulled or

that such an account must ultimately be empty because no noninstrumental explanation is available as to why courts would take an interest in reversing or correcting some transactions but not others. Instead, it is sometimes suggested, a system of corrective justice must borrow its content from a substantive theory of which purposes and activities are most important.

2. The Main Ideas

I think that Weinrib has the better of his debate with the instrumentalist, and I share his conception of wrongs as violations of rights and remedies as substitutive. But I defend these conclusions by a different route. Rather than working backward from a tort action, my account moves in the opposite direction, starting from the moral idea that no person is in charge of another. I develop an account of that idea, and use it to generate distinctions between the different types of private wrongs, each of which, except for defamation, is organized in terms of the use of means. I provide an explanation of the familiar divisions of tort law in terms of the consistent use of means. Defamation receives a separate treatment, because it is not concerned with the use of means, but is an application of the same idea of no person being in charge of another to imputations of wrongdoing. I argue further that the normative relationship through which one person is not in charge of another continues to hold even after a wrong has been committed, and so, like Weinrib, arrive at the conclusion that the particular plaintiff recovers from the particular defendant because of the right that was violated.

Although the point of a remedy is to provide a substitute for the right violated, I have sought to avoid putting the point in terms of "correction." Despite its distinguished pedigree, talk of corrective justice has led some people to suppose that the organizing idea is exclusively remedial,[14] that

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a driver hits a child, we cannot. The moment one person wrongs another, the wrong is part of our history, indelibly, and we must decide how to go on." See Hershovitz, "Corrective Justice for Civil Recourse Theorists," *Florida State University Law Review* 39 (2011): 117.

14. To some ears, the term "corrective" sounds irredeemably and irremediably remedial. Whether this is so of course depends on how it is understood. Weinrib's account of

it applies only in cases in which the plaintiff's loss is matched by an equivalent gain by the defendant, or that the point of the remedy is to replicate an antecedent factual situation, something that cannot be done in cases of loss, because any restoration of the plaintiff must come at the defendant's expense. But that isn't it at all. Instead, both right and remedy must be understood relationally.

I will develop this account by focusing on norms of conduct and will say almost nothing about remedies or liability until Chapter 8. Remedies are remedial, and for that reason secondary: They give continuing effect to the norms of conduct even after those norms have been violated. Ordinarily a dispute only makes it to court if one party seeks a remedy from the other. But although disputes provide the impetus for litigation, the rationale for the remedies is to be understood in terms of the norm of conduct, and applies even when the factual state of affairs cannot be restored. But, I will argue, only certain norms of conduct are capable of and require remedies in this way. I will argue that the point of a remedy is to protect what people already have: their person (understood as bodily integrity and reputation) and property. Tort law is a system that not only protects but *constitutes* each person's entitlement to use their bodies and

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corrective justice focuses on the idea of a system of rights to person and property that survive their own violation; it is an account of remedies that is nonetheless dependent upon an account of rights considered as nonremedial. See Weinrib's *The Idea of Private Law* and *Corrective Justice* (Oxford: Oxford University Press, 2012). Others have taken the term "corrective" in other directions. Other torts scholars, including Jules Coleman and Stephen Perry, have, in the process of articulating alternatives to the economic analysis of tort law, used the term "corrective justice" to refer to what is arguably a remedial view, a view that is supposed to explain the duty of repair owed by a defendant to the plaintiff he or she injured. Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001), 31–34. Perry, by contrast, characterizes it in terms of the correction of harms for which the tortfeasor is responsible, where that responsibility, in turn, is to be analyzed in terms of having had an adequate capacity and opportunity to avoid causing those harms. Stephen Perry, "Responsibility for Outcomes, Risk, and the Law of Torts," in *Philosophy and the Law of Torts*, ed. Gerald J. Postema (Cambridge: Cambridge University Press, 2001), 72–130. John Gardner suggests that corrective justice is the norm "that regulates (by giving a ground for) the reversal of at least some transactions." Gardner, "What Is Tort Law For? Part 1: The Place of Corrective Justice," *Law and Philosophy* 14 (2011), 10.