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## Rights, Wrongs, and Recourse in the Law of Torts

Benjamin C. Zipursky

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## Rights, Wrongs, and Recourse in the Law of Torts

*Benjamin C. Zipursky\**

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## I. INTRODUCTION

Cardozo's opinion in *Palsgraf v. Long Island Railroad Co.*<sup>1</sup> hinges on a stark assertion about rights and wrongs: A plaintiff has no right of action unless she can show "a wrong' to herself; i.e., a violation of her own right."<sup>2</sup> Cardozo himself made this principle the core of his analysis, yet scholars typically regard it as impenetrable, circular, vacuous, or, as Posner put it, "eloquent bluff."<sup>3</sup> Small wonder, then, that readers typically turn to "reasonable foreseeability" as the essence of the case. Leading scholars treat *Palsgraf* as a proximate cause case,<sup>4</sup> despite Cardozo's pronouncement that "[t]he law of causation, remote or proximate, is thus foreign to the case before us."<sup>5</sup> Though *Palsgraf* is widely regarded as the most famous case in American tort law, Cardozo's own reasoning in *Palsgraf* is typically ignored or derided, but not explained.

The facts of *Palsgraf* may be peculiar, but its core principle is pervasive: For all torts, courts reject a plaintiff's claim when the defendant's conduct, even if a wrong to a third party, was not a wrong to the plaintiff herself. For example, an injured plaintiff can win in fraud only if she was defrauded, in defamation only if she was defamed, in trespass only if her land rights were violated, and so on. Courts reach these results even where the defendant acted tortiously, the plaintiff suffered a real injury, and the plaintiff's injury was reasonably foreseeable. The legal rule upon which these cases rely is that which our scholarly tradition treats so ambivalently in *Palsgraf*:

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1. 162 N.E. 99 (N.Y. 1928).

2. *Id.* at 100.

3. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 43-45 (1990) (asserting that Cardozo's discussion of the relational nature of duty is "eloquent" but subtle "bluff"). See, e.g., JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* 134 (1976) (criticizing abstractness and unreality of Cardozo's opinion); Thomas A. Cowan, *The Riddle of the Palsgraf Case*, 23 MINN. L. REV. 46, 54 (1938) ("This is merely a definition in a circle, and has all the truth and all the sterility of every tautologous proposition."); William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 16 (1953) ("That is merely a dog chasing its own tail.").

4. See, e.g., W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 43, at 284-90 (5th ed. 1984) (presenting *Palsgraf* as leading proximate cause case). See also DAN B. DOBBS & PAUL T. HAYDEN, *TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* 210 (3d ed. 1997) (presenting *Palsgraf* in chapter entitled "Legal or 'Proximate' Cause"); RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 512 (6th ed. 1995) (presenting *Palsgraf* in chapter entitled "Proximate Cause (Herein of Duty)"); MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* 366 (6th ed. 1996) (presenting *Palsgraf* in the chapter entitled "Proximate Cause"); JOHN W. WADE ET AL., *PROSSER, WADE & SCHWARTZ'S CASES AND MATERIALS ON TORTS* 304 (9th ed. 1994) (presenting *Palsgraf* in chapter entitled "Proximate or Legal Cause").

5. *Palsgraf*, 162 N.E. at 101.

A plaintiff cannot win unless the defendant's conduct was a wrong relative to her, i.e., unless her right was violated. I shall call this principle the "substantive standing" rule and shall show that it is a fundamental feature of tort law.

Proponents of the most prominent theoretical approaches to tort law, law and economics<sup>6</sup> and corrective justice theory,<sup>7</sup> have generally neglected the substantive standing rule, and there are strong reasons to believe these approaches are unable to explain this area of tort doctrine. The larger problem is that the substantive standing rule provides evidence that tort law is built around certain conceptions of "wrongs," "rights," and "rights of action," and yet, I shall argue, seminal versions of law and economics and corrective justice theory do not appear to have adequate resources to accommodate these conceptions. With this in mind, I shall sketch a third way of understanding tort law.<sup>8</sup> While this third view differs markedly from its competitors, it is far from eccentric. Indeed, I think it is the view that has always been embedded in tort law itself.<sup>9</sup>

Tort law is not just a system for the selective imposition of liability in ways that will maximize wealth or other social welfare goals, as some law and economics scholars contend. Nor is it simply a system for rectifying losses or apportioning moral responsibility, as some corrective justice theorists maintain. Like a great deal of statu-

6. The most thorough and impressive attempt to provide a positive theory of tort law from an economic perspective is that of William Landes and Richard Posner. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987). See also GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of The Cathedral*, 85 HARV. L. REV. 1089 (1972); Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

7. See, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* (1992); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992). Some aspects of corrective justice theory may fruitfully be combined with a conception of tort law related to that advanced in this article. See Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in the Age of Mass Torts*, in *PHILOSOPHY AND U.S. TORT LAW* (G. Postema ed., forthcoming 1998) (philosophical analysis of market-share liability).

8. Arguably, there already is a dominant third view—the "deterrence-plus-compensation" view that might be called "conventional instrumentalism," and that courts and scholars of tort doctrine seem to employ implicitly. See, e.g., KEETON ET AL., *supra* note 4, §§ 1-5 (discussing deterrence and compensation in tort law). Whether or not this view might be termed a "theory," there is clearly a family of important perspectives on the normative underpinnings of tort law that is instrumentalist, is concerned with compensation and deterrence, and is not necessarily law and economics. The arguments I offer against instrumentalism in Part IV are intended to undercut both the law and economics approach and the "deterrence and compensation" view. See discussion *infra* Part IV.A.4.

9. See *infra* notes 300-03 and accompanying text.

tory law, tort law articulates rules telling citizens how they may and may not treat one another and how they may expect to be treated by others. In deciding and announcing these rules, appellate courts are imposing duties on individuals not to treat others in certain ways and creating rights in individuals not to be treated in certain ways. The tort law's web of rights and duties embodies a plurality of values as broad as those found in our statutory law.

Rights of action should be understood against the backdrop of these rights, wrongs, and duties. Our system normally prohibits individuals and the state from acting against another individual. However, when the state recognizes a private right of action, it empowers and privileges an individual to act against another through the coercive machinery of the state—to take his property or to force him to behave a certain way. The substantive standing rule states the conditions under which an individual is so empowered to act against a defendant: only when she has been legally wronged by the defendant, only when her own legal right has been violated by the defendant. Understood in this light, the substantive standing rule is not circular, vacuous, or irrelevant. Nor is it obviously justifiable. While it is central to the structure of tort law, it is contentious from a moral and political point of view. Neither efficiency, nor social welfare, nor corrective justice can explain such a requirement, I shall argue. And so we are led to consider whether there are other principles providing the normative underpinning of the institution of private rights of action.

I shall argue that our institution of private rights of action embodies a "principle of civil recourse." According to this principle, an individual is entitled to an avenue of civil recourse—or redress—against one who has committed a legal wrong against her. This principle is a civilized transformation of what is often considered a quite primitive "instinct" of retributive justice, the instinct that I am entitled to "settle a score" or to "get even" with one who has wronged me. In a civilized society, we are not permitted to "get even"—we are entitled to a private right of action in place of getting even. But the quasi-retributive nature of recourse explains why there is a substantive standing requirement. A private right of action against another person is essentially a response to having been legally wronged by that person, and therefore exists only where the defendant has committed a legal wrong against the plaintiff and thus violated her legal right.

The account I offer is intended to be a framework for a theory of tort law that is descriptive, not prescriptive. In Holmes's words, the first step is to "get the dragon out of his cave on to the plain and in the daylight"<sup>10</sup>—not to say what we should do with him. I shall not be arguing that the substantive standing rule, the relational conception of wrongs, or the principle of civil recourse is morally correct. Instead, I shall argue that tort law does contain a substantive standing rule, does embody a relational conception of wrongs, and does reflect our system's commitment to the principle of civil recourse.

Part II offers a close analysis of *Palsgraf*, and Part III demonstrates that the substantive standing rule is essential throughout the law of torts. We shall see that many of the most controversial and puzzling issues of tort law involve challenges to the substantive standing rule. These include, for example: whether the right to recover for emotional injury to a negligently injured loved one should hinge on the notorious "zone-of-danger" test;<sup>11</sup> whether pure economic loss resulting from negligent conduct should be recoverable;<sup>12</sup> and whether states should be limited to subrogation actions in their lawsuits against tobacco companies.<sup>13</sup> At first glance, the law in each of these areas appears inexplicably restrictive because even where there is tortiousness, injury, causation, and foreseeability, recovery is often denied. Upon closer inspection, however, it becomes apparent that the doctrinal key to the law in each of these areas is the substantive standing rule, the core of *Palsgraf*.

Part IV proceeds in two steps. Part IV.A argues that instrumentalist theories of tort law, including both law and economics and conventional "deterrence-plus-compensation" theory, utilize a reductive conception of "rights" and "wrongs" that renders the substantive standing rule vacuous. It further argues that, because most substantive standing cases do not involve inordinate administrative costs and do involve costs more efficiently internalized by defendants, reductive instrumentalist theories are unlikely to be able to "explain away" substantive standing doctrine. Part IV.B picks up the challenge of Part IV.A and constructs a non-instrumentalist framework for analyzing the notions of rights, wrongs, and duties in the law of torts.

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10. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897), reprinted in 110 HARV. L. REV. 991, 1001 (1997) [subsequent citations to 1997 reprinting].

11. See *infra* text accompanying notes 115-20.

12. See *infra* Part III.C.2.

13. See *infra* text accompanying notes 163-67.

Part V turns to corrective justice theory. Paralleling my treatment of instrumentalism, I begin in Part V.A by using substantive standing doctrine as evidence against corrective justice theory as a positive theory of tort law. The fundamental problem, I argue, is that whether a defendant is held liable should, from a corrective justice point of view, turn on whether she acted in a manner the law deems tortious and whether the link between this action and the plaintiff's injury was sufficiently foreseeable that we morally judge the injury to be the defendant's "fault." In fact, rights of action in our tort law do not track tortiousness plus foreseeability—they track substantive standing. Just as Part IV.B constructs an affirmative theory of rights and wrongs out of its critique of law and economics, Part V.B constructs an affirmative theory of rights of action out of the critique of corrective justice theory.

Part VI introduces the idea of civil recourse. Drawing upon social contract theory, Part VI argues that rights of action are a form of civil recourse against others and explains the substantive standing rule as a limitation on when one person is entitled to recourse against another. More broadly, Part VI synthesizes the analyses of rights, wrongs, and recourse to sketch a comprehensive picture of the structure of tort law.

The implications of this account are the subject of Part VII. The critique of law and economics and the critique of corrective justice theory suggest that those frameworks cannot lay claim to revealing the "inner logic" of tort law. To a significant extent, this undermines the aspirations of these theories to guide courts. The model of rights, wrongs, and recourse has implications for tort doctrine far beyond substantive standing. By suggesting how this model may affect our understanding of duty, proximate cause, and punitive damages, Part VII previews some of the work that remains to be done in furnishing an alternative framework for thinking about torts.

## II. SUBSTANTIVE STANDING AND *PALSGRAF V. LONG ISLAND RAILROAD CO.*

In *Palsgraf*, a conductor for the defendant railroad negligently pushed a passenger scrambling to get onto a moving train.<sup>14</sup> The neg-

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14. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928). The following description is roughly Cardozo's version of the facts for the purposes of the appeal. The secondary literature on *Palsgraf* includes a good deal of conjecture about the facts. See, e.g.,

ligent push caused a wrapped package to fall to the ground on the station platform. As it turned out, the package contained fireworks, which exploded and caused a scale to fall at the other end of the platform. The falling scale caused personal injuries to Mrs. Palsgraf, who then sued the defendant for negligence. Writing for a 4-3 majority of the New York Court of Appeals, Chief Judge Cardozo reversed a jury verdict for Mrs. Palsgraf, deciding that her negligence action failed as a matter of law.<sup>15</sup>

The ultimate legal issue in *Palsgraf* was whether a plaintiff whose injury was not reasonably foreseeable may recover in negligence. Cardozo's answer was no; a plaintiff may recover in negligence only if her injury was one a defendant exercising reasonable foresight (less than "extravagant prevision") would have foreseen.<sup>16</sup> Because Mrs. Palsgraf's injury was not reasonably foreseeable, she lost. Cardozo's argument breaks down into two parts: (1) If the plaintiff's injury was not reasonably foreseeable, the defendant's act was not negligent relative to her; and (2) a plaintiff has a right of action in negligence only if the defendant's conduct was negligent relative to her.

Cardozo reasoned that the defendant's act was not negligent relative to Mrs. Palsgraf because, in order for an act to be negligent relative to some person, it must be the case that the defendant breached a duty to that person "the observance of which would have averted or avoided the injury."<sup>17</sup> The duty to a person in negligence law is to avoid the "risk reasonably to be perceived" to that person.<sup>18</sup> Where the injury (as in this case) was one that was not reasonably foreseeable—was not "reasonably to be perceived"—it was not a breach of such a duty and therefore was not negligent relative to the plaintiff. Or, as Cardozo put it: "Relatively to her, there was no negligence at all."<sup>19</sup>

A more direct argument supports the second premise—that a negligence plaintiff may recover only if the defendant's conduct was negligent in relation to her. This point follows from a more general principle that Cardozo restated throughout the opinion: "The plaintiff sues in her own right for a wrong personal to her, and not as the vi-

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NOONAN, *supra* note 3, at 126-27 (speculating on the status of plaintiff's marriage and possible speech impediment); POSNER, *supra* note 3, at 43 (discussing possible inaccuracies regarding the presentation of facts in *Palsgraf*).

15. See *Palsgraf*, 162 N.E. at 101 (stating that the complaint should be dismissed).

16. See *id.* at 100-01.

17. *Id.* at 99-100 (quoting *West Virginia Cent. & P.R. Co. v. State*, 54 A. 669, 671 (1903)).

18. *Id.* at 100.

19. *Id.* at 99.

carious beneficiary of a breach of duty to another.”<sup>20</sup> In short, a plaintiff’s right of recovery depends on the defendant’s conduct having been a wrong relative to her. “What the plaintiff must show is ‘a wrong’ to herself; i.e. a violation of her own right, and not merely a wrong to someone else, nor conduct ‘wrongful’ because unsocial, but not ‘wrong’ to anyone.”<sup>21</sup> In negligence law, the pertinent type of “wrong” is negligence. Hence, it follows that where there was no negligence relative to the plaintiff, she may not recover in negligence.

A confusing characteristic of Cardozo’s opinion is his tendency to alternate between discussions of whether a “wrong” has been committed relative to plaintiff, on the one hand, and whether plaintiff’s “right” has been violated, on the other. One crucial passage, quoted above, strongly suggests that Cardozo meant these ways of speaking to be synonymous: “What the plaintiff must show is a ‘wrong’ to herself; i.e., a violation of her own right.”<sup>22</sup> Moreover, the two parts of Cardozo’s argument laid out above may be restated in terms of “rights” rather than “wrongs”: (1) If the plaintiff’s injury was not reasonably foreseeable, the defendant did not violate a right of plaintiff’s under negligence law; and (2) a plaintiff has no right of action in negligence unless the defendant violated plaintiff’s right under negligence law, which follows from the rule that a plaintiff has a right of action only against one who has violated her right.<sup>23</sup>

Whether we formulate the argument in terms of “wrongs” or in terms of “rights,” the two parts of the argument have different foci. The first part sets forth the kind of conduct that constitutes, under negligence law, a wrong in relation to someone. Or, correlatively, it concerns what conduct constitutes a violation of a right under negligence law. The second part says that there must be such a wrong to

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20. *Id.* at 100.

21. *Id.*

22. *Id.* (emphasis added).

23. Cardozo supported the first part of this argument on the ground that the right of a plaintiff in negligence law is to be protected from “unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue.” *Id.* at 99. Where injury was not reasonably foreseeable, there is no such invasion, and no violation of the right that negligence law protects. Cardozo correspondingly supported the second part of his argument by finding a more general principle about rights of action and rights: A plaintiff has no right of action unless defendant violated her own right. “The victim does not sue derivatively, to vindicate an interest invaded in the person of another.” *Id.* at 101. “What the plaintiff must show . . . is a violation of her own right . . . Plaintiff sues in her own right.” *Id.* at 100. These broad statements about the connection between rights and rights of action are the basis of his more particular conclusion about negligence law: “Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right.” *Id.* at 99.

the plaintiff (or such a violation of her right) for her to have a right of action in negligence.

The second part reaches this conclusion from a more general rule. What is crucial is that a plaintiff has no right of action unless she can show "a wrong to herself; i.e., a violation of her own right . . ."<sup>24</sup> This proposition is, in essence, a form of standing rule. It concedes that the defendant has violated a legal norm and that the plaintiff is injured, but specifies how the plaintiff must be situated in order to have a right of action against the defendant. The criterion offered for standing, according to the analysis in *Palsgraf*, is that the plaintiff herself must have been legally wronged (her right must have been violated) under the substantive legal norm in question—in this case, negligence. Because the criterion for standing offered by this rule is in this sense substantive, I shall refer to it as the "substantive standing rule."<sup>25</sup>

The substantive standing rule is indispensable in *Palsgraf*. Without it, there is no argument that negligence in relation to the plaintiff is a sine qua non for an action. And without this assertion, Cardozo has no argument at all. Reasonable foreseeability is relevant to whether there was negligence relative to plaintiff. But the more basic question is why that matters. That is where Cardozo relies upon the substantive standing rule.

A wide range of judges and scholars has recognized that the substantive standing rule is the key to Cardozo's *Palsgraf* opinion, though not of course using that label. Thus, in *Sinram v. Pennsylvania Railroad Co.*,<sup>26</sup> Judge Learned Hand phrased the question this way: "whether, if A omitted to perform a positive duty to B, C, who had been damaged in consequence, might invoke the breach, though otherwise A owed him no duty; in short, whether A was chargeable for the results to others of his breach of duty to B."<sup>27</sup> And Judge Henry Friendly followed this characterization of Cardozo's framing of the issue in the famous *Kinsman* case.<sup>28</sup> Some scholarship

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24. *Id.* at 100.

25. To my knowledge, the phrase "substantive standing" has not been used elsewhere. Some readers have suggested to me that what I call "substantive standing" is really just the notion of "standing" found in the law more generally, and best developed in federal courts jurisprudence. I do not mean to be taking a position on that issue in this article, but I do note that the account I present here is consonant, broadly speaking, with the anti-reductive account of standing offered in William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

26. 61 F.2d 767 (2d Cir. 1932).

27. *Id.* at 769-70.

28. *Petition of The Kinsman Transit Co.*, 338 F.2d 708, 721 (2d Cir. 1964). Notably, however, Judge Friendly was among those who took Cardozo's answer to be tautologous. See *infra* note 170 and accompanying text.

within the decades following *Palsgraf* also showed some awareness of the relevance of standing-like concepts to the opinion.<sup>29</sup> More recently, Professor Ernest Weinrib, in his book *The Idea of Private Law*,<sup>30</sup> has similarly demonstrated that Cardozo's *Palsgraf* opinion centers on an argument that only the plaintiff who herself was wronged under the law has standing to recover in tort.

But for the most part, judges, lawyers, and academics have *not* treated *Palsgraf* as a standing case, either explicitly or implicitly. On the contrary, *Palsgraf* is predominantly treated—at least by scholars—as a “proximate cause” case.<sup>31</sup> That interpretation, like the one offered here, takes the ultimate holding of the case to be that a plaintiff whose only injury is one that was not reasonably foreseeable to defendant may not recover for that injury. At this point the two interpretations diverge. The standard reading of *Palsgraf* contends that Cardozo reached this decision by consulting a more general constraint which usually goes under the label of “proximate cause”: A defendant is liable only for the injuries that he could reasonably have foreseen. A special case of this, of course, would involve a plaintiff whose only injury falls in this non-recoverable category of injuries—she will have no cause of action. Mrs. Palsgraf's injury was unforeseeable, therefore not proximately caused, and therefore not actionable. That is why she had no right of action.

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29. See, e.g., Cowan, *supra* note 3, at 48-52; Prosser, *supra* note 3, at 19-24. Interestingly, while it seems that *Palsgraf* has been discussed more extensively than any other torts case, scholarship on the case tailed off dramatically after the publication of Prosser, *supra* note 3. Weinrib's work, *supra* note 7, is a notable exception. Earlier *Palsgraf* scholarship includes (and the list is not exhaustive): Richard V. Campbell, *Duty, Fault, and Legal Cause*, 1938 WIS. L. REV. 402; Arthur L. Goodhart, *The Unforeseeable Consequences of a Negligent Act*, 39 YALE L.J. 449 (1930); Leon Green, *The Palsgraf Case*, 30 COLUM. L. REV. 789 (1930); Charles O. Gregory, *Proximate Cause in Negligence—A Retreat From Rationalization*, 6 U. CHI. L. REV. 36 (1939); Fleming James, *Scope of Duty in Negligence Cases*, 47 NEV. U. L. REV. 778 (1953); Clarence Morris, *Duty, Negligence, and Causation*, 101 U. PA. L. REV. 189 (1952); Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372 (1939); Note, *Loss-Shifting and Quasi-Negligence: A New Interpretation of the Palsgraf Case*, 8 U. CHI. L. REV. 729 (1941).

One other work that may shed light on *Palsgraf* is LEON GREEN, *THE RATIONALE OF PROXIMATE CAUSE* (1927). This work was written prior to *Palsgraf*, and there is anecdotal evidence that Cardozo was familiar with Green's views, which influenced Francis Bohlen (the Reporter of the *Restatement (First) of Torts*) and were probably discussed at a meeting of the American Law Institute at which Cardozo was present. Prosser, *supra* note 3, at 4-5. Green's thesis was that “proximate cause” did not really pertain to causation questions, but to the question of whether the interest protected by the law was invaded. See GREEN, *THE RATIONALE OF PROXIMATE CAUSE*, *supra*, at 5-11. As Green himself noted, this approach on its own does not entirely explain *Palsgraf*, because the question arises as to whether to extend the protection of the law to Mrs. Palsgraf's interest. See Green, *The Palsgraf Case*, *supra*, at 790-92.

30. WEINRIB, *supra* note 7, at 159-64.

31. See *supra* note 4.

The proximate cause reading of *Palsgraf* arguably has the advantage of carving up tortiousness and scope of liability in a fairly comprehensible manner that makes the case seem analagous to a large body of other negligence cases; this is undoubtedly part of why it has persisted. But that is no reason to interpret Cardozo as having a proximate cause view of the case. Such an interpretation simply does not correspond to what Cardozo actually said. Indeed, Cardozo, in the clearest of terms, denied making a proximate cause argument: "The law of causation, remote or proximate, is thus foreign to the case before us."<sup>32</sup> He explicitly assumed for the purposes of argument that, if liability was established, damages would be recoverable *even if they were unforeseeable*, "however novel or extraordinary."<sup>33</sup> As Cardozo appears to have recognized, it is not in fact a sound statement of law that the only recoverable damages are for foreseeable injuries.<sup>34</sup> This did not concern him because the problem, as he explicitly stated, was not the unforeseeability of the damages, but the fact that plaintiff herself was not wronged: "The consequences to be followed must first be rooted in a wrong."<sup>35</sup>

Although it is unfounded in what Chief Judge Cardozo actually said, the proximate cause interpretation of his opinion is somewhat understandable in light of Judge Andrews's dissent. Andrews took *Palsgraf* to involve an issue of proximate cause: "[W]here there is an act which unreasonably threatens the safety of others, is the doer liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger?"<sup>36</sup> Andrews himself clearly recognized that Cardozo had not framed the issue in terms of proximate cause. Andrews wrote of two "hypotheses" as to what the central issue of the case was: first, that the case was about whether there was negligence in relation to plaintiff, and second, that it was about whether there was proximate cause.<sup>37</sup> Indeed, the first goal of Andrews's opinion was to undermine Cardozo's "hypothesis" that the case should be framed in terms of the relational nature of negligence and the need for a breach of duty to the plaintiff herself. If he successfully rejected that framing of the issue, he thought, then the only question remaining would be whether proximate cause required reasonable foreseeability. Under the second

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32. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. 1928).

33. *Id.*

34. *See id.*

35. *Id.*

36. *Id.* at 102 (Andrews, J., dissenting).

37. *See id.* (Andrews, J., dissenting).

hypothesis, “we have to inquire only as to the relation between cause and effect. We deal in terms of proximate cause, not of negligence.”<sup>38</sup> While Andrews had insightful remarks on the issue of proximate cause in his *Palsgraf* dissent,<sup>39</sup> the 1921 case *Matter of Polemis*<sup>40</sup> already supported his answer—that foreseeability was not required for proximate cause—and Cardozo appeared willing to accept *Polemis*.<sup>41</sup> The real battle between Cardozo and Andrews was therefore not over proximate cause. It was over whether the alleged fact that the conduct was not negligent in relation to Mrs. Palsgraf—was not a wrong to her—prevented the court from even reaching the issue of proximate cause.

In this light, our scholarly tradition’s treatment of *Palsgraf* is profoundly ironic. It has accepted the dissent’s characterization of the issue in the case as one of proximate cause, and then it has read that issue back into the opinion of the court and understood the court to have resolved the issue in the opposite way from the dissent. In other words, scholars accept that *Palsgraf* is a proximate cause case, as Andrews said, but plaintiff loses, so Cardozo must be merely denying the existence of proximate cause in this particular instance. This is an odd way to read any case, especially a central case of our torts canon. While the traditional “proximate cause” reading of *Palsgraf* may be consistent with the outcome of the case, it is the reasoning of the case that imbues it with general importance in torts, not its outcome. The standard interpretation completely misses this reasoning. Cardozo had nothing to say about proximate cause; for him, this was crucially *not* a proximate cause case, and he was willing to assume *arguendo* that Andrews was correct about proximate cause.<sup>42</sup> Thus, neither of the famous opinions in the case agrees with—or even presents—the argument most commonly attributed to it.

Some scholars and courts have essentially retained the traditional interpretation of the opinion, but avoided the awkwardness of calling *Palsgraf* a proximate cause case by instead using the label “duty.”<sup>43</sup> According to this view, Cardozo believed that injuries not

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38. *Id.* (Andrews, J., dissenting).

39. *See id.* at 103-05 (Andrews, J., dissenting).

40. 3 K.B. 560 (1921).

41. *See Palsgraf*, 162 N.E. at 101.

42. *See id.* at 99.

43. *See, e.g., Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 546 (1994) (in context of discussing restrictions on action for negligent infliction of emotional distress, citing *Palsgraf* as basis for such limitations, and reasoning that “[s]ome courts phrase the limitations in terms of proximate causation . . . . Other courts speak of the limitations in terms of duty . . . . These formulations are functionally equivalent.”) (emphasis added) (citations omitted); *see also Babbitt v.*

reasonably foreseeable should not generally be recoverable, but he knew that they were frequently tolerated as part of consequential damages. However, where the plaintiff is in a category of persons whose sole injury is unforeseeable, a floodgates rationale applies fully, and the plaintiff should therefore be denied a right of action entirely. This conclusion is put by saying that the defendant has no duty to this plaintiff.

This relabeled proximate cause argument is problematic for the same reasons as was the proximate cause argument by its proper name: It attributes to Cardozo a view of the central issue of the case that he explicitly rejected, that the dissent recognized that Cardozo rejected, and that the dissent did embrace. It adds insult to injury by suggesting that Cardozo's denials are subterfuge, and the label of "duty" is brought in to cover his work. And it fails to address Cardozo's central propositions pertaining to the relational nature of negligence and the need for a "relational wrong" in order to have a right of action.

Interestingly, the relabeled proximate cause, or duty, interpretation at least can purport to address language in *Palsgraf* pertaining to duty, but its analysis inverts Cardozo's. It takes Cardozo's statement that there is no duty breached to plaintiffs with unforeseeable injuries to be derived from a prior decision that liability would extend too far if plaintiffs with unforeseeable injuries were able to recover. In fact, Cardozo's own reasoning goes just the other way. He infers that unforeseeable plaintiffs have no right of action from the fact that no duty to them is breached.<sup>44</sup> Furthermore, Cardozo's basis for finding that there is no breach of a duty to a person with injuries that are difficult to foresee does not pertain to fear of liability. The scope of a duty, according to Cardozo, is not the range of liability that may realistically be imposed upon people, but the range of conduct to which our norms may realistically hold them to be obliged. We will be involved "in a maze of contradictions"<sup>45</sup> if we hold people to a duty of care that requires them to have foresight (or "prevision"<sup>46</sup>) so extraordinary that they anticipate injuries as indirect as Mrs. Palsgraf's. "Life will have to be made over, and human nature

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Sweet Home Chapter of Communities For A Great Oregon, 515 U.S. 687, 713 (1995) (O'Connor, J., concurring) (noting that "proximate causation" and "duty" are "functionally equivalent" alternative characterizations in terms of foreseeability) (citing *Gottshall*). See also KEETON ET AL., *supra* note 4, § 43, at 281 (treating "duty" question as another label for proximate cause problem, in the context of unforeseeable consequences).

44. See *Palsgraf*, 162 N.E. at 100.

45. *Id.*

46. *Id.*

transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.<sup>47</sup> Less prosaically, to impose such a demanding duty of care would be to articulate a norm to which we could not realistically expect people to conform their conduct.

Scholars have criticized Cardozo for articulating no real argument and concealing his motivations behind a screen of rhetoric,<sup>48</sup> and it should now be clear why. They have taken the only possible basis for *Palsgraf* to be a liability-limiting policy rationale, but found that Cardozo himself said nothing about liability limitation in his decision except to deny that this was what he was doing. Indeed, Cardozo's opinion focused primarily on the morally loaded concepts of rights, rights of action, relational wrongs, duties of care, and an abstract standing-like rule that relates relational wrongs to rights of action. His comments on all of these are somewhat opaque. Critics therefore have been tempted to conclude that these opaque rights-based notions are a mere cover for an unexamined policy judgment.<sup>49</sup> To be sure, many commentators have recognized that Cardozo purported to offer a different argument, but most of them have found that argument pointless or circular.<sup>50</sup>

In the end, the problem with *Palsgraf* is not the absence of an argument. There is a forcefully stated argument: A plaintiff has no right of action unless there was a wrong relative to her or a violation of her right, and there is no such relational wrong or personal-rights violation in a negligence case where the duty to avoid foreseeable risk to the plaintiff has not been breached. The problem is that the argument rests on ideas—relational wrongs, personal rights, and a substantive standing rule—that are not easily grasped from within the most prominent theoretical perspectives on tort law.

### III. THE SUBSTANTIVE STANDING RULE THROUGHOUT TORT LAW

In Part IV, the Article begins to examine the concepts of rights and wrongs that will elucidate *Palsgraf*, but Part III adds an important doctrinal dimension to the Article. Some readers may still be

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47. *Id.*

48. See, e.g., NOONAN, *supra* note 3, at 141-51; POSNER, *supra* note 3, at 43-45.

49. See Prosser, *supra* note 3, at 16.

50. See *supra* note 3.

tempted to think that *Palsgraf* is simply an aberrant case, or that it turns solely on reasonable foreseeability, or that the text of Cardozo's opinion should simply be ignored, notwithstanding the significance usually attributed to it. Part III shows that the problem of explaining the substantive standing rule does not end with *Palsgraf*. What is unusual about Cardozo's opinion is the force and clarity with which he articulates the standing rule, and his ability to abstract the need for negligence relative to the plaintiff into a general tort requirement of wrongfulness relative to the plaintiff. The following Part demonstrates, however, that within every tort there is a black letter rule that, in effect, constitutes a version of a substantive standing rule.

Preliminarily, it is important for the reader to be clear as to what I am claiming and what I am not claiming about tort doctrine. I am not claiming that the term "substantive standing" is found throughout tort law; on the contrary, it is a term that I have coined. Nor am I claiming that the variety of doctrinal rules I discuss have all been conceptualized as standing rules. Indeed, this Article is intended to contribute to scholarship on tort doctrine by providing a unified doctrinal explanation, in terms of substantive standing, of apparently diverse rules of law. Third, I am not claiming that substantive rules are uncontroversial or without exception within tort law. Substantive standing rules, like other broad features of tort law, are often distinguished, exception-ridden, modified, or challenged.

What then *am* I claiming about tort doctrine? My claim is that, within every tort, the common law contains a black letter rule that limits recovery to plaintiffs who are situated in a particular way. This limitation takes for granted that a defendant has acted in a manner the law deems tortious, that the plaintiff has been injured as a result of this tortious conduct, and has suffered harm of a sort that tort law generally deems real and compensable. In many of these cases, unlike *Palsgraf*, the injury to the plaintiff was reasonably foreseeable. Yet the common law denies recovery, and hence it is not surprising that these are often among the most perplexing and controversial areas of tort law. On first blush, the basis for denial varies across the different torts, e.g., the "of-and-concerning-element" in defamation, the "reliance" element in fraud, the need for a "possessory interest" in property torts, and the "duty" element in negligence. But in looking at how each of these "elements" operates within the respective tort, I claim that each defines what it is for the defendant's conduct to be wrongful relative to the plaintiff, and each requires that a plaintiff must have been so situated in order to recover under the respective tort. In this sense, each of these elements presents a ver-

sion of a substantive standing rule within the respective tort. While the term "substantive standing" is novel, I am claiming that the limitation of recovery to those relative to whom the defendant committed a wrong is longstanding and fundamental.

### A. Dignitary and Personal Torts

#### 1. Defamation and Privacy

A plaintiff who is injured by a defamatory statement cannot recover unless she herself was defamed. Courts articulate this point by saying that the defamatory statement must be "of and concerning" the plaintiff.<sup>51</sup> This requirement applies even if the defendant defamed someone and the foreseeable result of this defamation was a reputational injury to plaintiff.

Thus, in *Gugliuzza v. K.C.M.C., Inc.*,<sup>52</sup> parents claimed that they suffered foreseeable reputational and dignitary injuries when a television station falsely described their teenaged son as a drug dealer.<sup>53</sup> In *Johnson v. Southwestern Newspapers Corp.*,<sup>54</sup> a woman claimed that she suffered injury when her husband was falsely accused of irresponsible conduct.<sup>55</sup> The owner of a corporation claimed,

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51. See ROBERT D. SACK & SANDRA S. BARON, *LIBEL, SLANDER, AND RELATED PROBLEMS* § 2.8, at 149 (2d ed. 1994).

52. 606 So. 2d 790 (La. 1992).

53. *Id.* See also *Zucker v. County of Rockland*, 489 N.Y.S. 2d 308 (App. Div. 1985) (discussing foreseeability of harm to individual whose photograph and name were published in an article concerning a "Scared Straight" program). In *Lee v. Weston*, 402 N.E.2d 23 (Ind. Ct. App. 1980), plaintiffs argued that the coroner's request for an autopsy of plaintiffs' son implied that the son's death was caused by drug overdose, and thereby besmirched their reputation. See *id.* at 24. The court rejected plaintiffs' defamation claim on the grounds that (1) only the party defamed may bring a defamation action, and (2) there is no cause of action for defamation of a deceased person. See *id.* at 28-30. *Lee* collects cases on both points nationwide.

54. 855 S.W.2d 182 (Tex. Ct. App. 1993).

55. See *id.* See also *Newspapers, Inc. v. Matthews*, 339 S.W.2d 890, 893 (Tex. 1960); *Talbot v. Johnson Newspaper Corp.*, 508 N.Y.S.2d 80, 83 (N.Y. App. Div. 1986) ("Since Talbot's wife was not personally mentioned in either article, she has no claim for humiliation and embarrassment. Nor may she recover the loss of her husband's earnings."); *Morgan v. Hustler Magazine, Inc.*, 653 F. Supp. 711, 719 (N.D. Ohio 1987) (holding that where defendant allegedly put fashion model's photograph on cover of Hustler magazine without her knowledge or consent, and falsely implied she endorsed hard core pornography, model's husband may not recover for embarrassment, ridicule, reputational damage, or emotional distress); *Taimenbaum v. Foerster*, 648 F. Supp. 1300, 1303 (E.D. Wis. 1986) (holding, under Wisconsin law, that a spouse lacks standing to bring an action based on a statement about the spouse). A few jurisdictions permit spouses to recover in loss of consortium actions predicated on a tortious injury to the spouse through libel. See *Garrison v. Sun Printing and Publ'g Ass'n*, 100 N.E. 430 (N.Y. 1912); *Food Fair, Inc. v. Anderson*, 382 So. 2d 150 (Fla. Dist. Ct. App. 1980). This is the exception, rather than the rule, and, as discussed at *infra* Part III.D, the nature of loss of consortium actions

in *Kesner v. Liberty Bank & Trust Co.*,<sup>56</sup> that false statements about the corporation's credit damaged his reputation and finances.<sup>57</sup> Partners of the prominent attorney Roy Cohn asserted, in *Cohn v. National Broadcasting Co.*,<sup>58</sup> that statements undermining Cohn's professional integrity and trustworthiness as an attorney hurt not only Cohn but also his firm and his partners.<sup>59</sup> Investors in a for-profit AIDS testing corporation argued, in *AIDS Counseling and Testing Centers v. Group W Television, Inc.*,<sup>60</sup> that a television station's defamatory attack on their corporation caused them financial injury.<sup>61</sup> In all of these cases, courts found that plaintiffs had no right of action in defamation because defendant's statement was not of and concerning the plaintiff.

The requirement that the defamatory statement be "of and concerning the plaintiff" is essentially a substantive standing rule in defamation. It is a rule that a plaintiff cannot recover unless the defendant's conduct was defamatory as to the plaintiff herself. As one court has stated (quoting Prosser and Keeton's Hornbook), "[a] libel action is 'personal to the plaintiff and cannot be founded on the defamation of another.'"<sup>62</sup>

Not surprisingly, tort actions for invasion of privacy display limitations similar to those in defamation. Thus, an action for wrongful disclosure of private fact exists only for a person about whom the private fact was disclosed,<sup>63</sup> and similarly for false light.<sup>64</sup>

## 2. Fraud

The general rule in fraud is that a plaintiff has no right of action unless she herself has been defrauded. This requirement is

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tends to support, rather than undermine, the substantive standing rule. Cf. *Flamand v. American Int'l Group, Inc.*, 876 F. Supp. 356, 372-73 (D.P.R. 1994) (denying the spouse a right to sue for tort of defamation based on defamation of her husband, but recognizing statutory right under Article 1802 to "recover damages for specific defamation of spouse").

56. 390 N.E.2d 259 (Mass. App. Ct. 1979).

57. See *id.* See also *Dexter's Hearthside Restaurant, Inc. v. Whitehall Co.*, 508 N.E.2d 113 (Mass. App. Ct. 1987) (holding that principal stockholder and officer of a corporation cannot recover for defamation of corporation).

58. 414 N.Y.S.2d 906 (N.Y. App. Div. 1979).

59. See *id.* at 907-08.

60. 903 F.2d 1000, 1005 (4th Cir. 1990).

61. See *id.* at 1002.

62. *Davis v. Costa-Gavras*, 619 F. Supp. 1372, 1376 (S.D.N.Y. 1985) (citing *KEETON ET AL.*, *supra* note 4, § 111, at 744).

63. See *SACK & BARON*, *supra* note 51, § 10.3, at 570, and cases cited therein.

64. See *Morgan v. Hustler Magazine, Inc.*, 653 F. Supp. 711, 719 (N.D. Ohio 1987).

usually expressed in terms of the reliance element of fraud.<sup>65</sup> A plaintiff may be injured as a foreseeable result of intentional, fraudulent conduct, but that is not enough to recover in fraud. Nor is it sufficient that someone else may have relied on the fraudulent statement. Plaintiff must prove that she herself relied on the content of the fraudulent statement or omission.

For example, in *Rosen v. Spanierman*, an art dealer intentionally misrepresented a certain piece of art to a couple who were about to be married.<sup>66</sup> The plaintiff offered to buy the couple a piece of fine art of their choice. Relying on the art dealer, the couple selected a certain piece of art and the plaintiff paid for it. On learning that she had paid money for an inauthentic piece of art, the plaintiff sued the art dealer for fraud. But her fraud action failed, because she herself did not rely upon the fraudulent statements.<sup>67</sup> Similarly, in *Cummings v. Kaminski*, a woman fraudulently induced an insurance company to alter the named beneficiary of an insurance policy, and the original beneficiary consequently suffered financial injury.<sup>68</sup> The defendant was not liable in fraud to the original beneficiary because the original beneficiary did not herself rely upon the fraudulent misrepresentations.<sup>69</sup> In *Peerless Mills, Inc. v. American Telephone & Telegraph Co.*, a partnership allegedly defrauded a businessman into joining the partnership.<sup>70</sup> The businessman borrowed money from his parents-in-law to join in the partnership, and the parents-in-law's money subsequently disappeared. The defrauding partnership was not liable to the parents-in-law because they did not rely on the misrepresentations, even though there was fraud and there was injury as a foreseeable result of that fraud.<sup>71</sup>

The reliance requirement applied to the plaintiff in a fraud claim is a substantive standing rule for the tort of fraud. A defendant has not committed the wrong of fraud relative to the plaintiff himself—she has not defrauded the plaintiff—unless the plaintiff has relied on the content of the fraudulent statement or omission. In other words, the law denies a right of action in fraud cases where the

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65. See RESTATEMENT (SECOND) OF TORTS § 537 (1977) (“The recipient of a fraudulent misrepresentation can recover against its maker for pecuniary loss resulting from it if, but only if, (a) he relies on the misrepresentation in acting or refraining from action . . .”).

66. 894 F.2d 28, 30 (2d Cir. 1990).

67. See *id.*

68. 290 N.Y.S.2d 408, 410 (N.Y. Sup. Ct. 1968).

69. See *id.*

70. 527 F.2d 445, 447 (2d Cir. 1975).

71. See *id.* at 449-50.

plaintiff lacks substantive standing. As is true in the emotional injury case law discussed below,<sup>72</sup> a good deal of uncertainty exists in the courts as to the dimensions, qualification, and justifiability of this rule.<sup>73</sup>

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72. See *infra* Part III.C.1.

73. See, e.g., *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997). In *Randi W.*, a student molested by a school administrator sued the administrator's former employer for misrepresenting the administrator's fitness for employment. See *id.* at 584. The court upheld negligent misrepresentation and fraud claims notwithstanding plaintiff's lack of reliance, based on "duty" analysis typical in negligence law. See *id.* at 588-94.

The *Restatement (Second) of Torts* may be plausibly interpreted as distinguishing the law of fraud from the law of negligent or intentional misrepresentation. The latter context typically involves cases where, as a result of the possibility that people will be physically injured unless it is known that a certain hazard exists, a duty of due care is imposed on the persons creating the risk to provide accurate information concerning the hazard. Breach of this duty subjects the defendant to liability to any plaintiffs foreseeably injured by the realization of the risk (assuming they can prove that, had the correct information been imparted, the risk would not have been realized).

Here, the relevant form of tortiousness is the failure to guard against a certain risk by providing correct information, in other words, the failure to take a certain precaution (a verbal one) against a certain risk. The conduct is tortious, in this respect, to anyone who is injured as a result of the realization of the risk. As is generally the case for accident cases in the negligence family, the defendant who failed to take the precaution that due care required is liable, whether this failure to take the precaution was negligent or intentional. Hence, under the *Restatement*, a person physically injured by a hazard that the defendant intentionally misrepresented may be liable without proof of reliance. But this type of case is treated under the *Restatement's* chapter on negligence, not fraud, and essentially involves failure to take reasonable care in warning, exacerbated (as are many negligence cases) by a scienter level on defendant's part. RESTATEMENT (SECOND) OF TORTS § 310 & cmt. d (1965) ("Conscious Misrepresentation Involving Risk of Physical Harm . . . . The liability stated in this Section is not confined to those persons whose conduct the misrepresentation is intended to influence, or to harm received in the particular transaction which the misrepresentation was intended to induce.").

It is also important to note that the requirement that the plaintiff rely on the content of the statement is not a privity requirement. Privity is not an element of fraud. *Kuelling v. Roderick Lean Mfg. Co.*, 75 N.E. 1098 (N.Y. 1905). Hence, if a plaintiff relies on a defendant's representation or omission, even if such representation or omission was not made directly to the plaintiff but was communicated indirectly to the plaintiff through third parties, the plaintiff has not merely been injured by the representation or omission, but she has been deceived, defrauded into believing the content of the misrepresentation. Such a plaintiff therefore has substantive standing in fraud. These cases, like *Kuelling*, often involve fraudulent misrepresentations as to the safety of a product which the user of the product relies upon when he uses the product mistakenly believing it to be safe. *Id.*

Finally, the Supreme Court's securities fraud jurisprudence deviates from the common law of reliance. Although this law is almost uniformly rejected by courts interpreting the common law of fraud, it is instructive to see that even the Court's apparently divergent analysis of reliance is compatible with the analysis above. In *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1971), the Court held that where the fraud consisted of a concealment, rather than affirmative misstatement, reliance by plaintiffs could be proved once the materiality of the misrepresentation was established. See *id.* at 153-54. Pushing this conclusion further in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), the Court held that where a plaintiff who has purchased securities proves that the defendant knowingly made fraudulent material statements in connection with those securities to intermediate parties prior to the plaintiff's purchases, reliance may be presumed. The *Basic* Court adopted a "fraud-on-the-market" theory: Information released into the market is converted into prices, which plaintiffs rely upon in

### 3. Malicious Prosecution and False Arrest

It is an “established rule” that “actions for false arrest and malicious prosecution are personal actions which do not give rise to a cause of action to any other than the person directly aggrieved.”<sup>74</sup> The same rule applies in the case of an action for abusive civil proceedings. Each of these causes of action has a substantive standing rule: An action for false arrest exists only for one who was falsely arrested; an action for malicious prosecution is only for one who was maliciously prosecuted; an action for abusive civil proceedings is only for one against whom proceedings are abusively brought.

*Jackson v. Kessner* sharply illustrates the courts’ enforcement of this rule.<sup>75</sup> Plaintiff Jackson was the executrix and sole beneficiary of her mother’s estate, which consisted of a commercial building. As executrix, she entered into a contract to sell this building to Kessner. Kessner did not perform in a timely manner, so Jackson kept the security deposit and entered into a contract with another party. At that point, Kessner filed an action against the estate and Jackson as executrix, and a notice of pendency against the building. The second deal consequently fell through. Claiming she suffered damage from Kessner’s malicious destruction of the second contract, Jackson filed a malicious prosecution action as both the executrix and the beneficiary. The court rejected Jackson’s action as beneficiary, on the ground that only parties to the original litigation may sue, and Jackson-as-executrix was the only party to the original litigation.<sup>76</sup>

### 4. Assault and Battery

Recognizing the tort of battery protects two interests: a “bodily integrity” interest in remaining free from harmful physical contact, and a “dignitary” interest in remaining free from offensive contact.<sup>77</sup>

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entering transactions. *Id.* at 229. What is interesting about both *Ute* and *Basic* is that the Court insisted that the plaintiff-reliance element remained intact, and that it only created an evidentiary presumption. *See id.* at 243 (“We agree that reliance is an element of a 10b-5 cause of action.”).

74. *Coverstone v. Davies*, 239 P.2d 876, 881 (Cal. 1952) (en banc) (citing cases).

75. 618 N.Y.S.2d 635 (N.Y. App. Div. 1994).

76. *See id.* *But see* *Rushing v. Bosse*, 652 So. 2d 869, 875 (Fla. Dist. Ct. App. 1995) (holding that in action for wrongful institution of adoption proceedings brought by infant’s biological grandparents on behalf of infant and individually against attorney assisting hopeful adoptive parents, infant need not have been named as a “defendant” in allegedly wrongful adoption proceedings).

77. 3 FOWLER V. HARPER ET AL., *THE LAW OF TORTS* § 3.2 (3d ed. 1996).

Closely paralleling causes of action in defamation, malicious prosecution, and privacy, a cause of action in battery is personal to one who has been harmfully or offensively touched. A third person whom the defendant has not harmfully or offensively touched normally cannot prevail in a battery action, even if she suffers foreseeable injury. Thus, for example, in *Davis v. Fulton County, Arkansas*,<sup>78</sup> a man whose wife was raped had no standing to bring intentional tort claims himself.<sup>79</sup> In *Coon v. Joseph*,<sup>80</sup> a man who suffered emotional injury in witnessing his partner physically attacked by a bus driver was denied a cause of action. In *Ntron International Sales Co. v. Carroll*,<sup>81</sup> a federal court held that a corporation whose employees were attacked by the defendant could not bring a cause of action for assault.<sup>82</sup>

Tort scholars have often cited the doctrine of "transferred intent" in the law of battery to rebut Cardozo's assertion in *Palsgraf* that only those toward whom the defendant's action was tortious are entitled to recover.<sup>83</sup> In the standard "transferred intent" case, A shoots a gun with the intention of hitting B, and instead hits C. C is able to recover in battery from A.<sup>84</sup> Thus, C may recover from A despite the fact that A's conduct was tortious only as to B. This conclusion seems to be an exception to the substantive standing rule.

This conclusion, however, rests on a misunderstanding. The law of battery forbids each of us from causing a harmful or offensive touching of others through certain sorts of wrongful conduct toward others. In specifying what sort of wrongful conduct toward others will give rise to a battery action, the law imposes a stringent state-of-mind (or *scienter*) requirement. Typically, *scienter* is glossed over as an

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78. 884 F. Supp. 1245 (E.D. Ark. 1995).

79. See *id.* at 1250. The court also thought that the rape victim's husband failed to allege sufficient injury to himself. But the court's overall analysis suggests that, if the husband had any cause of action associated with an intentional tort on his wife, it would be for loss of consortium. See *infra* Part III.D.

80. 192 Cal. App. 3d 1269 (1987). This case arguably cuts both ways, because it cites to cases in which heterosexual spouses or family members are able to recover for emotional injury as the result of a battery to a third person. *Id.* at 1272, 1274-77. However, these citations are misleading. Plaintiffs in such cases must win under a theory of intentional infliction of emotional distress through outrageous conduct. The very requirement that the conduct be intended (or known) to inflict emotional distress, in conjunction with the arbitrary proximity and family limitations imposed in such actions (see *infra* text accompanying notes 158-61), underlines the fact that a substantive standing requirement may severely limit recovery under battery.

81. 714 F. Supp. 335 (N.D. Ill. 1989).

82. See *id.* Note, however, that this case turned in part on the difficulty of attributing assault-like injuries to a corporate entity.

83. See, e.g., Prosser, *supra* note 3, at 12.

84. See, e.g., Lopez v. Surchia, 246 P.2d 111 (Cal. Dist. Ct. App. 1952). See generally William L. Prosser, *Transferred Intent*, 45 TEX. L. REV. 650 (1967).

intent requirement, although, as the case of *Garratt v. Dailey*<sup>85</sup> indicates, actual intent is not necessary.<sup>86</sup> In the standard transferred intent scenario, A has a specific intent to harm B, and therefore a rigorous state of mind requirement with regard to B is easily met. Although A did not have the same intent with regard to C, in the event that A hits C instead of B, it would be a mistake to infer that A was not engaging in wrongful conduct toward C, and it would be equally wrong to infer that A's lack of intent to injure C specifically undercuts C's battery claim against A. When A shoots at B, he displays an attitude of extreme subjective indifference toward the physical and emotional well-being of all those, including C, who might be hit by his bullet. The law implicitly takes A's extreme indifference to whether third parties are harmfully or offensively touched to be sufficient to meet the state-of-mind requirement for battery.<sup>87</sup> Indeed, this point is obvious if one considers the wholly unproblematic battery claim of a plaintiff who is hit by a defendant shooting into a crowd. A defendant's extreme indifference to the plaintiff's interest in remaining free from harmful or offensive bodily contact qualifies as the relevant sort of wrongfulness. "Transferred intent" caselaw therefore does not run counter to the substantive standing rule.

### B. Property Torts

#### 1. Nuisance

A private nuisance claim will fail if it is brought by a person who lacks a property right in the land in question, even if that person has clearly suffered an injury as a result of the defendant's creating a private nuisance.<sup>88</sup> Only those holding a property right, the use and enjoyment of which has been invaded, have substantive standing to bring a nuisance claim. Thus, although a defendant who keeps its land in a dangerous condition may be liable in nuisance to those who are thereby injured, it is "firmly established that in order to recover in a private nuisance action a plaintiff must have an ownership interest

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85. 279 P.2d 1091 (Wash. 1955) (holding knowledge of harmfulness is sufficient for intent under battery).

86. *See id.*

87. *See Lopez*, 246 P.2d at 113 (holding, in case where defendant was not aiming gun at plaintiff, plaintiff was liable because gross or culpable negligence supplied intent).

88. *See* RESTATEMENT (SECOND) OF TORTS § 821E (1979) ("For a private nuisance there is liability only to those who have property rights and privileges in respect to the use and enjoyment of the land affected.").

in the land."<sup>89</sup> In *Meizoso v. Bajoros*, for example, the plaintiff was injured on a softball field under the control of the defendant.<sup>90</sup> Although the plaintiff adequately alleged that the defendant kept its property in defective condition and that this caused him to break his ankle, his nuisance claim was rejected as a matter of law because he had no ownership interest in the land. Cases like *Meizoso* are legion. In landlord/tenant law, master/servant law, and generally law regarding conditions on one's land that are dangerous to those on the land, nuisance is simply not a viable cause of action. The remedy, if there is one, must lie within negligence law.

In *Arnoldt v. Ashland Oil, Inc.*, the Supreme Court of West Virginia considered an oil company's appeal from judgment on a jury verdict in favor of four plaintiffs who lived on land near the defendant's oil refinery.<sup>91</sup> The plaintiffs argued that the defendant's emissions were a nuisance that caused them a variety of damages, including "annoyance, discomfort, sickness, or emotional distress."<sup>92</sup> Explicitly invoking the concept of standing, however, the *Arnoldt* court held that three of the four plaintiffs could not recover because they "were occupants in the homes of relatives and held no ownership interest in the respective properties."<sup>93</sup> The applicable nuisance law required "that a person have an 'ownership interest' or 'possessory interest' in the property alleged to have been affected by the nuisance in order to have standing to bring an action for private nuisance."<sup>94</sup>

*Arnoldt* clearly applies a substantive standing rule. The plaintiffs whose claims were rejected had alleged an unreasonable interference with the use and enjoyment of a person's private land, and that they were injured by such nuisance-like conduct. But the plaintiffs neither owned nor held any possessory interest in property with which the defendant's nuisance-like conduct unreasonably interfered. The conduct was therefore not a nuisance with respect to them, but only with regard to third persons (those with a possessory interest in the land). The court followed the rule that plaintiffs must lose unless they had an ownership or possessory interest that was unreasonably interfered with.

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89. *Meizoso v. Bajoros*, 531 A.2d 943, 944 (Conn. App. Ct. 1987) (citing D. WRIGHT AND J. FITZGERALD, TORTS § 130 (2d ed.) and *Webel v. Yale Univ.*, 7 A.2d 215 (Conn. 1939)).

90. *Id.*

91. 412 S.E.2d 795, 799 (W. Va. 1991) (applying Kentucky law).

92. *Id.* at 803.

93. *Id.*

94. *Id.*

## 2. Trespass

Only those who have a right of possession in the property trespassed upon have a cause of action for trespass. Indeed, part of the reason the right of possession is so carefully defined is that it determines who has a cause of action for trespass. The structure of the *Restatement's* rule of liability for trespass makes this clear:

One is subject to liability *to another* for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

(a) enters *land in the possession of the other*, or causes a thing or a third person to do so, or

(b) remains on *the land*, or

(c) fails to remove from *the land* a thing which he is under a duty to remove.<sup>95</sup>

The liability imposed by this provision is liability *to the person who has the appropriate kind of possessory interest in the land trespassed upon*. Thus, in defining the contours of the right of exclusive possession, the courts are in fact defining who has substantive standing to sue for wrongs incurred through trespass.

*Hennigan v. Atlantic Refining Co.*<sup>96</sup> provides an interesting example. The plaintiffs in *Hennigan* were representatives of construction workers building a sewer for the City of Philadelphia (the "City"). The workers were killed by an explosion at the construction site caused by poisonous vapors emitted by the petroleum of defendant Atlantic Refining Company ("Atlantic"). Atlantic's petroleum had seeped into the property of the City. The plaintiffs argued that Atlantic had invaded the City's property right by permitting its petroleum to seep into the City's land, and that Atlantic had thereby engaged in trespass. The consequence of this trespass was the construction workers' deaths. The court rejected the plaintiffs' argument as a matter of law. It conceded that there was a trespass by Atlantic, that the plaintiffs' injury was of a sort that was compensable, and that the petroleum caused the plaintiffs' injury.<sup>97</sup>

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95. RESTATEMENT (SECOND) OF TORTS § 158 (1965) (emphasis added).

96. 282 F. Supp. 667 (E.D. Pa. 1967).

97. In rejecting the trespass claim, the court did not comment on foreseeability of injury; the plaintiffs' lack of a property right was entirely dispositive. However, the court's treatment of the negligence claim against Atlantic suggests, on first appearance, that it regarded these injuries as unforeseeable. That appearance is misleading. The court's entire opinion upholds a jury verdict for the full amount of injuries, plus punitive damages, against the City of Philadelphia. Atlantic had in fact settled with the plaintiffs prior to trial. The court evaluated

The trespass action did not lie, however, because "the invasion [of the property right] was not an invasion of any right of the decedents."<sup>98</sup>

*Hennigan* illustrates the substantive standing rule in trespass. Tortious conduct by the defendant—a trespass—plus a directly caused injury to the plaintiffs—death—did not yield a cause of action. The plaintiffs could not recover unless they had substantive standing, that is, unless the defendant engaged in trespass as to the plaintiffs.<sup>99</sup> For the tort of trespass, substantive standing is a matter of holding the property right (possession, not ownership, of land) that the defendant invaded. Indeed, the *Hennigan* court went so far as to explain why this substantive standing requirement exists: "[A]ctions for trespass to land are primarily to redress invasions of the right to exclusive use and possession thereof."<sup>100</sup>

Interestingly, the *Restatement* attempts to soften the substantive standing rule of trespass law by permitting the members of the possessor's household who are also members of his immediate family to sue for trespass.<sup>101</sup> The inclusion of household members represents a pragmatic understanding of the nature of the property rights enjoyed by, and respected in, the family members of a tenant of record. Basically, the *Restatement* expands the definition of the rights-holder in accordance with contemporary expectations regarding property rights, while leaving intact the fundamental requirement of substantive standing in the case of trespass: Only those whose property right is violated are entitled to sue.

Substantive standing is also a fundamental part of the doctrine of other property torts such as conversion<sup>102</sup> and wrongful

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the plaintiffs' claims against Atlantic only in the context of whether the City had a right of contribution against Atlantic. The court rejected the plaintiffs' negligence claim against Atlantic on the ground that the City had been so grossly negligent in failing to cease operations at the construction site once the poison vapors were found that its negligence was a superseding cause. In the context of this holding, the court stated that the degree of the City's negligence was unforeseeable. *See id.* at 677-79.

98. *Id.* at 679.

99. *See also* *Lal v. CBS, Inc.*, 726 F.2d 97, 100 (3d Cir. 1984) (holding only person in possession of property may recover for a defendant's trespass); *United States v. Village of New Hempstead*, 832 F. Supp. 76, 81 (S.D.N.Y. 1993) (holding plaintiffs lacking title to and possession of property may not bring trespass claim); *Sky Four Realty Co. v. New York*, 512 N.Y.S.2d 987, 989 (N.Y. Ct. Cl. 1987) (holding owner not in possession of shopping center may not recover for trespass); *Scott v. Elliot*, 451 P.2d 474, 480 (Or. 1969) (subsequent owner may not sue for damages resulting from trespass to land committed prior to his ownership and possession of land).

100. *Hennigan*, 282 F. Supp. at 679 (citing RESTATEMENT (SECOND) OF TORTS (1965), Scope Note to Chapter 7).

101. RESTATEMENT (SECOND) OF TORTS § 162 (1977).

102. *See, e.g.*, *Sigler v. LeVan*, 485 F. Supp. 185, 202 (D. Md. 1980) (holding that a survivor lacked standing to sue in conversion for book that would have passed from decedent but that

detention,<sup>103</sup> as well as torts predicated on other proprietary interests, such as tortious interference with contract.<sup>104</sup>

### C. Negligence

The *Restatement (Second) of Torts* articulates a substantive standing rule for negligence in the very definition of the tort, stating that a defendant is liable if "the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included."<sup>105</sup> The Comment accompanying this section clarifies:

In order for the actor to be negligent with respect to the other, his conduct must create a recognizable risk of harm to the other individually, or to a class of persons—as, for example, all persons within a given area of danger—of which the other is a member. If the actor's conduct creates such a recognizable risk of harm only to a particular class of persons, the fact that it in fact causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not make the actor liable to the persons so injured.<sup>106</sup>

*Palsgraf's* fact pattern is presented as an illustration of this provision,<sup>107</sup> and I have shown that the substantive standing rule is at the root of Cardozo's opinion in that case.<sup>108</sup>

Beyond *Palsgraf*, however, three prominent problem areas of negligence law present striking illustrations of the substantive standing rule at work. These areas are emotional harm, economic harm, and professional malpractice claims brought by third parties. Cases

survivor in fact did not own at the time of defendant's taking); *Kemp Motor Sales, Inc. v. Lawrenz*, 505 So. 2d 377, 379 (Ala. 1987) (holding that parties without demonstrable property interest in boathouse lacked standing to sue in conversion where defendant bore costs associated with alleged converter's destruction of boathouse); *First Bank & Trust Co. v. Insurance Serv. Ass'n, Inc.*, 269 S.E.2d 527, 530 (Ga. Ct. App. 1980) (holding corporate president lacked standing to bring conversion action for converter of corporate funds where he was not payee or lawful holder of corporate checks).

103. See, e.g., *John A. Artukovich & Sons, Inc. v. Reliance Truck Co.*, 614 P.2d 330, 331 (Ariz. Ct. App. 1979) (holding owner of crane who had leased out right to use crane lacked right to use crane and therefore lacked standing to bring action for wrongful detention of crane).

104. A substantive standing rule for tortious interference with contract is also, in some sense, based on a proprietary interest: A plaintiff has substantive standing and thus a right of action for tortious interference with contract only if the plaintiff was a party to the contract with which defendant tortiously interfered. See *Hufsmith v. Weaver*, 687 S.W.2d 130, 131 (Ark. 1985). See also *NBT Bancorp, Inc. v. Fleet/Norstar Fin. Group, Inc.*, 664 N.E.2d 492, 497 (N.Y. 1996) (stating that plaintiff with expectation of contract but no actual legally enforceable contractual right lacked standing to sue for tortious interference of contract).

105. RESTATEMENT (SECOND) OF TORTS § 281(h) (1977).

106. *Id.* at cmt. c. (emphasis in original).

107. *Id.* at Illustration 1.

108. See *supra* Part II.

involving these types of harm are striking because the injuries claimed in them, as in most of the cases we have considered, are reasonably foreseeable, but courts still deny recovery. Moreover, all of the cases involve a breach of the duty of due care to *someone*. The basis for the denial of recovery is that there is no breach of the duty of due care to the *plaintiff herself*.

### 1. Emotional Harm

At common law, and to a great extent today, a plaintiff who suffers emotional injury from a defendant does not have a right of action for negligent infliction of emotional distress unless the defendant's conduct breached a duty to avoid risk of emotional injury to the plaintiff.<sup>109</sup> Thus, substantive standing applies to claims of negligently induced emotional harm. Because negligence law generally holds that, absent a special relationship, one does not have a duty to avoid risk of emotional harm to others, there is generally no right of action for negligently induced emotional harm.<sup>110</sup> However, in negligence cases in which the defendant has breached her duty to take reasonable precautions against causing the plaintiff physical injury, and has caused such injury, consequential damages may sweep in emotional injuries as well.<sup>111</sup>

The most controversial type of case, however, falls between these categories. In such cases the defendant has caused physical injury to a third party through breach of a duty of due care to that party, and the plaintiff foreseeably suffers emotional harm as a result of that breach, although the plaintiff remains physically uninjured. Until this century, the common law's universal treatment of such cases was to deny recovery. Negligence law has traditionally required, in a manner dramatically parallel to *Palsgraf*,<sup>112</sup> that in order to have a cause of action for emotional injury, a plaintiff must show that the defendant breached a duty owed to the plaintiff to take reasonable precautions against causing such injury; breach of the duty to a third party is not sufficient.

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109. See generally KEETON ET AL., *supra* note 4, § 54, at 359-66.

110. See *id.* at 361.

111. See *id.* at 362-64. See also David Crump, *Evaluating Independent Torts Based Upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby From Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 439, 457 (1992) (finding negligently inflicted emotional distress recoverable in some contexts where there is contractual relation or as consequential damages or in bystander cases).

112. KEETON ET AL., *supra* note 4, § 54, at 365 (plaintiff stands "in the position of Mrs. Palsgraf").

In the past couple of decades, however, courts have begun to question this rule.<sup>113</sup> Given the dramatic pull of these cases, and given our scholarly tradition's incapacity to make sense of the substantive standing rule more generally, this is hardly surprising; currently, most jurisdictions permit recovery for bystanders under at least some circumstances.<sup>114</sup> More surprising is what has now become the notorious "zone-of-danger" rule in bystander cases,<sup>115</sup> adopted by many courts including the United States Supreme Court.<sup>116</sup> The general rule is still that a plaintiff who has suffered foreseeable emotional injury as a result of the defendant's negligent physical injury of a third party (such as a child) cannot recover. The zone-of-danger test created an exception to the general rule: A plaintiff may recover if she was among those who were physically endangered by the negligent conduct that actually caused physical injury to the third party. Thus, for example, a parent who witnesses her child die in an automobile accident caused by a defendant's negligence cannot recover for emotional injury unless the parent was sufficiently connected to the accident that the defendant's negligence *could* have caused the parent herself physical injury.

This zone-of-danger rule is in force in many jurisdictions, but it has been widely criticized as arbitrary.<sup>117</sup> For present purposes, I only wish to point out why scholars might have been tempted—wrongly, in my view—to use this apparently bizarre test to perform the job of limiting claims. On first blush, the zone-of-danger rule cleverly covers the defect in the plaintiff's claim—apparent lack of substantive standing. If the plaintiff was physically endangered by the negligent conduct of the defendant, then it seems defendant's act was wrongful relative to the plaintiff after all, for it involved negligent failure to take precautions against causing plaintiff physical harm. And hence, the argument would go, the substantive standing rule is not a bar to recovery in zone-of-danger cases. Thus, arguably, an apparent relaxation of the substantive standing rule is really only a clever application of it.

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113. See, e.g., *Stadler v. Cross*, 295 N.W.2d 552, 553-54 (Minn. 1980) (denying recovery where bystander not in zone of danger); *Bovsun v. Sanperi*, 461 N.E.2d 843, 847-48 (N.Y. 1984) (adopting zone-of-danger rule and reviewing other courts' adoption of rule).

114. See *Consolidated Rail Corp. v. Gottshall*, 512 U.S. at 532 & n.3 (1994) (noting that nearly all states recognize a right to recover for negligent infliction of emotional distress).

115. See generally Howard H. Kestin, *The Bystander's Cause of Action For Emotional Injury: Reflections on the Relational Eligibility Standard*, 26 SETON HALL L. REV. 512 (1996) (comparing approaches to bystander recovery).

116. See *Gottshall*, 512 U.S. at 542-44 (interpreting the Federal Employers' Liability Act).

117. See, e.g., Kestin, *supra* note 115, at 532.

In fact, the zone-of-danger rule is an intuitively and doctrinally unstable compromise. Intuitively, courts have been repulsed by the arbitrariness of granting recovery to one family member and denying recovery to another when both suffered severe distress at witnessing the death of a loved one and neither suffered any personal physical injury, simply because one of them hypothetically could have suffered injury.<sup>118</sup> From a doctrinal point of view, the substantive standing hole is not really patched because, on a basic level, the breach of duty to a third party caused the plaintiff's emotional injury.

Aware of the instability of the zone-of-danger rule but unwilling to turn back the clock on bystander plaintiffs, many courts have taken the more forthright route of the California Supreme Court in *Dillon v. Legg*.<sup>119</sup> The *Dillon* court recognized that severe emotional distress to family members in the vicinity of an accident was reasonably foreseeable to defendants. The court effectively created another exception to the general rule that there is no duty to avoid negligently causing emotional harm to others when it found a duty to avoid causing severe emotional distress to family members who witness, and are in the proximity of, an accident. The holding in *Dillon* suggests that in this and similar cases, the substantive standing rule is retained not by a clever patch-up but by explicitly expanding the category of duty.<sup>120</sup>

## 2. Economic Harm

The law of pure economic injury runs parallel to the law of emotional injury and likewise contains a substantive standing rule.<sup>121</sup> The general rule, represented in Holmes's famous decision in *Robins Dry Dock & Repair Co. v. Flint*,<sup>122</sup> is that there is no recovery for negligence causing pure economic injury unless the defendant was breaching a duty to the plaintiff to avoid risks of economic injury to her.<sup>123</sup>

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118. See *Dillon v. Legg*, 441 P.2d 912, 915 (Cal. 1968) (rejecting the zone-of-danger and impact rule).

119. *Id.*

120. *But see* *Thing v. La Chusa*, 771 P.2d 814, 827-30 (Cal. 1989) (narrowing *Dillon*). More generally, the discussion *infra* Part IV provides a framework for thinking about whether courts that grant recovery for emotional injury of non-physically injured witnesses are genuinely expanding the range of duty or are instead permitting a niche of liability where there is no duty.

121. Cf. Peter Benson, *The Basis for Excluding Liability for Economic Loss in Tort Law*, in 1 PHILOSOPHICAL FOUNDATIONS OF TORT LAW 427 (D. Owen ed., 1995) (stating whether plaintiff has right of action for economic loss depends on whether plaintiff's injury was a violation of her right, which is specified independently of instrumentalist considerations).

122. 275 U.S. 303 (1927).

123. See *id.* at 307.

Because there is also a general rule that, absent a special relationship, one does not owe a duty to others to avoid risks of economic injury, the result is a general rule that there is no recovery for negligently induced economic injury.<sup>124</sup> Exceptions exist, most of which involve persons whose relationship to a plaintiff is such that they have specific duties to watch out for the plaintiff's economic well-being.<sup>125</sup> For example, a person who hires an accounting firm (or, likewise, a law firm or business consulting firm) that misperforms its job can sue the firm for the economic injury she suffers as a result of this misperformance.<sup>126</sup> And again, as in emotional injury cases, recovery for pure economic injury is not barred if the plaintiff also suffered some other kind of injury on which the economic loss claim is founded. Economic injury absent such an accompanying injury is generally not actionable.<sup>127</sup>

The most controversial cases resemble *Rickards v. Sun Oil Co.*<sup>128</sup> In that case, Sun Oil owned a barge that negligently destroyed a third party's bridge. As a result of this occurrence, Rickards, who was a retailer on an island serviced by the bridge, lost the business of those customers who could not reach him because of the destroyed bridge. The court rejected Rickards's claim on the ground that pure economic loss is not recoverable.<sup>129</sup>

What is interesting about *Rickards* is that the plaintiff, like the plaintiffs in the bystander cases, seems to have an argument notwithstanding the general rule that there is no duty to take precautions against causing economic harm to others. Sun acted negligently, its negligence breached a duty, and the breach of duty caused an injury to Rickards. Moreover, courts routinely permit

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124. See KEETON ET AL., *supra* note 4, § 129, at 1000-01 (observing that exceptions to rule of nonliability for negligence turn on "special relationship or an assumption of responsibility by the negligent promisor").

125. Cf. Stephen R. Perry, *Protected Interests and Undertakings in the Law of Negligence*, 42 U. TORONTO L.J. 247 (1992) (pure economic loss actionable where defendant breaches duty created by undertaking to plaintiff).

126. See KEETON ET AL., *supra* note 4, § 129, at 1000-01.

127. See generally LANDES & POSNER, *supra* note 6, at 251-55; W. Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1 (1982); Robert L. Rabin, *Tort Recovery For Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513 (1985).

128. 41 A.2d 267 (N.J. 1945). I focus on *Rickards* because it is Landes and Posner's chief example. Ironically, New Jersey itself has more recently shown unusual receptiveness to pure economic loss claims, at least under sufficiently narrowly defined circumstances. See *People Express Airlines, Inc. v. Consolidated Rail Corp.*, 495 A.2d 107, 114 (N.J. 1985) (allowing recovery to particular plaintiffs or particular class where economic consequences are known or should be known to be likely).

129. See *Rickards*, 41 A.2d at 270 (stating that plaintiff's economic loss was not a natural and proximate result of defendant's negligence).

economic loss as an element of damages, and grant it as the only form of damages in several categories of cases (e.g., attorney malpractice to client, and unfair competition). There is nothing inherently objectionable about granting recovery for pure economic loss. Finally, it is foreseeable that if an undue risk of destroying a bridge is realized, those served by the bridge will be economically injured.

The court's rejection of the plaintiff's claim in *Rickards*—and other courts' rejections of scores of similar claims—can be understood as an intuitive application of the substantive standing rule in negligence law. A plaintiff cannot recover for negligently inflicted economic loss unless the defendant breached a duty owed to the plaintiff herself of taking reasonable precautions against causing the plaintiff economic loss. Of course, much of the difficulty of explaining *Rickards* and cases like it lies in explaining why there is no general duty to take precautions against others' economic losses. But, as in the cases of emotional injury, the greatest difficulty lies in explaining a denial of recovery where a defendant breached a duty that he clearly had to prevent another sort of injury, and that breach resulted in pure economic loss.

### 3. Privity

In cases involving emotional or economic harm, plaintiffs can make two distinct sorts of arguments:<sup>130</sup> an argument predicated on breach of a duty of due care to a plaintiff, and an argument predicated on breach of a duty of due care to a third party. The same two types of arguments appear in a third sort of case which is also pivotal in the law of torts: privity. Consider the accountant's liability case, *Ultramares Corp. v. Touche*,<sup>131</sup> also a Cardozo opinion. There, the plaintiff lost money because the defendant accountant had negligently prepared an audit for a third party. The issue was whether the plaintiff could recover despite the absence of privity between it and the defendant.<sup>132</sup> In theory, two lines of argument were available to the plaintiff. One was that, in preparing the audit, the defendant breached a duty of due care owed directly to the plaintiff. A second was that the defendant's breach of duty to its client subjected the defendant to liability to the plaintiff. The *Ultramares* court denied liability, ostensibly on a finding that there was no privity between the

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130. I am not suggesting, of course, that plaintiffs will always find it in their interest to distinguish these two lines of argument.

131. 174 N.E. 441 (N.Y. 1931).

132. See *id.* at 444.

negligent accountant and the plaintiff suffering economic loss.<sup>133</sup> Essentially, this holding means that an accountant does not have to take precautions against economic risks to third parties with whom there is no contractual privity. But a second argument remains: Why can the plaintiff not recover on the basis of the breach to the client? The argument is especially compelling in cases where third parties rely on audits, for these are parties to whom injury is clearly foreseeable.

Cardozo's denial of liability in *Ultramares* represents a rejection of both lines of argument: Cardozo found no direct duty, absent privity, and implicitly rejected the possibility of liability without a direct duty. Framed in this light, *Ultramares* exemplifies the substantive standing rule in the case of negligence. Indeed, *Ultramares* is akin to *Palsgraf*, but the victim in the former case belongs to a class of persons to whom injury is foreseeable. Because the duty to avoid economic harm is not predicated on foreseeability alone, but requires privity, the foreseeability of the victim's loss does not make the act negligent as to him.<sup>134</sup> Therefore, the case is on all fours with *Palsgraf*: no recovery because no negligence as to plaintiff himself. Substantive standing, not foreseeability, is the key to both cases.<sup>135</sup>

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133. *See id.* at 446.

134. *Ultramares* is not the majority rule. Nevertheless, those courts permitting recovery for non-clients do so on the ground that the duty to prepare audits with due care runs to all those whom the accountant knows will rely on them—the first form of argument, which incorporates the substantive standing rule. *See, e.g., Rosenblum, Inc. v. Adler*, 461 A.2d 138 (N.J. 1983) (finding duty of care owed to reasonably foreseeable recipients of financial statements).

135. Perhaps the most famous privity case in the law of torts is Cardozo's decision in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). Buick sold a negligently constructed car to a retailer, who in turn sold the car to the plaintiff. *See id.* at 1051. The plaintiff was injured by the car, because of its negligent construction, and he sued Buick. *See id.* Buick argued that there was no contractual privity with the plaintiff, and therefore there was no duty to him, and therefore there was no cause of action for negligence. Cardozo rejected the argument and permitted the consumer to sue Buick directly for damages. *See id.* at 1055.

Note that there were, again, two lines of argument available to the plaintiff in *MacPherson*. The first is that Buick's duty to construct the automobile with due care ran to consumers like the plaintiff himself, even if there was no privity of contract; the second is that there was a breach of the duty of due care to the retailer, and the plaintiff's injury was caused by this breach. Cardozo's opinion in *MacPherson* is a thorough analysis of the first line of argument, not the second. *See id.* at 1052-55. For him, *MacPherson's* ability to recover hinged solely on the viability of the first line of argument. His decision rings with morality precisely because he was announcing that a manufacturer has a duty to watch out for the well-being of all consumers, not just of those persons with whom there is contractual privity. The reason Cardozo needed to find a duty directly to *MacPherson* absent privity is that, without it, *MacPherson* would have violated the law's implicit substantive standing rule in the case of negligence. *See John C. P. Goldberg & Benjamin C. Zipursky, The Moral of MacPherson*

Many courts permit recovery by certain third parties in accountant's liability cases, but they do so because they find there is a duty of due care running from the accountant to the third party, despite the absence of privity.<sup>136</sup> In legal malpractice,<sup>137</sup> medical malpractice,<sup>138</sup> and economic harm doctrine,<sup>139</sup> privity remains a hotly contested issue of law. In all of these areas, there is negligence and foreseeable injury, and the key issue is whether, notwithstanding the lack of privity, the defendant breached a duty of due care running to the plaintiff. In this light, the duty element in privity cases is a version of the substantive standing requirement.<sup>140</sup>

#### 4. The Risk Rule

In an important book written several decades ago, then-Professor (now Judge) Robert Keeton attempted to explain *Palsgraf* as a case based on the "risk rule."<sup>141</sup> The risk rule presupposes that a given act is negligent because it carries with it an unduly high risk of certain injuries. As such, an act is negligent in relation to certain risks. The rule states that a defendant is liable in negligence for only those injuries that are realizations of the risks in relation to which the act was negligent.<sup>142</sup> Keeton posed as an example of the application of the risk rule a case involving a plaintiff injured by a

(unpublished manuscript, on file with the Author) (developing moral conception of duty within *MacPherson* and beyond).

136. See, e.g., *Rosenblum*, 461 A.2d at 145 (finding liability based on reasonable foreseeability of use); *Citizens State Bank v. Timm, Schmidt & Co.*, 335 N.W.2d 361, 367 (Wis. 1983) (describing liability based on foreseeability of injuries).

137. See, e.g., Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15 (1987) (examining privity in legal malpractice).

138. See, e.g., Cynthia Grant Bowman and Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. 549 (1996) (examining and criticizing recent cases in which therapist is held liable for emotional and reputational injury to non-patients).

139. See, e.g., *Bily v. Arthur Young & Co.*, 834 P.2d 745 (Cal. 1992) (lack of privity curtails third party's right to recover for accountant malpractice).

140. In the famous case of *Wagner v. International R.R. Co.*, 133 N.E. 437, 438 (N.Y. 1921), Judge Cardozo wrote for the New York Court of Appeals that a plaintiff injured while rescuing someone who suffered from an accident caused by defendant's negligence was entitled to recover from the defendant for his own injuries. He famously opined that "[d]anger invites rescue." *Id.* at 437. Cardozo was apparently reasoning that the prospect of a rescuer who might be injured was within the scope of the hazards the negligent defendant could be expected to foresee. Learned Hand adopted the same analysis in *Sinram*. See *Sinram v. Pennsylvania R.R. Co.*, 61 F.2d 767, 771 (2d Cir. 1932).

141. ROBERT E. KEETON, *LEGAL CAUSE IN THE LAW OF TORT* 79-80 (1963).

142. See *id.* at 10 (the second formulation of the risk rule is: "A negligent actor is legally responsible for the harm, and only the harm, that not only (1) is caused in fact by his conduct but also (2) is a result within the scope of the risks by reason of which the actor is found to be negligent.").

restaurant explosion caused by unlabeled rat poison kept near a stove.<sup>143</sup> It is negligent to keep unlabeled rat poison near the stove because it might be added to the restaurant's food, not because of the risk that it would explode, of which the restaurant could reasonably have been unaware. Hence, the risk rule demands nonliability in this case.<sup>144</sup>

Like the substantive standing rule more generally, the risk rule demands nonliability in *Palsgraf* because the injuries for which Mrs. Palsgraf sought recovery were not realizations of the risks that made the conduct negligent. As Keeton and subsequent scholars have pointed out, liability for negligent conduct causing physical injury is denied in a wide range of cases, essentially on the basis of the risk rule,<sup>145</sup> that is, on the ground that the action causing the injury was not negligent in relation to the injury that ultimately occurred, although it may have been negligent in some other respect.<sup>146</sup>

Although I believe that this topic merits examination beyond this Article, it appears that the risk rule can be understood as a conflation of the substantive standing rule with some form of causation requirement. The risk rule presupposes that the conduct must have involved the wrongful taking of a risk of certain injuries to the plaintiff—in other words, negligence in relation to the plaintiff. This is essentially a form of the substantive standing rule. The risk rule adds the requirement that the plaintiff's injury must have been caused by this specific negligence in relation to her—a particular form of causation requirement.<sup>147</sup> Note that in *Palsgraf*, Cardozo never had to reach the issue of causation because the risk rule's first presupposition was not satisfied—the conduct was not negligent in relation to the plaintiff. Causation was equally irrelevant in a number of the cases cited above.<sup>148</sup> By contrast, some of the cases involved negligence in relation to the plaintiff, but the negligence in

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143. See *id.* at 3-4 (varying the facts of *Larrimore v. American Nat'l Ins. Co.*, 89 P.2d 340 (Okla. 1939)).

144. See *id.*

145. See, e.g., authorities cited in KEETON ET AL., *supra* note 4, § 43, at 281 n.9.

146. See, e.g., *Gorris v. Scott*, L.R. 9 Ex. 125 (1874) (finding no cause of action in negligence where shipper's negligence in failing to keep sheep enclosed in pen was negligent in relation to risk of animals spreading contagious disease to others, but was not negligent in relation to the accident that occurred—drowning of sheep washed overboard).

147. Interestingly, Richard Wright has offered a forceful theoretical analysis of this causal requirement in the tort law, or what he calls "tortious aspect causation." Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1737, 1759 (1985). The idea is that there is no liability unless the aspect of conduct in light of which it was tortious was a but-for cause of the accident. See *id.*

148. See cases cited throughout Part III.

relation to the plaintiff is not what caused the injury.<sup>149</sup> While causation notions are analytically central to these latter cases, the causal explanations themselves presuppose a form of substantive standing rule.

Interestingly, the *Restatement (Second) of Torts* (like the *Restatement (First) of Torts*) makes this distinction quite explicit, albeit under the category of "legal cause": "In order that a negligent actor shall be liable for another's harm, it is necessary not only *that the actor's conduct be negligent toward the other*, but also that the negligence of the actor be a legal cause of the other's harm."<sup>150</sup> Ironically, while the *Restatement* itself explicitly recognizes that substantive standing (although not labeling it as such) in negligence is analytically prior to the question of legal causation, it nevertheless continues to insert this requirement not only under "negligence,"<sup>151</sup> but also under "legal cause."<sup>152</sup> This is presumably in part because, as I have suggested, the analysis of legal cause offered is one that can be understood only against a framework in which substantive standing is required. Nevertheless, discussing a substantive standing requirement only in the context of a section on "legal cause" has unfortunately perpetuated the error of thinking that *Palsgraf* is a causation case.<sup>153</sup>

149. See *supra* note 143, 146 and accompanying text. See generally Wright, *supra* note 147. Wright believes that the tortious aspect requirement can replace the risk rule. As I argue in detail in the discussion of Calabresi, *infra*, there is a category of risk rule (and substantive standing) cases that cannot plausibly be handled in this manner. See *infra* Part IV.A.3.b.

150. RESTATEMENT (SECOND) OF TORTS § 430 (1965) (emphasis added). The comment to this section clarifies:

The actor's conduct, to be negligent toward another, must involve an unreasonable risk of:

- (1) causing harm to a class of persons of which the other is a member and
- (2) subjecting the other to the hazard from which the harm results.

Until it has been shown that these conditions have been satisfied and that the actor's conduct is negligent, *the question of the causal relation between it and the other's harm is immaterial.*

*Id.* at cmt. a (emphasis added).

151. See *id.* § 281.

152. See *supra* note 147 and accompanying text.

153. The law of defective products treats emotional harm, economic harm, and the risk rule in roughly the same manner as does negligence law. See, e.g., *Walker v. Clark Equip. Co.*, 320 N.W.2d 561, 562-63 (Iowa 1982) (emotional injury claims based on defective products subject to same sort of analysis as under negligence); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No.2) § 6(b) (economic harm not predicated on personal or property harm must be predicated on interference with plaintiff's legally protected interest); *id.* § 10 (actual and proximate causation in product liability governed by same rules as in negligence). Moreover, the *Restatement (Second) of Torts* explicitly limits liability for abnormally dangerous activities by reference to a risk-rule criterion. See RESTATEMENT (SECOND) OF TORTS § 519(2) (1977) ("This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous."); *id.* at cmt. e ("The rule of strict liability stated in Subsection

*D. Loss of Consortium and Subrogation*

Judge Andrews objected in his *Palsgraf* dissent that the common law has long permitted recovery for torts to a third party in the form of loss of consortium awards to a man who loses his wife as a result of another's tort.<sup>154</sup> Understood historically, this is hardly a counterexample.<sup>155</sup> As feminist legal scholars have made amply clear, the common law regarded women and children, as well as slaves, as chattel.<sup>156</sup> It is true that our system has retained and even broadened family members' rights to sue for loss of consortium or loss of services, and has done so despite contemporary rejection of the property-based rationale. As a matter of political and historical reality, it was surely easier to reform this sexist law by increasing generosity to female plaintiffs whose husbands were tortiously killed or injured than by denying recovery to both men and women.<sup>157</sup>

But even leaving history, procedure, and institutional design aside, the peculiar nature of loss of consortium law supports rather than undercuts the hypothesis that substantive standing is a requirement of tort law. For even in family member cases, the law is still so uncomfortable permitting a plaintiff to sue for torts to a third person that foreseeably injure the plaintiff that it has replaced the

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(1) [for abnormally dangerous activities] applies only to harm that is within the scope of the abnormal risk that is the basis of liability." To this extent, at least, the substantive standing rule applies to what is sometimes termed "strict liability," as well as to negligence and the range of other torts considered. For many torts as well, such as trespass, nuisance, and defamation, the common law has historically permitted a substantial range of liability without fault, for which the substantive standing rule also applies.

154. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 102 (N.Y. 1928) (Andrews, J., dissenting).

155. The very "need" for loss of consortium as a doctrine demonstrates the strength of the substantive standing rule; were there no such rule, a loss of consortium doctrine would not be needed. Moreover, loss of consortium is, in most jurisdictions, a separate cause of action and not merely an element of damages, see KEETON ET AL., *supra* note 4, § 125, at 932, confirming that plaintiffs who lack substantive standing cannot recover under the tort itself.

156. See, e.g., Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 49 (1989) (discussing blatantly discriminatory limitation of loss of consortium to men based on law's treatment of women as chattel). See also 2 FOWLER V. HARPER ET AL., THE LAW OF TORTS, § 8.9, at 551 n.3 (2d ed. 1986). According to Harper and James, it is more specifically the husband's common law right to the services of his wife that grounded the right to loss of consortium under the common law. This action was originally an action in trespass *vi et armis*, referred to by Blackstone as the wrong of "beating a man's wife" which, if "very enormous," that is, if it actually deprived the husband of services, was a sufficient ground for a recovery for the loss of consortium. *Id.* (citing 3 WILLIAM BLACKSTONE, COMMENTARIES \*140).

157. See, e.g., *Smith & Co. v. Cole*, 242 F.2d 220 (D.C. Cir. 1957); *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir. 1950) (permitting loss of consortium action where wife sues for loss of her husband's companionship).

property-based rationale in loss of consortium cases with an equally strong idea that the claim is "derived from the marital relationship and the rights attendant upon it," and is in a fundamental sense *derivative*.<sup>158</sup> Hence, courts typically deny that the plaintiff spouse is really suing as a separate person, and treat the spouses as one person, often stating that a defense personal to the third person will block the plaintiff herself from suing.<sup>159</sup> The same rationale applies when children seek to sue for torts to their parents, or parents for torts to their children.<sup>160</sup> Where the family relation does not exist, but the plaintiff nevertheless has evidently suffered a real injury as a result of the tort to a loved one, courts are no longer comfortable with the "one person" metaphor, and recovery is typically denied.<sup>161</sup>

A similar analysis undercuts the apparent counterexample of "subrogation[,] suing in the right of the insured," noted by Judge Andrews in his *Palsgraf* dissent.<sup>162</sup> An insurer can often recover from a defendant who has acted tortiously as to the insured. The doctrine of subrogation imports either statutory or equitable authority for the fiction that the insurer steps into the shoes of the insured. As in the loss of consortium context, the defenses against the insured apply to the insurer. More importantly, as is true in the loss of consortium cases, there must be a legally relevant connection between the plaintiff and the person whose right was tortiously violated. Just as an actual family relation is required for a loss of consortium claim, so a legal obligation between the subrogor and subrogee is required in subrogation claim. It is this legal obligation, not the fact of foreseeable harm caused, that creates an equitable basis for a right of action. In effect, by having incurred the legal obligation to compensate the party injured in the tort, the subrogee gains an ownership interest in the victim's right of action. When the subrogee sues, it sues under a combination of two rights—the victim's right in tort and the subrogee's own right in subrogation.

The possibility of a subrogation action actually confirms the substantive standing rule. In most cases, an insurer's injuries are clearly foreseeable and provable, but the substantive standing rule

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158. KEETON ET AL., *supra* note 4, § 125, at 932.

159. *See id.* at 937.

160. *See id.*

161. *See id.* at 932; 2 HARPER ET AL., *supra* note 156, § 8.9 at 561 & n.37, 562 & n.38; *but see* *Bulloch v. United States*, 487 F. Supp. 1078 (D.N.J. 1980) (permitting loss of consortium action where couple had been married, had children, were divorced and reconciled but not remarried).

162. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 102-03 (N.Y. 1928) (Andrews, J., dissenting).

does not permit recovery on that basis alone; the defendant's act is wrongful relative to the insured, not the insurer. Only when the plaintiff/insurer is able to establish a legal basis for treating it as identical to the holder of the right of action, or as the legal owner of the right of action, will courts recognize an action.

The third-party insurer's right against a tortfeasor has become one of the most intensely disputed questions of the day, for it is a pivotal issue in several states' lawsuits against tobacco manufacturers.<sup>163</sup> In these actions, states assert that tobacco companies should be held liable to the states in light of the tortious conduct of the tobacco companies, which has caused injury to the states by forcing them to pay for the medical expenses of smokers. The tobacco industry in these cases does not necessarily contest the existence of a statutory right of subrogation, but argues that subrogation rights (equitable or statutory) exhaust the states' rights. This is an important argument for the industry, because it would generally permit a defendant to assert against the state any defenses it would have against the smoker—including "assumption-of-risk," which has proved an effective defense in litigation.<sup>164</sup> The attorneys directing the litigation for each state have attempted to craft legal theories that fall outside of traditional equitable or statutory subrogation<sup>165</sup> (or to have the states pass statutes that offer a less restrictive form of subrogation<sup>166</sup>). It is difficult to say who will prevail in these claims, or whether they will ever be fully litigated, in light of the parties' proposed settlement agreement.<sup>167</sup> The interesting point for our

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163. See, e.g., *Agency for Health Care Admin. v. Associated Indus. of Florida, Inc.*, 678 So. 2d 1239 (Fla. 1996); *Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490 (Minn. 1996). See generally Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, STAN. L. & POL'Y REV. 63, 73-76 (Winter 1997) (reporting on 15 states that have filed medical cost reimbursement suits against tobacco companies).

164. See Michael K. Mahoney, *Coughing the Cash: Should Medicaid Provide Independent State Recovery Against Third-Party Tortfeasors Such As the Tobacco Industry?*, 24 B.C. ENVTL. AFF. L. REV. 233, 246-47 (1996) (whether subrogation is limit of action is key issue in light of assumption-of-risk defense that operates under subrogation theory).

165. See Kelder & Daynard, *supra* note 163, at 73 (Mississippi Attorney General Mike Moore chose to proceed on theories of unjust enrichment and restitution; other states have followed and added a variety of different tort claims).

166. See, e.g., Fla. Stat. Ann. § 409.910 (West 1993) ("Medicaid Third-Party Liability Act"), *stricken in part, modified in part, upheld in part*, in *Agency for Health Care Admin.*, 678 So. 2d at 1243.

167. See John M. Broder, *The Tobacco Agreement: The Overview; Cigarette Makers in \$368 Billion Accord to Curb Lawsuits and Curtail Marketing*, N.Y. TIMES, June 21, 1997, at A1 (reporting global settlement agreement proposed, but awaiting approval, in tobacco litigation); *but see* David J. Morrow, *Spending It: Transporting Lawsuits Across State Lines*, N.Y. TIMES, Nov. 9, 1997, sec. 3, at 1 ("In September [1997] . . . monumental tobacco pact scuttled by

purposes is that, despite alleged tortious wrongdoing and foreseeable injury, the states must either be satisfied with their derivative status in subrogation, or engage in what is indeed creative and inventive lawyering. The common law, traditionally understood, would deny the insurer a right of action except in subrogation, because while the defendant's conduct may be tortious with respect to the smoker/beneficiary, it is not with respect to the insurer. The historical absence of a *direct* cause of action for the insurer, which would avoid the defenses against the insured, is yet another example of a substantive standing rule at work.

#### IV. WRONGS AND RIGHTS

##### A. A Critique of Instrumentalist Theories of Rights

###### 1. Substantive Standing and Instrumentalism: A Problem

The substantive standing rule appears puzzling from a conceptual point of view. If phrased in terms of "wrongs"—a plaintiff has a right of action only if the defendant's conduct was wrong relative to her—the rule depends upon the notion of "wrong-relative-to someone," and this notion seems utterly opaque. A legal wrong is the violation of a legal rule. It either is a legal wrong or it is not, one might argue.<sup>168</sup>

The conceptual puzzle appears different, but equally serious, if we phrase the substantive standing rule in terms of rights—a plaintiff has a right of action only if the defendant's conduct was a violation of the plaintiff's own right. This formulation seems to preserve comprehensibility by eliminating the notion of relative wrongs. To most lawyers, however, it may seem to do so at the high price of becoming circular. For what does it mean for a plaintiff to have a right against the defendant under the tort law? According to a very popular under-

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President Clinton as being too lenient."). See also John Kennedy, *Tobacco to Pay State \$11.3 billion; The Industry Avoided A Trial By Settling With Florida and Agreeing to Admit Cigarettes Are Addictive and Deadly*, ORLANDO SENTINEL, Aug. 28, 1997, at A1 (describing settlement agreement reached in Florida tobacco case); Barry Meier, *Mississippi Settles Suit With 4 Tobacco Companies*, N.Y. TIMES, July 4, 1997, at A1 (describing settlement agreement reached in Mississippi tobacco case).

168. The possibility that there is a category of borderline cases in which it is unclear whether an act is a legal wrong sheds no light on the idea of wrongs as relational either.

standing,<sup>169</sup> it simply means the defendant's conduct has invaded the plaintiff's interests in such a manner that the court will require the defendant to compensate the plaintiff for that invasion. But then the substantive standing rule simply says that a plaintiff has a right of action only if the defendant's conduct was such as to give rise to liability on the part of the defendant to the plaintiff, and this formulation is explicitly circular. This circularity is precisely the problem that agitated Prosser in his classic article, *Palsgraf Revisited*:

There are shifting sands here, and no fit foundation. There is a duty if the court says there is a duty; the law, like the Constitution, is what we make it. Duty is only a word with which we state our conclusion that there is or is not liability; it necessarily begs the essential question.<sup>170</sup>

In fact, the substantive standing rule presents a single, two-horned conceptual puzzle, whether we phrase it in terms of wrongs or in terms of rights. The dilemma is this: If we define legal rights and legal wrongs simply by reference to rights of action and liability, the substantive standing rule becomes a mere tautology. Yet if we must define rights and wrongs independently of rights of action and liability, then it is unclear what they could really mean, and how they could be relational in the sense suggested by the substantive standing rule. Hence, a "wrong relative to plaintiff" might be defined as the sort of wrong that could support a right of action by that plaintiff against the defendant, but such a definition would rekindle the circularity problem. Alternatively, we might accept that "right" could not be defined simply by reference to right of action, but then we would be forced to wonder whether there was anything to the notion of right in tort law that made sense, and if so, why the violation of plaintiff's own "right" was a prerequisite to a right of action.

To the extent that our scholarly tradition in tort law has been instrumentalist, it has been willing to impale itself on the first horn of the dilemma, and has taken the substantive standing rule to be a mere tautology. The failure to explain the substantive standing rule as anything but a vacuous tautology is a significant shortcoming in a positive theory of the tort law. A positive theory ought to be able to

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169. See *infra* Part IV.A.2.

170. Prosser, *supra* note 3, at 15. See also *In re Kinsman*, 338 F.2d 708, 721 (2d Cir. 1964) ("Thus stated, the query rather answers itself; Hohfeld's analysis tells us that once it is concluded that A had no duty to C, it is simply a correlative that C has no right against A. The important question is what was the basis for Chief Judge Cardozo's conclusion that the Long Island Railroad owed no 'duty' to Mrs. Palsgraf under the circumstances."). For an argument against the notion that this is *the* important question, see *infra* Part IV.B.6.

explain the doctrinal structure of the law, and the substantive standing rule is an important aspect of the doctrinal structure of the law. To treat it as a tautology is essentially to concede an inability to explain that entire aspect of doctrinal structure.

There is another cost to treating the substantive standing rule as a tautology. All the cases apparently decided under the substantive standing rule must be explained in some other way, because once we interpret the rule as a tautology, we can no longer treat it as providing any explanatory value for the outcome of cases. We commit ourselves to treating the rule as a sham for some other value, end, or principle that is silently being pursued. For the instrumentalist, an adequate explanation of the resolution of substantive standing case law must exist in terms of the social goods that tort law aims to realize. Such an explanation would at least mitigate the damage done to the theory by its failure to accommodate a central doctrinal notion.

I shall argue that reductive instrumentalism cannot “explain away” the law decided under the substantive standing rule. I select the predominant form of reductive instrumentalism—law and economics—as the focus of my critique, but the reasons presented against the law and economics view similarly undercut other such views. We are left to conclude that the substantive standing rule constitutes significant evidence against law and economics and instrumentalist theories of tort law. We are also given reason to probe more deeply into the possibility of a relational conception of legal wrongs and a non-reductive conception of rights. Part IV.B will construct a theoretical framework for these conceptions.

## 2. Holmes’s Rights Reductionism

Theories of private law sometimes distinguish between “primary rights” and “remedial rights.”<sup>171</sup> An example of a primary right is the right to use and enjoy one’s land, the basic right on which nuisance law is premised. An example of a remedial right is the right to be compensated for damages suffered as a consequence of another’s

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171. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 127-38 (1994) (prepared for publication from the 1958 Tentative Edition and containing an introductory essay by William N. Eskridge, Jr., and Philip P. Frickey). See also Stephen R. Perry, *Comment on Coleman: Corrective Justice*, 67 *IND. L.J.* 381, 407 (1992) (using similar distinction between primary rights and secondary rights). I prefer, at this initial stage, Hart and Sacks’s terminology of primary and remedial rights, because the phrase “secondary right” seems to beg the question of whether it is possible to be entitled to a remedy even if one’s primary right was not violated. Ultimately, this Article relies heavily upon the distinction between primary rights and rights of action.

interference with the use or enjoyment of one's land. We can also distinguish between primary and remedial duties. On the one hand, there is a "primary" duty of conduct not to interfere with certain of others' interests. On the other hand, there is sometimes a "remedial" duty of compensation owed to those whose interests have been interfered with. According to a naive version of natural law theory, the primary rights and duties laid out under the law embody our moral rights against and duties to one another, and the remedial rights and duties are created by the state to render the moral rights and duties concrete and actionable as legal rights and duties. Courts that presuppose a natural law theory may then see themselves as called upon, in deciding cases, to resolve what our natural moral rights and duties are.

Holmes rejected this view of "primary rights and duties" one hundred years ago in *The Path of the Law*:

The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies. One of the many evil effects of the confusion between legal and moral ideas . . . is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from . . . the consequence of its breach, to which certain sanctions are added afterward. But . . . a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right.<sup>172</sup>

Holmes, and the legal realist movement that followed him, maintained that insofar as judges are called upon to decide what the law shall be, ascertaining natural rights should not be part of the job. Rather, judges should assess the desirability of the consequences that flow from one scheme of liability rules rather than another. Expertise in law would come to require expertise in ascertaining the consequences of liability—hence, the economist and the statistician were to be the masters of law in the future.<sup>173</sup>

It is important to note that in the passage cited above, Holmes was not offering a stipulative definition of what "primary right" and "primary duty" would be used to mean; rather, he was *analyzing* those terms and concepts. This point is easily missed because the terms "primary" and "remedial" (or "secondary"<sup>174</sup>) suggest a definitional link between the terms. To some extent, Holmes was probably exploiting this ambiguity. However, the idea that primary

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172. Holmes, *supra* note 10, at 991-92.

173. *See id.* at 1001.

174. *See Perry, supra* note 171, at 407.

rights are given their entire content by the consequences of liability (remedial rights and actions) could not have been intended by Holmes as a stipulative definition of "primary right"; if it had been, his thesis could not have been interesting, controversial, or illuminating—it would simply have been true by his own stipulation. His contention was interesting precisely because it was a piece of conceptual analysis that attempted to explain and demystify what are usually called the "rights" and "duties" of the common law.

The Holmesian view has ripened into the law and economics movement. According to law and economics scholars, the rules of tort law are liability rules; they inform people what their liability will be if they engage in certain conduct and cause certain injuries. The liability rule determines the nature of the right.<sup>175</sup> The phrase "primary rights" is merely shorthand for describing what sorts of injuries will entitle someone to recover under the liability rules. Likewise, it makes sense to talk about "primary duties" only insofar as the phrase connotes the set of actions that will trigger liability. In order to understand the normative underpinnings of tort law, we must understand what justifies the liability rules. This, in turn, requires an understanding of how the liability rules produce socially desirable consequences. Similarly, from a prescriptive point of view, judges deciding cases *should* focus on determining what set of liability rules will yield socially desirable consequences—most particularly, efficient outcomes. This view is reductive in the sense that it reduces the content of primary rights to the content of remedial rights (or rights of action). It is instrumentalist because it alleges that the normative basis of rights of action (and liability rules) is their capacity to serve as instruments for the attainment of social goods.

Conventional tort theory since Holmes has not been solely oriented toward efficiency, but nonetheless has often embraced a form of reductive instrumentalism. Courts, casebooks, and torts teachers typically recite "deterrence" and "compensation" as the goals toward which tort law is to be aimed, and they cite a wide range of social harms that need to be deterred. Ernest Weinrib has labeled this view "multiple-goal" instrumentalism, and contrasted it with the single-goal instrumentalism of the law and economics theorist.<sup>176</sup> I shall argue, at the end of this Section, that multiple-goal instrumentalism

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175. See Guido Calabresi, *Remarks: The Simple Virtues of The Cathedral*, 106 YALE L.J. 2201, 2205 (1997) ("Of course, the so-called remedy defines the nature of the right . . . . Indeed, I (probably incorrectly) thought I had said as much in the article itself.") (citations omitted).

176. See Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 502-04 (1989).

does no better than law and economics in explaining away the doctrine of substantive standing.<sup>177</sup>

It is worth emphasizing that the fundamental problem which the substantive standing rule presents for reductive instrumentalist theories is not the outcome of cases. It is the analytical structure of the doctrine. Throughout this area of tort doctrine, courts reject plaintiffs' claims because the conduct has not been wrong relative to the plaintiff, has not been a violation of her right. Reductive instrumentalist theories leave no conceptual place for a non-circular understanding of this basic idea.

### 3. Law and Economics

#### *a. Foreseeability*

The most prominent economic theory of tort law is that of Landes and Posner,<sup>178</sup> and indeed it is the most comprehensive *positive* tort theory to be produced by any scholars. It maintains that the point of tort law is to promote the efficient allocation of resources.<sup>179</sup> In part, it solves the problem of "social costs." Human conduct has costs to the person who engages in that conduct, as well as to other persons. While a rational decisionmaker will consider the costs to herself before she undertakes a course of action, rationality (conceived in economists' terms) does not require her to consider the costs to others, at least in the absence of liability rules. Hence (in the absence of sufficiently low transaction costs to permit others to strike a bargain), her decision as to whether to undertake a course of action will exclude consideration of important costs of the activity. These excluded costs to others—often called "externalities"—sometimes lead decision makers to act in ways that are not, from the aggregate point of view, efficient.<sup>180</sup>

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177. See *infra* Part IV.B.4.

178. LANDES & POSNER, *supra* note 6.

179. *Id.* at 1 ("This book explores the hypothesis that the common law of torts is best explained as if the judges who created the law through decisions operating as precedents in later cases were trying to promote efficient resource allocation.")

180. There is an irony in the economic literature about the problem of social costs. A.C. Pigou, in A.C. PIGOU, *THE ECONOMICS OF WELFARE* 134, 192 (4th ed. 1992), described the problem of externalities, or the problem of "social cost." The subject of how to internalize costs has indeed been central to the work of leading theorists in positive and prescriptive economic analysis, including Calabresi. See, e.g., CALABRESI, *supra* note 6, and, more pertinently for present purposes, LANDES & POSNER, *supra* note 6. Nevertheless, the most famous single article in the field, Coase's *The Problem of Social Cost*, *supra* note 6, is a sustained critique of

Tort law solves the problem of social costs by creating a network of legal rules, typically liability rules.<sup>181</sup> These rules tell decisionmakers that, under certain conditions, they will be forced to bear the costs of their activities to others. The effect of such rules is to give rational decisionmakers an incentive to incorporate the costs to others into their decisions about whether to engage in the activity, and hence, to create a situation in which the activities chosen by the rational decisionmaker are efficient from an aggregate point of view. In this way, externalities are "internalized."

The simplest explanation of *Palsgraf* within this framework is as follows. Like ripples in a pond, the effects of an activity continue on indefinitely.<sup>182</sup> Insofar as these effects constitute costs to others that the decisionmaker would not consider absent liability rules, they are all externalities. Tort law must decide which of these externalities need to be internalized by the decisionmaker. *Palsgraf* stands for the proposition that the tort law does not require an individual to consider, in selecting her activity, costs to persons to whom harm is not reasonably foreseeable. Unforeseeable harm cannot be internalized because, by definition, the decisionmaker could not have foreseen it. Imposing liability where there is no foreseeability will "confer no economic benefit; it will merely require a costly transfer payment."<sup>183</sup>

It is possible to add nuance to the idea of foreseeability within this framework. There is not necessarily a sharp line between what

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Pigou's assertion that the law is needed to internalize costs. Coase, of course, explained that externalities could be a problem to the degree that transaction costs were significant, but the mixed treatment of the topic of externalities remains.

For these reasons, Stephen Perry is both right and wrong to suggest that internalization theories have been abandoned in favor of deterrence theories in the economic theory of tort law. See Stephen R. Perry, *Tort Law in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 57, 61 (D. Patterson ed., 1996). Certainly the Pigouvian notion of tort law as solving an *essential* problem of externalities has been rejected, and, more generally, deterrence-based approaches such as Landes's and Posner's lead contemporary tort theory. But the deterrence approach, as explained in the text, depends essentially on internalizing externalities, interpreted in a suitably broad sense.

181. See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (stating that negligence law internalizes costs of accidents through liability rules). Of course, law and economics theory does not assume that liability rules constitute the only form of legal rules; indeed, economists purport to offer a theory of when liability rules are appropriate and when property rules are appropriate. See generally Calabresi & Melamed, *supra* note 6; Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996); Symposium, *Property Rules, Liability Rules, and Inalienability: A Twenty-Five Year Retrospective*, 106 YALE L.J. 2081 (1997).

182. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) (analogizing causation issues to flow of a stream).

183. LANDES & POSNER, *supra* note 6, at 247.

“could be foreseen” and what could not be foreseen.<sup>184</sup> Decisionmakers will be able to anticipate a wider range of the effects of their actions if they expend more resources gathering information about the possible effects of their actions. The law’s liability rules affect the amount of resources decisionmakers will devote to doing this. Imposing liability in cases like *Palsgraf* would either have no effect on conduct (if the outcome were not foreseen on subsequent occasions) or it would create an incentive for decisionmakers to spend a greater amount of resources gathering information. Beyond a certain point, such information-gathering is socially inefficient. *Palsgraf*’s holding that unforeseeable victims cannot recover prevents the tort law from being inefficient in this way. More particularly, it embodies the economic insight that it is inefficient to place certain actors in the position of avoiding certain costs if it would be very expensive for them to avoid those costs, because it would be expensive for them to gather information even to learn about those potential costs.

Because the law and economics model relies upon foreseeability in this way, it is ill-equipped to explain the substantive standing requirement. The domain of cases decided under the substantive standing rule includes many in which the harm to the plaintiff *is* foreseeable. Consider defamation cases. It is foreseeable that if a company’s business reputation is injured, its owners will also be injured; that vicious lies about someone’s “deviant” sexual practices will be hurtful to the reputation of a spouse; that an attack on the professional integrity of a lawyer will be harmful to her law partners. In short, it is not only the person actually defamed who will foreseeably be injured by defamation. Yet defamation permits recovery only by those defamed, that is, only if the statement was made of and concerning the plaintiff.

In virtually all of the cases presented in Part III, injury to the victim was reasonably foreseeable. Indeed, as we saw, even in cases involving the tort of negligence itself, foreseeable victims of tortious conduct may not always recover. A parent’s severe emotional distress at the negligent death of a child is surely foreseeable; an investor’s loss due to a negligently prepared financial audit is equally foreseeable. Yet recovery in such cases has been the exception rather than the rule, despite the presence of foreseeability. The denial of recovery in substantive standing cases is therefore not based on the lack of foreseeability. If the point of tort law is to internalize externalities,

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184. See Mark F. Grady, *Proximate Cause and the Law of Negligence*, 69 IOWA L. REV. 363 (1984).

the law should be imposing liability even where substantive standing is lacking.<sup>185</sup>

*b. The Cheapest Cost-Avoider*

Substantive standing case law is also not explained away by Calabresi's subtle account of *Palsgraf* and proximate cause in terms of market deterrence and the cheapest cost-avoider.<sup>186</sup> According to Calabresi, whether liability should be imposed for a plaintiff's injury depends upon whether we want defendants, in selecting the most efficient course of action, to contemplate a level of liability that includes the costs of injuries suffered by plaintiffs so situated, or whether we want plaintiffs or some third party to have these costs figure into their decisions.<sup>187</sup> The choice turns upon a determination of who, among these candidates, would most cheaply avoid these costs if they were internalized by law.<sup>188</sup> Thus, following Calabresi's analysis, a decision that a certain act is tortious may be understood as a decision that the defendant is the cheapest avoider of the cost plaintiff suffered. In this sense, the decision relates a particular kind of conduct to a particular kind of injury. In a case like *Palsgraf*, the injury suffered falls outside the range of injuries that the defendant was judged to be the cheapest at avoiding. Hence, a judgment that the defendant should bear the cost for this injury does not follow automatically from a finding that the defendant's conduct was tortious.<sup>189</sup>

Thus, for example, the law might decline to impose liability on a defendant who handed a child a loaded gun, where the child's parent seeks compensation for a toe broken when the child dropped the gun on it.<sup>190</sup> Tort law's inclination would be to say that the plaintiff cannot recover because the risk that made the conduct

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185. Landes and Posner also discuss the high administrative costs of permitting recovery in cases like *Palsgraf*, but their arguments are based on the unforeseeability of the injury, which is not applicable to substantive standing cases. LANDES & POSNER, *supra* note 6, at 247. Note also that many of the substantive standing cases do not involve particularly remote, difficult to identify, or difficult to prove issues. For further discussion of administrative costs, see *infra* text accompanying notes 196-98.

186. See Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975).

187. See *id.* at 84-91.

188. See *id.*

189. See *id.* at 90, 91-100. See also Part III.C.4 (discussing risk-rule cases).

190. Calabresi, *supra* note 186, at 98. I have embellished Calabresi's example to strengthen it as an illustration of his insight; the parent is arguably the cheaper cost-avoider with respect to injuries caused by his or her child dropping things, while the defendant is still probably a cheaper cost-avoider as to injuries from a gun firing accidentally. Calabresi's example is taken from RESTATEMENT (SECOND) OF TORTS § 281, cmt. f. Illus. 3 (1965).

negligent was not the risk whose realization caused the injury. Calabresi's analysis would be that the cheapest avoider of the broken toe is not necessarily the cheapest avoider of accidents from the misfired gun.

While Calabresi's account provides insight to the notion of proximate cause, it too is unable to explain away the substantive standing rule. To see why, it will be useful to distinguish two sorts of cases—what I will call “pathway-dependent” and “pathway-independent” cases.<sup>191</sup> A pathway-dependent case is one in which the injury of which the plaintiff complains occurred as a consequence of the realization of the hazard with relation to which the defendant's conduct was negligent. *Palsgraf* was a pathway-dependent case: The defendant's conduct was negligent because it risked knocking a package out of the passenger's hands. Mrs. Palsgraf's injury was distinct from the occurrence of that risk, but it was a consequence of the occurrence of that risk. By contrast, the case of the dropped gun above may be called “pathway-independent.” In that case, the hazard of a mistakenly fired gun was what made it negligent to hand over the loaded gun; the hurt toe was not a consequence of the realization of a mistakenly fired gun. Note that with regard to each of these cases, one may ask both whether the injury was pathway-dependent, and also whether it was foreseeable; all four possible combinations in principle could exist.

Calabresi's account arguably makes sense with respect to all pathway-independent risks, and to unforeseeable pathway-dependent risks (as in *Palsgraf*). But for foreseeable pathway-dependent risks, the situation is different. In these cases, a party who is good at foreseeing the “target” hazard, and can cheaply avoid it, will *a fortiori* be in a good position to avoid the sort of injury the plaintiff suffered. Avoiding the hazard will minimize the risk of the plaintiff's injury too. Moreover, the defendant is hypothetically capable of foreseeing the extra costs to the person in the plaintiff's situation. For this type of case, the judgment that the defendant is the cheapest cost-avoider of the target hazard carries considerable force with respect to whether it would be a cheap cost-avoider of the plaintiff's injury. Indeed, in the absence of a reason to think the plaintiff would be well situated to avoid such injuries cheaply, shifting the loss to the cheapest cost-avoider of the original hazard—the defendant—would seem to be warranted.

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191. This terminology is coined for the purposes of this Article, and should not be confused with the terminology of “path-dependency.”

Substantive standing case law is replete with foreseeable "pathway-dependent" injuries: the parent hurt by defamation of the son, the bystander hurt by the tortiously caused suffering of another, the business destroyed by the negligent destruction of another's property, the investor ruined by the defrauding of a borrower. In all of these cases, the injury suffered is one that the defendant would seem to be in the best position to avoid (this is particularly true of intentional torts). Moreover, even when the torts are not intentional, they are typically foreseeable pathway-dependent injuries, where the finding of liability for the "target" injury should entail a finding of liability for the plaintiff's actual injury.<sup>192</sup> The Calabresian model of cheapest-cost avoiders is therefore unable to explain away the doctrine of substantive standing.

*c. An Analogy to Antitrust Law*

Private antitrust law contains a well developed jurisprudence of standing,<sup>193</sup> particularly in the context of the application of the "indirect purchaser rule" formulated in *Illinois Brick v. Illinois*.<sup>194</sup> The indirect purchaser rule states that indirect purchasers lack standing to sue for antitrust violations.<sup>195</sup> This rule offers possibilities not yet canvassed, including: (1) that imposing liability on defendants would result in overdeterrence, because the defendant already has liability to a third party for the same conduct;<sup>196</sup> (2) that permitting plaintiffs to recover would involve overcompensation of plaintiffs, since they already are indirectly benefiting from the third parties' recovery;<sup>197</sup> and (3) that in light of liability to third parties, the administrative costs would become too high.<sup>198</sup> It is worth considering these rationales, both because courts have developed them and also because law and economics scholarship has supported them.<sup>199</sup>

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192. The domain of foreseeable pathway-dependent injuries that do not suffice for substantive standing explains why Richard Wright's account of causation would also fail to explain the substantive standing rule. See Wright, *supra* note 147 at 1766-71 (causation element satisfied only if injury caused by aspect of conduct that made it tortious).

193. See generally 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 3G (rev. ed. 1995).

194. 431 U.S. 720 (1977).

195. See *Illinois Brick*, 431 U.S. at 724. See also *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) (setting up *Illinois Brick* by forbidding defendants to offset damages that plaintiff/direct purchasers "passed on" to indirect purchasers).

196. See *id.* at 730.

197. See *id.*

198. See *id.* at 732.

199. See, e.g., William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*,

The substantive standing rule is not explained by any of these rationales. One premise of the overdeterrence rationale is that the harm caused to the plaintiff has already been counted once.<sup>200</sup> But this is not true, as a general matter, in the substantive standing case law where plaintiffs are denied recovery altogether. In some cases, defendants will be deterred from wrongful conduct, but only in connection with the harm it may cause to third parties, and that harm is not construed broadly enough to include plaintiffs who lack substantive standing. For example, in *Palsgraf*, the man whose package was dropped may be able to sue the Long Island Railroad, but there is no sense in which his recovery will include Mrs. Palsgraf's loss. Of course, one could imagine a case in which Mrs. Palsgraf could sue the firecracker carrier for negligence, and he could in turn sue the Long Island Railroad for indemnification or contribution. Perhaps there would be an interesting analogy to antitrust standing rationales in that case. However, the denial of recovery in *Palsgraf* is in no way contingent on a theory that the harmfulness of the conduct is being otherwise reflected in the damages against the defendant. Indeed, for every tort, the substantive standing cases demonstrate the same problem: The injury done to the plaintiff is not reflected in an award to a third party. The problem is most severe where there is no other plaintiff at all.<sup>201</sup>

The problem with the second rationale—overcompensation of plaintiffs—has already been anticipated. Mrs. Palsgraf could recover from no one; that is partly why the case is famous. The same thing is true in most of the substantive standing case law we considered.

The third rationale also fails, for the key to the administrative and efficiency arguments in the antitrust context is that optimal deterrence and appropriate compensation require choosing a scheme that permits a smaller set of plaintiffs to recover all losses or a larger set of plaintiffs each to recover some losses. As between these two schemes, either of which could provide deterrence in proportion to harm and compensation for those wronged, efficiency of enforcement and administrative ease may be powerful reasons for non-recovery.

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46 U. CHI. L. REV. 602 (1979) (presuming that if indirect purchasers have standing, then direct purchasers will not be able to recover damages that are passed on to indirect purchasers, and arguing that efficient enforcement favors permitting direct purchasers to sue unhampered by passing-on defense).

200. This is particularly evident in actions brought by indirect purchasers who seek to recover "pass-on" costs, in a system that does not allow defendants to use a "pass-on"/mitigation defense against direct purchasers. See *Illinois Brick*, 431 U.S. at 730.

201. It is also worth noting that the overdeterrence problem in antitrust law, where actual damages are trebled, is particularly severe. Treble damages do not, of course, apply in torts.

But what the previous discussion has shown is that denial of compensation where the plaintiff lacks substantive standing fails to provide deterrence in proportion to harm, and fails to compensate those harmed by wrongdoing. It is precisely in these cases where administrative ease arguments should not be decisive.

Finally, it is worth noting that, unlike many antitrust suits in which there is no right of action (and some in which a right of action is nevertheless found), tort claims denied because substantive standing is lacking do not appear to be accompanied by particularly high tertiary (or administrative) costs. In most of the cases surveyed in Part III, the injuries were relatively concrete and measurable, and, at a minimum, were the sorts of injuries for which courts typically do find it tenable to have tort litigation. The causal pathways were typically foreseeable, and hence the tertiary costs associated with difficult questions of causation were not generally evident. These considerations all cut against the capacity of law and economics to explain why tort law treats substantive standing as a condition for a right of action.<sup>202</sup>

#### 4. Conventional Instrumentalism

Conventional instrumental tort theory looks at compensation and not just deterrence, and we might therefore look to the goal of compensation to explain away substantive standing. However, the goal of compensation would be served by permitting recovery in all of the cases considered in Part III. The injury suffered in each case was of the type that tort law deems sufficiently provable and sufficiently important to be compensable—for example, reputational injury in defamation, and economic injury in fraud—and in many of the cases the injuries were quite severe.

While the law and economics framework attempts to translate all harm into economic terms, conventional tort theory does not. Even if it did, conventional tort theory would not provide a different answer along the deterrence axis, for in all of the substantive standing cases, the defendant has acted in precisely the socially harmful manner that tort law has identified and seeks to deter, and the defendant has

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202. The "antitrust injury" rule set forth in *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477 (1977), and its progeny is similar to a substantive standing rule. In *Brunswick Corp.*, the plaintiff suffered harm as a result of a violation of the antitrust laws. *See id.* at 486. The harm was foreseeable. However, the plaintiff lost because it failed to allege what the Court has called "antitrust injury," that is, it failed to allege that the injury suffered was the sort of injury that the antitrust laws were designed to protect people against. *See id.* at 489.

caused an injury of the sort the law deems it expedient to force defendants to compensate. The goal of deterrence, even broadly construed, would seem to be fostered by recovery even where there is no substantive standing.

Perhaps the most common instrumentalist approach to explaining away substantive standing cases would focus on the need to limit a tortious defendant's liability. A tortious act will inevitably cause many injuries, as Andrews pointed out in his *Palsgraf* dissent.<sup>203</sup> We must draw the line for imposing liability somewhere. Otherwise, defendants will face crushing liability and courts will be flooded with cases. In light of the need to limit liability, recovery is denied where the injury lies outside of the risk that made the conduct tortious;<sup>204</sup> *a fortiori*, recovery is denied (in the terminology of this Article) where substantive standing is lacking.

This "crushing liability" argument is unsatisfactory for a number of reasons. First, such an argument is interpretively weak in that (1) it does not capture what courts actually say in these cases, and (2) it leaves the substantive standing rule hanging in the wind as a mere tautology that conceals courts' real reasons for denying liability. These remarks are not dispositive, of course, for courts may in fact be dressing up what they say. Notably, however, modern courts are typically not afraid to say that they are denying recovery in order to avoid "opening floodgates" or imposing crushing liability.<sup>205</sup> Indeed, these are now among the most popular rationales for denying liability, yet they are not usually applied in substantive standing cases.

Second, the liability-limiting rationale is unpersuasive in light of the above discussion of foreseeability. Foreseeability is often hailed as an extremely important and appropriate liability-limiting rule, and, indeed, many scholars have held that foreseeability effected too severe a limitation of liability in *Palsgraf*.<sup>206</sup> Foreseeability admittedly provides an important and principled limitation, but the substantive standing rule adds an independent limitation. No

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203. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

204. See, e.g., KEETON, *supra* note 141, at 18-20; KEETON ET AL., *supra* note 4, § 43, at 287.

205. See, e.g., *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 36, 38 (N.Y. 1985) (declining to find grossly negligent electric company owed a "duty" to a tenant who fell down stairs during negligently caused blackout in landlord/customer's building on ground that it is the "responsibility of courts . . . to protect against crushing exposure to liability" and "permitting recovery to those in plaintiff's circumstances would, in our view, violate the court's responsibility to define an orbit of duty that places controllable limits on liability").

206. See, e.g., NOONAN, *supra* note 3, at 136-38, 191 (criticizing injustice of denying recovery to Mrs. Palsgraf).

explanation is offered for why the substantive standing limitation is more appropriate than the foreseeability limitation, and the extant tort theories suggest that the latter is actually more appropriate.<sup>207</sup>

Third, even if foreseeability is not an adequate limit, this does not explain courts' use of the substantive standing rule to limit liability. There are other more easily rationalized ways to limit liability and stem a flood of litigation. For example, to mention just a few obvious modes of demarcation that seem to have clearer, more manageable, and more intelligible rationales, courts could: (1) adopt a threshold of severity of injury; (2) tighten the description of wrongdoing; (3) utilize (or tighten) a conception of remoteness of injury; (4) limit the categories of damages available; or (5) raise the evidentiary burdens on plaintiffs. While a substantive standing rule may limit liability, it seems to do so on an arbitrary basis that is much less defensible than these other ways.

Fourth, the crushing liability argument is really just another version of the argument discussed in the context of antitrust law: Overdeterrence and administrative ease demand that there be a limit on wrongdoers' liability. As the discussion there showed, that argument is fatally incomplete, for administrative ease serves as sufficient reason for cutting off liability only if there is some analytical benchmark for deciding whether deterrence and compensation goals are being adequately realized. The crushing liability argument provides no such benchmark.

Thus, the tools of deterrence-plus-compensation instrumentalism and of law and economics do not successfully explain away the substantive standing rule. Concededly, this Article has not anticipated all possible instrumentalist strategies for explaining away substantive standing doctrine on instrumental grounds. But those it has anticipated are not promising. In one sense, the failure of those arguments to explain substantive standing is not surprising, for the task is an ambitious and defensive one. Recall that tort law appears to create categories of treatment based on whether conduct was wrongful relative to the plaintiff, or whether it violated the plaintiff's right. Within the context of reductive instrumentalism, "relative wrongs," and "rights" *apart from rights of action* make little sense. The instrumentalist must shoulder the burden of showing that the apparent conceptual structure of substantive standing doctrine simply

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207. See *supra* Part IV.A.3.a (foreseeability is highly relevant in law and economics); see *infra* text accompanying notes 263-64 (foreseeability is highly relevant in corrective justice theory).

could be abandoned, and that the contours of liability produced by the substantive standing rule could be explained away through some entirely different instrumental terms. I have provided a basis for questioning whether the reductive instrumentalists can carry this burden.

### *B. A Relational Theory of Wrongs and Rights in Tort Law*

#### 1. Liability Rules

My positive account grows out of an analysis of the shortcomings of reductive instrumentalism, and particularly of law and economics. Recall that the economic theorist regards tort law as (overwhelmingly) a series of liability rules.<sup>208</sup> These rules protect entitlements by pricing them, informing potential tortfeasors that they will have to pay those prices if they invade the entitlements. Our system of rights of action is a system of carrying through on these statements about price, basically by forcing the takers of the entitlements to pay the owners for what they have taken. For something to be a right is for it to be among the entitlements the invasion of which will trigger liability in the defendant. To say that the defendant has a duty not to invade the entitlement is simply to say that she will have to pay the plaintiff a certain amount if she does.

Jules Coleman and Jody Kraus have presented powerful arguments against the view that tort law consists solely of liability rules thus understood.<sup>209</sup> In particular, they argue that this view implies that ex post compensation by a tortfeasor legitimates the tortfeasor's conduct. To use Coleman and Kraus's example, the liability rule view implies that if a reckless driver injures someone, her recklessly injuring that person will be legitimate so long as she compensates him afterwards.<sup>210</sup> This is highly implausible from the perspective of the ordinary citizen.<sup>211</sup> The rules of tort law do have implications about what defendants must pay, but it is a mistake to infer that ex post

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208. See *supra* text accompanying notes 178-81.

209. See Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 *YALE L.J.* 1335 (1986).

210. See *id.* at 1358. See also Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of The Cathedral*, 83 *VA. L. REV.* 837, 848 (1997) (the fact that one can commit a tort and pay damages afterward should not be interpreted to mean that society regards the conduct as permissible).

211. See Coleman & Kraus, *supra* note 209, at 1358.

payment legitimates the conduct.<sup>212</sup> To put it differently, while there is a liability rule, that is not all there is. The salient point in the reckless driver example above is that the defendant did breach a duty by negligently injuring the plaintiff, regardless of whether compensation is paid. If tort law is taken to be simply a series of rules stating what amounts defendants will be required to pay to those whom they injure, then it is difficult to explain in what sense the defendant who has paid compensation has even broken a rule.

The point is more powerful still if we switch to the language of rights. Under the liability rule view, the core of having a right is having a claim for compensation if a certain kind of injury is suffered.<sup>213</sup> The performance of an action that triggers an entitlement to compensation—the tortious action—is therefore not an invasion of the legal right, rather it actually gives rise to a right. There has been no illegitimate transfer, so long as compensation is paid *ex post*.

In fact, this is not how legal rights are normally considered and it is not how the protection of negligence law is normally conceived. Tort law prohibits individuals from interfering with others' interests in certain ways. The tortious action is a prohibited—and in that sense, illegitimate—interference with an interest. The damages caused by the interference will, if proved (and if other procedural requirements are met), trigger an additional legal obligation to provide the plaintiff some form of relief available under the tort law. But while the provision of the relief may dispatch that secondary legal obligation, it does not diminish the fact that a rule of tort law was broken and the plaintiff's right was violated. It does not make the original action of the defendant lawful.

This point applies in the context of every kind of tort. Someone who uses another's property without consent, absent some justification, has trespassed and invaded another's legal rights in his property whether or not she ultimately compensates him. The use of property there has been illegitimate. Someone who falsely calls another person a murderer in the local newspapers has acted illegitimately and violated that person's reputational rights whether or not compensation is paid. A fraudulent sale of a failing business is again a breach of a duty to the party defrauded, and thus an invasion of that party's interest in not being defrauded. Even if there is

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212. *See id.*

213. Whatever questions were left open in the Calabresi-Melamed article (*see supra* note 6), regarding the connection between forms of rules and the nature of rights, Calabresi has now explicitly stated that the article intended to link the nature of rights to the nature of rules. *See Calabresi, supra* note 175, at 2205.

rescission or compensation or punishment, the unlawful, illegitimate, rule-breaking activity actually occurred. And similarly, to injure a patient by performing an operation with non-sterile instruments, thereby causing serious infection, is to invade the patient's right to be free from medical malpractice and its consequent injuries. In each case, the point is not merely that the conduct is immoral or that the law should prohibit such conduct. The point is that in each case, tort law does prohibit such conduct.

This account is not about whether we regard people as having violated one another's *moral* rights. Rather, it is about whether they have violated others' *legal* rights. Moreover, this is a descriptive legal account, not a prescriptive one. And it is not about the normative underpinnings of our actual tort law. It is about the conceptual structure of our tort law, and notions of legitimacy, primary rights, and primary duties that are embedded in our law.

## 2. The Force of the Norms of Tort Law

At the root of reductive instrumentalism is a narrow view of how law guides human conduct, and more generally, of what law is. For the reductionist, law is a pattern of enforcing liability upon persons for certain conduct, and having a series of explicit legal rules stating the conditions under which liability is imposed. The legal norms inform people that they will incur certain liabilities if they engage in certain conduct. A rational person takes this information and integrates it into her decision about how to behave. The norm changes her incentive structure, thereby giving her a reason to refrain from engaging in certain conduct. To the extent that the existence of a law making it tortious to treat others a certain way actually has an effect on conduct, that is how it does so.

It is worth noting that the conception of how law is capable of guiding conduct is in fact the flip side of a conception of what legal norms mean. If the prototype of understanding a legal norm is being aware of the conditions for imposing liability, then it makes sense simply to regard the content of the legal norm as a representation of the conditions of liability. For the meaning of a statement is just that which one has understood when one understands the statement. The converse is also true: Analyzing legal norms as liability rules dictates a picture according to which the understanding of a legal norm is the grasping of a liability rule and, insofar as the compliance with norms is explained by awareness of those norms, it is explained by awareness of one's potential liabilities.

This conception of how law guides, and what laws mean, has its roots in Holmes, and it has carried through to the current law and economics movement. There is undoubtedly much to be learned from this view, but as H.L.A. Hart and many others have pointed out, it is woefully incomplete.<sup>214</sup> As Dale Nance argues effectively in a recent article criticizing the liability-rule view, citizens are often motivated to act in compliance with the law because it is the law.<sup>215</sup> The fact that the law says that some conduct is not to be done is typically taken as a reason not to engage in that conduct. This is not simply because there is a rational calculation that a certain degree of liability is a likely consequence of the conduct. It is also because legal rules are typically regarded as possessing a sort of authority.<sup>216</sup>

This view of how laws are able to guide conduct accompanies a particular understanding of the sort of meaning some laws have: Some legal norms *enjoin* citizens to behave in certain ways and to refrain from behaving in other ways. The law against homicide, for example, *enjoins* people from murdering one another. That is to say, it is essentially a directive statement whose force is to prohibit people from murdering others. It would be a mistake to understand the law as merely conveying information as to what will happen to someone who does commit homicide.

I shall call laws that enjoin, prohibit, or require certain conduct "directive legal norms," or "directives." Of course, there are also many other legal provisions specifying what happens to those who violate legal norms, and when the inclination simply to do what the law says fails, we certainly consider the costs of violating the law. But that is just the point: We can speak intelligibly about what counts as violating the law, before we even address the question of liabilities and remedies.<sup>217</sup>

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214. See H.L.A. HART, *THE CONCEPT OF LAW* 88 (1961).

215. See Nance, *supra* note 210, at 858-63 (observing that ordinary citizens treat legal rules as guidance rules, not simply as enforcement rules).

216. Cf. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979) (analyzing the sense in which law claims authority for itself, and assessing extent to which it should be treated as possessing such authority).

217. I leave open the possibility that in order for a directive to be law, there must be a means of enforcement attached to it. I similarly leave open the possibility that in order for a directive to be law, those subject to the directive must believe that a means of enforcement is attached to it. Neither of these entails that legal provisions are best understood as statements about the conditions under which liability will be imposed and the kind of liability that will be imposed.

### 3. Directives and Relational Wrongs

In this Section of the Article, I will attempt to make sense of the notion of a relational wrong, beginning by setting forth how I shall be using various terms. "Acts enjoined by directive legal norms," "legal wrongs," and "breaches of legal duties," I intend as three different ways of referring to the same thing. When I refer to a person's act as a "legal wrong," I shall mean simply that there is a directive legal norm enjoining people from engaging in that act. For example, to say that vandalism is a "legal wrong" in the sense I use that term is simply to say that there is a directive which states that one shall not engage in vandalism. When I say that there is a "legal duty" not to commit a particular act, I shall mean that there is a directive legal norm enjoining people from engaging in that act. Hence, to return to the above example, there is a legal duty not to vandalize. If one breaches that legal duty, one commits a legal wrong.

For my purposes, it is useful to distinguish two kinds of directives: "simple" and "relational." Simple directives enjoin persons from committing certain acts. Laws enjoining people from polluting, flag-burning, or conspiring to traffic in narcotics are simple directives. They share the following form: *For all x, x shall not A.*

Relational directives, by contrast, enjoin persons to treat or to refrain from treating *other persons* in a particular way. Laws prohibiting eavesdropping, fraud, rape, and murder are all relational directives. They enjoin people from eavesdropping *on another person*, from defrauding *someone*, from raping *someone*, and from murdering *someone*. They all share roughly this form: *For all x, for all y, x shall not A y.*<sup>218</sup>

We can distinguish two types of legal wrongs based on the distinction between simple and relational directives. To say that an act is a "simple legal wrong" (or "simple wrong") is to say that there is a simple directive under which it is a legal wrong. To say that it is a "relational legal wrong" (or "relational wrong") is to say that there is a relational directive under which the act is a legal wrong. Similarly, to say that an act is a breach of a "simple legal duty" is to say that there

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218. Or, "for all x, for all y, x shall B y." I do not mean to suggest that all relational directives are phrased in terms of obligations held by "all people," or even that they specify norms running to all people. The form of the relational directives (and of the simple directives presented earlier), can be modified to accommodate various special relationships within tort law. For example, "Doctors have a duty to provide all material information regarding a procedure to their patients," would be "For all x, for all y, if x is a doctor and y is a patient of x, x must provide all material information to y."

is a simple directive under which it is a breach of duty, and to say that an act is a breach of a "relational legal duty" is to say that there is a relational directive under which it is a breach of duty. Thus, polluting, flag-burning, and conspiring to traffic in narcotics are simple wrongs and breaches of simple legal duties, while eavesdropping, fraud, rape, and murder are relational wrongs and breaches of relational legal duties.<sup>219</sup>

Tort law contains relational directives: Fraud law enjoins each from deceiving others; negligence law enjoins each from failing to take due care not to injure others; defamation enjoins each from defaming others; battery enjoins each from battering others; trespass enjoins each from using or possessing another person's land. As contended in the previous section, each of these areas of the law contains not only liability rules but also legal norms that have directive force. And in each case, the structure of the norms is relational, not simple.

It is plausible that my definition of "legal wrong" as a violation of a directive captures the concept of a legal wrong. An act is a legal wrong if it is wrong under some law, and it is wrong under some law if there is a law that enjoins the act. It is similarly plausible to think of relational legal wrongs as acts that violate relational directives. My account therefore suggests that torts are relational legal wrongs. Likewise, it is also plausible that the concept of legal duty in the tort law is captured by the concept of "relational legal duty" that accompanies the relational directives of torts. To say that there is a duty under the law of torts not to invade someone's privacy, for example, is the equivalent of saying that there is a directive enjoining people not to invade others' privacy. For each tort, what it means for a person to have a duty not to commit that tort upon others is for there to be a directive applicable to that person enjoining her from treating others that way.<sup>220</sup>

#### 4. Relational Wrongs and Substantive Standing

For simple wrongs, it makes no sense to ask whether the wrong was committed relative to a particular person. If the wrong is

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219. These formulations leave open the possibility that certain acts are both simple legal wrongs and relational legal wrongs, and both breaches of simple legal duties and breaches of relational legal duties, since an act may be a wrong under both a simple directive and a relational directive.

220. Cf. Peter Birks, *The Concept of a Civil Wrong*, in 2 *PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, *supra* note 121, at 29, 32 (analyzing notions of "civil wrong" and "legal duty" involved in tort law).

flag-burning, then either the defendant committed the wrong or he did not.

In the context of relational wrongs, however, it makes sense to ask whether the wrong was committed relative to a particular person. Take murder, for example. It is true that either *D* murdered someone or she did not. Even after we decide this question, we can still ask whether *D* committed murder with respect to *P*. This is simply to ask whether *D* murdered *P*. *D* might have murdered *O* but not *P*.

This analysis permits us to come to grips with the meaning of the substantive standing rule. Let us suppose there is a wrong of T-ing, and there is a directive legal norm ("LN") that states:

*(LN-T) For all x, for all y, x shall not T y.*

The substantive standing rule says that *P* has a right of action against *D* for T-ing only if *D* T'd *P*. In cases where *D* T'd some other person *O*, but not *P*, *D* has violated LN-T and *P* may have suffered injury—perhaps reasonably foreseeable injury—as a result. The substantive standing rule demands that *P* lose such a case, however, precisely because *P* herself was not T'd by *D* (although *O* was).

The scheme is merely an illustrative device and can easily be applied to concrete cases. Take, for example, *Talbot v. Johnson Newspaper Corp.*,<sup>221</sup> in which the plaintiff (Mrs. Talbot) claimed that she suffered embarrassment and humiliation caused by the defendant's publication of a defamatory article about her husband (Mr. Talbot).<sup>222</sup> Mrs. Talbot appropriately alleged that the defendant violated the tort law of defamation by defaming Mr. Talbot; if the defendant did defame him, it violated (LN-defame). (LN-defame) states: "*For all x, for all y, x shall not defame y.*" But even if Mrs. Talbot was foreseeably injured, she did not have a cause of action. The substantive standing rule requires that Mrs. Talbot herself be defamed by the defendant, and courts typically express this requirement in the "of-and-concerning" element of defamation law.<sup>223</sup>

Some of the confusion over the substantive standing rule evolves, I believe, out of a mistake in the logical analysis of the legal norms of tort law. Recall that some directives are simple and some relational. It is easy to mistake the directives of tort law as being simple rather than relational. For example, instead of taking defama-

221. 508 N.Y.S.2d 80 (N.Y. App. Div. 1986).

222. *See id.* at 83.

223. *See supra* note 51 and accompanying text.

tion law to express the directive "For all  $x$ , for all  $y$ ,  $x$  shall not defame  $y$ ," one could take it to express the directive "For all  $x$ ,  $x$  shall not defame anyone." Under this view, once Mrs. Talbot has proved the defendant published a defamatory statement, and that simple directive was violated, there should be nothing left to say about whether the conduct was a legal wrong in relation to her. Questions may of course remain concerning foreseeability, damages, and causation, but the legal wrong would be clearly established.

Courts' actual resolution of *Talbot* and scores of cases like it in defamation law—applying the "of-and-concerning" element of defamation law—provides strong evidence that the principal legal norm in our actual defamation law is a relational directive, not a simple directive. Moreover, consistent application of the substantive standing rule in other areas of tort law is further evidence that the legal norms of tort law have the relational structure I have described.

Let us look at *Palsgraf* in this light. Cardozo's statement that "[n]egligence, like risk is . . . a term of relation"<sup>224</sup> reflects a particular way of conceptualizing the tort of negligence. Cardozo understood negligence to be a relational wrong, and its directive to be a relational directive. Negligence law requires that one take due care to others:

*(LN-negligence) For all  $x$ , for all  $y$ ,  $x$  shall take due care not to injure  $y$ .*

In *Palsgraf*, Mrs. Palsgraf claimed that the Long Island Railroad violated (LN-negligence), and Cardozo accepted this claim for the purposes of argument. It did not follow, however, that she had a right of action. A negligence plaintiff must show, in addition, that the conduct was negligent in relation to her. As (LN-negligence) indicates, this means she must show that the defendant did not take the care due to her. Mrs. Palsgraf could not show this, because the failure to take precautions against an injury to Mrs. Palsgraf that was not reasonably foreseeable was not a failure to take the care due to her.

Andrews, by contrast, understood negligence to be a simple wrong and the directive of negligence law to be a simple directive:

*(LN-negligence) For all  $x$ ,  $x$  shall take due care not to injure others.*

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

According to Andrews's view then, once Mrs. Palsgraf had shown that (LN-negligence) was violated, no other showing was necessary to prove the wrongfulness of the defendant's conduct. The only questions remaining pertained to injury, causation, and liability limitation.

The substantive standing rule in negligence law shows that negligence is a relational wrong and the directive of negligence law is relational. More generally, the possibility of relational directives explains what it could mean to say that an act is a legal wrong in relation to one person, but not in relation to another.<sup>225</sup>

### 5. Primary Rights

The foregoing account of relational legal wrongs was based on a certain analysis of the force and form of relational legal directives. The same account is capable of generating an attractive account of the place of rights in tort law, an account that provides a non-metaphysical alternative to the reductive instrumentalist's conception of rights in terms of liability rules.

Where relational legal duties are involved, it is also plausible to speak of "legal rights." Hohfeld argued that there is one sense of "legal right" that, as a purely analytical matter, is simply correlative to "legal duty."<sup>226</sup> In this sense, to say that *B* has a legal right that *A* treat him a certain way is equivalent to saying that *A* has a legal duty to treat *B* that way. For example, to say that *B* has a legal right that *A* not eavesdrop on his conversations is to say that *A* has a legal duty not to eavesdrop on *B*'s conversations.

I have argued above that the tort law contains relational directives generating relational legal wrongs and relational legal duties. Thus, for example, each person has a relational legal duty to every other person to refrain from defaming that person. If *A* and *B* are randomly chosen, *A* has a relational legal duty to *B* not to defame him. It follows, through Hohfeldian analysis, that *B* has a legal right not to be defamed by *A*. The point can be generalized to say that each person has a right not to be defamed by anyone. Hence, where the

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225. Note that my rejection of the liability-rule view of the meaning of the norms of tort law clears the way for a "directives"-based account of those norms. However, standing on its own, the directives-based account does not necessarily explain how an act may be a wrong relative to one person but not a wrong relative to another person. This problem is solved by distinguishing the logical structure of relational directives from the logical structure of simple directives.

226. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30-32 (1913).

body of tort law contains universal relational legal duties to treat all others in certain ways, it must correlatively contain universal relational legal rights not to be treated in those ways. More generally, the relational directives of tort law, in creating relational legal duties, also create relational legal rights, for the latter are just the analytical reflex of the former.<sup>227</sup>

The primary rights and duties of tort law are the legal rights and duties that go hand in hand with relational directives. The primary right each person enjoys under the law of defamation, for example, is the right not to be defamed by others. For such a primary right to exist is simply for there to be a valid legal relational directive stating that no one shall defame another. The primary right created by the law of battery is the right not to be battered by others; under fraud, the right not to be defrauded, and so on, for each tort. Under negligence law, the primary right is a right not to be injured by another through his failure to take the care one is owed.

This analysis of rights elucidates, at least from a conceptual point of view, the alternative formulation of the substantive standing rule: *A plaintiff has a right of action against a defendant only if the defendant violated the plaintiff's right.* This means that a plaintiff has a right of action against a defendant only if there is a legal norm proscribing individuals from doing a particular sort of wrong to others, and defendant has done that wrong to a plaintiff. Thus, one has a right of action in battery only if one's right not to be battered has been infringed, a right of action in fraud only if one's right not to be defrauded has been infringed, and so on.

The relational directives of tort law (like, for example, those of constitutional law) are found, to a great extent, in judicial opinions. In the early common law, many tort actions were predicated upon a violation of the "King's Peace"—essentially extrapolated from the simple directives of criminal law issued by the King or those under his control.<sup>228</sup> Today, of course, these directives are uttered by courts, not through executive order or legislatively enacted statutes. Thus, for example, courts, not legislatures, announced that a psychiatrist

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227. My account of relational duties is distinct from other accounts of relative duties offered by analytic philosophers. See Carl Wellman, *Relative Duties in the Law*, 18 PHIL. TOPICS 183 (1990) (reviewing and criticizing variety of theories of relative duties). It also differs from most theories of legal rights in the analytic philosophy literature, in being neither an interest theory, nor a choice theory. See generally Jules Coleman, *Introduction*, in RIGHTS AND THEIR FOUNDATIONS ix (Jules Coleman ed., 1994) (classifying rights theories into two general categories—interest theories such as Raz's and choice theories such as Hart's).

228. See *infra* notes 300-03 and accompanying text.

has a duty to warn a third party in danger,<sup>229</sup> and courts decide whether a person has a right to exclude the media from her property.<sup>230</sup> In general, courts, not legislatures, announce day in and day out what sort of care one is required to give and entitled to expect in a wide variety of contexts.<sup>231</sup> Perhaps more importantly, of course, courts, in announcing relational directives, primary rights, and primary duties, usually follow precedent, building incrementally, if at all, upon established case law. In this sense, the relational directives, rights, and duties of the law of battery, trespass to land, libel, fraud, and conversion, for example, have been handed down, with some modifications, from the English "criminal" law to the English civil common law to the American common law to our contemporary courts. Other directives, rights, and duties, such as those of negligence law, were born within the courts themselves.

Of course, in ascertaining these directives, lawyers and courts interpreting judicial opinions must look not merely at what prior courts explicitly stated about the content of directives, but also at what prior courts *did*, in enforcing directives with remedies. In tort law, the predominant form of remedy is damages. Thus, lawyers often consider a damages award as an indication that the court is pronouncing the existence of a legal duty or legal right. Likewise, courts often announce the legal rights and duties in a manner that is interwoven with their imposition of a remedy.

This does not mean that the articulation of a legal right or duty is just the imposition of a remedy (or pattern of remedies), as reductive instrumentalism insists. That is to confuse the effect of such a directive and the evidence for the directive, on the one hand, with what the directive actually is, on the other. To put it differently, it is to confuse the means of enforcement of the law with the law's content. We have no inclination to take that view toward, for example, constitutional directives articulated by courts, or a wide range of statutory directives either. Moreover, there is often a wide gap, even in tort law, between a remedy and a directive that was

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229. See, e.g., *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

230. Compare, e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1217, 1220-24 (M.D.N.C. 1996) (holding, in effect, that a grocery store had a right not to be deliberately misinformed about defendant/reporter's identity in deciding whether to permit defendant on property), with *Desnick v. American Broad. Co., Inc.*, 44 F.3d 1345, 1351-52 (7th Cir. 1995) (per Posner, C.J.) (finding that public entities such as professional businesses and restaurants are not entitled to bar from their premises those surreptitiously doing critical evaluation for the public).

231. In many areas of personal injury and other tort law, state and federal legislatures obviously complement and supplant some of what the state courts do.

breached. Statutes of limitation, governmental immunity, unclean hands, and estoppel are just a few examples of doctrines that may bar a remedy. But the pivotal point, as I have argued in the preceding sections, is that reductive instrumentalism fails to make sense of our understanding of what it is to have legal rights and duties, of what we understand in grasping legal norms, and how those norms are capable of guiding our conduct.

Although reductive instrumentalism has had a great impact across all of law, it has made its greatest impact on the common law, and I think the analysis above suggests one of the reasons why. In the common law, there is little text outside of judicial opinions, and so the evidentiary link between the remedies courts provide and the rights they announce is often quite close. In statutory law, by contrast, there is typically a written directive or series of directives that one can point to outside of judicial opinions. In the latter context, it is much less likely that the content of the directive will be confused with its means of enforcement. But in the common law, the risk of this error is high.

Holmes, and many following him, have been attracted to a reductive account of primary rights largely because they reject, for anti-metaphysical and political reasons, a natural law approach to primary rights. The account I have offered thus far says nothing about natural law or the substantive moral conceptions underlying primary rights and duties. My thesis is a descriptive and conceptual one: The tort law *does* announce rules or directives which citizens understand as enjoining them from behaving in various ways and as enjoining others from treating them in various ways. If this proposition is correct, then a claim that some legal duty exists should not generally be justified by showing that one is morally obliged to act in a certain way. It should (from the point of view of positive tort law) be justified largely by showing that courts or other authoritative sources of law in fact articulate or have articulated the relevant relational directives.<sup>232</sup> This conception of primary rights and duties is utterly non-metaphysical, and Holmesian anti-natural-law arguments have no force against it.

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232. This is not to deny, of course, that courts *could* engage in moral thinking in deciding what the relational directives of the law are or ought to be. It is only to point out that the non-instrumental and non-reductive conception of legal rights and duties offered here in no way *entails* natural law commitments.

## 6. The Contours of Primary Rights and Duties in Tort Law

Thus far in this Section, I have attempted to accomplish three things: First, I sketched a theory of the force and structure of legal directives, and primary rights and duties in tort law; second, I outlined the primary rights and duties that are in fact imposed by our tort law; and third, I commented briefly on how primary rights and duties are to be identified. I have not offered a descriptive theory of the normative underpinnings of primary rights and duties in tort law. The tort theory literature includes global, tort-specific, and issue-specific writings on this question from moral, economic, political, and pluralistic perspectives. As Jules Coleman has argued persuasively, a theory of the conceptual structure of rights and wrongs may leave open the question of the normative foundations of the rights we actually have.<sup>233</sup>

It is worth noting, however, that the relational directives theory I have offered does tell us something important about what might be called the "contours" of primary rights and duties. Recall that relational directives enjoin people from treating others in certain ways. A particular person has a primary right under the tort law not to be treated a certain way by another person only if there is a relational directive enjoining people from treating others that way. Thus, for example, a court cannot decide that *P*'s right was violated when economic harm was negligently inflicted on her by *D* without deciding something roughly of the following form: "*For all x, for all y, x shall take reasonable care not to inflict economic injury upon y.*" Perhaps the domain could be narrowed to certain subsets of people, or certain defenses could be created, or perhaps a level of severity of injury or some detail in the level of care could be added. But the basic point is that it is in the nature of primary rights, as I have analyzed them, that a court cannot find that there is a primary right without committing itself to a form of relational directive that requires people to treat others a certain way as a general matter.

This is not just a matter of courts needing to treat like cases alike in future proceedings. Obviously, one can draw the criteria of similarity very narrowly. Courts must say something about what category of conduct by one person affecting another is from now on to be considered enjoined by law, not simply about what fact patterns will now lead a court to provide a remedy. In a case like *Rickards*, a

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233. See COLEMAN, *supra* note 7, at 335-40.

court granting a remedy would be imposing a duty to take care against causing pure economic harm to others.<sup>234</sup> In *Palsgraf*, Cardozo thought, for the court to provide a remedy would be tantamount to announcing a duty to anticipate injuries as remote from one's conduct as those suffered by Mrs. Palsgraf were from the trainman's conduct.<sup>235</sup> In the defamation cases we considered, courts would be announcing a duty to guard against causing a person reputational injury, above and beyond what one says or implies about that person.<sup>236</sup> And in each of these areas, courts would be *prima facie* committed to recognizing a right of action on behalf of those who were so treated.

Good attorneys for the plaintiffs in any of these cases would, of course, not usually be asking the courts for the announcement of a broad relational directive, just the provision of a remedy for those situated as their clients are. This produces the appearance of a carefully carved niche of liability, a niche that the "zone-of-danger" case law on emotional injury of bystanders so forcefully illustrates. It would be the worst kind of formalism to deny the possibility of such a niche of liability. But if a court takes up the offer to create this niche of liability, in other words, if it finds a right of action *without* announcing an appropriately structured relational directive, then—however it labels its conclusion—the court is giving the plaintiff a right of action without finding that she had a primary right that was violated, and without finding a legal wrong as to the plaintiff herself. In such a situation the court is not altering the realm of how a defendant is legally required to treat others or how others are legally entitled to be treated; it is only altering the scope of liability.

The nature of primary rights and duties therefore limits the contours of such rights and duties and dictates a choice: A court must either (1) find a primary rights violation by announcing a relational directive that recognizes a category of primary duties to treat others in a certain way, and a corresponding range of liability, or (2) simply permit a right of action without recognizing a violation of the plaintiff's primary right, presumably predicating the action on the fact that the defendant did violate a directive (even if it was relative to a third party), and the plaintiff was injured and needs compensation.

The most obvious question is what are the normative grounds for declining the first option, the broader category of primary rights

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234. 41 A.2d 267 (N.J. 1945). See *supra* note 128 and accompanying text.

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

236. See *supra* Part III.A.1.

and duties. In *Palsgraf*, Cardozo answers this question in florid prose: "Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform."<sup>237</sup> This statement is not about excessive liability, but about an excessive primary duty—that is, an unrealistically stringent obligation to think about the well-being of others as one leads one's daily life. Note also that Cardozo appears to be working from the precise analytical framework I have just described, presupposing that to find that what Mrs. Palsgraf suffered was indeed a violation of *her* right, he must be willing to articulate a "norm of conduct," a "customary standard to which behavior must conform,"<sup>238</sup> which has a commensurably broader scope. Because he rejects that broader norm, he is left thinking that Mrs. Palsgraf is trying to recover "derivatively," i.e., that no wrong to her was committed, no duty to her was breached, and no right of hers was violated.

The suggestion in *Palsgraf* that judicial rejection of unrealistically stringent formulations of "duty" may underlie restrictions on primary duties is interesting, and may well explain the absence of many general primary duties in tort law, such as those involving non-feasance, duty to rescue, or emotional and economic harm; I will not pursue that line of thought here.<sup>239</sup> There are many other principles that might underlie the law's refusal to articulate more general relational directives, including moral, social, and economic ones. But even if the broader duty point is decided against the plaintiff—even if she lacks a primary right in the sense I described it—it is still far from clear that she should lose, for what might be called the "niche" argument still remains. The question of why our system generally rejects the niche argument—why, in other words, a plaintiff is required to show a rights violation in order to have a right of action, and why she must have substantive standing—is addressed in the remainder of the Article.

It is tempting to argue that Cardozo begged the question when he said that no right of Mrs. Palsgraf was violated: Arguably, the real question is why she had no primary right. We have now considered two versions of that argument. The first version dealt with a form of question-begging that is logically flawed, a vicious circle. The idea there was that statements regarding primary rights are simply termi-

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237. *Palsgraf*, 162 N.E. at 100.

238. *Id.*

239. See Goldberg & Zipursky, *supra* note 135.

nological devices for referring to what would give rise to a right of action. This version was the reductive instrumentalist's, and I offered a plausible alternative account of primary rights.

But there is a second, softer version of the "question-begging" argument which is sometimes made. This version concedes the possibility that the term "primary right" has content independent of "right of action," but still contends that the interesting question about substantive standing is why there is no primary right. This argument has things backwards, however. The question of why there is no primary rights violation in a case like *Palsgraf* may be an interesting question, but it is not a question about substantive standing at all. The substantive standing rule—the principle that there is no right of action where there is no rights violation—comes into play precisely where there is no violation of a primary right. The real question is why it *matters* whether there is a primary rights violation, why it matters whether plaintiff herself was wronged. That is where we turn next.

## V. RIGHTS OF ACTION

### A. *Corrective Justice and Substantive Standing*

The most prominent challenge to the law and economics movement in tort theory is corrective justice theory. One might therefore hope that corrective justice theory would provide an explanation of the substantive standing rule. My treatment of corrective justice theory will be similar to the above treatment of law and economics, and warrants similar caveats. I cannot claim to have discredited an entire theoretical approach, to have examined every possible version of it, or to have shown that no version of the theory could possibly accommodate the doctrinal evidence I present. Rather, by examining certain prominent examples of this approach,<sup>240</sup> I intend to highlight significant tensions between corrective justice theory's analysis of the conceptual and normative structure of tort law, on the one hand, and actual tort case law, on the other. I then use this doctrinal argument as a stepping stone to an argument that there is something funda-

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240. See COLEMAN, *supra* note 7; WEINRIB, *supra* note 7; Perry, *supra* note 7. It is unclear to what extent Coleman adheres to the positions expressed in *Risks and Wrongs*, in light of what appears to be the rather different theory offered by himself and Arthur Ripstein in Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91 (1995).

mentally wrong with the conceptual structure of corrective justice theory. Both the doctrinal and the conceptual arguments are intended as evidence against corrective justice theory as a positive theory of tort law.

In a rather broad sense, any view that attempts to give a prominent role to fairness in explaining tort law might be labeled a "corrective justice" theory;<sup>241</sup> in this sense, my own view is ultimately a "corrective justice" theory.<sup>242</sup> But the fundamental basis of corrective justice theory, understood more narrowly, is that justice requires that a tortfeasor restore those whom his wrongdoing has injured.<sup>243</sup> This conception of "corrective" justice stems from Aristotle,<sup>244</sup> and the modern tort lawyer might simplify it into the idea that where a tortious defendant has caused an innocent plaintiff to suffer an injury, justice requires that the defendant provide that plaintiff with compensation for the injury. The version of corrective justice theory stemming from Aristotle offers a conception of justice that involves a duty of repair running from the defendant to the plaintiff, and claims that our tort law, in recognizing and enforcing legal duties of repair, can be understood as an embodiment of this conception of justice.

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241. See, e.g., Fletcher, *supra* note 7 (contrasting paradigm of "fairness" and "reciprocity" with paradigm of "utility" and "reasonableness" in tort theory). Several important fairness-based accounts of tort law do not lay heavy emphasis on the notion of rectification; it is not obvious whether they ought to be called "corrective justice" views. See, e.g., Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996) (arguing that the Rawlsian notion of reasonableness better accounts for reasonableness in negligence doctrine than economic conception of rationality). See also CHARLES FRIED, AN ANATOMY OF VALUES 177-93 (1970) (reciprocity in tort theory).

242. See Ripstein & Zipursky, *supra* note 7; *infra* Part VI.A.

243. Cf. Jules Coleman, *The Practice of Corrective Justice*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 121, at 53, 66-67 (stating agency, rectification, and correlativity are central to corrective justice). I differ with Coleman's interpretation of Perry. See *id.* at 68 (describing Perry as not a corrective justice theorist in a core sense, in light of his distributive concerns with allocation of losses). I believe Perry is a corrective justice theorist in this narrow or core sense, and that he does give substantial central theoretical importance to the notion of rectification, as his recent work makes clear. See Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, 146 U. PA. L. REV. \_\_\_\_ (forthcoming 1997) (justice of tort law rooted in moral obligation of tortfeasor to compensate; distributive concerns secondary).

244. See ARISTOTLE, NICOMACHEAN ETHICS 120-23 (Martin Ostwald trans., 1962). Cf. James Gordley, *Tort Law in the Aristotelean Tradition*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 121, at 131-58 (defending quite strict version of Aristotelian corrective justice theory in modern American tort law). But see, e.g., Perry, *supra* note 7, at 457-58 (arguing that Aristotelian notion requiring proportionality between wrongful loss and wrongful gain is untenable); WEINRIB, *supra* note 7, at 115-28 (recognizing untenability of Aristotelian account, if interpreted in terms of actual loss and actual gain and proposing modified Aristotelian account in terms of "normative" loss and gain).

The substantive standing rule is *prima facie* problematic for corrective justice theory. According to corrective justice theory, the fact that a plaintiff has suffered harm as the result of a defendant's wrongdoing is what triggers an obligation on the part of the tortfeasor, and should therefore trigger liability. As a wrongdoer, the defendant should have to pay for the harm,<sup>245</sup> because it is not fair that the innocent plaintiff should be made to bear the burden of the loss. Indeed, it is perhaps from this perspective that the substantive standing cases appear most problematic. Beginning with *Palsgraf* itself, we have a completely innocent plaintiff who has suffered real harm as a result of something the defendant did, and we have a jury finding that the defendant acted tortiously. Why *not* make the defendant pay? The problem is even more acute in cases involving emotional or economic harm, or injuries foreseeably caused through defamation, fraud, and property torts. In all of those situations, the victims have been injured—often seriously—as a *foreseeable* result of conduct that is tortious or even, in some cases, intentional. Yet under the substantive standing rule, there is no recovery. Thus, there is reason to believe that corrective justice theory cannot account for substantive standing.

Corrective justice theory is open to relational and non-reductive conceptions of legal rights,<sup>246</sup> but this does not solve the problem. There is surely symmetry in saying that only a person whose legal right has been violated has a right of action,<sup>247</sup> yet it is far from clear why symmetry matters in a positive (or prescriptive) theory of tort law.<sup>248</sup> If a plaintiff has been harmed in a manner the tort law recognizes, and the defendant foreseeably caused the harm by conduct the law regards as wrongful, it seems that the defendant should compensate the plaintiff for his loss. Once "right" is defined independently of liability and rights of recovery it is unclear why the corrective justice theorist should care whether the conduct violated the plaintiff's right or someone else's right. Similarly, it will not do to

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245. The substantive standing rule is particularly at odds with Epstein's view, which maintains that corrective justice demands rectification of plaintiff's injury by a defendant who caused the injury, even if the defendant's conduct was not wrongful. See Epstein, *supra* note 7. *A fortiori*, under Epstein's view, liability should not turn on whether the conduct was wrongful relative to the plaintiff.

246. See, e.g., COLEMAN, *supra* note 7; WEINRIB, *supra* note 7; Perry, *supra* note 7.

247. See WEINRIB, *supra* note 7, at 144 ("[P]laintiff's right to be free of wrongful interferences with his or her entitlements is correlative to the defendant's duty to abstain from such interferences . . . . [E]ach litigant's position is the mirror image of the other's.").

248. Cf. Robert L. Rabin, *Law for Law's Sake*, 105 YALE L.J. 2261, 2270-72 (1996) (reviewing ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995)) (aesthetic value of formalism, coherence, and bipolarity do not justify them or explain their justification).

say that the corrective justice theorist recognizes that the conduct is only a legal wrong in relation to the third party and not to the plaintiff. The question is why that should matter in determining the proper scope of liability.

The place to begin is with Ernest Weinrib, a leading corrective justice theorist whose recent book, *The Idea of Private Law*, presents a reading of *Palsgraf* similar to my own.<sup>249</sup> While he does not use the phrase “substantive standing” Weinrib contends that a central feature of tort law is that “the duty breached by the defendant must be with respect to the embodiment of the right whose infringement is the ground of the plaintiff’s cause of action.”<sup>250</sup> In other words, the duty of repair can run only to a plaintiff to whom the defendant breached a primary duty.

Unfortunately, Weinrib’s own theory does not seem to yield his conclusion. Weinrib’s account of the duties we owe one another under tort law, and the rights we consequently enjoy against one another, is a Kantian theory of *primary rights and duties*.<sup>251</sup> Weinrib believes tort law embodies a set of norms that accommodate our conflicting needs and interests by shaping them into rights and duties we each hold against every other person.<sup>252</sup> For Weinrib as for Hohfeld, as we saw in Part IV.B, a primary right in one person is correlative to a primary duty in another.

Within Weinrib’s framework, *Palsgraf* stands for the principle that a defendant has a duty of repair to a plaintiff only if the defendant has violated the plaintiff’s primary right, by breaching a duty correlative to that right. Weinrib explains:

When the defendant thus breaches a duty correlative to the plaintiff’s right, the plaintiff is entitled to reparation. The remedy reflects the fact that even after the commission of the tort the defendant remains subject to the duty with respect to the plaintiff’s right. The defendant’s breach of the duty not to interfere with the embodiment of the plaintiff’s right does not, of course, bring the duty to an end, for if it did, the duty would—absurdly—be discharged by its breach. With the materialization of wrongful injury, the only way the defendant can discharge his or her obligation respecting plaintiff’s right is to undo the effects of the breach of duty.<sup>253</sup>

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249. See WEINRIB, *supra* note 7, at 159-70.

250. *Id.* at 134.

251. See *id.* at 84-113.

252. See *id.* at 128-29, 150-52.

253. *Id.* at 135.

This explanation is unpersuasive for numerous reasons. First, it is highly implausible that one is discharging the duty to refrain from wronging someone by compensating her ex post for the harm she has suffered in consequence of being wronged. That suggestion is a variation on the reductive instrumentalist's mistaken conception of tort rules as liability rules.<sup>254</sup> It is particularly unsatisfactory as an aspect of Weinrib's Kantian view, for he has told us that it is in the nature of primary duties that they are (rational) constraints on the liberty of action. Presumably, the constraint has been crossed when the plaintiff has been acted upon in a tortious manner. The duty discharged when repair is made is a different duty, not the (primary) duty of action with regard to how others are to be treated.

Second, Weinrib's account does not explain why a tortfeasor might not owe a duty of repair even to those whose right was not violated. As I shall show, Coleman and Perry suggest there may be reason to impose on those who have wrongfully caused losses to certain others an obligation to compensate those others regardless of whether the duty breached was a duty to these others. Weinrib himself sometimes suggests that corrective justice is a matter of restoring the plaintiff to the situation she would have been in had the defendant not disturbed normative equilibrium.<sup>255</sup> Hence it is unclear why having breached a primary duty to the plaintiff should be a necessary condition for owing a duty of repair to the plaintiff, even if, *arguendo*, it is a sufficient condition.

Third, and more generally, Weinrib appears to be mixing categories. The question of how one is obligated to conduct oneself toward another is different from the question of what one ought to do if one harms another through breach of that obligation. Perhaps one should repair the harm done to another to whom one has breached a duty. But what we need is an *explanation* of why one should provide this repair. As Stephen Perry has forcefully argued in his critique of Weinrib, we need an explanation of how breach of a duty is connected to the obligation to repair harm done by that breach.<sup>256</sup>

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254. See *supra* text accompanying notes 178-82.

255. See WEINRIB, *supra* note 7, at 135 ("[T]ort law places the defendant under the obligation to restore the plaintiff, so far as possible, to the position the plaintiff would have been in had the wrong not been committed.")

256. See, e.g., Stephen R. Perry, *Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice*, in TORT THEORY 24 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993) (criticizing Weinrib); Perry, *supra* note 7, at 478-88. Perry has offered a related set of criticisms of Jules Coleman and Arthur Ripstein, in Stephen R. Perry, *The Distributive Turn: Mischief, Misfortune and Tort Law*, in JURISPRUDENCE AND LEGAL THEORY: ESSAYS ON THE WORK OF JULES COLEMAN (B. Bix ed., 1997) ("[A] fault standard tells us nothing about when, or

Interestingly, the problem that Perry has identified in Weinrib's analysis is the mirror image of the problem I identified in reductive instrumentalism. Reductive instrumentalism understands rights and duties merely to be shorthand for statements about who was liable for which injuries, and takes the normative basis for statements about liability to be founded upon purely instrumentalist concerns. The problem we are focusing on in Weinrib is the converse: Weinrib maintains that conclusions about who owes a duty of repair to whom are entailed by statements about who breached a primary duty to whom, and he provides a Kantian justification for claims about primary rights and duties.<sup>257</sup> But there is no reason to think that conclusions at the level of remedies are entailed by principles about how people ought to conduct themselves toward one another, just as there is no reason to believe that conclusions at the level of remedies (liability rules) implicitly capture what our tort law says about how people ought to treat others.<sup>258</sup>

Both Perry and Coleman have offered elegant theories purporting to bridge this gap, to explain why and under what conditions a breach of a primary duty (or a rights invasion, or a wrong) will lead to a duty to repair. Perry argues that a central doctrinal feature of tort law is the defendant's duty to repair certain injuries he has caused.<sup>259</sup> The legal duty of repair may be understood as an embodiment of a moral duty of repair. A central question for Perry is the normative foundation of this duty of repair, and of the notion of moral responsibility which undergirds the duty of repair. His account has two parts:

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even whether, misfortune should be shifted from one person to another. What it tells us, rather, is *how we should behave towards one another . . .*").

257. See WEINRIB, *supra* note 7, at 84-113.

258. See *supra* Part IV.B. While the portion of Weinrib's work on which I have focused is central to Weinrib's recent and most extensive discussion of correlativity, and is therefore an appropriate representative of his position, Weinrib's writings are voluminous and multi-layered. I therefore do not rule out the possibility that other explanations could be generated from his work (and even from within *The Idea of Private Law*, *supra* note 7). One prominent Weinribian argument not mentioned in the text of this Article is that tort law is about "doing" and "suffering," and that the imposition of liability constitutes a reversal of the process of injury, in that the tortfeasor *undoes* the wrong done to the plaintiff. It is essential, then, that only the one to whom the wrong was done may be the plaintiff. See *id.* at 142-44, 168-70.

The problem with Weinrib's account is not its inability to handle the substantive standing rule *per se*, but its cogency more generally. Jules Coleman has offered a sustained critique of Weinrib's contention that tort law is about rectifying "wrongs" rather than "losses," see COLEMAN, *supra* note 7, at 318-24, and Stephen Perry has provided a thorough attack both of the "doing/suffering" aspect of Weinrib's theory, and the capacity of a "wrongs" theory to give adequate place to the significance of harm in a theory based on rectification. See Perry, *supra* note 7, at 479-88.

259. See Perry, *supra* note 7, at 450 ("[T]he principles of reparation that I develop do constitute the main moral foundations of tort law.").

A defendant is morally responsible for the plaintiff's injury if (a) the defendant's conduct was faulty,<sup>260</sup> and (b) the plaintiff's injury is so connected to the defendant's conduct that the injury is among those outcomes for which defendant is "outcome-responsible."<sup>261</sup> If these conditions are met then there is moral responsibility for the injury, and there is a moral duty of repair.

A pivotal notion of responsibility in the context of tort law, according to Perry, is what he calls "outcome-responsibility."<sup>262</sup> The key to outcome responsibility is the *foreseeability* of the bad outcome.<sup>263</sup> The foreseeability of the bad outcome connects the tortfeasor to the bad outcome and puts the tortfeasor among the class of persons who may be deemed responsible for the outcome, including the plaintiff.<sup>264</sup> This creates a limited domain of potentially responsible parties. Perry then looks at the first factor—fault—and suggests that we deem the tortfeasor morally responsible for the injury because she is the one who acted in a faulty manner among those who are "outcome-responsible." The tortiousness of the conduct makes it appropriate for the defendant, rather than an innocent plaintiff, to bear the loss.<sup>265</sup> Thus, a duty of repair emerges from a combination of the fact that the defendant's conduct was tortious and the fact that the injury to plaintiff was foreseeable, so that the outcome is among those for which defendant is responsible.<sup>266</sup>

Before turning to the substantive standing rule, it is worth noting a broader concern about Perry's account. Perry's theory is problematic on a general level because it often requires positing an extraordinarily high moral duty of repair. Tort law commonly

260. Particularly in his explanation of the possibility of so-called "strict" liability, Perry emphasizes that the judgment of "fault" may, to a certain extent, be a relative judgment regarding who, among those outcome-responsible for the injury, acted in a manner that was faulty relative to the actions of other outcome-responsible parties.

261. Perry, *supra* note 7, at 499.

262. *Id.* at 497-99; Perry, *supra* note 243. See also Tony Honore, *Responsibility and Luck*, 104 LAW Q. REV. 530 (1988).

263. See Perry, *supra* note 7, at 505 ("I have suggested that there is more to proximity than foreseeability, but it will not be necessary to explore that issue further here because the law has correctly sensed that it is proximity-as-foreseeability that is particularly relevant to reparation."). See also Perry, *supra* note 243 (foreseeability central to outcome-responsibility).

264. See Perry, *supra* note 7, at 497-98.

265. See *id.* at 499.

266. See *id.* at 497. Specifically:

The localized distributive argument for fault and the agency-oriented understanding of outcome-responsibility are complementary. Each completes a gap in the other that prevents it from constituting an adequate justification, standing on its own, for correlative rights and obligations of reparation. Taken together, though, they form a single, coherent, justifying argument.

imposes extraordinary legal duties of repair on defendants who have behaved in a manner that is faulty, even if only in a rather minimal quotidian sense—taking one's eyes off the road for a moment, for example.<sup>267</sup> Of course, such behavior is negligent and should not be engaged in. Moreover, such behavior might foreseeably cause serious injury. It seems peculiar, however, that on most of the occasions when a person behaves somewhat negligently, no sanction whatsoever is imposed, but if some slight negligence on the part of that person causes a serious injury, he incurs a massive duty of repair.<sup>268</sup> While the foreseeability of the injury may warrant the conclusion that the defendant was outcome-responsible, that the injury was the defendant's fault, or that the defendant bears moral responsibility for what happened, it seems far less clear that the defendant has a moral duty of repair for the entire loss. Yet Perry's account requires this stricter conclusion in a wide variety of cases<sup>269</sup> in order to explain the tort law's imposition of liability as an embodiment of the moral duty of repair. Indeed, this criticism applies widely to corrective justice theories predicated on a moral duty of repair. My point is not that our system is immoral or unfair in imposing this liability on the negligent defendant, but simply that the defendant's minimally faulty behavior does not necessarily warrant a moral duty of repair of this magnitude. This observation, in turn, casts doubt on the idea that the imposition of liability is an embodiment of the moral duty of repair. For the moment, however, we will accept *arguendo* this aspect of Perry's theory.

The problem with regard to the substantive standing rule is more acute. Perry's theory can handle the outcome in cases like *Palsgraf*, but only because the injuries are not foreseeable. As we have seen, the substantive standing rule dictates denial of recovery even where there is foreseeability<sup>270</sup> and therefore "outcome-responsi-

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267. See, e.g., Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, *supra* note 121, at 387.

268. See *id.* at 389-93. Cf. Christopher Schroeder, *Causation, Compensation and Moral Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, *supra* note 121, at 347, 351-52 (plausible moral theory of appropriate sanction for defendant incompatible with disparate treatment of tortfeasors based on harm caused).

269. Perry himself is cautious on this and related points. He believes that our moral conception of the duty of repair demands that responsibility be apportioned in proportion to fault, among outcome-responsible parties, in roughly the way that comparative negligence jurisdictions do. See Perry, *supra* note 243. Thus, in some cases, a tortfeasor will not bear the entire loss. In many others, however, a defendant such as the careless driver will bear the entire loss because, although his or her negligence was not of an extraordinary level, no one else was at fault in any way.

270. See *supra* text accompanying notes 184-85.

bility." Moreover, even in *Palsgraf* itself, there are two issues: (1) Why isn't the conduct negligent in relation to Mrs. Palsgraf herself; and (2) why must the conduct be negligent in relation to a plaintiff herself in order for the plaintiff to recover?<sup>271</sup> Perry's theory may illuminate the first issue, but does not speak to the second.<sup>272</sup>

Corrective justice theory, insofar as it purports to explain the structure of our actual tort law, could simply adjust and concede that the notion of responsibility for outcomes in the tort law is not captured by foreseeability, but relates more closely to substantive standing. Jules Coleman appears to make such an adjustment in his own view in an effort to accommodate similar concerns.<sup>273</sup> Coleman asserts that a defendant who wrongfully causes a plaintiff's loss is responsible for that loss only if the loss was the *defendant's fault*. For a loss to be D's fault, "P's loss [must] fall[] within the scope of the risks that make that aspect of D's conduct at fault."<sup>274</sup>

Even if Coleman's account accommodated substantive standing doctrine, it would do so only by relying upon an implausible explication of the notion of *fault*. Substantive standing case law is so jarring precisely because, in many of the cases, the concept of fault we generally use in torts and in everyday judgments of responsibility would lead us to say that the plaintiff's injury *is* the defendant's fault. Indeed, in bystander cases in which a negligent driver kills a child,<sup>275</sup> the tremendous grief and sense of loss suffered by the parent quite plausibly *is* the driver's fault; if a law firm can prove it went bankrupt because everyone believed a defamatory article about its rainmaker,<sup>276</sup> then one is inclined to say the loss suffered by the law firm *is* the defamer's fault; if a woman loses the proceeds of an insurance policy of which she was the beneficiary because the defendant defrauded the insurance company into removing her name as a beneficiary,<sup>277</sup> her loss *is* the defendant's fault.

271. See *supra* text accompanying notes 14-24.

272. But see Perry, *supra* note 256, at 82-87. Perry recognizes that, in light of *Palsgraf* and risk-rule cases, the fault that justifies an obligation to compensate "must grow out of the defendant's outcome-responsibility." *Id.* However, though Perry may aspire to explain this constraint, his account goes no further than to recognize it as part of the structure of tort law (at least as regards negligence and the risk rule). See also Perry, *supra* note 125 (recognizing peculiar contours of duty in economic harm cases), and Perry, *supra* note 171, at 407 (recognizing necessity of primary rights violation to trigger right to repair).

273. See COLEMAN, *supra* note 7, at 345-47.

274. *Id.* at 346.

275. See *supra* notes 114-17 and accompanying text.

276. See *supra* notes 58-59 and accompanying text.

277. See *supra* notes 68-69 and accompanying text.

The problem, as these examples and the entire body of law presented in Part III suggest, is that whether a plaintiff has substantive standing does not seem to track our ordinary moral judgments about whether a plaintiff's loss was the defendant's fault. It also does not seem to track our notion of when a defendant is morally responsible for the plaintiff's loss. On the contrary, Perry's synthesis of faulty conduct and foreseeable outcome seems to capture more aptly our intuitive moral judgments about when someone is responsible for someone else's loss: when he has acted in a faulty manner, and the plaintiff has suffered a foreseeable loss as a result of that action. Hence, assuming that we are willing to say that "fault" or moral responsibility for a given outcome does generate a full-fledged duty of repair, from a moral point of view,<sup>278</sup> Perry's theory seems to provide a better explanation of the duty of repair, and therefore, of the concept of corrective justice. Nonetheless, Perry's theory appears to be inconsistent with substantive standing doctrine. Thus, to the extent that corrective justice theory can provide a plausible explanation of the basis of a moral duty of repair, it will turn out that existing tort law cannot be understood as an embodiment of the principles of corrective justice theory.

#### *B. The Concept of a Private Right of Action*

Corrective justice theory has difficulty accommodating the substantive standing rule because it mischaracterizes the way imposition of liability fits into the structure of tort law. Corrective justice theorists see the imposition of liability on the defendant as a reflection of a principle, embedded in the law, that people ought to bear the costs of those injuries stemming from their wrongful acts. The key issues in corrective justice theory are therefore: (1) Did defendant act tortiously; and (2) was the injury in question sufficiently connected to the defendant to make him or her responsible for it? In all of the cases we have considered, the defendant violated a norm of the tort law (acted tortiously) and attention therefore focused on the second issue. From a moral point of view, there is no reason to believe the criterion of substantive standing is relevant to whether defendant is responsible. Morally and intuitively, foreseeability seems much more relevant.

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278. *But see supra* notes 264-67 and accompanying text.

This account runs into trouble for a very basic reason. It wrongly presupposes that the imposition of liability reflects a judgment, embedded in the law, that defendants *ought* to bear the costs of certain injuries. This assumption misconstrues what the state actually does in private causes of action under the tort law. In an important sense, the state does not judge that certain defendants ought to pay certain amounts to plaintiffs. Rather, *the state accedes to, and enforces, a plaintiff's demand that the state compel defendant to pay her a certain amount.* Such action by the state appears to embody the judgment that an individual is entitled to have the state compel a defendant to pay her under certain circumstances, if she chooses to demand payment. Of course, in many cases it may be plausible, from a normative point of view, that the defendant ought to pay the plaintiff, or that it would be a good thing if the defendant paid the plaintiff. But, merely by affording a right of action, our system is not committed to these stronger claims. It is at most committed to the view that the state ought to act on certain individuals' demands that others be forced to pay them.

Our law makes available private rights of action for certain persons against tortfeasors. Individuals who wish to obtain various forms of relief against a defendant may do so provided they follow certain steps. The state provides remedies to those who successfully go through these steps. The contention that it is legitimate, proper, or desirable that the state afford such private causes of action is not equivalent to the statement that defendants ought to be paying damage awards in certain cases. That our legal system affords rights of action reflects a collective judgment that the state ought to facilitate the plaintiff's demand for a certain remedy by coercing the defendant into giving the remedy.

The phrase "right of action" indicates that our system regards plaintiffs as *entitled to act against defendants* in certain respects. As Hart and Sacks explained in their classic work, *The Legal Process*, our system of enforcing private rights of action essentially creates a power in plaintiffs to act against defendants through the state.<sup>279</sup> However,

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279. HART & SACKS, *supra* note 171, at 137-38. My analysis of rights of action is similar but not identical to that of Hart and Sacks: "A right of action is a species of power—remedial power. It is a capacity to invoke the judgment of a tribunal or authoritative application upon a disputed question about the application of preexisting arrangements and to secure, if the claim proves to be well-founded, an appropriate official remedy." *Id.* at 137. I would maintain that a right of action is a power to obtain redress by successfully meeting certain evidentiary and procedural requirements. According to Hart and Sacks, however, it is a power to go before a court and present one's case for securing redress, with the possible consequence of securing redress if one's case is judged well-founded. *See id.*

the mere availability of a systemic remedy does not presuppose a moral duty of repair corresponding in magnitude to the massive liability judgments the tort system regularly produces in tort cases. To put it differently, the system recognizes that plaintiffs ought to be able to act against defendants by compelling such relief from defendants through the state, not that defendants have a free-standing moral obligation to provide such relief. In the absence of tortious or illegal conduct (or consent), individuals are not normally permitted to act against one another either directly or through the state. A private right of action is consequently not only a power of individuals to act against others, it is also a Hohfeldian "privilege" to act against others.<sup>280</sup>

Thus, the relevant question is not what is the normative basis for the statement that defendants ought to provide relief to plaintiffs. It is what is the normative basis for saying that plaintiffs are entitled to act against defendants through the coercive machinery of the state. The answer to this question will explain the normative basis of the institution of private rights of action. The substantive standing rule is a limitation on this institution. We may then ask why the normative rationale that permits private rights of action does not permit them where substantive standing is lacking.

Corrective justice theory does not provide the wrong answer to these questions, it does not even ask the questions. It goes off track, I believe, for reasons that parallel those of instrumentalism. Instrumentalism was inadequate as a tort theory because it conflated two levels of tort theory, the level of rights and the level of rights of action. But there is at least one more level of tort theory: the level of remedies. Even after we have decided that a particular plaintiff is entitled to a right of action against a defendant, that leaves open the question of what remedy the plaintiff ought to be able to obtain. "Rectification" or "making whole" is surely a powerful normative idea embedded in our tort law, but we must look carefully at the question it is used to answer. I believe it explains why, assuming that a person has a right of action against a defendant, that person is entitled to compensatory damages as a remedy. In other words, it is a normative idea that figures centrally at the level of remedies.

Corrective justice theorists have permitted a plausible principle at the level of remedies to spill over into the concept of private rights of action. As a result, the principle that those who have a right

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280. See HART & SACKS, *supra* note 171, at 137-38; Hohfeld, *supra* note 226, at 32-33.

of action against a defendant are entitled to have the defendant pay them compensatory damages, with the aim of making them "whole," is converted into a principle that the very justification for imposing liability on a defendant is that the defendant has caused harm to a plaintiff, and made her less than whole. The substantive standing rule and, more generally, the concept of a right of action as a plaintiff's power and privilege, provide strong reasons to believe that corrective justice theory is inadequate at the level of rights of action and the conditions of liability. Recognition of the theory's limitations does not undercut the importance of corrective justice theory as an account of the permissibility and justice of compensatory damages as a form of remedy. Just as the instrumentalist errs in conflating the level of rights with the level of rights of action, the corrective justice theorist errs in conflating the level of rights of action with the level of remedies.

## VI. CIVIL RECOURSE

One version of the substantive standing rule is this: A plaintiff does not have a right of action against a defendant unless the defendant violated her right. We have seen that the substantive standing rule cannot be accounted for from the point of view of corrective justice theory or law and economics, the former because it fails to capture the notion of "right of action" in the tort law, and the latter because it fails to capture the notion of "right." I have suggested a firmer conceptual foundation for "right" and "right of action." It is now time to construct a positive account of the substantive standing rule.

### *A. The Principle of Civil Recourse*

What I shall call the "principle of civil recourse" states that a person ought to be permitted civil recourse against one who has violated her legal rights. Our tort law can be understood, in part, as an embodiment of this principle. It explains why plaintiffs are empowered and privileged to act against defendants: The law's recognition of a privilege in a plaintiff reflects an acceptance of the idea that a person ought to be able to proceed against others, through the state, under certain circumstances. As discussed above, a recognition of this privilege does not entail that a defendant ought to be required to pay a plaintiff independently of the plaintiff's decision to proceed against

that defendant. Rather, the plaintiff is privileged to have the state coerce the defendant into paying him if he chooses to proceed. The plaintiff's privilege exists because the defendant violated the plaintiff's right.

Civil recourse is "civil" in at least three respects. First, it is civil as opposed to "barbaric." Holmes famously discussed the "blood feuds" of German origin that predated our tort system.<sup>281</sup> The early medieval common law of England permitted vicious and cruel punishments to be imposed as remedies by private parties whose rights had been violated; these included hanging, blinding, castration, and amputation of a hand or foot.<sup>282</sup> Similarly, the ancients permitted tort penalties that included "debt slavery, chattel slavery, killing, beating, mutilation, public disgrace, outlawry, and the blood feud."<sup>283</sup> Whatever complaints one might have about the potential onus of money judgments and dealing with lawyers, a money judgment is not this kind of barbarism, and in this respect, the recourse open to plaintiffs is civil.

Second, unlike the blood feuds Holmes discusses, the recourse is provided through a civil legal system and is essentially mediated by this system. A wronged plaintiff is privileged to use the civil law in a certain way against the defendant. She is not personally entitled to take land or money from the defendant; she is entitled only to use the civil legal system to exact compensation from the defendant through a civil procedure.

Third, the recourse is civil as opposed to criminal. The law does not invest individuals with the privilege to bring the criminal law down on the head of one who violated his right. A person can complain to the state, but it is not his choice whether the criminal law will be applied to the defendant, and it is not his choice whether to impose a criminal punishment on the defendant.

The idea of recourse is arguably in the same conceptual family as the retributive notion of an eye for an eye, and an idea of recourse lies behind the conviction that I may hit someone who hits me, that I may take back stolen property, that I may lash out with bitter words at one who has acted cruelly towards me. The same principle

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281. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (Dover ed. 1991) (1881).

282. See David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 61-62 (1996).

283. James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U. L. REV. 29, 31 (1996).

supports the notion that a person is entitled, as a matter of justice, to redress a wrong done to her.

I believe that legal scholars have shied away from the idea of a right to redress because it seems to reflect a sense of private retribution based on vengeance, which is antithetical to contemporary notions of justice and the rule of law. The essence of a genuinely lawful and just system, one might think, is that individuals are not permitted to take an eye for an eye: The *law* reigns, not fits of private vengeance.

One may sympathize with this reaction, as I do, but still recognize the importance of recourse in our tort law; indeed, I shall argue that these concerns are part of a justification of the principle of civil recourse. It is essential to our ordered society and our legal system that we do not permit private retribution for the violation of legal rights. Having been wronged is neither an excuse nor a justification for violence against or taking from another, except in rare cases. The law prohibits and criminalizes violence as a reaction to legal wrongs. That is, indeed, part of what is sometimes meant by "the rule of law." Nevertheless, the often touted principle, "*Ubi jus, ubi remedium*"—where there's a right there's a remedy—expresses the widely shared conviction that if one has been wronged, one ought, in fairness, to have some recourse through the state against the wrongdoer. In other words, where the state forbids private vengeful retribution, fairness demands that an opportunity for redress be provided by the state.

An analogy to familial disputes illustrates the conception of fairness at play. When a child has been wronged by her brother or sister—when she has been hit or taunted or her toys have been forcibly removed—her immediate instinct may be to retaliate, perhaps violently. Parents who forbid their children to be violent, even in retaliation for a recognized violation of the rules, are typically then faced with a certain kind of appeal from the rule-abiding child. The child appeals to the parent to respond to the fact that her sibling hit her or took her toys by reprimanding the sibling, requiring an apology, or some other act on her behalf. There are often sound pragmatic reasons to respond to the victimized child's appeal; for example, it probably helps to prevent disputes from escalating. Beyond pragmatic reasons, however, there is a reason of fairness. Having forbidden the child to respond directly to being wronged by her sibling, the parent may have an obligation to provide the child with some other way of dealing with having been wronged by her sibling. It is unfair to ask the child to remain passive in the face of

her sibling's wrongs against her, without at least permitting her to use parental authority to force her sibling to make up for those wrongs.

The principle of civil recourse reflects a similar conviction about fairness in civil life among citizens. Life in civil society requires obeying a series of rules and refraining from a wide range of conduct. These rules are occasionally broken by others. Others sometimes fail to respect one's rights. The rule of law forbids private retribution when such invasions of rights occur. Individuals whose rights are invaded are therefore left in a predicament; they are not permitted to seek private redress or retribution, but to leave the rights invasion unredressed would be intolerably unfair.

The law solves this problem by recognizing a privilege and creating a power in the person whose rights were violated to act against the rights-violator through the authority of the state. In doing so, the law creates what is literally a *right of action* against the rights-violator. Our society thus avoids the mayhem and crudeness of vengeful private retribution, but without the unfairness of leaving individuals powerless against invasions of their rights. The statement that one has a "right" to bring an action against a defendant is a way of saying that fairness demands that the state recognize an individual's privilege to proceed against the defendant for civil recourse.

If we wish, we can also frame this point in the language of social contract theory.<sup>284</sup> It is too thin a version of social contract theory to imagine that we consent to obey certain rules of conduct on condition that others do the same. Any sensible party to a social contract will want to know what will happen if other parties violate the contract, that is, violate one's rights. Providing only criminal sanctions for rights violations is inadequate in at least two ways. First, such sanctions do not ensure that a violation will never occur, and if it does occur, the victim's need for redress will not necessarily be satisfied by the imposition of punishment on the rights-violator.

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284. Cf. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 7-10 (C.B. Macpherson ed. Hackett 1980) (1690) (recognizing right of an individual to "retribute" wrongs to him, and explaining it within a social contract framework); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 10-25 (1974) (developing within libertarian framework Lockean social contract ideas regarding right to aggress against wrongdoers in state of nature). Nozick's account develops along the lines of a liability rule view, NOZICK, *supra* at 54-87, which, for the reasons stated in Part IV, *supra*, I believe does not provide an adequate account of the actual structure of our tort law. The framework I am developing here is not inconsistent with that of the preeminent contemporary social contract theorist, John Rawls. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971), elaborated and modified in JOHN RAWLS, POLITICAL LIBERALISM (1993).

Second, if there is a broad set of rights, then the proliferation of criminal sanctions for violations of such rights would be a serious and frightening constraint on the liberty of the social contractor, *ex ante*, especially since many rights invasions will be unintentional.

The idea of civil recourse is a desirable solution to the social contractor. Consenting to comply with all the rules, even after one's rights are violated, does not entail giving up all possibility of redress should others invade one's own rights. Conversely, consenting to be subject to a wide variety of duties to others does not entail being vulnerable to a similarly wide range of possible criminal sanctions. While the state takes away the liberty of private retribution, it offers a right to civil redress in its place. While it creates in each a vulnerability to action under the law, it provides in return protection from the threat of private retribution.<sup>285</sup>

### *B. Substantive Standing and the Principle of Civil Recourse*

Let us return to substantive standing. To reiterate, the substantive standing rule says that a plaintiff does not have a right of action against a defendant on the basis of harm suffered as a result of the defendant's invasion of a third party's right; the defendant must have invaded the plaintiff's own right. The principle of civil recourse provides an explanation. It states that a person whose right has been invaded by another is entitled to civil recourse against that other person. This principle, so stated, does not imply an entitlement to civil recourse for any but those whose rights have been violated. Hence, if the civil recourse principle is indeed the basis for permitting private rights of action, and if the importance of security against others precludes permitting private rights of action absent entitlement to civil recourse against another,<sup>286</sup> it follows that substantive standing should be required.

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285. Cf. David Gauthier, *Self-Defense and the Requirement of Imminence: Comments on George Fletcher's Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 615, 619 (1996) (offering social contract explanation of features of criminal law, reasoning that criminal law "offers public deterrence in place of private preemption, public punishment in place of private retaliation"). I am suggesting that tort law offers private rights of action in place of private retaliation.

286. The social contract frameworks I have invoked, be they Lockean, Nozickean, or Rawlsian, would presume that individuals have a substantial security interest in not allowing the state to compel them to relinquish money or property in response to another private person's initiative. I am arguing that the principle of civil recourse provides a rationale for permitting those who have been wronged to have a power and privilege against those who wronged them that is sufficiently strong to permit invasion of this (presumed) interest. Given this presumed security interest, however, the absence of a justification for a right of action grounded in the principle of civil recourse entails at least a *prima facie* recourse argument that

But the issue requires greater attention than we have given it. The prior section explained the idea of civil recourse and the general reason why fairness often requires that individuals be provided with recourse against others. In fully evaluating the substantive standing rule, we must explore why individuals might be entitled to civil recourse under some conditions but not others. In particular, why is it critical that a person's right have been invaded in order for her to be entitled to civil recourse against another? *Palsgraf* suggests the following question: Why is it not sufficient that she has been tortiously harmed by the other? The law gathered in Part III suggests an even more challenging question: Why is it not sufficient that the plaintiff has been foreseeably tortiously harmed by the defendant?

We can get an intuitive grasp of the answer to this question by returning to an earlier characterization of the substantive rule: A plaintiff may not recover unless the defendant's conduct was wrong relative to her. In short, she may not recover unless the defendant breached a tort duty to her or *wronged* her (relative to the set of wrongs designated under the tort law). If the defendant wronged a third party, but not the plaintiff, then that plaintiff has no right to recover. Why should this be so? The answer is that entitlement to recourse does not spring from the need precipitated by injury. It springs from the affront of being wronged by another. Because one should not have to suffer that affront passively, without response, fairness requires that one have recourse against the wrongdoer. Substantive standing cases are ones in which the plaintiff is injured, but she has not suffered the affront of being wronged by defendant. Thus, while she may have the need for compensation, she does not have a right to act against the defendant.

The point can also be stated in terms of rights. The law marks out a set of interests that each of us has in remaining free from the interferences of others, and a set of prohibitions against interfering with these interests in others. It thereby recognizes a set of rights in each person to be free from certain actions of others and a set of duties in each to refrain from interfering with certain interests of others. When one person invades another's right, she fails to respect that special set of interests that the other person is entitled, by law, to have her respect. The law therefore permits that person civil

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there ought not be a right of action. That is, if the principle of civil recourse does not provide a basis for a right of action—which is true where substantive standing is lacking—then there is at least a *prima facie* argument that the plaintiff is not entitled to a right of action against the defendant.

recourse against her. But where the defendant has not invaded the plaintiff's right, regardless of whether the defendant caused her harm indirectly by interfering with some third party's right, the plaintiff is not entitled to recourse against her. Harm per se does not entitle a plaintiff to recourse.

Finally, it is critical to distinguish the question of whether a plaintiff has a right of action from the question of what form of remedy is available to her if she does have a right of action. Obviously, once it is established that a plaintiff has a right of action because her primary right was invaded, our system generally permits the plaintiff to recover compensatory damages, including consequential damages, for the harm she suffered as a result of that invasion. The availability of compensatory damages to one who can establish a rights invasion does not necessarily indicate that harm is the basis of a right to recourse. Rather, it merely reflects acceptance of the view that compensation for the harm caused is typically an appropriate form of recourse for those whose rights have been invaded. A wide variety of reasons supports this normative view of remedies, which is entirely consistent with the principle of civil recourse. In Part VII, we shall touch upon the issue of whether "compensatory damages" is the only appropriate form of remedy under this model.<sup>287</sup>

### C. *Substantive Standing in Tort Law*

The principles of civil recourse and substantive standing inform analysis of every kind of tort, but the application of these principles is most evident for torts like trespass that define legal rights without reference to harm. It seems fairly obvious that, because a right of action in trespass is predicated on invasion of a legal right in the land, only the holder of that legal right has a right of action for violations of that right.<sup>288</sup> This way of understanding the law of trespass is grounded in a broad conceptualization of rights of action: One is entitled to a right of action because one is entitled to recourse against persons who have invaded one's interests with which the law directs others not to interfere.

At the opposite end of the spectrum is the tort of negligence. The legal right identified by negligence law is defined, in part, by reference to harm. In enjoining each person to take the care he or she

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287. See *infra* text accompanying notes 313-17.

288. See, e.g., *Sky Four Realty Co. v. New York*, 512 N.Y.S.2d 987, 989 (N.Y. Ct. Cl. 1987) ("Restating what would appear to be most obvious, an action for trespass may be brought by a person in exclusive legal possession at the time of trespass.").

owes to others, negligence law protects each individual's interest in being free from harm caused by others' failure to take the care they owe to that individual. Harm is therefore a necessary component of an invasion of a legal right in negligence law. It is consequently also a necessary condition for the right to recourse. Finally, in negligence law, the remedy afforded a plaintiff is neatly tailored to rectify the harm by making the plaintiff whole.

But harm without a violation of a plaintiff's right does not give rise to a cause of action in negligence law. Thus, a parent whose child has been injured by negligence typically cannot recover for her own emotional injury if it was only her child to whom the duty was breached;<sup>289</sup> a merchant who suffers financial ruin because of the defendant's negligent destruction of a third party's property cannot recover if it is only the duty to a third party that was breached;<sup>290</sup> a non-client cannot recover for harm caused by an accountant's negligence if it was only the accountant's duty to the client that was breached.<sup>291</sup> To the extent that the law of negligence becomes more receptive to plaintiffs in these areas, it is because the scope of duty is expanded; the substantive standing rule is retained in any case. The principle of civil recourse explains this rule.

In certain respects, defamation and fraud lie somewhere between property torts and negligence, and this is perhaps why the substantive standing rule seems neither trivial nor formalistic in these areas. Unlike negligence, these torts do not define rights in terms that make reference to freedom from harm. Unlike trespass and nuisance, which draw from property law, these torts do not draw upon a scheme of rights used elsewhere in the law. Thus, defamation protects individuals against the affront of a reputational attack; a person has a right of action under defamation law only if his reputation is attacked. The of-and-concerning element ensures that only a person whose right against attack has been invaded may bring an action, regardless of whether others were actually harmed. The substantive standing rule in defamation cases—the of-and-concerning requirement—embodies the principle of civil recourse in the case of defamation.

A similar analysis applies to fraud. The right protected is a right against being deceived. A fraud plaintiff arguably can be deceived in any number of ways: by a representation made directly to

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289. See *supra* notes 114-16 and accompanying text.

290. See *supra* notes 128-29 and accompanying text.

291. See *supra* notes 131-33 and accompanying text.

her, by a representation made to her through other parties, by a representation made to the public which she hears and relies upon, by a concealment or omission, or by a representation translated into a price. If a plaintiff has been deceived, her right has been invaded and she is entitled to civil recourse. But where a plaintiff has not relied upon the representation, omission, or translation in any way, she has not been deceived, and the right protected by fraud law has not been invaded. She thus has no right of recourse against the originator of the misrepresentation. The principle of civil recourse appears in fraud cases as the rule that only a plaintiff who has relied may recover; only the right of one who relied has been invaded and only she has been deceived by the defendant.

The substantive standing rule within each tort is explained analogously. Thus, nuisance is an interference with another's use and enjoy property; the right invaded is the right to use and enjoy property. Only the party whose property right is invaded is entitled to recourse against the person whose action is a nuisance. Malicious prosecution is an invasion of the right to be free from abusive litigation; only the one litigated against is entitled to recourse for violation of this right. Privacy torts recognize a right against interference with a person's freedom from certain kinds of intrusion, appropriation, or publicity; only persons whose right against such interferences has been invaded have recourse against these invaders. Only someone who herself has been wronged has recourse against the one who committed that wrong.

The core idea of civil recourse is that the affront of being legally wronged by another entitles an individual to a right of action against that other. The tort law defines the ways in which we wrong one another: by deceiving, hitting, attacking reputation, abusively suing, depriving another of use or enjoyment of land, invading another's privacy, inflicting physical or property damage through want of care owing to the other, or interfering with one's contract. A person who has been wronged in these ways has a right to civil recourse against the one who has wronged her. The institution of private rights of action in tort law is an embodiment of the principle of civil recourse.

#### D. Palsgraf, *Public Law, and Private Law*

Behind Cardozo's adherence to the substantive standing rule in *Palsgraf* lies the idea of civil recourse. "One who seeks redress at law does not make out a cause of action by showing without more that

there has been damage to his person;<sup>292</sup> to be entitled to redress, reasoned Cardozo, one must show not just a harm to oneself, but an “[a]ffront to personality.”<sup>293</sup> Such an affront is “the keynote of the wrong.”<sup>294</sup> Noting that the medieval trespass action is the historical basis of negligence, he wrote that, originally, “trespass did not lie in the absence of aggression, and that direct and personal.”<sup>295</sup> Cardozo clearly viewed a plaintiff’s right of action as an opportunity to redress, and thereby to vindicate, the violation of rights she has endured, and not as an opportunity to gain compensation for the harm she has suffered. And that is precisely what he says as he concludes his analysis in *Palsgraf*: “The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another. Thus to view his cause of action is to ignore the fundamental difference between tort and crime. He sues for breach of a duty owing to himself.”<sup>296</sup>

Cardozo’s mention of the distinction between tort and crime provides another clue as to why his opinion often seems odd to modern scholars. In his insistence that Mrs. Palsgraf lacks standing to sue for a wrong to another, Cardozo appears to display a rejection of torts as an arena of public law, and this apparent rejection seems especially counterintuitive on the facts of *Palsgraf*: If the trainman acted wrongly, why not sanction him? And if Mrs. Palsgraf needed compensation, why not compensate her? When we picture tort law as a form of social insurance funded by sanctions imposed upon wrongdoers, or when we picture it as a form of regulation whose proceeds are used to compensate the injured, the case seems wrongly decided. As I have argued above, however, such an instrumental perspective is incapable of taking into account huge areas of tort doctrine, not just *Palsgraf*. What is so striking about *Palsgraf*, however, is the explicit recognition, by this highly esteemed common law judge, that tort law is not just about deterrence and compensation. Cardozo seems to be rejecting one of the most widely accepted of Holmes’s insights; he seems to be denying that tort law is really a form of public law.<sup>297</sup>

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292. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. 1928).

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. Weinrib can be interpreted as embracing this view of Cardozo’s opinion in *Palsgraf*, and making it the center of his theory. See WEINRIB, *supra* note 7, at 7 (a target of Weinrib’s formalism is the view that “[a]ll law is public, in that the legal authorities of the state select the

The model I have offered suggests that this conclusion misses the mark. For Cardozo, tort law was both more public and more private than Holmes recognized. Insofar as tort law is about enforcement—rights of action—it is indeed more of a private matter than instrumentalists maintain. In recognizing a private cause of action against a defendant, the state is *not* necessarily endorsing the view that justice or efficiency or avoidance of social harm will be better served if the defendant is required to pay the plaintiff compensatory damages under these circumstances. While these considerations undoubtedly play important roles within our system, the root justification for a private right of action is the idea that the plaintiff whose legal rights were invaded by the defendant is entitled to act against the defendant through the state, by having the state enforce a judgment against the defendant on her behalf. The justice in the enforcement of private law lies in recognizing in those who are aggrieved a right to recourse against those who wronged them. It does not lie in the justice of bringing about a state of affairs that is optimal from a social point of view, whether corrective, distributive, or economic considerations provide the criteria of optimality.

Yet this is only half of the story—the remedial half. Tort law consists not only in rights of action, but, I have argued, in primary rights and duties, in wrongs, and in relational directives. In announcing the kind of conduct that is tortious, courts are enjoining individuals from treating one another certain ways and enjoining them to treat one another certain ways. This is the creation of schemes of legal rights and duties. These schemes are founded, in our system, on a wide range of moral, political, and economic considerations characteristic of those underlying public law.<sup>298</sup> They serve as norms that guide the behavior of citizens toward one another.<sup>299</sup> They create or reinforce a sense of legal obligation to treat others certain ways, and a sense of legal entitlement in the security of certain interests. These directive norms in tort law regulate conduct ranging from how a physician treats her patients and how a driver treats other drivers, to

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avored goals and inscribe them into a schedule of collectively approved aims"); *id.* at 159-70 (making *Palsgraf* central to account of tort law as private law).

298. Cf. COLEMAN, *supra* note 7, at 354-60 (describing variety of "local" and conventional norms that give content to duties within a broader corrective justice framework). Cf. ISHAK ENGLARD, *THE PHILOSOPHY OF TORT LAW* 64-70 (1993) (describing broader pluralism, both at the level of liability imposition and at the level of rights and wrongs).

299. See John C.P. Goldberg, Note, *Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 N.Y.U. L. Rev. 1324, 1334-36 (1990) (noting that Cardozo believed that common law judges served the function of articulating and enforcing norms of social conduct).

how a large industry monitors its emissions and how a manufacturer designs its appliances. In this important sense, tort law is also a form of public law.

While the "rights, wrongs, and recourse" model I have offered is distinct from the dominant approaches in contemporary tort theory, it is neither novel nor idiosyncratic. The historical roots of tort law display a similar character. From the early medieval period until the sixteenth century, what we would now call tort actions were private rights of action for damages, predicated on the defendant's having committed a legal wrong.<sup>300</sup> The legal construct permitting a private person to act against one who "trespassed" against him was formed by grafting together two different ideas. On the one hand was the idea that the law requires each of us to refrain from interfering with others in various ways. Historically, these "legal wrongs" were those actions that constituted "breaches of the King's peace"<sup>301</sup> and, more generally, violations of the duties express and implied in the law of private property, social custom, and contract.<sup>302</sup> On the other hand was the idea that individuals who have been wronged by others are entitled to some redress against them.<sup>303</sup> Through time, of course, the range of wrongs, rights, and duties articulated in the law has expanded beyond the range of criminal law and property law; the forms of recourse have been narrowed, principally to actions for damages and injunctions—to civil recourse as we know it. Though they have evolved, the two basic ideas at the core of tort law—a scheme of wrongs and rights and a mode of civil recourse through the state—have remained constant.

## VII. IMPLICATIONS

The analysis above casts doubt upon two prominent forms of argumentation in torts. Some advocates of law and economics analysis—most notably Landes and Posner—claim that they have articu-

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300. See Seipp, *supra* note 282, at 83-85 (observing that in early common law, both torts and crimes were for the same actions—breaches of the King's peace).

301. See *id.* at 72-78.

302. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 478-90 (3d ed. 1990) (observing that nuisance law developed out of recognition of proprietary rights and entitlement to enjoy property appurtenant to such rights); *id.* at 462-64 (prior to eighteenth century, most negligence cases were predicated on deviation from custom of realm).

303. See *id.* at 571 ("The civil law is designed to provide private redress for wrongs to individuals.").

lated the structure underlying tort law.<sup>304</sup> For judges who believe that the task of adjudication is to discern the normative logic of the law, and then follow out the implications of that logic,<sup>305</sup> Landes and Posner's argument provides a strong basis for using economic analysis in deciding the law. And, indeed, such thinking is apparent in many cases.<sup>306</sup> I have argued, however, that a reductive economic approach does not explain the doctrine of substantive standing. More generally, I have suggested that the structural relationship among rights, rights of action, and remedies in our tort law does not support a global economic account of the normative structure of tort law. If my arguments are sound, significant consequences follow for adjudicative methodology. For judges who wish to follow the logic of our actual tort law, the economic model is probably not the place to begin. If they wish to use an economic model in shaping tort law, they must do so on the ground that this model is normatively superior on its own right, not that it is the normative structure to which the law is already committed. And they must be prepared to argue that it is within their proper role as adjudicators to implement a shift in the normative structure of tort law.

Likewise, to the extent that corrective justice theorists claim to have captured the normative underpinnings of tort law, my account casts doubt on those claims. Judges should not apply the normative principles these theorists set forth if they are doing so under the assumption that they are following the logic of the law. If they do apply corrective justice principles, they must do so because they believe these are the normative principles the law ought to follow, and they believe it is a sound exercise of their institutional role to correct the normative orientation of the tort law.

In a more positive vein, the account I have set forth above also appears to have implications for several concrete issues in tort law. I will briefly mention a few of these issues in order to preview some of the work that I believe needs to be done. If my analysis of *Palsgraf* is correct, then, at least in light of the overall normative foundation of tort law, the mainstream of tort scholarship on the duty and proximate cause elements in negligence law has laid too great an emphasis on foreseeability and a potpourri of *ad hoc* liability-limiting considera-

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304. See LANDES & POSNER, *supra* note 6, at 312 ("[T]he structure of the common law is economic in character.").

305. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986).

306. See, e.g., *Edwards v. Honeywell*, 50 F.3d 484, 491 (7th Cir. 1995) (Posner, C.J.) (using "cheapest-cost-avoider" analysis to decide duty issue).

tions.<sup>307</sup> My account suggests that a thick relational conception of duty must be developed to offer a satisfying explanation of the controversial three-party tort cases involving emotional injury,<sup>308</sup> economic injury,<sup>309</sup> or liability to non-clients and non-patients.<sup>310</sup> With respect to proximate cause, the risk rule has a broad and legitimate role to play.<sup>311</sup> Both the relational conception of duty and the risk rule are conceptual companions to the substantive standing rule, although instrumentalists have rejected these notions as incoherent because they cannot make sense of substantive standing. These notions, now revitalized, must be developed as an alternative to the instrumentalist free-for-all that now dominates both duty and proximate cause analysis.<sup>312</sup>

My analysis of the normative basis of rights of action in terms of civil recourse may also have implications for how we think about damages in tort law, particularly how we think about punitive damages.<sup>313</sup> Under leading versions of corrective justice theory, there is simply no place for any form of damages that are non-compensatory.<sup>314</sup> While law-and-economics scholars can offer various rationales for super-compensatory damages, particularly by noting underenforcement and detection problems,<sup>315</sup> it is highly unlikely that an underenforcement rationale will explain why punitive damages are unusual and why they hinge on state-of-mind. In short, law and economics is unlikely to be able to offer a persuasive positive account. More generally, both corrective justice theory and law and economics can be expected to have difficulty with non-compensatory damages because the idea that a defendant is liable for the cost of the plaintiff's injury is built into the very determination of why there is a right, under

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307. See KEETON ET AL., *supra* note 4, § 53, at 358 (defining duty as the "expression of the sum total of those considerations of policy which lead the law to say that plaintiff is entitled to protection").

308. See *supra* Part III.C.1.

309. See *supra* Part III.C.2.

310. See *supra* Part III.C.3.

311. See *supra* Part III.C.4.

312. See Goldberg & Zipursky, *supra* note 135 (criticizing instrumentalist conception of duty element in negligence law and developing an alternative based on relational, moral conception of duty).

313. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (holding \$2 million punitive damage award on \$4,000 injury violated due process).

314. See, e.g., WEINRIB, *supra* note 7, at 135 n.25 ("[U]nder corrective justice damages are compensatory, not punitive.").

315. See, e.g., SHAVELL, *supra* note 6, at 148 (noting one reason for damages above compensation is problem of injurers who escape detection).

their view.<sup>316</sup> From the point of view of positive tort theory, these limitations are striking, for our actual tort law contains not only compensatory damages, but punitive and nominal damages, as well as a variety of forms of injunctive and non-monetary relief, not to mention monetary awards for pain and suffering, which fit uneasily within the notion of "making whole."<sup>317</sup>

The principle of civil recourse, by contrast, leaves plenty of conceptual space for non-compensatory damages. It states that a person is entitled to civil recourse against one who has wronged her, but leaves open the question of what form of recourse ought to be afforded. In assessing whether a particular form of recourse is appropriate or at least permissible, society may reasonably consider whether a plaintiff's having been wronged in a certain way by a defendant serves as a sound basis for permitting the plaintiff to exact a certain sort of remedy from the defendant. More generally, the principle of civil recourse as a theory of private rights of action creates a different context within which to think about the reasons underlying the availability of a variety of forms of damages in tort law. In light of mounting controversy concerning the appropriate extent of punitive damages and non-pecuniary damages, a new and flexible analytical perspective should be a welcome arrival.<sup>318</sup>

Proximate cause, duty, and damages are only a few of the many aspects of tort law that the rights and recourse model may illuminate.<sup>319</sup> I do not mean to suggest that application of the theory should be undertaken lightly; many qualifications are necessary. Thus, it may be said that law and economics and corrective justice theory are comprehensive theoretical enterprises that cannot be refuted by reference to one or two problems; that the normative structure of tort law—if there is such a thing at all—may be pluralistic and not monolithic; and that, however tort law may once have been under-

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316. Of course, Calabresi and Melamed, *supra* note 6, have generated an important framework for addressing when injunctive relief, as opposed to damages, should be available, and a large body of literature has developed this framework. See also *supra* note 181 and authorities cited therein. But given the initial categorization of a right in terms of a liability rule (rather than a property rule), and given Posner's account of why compensatory damages are presumptively the appropriate level of damages, it is unclear why the common law's many deviations from compensatory damages are coherent.

317. Cf. Steven P. Croley & Jon D. Hanson, *The Non-Pecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785 (1995) (setting forth economic analysis of advisability of permitting pain-and-suffering awards).

318. See generally Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190, 1208-09 (1996) (stating many current tort reform controversies focus on remedies).

319. See, e.g., Ripstein & Zipursky, *supra* note 7 (utilizing notion of recourse to analyze causation and theory of market-share liability in mass torts).

stood, highly instrumentalist notions have now become part of the fabric of tort law. All of these are fair complaints. They speak to the need for caution in jettisoning established theories, for modesty in the application of new ones, and for integration of the insights of economic analysis, corrective justice theory, and deterrence-and-compensation instrumentalism into the model of rights, wrongs, and recourse.

The kind of analysis I have offered in this Article might give rise to a different and deeper concern. I have argued that certain aspects of tort law are best explained as embodiments of a normative principle—the principle of civil recourse. I have also suggested that there are certain appealing normative justifications for the principle of civil recourse. It might be inferred from this argument that tort law *ought* to be interpreted, in the future, to conform to the normative principles that it has been argued to embody. This inference has been vigorously defended by Ronald Dworkin in all areas of the law.<sup>320</sup> Despite the controversy it has aroused in circles of jurisprudence and constitutional theory,<sup>321</sup> it is remarkably well liked in tort law. Indeed, such an assumption appears to underlie some of the work of Landes and Posner, Epstein, Coleman, and Weinrib, and I have arguably presupposed it myself in previewing the implications of my account for the analysis of duty, proximate cause, and damages.

The inference from existing normative structure to the proper manner of articulating the law is by no means forced on judges, however. Common law judges obviously have the raw power to shape the law as they see fit; whether, on unsettled questions of law, such exercises of power are legitimate if aimed to implement a normative structure that conflicts with that embedded in tort law is a delicate question. It is particularly delicate in light of the observation that, even assuming some normative ideas to be central, a plurality of normative ideas underlies the precedents of contemporary tort law.<sup>322</sup> More importantly, tort theorists must look beyond adjudication, because as a practical matter, citizens and legislators want to know what laws they should create, abolish, or modify, and why. For all of these reasons, what I have presented—a descriptive theory of the normative

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320. See DWORKIN, *supra* note 305, at 410-13.

321. See, e.g., Larry Alexander & Kenneth Kress, *Against Legal Principles*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 279 (Andrei Marmor ed., 1995) (describing and criticizing Dworkin's and other theories that place weight on "principles" allegedly underlying legal decisions).

322. See, e.g., ENGLARD, *supra* note 298, at 64-70.

structure of tort law—is not necessarily all one might want from a tort theory.

On the other hand, a descriptive theory is worthwhile even for those who are aiming, through tort law, to realize normative goals they believe to be defensible and important in their own right. An understanding of what tort law has in some sense been designed to do may be useful in assessing the limits of what it can be made to do. If we think certain social goals ought to be realized—for example, corrective justice between private parties, efficient allocation of resources, compensation of those seriously injured, deterrence of socially costly corporate conduct—it may be that we will achieve only partial success in realizing these goals through tort law and that we ought to put our energy into other forms of law or other institutions in order to realize such goals.<sup>323</sup> Other goals—distributive economic justice, for example—may in fact conflict with the fundamental normative structure of tort law and provide reason to limit the reach of the law. We will achieve greatest success in answering these questions if we come prepared with an understanding of the normative principles our actual tort law embodies.

### VIII. CONCLUSION

Tort theory is currently dominated by two competing frameworks: law and economics and corrective justice theory. Law and economics sees tort law as an instrument for the attainment of efficient levels of activity and allocation of resources. Corrective justice theory depicts the law as an embodiment of a set of principles according to which wrongdoers who injure others have an obligation to rectify the harm they have done. Each maintains that its own view offers the best positive theory of tort law. I have argued that each is flawed and have offered an alternative to both.

My argument proceeded at two levels, one doctrinal and the other conceptual. At the doctrinal level, I argued that a fundamental feature of tort law—the substantive standing rule—is anomalous within both economic and corrective justice theory. This rule is a

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323. See, e.g., STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* 127-200 (1989) (advocating insurance and regulatory alternative to tort system); Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 78 (1993) (arguing need for expanded compensation system outside of tort law in light of the limitations intrinsic to tort law).

pervasive requirement in tort law; it underlies many of the most puzzling areas of tort doctrine, and it lies at the root of our most famous case, *Palsgraf*. Yet neither theory adequately explains the logic of *Palsgraf*. More generally, neither explains the existence of the substantive standing rule in other torts, and neither explains the idea of substantive standing. As positive theories of tort law, therefore, both frameworks are deficient.

The substantive standing rule also points to fundamental conceptual problems with both major theories. Law and economics cannot make sense of the substantive standing rule because it treats the concept of a "right" under the tort law simply as a shorthand way of referring to rights of action. This treatment, in turn, derives from economists' more general view of tort law as a series of liability rules. I argued that the norms of tort law are not mere liability rules, and I set forth an alternative conception of legal wrongs, rights, and duties in tort law. This alternative conception permits us to understand how wrongs can be "relational" and how rights can be something more than price tags for our activities.

While corrective justice theory may be able to handle the notion of rights, it too fails at a structural level. It focuses on the defendant's duty of repair, not seeing that a more fundamental set of principles in tort law concerns a plaintiff's right of action. Tort theory ought to focus upon questions about why the state empowers plaintiffs to act against defendants through civil litigation, not about why the state requires defendants to take responsibility for the harms they cause. I have offered an analysis of the notion of a "right of action" that enables us to address these questions.

Thus, law and economics and corrective justice theory both appear to be unsatisfactory as positive theories of tort law. One theory falls short because of its inability to make sense of the notion of rights and wrongs, the other because of its inability to make sense of the notion of a right of action. The substantive standing rule, which relates rights and wrongs to rights of action, dramatically illustrates the need for a theory that makes sense of both. But even apart from the doctrinal importance of the rule, any framework that misconceives rights, wrongs, or rights of action will be inadequate as a positive theory of tort law.

A different picture of tort law emerges from my critique. One aspect of tort law consists of legal rules—directives—which enjoin every person from treating any other person in certain ways. According to these rules, no one is to batter, defame, defraud, or negli-

gently injure others, or trespass upon their land. Conversely, no one is to be battered, defamed, defrauded or negligently injured, and no one is to have her land trespassed upon. The rights created by the tort law are simply ways of being treated that the tort law enjoins through legal rules. As with our statutory law, a multiplicity of policy and principle reasons underlie our existing set of legal rules specifying how people may treat one another.

A second, and equally important, aspect of tort law concerns rights of action. A private right of action is a private individual's power and privilege to act against others through the state. The substantive standing rule is a limitation on the institution of private rights of action. It permits a plaintiff to act through the state against a defendant only if the defendant has treated the plaintiff in a manner proscribed by the legal rules of tort law. The normative basis for this limitation is the idea of civil recourse, the idea that being wronged by another is what gives rise to a right to act against the other. To this extent, and in a manner that is artificial, indirect, and civil, the tort law is about getting even. More accurately, it is about *not getting even*, about what the state gives us in place of getting even.

Rights, wrongs, and recourse form the conceptual core of the law of torts. On the side of rights and wrongs, a domain of legal norms asserts that people are not to be treated in certain ways. On the recourse side, a system of rules empowers those who have been treated in the ways the law prohibits to seek redress, through the state, against those who have mistreated them. Efficiency, corrective justice, deterrence, and compensation may each have a role to play in explaining why we classify some conduct as mistreatment and not others, and why we permit recourse on certain occasions and in certain forms. But without adequate conceptions of rights, wrongs, and recourse as our framework, we cannot make sense of the basic structure of tort law.