

As If It Had Never Happened.<sup>1</sup>

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

R.M. Hare<sup>2</sup>

[T]he injured right lives on in a claim for damages.<sup>3</sup>

Law students are usually told that the purpose of damages is to make it as if a wrong had never happened. Although we torts professors are good at explaining this idea to our students, it is the source of much academic perplexity. Money cannot really make serious losses go away, and it seems a cruel joke to say that money can make an injured person “whole.” Worse still, if it could, it would seem that injuring someone and then paying them was just as good as not injuring them at all. My aim in this paper is to redeem the commonsense idea that damages really do make it as if a wrong had never happened. I do so by focusing on the normative structure of private rights to person and property. I the first show how such rights are best understood in terms of an entitlement to have certain means subject to your choice. I then go on to argue that although wrongdoing can cause a factual loss, it does not change what a person has a right to. I will then show how money can be understood as restoring such means. I will close with some broader reflections about the relation between law and morality.

There is a familiar way of thinking about the law of private remedies, both loss-based and gain-based, according to which the purpose of a remedy between two private parties is to make it as though the wrong in question had never occurred. So, for example, in the most familiar case of compensatory damages, defendant is made to repair plaintiff’s loss, so that plaintiff will be in the situation in which she would have been, if defendant had no

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<sup>1</sup> I am grateful to Peter Benson, Bruce Chapman, Jules Coleman, Ernest Weinrib and Benjamin Zipursky for many years of discussion of these issues, and to Andrew Botterell for more recent ones.

<sup>2</sup> Hare continues “[W]e therefore find it hard to discuss philosophy with, or to read the books of, people who do not seem to be *worried* about the problem of convincing the sceptic that their philosophical propositions mean something.” R.M. Hare “A School for Philosophers,” *Ratio*, II, No. 2 (1960). Reprinted in R. M. Hare, *Essays on Philosophical Method* (University of California Press, 1972).

<sup>3</sup> WALTER VAN GERVAAN ET al., COMMON LAW OF EUROPE CASEBOOKS: TORT LAW 753 (2000)

longer. In the equally important, if less familiar, context of gain-based damages, the defendant is made to surrender the benefits she gained through wronging that plaintiff, to the plaintiff. Thus *defendant* is put back into position in which she would have been, if she had not wronged plaintiff. Law students accept something like this picture in the first week of their torts course, as do experienced lawyers trying to settle a case, asking what it would take to make a problem “go away.” My aim is to defend this familiar wisdom.

The supposed difficulties are almost as familiar as the view itself: first of all, a sum of money, even a huge sum of money, does not really make it as though someone has not suffered terrible bodily injury, or lost a loved family member. Personal injuries are not fungible, and so no amount of money can make them “go away.” In cases of property damage, if injurer is made to compensate victim, it may be that, from the point of view of the victim, it is as though things had never happened, but, it is said, it is hardly so from the point of view of the injurer, who is left worse off as a result. So, the argument continues, we cannot undo the harm, we can only transfer it, and the costs of making the transfer exacerbates the problem.

The conclusion usually drawn from this line of thought, at least since Holmes’s *The Common Law*, is that the “moral phraseology” in which the law “abounds” cannot be taken at face value. The real inquiry is not about making wrongs go away, indeed, not about wrongs at all, but rather about when we should call upon the “cumbersome machinery of the state” to transfer a loss from one person to another. Sophisticated people take old-fashioned talk about making a plaintiff “whole” or making it as though a wrong had never happened as a sort of smokescreen to disguise the difficult questions of social policy that judges are forced to confront. Like the philosophers on whose behalf Hare speaks in the opening quote, they doubt these familiar claims mean anything.

This line of thought is not limited to damages: Guido Calabresi describes “causation” as “weasel word” behind which judges hide their policy choices<sup>4</sup>; Lord Denning wrote that “the trust is that all these three, duty, remoteness and causation, are all devices by which the courts limit the range of liability for negligence or nuisance. ... it is not every consequence of a wrongful act which is the subject of compensation. The law has to draw a line somewhere. Ultimately it is a question of policy which we, as judges, have to decide.”<sup>5</sup>

The common sense view is also said to run into difficulty in circumstances in which the injured party ends up better off as a result of the wrong against her. In cases of “waiver of tort,” plaintiff declines to make the claim in tort for the wrong she has suffered, demanding instead that defendant disgorge the gains he garnered by wronging her. As a matter of legal strategy, as well as self-interest, a plaintiff will only waive her tort rights when the defendant’s gain exceeds her loss. In such cases, she ends up doing better for having been wronged. How can two remedies that differ in their magnitude (the feature that is of immediate interest to the parties) each serve to make it as though the wrong in

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<sup>4</sup> Cite to “Concerning Cause and the Law of Tort,”

<sup>5</sup> *Lamb v. London Borough of Camden* [1981] QB 625 (CA)

question had never happened? If that is not enough of a puzzle, how can they do so solely at the election of the plaintiff?

The solution to all of these problems can be found in other ideas that are both as familiar and unpopular as the problems themselves: the legal distinction between harm and wrongdoing, and the dependence of remedies on primary rights. It is a commonplace of legal analysis that not all harms are wrongs, and not all wrongs harms. If I cut across your lawn without your consent, I commit a trespass against you, but any harm that I do to you is well below the *de minimis* range. I wrong you nonetheless, even if it is not worth your while to do anything about it. It is also a commonplace of private law that not all harms are wrongful. If you lure customers away from my business, you harm me, but as a matter of legal doctrine, you do not wrong me. Again, if you damage property that I depend on, but have no legal right to, you harm me without wronging me. I have no legal grounds for complaint. It is equally a commonplace that private law remedies follow rights: the plaintiff in a tort action comes before a court claiming that defendant has wronged her, and seeking a remedy to address that wrong. None of the puzzles arises if these basic ideas stay in focus.<sup>6</sup>

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

These conclusions may strike you as bizarre, callous or both. There are *many* important respects in which money damages can never undo terrible things that have happened. Most significantly, I do not mean to deny the tremendous human significance of suffering or loss. My claim is that despite these important dissimilarities, the sole rationale for granting damages at all – for bringing the coercive (and cumbersome) machinery of the state to bear on a particular defendant to require him to compensate the plaintiff he has injured is the respect in which damages make it as if the wrong had never happened.

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

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<sup>6</sup> The misunderstandings that arise once people move away from these familiar ideas are not inconsequential, for they have come to carry weight outside of the Academy as well as within it. For example the Virginia tort reform statute (reference) sets a flat cap for damages, regardless of their nature. If damages are a tool for shaping conduct, or for granting satisfaction to angry victims, flat caps makes sense. If, however, they are the vindication of pre-existing rights, and serve to make it as though the violation of those rights had never happened, they and the measure of damages must always be the measure of the asset to which plaintiff had a right.

become a mainstay of debates about the criminal law.<sup>7</sup> In the same way, the repair of a wrong is not simply a matter of the causal annulment of its factual effects of the wrong, but of the reinstatement of the rightful claims of the part he who has been wronged.

In order to make this point, I will offer an interpretation of the distinction between wrongs and harms. That distinction provides the starting point for my analysis, because it highlights the sense in which central focus for private law is on norms of conduct, and the wrongs that consist in violations of those norms, rather than on harms or benefits, considered simply as such.<sup>8</sup> I will also explain how a focus on wrongs rather than on harms is can explain the significance that attaches to the harm plaintiff suffers. In the familiar context of a negligence action, the measure of damages is tied to the magnitude of plaintiff's loss.

In much recent non-instrumentalist torts scholarship, the bifurcation between wrongs and remedies at the heart of instrumentalist analysis has been preserved. My two co-panellists and sometime co-authors will serve as examples. Jules Coleman has argued that tort law is a matter of corrective justice, charged with repairing a wrong as between two persons, but maintains that the idea of a wrong is merely a placeholder, requiring some independent analysis and defense. Coleman compares the principle of corrective justice to the retributive principle in criminal law, arguing that each principle of redress requires some independent account of primary norms of conduct, but is compatible with a wide range of such accounts.<sup>9</sup> Benjamin Zipursky has argued that this is a deficiency in corrective justice theory, and suggested that the core of tort law is the specification of duties governing interactions between private parties, and that the remedial stage of corrective justice must be understood as an independent social practice designed to give "satisfaction" to the victims of wrongdoing. Both of these approaches share the bifurcation characteristic of instrumental approaches to private law, because they suppose that norms of conduct and duties of repair can be analyzed independently of each other. The debate between them as to what makes up the "core" of tort law boils down to be a fruitless verbal dispute. In the account that I will offer, duties of conduct and duties of repair are inseparable. Duties of conduct protect each person's entitlement to such a means as he or she happens to have against interference by others; duties of repair require that wrongdoers restore equivalent means to those that have wronged. The state only has standing to "correct" a certain set of wrongs, and the only things it can do about those wrong is to correct them. Anything else is an arbitrary use of force, inconsistent with the freedom of the citizens.

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<sup>7</sup> Joel Feinberg, in his monumental work on the moral limits of the criminal law, *The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, Various Dates) explicitly defines harm as to "setback to an interest." He goes on to narrow his conception when he writes, on page 31 of the first volume of the set, *Harm to Others*, that his aim is to analyze the idea of harm without "mentioning causally contributory actions." On this understanding, although interests may be complex, it must be possible to identify them independently of what violates them.

I show the deficiencies of the harm principle in the context of the criminal law in "Beyond the Harm Principle" forthcoming in *Philosophy & Public Affairs*.

<sup>8</sup> Economic analysis of law, which focus on the incentive effects of various legal rules deny the connection between rights and remedies.

<sup>9</sup> (refs.)

In order to make good on my claim that we can understand the law of damages in terms of the idea of obligations and wrongs, I must explain how losses (and, in certain cases, gains) are significant to measuring the violation of a right. There has been a good deal of confusion about this issue, almost all of it generated by the fact that harms have a magnitude, in a way that neither “deontological”<sup>10</sup> obligations nor wrongs consisting in the violation of those obligations do. The criminal law might punish theft below \$1000 less seriously than it punishes theft above \$1000, but it is artificial to say that there is somehow a different *obligation* to respect property depending on whether it is worth more or less than \$1000. It is no less artificial to talk about the seriousness a wrong in proportion to its magnitude.<sup>11</sup> Fortunately, my analysis does not depend on anything so unintuitive. The *nature* of a wrong does not depend on its magnitude at all. The obligation is to avoid violating the rights of another, whether the rights to person and property protected by tort law, or the rights to performance central to contract law. Nonetheless, these rights get their significance from the rightholder’s ability to choose. Although the obligation makes no reference to a magnitude, a wrong in violation of that obligation will always have a magnitude, and can only be addressed by the transfer of powers of choice equivalent in magnitude.

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

The distinction between means and ends is a philosophical commonplace, but like many such commonplaces, it requires a precise formulation. It is sometimes said that choice is a matter of taking up a means in order to achieve what ever ends you have and, although this formulation is not false, there is a sense in which it is misleading. For the philosophical tradition originating in Aristotle and running through Kant to Rawls means are not simply tools a person uses to pursue an already determinate end, but rather are essential to setting your own purposes at all. You can only decide to do something – make it your end – if you take it to be in your power to do so. You might be mistaken about whether it is in your power. It is certainly possible to pursue something that, as a matter of fact, he will never succeed in. Thomas Hobbes sought to square the circle, believing himself to have everything he needed – a compass, a straightedge, and one of the greatest minds of the 17th century. He was wrong, but if he did not have a compass or straight edge, or if he thought that the problem was mathematically beyond him, he could not have even tried to square the circle. Other choices that people make have better prospects for success, but the same structure. You can make your purpose to pursue more ?word? and airy ends provided that you take yourself to have the means with which to achieve them. Otherwise all you can do is wish or hope for those results, but you cannot make them your purposes. Wishing is always easier, and in certain ways, more satisfying, than choosing, because your wishes do not need to form a consistent set, let alone one that can be fully achieved. As you choose, you need to figure out which of the

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<sup>10</sup> Strictly speaking the wrongs at issue in private law are dikaeological, not deontological, as they involve rights and their correlative relational duties, rather than duties alone.(refs.)

<sup>11</sup> Hence the entire moral luck literature about negligence.

many things you wish for you will actually use the means that you have to achieve, and so your choices must for what you take to be an achievable set.

My central contention will be that the law of tort protects each person's means against other persons, so that each person is secure in the means that he or she has. The law of tort does this by articulating each person's private rights, as against other private persons, to the means that they happen to have. Your ability to wish is in some sense already secure from the actions of others. With your ability to choose, things are otherwise. If there are many separate persons, each can only have his or her means securely provided that everyone is subject to reciprocal limits on the ways in which they use what is theirs. You must use your means in a way that is consistent with everyone else being able to use what is, in turn, theirs. Achieving that consistency requires limits on the side effects of one person's activities on the means that others have, and also restrictions preventing people from using means that belong to others. If such consistency is achieved, then everyone is secure in their capacity to choose, because it is up to each person to decide what purposes his or her means will be used for. As objects in the natural world, the means that you have are subject to generation and decay, so they may stop being useful, or become more useful, with the passage of time. Your rights in private law simply guarantee their security against the actions of other persons, not against the ravages of time.<sup>12</sup>

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

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<sup>12</sup> On this understanding, the law of tort is of no help to those who have limited means at their disposal. The much discussed absence of a tort duty to rescue, is just a special case of a more tort law's indifference to questions about the adequacy of any particular person's means to any purpose whatsoever. From that perspective, need is no different from any other wish. Other departments of a liberal state must see to need, but tort law's focus on the means each person has prevents it from doing so.

It is sometimes said that the law of tort protects persons and property as a result of the particular values or priorities that this or that society happens to have, so that it might instead protect other things, or decline to protect property, or protect other interests that people have. My own view is very different: the law of tort protects persons and property because your bodily powers as a person, and the property you hold, exhaust the set of means that you have available to you with which to set and pursue your own purposes. The only way to secure your capacity to choose is by securing the means that are at your disposal, and those means are exhausted by your person and property. I choose the word "secure" here carefully, because many other normative regimes, legal and otherwise, might *improve* your capacity to choose by giving you additional means, or by depriving you of means that you are likely to use in a way that will eventually subvert your own capacity to choose. Economic redistribution normally enables choice, and, laws prohibiting the use of certain drugs are sometimes defended on the grounds that they extend a person's global capacity to choose by limiting specific, local choices. The law of tort takes what you have as given.

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

I do not mean to suggest that it is appropriate for anyone to think of his or her own body merely as a tool, as a sort of tradable, expendable piece of property that he or she has. My claim is only that there is that the most consistent and plausible way of thinking about the law of damages that suggests that *it* takes exactly this attitude towards bodily injury, because it supposes that other people must take that very attitude towards your body. Recent “philosophical” writing about the law of torts has often taken personal injury as the starting point for analysis, talking either about the "natural duty" of persons to respect the bodily integrity of others,<sup>13</sup> or, alternatively, talking about the way in which bodily health and integrity are fundamental to a person's ability to make his or her own way in the world.<sup>14</sup> So understood, the safety of others is a pressing interest that takes priority over any competing interest: personal injury is presented as an outrage that must be addressed. While I do not want to deny either of these fine-sounding pieces of moral analysis, I do want to deny their significance to understanding the law of tort and thus the law of damages. Damages are not awarded to compensate for the awful things that people do to each other, but rather to make it as if the persons had the means that they would have had if others had not deprived them of them.

The legally significant way to secure each person in the means he or she has as against others is to limit the conduct of others. That is why the law of tort is part of the broader law of obligations: it sets limits on the ways in which people may interact with each other. Its secondary mode of securing what each person has is through the law of damages. On to and those entitlements, not in the sense of making it more likely that

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<sup>13</sup> Perry

<sup>14</sup> Keating.

they will be secure across time, but in the more direct sense of making them be entitlements at all: you are entitled to the means that properly belong to you, as against all others, that is, you, and you alone are entitled to fix the purposes for which they will be used. Protecting each in his or her person and property creates a regime of equal private freedom, in which each person's capacity to said his or her own purposes is secure against the equally protected freedom of others to pursue affairs. The "cumbersome machinery of the state" serves as guarantor of this equal freedom provided that it both articulates the appropriate standards of conduct and, should those standards be violated, it makes it as if the wrong had never happened.

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

*Torts in the Plural: losses and other wrongs*

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

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

Someone can interfere with your secure entitlement to your means by depriving you of those means, or by using those means for purposes that you have not authorized. The first of these is the basis of all damage-based awards, from negligence, through nuisance, to the various forms of product liability that have emerged in recent decades. In each case, plaintiff comes before the court, complaining that defendant has deprived him or her of something to which he or she had a right. And, in each case, plaintiff demands to get back what he or she was deprived of. The second type of interference does not necessarily deprive plaintiff of anything, though it often does. This second type of interference is the basis of the law of trespass against land and chattels, and also, when applied to persons, of the law of battery. In cases of both trespasses and batteries, one

person uses something belonging to another, whether property or that person's body, for a purpose that has not been authorized by that person. In as a result, those means are subject to someone else's choice.

Some torts, notably conversion, both deprive plaintiff of something and also use it for purposes plaintiff has not authorized. Many trespasses also damage the thing trespassed upon, as in Coase's famous example of the wandering cattle.<sup>15</sup> The overlap between these wrongs, however, should not distract attention from their differing analytical structure: there is a difference between being deprived of means and having those means used in ways that you did not authorize. That is why a battery, as an unauthorized touching, is still wrongful, even if it does no harm.

### *Rights Survive Wrongs I: Negligence and Losses*

If someone deprives you of your powers, they deprive you of part of your ability to choose in the sense of the ability to use those powers to set and pursue your own purposes. But they do not deprive you of your entitlement to have those powers at your disposal. This is particularly obvious in the case of theft. Suppose you have a car, and I steal it. Who does the car now belong to? There is one sense in which someone might be prepared to say that it now belongs to me, if I am in physical possession of it. But the law is not interested that question, but rather in the question of who it *properly* belongs to. The answer to that question is that it belongs to you. My depriving you of it does not make it stop belonging to you. Now suppose that I deprive you of it in a different way – rather than taking it, I damage or destroy it. If I damage it, you are in the same position as you would be in if I destroyed it: you would not have the car you are entitled to have. The law of damages makes it as though my wrong against you had never happened, by giving you back the thing you were entitled to have. If I destroy the car, I cannot literally give it back. What I can do is give you back equivalent means, that is, I can give you a sum of money equivalent to the replacement cost of the car. Not only does that sum of money put you in a position where you can go out and purchase the car if you like. It also enables you to liquidate your interest in the car if you so choose. The law of damages views any assets you have as something that can be used for pursuing your purposes, both directly, by using them to accomplish particular purposes, as when you use your car to drive to visit friends, or indirectly, as when you sell your car in order to buy new appliances for your kitchen. When you had the car in the first place, you could have sold it, and used the proceeds for other purposes; by compelling me to give you that amount of money, I put back in the position he would have been – you can either acquire another car, or do something else. Your ability to pursue your purposes is the same as it always was. It is as if it had never happened.

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

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<sup>15</sup> ref

that you have established all of the traditional elements of negligence analysis, and the only remaining question concerns damages.

At no point in the analysis will I focus on what happens to *my* holdings in the process of making it as though you had never been wronged. There is a natural misunderstanding that leads people to suppose that where there is a net loss that must either lie where it falls or be shifted to some other person, the only issue is where to place it. On the account I will defend, the "allocation" of a "burden" is the conclusion of the analysis, not the problem the analysis is supposed to solve. Just as an ordinary negligence action is structured by the question of whether the defendant owed plaintiff the duty to avoid injuring her in that way, and whether the injury she suffered fell within the ambit of defendant's duty, so the analysis of whether defendant must pay for plaintiff's loss depends upon the same set of questions: did defendant wrongfully deprive plaintiff of something to which she had a right. The law of damages requires a remedial transaction so that the net effect of the involuntary transaction and the compelled transaction is to make it as though plaintiff had never been wronged. Defendant will often end up with a loss, because the effect of the remedy is to make it as though defendant had never wronged plaintiff, but has voluntarily squandered the powers at his disposal.<sup>16</sup>

*1. Having means at your disposal.* Using the word "means" here, I intend to make explicit the idea contained in such colloquialisms as "a person of means" or "living beyond your means", that is, the idea that the means you have are relevant to your ability to achieve what ever you happen to want to achieve. A person of means has lots of money, because, although money can't buy everything, it can buy many things; the person who lives beyond his means is trying to achieve things that he cannot afford to achieve. Among the means a person has, first and foremost, of course, are that person's mental and physical powers, since they are the things that are used to pursue whatever purposes when asked. But, equally obviously, one can have other things as means, including, prominently, property, but also, in a slightly different way that I will explain what follows, contractual rights against others.

Talk about each person having his or her own body merely as "a means," may strike many as misleading, offensive, or both. So too may parallels between personal injury and property damage. Advocates of economic analysis of law have been happy to regard all injuries as fungible, and this is the aspect of economic analysis that seems most at odds with ordinary understandings. Nonetheless, economic analysis has actually presumed such an equivalence without offering any explanation of it, because economic analysis generally supposes that tort liability serves to deter future offenders, so that any role it has in undoing the effects of a wrong is merely incidental.

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<sup>16</sup> Alternatively: This problem is particularly pressing if we suppose that the sort of "corrective" or rectificatory justice involved in these cases is a matter of restoring some prior distribution, a distribution which was thought to be just on its own merits. On such an understanding, the prior distribution is not been restored, and so it is difficult to see why things have been rectified. They have been rectified for some, at the expense of others, and, if this expense is borne by the wrongdoer, that may be appropriate, but how is it returning things to a *status quo*? Indeed, it does not even seem to be returning the relation between the parties to the situation in which it would have been without the wrong.

If you have certain means, you have them in a way that is, to borrow a phrase from the philosopher John Rawls "all-purpose". Your means are at your disposal. Although the only way you can use them is by using them for some particular purpose or other, they are, as a general matter, useful, because they can be used for a variety of purposes. This will be important what follows, since it is the key to understanding consequential damages. If you have something as your means, you thereby also have whatever further means follow from having them. So, if you have something that can be used as a way of generating more useful things – property on which you can earn income, for example – then you have that income as your means also. You don't have them with the same certainty that you have the property itself – which is why future income is discounted in the familiar way that it is.

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

This distinction between what you already have and what you are trying to get by using what you already have is familiar from the doctrine of first acquisition in the law of property. In the famous fox capture case of *Pierson v. Post*<sup>17</sup>, a disputed fox went to the "saucy intruder" who captured it, not the plaintiff who had tired it out by giving chase. The reason is simple: plaintiff had not yet acquired the fox; he had only used his powers (in this case, his legs) to try to capture it. He had no right against defendant that he succeed in his efforts, any more than you have a right against other shoppers that there be a lettuce in place when you arrive in the produce aisle. The saucy intruder may turn out to be better off as a result of the plaintiff's efforts, in a way that you make it no easier for me to acquire the lettuce. That difference is merely incidental to the issue of wrongdoing, because the problem in both cases is that nobody has a right that others provide an environment suited to the uses to which she hopes to put her means.

The same structure animates the celebrated *Fountainbleau* case<sup>18</sup>, in which plaintiff was refused an injunction preventing defendant from erecting a tower that would cast a shadow which made plaintiff's pool and cabana unattractive to tourists. The court held that plaintiff had no right to passage of light, not because the light was of no value to the

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<sup>17</sup> ref

<sup>18</sup> ref

plaintiff – it was of great value – but because plaintiff was not entitled to require defendant to use his land to accommodate plaintiff's preferred use of his. The court took it for granted that defendant's property right was, in the first instance, the right to occupy the air? on and above his land. Some might wish to question the wisdom of this as a matter of social policy, but, the court simply took the settled law of property as given. With the idea that defendant has the right to occupy his own space, it follows straightforwardly that plaintiff may not encumber part of that space to create a path for light to flow through, because that would mean that plaintiff was entitled to use defendant's space for a purpose that defendant had not chosen. Thus the harm suffered by plaintiff is irrelevant, as plaintiff's claim that he has a right to be free of it is equivalent to the claim that defendant's space must be used to suit plaintiff's specific purposes, a claim that is inconsistent with the idea that each is entitled to use his or her means as he or she sees fit, but not entitled to use means belonging to another. The same structure applies to the familiar English case of *Bradford v Pickles*, in which defendant diverted percolating water from running under his land into plaintiff's reservoir. Although the reservoir owner or relied on the water, have defendant arrange his affairs so as to provide a suitable path for it. Defendant's conduct was motivated by the hope that plaintiff would be forced to purchase his interest in the land, but the court held that this was of no consequence. Defendant is free to use his means -- in this case is land -- as he sees fit, provided only that he does not interfere with plaintiff's use of his means as he sees fit. The only way to reconcile their separate claims to use what is theirs for their own purposes is to will leave defendant of any obligation to use what is he is in a way that accommodates plaintiff's preferred use of his own property.

In both *Pierson v. Post* and *Fountainbleau*, plaintiff was unable to use his powers – his ability to give chase, and his land, respectively – in the way he chose to – catching foxes and attracting guests. In each case, the action of others changed the environment in which he used his means, making it pointless to give chase or build a luxury hotel, because the fox was unavailable and the tourists uninterested. Yet neither plaintiff was deprived of means he had, or even deprived of the ability to use them in the preferred way. Defendant in *Pierson v Post* didn't break plaintiff's legs, and defendant in *Fountainbleau* didn't destroy plaintiff's pool or Cabana. The first remained free to chase other foxes; the second free to try to attract guests. The right to use your means as you see fit is the right to try to do various things, not a right to succeed, or a right to a favourable environment where you are more likely to succeed at some particular purpose.<sup>19</sup>

Which means are yours is a matter of your legal relations to others. *Your* means are the ones that you can use without seeking permission from others, and others may not use without your permission. This specification of what it is to have means provides a simple account of why pure economic loss is generally not recoverable in tort. Not everything that a person benefits from, or uses to his advantage, counts as his means in the relevant sense. The paradigmatic examples of economic loss that is not recoverable involve users of a bridge that is owned by somebody else. Defendant destroys a bridge that plaintiff's

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<sup>19</sup> The subsequent history of the plaintiff hotel in *Fountainbleau* makes this clear: concerns about skin cancer subsequently made a shaded pool area attractive to guests. Which environments are favorable for which purposes depends in part on the choices of others.

customers use to get to and from his place of business. Such examples illustrate the sense in which someone can use something without it being at that person's disposal. The drivers who cross the bridge are, in legal language, "licensees" who are permitted to use the breach in particular way, but not to use it however they see fit. They would not be entitled to close the bridge down, to exclude others from, to demolish it, or to sell it and have it moved to another location. The owner of the bridge, as a matter of private law, presumably has all of those powers over it even if legislation limits his exercise of them. In so far as a wide variety of public law régimes limit those private powers, they do nothing to change the basic legal relationship reach owner of the person who damages it, or between the owner and those who are licensed to use the bridge.

Again, cases in which a wrong is suffered by an employee do not normally gives her employer a cause of action against the injurer, even though the injurer causes the employer to suffer a loss. Again, employment contracts give the employer rights against the employee, but no right *to* the employee as against third parties. Any public law regulations of the employment relationship do not change this basic structure. The relationship between employer and employee is fundamentally different from the relation that the owner of a domestic animal has to that animal. The owner can complain of being wronged if the animal suffers injury. That is because, as a matter of private law, the animal is entirely at the owner's disposal, even if, as a matter of public law, there are statutes governing health and cruelty to animals that limit the owner's powers.<sup>20</sup> It is the ability to dispose, not the vulnerability to harm, it is significant here. The key employee may be much more significant to a corporation's ability to do business than a factory is. Because private law focuses on rights, rather than injuries, this is the wrong measure.<sup>21</sup>

Economic loss is frequently foreseeable, but it is as a general rule not held to be actionable. The standard explanation of this exclusion is that permitting recovery for economic loss would open up the floodgates of litigation, since the amount of economic loss is foreseeable in the case of a wrong is almost without limit. A focus on means puts its finger in the dyke of the floodgates argument. There is no liability for pure economic loss because the plaintiff has no proprietary right to economic interests that was injured. Put in the vocabulary of means, plaintiff was not deprived of means to which he or she had a right. As a result, although defendant may have behaved badly, and plaintiff may have suffered, there is no wrong to make up. No damages are awarded, because from the point to a few of plaintiff's claim to those means, nothing happened.

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<sup>20</sup> Again, in Roman law, if one person injured the slave of another, the loss is recoverable, on grounds that it was property damage. We can nicely encapsulate one aspect of what is wrong with slavery by noting the differences between the ways wrongs against employees are treated in the ways in which wrongs against slaves were treated. Nobody has another person at his disposal in these ways.

<sup>21</sup> It is perhaps worth noting in this context that economic analysis will always have difficulty explaining the exclusion of your economic loss, because it focuses only on harms and benefits. As a result, without likely effects of this type of vulnerability must be the only measure. Other factors may or may not be proxies for the basic distinction, notably Richard Posner's claim that economic loss is not likely to involve the net loss of wealth in the economy, because others are likely to simply take their business elsewhere in a functioning market economy. If this is ever true, it is just as much for true of economic loss that is consequential on property damage, so it cannot be real explanation of the exclusion.

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

3. *Rights survive wrongs* If I deprive you of something to which you have a right, I wrong you. The very idea that I could do that to you depends on the fact that by wronging you I do not extinguish your right. Just as the person who steals or converts the property of another does not acquire good title in the object because the original owner retains it, so the person who damages or destroys means belonging to another does not disturb the other's right to those means. The normative situation is unchanged, because a person can only lose a right to something through a voluntary act (and not always even that way.) An involuntary transaction in which someone else takes, damages or destroys something that is yours doesn't change your rights. It only changes your ability to exercise them.

The idea that how things should be isn't changed by any event that shouldn't have happened sounds puzzling, but is actually familiar from other contexts. Suppose you make a mistake adding a column of figures; the correct sum isn't changed by the fact that you wrote down the wrong one. I copy a quotation down incorrectly; the correct quotation remains correct, no matter how many further copies are made of my mistaken transcription. Someone makes a common mistake in reasoning; whether the conclusion follows from the premise is fixed by the rules of sound reasoning, not by the way they were mistakenly applied. In each of these cases, the things that shouldn't have happened is identified by the rules of addition, transcription, or reasoning, but doesn't change the result those rules requires. If someone then correct the mistake, it does not undo the fact that the mistake really happened, but there is a perfectly serviceable sense in which we know exactly what the result was supposed to be, and so we cannot go back and correct it.<sup>22</sup> The relevant norm takes priority over what actually happened.

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<sup>22</sup> This is the key idea in the passage in the *Groundwork* in which Kant says that the "noumenal "would" becomes the phenomenal "ought." It is easy to be puzzled by this passage, if you suppose that the distinction between the noumenal and phenomenal realms is ontological. Why should I do want some sort of spooky doppelganger of mine would do? The less mysterious understanding of the distinction between the noumenal and phenomenal realms sees the noumenal realm as the realm of norms and standards: because the noumenal realm is outside of space and time, there are no causal connections in it. There is only the relation of ground and consequent (cite from the first critique). On this understanding, I would not believe the logical consequences of my beliefs, because in the noumenal realm, there are only the inferential relations between those beliefs, considered as propositions. So there is no causal about whether I actually do reason successfully from my premises to those conclusions, only the question of what I would believe. In the empirical realm, I ought to believe what I would believe, that is, in the empirical realm, I ought to think in accordance with the rules of logic, and whatever other sound rules of inference there are. In order to make the move from "would" to "ought" I need to start with premises in order to reach determinate conclusions about particulars, rather than simply the general conclusion that I ought to believe the consequences of my other bully's. In the moral case, I ought to act in accordance with whatever the noumenal standards are; both what I would do, and what I ought to do, will depend in any specific case on the particular details of the situation. So the fact that I promised to meet you is relevant to whether I ought to meet you at the appointed place and time. (That is why Kant talks about maxims, since they provide the proprietary description of actions, and so, the premises from which I reason.) Kant argues that the sole

Rules governing legal entitlements are less sharply defined than rules governing addition or transcription. In this they are more like rules for translating from one language to another. Despite the mass of unclear or controversial issues of translation, there are still many things that are uncontroversial *mistranslations*. The mistake does not change the correct answer – you still should have translated the Latin “lege” as “by law” not as “law.”

What happens as a matter of fact is irrelevant to legal requirements in another familiar context: the appellate court. A case can only be appealed on questions of law, and the finding of law by the court below, although it is the starting point for the appeal, counts for nothing if the competent court decides that the appellant was entitled to a different legal rule. If the court below held that plaintiff and defendant had a valid contract, and ordered completion of it, the appellate court can reverse that finding, because the rules, rather than what actually happened – in this case of the decision of the court of first instance – determines the rights of the parties. When the holding of a trial court is overturned, from the point of view of the rights of the parties, it is as if it had never happened, from which it does not follow that, in fact it never happened. It is a datable event in the history of the world, but one that is entirely without normative significance.

In a parallel way, if I break your vase, all you have are shards. But you have a right to the intact vase. Only deeds to which you are a party can change your private rights; a deed of which you are simply the victim cannot. It is a datable event in the history of the world, but one that is entirely without normative significance.<sup>23</sup> Kant makes this point in terms of what he calls “noumenal possession.” He notes that rights to property involve an entitlement to a thing that persists even when I am not holding the thing, so that I can be

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standard in the noumenal realm is the categorical imperative, but his insight into the relation between “would” and “ought” does not depend on the success of those arguments. In the case of right, the noumenal “would” becomes the phenomenal “must” that is, the authorization to use force. In the noumenal realm, persons would respect the entitlements of others, because the noumenal realm just is the specification of that set of entitlements. That is why *status naturalis* is and “idea of reason.” It is the specification of the complete set of reciprocal limits on freedom in accordance with a universal law. Just as theoretical arguments require premises, and practical arguments require descriptions of actions, so too, at the level of right, the requirements of right only apply to particular is one in determinate entitlements are specified. Once those entitlements are specified, they can only be changed through consensual transactions. You and I can unite our wills in order to effect a transfer of rights from one of us to the other and vice-versa. In private right, you can be compelled to pay your debts (6:230) or compensation if you wrong someone (6:271). Your creditor’s right to payment is noumenal, and so is not defeated by your failure to pay; the person who you injure has a right to be uninjured, a right that the noumenal realm treats as continuing to exist in spite of your injury. Because your rights is not an empirical thing, no empirical deed can change it. (Indeed, that is the whole point of the contract arguments. No merely empirical deed can change the rights of others, and so, if my factum is to bind you, we must understand it has part of our united will.) If no non-contractual empirical deed can change the existence of a right, then it must be the case that my injuring you, or my failure to pay and death, makes no difference to your rights. In each case, the payment makes it as though the right in question was intact. In public right the noumenal would – the authorization of a civil condition– becomes the phenomenal must – others can force you into a civil condition.

<sup>23</sup> Public law operates differently: this state can place you under an obligation without you being a party to it in any apparent sense. The social contract tradition has sought to articulate a sense in which citizens are always parties to see legitimate actions of their governments, but the possibilities of that approach are not my concern here

wronged in relation to it without being wronged in my own person. If you grab an apple out of my hand, you perform a battery against me as you displace my fingers from it. The wrong of theft or conversion is fundamentally different, because you can wrong me in respect of an apple that I have put down, were left at home, or is it sits on my free, hundreds of miles away from me. This same idea of noumenal possession explains the sense in which my claim to a thing persists, even after another has taken it from me or destroyed it. The apple is still mine as a matter of right if it is physically separated from me; it continues to be mine as a matter of right even if you are now holding it, or if it no longer exists because you have eaten it.

The idea that your right survives the wrong committed against it does not entail that the remedy makes the wrong rightful, so that the wrongdoer has a choice between refraining from wrongdoing or wronging and paying you.<sup>24</sup> Some defenders of economic analysis have sought to explain some aspects of tort law in just this way, as a pricing system, or, as Guido Calabresi once put it, "a private power of eminent domain." The paying of damages does not served to retroactively make the wrongdoing permissible, because it is a violation of the plaintiff's right. If defendant could decide to violate plaintiff's right to person and property, plaintiff would be subject to defendant's choice. The primacy of plaintiff's right precludes that possibility. That right does not expire once he is wronged, and so damages served to restore the plaintiff to the situation he was in, so that plaintiff's freedom, as measured by the means at his disposal for doing as he sees fit, can be restored. Having received means equivalent to what he lost, from the point of view of the plaintiff's ability to set his own purposes, it is as if it had never happened.

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

In cases in which one person accidentally injures another, the way to set things right is to focus on the injury. The insurer must repair the injury, that is, to use the language we introduced earlier, the injurer must provide the injured party with means equivalent to those that he lost through the injury, including all of those means, so that, for example, if I injured you and you are unable to work, I have deprived you both of the use of your body during your period of recovery, and also of the uses to which she would have put your body during that period, and so of any further means that you can show that you would have accrued in the process. That is, I must make up your lost income. If I damage your property, I must both pay for the cost of repairing it, and for its lost income. If you can show that there are uses to which she would have put it for earning money, I have deprived you of the further means that you would have acquired, had I not interfered with your property. As a result, the loss is shifted to me. Now this raises our first puzzle, that is, how is it the things have been put back where they were, when all that we really seem to have done is, as Holmes put it, use the "cumbersome machinery of the state" to

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<sup>24</sup> Refs to Goldberg and Zipursky.

shift a burden from one person to another. A burden has not disappeared, and things will never be the same. What's done is done.

Yet if we think about wrongdoing in terms of an interference with purposiveness through an interference with the means plaintiff was entitled to have with which to set and pursue his or her own purposes, rather than in terms of benefits and burdens, the possibility that the *factual* loss cannot be made to go away is of no significance to the analysis. Although it is true that defendant ends up bearing the loss, from the standpoint of the respective rights of the parties, the bearing of that loss is of no significance whatsoever.

People bear losses all the time, without the freedom of others being implicated. If I had damaged my own property, instead of yours, I would be left bearing the loss. If I had injured myself, rather than injuring you, I would be left bearing the loss. In each of these examples, from the standpoint of our rights to secure possession of our means, nothing has taken place, because there has been no interference with any person's use of a thing to which he has a right. What the law of damages does is assimilate the case in which I wrong you to the case in which I injured myself. Although the loss does not go away, there is a sense in which the wrong does go away, precisely because nobody is deprived by another of means to which he or she is entitled. So we make the situation into one that can be redescribed as a situation in which no wrong has taken place. Instead, I have simply injured myself.

5. *Money*: Money is something that can only be used by being exchanged. It is also a universal means, in that it can be exchanged for (almost) any other means. As Kant puts it, money is "the means through which people exchange their industriousness." Although few people would be indifferent between being free of injury and being injured and receiving compensation, adequate compensation can enable a person to have (almost) the same range of options. The qualification "almost" is important here. The claim is not that life can be just as enjoyable, or easy. Compensation does not aspire to place a person on the same indifference curve she would have been on had she not been injured. My sentimental attachment to property I own, and my experiential connection to my body aren't things that can be replaced, so they cannot be compensated. Courts frequently award damages for pain and suffering, and critics of corrective justice are right to wonder whether they do anything at all to make plaintiffs "whole." They may make plaintiffs less unhappy, and this is not crazy a thing for a court to try to do. But it doesn't restore or correct anything. Compensatory damages give you back the means you had. Your happiness was not among those means. That is why someone who makes you unhappy without injuring your person or property is not liable, even if you are more effective at whatever you do when you are happy.<sup>25</sup> But if you require counselling to regain your

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<sup>25</sup> I remember being told as a law student that the real point of pain and suffering damages was to cover lawyer's fees. I have no idea whether they correlate with fees, but the explanation is striking in its desperation to find something that they accomplish, since they so plainly do not make tort victims whole.

focus as the result of a wrong, you recover the cost of it, because the wrong deprived you of your most important power, the ability to decide how to use your other powers.<sup>26</sup>

In the first instance, your entitlement to your person and property does not depend on the particular purposes you pursue with it. If I negligently destroy a box of philosophy books that sat in your basement, you are entitled to their replacement cost even if you had forgotten you had them and purchased new copies, lost interest in the subject, or forgotten how to read the languages they were written in. If I wrongfully injure or disfigure you, you are entitled to equivalent means, to allow you to have the same means available to you, however exactly you may have planned (or been able) to use them. In the case of wrongs against your person, the equivalent means are much harder to quantify, because depending on the technology, there may be no market or other mechanism for producing and allocating the good you have lost. As a result, the finder of fact will at best be able to come up with a measure within an acceptable range.

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

*6. Redescription:* The general strategy for making it as though a wrong had never happened is to make it as though something else had happened instead. If I damage your property and for pay the cost of repairs and any consequential losses, you have all of the means you would have had if it – the wrong – had never happened. I have fewer means, because it is as if I had damaged my own property. As a result of my deed, I end up with less than I would have had. But the change in my holdings that results from the initial transaction and the one that corrects it is no more significant than the same change would have been if it was the result of a single incident in which I damaged my own property. Damages do not restore a prior distribution—once something has been damaged, that can't be done, because there is less after the injury than there was before. Instead, they restore to the aggrieved party the things she had a right to. She had no rights with respect to the size of the holdings of others, just as nobody has a right<sup>27</sup> that their holdings remain the same even if they damage them.

*A Further Illustration: Causal Overdetermination*

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<sup>26</sup> Sometimes the loss is impossible to quantify. In defamation, plaintiff often recovers ‘general damages,’ which make up the loss of a very important asset – his or her reputation—the costs of which may be difficult to measure. See e.g. (refs.)

<sup>27</sup> Except by contract with an insurer.

I want to illustrate these general points by focusing on a series of familiar puzzles about causal overdetermination in torts. The puzzles arise in those cases in which defendant behaves negligently towards plaintiff, or commits a nuisance interfering with a property right plaintiff has, but some other factor, human or otherwise, produces or would have produced the same injury. Ordinarily, the burden lies with plaintiff to show that, were it not for defendant's action plaintiff would not have been injured. In these cases, plaintiffs face a special difficulty, because the duplication of cause seems to show that she would have been injured anyway. A favorite example is *Corey v. Havener*<sup>28</sup>, in which two defendants drove their motorized tricycles on the two sides of plaintiff's carriage. The noise startled plaintiff's horse, as a result of which plaintiff was injured. It's obvious in this case that the two defendants are not each allowed to avoid liability by pointing out that the other one would have startled the horse and caused plaintiff's injury, thus each absolving themselves.

There are a number of available explanations of this seemingly obvious result: some hold that the causation is significant for reasons of administrative convenience, and where the ordinary standards of proof fail, some other convenient way of providing insurers with appropriate incentives, or of guaranteeing compensation to injured parties must take priority. I take this to be the general thrust of the economic analysis, including Guido Calabresi's work.<sup>29</sup> Again, some have offered broadly moralistic explanations, according to which there is something wrong with the way in which each of the parties is able to point to the other that requires that we change our basic understanding of causation and its relevance in these cases.

The result seems obvious, but the source of the obviousness is not. A focus on administrative convenience or incentives simply disregards the significance of the transaction between the parties, and singles out defendant to pay plaintiff purely as a matter of administrative convenience. Again, the moralistic explanation that I mentioned is also unable to preserve the relation between the two parties, because the reason plaintiff recovers in the two-wrongdoer case depends on the relation between the wrongdoers, to which plaintiff seems to be little more than a bystander, what Cardozo might have called a "vicarious beneficiary" of the distaste a court rightly has for wrongdoers claim of advantage from each other.

I want to talk about two English causation cases to explain how the "rights survive wrongs" approach addresses these issues. In the first of these, *Baker v. Willoughby*, plaintiff was injured by defendant's negligent driving. He sued for the income he would have lost because an injury to his leg prevented them from working at his normal job. Before the trial, plaintiff was victim of an unrelated attempted robbery, during which he suffered further damage to the injured leg, and lost it. Defendant sought to avoid liability for plaintiff's lost income after the robbery. The House of Lords rejected the argument. In the second, *Jobling v. Associated Dairy*, plaintiff suffered a back injury that limited his work options. Before trial it was discovered that he was suffering from an unrelated spinal disease which made him unable to work. Defendant sought to avoid liability for

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<sup>28</sup> ref

<sup>29</sup> ref

plaintiff's lost income on the grounds that he would have lost it anyway. The House of Lords accepted defendant's argument, and insisted that it was consistent with the holding in *Baker*.

The result may seem puzzling, because in each case it seems that, as a matter of natural fact, it can be said that plaintiff would have been unable to work in any way, and so that defendant did not cause his inability to work. The important difference, which seems to demarcate these cases is the fact that the second cause in *Baker* was tortious. Yet it is not a problem of the two wrongdoers each being able to point it each other. The result would be the same if the robber had dropped out of sight, and so there was nobody for anyone to point to.

Lord Keith of Kinkel declined to formulate "a precise juristic basis" for distinguishing supervening torts from supervening illnesses, noting only that it might be said that a supervening tort is "not one of the ordinary vicissitudes of life, or that it is too remote a possibility to be taken into account, or that he it can properly be disregarded because it carries its own remedy. None of these formulations, however, is entirely satisfactory." I want to suggest that the guiding principle in these cases can be found in the idea that a person's entitlement to the means that they have survives wrongs against them. That is as I suggested earlier, the basic principle underlying the law of compensatory damages: if I deprive you of something to which you have a right, your right survives my wrong against it. By restoring to you equivalent means that you are entitled to, and making it as though the wrong never happened, you have everything that you are entitled to. I have less than I had before, but, I do not cease to have something that I had a prior entitlement to.

If rights survive wrongs, however, then we have a simple and straightforward explanation of why the wrongdoer cannot point to a subsequent tort. Plaintiff's entitlement presupposes the absence of wrongdoing. It is not that plaintiff has a right to what he would have if others wrong him. Plaintiff has a right to what he would have if there was no wrongdoing. That is the basic principle of damages under which plaintiff recovers from defendant for his loss. Defendant can say that plaintiff would have lost what he had to natural causes, because plaintiff has no entitlements in relation to natural causes. Everything plaintiff has is subject to natural deterioration, because all material objects are subject to such determination. Thus defendant can appeal to the fact that what plaintiff had what is the end less valuable or less useful in any variety of ways, due to natural wear and tear or surprising natural accidents. If plaintiff's car is hit by a meteorite, this may be too remote a possibility to be taken into account, but defendant can truly say that plaintiff would only have had a right to the remains of his car, not to an intact car. If defendant damage the car a few minutes earlier, then defendant will have wrong the plaintiff, but deprive her of nothing. On the other hand, the possibility that plaintiff's car will be vandalized after defendant wrongfully damages it may be not been promoted all, but if the vandalism is unconnected to the accident, defendant cannot appeal to it. Plaintiff's entitlement to her car is an entitlement to a car against which no wrongs have been committed.

I now want to bring this point to bear on a more general issue about money damages: a tort deprives plaintiff of means to which she is entitled. Money damages make up the value of those means. That value can only be calculated against the background of the assumption of properly functioning markets, that is, against the background of the assumption that nobody wrongs anybody else. Things only have prices on the assumption that people will enter into honest contractual relations with each other. If they do not, the magnitude of the loss is indeterminate.

*Gain-based damages.*

John Goldberg has recently bemoaned the fact that the law of torts is “unloved” in contemporary legal scholarship.<sup>30</sup> If the law of torts is unloved, then intentional torts in particular are the neglected child of that scholarship. I do not have to space here to fully repair that neglect, or even to take them into protective custody. Nonetheless, I want to reintroduce them to make is that the significance they have to the claim of the law of damages to make it as though wrongs had never happened.

Intentional torts often involve intentional wrongdoing, but, they are puzzling from many perspectives because they all are also, it seems, torts of strict liability that involve no apparent wrongdoing. Goldberg describes the tort of trespass as “normatively complex,” because it can be done innocently, yet intentionally.<sup>31</sup> Trespass against land is an intentional tort, but so was battery; doctrinally, a common trespass against minerals is a central case, as is conversion.

I want to suggest, however, that intentional torts are normatively simple, for the very reasons that Goldberg finds them complex. An intentional tort involves using means that belong to another person for purposes that person has not authorized. The intention is required because, based on the Aristotelian conception of action introduced earlier, someone must intentionally use means that properly belong to another. You cannot use means, except intentionally, since, on this analysis, to act intentionally is simply to take up means in order to pursue an end. Presumably you cannot do something intentionally without being aware that you are acting intentionally: you cannot cut down a tree without taking yourself to be cutting down a tree, even though you can knock down a tree negligently without realizing that you are doing so. The element of intention requires awareness of the means that you are using in order to pursue your ends.

Far from being in tension with this, the combination of strict liability and intention is an immediate consequence of it: if I use something for my purposes, I may not know who it is that properly gets to decide how it will be used. For example, I can use a piece of land for setting up my tent, without knowing whose land it is. I act intentionally, because my Maxim is “use land to set up your tent.” But I may not realize I am doing so on your land, because the minor premise, as Aristotle would call it, of my action is “here is some land.” Like Aristotle's example of the man who says “dry food suits any man, here is some dry food” and proceeds to eat it, I identified my means without reference to their title. The description under which I take them not to focuses on their usefulness for my

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<sup>30</sup> Ref to Vanderbilt piece.

<sup>31</sup> Ref to YLJ piece

particular purpose, rather than their situation from the standpoint of right. There is nothing objectionable about my thinking in this way. The wrong is not indifference to the rights of others, but rather in that I use some thing for a purpose that its owner has not authorized.<sup>32</sup>

The remedy reflects this wrong: plaintiff's property is to be used only for her purposes. If it is used for a purpose she hasn't authorized, the law must make it as if the wrong had never happened. It cannot undo the fact of defendants' use of it, but it can treat it as plaintiff's own use, by requiring defendant to disgorge his gains. At the highest level of abstraction, it is as if the wrong had never happened: plaintiff's property is used to create additional means. Those new means are then subject to plaintiff's choice.<sup>33</sup>

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<sup>32</sup> The sense of intention at issue in intentional torts is thus significantly different from the role of intention in the criminal law. In both cases, an intention is best analyzed in terms of the use of the means to achieve a particular purpose: "I will use this land to graze my cattle on." An intentional tort violates the private right of the owner of the land by using it for a purpose that he is not authorized, I can do so without any realization of the fact that the land belongs to somebody else. Thus an intentional tort can be committed innocently. In the criminal law, the intention is also analyzed in terms of the means that criminal uses in order to achieve his purpose, but, in the most familiar cases of crimes *mala in se*, the criminal uses means that are inconsistent with the very existence of a legal system, such as property belonging to another. Thus the intention is to be analyzed as "I will use what belongs to another for achieving my own purposes." I examine these issues in more detail in my forthcoming book on Kant's *Doctrine of Right*.

<sup>33</sup> If the wrong is intentional in a more robust sense, and defendant wilfully wrongs plaintiff, for example by using plaintiff's property for his own purposes, he is made to disgorge any gains he might make and, in some cases not allowed any offset for expenses that he might have incurred in making those gains. And so, it would appear, plaintiff receives a windfall. Even if we can understand why it is that defendant should not be allowed to keep his profit, it is not obvious, in terms of making things as they would have been had the wrong never occurred, why plaintiff should be entitled to a positive gain. So in one case, defendant is worse off than he would have been, and in the other, it appears, plaintiff is better off than she would have been. In one sense of things returned to normal?

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

By contrast, if I intentionally take what is yours, "your consent, and meaning to appropriated for purposes of my own, a different analysis must be made to apply. That is because, where I wrong you intentionally, I cannot simply be taken to be acting on your behalf, because if I were so taken, then it would be the case that I could, through my wrong, the force you to hire me as your agent, that is, I could decide, unilaterally, that you will use my services to, for example, get your coal out of the ground. But I cannot do that

Not every trespass produces a gain for defendant. Some produce a loss for plaintiff, in which case plaintiff is entitled to be put back where she would have been, if the trespass had never happened. That is the result if my cattle wander onto your land and flatten your crops. Coase's famous claim that the harms are reciprocal is true but beside the point: your claim to damages is not based on the harm I cause you, but on the fact that I

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unilaterally, because allowing me to do so would be incompatible with the name of equal limits on freedom, since I would be able to enlist you into purpose that you did not share. Of course, I may accidentally so enlist you, as when I accidentally use what is yours, but if I do, it can be turned into your purpose. By contrast, to force you to use my services for removing your coal, is something that cannot be turned into your purpose.

So we need a different redescription of the situation, which allows us to say both that you are entitled to the benefits of your property, but I am not able to claim the fruits of my efforts. This may seem puzzling, since, it might seem, a regime of equal freedom always entitles me to claim the fruits of my efforts. But that rests on the misunderstanding, one that goes to the heart of the focus on benefits and burdens. As a general matter, I am not, as a matter of right, entitled to the fruits of my efforts. I am only entitled to the fruits of my efforts if I manage to retain them. I might retain the fruits of my efforts by putting my efforts into things which have no side-effects on others. This turns out to be remarkably difficult to do; I can harvest most of the fruits of my efforts if, for example, I work on my own land, but, there may be fruits of my efforts that spill off of my land, from which others benefit. I am only entitled to those fruits of my efforts provided that I negotiate with others to keep them. So, for example, if I know that you are benefiting from the shade cast by my fence, I can tell you that I will tear down my fence if you do not pay me a certain fee. But, I cannot claim that you have been unjustly enriched by the past existence of my fence, and demand a share of your profits. I cannot do that because I do not have a right to exclude others from side benefits of my activity, except in the sense in which I can change my activity unless they agreed to pay me. Again, if, for example, I leave a basket of flowers on your doorstep, and, as a result, a potential purchaser of your house comes away with a particularly good impression, and buys the house for a higher fee and you might otherwise have been able to fetch, I cannot claim a share in your profits, but only can reclaim, my basket of flowers. To vary the example, in away that will perhaps make it more obvious, if we are neighbors, and I keep a beautiful garden, as a result of which your house looks better to prospective purchasers, I cannot claim a share of your profits then, because you did not asked me to go into business with you, and you did not in any way acquiesced in the benefit. You did not really have much choice in the matter; you just kept your house where it was. As Baron Pollack put it in a 19th-century English case "one shines another's shoes. What choice has the other but to put them on?" Even if you set out to confer a benefit on me, you cannot then the claim the benefit, unless I have freely accepted, precisely because you cannot unilaterally forced me into a contractual arrangement with you. So if I cannot force you into a contractual arrangement by conferring a benefit on you, and so cannot force you to use my services in such a case, but I certainly cannot force you to use my services in the case in which I set out to take your property as my own. Instead, I must be understood as having done something from which you benefit, but, something for which I have no right to demand payment. Returning to our example, then, although I am acting on your behalf, in bringing your coal to market, I am not allowed to force you, through my unilateral choice, into paying me for my efforts in so doing. Instead, what had appeared to be your windfall, turns out to be no different from the windfall you receive if I shine your shoes in the hope that you will pay me, or the windfall you receive if I beautify my garden in away that increases the value of your home. In each case, I could offer to do these things for you in return for a fee, and, if you accepted my offer, you would thereby be bound to pay for the benefits received. But, since I did not offer to do these things for you, I cannot force you to pay the benefit. I must be understood instead as having squandered my efforts, and you, as it turned out, received a benefit. The benefit is a windfall, in the sense in which you end up with more, having been wronged by me, than you would have received had we negotiated an agreement. But, there are many ways in which you can benefit from my activities to a greater degree then you would have had we negotiated an agreement with respect to those activities. But that is simply my loss, and your gain.

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

use your land for a purpose you have not authorized, and you are entitled to be put back in the situation you would have been in if the wrong had never happened.<sup>34</sup>

*Conclusion:*

I want to close with some broader observations about the broader theme of this symposium, that is, the relation between law and morality. Explanatory and interpretive tort theory developed in the wake of the collapse of legal realism in American law schools in the middle part of the last century. The collapse of legal realism did not completely change the broader conception of what it is to be properly tough-minded and focused on the facts. One aspect of this academic culture was a readiness to assume, without argument, that the law of tort was concerned with preventing harm, coupled with the inevitable concomitant that it needed to be understood as an instrument for doing so. Instrumental analysis of tort law has lost some of its lustre, as critics have pointed to its inability to make sense of core doctrinal ideas such as duty, or the relational nature of obligations in tort. Half a century ago, ideas that are now prominent in torts scholarship might have been charged with failure to mean anything, and so made it “hard to read the books of, people who do not seem to be *worried* about the problem of convincing the sceptic that their philosophical propositions mean something.”<sup>35</sup> But the broader assumption that tort law must have some sort of function, that it must be called to account for its success or failure at delivering some set of goods that can be specified outside of that -- be they harm prevention, wealth maximization, or civil peace and the sublation of the desire for revenge -- keeps reasserting itself.

Like every aspect of academic culture, there are a variety of factors at work, but at least part of the difficulty grows out of the assumption that normative legal theory must be a form of applied ethics, where some other moral view, such as utilitarianism or the deontology many claim to find in Kant’s *Groundwork*, is supposed to be “applied” to questions of institutional design. The applied ethics model assumes that morality is complete, without any reference to the law. Legal questions and become simply questions about the efficacy of legal institutions in realizing moral purposes that stand apart from them.

The felt need to present moral arguments in functionalist terms is a symptom of a broader concern for tough mindedness. It also leads to peculiar formulations of obvious points. Holmes’s attempt to give a utilitarian foundation to common law doctrine is one example; Lord Denning’s odd mix of pronouncements of “policy” and regular talk about “whose lookout” various risks are provides another. Guido Calabresi’s claim that legal concepts are “weasel words” than enable judges to mask their policy decision is yet another. Many of these views no longer seem as compelling as they once did. It is beginning to look as though tough minded utilitarianism is really the façade behind which lawyers and judges hide their commitment to basic issues of principle.

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<sup>34</sup> Some trespasses produce neither gains nor losses. In such cases, plaintiff is entitled to "nominal" damage it is, that is, damages the act articulate the nature of the wrong without quantifying it. Such damages are nominal by name, but not by nature, since they are based on the existence of a wrong.

<sup>35</sup> Hare, *supra* note \_\_\_

The ordinary and familiar ways of thinking and talking about wrongs and remedies do make sense. Damages make it as if a wrong had never happened. The example of damages also reveals a broader point: with respect to the supposed lessons of supposedly sophisticated talk about the “purposes” of law, and their related urge to unmask or otherwise discipline legal language: we can carry on in our old ways as if nothing had happened.