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ARTICLE

WHAT IS A TORT?

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WHAT IS A TORT?

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INTRODUCTION

What is a tort, and what is tort law for? On one leading scholarly account, torts are legal liability rules that seek to promote the welfare of society at large by disincentivizing socially suboptimal behavior and distributing the costs of accidents to those who can best bear them.¹ Over the twentieth century, this instrumentalist view of tort law won powerful support in elite American legal culture.² But it has never gained much traction in other common law jurisdictions, where judges and legal scholars standardly suggest that private law domains such as tort are “inextricably interwoven” with interpersonal morality.³ After all, the law of torts deals in concepts — negligence, deceit, assault — that are familiar from ordinary moral life. On the classical, moralist understanding of tort law, this moralized conceptual architecture reflects tort law’s basic normative substance. At its core, the common law of torts is an institutionalized application of “common morality and common sense”⁴ — a corpus of legal doctrine formed by courts “articulating inchoate lay ideas of right and wrong.”⁵

Over the last several decades, this classical moralist view of tort law has enjoyed a revival of interest in the American legal academy,⁶ helping to revive interest in moralist approaches to the private law more generally. In the rest of the common law world, in both tort and other private

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¹ See, e.g., Catherine M. Sharkey, *Modern Tort Law: Preventing Harms, Not Recognizing Wrongs*, 134 HARV. L. REV. 1423, 1432–34 (2021) (book review); GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 39, 68 (1970).

² See Sharkey, *supra* note 1, at 1432.

³ *Smith New Ct. Sec. Ltd. v. Scrimgeour Vickers (Asset Mgmt.) Ltd.* [1997] AC 254 (HL) 280 (Lord Steyn) (appeal taken from Eng.) (“The law and morality are inextricably interwoven. To a large extent the law is simply formulated and declared morality.”).

⁴ *Doughty v. Turner Mfg. Co.* [1964] 1 QB 518 at 531 (Eng.).

⁵ S.F.C. MILSOM, A NATURAL HISTORY OF THE COMMON LAW 19 (2003).

⁶ See, e.g., JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 2 (2020).

law domains, moralism has long been academic and judicial orthodoxy.⁷ The intellectual lodestar of contemporary private law moralism, especially in tort, is the most famous opinion in the common law canon: Chief Judge Cardozo's opinion in *Palsgraf v. Long Island Railroad Co.*⁸

By now the facts of the case are familiar to us. A man attempted to jump onto a train as it was departing from a Long Island Railroad station.⁹ In the course of this attempt, the man was negligently jostled by a train attendant employed by the Long Island Railroad Company, causing the man to drop a package he was carrying underneath his arm.¹⁰ Quite improbably, the package contained some powerful explosives; the resulting explosion caused heavy scales at the other end of the train station to drop onto the head of Helen Palsgraf.¹¹ Writing for the majority of a divided New York Court of Appeals, Cardozo refused to allow Mrs. Palsgraf to recover.¹²

The lasting significance of Cardozo's opinion rests less on its conclusion, however, than on its claims about the nature of the negligence tort and the law of torts more generally — claims that have proved highly influential in common law courts as well as in the legal academy.¹³ In virtually all legal systems, including civil law jurisdictions such as Germany and Italy, courts refuse to impose negligence liability for utterly unforeseeable injuries, such as the improbable injury suffered by Mrs. Palsgraf.¹⁴ But Cardozo's opinion vigorously asserted an even more basic obstacle to her recovery than the unforeseeability of her injury. If a *plaintiff* is unforeseeable to a defendant, the opinion maintains, then the defendant cannot treat *her* wrongfully — the defendant cannot breach any duty owed *to her*, cannot commit a wrong against her as opposed to other people (or society at large).¹⁵ In tort law, Cardozo insisted, a plaintiff can only sue “for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.”¹⁶

⁷ See, e.g., ANDREW BURROWS, REMEDIES FOR TORTS, BREACH OF CONTRACT, AND EQUITABLE WRONGS 16 (4th ed. 2019) (“The common law is best regarded as a complex system of principles, based on ‘moral rights’ reasoning, modified and tempered by the desire to pursue certain long-term policies.”).

⁸ 162 N.E. 99 (N.Y. 1928). The British analog, which employs very similar reasoning, is *Bourhill v. Young* [1943] AC 92 (HL) (appeal taken from Scot.).

⁹ *Palsgraf*, 162 N.E. at 99.

¹⁰ *Id.*

¹¹ *Id.*

¹² See *id.* at 99, 101.

¹³ See Mark A. Geistfeld, *Proximate Cause Untangled*, 80 MD. L. REV. 420, 427 (2021) (“[C]ourts in the vast majority of states now follow *Palsgraf* and require the defendant to breach a relational duty owed to a plaintiff who was foreseeably injured by the defendant's tortious conduct.”).

¹⁴ See generally MAURO BUSSANI, ANTHONY J. SEBOK & MARTA INFANTINO, COMMON LAW AND CIVIL LAW PERSPECTIVES ON TORT LAW 186–91 (2022).

¹⁵ See *Palsgraf*, 162 N.E. at 99.

¹⁶ *Id.* at 100.

For tort scholars who join Cardozo in taking up the “*Palsgraf* perspective,”¹⁷ this basic doctrinal proposition — the “*Palsgraf* principle,”¹⁸ as it is sometimes called — reflects and reveals the moral heart of tort law. Tort law is about recognizing and redressing *relational wrongs*: breaches of duties owed by one private person to another.¹⁹ So unless a defendant has breached a duty to the plaintiff — unless *she* has been mistreated by his behavior — she cannot recover from him in tort.²⁰

That is because tort law, unlike the criminal law or administrative regulation, is not a set of legal liability rules that protect the public interest or incentivize socially desirable behavior.²¹ Instead, tort law is “irreducibly relational.”²² The law lays down *relational norms of conduct* — legal duties that we owe to other people.²³ A tort such as negligence or battery is a sort of relational legal wrong, which consists in

¹⁷ The term “*Palsgraf* perspective” is drawn from Benjamin C. Zipursky, *Palsgraf, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1792 (2012) [hereinafter Zipursky, *Palsgraf, Punitive Damages, and Preemption*]. Representative works include: GOLDBERG & ZIPURSKY, *supra* note 6, at 198; Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in PHILOSOPHY AND THE LAW OF TORTS 214, 219 (Gerald J. Postema ed., 2001); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 15 (1998) [hereinafter Zipursky, *Rights, Wrongs, and Recourse*]; ARTHUR RIPSTEIN, PRIVATE WRONGS 90 (2016); Ernest J. Weinrib, *The Passing of Palsgraf?*, 54 VAND. L. REV. 803, 808 (2001); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 160 (1995); Stephen Perry, *The Role of Duty of Care in a Rights-Based Theory of Negligence Law*, in THE GOALS OF PRIVATE LAW 79, 104 (Andrew Robertson & Tang Hang Wu eds., 2009); John Oberdiek, *It's Something Personal: On the Relationality of Duty and Civil Wrongs*, in CIVIL WRONGS AND JUSTICE IN PRIVATE LAW 301, 301 (Paul B. Miller & John Oberdiek eds., 2020); HANOCH DAGAN & AVIHAY DORFMAN, RELATIONAL JUSTICE 3 (2024); ROBERT STEVENS, TORTS AND RIGHTS 95 (2007); ALLAN BEEVER, REDISCOVERING THE LAW OF NEGLIGENCE 297, 302 (2007); and Christopher Essert, *The Value of the Neighbour Relation*, in PRIVATE LAW AND PRACTICAL REASON 297, 301–02 (Haris Psarras & Sandy Steel eds., 2023). Accounts that can be understood as embracing some but not all aspects of the *Palsgraf* perspective, and that are subject to some but not all of the criticisms I press, include Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107, 108–09 (2011); Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 154 (2011); GREGORY C. KEATING, REASONABLENESS AND RISK 132 (2022); Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 AM. J. JURIS. 143, 196 (2002); Sandy Steel, *Compensation and Continuity*, 26 LEGAL THEORY 250, 250 (2020); Steven Schaus, *Wrongs to Us*, 121 MICH. L. REV. 1185, 1186–88 (2023); and STEPHEN A. SMITH, RIGHTS, WRONGS, AND INJUSTICES 133–34 (2019).

¹⁸ John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remediating Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 380 (2013). Other terms have also been used to describe the principle. See, e.g., GOLDBERG & ZIPURSKY, *supra* note 6, at 198 (“proper-plaintiff principle” (emphasis omitted)); Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 17, at 5 (“substantive standing requirement”).

¹⁹ See GOLDBERG & ZIPURSKY, *supra* note 6, at 28.

²⁰ See *id.* at 188.

²¹ *Id.*

²² RIPSTEIN, *supra* note 17, at 73.

²³ See *id.* at 200; John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1564 (2006) (“[T]ort is a collection of ‘dos’ and ‘don’ts’: It mandates how we are obligated to act with regard to the interests of others and provides persons who are victimized by breaches of these obligations with the ability to obtain satisfaction, through law, for having been mistreated.”).

the breach of one such relational duty: “do not injure another person by treating her negligently” (the tort of negligence), “do not harmfully or offensively contact another person” (the tort of battery), “do not make a false and injurious communication about another person” (the tort of defamation), and so on.²⁴ By laying down relational legal duties and wrongs that recognize relational *moral* duties and wrongs — duties and wrongs that we acknowledge in everyday moral life — tort law allows us to obtain redress from those who have treated us wrongfully.²⁵ According to the *Palsgraf* perspective, that is tort law’s core aspiration and purpose: to recognize and redress relational wrongs.

This Article argues that the *Palsgraf* perspective is mistaken and proposes a different moral picture of tort law’s normative substance and doctrinal structure. Tort law may be centrally concerned with “common morality,” rather than promoting the welfare of society at large.²⁶ But torts are not relational legal wrongs, and their purpose is not to recognize or redress relational moral wrongs. Torts are *remedial pigeonholes*: legal liability rules that identify the complex conditions under which a defendant is morally liable to provide a plaintiff with compensation or other forms of remedial relief. Rather than recognizing a species of relational moral wrongdoing or interpersonal mistreatment, a tort such as negligence is a coarse doctrinal device that identifies instances of “moral wrongdoing for which the offender *must pay*,”²⁷ whether or not he has treated the plaintiff wrongfully. Other torts identify forms of behavior that render a defendant liable to pay compensation for resulting injuries although he has not behaved wrongfully at all. In both negligence and the other torts, a defendant may be liable to compensate a plaintiff even if he has not wronged or mistreated her. Contra the *Palsgraf* perspective, relational moral wrongdoing is not the basis of remedial liability, either in ordinary morality or the law of torts.

What is? Like the ordinary morality that it reflects, the common law contemplates many answers.²⁸ Many of these answers, however, have a common core: the defendant’s *moral responsibility* for causing *unjust damage* to the plaintiff, in the sense of infringing some *right against injury* that the plaintiff holds. The idea of responsibility for unjust damage does not receive clean expression anywhere in the common law.

²⁴ See RIPSTEIN, *supra* note 17, at 200.

²⁵ See GOLDBERG & ZIPURSKY, *supra* note 6, at 154–55.

²⁶ This Article shares with the *Palsgraf* perspective the basic assumption that the doctrinal and conceptual core of tort law (including the heartland of the tort of negligence) is concerned with a set of ordinary moral norms. It joins issue on the character of those moral norms and the formal doctrinal structures that implement them. It is plausible, however, that tort law also leverages this moralized doctrinal apparatus to serve larger societal ends. For an exploration of how it might do so, see Douglas A. Kysar, *The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism*, 9 EUR. J. RISK REGUL. 48, 58–64 (2018).

²⁷ *Donoghue v. Stevenson* [1932] AC 562 (HL) 580 (Lord Atkin) (appeal taken from Scot.) (emphasis added).

²⁸ Others are briefly discussed *infra* pp. 1076–78.

It receives somewhat more transparent expression in many civil law jurisdictions, where the private law (including tort law) is largely codified in statute. So, for example, the most important tort law clause in the Italian *Codice Civile*, CC 2043, lays down that “[a]ny intentional or negligent act that causes unjust damage [*danno ingiusto*] to another person obliges the person who has committed the act to pay damages.”²⁹ It is standardly supposed in Italian legal thought that a loss suffered by a plaintiff is compensable — that it counts as “damage” rather than mere “loss” — only if it infringes a right, or injures a protected interest, that she holds.³⁰ There are similar clauses in other civil law codes.³¹ Thus, for example, section 823(1) of the *Bürgerliches Gesetzbuch* (BGB), the German Civil Code, lays down that “[a] person who, intentionally or negligently, unlawfully injures the life, limb, health, freedom, property or some other right of another person is liable to provide compensation to the other party for the damage arising therefrom.”³²

The civil law codes identify when a defendant is morally responsible for causing unjust damage, such that she is morally liable to compensate her victim, through generally worded legal liability rules such as CC 2043. The common law performs the same function in a more opaque and fragmentary fashion, through its “‘pigeonhole’ system of nominate torts,”³³ a motley array of more specific liability rules such as battery, defamation, and negligence. Many of these causes of action (such as battery and defamation) take their names from species of relational moral wrongdoing, just like the pigeonhole causes of action found in the classical Roman law³⁴ from which modern civil law codes largely derive.³⁵ But it is a mistake to infer the character of the law’s moral substance from its outer doctrinal form — to insist, as defenders of the *Palsgraf* perspective often do, on “taking [tort law’s] structures and

²⁹ Art. 2043 Cod. Civ. [Italian Civil Code] (It.) (“Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno.”) (author’s translation). The key phrase *danno ingiusto* has been translated into English in other ways, such as “unjustified damage” and “wrongful damage.” 2 DIGEST OF EUROPEAN TORT LAW 30 n.86 (Bénédict Winiger et al. eds., 2011).

³⁰ BUSSANI, SEBOK & INFANTINO, *supra* note 14, at 155. Classically, the relevant set of rights included “rights to property, liberty, life or reputation.” *Id.* In the last sixty years, Italian tort jurisprudence has liberalized so as to recognize other protected interests. *Id.*

³¹ See 6 THE DEVELOPMENT AND MAKING OF LEGAL DOCTRINE 223 app. (Nils Jansen ed., 2010); Helmut Koziol, *Damages*, in PRINCIPLES OF EUROPEAN TORT LAW 19, 27 (Eur. Grp. on Tort L. 2005); Claudia María Castro Valle, *A First Approach to Tort Liability in the Central American Civil Codes*, 11 J. CIV. L. STUD. 189, 190 (2018).

³² Bürgerliches Gesetzbuch [BGB] [Civil Code], § 823, para. 1 (Ger.), https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf [<https://perma.cc/EF4V-J233>]; BUSSANI, SEBOK & INFANTINO, *supra* note 14, at 14–15.

³³ Ferdinand F. Stone, *Touchstones of Tort Liability*, 2 STAN. L. REV. 259, 272 (1950).

³⁴ See generally A.J.B. Sirks, *Delicts*, in THE CAMBRIDGE COMPANION TO ROMAN LAW 246, 247 (David Johnston ed., 2015) (describing different kinds of Roman delicts); NILS JANSEN, THE STRUCTURE OF TORT LAW 141–43 (Sandy Steel trans., 2021).

³⁵ See David Ibbetson, *How the Romans Did for Us: Ancient Roots of the Tort of Negligence*, 26 U. N.S.W. L.J. 475, 477 (2003).

doctrines at face value.”³⁶ Tort law’s formal structure should certainly be taken *seriously*. But that requires taking seriously the complex and unruly relationship between the law’s moral substance and its doctrinal form.³⁷ Like the formulary actions in classical Roman law and the writs of action in medieval English common law, today’s common law torts do not wear their moral commitments on their sleeves.³⁸

Distinguishing between relational wrongdoing and moral responsibility for causing unjust damage (that is, infringing rights against injury) requires fixing some terms. In ordinary moral discourse, terms such as “duty,” “right,” and “wrong” are polysemous. The term “duty,” as it is most commonly used, refers to a sort of *norm of conduct*, or *standard of behavior*, which tells us to refrain from acting in a certain way. A moral duty, so understood, is largely or exclusively an *evidence-relative* phenomenon: It reflects those reasons that are accessible to an agent from her epistemic and deliberative position.³⁹ To violate a duty owed to another person is thus to *wrong* or *mistreat* her by giving insufficient weight in one’s moral deliberation to moral reasons that reflect her status as a “self-originating source[] of claims.”⁴⁰ Sometimes the term “right” is used as a synonym or conceptual flipside of “duty” (and thus the correlative of “wrong”): To violate a duty owed to another person *just is* to violate her right and to wrong her. This is the usage that Cardozo himself seems to have had in mind when he spoke of duties,

³⁶ RIPSTEIN, *supra* note 17, at 23; GOLDBERG & ZIPURSKY, *supra* note 6, at 46 (“[T]he economic school and social welfare school . . . go astray for the same reason: namely, their Holmesian unwillingness to take the language of tort law at face value . . .”).

³⁷ In making this argument, this Article pushes back against a certain sort of formalism that has substantial currency not only among defenders of the *Palsgraf* perspective but also among philosophically and doctrinally oriented private law scholars more generally. But “formalism” is a multifarious word. There are other commitments sometimes described as “formalist” in nature — such as a normative commitment to bright-line rules over discretionary standards in adjudication — that this Article’s argument does not touch. For an illuminating discussion of formalism in contemporary private law scholarship, see generally Paul B. Miller, *The New Formalism in Private Law*, 66 AM. J. JURIS. 175 (2021).

³⁸ Cf. Nils Jansen, *The Development of Legal Doctrine in Europe*, in THE DEVELOPMENT AND MAKING OF LEGAL DOCTRINE, *supra* note 31, at 6 (“As in Roman law, the choice between [medieval English common law’s] actions was often less determined by questions of substantive law than by considerations of a purely procedural nature. None the less, beyond this disparate picture natural law thinking was already lurking . . .” (footnotes omitted)).

³⁹ On the distinction between evidence-relative and fact-relative moral phenomena, see 1 DEREK PARFIT, ON WHAT MATTERS 150–64 (Samuel Scheffler ed., 2011); THOMAS HURKA, BRITISH ETHICAL THEORISTS FROM SIDGWICK TO EWING 78–85 (2014); and Gregory C. Keating, *Strict Liability Wrongs*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 292, 299–300 (John Oberdiek ed., 2014). Similar distinctions are recognized in JOHN GARDNER, TORTS AND OTHER WRONGS 139 (2019); and GOLDBERG & ZIPURSKY, *supra* note 6, at 183–88.

⁴⁰ John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 543 (1980).

rights, and wrongs in *Palsgraf*, and defenders of the *Palsgraf* perspective largely follow him in this regard.⁴¹

There is, however, a different and equally important sense of “right,” one that is perhaps more familiar to moral philosophers and scholars in the civil law tradition than to common law tort scholars. A moral right, in this sense, is a reason for action — a reason that is grounded in facts about the person whose interests and standing the right protects, whether or not those facts are epistemically accessible to an agent.⁴² So, for example, it is possible for an agent to infringe another person’s property right innocently and unforeseeably, as by walking across land that does in fact belong to the plaintiff although the defendant could not reasonably have known it. Similarly, to borrow an example from Professor Judith Thomson, an agent might infringe another person’s moral right against bodily injury by flipping a light switch in her home that unforeseeably generates a freak current and electrocutes him.⁴³

Moral rights, in this sense, are *fact-relative*: Whether an agent infringes a fact-relative right, or *right against injury*, depends on *what the agent actually does*, not on what she reasonably believes she might do.⁴⁴ Thus an agent who infringes another person’s right against injury does not breach any duty to him, or wrong him, except (perhaps) in the extremely thin sense that her action has in fact injured him.⁴⁵ Put another way, an agent can infringe another person’s right against injury without in any way mistreating that person or behaving culpably or disrespectfully toward him.

Only in the property torts, such as trespass and conversion, does tort law directly encode and enforce moral rights against injury, and that is largely for contingent historical reasons involving the common law’s use of property torts to perform noncompensatory functions such as settling disputes about title.⁴⁶ Most of the time, tort law — like the common

⁴¹ See GOLDBERG & ZIPURSKY, *supra* note 6, at 16 (“A tort is a contravention of one of these judicially recognized (or legislatively enacted) relational directives, and the contravention of a relational directive is at once both a violation of the victim’s right and a breach of the tortfeasor’s duty.”).

⁴² See, e.g., Joel Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243, 255 (1970); Joseph Raz, *On the Nature of Rights*, 93 MIND 194, 195–96 (1984); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 180 (1986); see also JANSEN, *supra* note 34, at 343–45 (discussing rights as grounds of legal duties).

⁴³ JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 229 (1990).

⁴⁴ On evidence-relative versus fact-relative moral phenomena, see sources cited *supra* note 39.

⁴⁵ This very thin sense of “duty” has been characterized using various terms. See Victor Tadros, *Beyond the Scope of Consent*, 50 PHIL. & PUB. AFFS. 430, 434 (2022) (“fact-relative dut[ies]”); GARDNER, *supra* note 39, at 142 (“obligations to succeed” (footnote omitted)); GOLDBERG & ZIPURSKY, *supra* note 6, at 113 (“dut[ies] of noninjury”). Because fact-relative duties cannot guide an agent’s behavior (at least not directly), and violating them does not render an agent open to criticism or blame, it is controversial whether they should be understood as genuine duties at all. For thoughts along these lines, see T.M. SCANLON, *MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME* 47–52 (2008).

⁴⁶ See *infra* notes 302–05 and accompanying text.

sense morality that it reflects — holds a defendant liable to compensate a plaintiff only if the defendant's infringement of the plaintiff's right is *attributable to* and *reflective of* some morally significant feature of the defendant's responsible agency (such as, paradigmatically, a culpable and wrongful choice). A great deal of tort doctrine consists in the law's attempt to articulate, elaborate, and enforce "informed common sense" about "how far the responsibility of the defendant ought fairly to extend"⁴⁷ for causing unjust damage to other people, that is, infringing their fact-relative rights against injury.

This Article argues that moral responsibility for causing unjust damage (that is, infringing fact-relative rights against injury) lies at the moral core of tort law — not relational wrongdoing (that is, the breach of relational duties). The following cases may help to provide an initial sense of how the two diverge.

Consider, first, a case in which a defendant is liable for negligently injuring an unforeseeable plaintiff. Suppose the defendant is conducting construction work near a building that appears to be owned solely by Alma, a local celebrity who is famously averse to litigation. To limit his legal risk, the defendant undertakes a laborious investigation of title — so laborious an investigation that it is fantastically improbable, once the investigation concludes, that anyone other than Alma owns the building. If against the odds there *does* exist another owner of the building, Bessie, and if the defendant foreseeably destroys the building through conducting his construction work carelessly, it seems clear that he is liable to compensate Bessie no less than Alma. That is true although Bessie is not a foreseeable victim, and the defendant has not (therefore) breached any duty to be careful *toward her*. Instead, the defendant's liability to compensate Bessie rests on the fact that he has negligently and foreseeably risked causing a certain sort of unjust damage (that is, infringing a certain sort of right), this risk has materialized, and Bessie does in fact hold one of the rights thereby infringed.

The defender of the *Palsgraf* perspective might respond that Bessie *is* foreseeable under a suitably generic description (say, "an owner of that building, whomever he or she may be").⁴⁸ But this sense of victim

⁴⁷ *Kuwait Airways Corp. v. Iraqi Airways Co.* [2002] UKHL 19, [2002] 2 AC 883, 1091 (Lord Nicholls of Birkenhead) (appeal taken from Eng.).

⁴⁸ Defenders of the *Palsgraf* perspective often insist that, under the principle in *Palsgraf*, the defendant must treat the plaintiff carelessly (or otherwise wrongfully) only under some abstract and generic description. See, e.g., WEINRIB, *supra* note 17, at 165 ("In the *Palsgraf* case, for instance, it does not matter whether the defendant foresaw the danger to the plaintiff, Mrs. Palsgraf, as a specific and identified person . . ."); see also John Oberdiek, *The Wrong in Negligence*, 41 OXFORD J. LEGAL STUD. 1174, 1181–82 (2021) (predicating tort liability on the breach of a duty of care "owe[d] [to] another individual, whether named or described generically," *id.* at 1181). Even those who reject the *Palsgraf* perspective, in various respects, sometimes suggest such a view. See, e.g., KEATING, *supra* note 17, at 152 ("Obligations of reasonable care . . . are relations between and

foreseeability seems strained and artificial — and this response makes a hash, therefore, of other explanatory roles that victim foreseeability plays in legal and moral thought. Imagine, for example, that a construction mogul wishes to build a shopping center. To do so, she must engage in some blasting that will likely destroy a nearby (currently uninhabited) residence that reasonably appears to be owned solely by Abelard. Absent exigent circumstances, it is justifiable and nonculpable for the construction mogul to proceed if and only if she is reasonably certain that she has obtained the consent of Abelard. That is because Abelard is the only foreseeable owner of the building. Even if there exists some other, hidden, owner of the building (call him Baldwin), that fact is plainly irrelevant to whether it is justifiable and nonculpable for the construction mogul to risk destroying the residence. It is irrelevant precisely because Baldwin is not, in any natural or independently plausible sense of the term, a *foreseeable* victim (supposing his existence cannot be ascertained with reasonable diligence).

It is certainly possible to define an unorthodox sense of victim foreseeability under which hidden victims such as Bessie and Baldwin *do* count as foreseeable. That such a stipulative artifice is required to capture the intuitive moral phenomena, however, suggests that these phenomena are in truth explained by moral principles that do not hinge on victim foreseeability at all. In any event, even if the *Palsgraf* principle helps itself to this artificial sense of victim foreseeability, the principle cannot ultimately be saved. For the *Palsgraf* principle is not, at bottom, about victim foreseeability (or plaintiff foreseeability) at all. Rather, the principle maintains that a plaintiff must be wronged — must be treated carelessly or otherwise wrongfully by the defendant — in order to recover. Plaintiff unforeseeability is simply *one* sort of factor that precludes a defendant from treating the plaintiff carelessly, from breaching a duty to be careful toward her.

The *Palsgraf* principle is equally impugned, therefore, by negligence cases in which a defendant is liable to compensate a *foreseeable* plaintiff whom he has not treated carelessly. Imagine, for example, that a defendant runs a business that engages in a lucrative activity that spews toxic chemicals into the surrounding air — creating a significant risk of killing some nearby residents and damaging a neighboring piece of land, Blackacre.⁴⁹ It is negligent for the defendant to direct his factory to engage in this activity, for the commercial advantages that he and his business's shareholders will thereby gain do not justify imposing these risks of personal injury and property damage. Suppose the defendant

among representative persons, with respect to the kinds of dangers that we might reasonably foresee happening.”). For a precise articulation of this generic understanding of the *Palsgraf* principle, see Jed Lewinsohn, “*I Didn’t Know It Was You*”: *The Impersonal Grounds of Relational Normativity*, 59 *NOÛS* 191, 194–96 (2025).

⁴⁹ For a structurally similar example involving battery, see *infra* notes 173–75 and accompanying text.

has excellent reason to believe that the owner of Blackacre (whoever he or she may be) is a large shareholder in his factory — and that he or she has enthusiastically consented to the defendant's continuation of his chemical-generating activity, notwithstanding the associated risk of damage to Blackacre, because he or she stands to reap a large financial gain (on balance) if this activity continues. It turns out, however, that the defendant's evidence is misleading; in fact, the owner of Blackacre is *not* a shareholder in the defendant's business and has not consented to the defendant's pollution-generating activity.

If the defendant's wrongful activity foreseeably damages Blackacre, he is surely liable to compensate its owner. But the defendant has not breached any duty to be careful *toward her* — has not treated *her* carelessly as opposed to other people. That is true whether she is identified under a specific description (such as her name) or under some abstract and generic description (such as “the owner of Blackacre” or “the owner of that parcel of land” or “the owner of the parcel of land that my action might foreseeably damage”).⁵⁰ After all, the defendant had excellent reason to believe that the plaintiff, even if described in some such generic fashion, consented to his activity.⁵¹ No duty to be careful toward the plaintiff has been breached, and yet the plaintiff may plainly recover. That is because relational wrongdoing toward the plaintiff is not the true ground of recovery. Rather, the defendant is liable because he is morally responsible for infringing the plaintiff's right against property damage.

In continental Europe, the non-relational normative principles operative beneath the relationally worded Romanist causes of action were distilled over many centuries by doctrinal scholars and moral philosophers, a process that culminated in the enactment of continental codes such as the Italian Civil Code and the German BGB.⁵² In England and America, with a few exceptions, such sweeping attempts at normative distillation and doctrinal reconfiguration have rarely occurred.⁵³

⁵⁰ See sources cited *supra* note 1.

⁵¹ If the owner of Blackacre *actually did* give consent, the defendant is not liable to compensate her — but that is simply because, by consenting, she waived her right against such damage. Thus, while the defendant may be causally and morally responsible for the damage the plaintiff suffers, this damage is *not unjust*; it infringes no right that the plaintiff holds.

⁵² See Reinhard Zimmermann, *Codification: History and Present Significance of an Idea*, 3 EUR. REV. PRIV. L. 95, 98 (1995).

⁵³ The most important arguable exception is the California Civil Code, which codified the state's tort law in statutory form. See Maurice E. Harrison, *The First Half-Century of the California Civil Code*, 10 CALIF. L. REV. 185, 185 (1922) (describing the California Civil Code as “the first attempt on the part of an English-speaking community of considerable size to codify comprehensively the substantive common law”). In the famous case of *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968), the California Supreme Court asserted that the central tort provision of the Civil Code, section 1714, “states a civil law and not a common law principle,” before mentioning with approval that “some common law judges and commentators have urged that the principle . . . serves as the

Despite the formal doctrinal divergence between common law tort and civil law tort, this Article argues that the two categories' moral substance is much the same. Like the general clauses of the civil law, the pigeonhole causes of action in the common law are centrally concerned with identifying and enforcing remedial moral liabilities that arise from a defendant's moral responsibility for infringing a plaintiff's rights against injury.

Call this the *pigeonhole perspective*. This Article argues for the pigeonhole perspective by examining a range of common law tort doctrines that utilize the language of relational wrongs to identify and enforce, often quite opaquely, remedial moral liabilities that are not grounded in relational wrongdoing.

Take the venerable doctrine of transferred intent in battery.⁵⁴ Suppose that a defendant shoots at one person in an attempt to murder him. He thereby kills a different person who is unforeseeably on the scene. If this unforeseeable plaintiff's estate brings suit, the defendant will be held liable to the plaintiff by means of the fiction that the defendant "intended" to harm her — although, in truth, the defendant did not intend harm to this plaintiff, or otherwise behave wrongfully toward her, any more than the train operator behaved wrongfully toward the unforeseeable Mrs. Palsgraf.⁵⁵ For this reason, as Cardozo himself obliquely recognized in *Palsgraf* (but quickly brushed aside), transferred intent doctrine cannot be reconciled with the *Palsgraf* principle,⁵⁶ which insists relational wrongdoing is the moral gravamen and *sine qua non* of tort liability.⁵⁷

Rather, transferred intent doctrine indirectly recognizes a moral phenomenon that tort law elsewhere recognizes more explicitly: While the scope of a defendant's moral responsibility is *presumptively* limited to the reasonably foreseeable outcomes of his action, sufficient culpability can expand the scope of a defendant's moral responsibility (and the remedial moral liability it grounds) to outcomes that lie beyond the boundaries of reasonable foreseeability. The black letter of battery doctrine is relational — it demands a wrongful intention toward the plaintiff. Transferred intent doctrine remodels this relational formal architecture through an "arrant, bare-faced fiction of the kind dear to the heart of the medieval pleader,"⁵⁸ in order to enforce a compensatory moral liability that does not arise from relational moral wrongdoing.

foundation of our negligence law." *Id.* at 564. This position is, on a natural interpretation, congruent with this Article's claim that the normative principles underlying tort law are substantially continuous across common law and civil law systems.

⁵⁴ See *infra* section II.A, pp. 1035–46.

⁵⁵ See William L. Prosser, *Transferred Intent*, 45 TEX. L. REV. 650, 650 (1967) (quoting State v. Batson, 96 S.W.2d 384, 389 (Mo. 1936)).

⁵⁶ See *Palsgraf*, 162 N.E. at 101.

⁵⁷ See *id.* at 100.

⁵⁸ Prosser, *supra* note 55, at 650.

Taking tort law's formal surface at moral face value distorts the nature of tort law's underlying moral commitments, thus inhibiting the philosophical project of delineating their contours and assessing whether they can withstand reflective scrutiny. If torts are not relational moral wrongs, and relational wrongdoing is not required to hold a defendant liable to a plaintiff in tort, then the moral logic of central aspects of tort doctrine (such as the proximate cause element in negligence) cannot be understood along the lines that defenders of the *Palsgraf* perspective and other philosophically oriented tort theorists often suppose. Judges, of course, are not philosophers; their task is to faithfully elaborate legal principles in light of the received doctrine and its underlying normative commitments, not to overturn those commitments in the name of philosophical reflection. But the loss of analytical clarity incurred by the *Palsgraf* perspective distorts the judicial function as well. For there are cases, we will see, in which tort law's underlying moral commitments imply that a plaintiff should recover more often than the relational formal structure of its causes of action allows. That is precisely why the law has been compelled to resort to doctrinal fictions such as transferred intent. Once we see how the law's formal structure fails to fully implement its substantive commitments, we can formulate and entertain new possibilities for giving those commitments doctrinal and institutional expression. So, for example, we might devise new remedial structures, such as new derivative causes of action, that "piggyback" on the relational structure of existing torts in order to achieve non-relational remedial ends.⁵⁹ To identify the divergence between the law's formal structure and its moral substance is to liberate our imagination about the space of doctrinal possibilities — to appreciate that we can reconfigure the existing forms in service of the moral principles they are supposed to serve.

The Article proceeds as follows. Part I outlines the *Palsgraf* perspective and compares it to the pigeonhole perspective. It explains how, on the latter, the common law of torts is implementing a set of moral principles about a defendant's responsibility for unjust damage (infringing the plaintiff's rights against injury) and the resulting remedial moral liability, which are more directly implemented by the tort liability rules we find in civil law. Part II compares the *Palsgraf* perspective and the pigeonhole perspective across a wide range of issues in tort doctrine and theory, in each case arguing that the pigeonhole perspective yields a more plausible account of the law's operation and its underlying normative commitments. The Article's Conclusion briefly explores some methodological implications regarding the role of legal fiction and doctrinal opacity in interpretive private law theory, and some deeper philosophical questions about whether tort law's underlying moral commitments can ultimately survive reflective philosophical scrutiny.

⁵⁹ See *infra* notes 225–39 and accompanying text.

Before proceeding, a word about methodology may be warranted. In line with a venerable tradition of common law torts scholarship, including early scholarship on *Palsgraf*, this Article makes extensive use of hypothetical cases.⁶⁰ Such cases can help to elicit the structure of the common moral sensibilities and convictions embedded in tort doctrine, and thereby to illuminate the law's underlying moral commitments. The history of *Palsgraf* itself supplies a vivid demonstration of this point. Two days after *Palsgraf* was argued in the Appellate Division of the New York Supreme Court, a distinguished group of torts scholars and judges, convened by the American Law Institute (ALI), met to discuss a hypothetical case strikingly similar to the facts of *Palsgraf*.⁶¹ The case was offered for discussion (independently, it seems) by Professor Francis Bohlen, the reporter for the First Restatement of Torts.⁶² Among the luminaries present at this discussion was Cardozo.⁶³ In the meeting's transcript, we find Cardozo's skeletal articulation of the moral account of tort liability that he would later defend in *Palsgraf*.⁶⁴ We also find the equally distinguished jurist Learned Hand offering a skeletal articulation of something like the competing moral account of tort liability that I defend here.⁶⁵ It is plausible to surmise that this discussion influenced how *Palsgraf* was decided, and thereby had a considerable effect on the course of the common law. But in that ALI meeting, it was Hand, not Cardozo, who better understood the moral character and doctrinal structure of tort law. That, at least, is what this Article immodestly attempts to show.

I. TWO MORAL PICTURES OF TORT LAW

A. *The Palsgraf Perspective: Torts as Relational Wrongs*

Ordinary moral thought recognizes moral duties that are *relational* as well as duties that are *impersonal*. A relational moral duty is owed

⁶⁰ See, e.g., William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 20–21 (1953); E. Anthony Machin, *Negligence and Interest*, 17 MOD. L. REV. 405, 410 (1954). Accomplished examples of this method in recent tort theory include SANDY STEEL, OMISSIONS IN TORT LAW 11 (2024); Lewinsohn, *supra* note 48, at 199; ADAM SLAVNY, WRONGS, HARMS, AND COMPENSATION (2023); and Rebecca Stone, *Who Has the Power to Enforce Private Rights?*, in 2 OXFORD STUDIES IN PRIVATE LAW THEORY 25, 36–37 (Paul B. Miller & John Oberdiek eds., 2023).

⁶¹ ANDREW L. KAUFMAN, CARDOZO 287–88 (1998).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 289–93 (quoting A.L.I., Torts Conference Minutes (Oct. 23, 1927)).

⁶⁵ See *id.* at 289–92 (“In negligence are you approaching it on the theory that the law sets up a series of duties? I had always supposed that the better view was that you are responsible for the consequences of your act but there was a limitation based upon the degree you are bound to apprehend them.” *Id.* at 290 (quoting A.L.I., Torts Conference Minutes, I, 39–43) (statement of Judge Hand)).

to another person, such that she is *wronged* by its breach.⁶⁶ By contrast, an impersonal moral duty is owed to no one, or (perhaps) owed to the world at large. Suppose, for example, that *A* has reason to believe that detonating a piece of dynamite would destroy an ancient and beautiful cave that no one will ever see. Absent some good reason to do so, it would plausibly be morally wrong for *A* to detonate the dynamite, but doing so would not wrong anyone else — it would simply be wrong, full stop. If, by contrast, *A* has reason to believe that detonating the dynamite will kill another person, *B*, or destroy her property, then *A*'s duty not to detonate the dynamite is owed *to B*, such that he would wrong her by breaching this duty.⁶⁷

The *Palsgraf* perspective's organizing interpretive commitment is that relational duties and wrongs — rather than impersonal duties and wrongs, or incentives for promoting societal interests or impersonal values — lie at the heart of tort law. Today, its scholarly defenders fall into two major camps. *Pragmatic constructivists* such as Dean John Goldberg and Professor Benjamin Zipursky believe that each tort — negligence, battery, defamation, and so on — defines a sort of relational legal wrong, which in turn encodes (though not precisely) a certain sort of relational moral wrong.⁶⁸ Pragmatic constructivists tend to maintain a sort of studious philosophical quietism about the nature and content of these relational moral wrongs.⁶⁹ Their focus is instead on elucidating the norms and practices of the courts and the legal profession, through which tort doctrine draws upon and roughly encodes relational moral wrongs recognized in ordinary moral life.⁷⁰

By contrast, *philosophical formalists* such as Professors Arthur Ripstein and Ernest Weinrib believe that tort law's gallery of relational legal wrongs together encodes one overarching sort of relational moral wrong, the wrong of acting as another person's master, by violating that

⁶⁶ Some leading philosophical treatments of relational morality include STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT* (1st paperback ed. 2009); T. M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1st paperback ed. 2000); and R. JAY WALLACE, *THE MORAL NEXUS* (2019).

⁶⁷ For similar examples, see SLAVNY, *supra* note 60, at 68–69.

⁶⁸ See John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 17, 35 (John Oberdiek ed., 2014) (“[T]ort law tends to include legal directives that closely resemble customary norms of conduct — socially accepted moral directives. Nonetheless, the norms of tort are sharper in some places and duller in others, and more structured in certain respects, too.”); John C.P. Goldberg & Benjamin C. Zipursky, *Replies to Commentators*, 41 *LAW & PHIL.* 127, 133 (2022) (“[T]here are good reasons for tort law to define wrongs and to articulate standards of conduct that diverge *to some degree* from their moral counterparts.” (emphasis added)); *id.* at 134 (“[C]ourts have long fashioned and applied tort law so that it stays in touch with moral norms without *strictly requiring* moral wrongdoing as a condition of liability.” (emphasis added)).

⁶⁹ See *infra* notes 284–86 and accompanying text.

⁷⁰ See, e.g., GOLDBERG & ZIPURSKY, *supra* note 6, at 234 (“[Tort law’s] content . . . derives from a set of well-established moral judgments that the courts have elaborated in both uncontroversial and controversial ways.”).

person's equal freedom to set their own ends — either by using that person's means (that is, his body or property) without his consent,⁷¹ or by imposing on that person an abnormal risk of damage to his means.⁷² Thus, philosophical formalists are inclined to monism where pragmatic constructivists are inclined to pluralism. Unsurprisingly, philosophical formalists' interpretive enterprise is far from philosophically quietist. Their aim is to elucidate the unified relational moral wrong of acting as another person's master by reference to Kantian and Aristotelian philosophy, and thereby to defend it not only as an understanding of the law but also as a first-order normative view of how tort law ought to operate.⁷³

Thus pragmatic constructivists and philosophical formalists diverge in various important respects.⁷⁴ Despite these differences, both camps agree that a tort *just is* a relational legal wrong that reflects a relational moral wrong — and that providing redress for relational wrongs (or empowering the victim of such a wrong to obtain redress at her option) is tort law's central normative aspiration.

Consider how this understanding of tort law deals with the facts in *Palsgraf* itself. The freakish outcome that Mrs. Palsgraf suffered, as a result of the train attendant's negligent treatment of the youth attempting to board his train, was not a foreseeable result of that negligent action.⁷⁵ Thus many scholars and judges have supposed that Mrs. Palsgraf's claim fails simply for want of proximate cause (which, to a rough approximation, requires that the plaintiff's injury be the foreseeable materialization of the risk that made the defendant's action wrongful).⁷⁶ As defenders of the *Palsgraf* perspective note, however, treating

⁷¹ See *infra* note 185 and accompanying text.

⁷² See *infra* note 186 and accompanying text.

⁷³ See, e.g., RIPSTEIN, *supra* note 17, at xi, 4; WEINRIB, *supra* note 17, at 84. Professors Stephen Perry and Robert Stevens defend philosophical views that are largely though not entirely similar. See Perry, *supra* note 17, at 107 (“[T]he fundamental moral right underlying negligence law is, roughly, a right not to be caused reasonably foreseeable physical harm as a proximate result of another person's engaging in unreasonably risky conduct towards one.”); STEVENS, *supra* note 17, at 107 & n.71 (arguing that “the golden rule provides a better explanation for . . . the law of torts than a utilitarian or wealth maximization approach,” *id.* at 107, and comparing this view to Kant's, *see id.* at 107 n.71).

⁷⁴ For example, while pragmatic constructivists generally argue that tort law's purpose is to empower the victims of wrongs to obtain redress for being wronged, if those victims so choose, philosophical formalists argue that tort law's purpose is to enforce the compensatory moral duties that one person incurs by wronging another (even if the ordinary mode of enforcement is via a suit commenced at the victim's option). Which of these two aims is the (more) fundamental aim of tort law has been the subject of an extended intramural debate among scholars sympathetic to the *Palsgraf* perspective. See generally Hershovitz, *supra* note 17.

⁷⁵ See *Palsgraf*, 162 N.E. at 99 (“Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed.”).

⁷⁶ See, e.g., Edward S. Adams, Gordon B. Brumwell & James A. Glazier, *At the End of Palsgraf, There Is Chaos: An Assessment of Proximate Cause in Light of Chaos Theory*, 59 U. PITT. L. REV. 507, 507 (1998) (“The New York Court of Appeals . . . [held] that the railway company's actions were not the proximate cause of Mrs. Palsgraf's injuries.”).

Palsgraf simply as a proximate cause case does not comport with Cardozo's reasoning in the opinion itself.⁷⁷

For Cardozo, Mrs. Palsgraf's claim failed for a more fundamental reason than want of proximate cause: The train attendant's negligence toward the boarding youth was not negligent *toward Mrs. Palsgraf*, since she was not a foreseeable victim.⁷⁸ "Negligence . . . is . . . a term of relation"⁷⁹: To commit the tort of negligence is to (foreseeably) injure someone by breaching a duty to take reasonable care *as to her*. More generally, unless a defendant breaches a duty owed to the plaintiff — that is, commits a wrong against her — the *Palsgraf* perspective maintains that the plaintiff cannot recover for any resulting injuries, because redressing relational wrongs is tort law's fundamental purpose.

Of course, as anyone who has taken introductory torts is aware, the defendant's breach of a duty of care to the plaintiff is not *enough* to render him liable to her: Duty and breach are only two of the elements that together make up the tort of negligence, along with injury, cause in fact, and proximate cause.⁸⁰ According to the *Palsgraf* perspective, all of these elements together define a complex relational duty: roughly, a duty not to foreseeably cause injury to another person by breaching one's duty to take reasonable care against causing her such injury. So the tort of negligence — perhaps uniquely among the various torts — is associated with *two* relational legal duties: a duty of *non-injuriousness* (take reasonable care toward another person if your action might foreseeably injure her) and a *qualified duty of non-injury* (do not actually injure another person *by* breaching your duty to take reasonable care toward her).⁸¹ To violate this second duty — a qualified duty of non-injury — is to commit the tort of negligence.⁸² Or so the *Palsgraf* perspective says.⁸³

On its face, there is something strange about this way of understanding the tort of negligence — at least on the assumption that a tort such as negligence is a sort of legal wrong that tracks a sort of moral wrong. The negligence tort, so understood, does not appear to track any recognizable sort of moral wrong at all; it is rare to see anyone other than defenders of the *Palsgraf* perspective refer to such a thing as a qualified

⁷⁷ See GOLDBERG & ZIPURSKY, *supra* note 6, at 198; see also PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 284 (W. Page Keeton ed., 5th ed. 1984) (describing Cardozo's opinion in *Palsgraf* as "forsaking 'proximate cause'" and "stat[ing] the issue of foreseeability in terms of duty").

⁷⁸ See GOLDBERG & ZIPURSKY, *supra* note 6, at 198.

⁷⁹ *Palsgraf*, 162 N.E. at 101.

⁸⁰ See PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 77, § 30, at 164–65.

⁸¹ For an especially clear presentation of the distinction, see Ripstein & Zipursky, *supra* note 17, at 218.

⁸² See *id.* at 219.

⁸³ *But see generally* Oberdiek, *supra* note 48 (rejecting this component of the *Palsgraf* perspective while adopting its other commitments, such as the basic idea that a defendant in negligence must breach a duty of care owed to the plaintiff in order to be morally or legally liable to her).

duty (or wrong) of non-injury. By itself this observation is hardly damning. Philosophical reflection can sometimes reveal that our ordinary moral practices are implicitly committed to the existence of some complex moral phenomenon that no concept in our ordinary moral vocabulary readily picks out. Nevertheless, the *prima facie* oddity of the idea of a qualified moral duty (or wrong) of non-injury invites the question of whether a more plausible moral understanding of what a tort is — and what tort law is doing — might be found.⁸⁴

*B. The Pigeonhole Perspective:
Torts as Remedial Moral Liability Rules*

As already suggested,⁸⁵ the tort clauses of the civil codes point the way to such an account: A tort is a legal liability rule, which specifies a set of conditions under which a defendant has an enforceable legal obligation to compensate a plaintiff. Consider again the central tort clause of the Italian *Codice Civile*, CC 2043: “Any intentional or negligent act that causes [unjust damage] to another person obliges the person who has committed the act to pay damages.”⁸⁶ That this clause lays down a compensatory legal liability rule is evident on its face. And nothing in such a clause appears to make any reference to the ideas that the *Palsgraf* perspective locates at the heart of tort law. Whether a defendant has acted wrongfully toward a plaintiff, mistreated her, affronted her personality, disrespected her, and so on — whether he has committed a wrong *to her*, not just a wrong to other people or society at large — is, on the face of these clauses, immaterial.

To be sure, Italian and German law would preclude recovery in a case such as *Palsgraf* no less than the common law would. But that is simply because civil law judges have read into such clauses something like a remoteness or proximate cause restriction, under which *outcomes* that are overly fortuitous or unrelated to the wrongful character of the defendant’s action are presumptively beyond the scope of his remedial

⁸⁴ Professor Stephen Smith agrees with defenders of the *Palsgraf* perspective that the tort of negligence (like other torts) lays down a qualified duty of non-injury, but he suggests that such duties are “ad hoc mixtures of qualitatively different and independently complete concepts.” Stephen A. Smith, *Duties to Try and Duties to Succeed*, in DEFENCES IN TORT 65, 78 (Andrew Dyson, James Goudkamp & Frederick Wilmot-Smith eds., 2015). Smith believes that the common law of tort embraces such incoherent legal duties because it ultimately derives from the medieval forms of action, which were liability rules directly designed to provide remedial relief in appropriate circumstances (rather than to guide conduct). *Id.* at 83–84. I agree with Smith that the concept of a qualified duty of non-injury is ad hoc and unnatural, but I disagree that the common law of torts recognizes any such legal or moral duty. Rather, I believe, common law torts do not represent legal or moral duties (or wrongs) at all (even if the tort of negligence contains a legal and moral duty, the duty of care, as one of its elements). Rather, like the medieval common law’s forms of action and the modern civil law’s general clauses, today’s common law torts are remedial legal liability rules that roughly track the conditions of remedial moral liability.

⁸⁵ See *supra* notes 29–32 and accompanying text.

⁸⁶ See *supra* note 29 and accompanying text.

liability.⁸⁷ The civil law thus joins the common law in holding that, at least in normal circumstances, “a man must be considered to be responsible for the probable consequences of his act.”⁸⁸ Put roughly, the injurious *outcome* or *consequence* must be foreseeable, but the foreseeability of the *plaintiff* is immaterial.⁸⁹

The plaintiff does figure in civil law analysis, but in a much more restricted fashion: The foreseeable consequence that the defendant causes, in a morally responsible manner, must infringe some *right* held by the plaintiff. Merely causing a *loss* to the plaintiff — even wrongfully and foreseeably — does not generate any compensatory liability toward her.⁹⁰ Suppose, for example, that *A* negligently and foreseeably kills a rare and endangered sort of wild animal, thereby preempting *B*’s attempt to capture and exhibit this animal for profit in her zoo.⁹¹ If *B* had owned the animal, she would of course be entitled to compensation from *A*, for his killing of the animal would have infringed her property right. Because *B* has no such right, she is *not* entitled to compensation from *A* for the economic loss she suffers as a result of his action.⁹² Or suppose that *A*’s chattel falls onto the land of *B*, who innocently believes that the chattel belongs to her and plans to use it for her own gain. *A* is able to enter *B*’s land in a timely manner to regain the chattel,⁹³ but doing so will (as a side effect) unavoidably destroy the property of another innocent party, *C*. If *A* recaptures the chattel nevertheless, *A* is liable to compensate *C*, but *A* is not liable to compensate *B*. That is for

⁸⁷ See BUSSANI, SEBOK & INFANTINO, *supra* note 14, at 186–88; BASIL S. MARKESINIS, JOHN BELL & ANDRÉ JANSSEN, MARKESINIS’S GERMAN LAW OF TORTS 64–67 (5th ed. 2019).

⁸⁸ Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng’g Co. (The Wagon Mound No. 1) [1961] AC 388 (PC) 422–23 (appeal taken from Austl.).

⁸⁹ MARKESINIS, BELL & JANSSEN, *supra* note 87, at 71 (comparing civil law and common law methods of blocking recovery for unforeseeable injury and finding that “the common law systems . . . possess an additional doctrine — that of the unforeseeable claimant”).

⁹⁰ Professor Nicolas Cornell has recently argued to the contrary, although his competing account is offered as a first-order proposal in moral philosophy rather than an interpretation of tort law (or its moral commitments). NICOLAS CORNELL, WRONGS AND RIGHTS COME APART 10 (2025). Cornell argues that someone who suffers loss through another person’s wrongdoing is for that reason alone morally entitled to obtain compensation from him, has special standing to demand an apology from him, and so on. *Id.* at 11, 16 (arguing that “many of our most significant injuries . . . arise out of matters over which we have no right,” *id.* at 11, and that such injuries can ground duties of “apology,” “compensation,” and “repair,” *id.* at 16). In my opinion, this view is implausible at least as to compensatory moral liability, both for the reasons described in the text above and because it dispenses with any sort of proximate cause–like restriction on the scope of a wrongdoer’s liability. Cornell’s view may be more plausible, however, with respect to other sorts of moral duties that arise out of wrongdoing, such as duties to apologize.

⁹¹ The case is modeled on *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

⁹² See Koziol, *supra* note 31, at 27 (noting that, in European civil law systems, “[d]amage requires . . . harm to a legally protected interest”).

⁹³ See RESTATEMENT (SECOND) OF TORTS § 198(1) (A.L.I. 1965) (“One is privileged to enter land in the possession of another, at a reasonable time and in a reasonable manner, for the purpose of removing a chattel to the immediate possession of which the actor is entitled, and which has come upon the land otherwise than with the actor’s consent or by his tortious conduct or contributory negligence.”).

the simple reason that *A*'s action, however wrongful and culpable, did not infringe any property right (or right of another kind) held by *B*. Even if he deprives her of a gain she would have enjoyed without his wrongful action, she had no right to that gain, and thus, he is not liable to compensate her for it.

Civil law jurisdictions, like common law jurisdictions, generally recognize that wrongfully causing loss (without infringing any sort of right) does not ground compensatory liability.⁹⁴ But the common law, unlike the civil law, insists (at least on its face) that a defendant must not only infringe the plaintiff's right against injury; he must also breach a duty owed to her, that is, treat her wrongfully by violating a norm of conduct regarding how she should be treated.⁹⁵ Thus, on its face, the common law denies recovery to an unforeseeable plaintiff whose property is foreseeably destroyed by the defendant's negligence or a foreseeable plaintiff who is not treated carelessly by the negligent defendant.⁹⁶ A civil law clause such as BGB section 823(1), by contrast, elegantly explains the propriety of recovery in such a case,⁹⁷ and in many other cases to be discussed below.

This Article's claim is that the common law's formal veneer — its surface language of relational duties and wrongs — obscures its substantive moral commitments. In both common law and civil law, the core of tort liability is about tracking remedial moral liability — and remedial moral liability for inflicting injury does not ultimately rest on relational wrongdoing or mistreatment between the defendant and the plaintiff. Rather, it rests on the defendant's moral responsibility for infringing a right against injury held by the plaintiff.

The idea of moral responsibility at work here is a familiar one — even if its nature and grounds are somewhat elusive on philosophical reflection. Ordinary moral thought recognizes that causing (or “doing”) harm can be highly morally significant.⁹⁸ A person whose action is causally responsible for some harmful outcome is connected to that outcome in a way that other people, mere bystanders, are not — and this special

⁹⁴ Even French law, which on its face allows recovery for all loss sustained through fault, in practice heavily restricts such recovery through “actual solutions of particular cases [that] are not so very different from those of English, or, for that matter, of German law.” F.H. Lawson, *The Duty of Care in Negligence: A Comparative Study*, 22 TUL. L. REV. 111, 118 (1947); see also Mauro Bussani & Vernon Valentine Palmer, *The Liability Regimes of Europe — Their Façades and Interiors*, in PURE ECONOMIC LOSS IN EUROPE 120, 126 (Mauro Bussani & Vernon Valentine Palmer eds., 2003); Christophe Radé & Laurent Bloch, *Compensation for Pure Economic Loss Under French Law*, in PURE ECONOMIC LOSS 41, 44 (Willem H. van Boom, Helmut Koziol & Christian A. Witting eds., 2004) (describing the availability of pure economic loss under the French system).

⁹⁵ See, e.g., RESTATEMENT (SECOND) OF TORTS § 281 (A.L.I. 1965) (listing as requirements for negligence that an invaded interest be “protected against unintentional invasion” and “the conduct of the [tortfeasor] is negligent with respect to the other [person]”).

⁹⁶ See *supra* notes 46–51 and accompanying text.

⁹⁷ See *supra* note 32 and accompanying text.

⁹⁸ See generally Jeff McMahan, *Killing, Letting Die, and Withdrawing Aid*, 103 ETHICS 250 (1993); Samuel Scheffler, *Doing and Allowing*, 114 ETHICS 215 (2004).

connection may help to explain why certain responses to that outcome (regret, guilt, apology, compensation, and so on) are fitting or even obligatory for the person in question, while no such response would be fitting or obligatory for a mere bystander.⁹⁹ But mere causal responsibility alone (sometimes called outcome responsibility¹⁰⁰) is inadequate to render onerous affective responses such as guilt fitting, or onerous practical responses such as compensation obligatory — for that, something more is required.

This is a general phenomenon that has nothing essentially to do with rights against injury or relational wrongs. To illustrate, consider a variation on Thomson's example¹⁰¹: Suppose that *A* innocently flips his kitchen switch and thereby unforeseeably causes the destruction of an (unowned) beautiful nature preserve, or some other environmental disaster. Although *A* is causally responsible for this outcome, there is an intuitively clear sense in which he is not *morally* responsible for it: The outcome is not connected, in the right way, to the quality of his responsible moral deliberation, judgment, and agency.¹⁰² And so, although mild forms of regret might be warranted, and limited forms of repair might be called for, it would be strange for *A* to be consumed by guilt or to regard himself as under a strong and onerous obligation to repair the harm he has caused.

Matters seem quite different if *A* has *foreseeably and culpably* risked such an outcome. In that case, moral attitudes such as guilt might be strongly warranted. And actions such as attempting to repair the harmful outcome in question, or (insofar as repair is impossible) make amends by preventing *other* such harmful outcomes, might well be morally obligatory, even at large personal cost. The same moral asymmetries between morally responsible and non-responsible causation would seem to exist when it is the infringement of another person's right, rather than the destruction of some impersonally valuable object, that is at stake.

There may be various forms of moral responsibility — relationships between the quality of an agent's responsible moral agency (on the one hand) and the outcome that her action causes (on the other) — that can ground remedial moral liability and liability in tort.¹⁰³ But plausibly —

⁹⁹ See Carolina Sartorio, *Causation and Responsibility*, 2 PHIL. COMPASS 749, 750 (2007) ("Imagine that someone is killed in a remote part of the world: someone with whom you have never had contact of any sort. Do we consider you to be morally responsible for his death? Obviously not. . . . [Y]ou weren't causally related to the [person's] death in any way: there is no way to link anything you did to the person's death.").

¹⁰⁰ SLAVNY, *supra* note 60, at 102 (defining the term).

¹⁰¹ See *supra* note 43 and accompanying text.

¹⁰² See THOMSON, *supra* note 43, at 230.

¹⁰³ In the common law, these other paradigms of remedial moral liability find expression in pigeonholes such as the strict liability for abnormally dangerous activities tort. See RESTATEMENT (SECOND) OF TORTS § 519(1) (A.L.I. 1977) ("One who carries on an abnormally dangerous activity

as suggested by the central role of clauses like CC 2043 and BGB section 823(1) in the civil law, and the central role of the tort of negligence in the common law¹⁰⁴ — the legally central form of liability-grounding moral responsibility is culpable wrongdoing. More specifically, I suggest, something like the following moral principle is implemented by vast swathes of tort law in both common law and civil law systems:

Liability for Culpable and Foreseeable Damage (CFD): An agent who culpably and foreseeably risks causing damage, that is infringing a moral right against being caused injury (to body, property, liberty, reputation, and so forth), is liable to compensate the person whose right he thereby infringes.

I will argue that this moral principle (as duly refined) furnishes the normative substance of torts such as negligence, battery, and defamation.¹⁰⁵ To be sure, many torts (or central elements of them, such as the duty of care in negligence) have a facially relational structure.¹⁰⁶ That this formal structure obscures the common law's underlying substantive concerns is revealed by the common law's handling of situations where relational wrongdoing and moral responsibility for rights infringement diverge: In such cases, the common law disregards the relational formal structure of its causes of action, deforms this structure through legal fiction, or utilizes nonrelational doctrinal appendages such as derivative causes of action.

In short, common law and civil law tort are both, in their heartland, concerned with moral responsibility for causing unjust damage — that is, infringing rights against injury — not with relational wrongdoing. The rest of this Article will attempt to provide a great deal of casuistical

is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.”). Such pigeonholes, and the moral principles they implement, are considered in section II.F, pp. 1067–76. Until then, this Article principally focuses on the paradigm of liability-for-rights infringement through culpable wrongdoing that (it argues) underlies both civil law general clauses such as CC 2043 and BGB section 823(1) and much of common law negligence and battery doctrine.

¹⁰⁴ On the centrality of negligence and negligence-like forms of products liability in common law tort, see generally James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 UCLA L. REV. 377 (2002).

¹⁰⁵ In an excellent recent essay that also engages extensively with *Palsgraf*, Professor Adam Slavny has suggested a broadly similar principle (albeit as a proposal in first-order moral philosophy rather than as an interpretation of tort law's moral commitments). Adam Slavny, *Relational Fault and Unforeseeable Victims*, 31 LEGAL THEORY 96, 113 (2025). According to this principle, a faulty act incurs (at least presumptively) moral liability to compensate a victim if “the outcome for [that victim] is sufficiently similar to the grounds on which the act that harmed [that victim] is at fault.” *Id.* To test this principle, suppose a defendant negligently destroys a painting owned by *A*, which *A* would otherwise have sold for \$5,000 to *B*, who in turn would have sold it to *C* for \$10,000. *A* and *B* both lose out on \$5,000, but only *A* is entitled to recovery (both as a matter of tort doctrine and ordinary moral intuition); *B* has suffered textbook pure economic loss. The parties are distinguished only by the fact that *A*'s rights, unlike *B*'s, are infringed. The case suggests that Slavny's principle is not quite accurate, whether as an interpretive account of tort doctrine or as a philosophical account that faithfully reflects ordinary moral intuition, unless it tacitly builds in the idea of rights infringement.

¹⁰⁶ See, e.g., RESTATEMENT (SECOND) OF TORTS § 281 (A.L.I. 1965).

evidence for this claim. Before that, however, it is worth mentioning a more abstract sort of consideration: It would be surprising if the moral substance of the common law of torts turned out to differ starkly from the moral substance of the tort liability clauses in the civil codes. *Prima facie*, it seems more plausible that the common moral sensibilities embedded in the civil codes are largely continuous with the common moral sensibilities that have been embedded in the common law.

After all, the common law was at its inception largely derived from continental Europe — it was feudal law originally “developed on the Continent, from the days of Charlemagne onwards” and “imported into England by the Norman conquerors.”¹⁰⁷ After that, the common law was substantially influenced by academic treatises on the civil law¹⁰⁸ and regular interaction with ecclesiastical canon law,¹⁰⁹ itself largely derived from the classical Roman law from which the modern civil law largely originates.¹¹⁰

That no stark normative divide exists between the private law (including tort) in common and civil law systems was once, it appears, the common understanding of common lawyers.¹¹¹ As one British judge put it, “the [c]ivil law is not of itself authority in an English [c]ourt, [but] it affords great assistance in investigating the principles on which the law is grounded.”¹¹² In fact, some historians of the common law have argued that “the basic structure of the tort of negligence . . . was directly or indirectly derived from Roman law,”¹¹³ partly by way of continental moral philosophers, such as Grotius and Pufendorf, who were influential in shaping the eighteenth-century English legal consciousness as well as the civil law codes.¹¹⁴ Whether or not this strong claim is sound, there is ample evidence of robust influence and doctrinal borrowing. Some of the common law’s leading tort judgments, such as Lord Atkin’s famous speech in *Donoghue v. Stevenson*,¹¹⁵ conspicuously draw upon civil law concepts in order to frame or support their analyses of common law

¹⁰⁷ R.C. VAN CAENEGEM, *EUROPEAN LAW IN THE PAST AND THE FUTURE* 2 (2001).

¹⁰⁸ JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT* 10 (2006).

¹⁰⁹ See, e.g., *id.* at 176–77 (discussing one thirteenth-century English legal doctrine derived from the canon law).

¹¹⁰ See, e.g., REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 1031–35 (1st ed. 1990) (discussing the Roman origins of the modern law of delict).

¹¹¹ See David Ibbetson, “*The Law of Business Rome*”: *Foundations of the Anglo-American Tort of Negligence*, 52 *CURRENT LEGAL PROBS.* 74, 75 (1999).

¹¹² *Taylor v. Caldwell* (1863) 122 Eng. Rep. 309, 313 (KB); see also Ibbetson, *supra* note 111, at 76 (quoting the same).

¹¹³ Ibbetson, *supra* note 111, at 77.

¹¹⁴ See *id.* at 85–86; GORDLEY, *supra* note 108, at 154.

¹¹⁵ [1932] AC 562 (HL) (appeal taken from Scot.).

doctrine.¹¹⁶ To my knowledge, in none of these contexts did common lawyers ever suggest that the structural divergence between common law tort and civil law tort bespoke some significant normative discontinuity between them.

Reflection on the history of the civil law itself similarly provides some evidence for normative continuity. Modern civil law largely derives from classical Roman law. Like the common law today, classical Roman law contained “a somewhat haphazard assemblage of individual delicts,”¹¹⁷ which took their names from commonly recognized forms of relational moral wrongdoing: theft, violent robbery, loss inflicted through a wrong (the famous *lex Aquilia*, the most general form of action, with roughly the scope of the common law tort of negligence¹¹⁸), offensive personal insult, and so on.¹¹⁹

European legal systems largely inherited this doctrinal structure. Before the enactment of the BGB, for example, German tort law largely operated with such Romanist causes of action.¹²⁰ Like the common law of torts, therefore, pre-BGB German tort law “refused to grant any claim outside the specific bases which were explicitly recognised.”¹²¹ Until the drafting of the BGB, “scholars never really considered unifying the list of torts into one general rule,”¹²² nor did the legal system.¹²³ As with many other civil law tort codes, the intellectual pre-history and legal drafting of the BGB involved a process of abstracting and generalizing from the particular doctrinal details of the received Romanist causes of action,¹²⁴ in order to arrive at general legal principles about fault, unjustifiability, rights, and remedial liability such as BGB section 823(1).

It is conceivable that remodeling the conceptual structure of German law in this way effected a profound transformation of its underlying normative substance. But it seems more plausible that this process

¹¹⁶ See, e.g., *id.* at 580 (“The liability for negligence, whether you style it such or treat it as in other systems as a species of ‘culpa,’ is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.”); *Coggs v. Bernard* (1703) 92 Eng. Rep. 107, 110–13 (KB).

¹¹⁷ ZIMMERMANN, *supra* note 110, at 914 (emphasis omitted); see also JOE SAMPSON, THE HISTORICAL FOUNDATIONS OF GROTIUS’ ANALYSIS OF DELICT 60 (2018) (describing the Roman system of delicts as “a series of wrongs enacted over centuries” that do not “represent a cohesive whole”).

¹¹⁸ Ibbetson, *supra* note 111, at 76–77.

¹¹⁹ ZIMMERMANN, *supra* note 110, at 915; SAMPSON, *supra* note 117, at 38.

¹²⁰ See Patrick Mossler, *The Discussion on General Clause or Numerus Clausus During the Preparation of the German Civil Code*, in NEGLIGENCE: THE COMPARATIVE LEGAL HISTORY OF THE LAW OF TORTS 361, 361 (Eltjo J. H. Schrage ed., 2001).

¹²¹ *Id.* at 362.

¹²² *Id.*

¹²³ *Id.* at 361–62.

¹²⁴ See generally FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE (Tony Weir trans., 1995); Mossler, *supra* note 120 (identifying connections between the law of torts in the nineteenth century and the development of the BGB); F.H. LAWSON & B.S. MARKESINIS, 2 TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW 39–41 (1982) (describing causes of action from Romanist texts).

involved the abductive extraction and refinement of normative principles immanent within the legal corpus, which ultimately received more transparent articulation in the form of the general legal principles laid down by the BGB. In my view, common law causes of action such as negligence and defamation ought to be understood in the same way. The pigeonholes of pre-BGB German tort law were coarse remedial devices whose underlying moral principles were never perspicuously disclosed by their formal structure. That these causes of action were named after various forms of relational wrongdoing did not indicate that relational wrongdoing was their basic moral concern. So, too, the common law torts are remedial legal pigeonholes — legal formulas for obtaining judicial relief — that, notwithstanding their surface form, are largely concerned with tracking a defendant’s moral responsibility for infringing a plaintiff’s rights and with enforcing the resulting moral liabilities to provide compensation or other forms of remedial relief.

Were the common law to be comprehensively remodeled in the form of a statutory code, this basic moral concern might receive cleaner expression in its formal structure. Most of the time, however, the common law’s pigeonholes do well enough in supplying recovery by the lights of their animating moral principles that any felt pressure to undertake the laborious process of abstract system-building, deeper normative explanation, and comprehensive doctrinal reform is defused.¹²⁵

These implicit moral principles can range across the boundaries of different torts. And it is because the common law’s relational formal structure — constituted by its motley assemblage of pigeonhole torts — does not clearly articulate these underlying moral principles that the common law must sometimes deform its formal structure through devices like legal fictions, such as the one we will now examine. To take the common law’s formal architecture at moral face value, as the *Palsgraf* perspective urges, is thus to misconstrue the nature of the commonsense moral principles that it houses.

II. COMPARING THE PICTURES

A. *The Fiction of Transferred Intent*

Let us begin with an issue that Cardozo observed in *Palsgraf* but treated only in clipped and conclusory fashion: His claims about the

¹²⁵ Compare Frederick Pollock and Frederic William Maitland’s famous remarks on the absence of a direct action by a bailor against the converter of property entrusted to his bailee: “If the men of the thirteenth century, or of yet earlier times, had been asked why the bailor had no action against the third hand, they would not have said, ‘Because he has only a contract to rely upon and a contract binds but those who make it’; they would, we believe, have said, ‘We and our fathers have got on well enough without such an action.’” 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 186 (2d ed., Liberty Fund, Inc. 2010) (1895).

nature of tort and tort liability¹²⁶ are incompatible with the venerable common law doctrine of transferred intent.

The paradigmatic transferred intent case is from Professor William Prosser's classic article on the subject:

Defendant shoots at *A*, intending to wound or kill him. His aim is bad, and he misses *A*. The bullet passes through a screen of bushes and hits *B*. Defendant is unaware of *B*'s presence, and he could not reasonably have been expected to be aware of it. There is no intent to hit *B* and no negligence with respect to *B*. The injury to *B* is an accident, pure and simple. Nevertheless, [D]efendant is liable to *B* for battery, an intentional tort.¹²⁷

If we wish to explain this sort of conviction, and the cases in which it finds expression,¹²⁸ two options are available to us. The first is to say that, although *B* is unforeseeable to the defendant, the defendant nevertheless breaches a duty owed to *B* by shooting at *A*. To embrace this option is, of course, to abandon the idea that tort duties cannot be owed to unforeseeable plaintiffs. The second option is to say that *B* is entitled to redress against the defendant (and/or the defendant owes him an enforceable duty of compensation) despite the fact that the defendant has breached no duty owed to *B*. To embrace *this* option is to abandon the basic idea that liability must be founded on the breach of some duty owed to the plaintiff. Either way, transferred intent doctrine is incompatible with a fundamental assumption about tort law on which Cardozo's reasoning in *Palsgraf* relies.

An obvious response to this tension is to dismiss the doctrine of transferred intent as the archaic relic of a bygone legal age. That response would have been consistent with Cardozo's suggestion that allowing the victim of a harmful action to sue for the breach of a duty owed to another would be "to ignore the fundamental difference between tort and crime."¹²⁹ Transferred intent doctrine has its roots in the early writ of trespass, which sat somewhat indeterminately at the border of crime and tort (as we understand those legal categories today).¹³⁰ The doctrine continues to play an important role in the criminal law, which few are prepared to abandon. But it is possible to maintain that the doctrine's persistence in tort law is an archaism that ought to be abandoned.

That is not the strategy that Cardozo adopted, however, and it is not hard to see why. The intuitive moral conviction that, in cases such as Prosser's hypothetical, the defendant owes his victim an enforceable

¹²⁶ *Palsgraf*, 162 N.E. at 100–01 ("Even to-day, and much oftener in earlier stages of the law, one acts sometimes at one's peril. Under this head, it may be, fall certain cases of what is known as transferred intent . . . *These cases aside*, wrong is defined in terms of the natural or probable, at least when unintentional." (emphasis added) (citations omitted)).

¹²⁷ Prosser, *supra* note 55, at 650.

¹²⁸ See, e.g., *James v. Campbell* (1832) 172 Eng. Rep. 1015, 1015; *Talmage v. Smith*, 59 N.W. 656, 656 (Mich. 1894); *Lambert v. Brewster*, 125 S.E. 244, 245 (W. Va. 1924); *Bici v. Ministry of Def.* [2004] EWHC (QB) 786, [68]–[71].

¹²⁹ *Palsgraf*, 162 N.E. at 101.

¹³⁰ Prosser, *supra* note 55, at 652–55.

duty to compensate for the damage he has inflicted on her — a remedial duty of precisely the kind that the tort system ought, in principle, to enforce — is a very powerful one. It finds expression in a longstanding body of case law on transferred intent;¹³¹ it is expressly affirmed by both the Second and Third Restatements;¹³² and it has deeply rooted doctrinal analogues in other legal systems, both common law and civil.¹³³ And the intuition does not seem like it can be explained away as the creature of retributive instincts properly located in the criminal law (if anywhere). The law would not satisfy the intuitive requirements of justice to *the victim* simply by punishing the defendant in such a case, or by extracting from him a financial penalty to be deposited into a general fund for the victims of crime. It seems clear that the defendant is liable to *his victim*, unforeseeable though she may be — that he must compensate *her*, in preference to the victims of other wrongdoers.

It is understandable, then, that Cardozo did not reject transferred intent out of hand or admit the incompatibility of transferred intent's normative logic with his opinion's grand claims about the nature of tort liability.¹³⁴ Doing so would have severely compromised the interpretive and moral plausibility of those claims and weakened the persuasive power of his judgment. Instead, he acknowledged the doctrine and intimated that its significance lies outside the domain of his discussion, in two passages. In the first passage, the reference to transferred intent is oblique:

Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. 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. *If the harm was not willful*, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended.¹³⁵

The implicit suggestion is that the logic of the italicized exception does not vitiate the logic of Cardozo's general claim. But that suggestion plainly calls out for explanation and defense. If willfully harmful actions

¹³¹ See, e.g., cases cited *supra* note 128.

¹³² See RESTATEMENT (SECOND) OF TORTS § 16 (A.L.I. 1965); RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 110 (A.L.I., Tentative Draft No. 1-110, 2018); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 33 (A.L.I. 2010).

¹³³ See GORDLEY, *supra* note 108, at 184–87.

¹³⁴ Some of Cardozo's followers have in fact explicitly rejected transferred intent in order to preserve the *Palsgraf* principle. See, e.g., Allan Beaver, *Transferred Malice in Tort Law?*, 29 LEGAL STUD. 400, 401 (2009); STEVENS, *supra* note 17, at 102 (likewise criticizing *Bici v. Ministry of Def.* [2004] EWHC (QB) 786).

¹³⁵ *Palsgraf*, 162 N.E. at 101 (emphasis added).

may render a tortfeasor liable for harm to an unforeseeable victim, one wishes to know, why not negligently harmful actions? If a tortfeasor cannot owe a duty against careless injury to an unforeseeable victim, how can a tortfeasor owe a duty against intentional injury to an unforeseeable victim? Absent some plausible explanation of this asymmetry, consistency would appear to require dispensing with the doctrine of transferred intent or renouncing the relationship between foreseeability and negligence liability that Cardozo posited. And nothing in the passage attempts to supply the needed explanation.

There is, however, a second passage in which Cardozo discussed transferred intent. In that passage, the germ of an explanation may be suggested:

Some acts, such as shooting[,] are so imminently dangerous to any one who may come within reach of the missile[,] however unexpectedly, as to impose a duty of prevision not far from that of an insurer. Even to-day, and much oftener in earlier stages of the law, one acts sometimes at one's peril. Under this head, it may be, fall certain cases of what is known as transferred intent, an act willfully dangerous to A resulting by misadventure in injury to B. These cases aside, wrong is defined in terms of the natural or probable, at least when unintentional.¹³⁶

It is not entirely clear how to understand Cardozo's suggestion, but there is a plausible interpretation that comports with views that some defenders of the *Palsgraf* perspective have offered on his behalf.¹³⁷ In many circumstances, a defendant who shoots a gun at person *A* should be aware that doing so could result in harm to some other person *B*, even if no other person appears to be on the scene. For there is a non-trivial chance that another person is in fact present, invisibly to the defendant's eye, and shooting a gun is so dangerous an activity that it poses a nontrivial risk of injuring any such person. Thus, *B* can recover for her injuries, in such a case, on ordinary principles of negligence: By shooting his gun at *A*, the defendant foreseeably risks causing harm to persons such as *B*, such that the agent breaches a duty of care to *B* by shooting the gun without adequate justification. Characterizing the situation in this way allows *B* to recover for injuries sustained through an act wrongful as to *her*, without invoking any conceit about transferred intent.

This maneuver does handle many of the cases that are standardly described as exhibiting the transferred intent fiction, but it distorts the moral gist of the doctrine. A simple modification to Prosser's case will illustrate. Suppose a defendant is planning to murder *A* and that he makes laborious preparation to dispose of her body after the crime. The

¹³⁶ *Id.* at 100–01 (citations omitted).

¹³⁷ See, e.g., John C.P. Goldberg, Lecture, *Ten Half-Truths About Tort Law*, 42 VALPARAISO U. L. REV. 1221, 1263 (2008); BEEVER, *supra* note 17, at 243. Others have suggested that courts engage in similar doctrinal surgery. See, e.g., Peter B. Kutner, *The Prosser Myth of Transferred Intent*, 91 IND. L.J. 1105, 1113 (2016).

defendant ardently desires not to kill any bystanders, however, for he has not made any such preparations with respect to them, and inadvertently killing a bystander would threaten to expose his wrongdoing. Hence the defendant diligently examines the plot of land where he plans to kill *A*, so as to make sure that no one else is on the scene. In an exceptionally improbable turn of events, it turns out that some other person, *B*, has been buried alive, by a different villain, beneath that very plot of land. The police are on their way to dig out *B* (and thereby save him from impending asphyxiation). But before the police can arrive, the defendant shoots at *A*; the bullet misses *A* but goes into the land beneath him and pierces *B*'s heart, killing her. Here the risk that shooting at *A* might cause harm to anyone else, such as *B*, is so exceptionally small as to foreclose the conclusion that *B* was a foreseeable victim; the defendant cannot be plausibly accused of negligence toward anyone other than *A*. All the same, *B*'s estate appears to have a forceful moral claim to redress.

It is through the doctrine of transferred intent that the law would enforce these intuitive moral liabilities. The attempt to substitute negligence principles in the place of transferred intent doctrine would preclude the law from doing so. In practice, such clean test cases — in which the transferred intent plaintiff is *clearly* unforeseeable, rather than only arguably so — are unlikely to arise, and certainly they are unlikely to be litigated.¹³⁸ Still, predicating the victim's ability to recover in such cases on negligence principles distorts the character of the ordinary moral convictions that underlie the law's provision for recovery. Intuitively, these convictions have little to do with any thought that the victims are in fact foreseeable to the wrongdoers who injure them. By itself, the doctrine of transferred intent does not elucidate or vindicate these underlying moral instincts, but it permits them greater expression than the Procrustean reliance on negligence principles would allow.

For that reason, excising transferred intent doctrine would compel the law to draw distinctions between plaintiffs that seem morally absurd. Suppose that a defendant attempts to murder his romantic rival *A* by shooting at a figure that looks like *A*, but the figure is in fact a mannequin; the bullet goes through the ground where it pierces the heart of another person who is unforeseeably buried alive beneath it (and would have been dug out in due course, had she not been shot). Even without a doctrine of transferred intent, the law would appear to hold the defendant liable in battery to the victim if the victim happens to be *A*, for in that case the defendant has killed *A* by acting on an intention

¹³⁸ In general, intentional tort cases are infrequently litigated. See Kenneth W. Simons & W. Jonathan Cardi, *Restating the Intentional Torts to Persons: Seeing the Forest and the Trees*, 10 J. TORT L. 343, 381 (2017).

to kill him (strange though the causal route may be).¹³⁹ Without a doctrine of transferred intent, the law will hold the defendant liable to the victim *only if* the victim happens to be *A*, rather than some different person *B*. That seems absurd.

To credit such a distinction yields even greater absurdity in other cases. Imagine a version of *Palsgraf* in which the defendant train attendant is a bigot who *intentionally* jostles the boarding youth in order to murder her, because the attendant wishes to murder an Indian person with plausible deniability, believes that the youth is a famous stage actor, Sonia, and believes that Sonia is Indian. As it turns out, the train attendant is multiply mistaken: The youth is not Sonia, and Sonia is Italian, not Indian. The resulting explosion causes some scales to drop at the other end of the station, injuring three unforeseeable victims — Elise (French), Amna (Indian), and Sonia (who just happens to be at the station, waiting for a train). Without a doctrine of transferred intent, the law will of course deny Elise recovery, which seems perverse enough. As to Amna and Sonia, the law will need to determine how to characterize the content of the train attendant's murderous intention (an intention to kill Sonia, or an intention to kill an Indian, or . . . ?). The exercise seems ludicrous, and there does not seem to be any morally or metaphysically principled way to carry it out.

That such an exercise is implied by the logic of the *Palsgraf* perspective should “enkindle doubt whether a flaw may not exist” in the logic that entails it.¹⁴⁰ If the tort of battery is the legal recognition of a certain kind of relational moral wrong — the wrong of harming another person by acting on an intention to harm (or harmfully touch) *her* — and if providing redress for legally recognized relational moral wrongdoing is tort law's basic normative aspiration, then tort law is, in such a case, committed to engaging in such an exercise as a matter of basic moral principle. That remodeling tort doctrine in line with the *Palsgraf* principle would in relevant cases commit the doctrine to conducting such an exercise is evidence that the *Palsgraf* principle distorts the moral sensibilities encoded by the law.

At this point, Cardozo's followers might elect a more drastic maneuver. The idea here would be that, although in transferred intent cases the plaintiff is unforeseeable to the defendant, the defendant nevertheless breaches a legal duty owed to him: a legal duty not to injure him (unforeseeable though he may be) by acting on an intention to injure

¹³⁹ See RESTATEMENT (SECOND) OF TORTS § 435A (A.L.I. 1965) (“A person who commits a tort against another for the purpose of causing a particular harm . . . is liable for such harm if it results, whether or not it is expectable.”); cf. John C.P. Goldberg, *Rethinking Injury and Proximate Cause*, 40 SAN DIEGO L. REV. 1315, 1340 (2003).

¹⁴⁰ *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931).

someone else.¹⁴¹ Once the requirement of victim foreseeability is jettisoned as to duties in battery, however, it becomes obscure why it should be retained as to duties in negligence. If (as the *Palsgraf* perspective's defenders say) "the idea of owing [a] duty to someone who is unforeseeable" is incoherent — because a duty must be able to "guide [the defendant's] conduct"¹⁴² (and a person deliberating about her conduct cannot take account of an unforeseeable victim) or else because the duty's violation must express an "[a]ffront to [the plaintiff's] personality"¹⁴³ (and an unforeseeable victim's personality cannot be affronted) — then such a duty is no less incoherent in battery than in negligence. If, by contrast, it is coherent and plausible to recognize a duty to unforeseeable victims in battery, there should be no obstacle to recognizing a duty to unforeseeable victims in negligence as well. But to recognize such a duty in negligence would, of course, vitiate the reasoning in *Palsgraf* entirely.

What is more, the envisaged maneuver would undercut the *Palsgraf* perspective's basic supposition that the relational legal duties and wrongs we find in tort law track the relational moral duties and wrongs of ordinary moral life. The species of relational duty under consideration — a duty not to injure one person by acting on an intention to harm someone else entirely — seems like an unnatural creature, pieced together by dissecting familiar sorts of moral duties and conjoining them into a beast that does not roam the landscape of ordinary moral thought. In short, such a desperate maneuver would preserve the outermost legal form of the *Palsgraf* principle only by emptying it of any plausible or recognizable normative substance.

The lesson, I believe, is that the *Palsgraf* principle is unsound: One need not act wrongfully toward another — need not mistreat *her*, as opposed to other people — to incur a liability in morality or law to compensate her for the injuries one has inflicted on her. If that lesson is correct, however, what should we make of the black-letter proposition, which is embraced by most common law jurisdictions, that the duty of care in negligence is owed only to foreseeable victims, such that only

¹⁴¹ This is one interpretation of the view laid out in Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 17, at 23 ("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 Second Restatement might be understood as positing such a duty when it lays down that "[a]n actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results." RESTATEMENT (SECOND) OF TORTS § 13 (A.L.I. 1965) (emphasis added). The more natural and plausible interpretation of this provision, however, is that it constitutes a pigeonhole liability rule under which the transferred intent victim can claim in battery although no duty to him (except a bare duty of non-injury) has been breached.

¹⁴² RIPSTEIN, *supra* note 17, at 90.

¹⁴³ Zipursky, *Palsgraf, Punitive Damages, and Preemption*, *supra* note 17, at 1767 (quoting *Palsgraf*, 162 N.E. at 101).

foreseeable victims can in ordinary cases recover?¹⁴⁴ In my view, this black-letter rule does not reflect any principled commitment to the significance of relational wrongdoing in grounding negligence liability (a commitment that would sit in stark tension with the underlying moral commitments of transferred-intent doctrine). There is, rather, a more complex moral principle operating beneath the surface of both doctrinal areas — a principle that explains why unforeseeable transferred intent victims can recover, *and* why unforeseeable victims of mere negligence (as in *Palsgraf*) typically cannot.

This principle is simply the principle that we have already located at the core of civilian tort clauses such as CC 2043,¹⁴⁵ more accurately formulated:

Liability for Culpable and Foreseeable Damage* (CFD*)¹⁴⁶: An agent who culpably and foreseeably risks causing damage, that is, infringing a right against injury, is liable to compensate the person whose right he thereby infringes, where the degree of foreseeability required depends on the degree of the agent's culpability.

Such a principle finds considerable support in the modern civil law and the classical Roman law from which it derives.¹⁴⁷ The same principle is recognized in the common law as well — occasionally with great clarity, as in a leading British judgment that forthrightly observes that “[t]he more culpable the defendant the wider the area of loss for which he can fairly be held responsible.”¹⁴⁸ Most of the time, however, the common law recognizes this principle more coarsely and obliquely,

¹⁴⁴ See W. Jonathan Cardi, *The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1913 (2011) (concluding from a fifty-state survey that Cardozo's understanding of foreseeability as a question of duty — rather than only proximate cause — has “undoubtedly prevailed”).

¹⁴⁵ See *supra* note 29 and accompanying text.

¹⁴⁶ The CFD* principle is a refinement of the CFD principle introduced above. See *supra* notes 102–04 and accompanying text.

¹⁴⁷ See, e.g., Ralph S. Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586, 589 (1933) (explaining that the Roman courts “allowed damages for resulting harm more readily in cases of *dolus* [roughly, ‘malicious intent’] than in those of *culpa* [roughly, ‘negligence’]”); Ton Hartlief, *Toerekening naar redelijkheid* [Reasonable Attribution], in SLUITERTIJD: REFLECTIES OP HET WERK VAN JAAP HIJMA 151, 155 (C.G. Breedveld-de Voogd et al. eds., 2020) (observing that under Dutch case law the defendant's degree of fault bears on whether the defendant is liable to compensate for damage of which his action is a but-for cause); Bjarte Askeland, *Basic Questions of Tort Law from a Norwegian Perspective*, in BASIC QUESTIONS OF TORT LAW FROM A COMPARATIVE PERSPECTIVE 99, 151 (Helmut Koziol ed., 2015) (“The basic requirements of adequacy are that the damage which occurred was foreseeable *and* that the damage was sufficiently closely connected to the interests of the plaintiff. . . . The boundaries of adequacy are drawn further where the damage is caused with intent. . . . Also the presence of gross negligence constitutes a reason for making even remote kinds of damage compensable.” (footnotes omitted)).

¹⁴⁸ *Kuwait Airways Corp. v. Iraqi Airways Co.* [2002] UKHL 19, [101], [2002] 2 AC (HL) 883 (appeal taken from Eng.).

through a crude categorical distinction between intentional torts and the tort of negligence.¹⁴⁹

Thus, it is a familiar observation in the case law, doctrinal commentary, and restatements, that intentional torts such as battery will subject a tortious wrongdoer to a far wider scope of liability than the tort of negligence¹⁵⁰: “The rule of legal (proximate) cause . . . for intentional torts sweeps very broadly, almost to the full reach of factual causation.”¹⁵¹ The law seems to draw the boundaries of proximate cause more widely in battery than in negligence because the law takes intention to harm as a rough but serviceable proxy for agential culpability, which (as the law recognizes) expands the range of risks for which a wrongdoer bears remedial moral responsibility. As an early twentieth-century American case put it: “For an intended injury the law is astute to discover even very remote causation . . . because it has been felt to be just and reasonable that liability should extend to results further removed *when certain elements of fault [are] present.*”¹⁵²

The same general principle operates within the boundaries of the negligence tort alone. Consider a defendant who has imposed an unreasonable risk upon a foreseeable plaintiff, such that he has plainly breached a duty of care owed to her. In determining whether the resulting injury was “foreseeable,” such that the proximate cause element of the tort of negligence is satisfied, the law will treat a tortfeasor more harshly the more culpable he is. Thus, a grossly reckless tortfeasor will be held liable for the materialization of a wider range of risks than a barely negligent one.¹⁵³ Put another way, the proximate cause inquiry in the tort of negligence is *culpability-sensitive*.

My proposal is that all of these common law phenomena — the fiction of transferred intent, the broader scope of liability for intentional wrongdoing as opposed to negligent wrongdoing, and the culpability-sensitivity of proximate cause within the tort of negligence — are simply particular doctrinal expressions of the same underlying moral principle, namely, something like CFD*.

¹⁴⁹ See Sandy Steel, *Culpability and Compensation*, in *TAKING LAW SERIOUSLY: ESSAYS IN HONOUR OF PETER CANE* 47, 58–59 (James Goudkamp, Mark Lunney & Leighton McDonald eds., 2022). German law seems to do the same. MARKESINIS, BELL & JANSSEN, *supra* note 87, at 82 (“[A]s in the common law, German law does not require foreseeability where the harm is intentionally caused.”); *id.* at 81–82 (explaining that “intentional” harming includes causing harm very recklessly, or with an awareness and acceptance that harm will follow).

¹⁵⁰ See Robert J. Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127, 1128 (1934) (“Where the wrong is done intentionally the law seeks more remotely for results . . .”).

¹⁵¹ David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1773 n.30 (1997); see also RESTATEMENT (SECOND) OF TORTS § 435A (A.L.I. 1965).

¹⁵² *Derosier v. New Eng. Tel. & Tel. Co.*, 130 A. 145, 152–53 (N.H. 1925) (emphasis added); see also Bauer, *supra* note 147, at 589; RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 33 cmt. e (A.L.I. 2010) (“[I]f an intentional tort is not highly culpable . . . the scope of liability should be scaled to the more modest culpability.”).

¹⁵³ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 33 (A.L.I. 2010).

Consider, in more detail, how this proposal makes sense of the kinds of transferred-intent cases discussed above. It explains why the defendant who maliciously shoots at *A* ought to be liable to compensate another person, *B*, whom he thereby kills, even if *B*'s presence on the scene is utterly improbable. Similarly it explains why, if the defendant attempts to kill *A* by shooting at a mannequin that mistakenly appears to be *A*, and the defendant thereby kills another person unforeseeably on the scene, the defendant is liable to compensate that person regardless of whether she happens to be *A* or some other person *B*.

There are certain respects in which the proposal does not track all of the fine-grained structural contours of the transferred intent fiction — but that is a virtue of the proposal, not a vice. Suppose that the defendant negligently pets *A*'s dog, which he mistakenly believes to be his own. By doing so, he triggers a hidden motion detector that detonates a bomb, blowing up a cat that belongs to another person, *B*. By its terms the doctrine of transferred intent seems to apply to the tort of trespass to chattels,¹⁵⁴ so it yields the result that the defendant is liable in trespass to *B* for the injury he has unforeseeably inflicted on her cat. But this seems entirely at odds with common moral understanding; the defendant seems no more morally liable than the train attendant in *Palsgraf*.

In this sort of case, therefore, the scope of a legal rule plainly diverges from the common moral sensibilities that underlie and rationalize it. By its terms, the transferred intent fiction prescribes a recovery here that “does not seem consonant with current ideas of justice or morality.”¹⁵⁵ Common sense morality does not suppose that “for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave.”¹⁵⁶ The scarcity of transferred intent cases, in life and litigation, prevents this divergence between legal form and moral substance from working much injustice in practice.

The idea that the operative instincts behind transferred intent doctrine sound in agential culpability is far from a novel one. This idea is suggested by *Prosser and Keeton on the Law of Torts*¹⁵⁷ and equally authoritative English authority,¹⁵⁸ as well the *Third Restatement*, which accordingly prescribes that the doctrine should be interpreted and

¹⁵⁴ Prosser, *supra* note 55, at 655–56. *But see* Kutner, *supra* note 137, at 1126.

¹⁵⁵ *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (Wagon Mound No. 1)* [1961] AC 388 (PC) 422 (appeal taken from Austl.).

¹⁵⁶ *Id.*

¹⁵⁷ PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 77, § 8, at 38 (“It is quite probable . . . that the persistence of the principle has been due to a definite feeling that the defendant is at fault, and should make good the damage.”).

¹⁵⁸ W.V.H. ROGERS, WINFIELD AND JOLOWICZ ON TORT 303 (17th ed. 2006) (“[T]he law insists, and insists quite rightly, that fools and mischievous persons must answer for consequences which common sense would unhesitatingly attribute to their wrongdoing.”).

applied in light of the tortfeasor's degree of culpability.¹⁵⁹ There is no way of interpreting the doctrine, however, that will entirely cure its mismatch with the common moral convictions that underlie and justify it. For there are situations, such as the hypothetical just discussed, in which the terms of the transferred intent fiction plainly call for recovery, but this underlying justification supplies no basis for it.¹⁶⁰ Conversely there are cases in which this underlying justification is fully implicated but the terms of the transferred intent fiction are silent.

Imagine, for example, a variation of Prosser's case in which the defendant is grossly reckless with respect to his possible commission of some deadly bodily intrusion against *A*: Without any good reason, the defendant releases a cat in *A*'s direction, knowing that there is a one-in-two chance that the cat will come into contact with *A* and kill her, since *A* is deathly allergic to cats. As it happens, the cat does not come into contact with *A* but *does* come into contact with *B*, a different person who is unforeseeably on the scene and who is *also* deathly allergic to cats. Since the defendant did not possess any "substantial certainty" as to the harm he might cause *A*, he cannot be deemed even constructively to have intended harm to *B*.¹⁶¹ Thus, the doctrine of transferred intent will be unable to secure any recovery to *B*. And since, as *Palsgraf* lays down, there is no doctrine of transferred negligence — not even in the case of gross negligence or gross recklessness¹⁶² — *B* will be left without any doctrinal peg on which to hang a claim for recovery. Yet the same common moral instincts that counsel in favor of permitting *B* recovery in Prosser's original case seem to speak powerfully in favor of affording *B* recovery here. If such a case should actually arise, it would not be at all surprising to see the court defy the formal strictures of doctrine in order to send it to the jury, or to see the jury grant the plaintiff recovery.

Such cases suggest that the transferred intent fiction is most plausibly understood as an extremely coarse fictional device by which the law roughly tracks one dimension of the more general moral phenomenon articulated by CFD*: The scope of an actor's remedial moral responsibility for the materialization of the risks of injury posed by his action is sensitive to his degree of culpability for imposing the risks in question. Is it implausible to suppose that the law should implement its underlying moral principles with so coarse a device? No; we will see several more such coarse devices below. Before that, however, it is worth dwelling a

¹⁵⁹ RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 110 cmt. d (A.L.I., Tentative Draft No. 1, 2015).

¹⁶⁰ See *supra* p. 1043.

¹⁶¹ See RESTATEMENT (SECOND) OF TORTS § 8A (A.L.I. 1965) ("The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.").

¹⁶² Prosser, *supra* note 55, at 662 ("The attempt to extend the 'transfer' to negligence met defeat, apparently final, in the *Palsgraf* case.").

bit more on one of the doctrinal phenomena we have just encountered, and others in its vicinity.

B. Proximate Cause, Punitive Damages, and Holistic Culpability

As just discussed, the proximate cause determination in negligence is sensitive to a defendant's level of culpability in performing the action that injured the plaintiff. Similarly, and even more obviously, the defendant's level of culpability determines whether the plaintiff whom he has injured can exact punitive damages from him. In both ways, the law takes cognizance of the defendant's *holistic culpability*, rather than his culpability *as toward the plaintiff*. It is difficult to square these doctrinal phenomena, therefore, with the *Palsgraf* perspective's insistence that a defendant's liability to a plaintiff must turn entirely on his mistreatment of *her*.

Let us begin with punitive damages. Consider again the classic transferred intent hypothetical in which the defendant attempts to shoot and kill one person, *A*, and ends up, improbably, shooting and killing some different person, *B*, instead. Suppose a variation of the case in which *B* is a foreseeable, albeit improbable, victim. In such a case, it is indeed possible to explain the defendant's liability to *B* (or her estate) in conformity with the *Palsgraf* principle, for he has acted wrongfully toward her as well as toward *A*.

Now let us imagine, however, that *B*'s estate presses not only for compensatory damages but for an award of punitive damages as well. It would be entirely unremarkable, indeed prosaic, for a jury to grant such an award, and no judge would dream of reversing it. Notice, however, that the propriety of such a punitive damages award cannot be grounded in the magnitude of the defendant's mistreatment of *B*, for the defendant was not very negligent *as toward B* at all. The defendant's vulnerability to punitive damages, in such a case, depends upon his culpability *tout court*, not his culpability vis-à-vis the plaintiff.¹⁶³ There is no strict inconsistency in supposing that, while the defendant's liability to compensate *B* depends on whether he has mistreated her, his liability

¹⁶³ One might suggest that the defendant's killing of *B* constitutes extreme mistreatment of her, so as to warrant punitive damages, because the defendant had no even minimally good reason to impose a risk of death upon her. But that cannot be right. Suppose that some defendant negligently plays around with a gun in such a way that foreseeably imposes a very small but nontrivial risk of death on a bystander. If that risk materializes, the defendant will be liable in negligence to the bystander's estate, but he will not be vulnerable to punitive damages. See RESTATEMENT (THIRD) OF TORTS: REMEDIES § 39 cmt. b (A.L.I., Tentative Draft No. 3, 2024) (“[N]egligence alone is not sufficient to justify punitive damages.”). The cases are similar in that, in both, the defendant has a very weak reason for exposing the victim he ends up killing to a risk of death. They are distinguished by the defendant's level of holistic culpability. See *id.* § 39(a)(2) (noting that a plaintiff may be entitled to punitive damages if she “establishes by clear-and-convincing evidence that the defendant intended to harm the plaintiff *or others*, recklessly disregarded a substantial risk of harm to the plaintiff *or others*, or otherwise acted in an outrageous or malicious manner” (emphases added)).

to pay punitive damages to her may depend on how gravely he has mistreated others. But the tension between these propositions is glaring, and it is unlikely that both of these propositions will survive any plausible attempt to work out the normative basis of liability to pay punitive damages.

Take proximate cause next. Suppose that in attempting to shoot and kill *A*, the defendant triggers a nest of hornets, unforeseeably hidden on the scene, that lethally sting both *A* and *B*.¹⁶⁴ The defendant will be liable to *A* in battery,¹⁶⁵ and liable to *B* in battery on the fictional basis that the defendant intended *B*'s death alongside *A*'s. But suppose that, in line with the maneuver described above, we dispense with that fiction and instead attempt to ground the defendant's liability to *B* on the basis of ordinary negligence principles. Can we do so? Only if we acknowledge that the defendant's enormous culpability *as to A* can expand the range of harms *to B* for which he is liable, beyond the boundaries of reasonable foreseeability which would normally delimit this range.¹⁶⁶ If (for example) the defendant were merely careless in playing with a gun, notwithstanding the risk that by doing so he might shoot and kill *A* and *B*, it is unlikely that any court would hold him liable for bringing about *B*'s death by shooting and triggering an unforeseeable nest of hornets.¹⁶⁷ The scope of the defendant's liability for causing unforeseeable harm to *B* in the preceding case, just like his liability for causing unforeseeable harm to *A*, reflects his *holistic* culpability for his action. That is true whether the defendant's liability to *B* is doctrinally secured by the fiction of transferred intent or instead by the proposition that the defendant's heightened culpability can expand the ambit of harms for which he is liable in negligence, beyond those harms that he can reasonably foresee.

That proximate cause determinations are sensitive to a defendant's holistic culpability is readily intelligible if the law is implementing a moral principle such as CFD*. Predicating liability for punitive damages on holistic culpability coheres naturally with this position as well (although any sustained treatment of punitive damages is beyond the scope of this Article). These phenomena are much harder to square with the *Palsgraf* perspective. If a court must determine whether a defendant is liable to a plaintiff *at all* by asking only whether he has mistreated her (as opposed to other people), why should it be proper for the court to determine the *scope and magnitude* of the defendant's liability by looking at his mistreatment of the plaintiff among other people?

Indeed, the idea that culpability *in any form* should bear upon proximate cause is mysterious if we adopt the *Palsgraf* perspective. Recall

¹⁶⁴ This case is modeled on a hypothetical in Goldberg, *supra* note 139, at 1340.

¹⁶⁵ *See id.*

¹⁶⁶ *See id.* at 1342.

¹⁶⁷ *See id.* at 1340.

its central interpretive commitment: that the elements of each tort together define a qualified relational legal wrong of injury, which consists in the breach of a qualified relational legal duty of non-injury, and that each such legal duty and wrong encode a moral duty and moral wrong recognized by the law.¹⁶⁸ On this view, the proximate cause element of the negligence tort must be located within the content of the qualified relational duty of non-injury that the negligence tort defines. For this reason, accounting for the culpability-sensitivity of proximate cause determinations requires characterizing the content of this relational duty in a baroque way: It must be characterized as a duty not to foreseeably injure another person by breaching one's duty to take care not to injure him, where one's level of culpability in breaching that duty of care determines whether the resulting injury counts as sufficiently foreseeable that one has breached the qualified duty of non-injury in which the duty of care is embedded.

So even if we are prepared to recognize qualified relational moral duties of non-injury, it seems especially difficult to construe the tort of negligence as encoding any plausible instance of this sort of duty (or correlative wrongs) once the holistic culpability-sensitivity of the proximate cause element is brought clearly into view. It is more natural to regard considerations such as a tortfeasor's holistic culpability for an action and the fortuitous or foreseeable character of the resulting injury, as helping to determine his *responsibility* for occasioning that injury.¹⁶⁹

C. *Form and Substance in the Tort of Battery*

Even if it is unnatural to understand the negligence tort as a relational wrong, there are other torts that — at least on their face — are more natural to understand in this way. Consider battery. We have seen that the law sometimes deforms the relational structure of battery, by means of the transferred intent fiction, in order to recognize and enforce a sort of compensatory moral liability that does not rest on relational moral wrongdoing between defendant and plaintiff.¹⁷⁰ But at least in its nonfictional core, one might think, the tort of battery plainly articulates a sort of relational wrong. A defendant batters a plaintiff by harmfully or offensively contacting *him*, through intending such a contact, without adequate privilege or excuse.¹⁷¹

¹⁶⁸ See *supra* p. 1027.

¹⁶⁹ *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (Wagon Mound No. 1)* [1961] AC 388 (PC) 422–23 (appeal taken from Austl.) (“It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act.”).

¹⁷⁰ See *supra* notes 47–51 and accompanying text.

¹⁷¹ Allan Beever, *The Form of Liability in the Torts of Trespass*, 40 COMMON L. WORLD REV. 378, 390 (2011) (“[A]ny touching of another’s body is, in the absence of lawful excuse, capable of amounting to a battery and a trespass.” (emphasis omitted) (quoting *In re F. (Mental Patient: Sterilisation)* [1990] 2 AC 1 (HL) 73 (appeal taken from Eng.) (Lord Goff))).

This understanding gains support from the fact that at least certain defenses to battery — which prevent a *prima facie* case of battery from counting as an actionable wrong, all things considered¹⁷² — appear to have relational structure. Consider the apparent consent privilege.¹⁷³ If a defendant reasonably but mistakenly believes that a plaintiff has consented to some harmful contact, then he will escape liability in battery although the plaintiff did not *in fact* consent.¹⁷⁴ To understand this privilege in relational terms is, on its face, quite natural: It is because *A* does not treat *B* wrongfully that she cannot recover from him in these circumstances, although she did not *in fact* waive her right against being so contacted.

Consider, however, the following case: Suppose that, as part of a puerile reality show, the defendant sprays a stinky gas that could potentially prove lethally injurious at two people, *A* and *B*. It is clear that *A* does not consent, but the defendant simply does not care; by contrast, the defendant has strong reason to believe (in part on the basis of a reasonable interpretation of her gestures) that *B* *does* consent. Suppose it turns out that *B* does not in fact consent (and, for good measure, suppose that the prospect that her gestures might be interpreted as consent, or that she might otherwise be taken to consent, was not reasonably foreseeable to *B*). If both *A* and *B* are killed by the gas, it seems clear that the defendant is liable to compensate both of their estates. But the apparent consent privilege, if taken at face value, denies *B*'s estate such recovery.¹⁷⁵

That the apparent consent privilege misfires, in such a case and others like it, indicates that the privilege is only a rough proxy for the common moral judgments that it registers. If a plaintiff reasonably appears to consent (but does not in fact consent) to a defendant's injurious action, it will often be the case that the defendant cannot be accused of any fault. It may also be true that the plaintiff has foreseeably induced in the defendant a mistaken impression that she is aggressing against him, in which case it may be plausible that she waives her right against

¹⁷² Cf. RESTATEMENT (SECOND) OF TORTS § 5(b) (A.L.I. 1965) (stating that an actor's conduct renders them liable only if they have no applicable defense).

¹⁷³ *Id.* § 892(2) ("If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.")

¹⁷⁴ See *id.*; *id.* § 892A(1).

¹⁷⁵ This result might be less repugnant if *B*'s estate were able to recover in negligence, but taking the relational structure of the negligence tort at face value would preclude such a recovery as well. For the defendant's lack of due care, in such a case, is not a lack of due care *toward B*. (If this is not clear, we can fill in the details of the case to make it clear: For example, suppose that the defendant has good but misleading evidence to believe that *B* has given enthusiastic and informed consent, for amply sufficient remuneration, to being sprayed by the gas.) What makes it culpable and wrongful to spray the gas, in such a case, clearly has nothing to do with *B*: It is the fact that *A* clearly does not consent that puts the defendant in breach. Although *B* is not an unforeseeable victim, she is nevertheless not wrongfully treated; allowing her a negligence recovery would run afoul of Cardozo's insistence that the negligence plaintiff must sue for a wrong personal to her.

the resulting injury via some moral mechanism akin to estoppel.¹⁷⁶ Where neither is true, the defendant is morally liable to compensate the plaintiff for culpably and foreseeably causing an infringement of her right against being harmfully touched (a right that she has not, in fact, waived or otherwise lost). Presented with facts of this kind, it is difficult to believe that a court would not find a way to reach the same conclusion. And if such facts were to arise with some regularity, it would not be surprising to see the common law devise fictional maneuvers to provide for such recovery as a matter of course.

The self-defense privilege can misfire in a similar way. The privilege immunizes an actor from liability for using lethal defensive force against an apparent aggressor if the actor reasonably believes that “the [apparent aggressor] is about to inflict upon him an intentional contact or other bodily harm”¹⁷⁷ and “he is thereby put in peril of death or serious bodily harm or ravishment, which can safely be prevented only by the immediate use of such force.”¹⁷⁸ Thus it is natural to interpret the self-defense privilege, too, as embodying a concern for relational wrongdoing: Although the merely apparent aggressor has in fact done nothing to forfeit or diminish her right against being killed, the defendant who uses lethal force against her cannot be said to mistreat her, given his reasonable belief to the contrary.

But now suppose that the defendant is walking along the ridge of a high cliff when he notices *A*, proceeding in his direction, with a hunting rifle. *A* is a perfect doppelganger for a hit woman that has been trying to kill the defendant. The defendant reasonably but mistakenly believes that *A* is the hit woman and is imminently about to murder him, such that he can save his life only by preemptively killing her. Thus the defendant grabs an innocent and obviously unthreatening bystander who happens to be on the scene, *B*, and throws *B* at *A*, sending both of them off the cliff and to their demises. In fact, *A* was *also* an entirely innocent and unthreatening person, returning to her home after using her hunting rifle to cull an overgrown herd of wild animals (and she could not reasonably have known, we may suppose, that she might be mistaken for an aggressor on her way back home). The defendant is straightforwardly liable, both in morality and the law of battery, to compensate *B*'s estate for lethally using her body without her consent.¹⁷⁹

¹⁷⁶ See Kenneth W. Simons, Actual, Apparent, and Hypothetical Consent in Tort Law 10 (unpublished manuscript) (on file with the Harvard Law School Library) (noting that the apparent consent privilege can be treated as a kind of estoppel doctrine); RESTATEMENT (SECOND) OF TORTS § 65(1)(a)–(b) (A.L.I. 1965).

¹⁷⁷ RESTATEMENT (SECOND) OF TORTS § 65(1)(a) (A.L.I. 1965).

¹⁷⁸ *Id.* § 65(1)(b).

¹⁷⁹ *Id.* § 73 cmt. b (“The fact that the actor cannot otherwise protect himself against bodily harm so threatened gives him no privilege to cause any substantial bodily harm to an innocent person.”); see also *id.* § 73 cmt. b, illus. 2 (“As *A* is on the point of discharging the pistol, *B*, to shield himself, deliberately seizes *C*, a bystander, and drags him in front of *B*. The bullet from *A*'s pistol, which otherwise would have hit *B*, hits and wounds *C*. *B* is subject to liability to *C*.”).

Intuitively, however, the defendant is morally liable to compensate *A*'s estate for culpably killing her, too, and one strongly suspects that a common law court would find a way to enforce this liability. But the self-defense privilege, as articulated on its face, blocks such a recovery.¹⁸⁰

Again the most plausible diagnosis is that the doctrinal contours of this privilege track the contours of the underlying moral terrain only roughly. When a defendant uses evidently necessary deadly force against a plaintiff who reasonably appears to be threatening his life, it will very often be the case that the defendant's action is not culpable. Sometimes, it may also be the case that the plaintiff has foreseeably and responsibly induced in the defendant this reasonable appearance, such that the plaintiff should be understood to have waived her right against this action in an estoppel-like fashion.¹⁸¹ In some cases, however, neither will be true — and in such cases, the privilege will immunize from liability a defendant who ought in justice to compensate his victim, because he has culpably and foreseeably infringed her right against being killed or injured.¹⁸²

As such cases suggest, it is facially plausible but implausible upon reflection to construe the self-defense privilege as encoding a principled moral commitment to predicating the defendant's liability to the plaintiff on whether he treated *her* wrongfully. In such cases, a relational understanding of the privilege's moral logic would implausibly divorce this logic from common moral intuition. The more plausible view is that relational wrongdoing between defendant and plaintiff, in mistaken self-defense cases, is not the ground of the former's liability to the latter even if it mostly tracks this ground well enough. Like the apparent consent privilege, the self-defense privilege's moral function is not to identify and redress a relational moral wrong between defendant and plaintiff; it is to roughly track features of the defendant's conduct (in particular, his culpability) and the plaintiff's conduct (in particular, her responsibility for inducing a relevant mistake about whether she has consented or is aggressing) that help to determine whether the former is liable to the latter.

An obvious objection to the preceding arguments is that they infer too much about the moral substance of battery law from its doctrinal periphery. Most paradigmatic battery cases, of the sort that figure prominently in casebooks and treatises, do indeed involve relational wrongdoing or mistreatment: A defendant intentionally touches another person, in a manner not unlikely to be at least somewhat harmful or offensive, without any adequate reason for doing so.¹⁸³ And so, one might suggest, the tort of battery is, *at least in its heartland*, the law's

¹⁸⁰ See *id.* § 65(1)(a)–(b).

¹⁸¹ NICHOLAS J. MCBRIDE & RODERICK BAGSHAW, *TORT LAW* 49 (7th ed. 2024).

¹⁸² See *RESTATEMENT (SECOND) OF TORTS* § 65 (a)–(b) (A.L.I. 1965).

¹⁸³ See, e.g., *Cecarelli v. Maher*, 12 Conn. Supp. 240, 240 (C.P. 1943).

recognition of a sort of relational moral wrong — a moral wrong that is distinctive in kind from, and generally graver than, the moral wrong recognized by the tort of negligence, for which reason the law separately recognizes it and attaches distinctive consequences to its commission.¹⁸⁴

But it proves very difficult to articulate any plausible account of what this distinctive sort of relational moral wrong is supposed to be. Attempts to do so, including by defenders of the *Palsgraf* perspective, tend quickly to lose sight of battery doctrine — not only its periphery, but also its heartland. Kantian philosophical formalists, for example, suggest that battery and trespass encode the relational wrong of using another person’s body, which (along with her property) belongs to her, without her consent.¹⁸⁵ The suggestion is attractive because harmfully instrumentalizing other people’s bodies is widely regarded as an especially serious form of interpersonal mistreatment: To kill someone in order to eliminate him as a romantic rival is seriously wrongful, but to enslave him, or kill him in order to appropriate his organs, is even more so.

In many paradigmatic cases of battery, however, the defendant does not in any ordinary sense of the term *use* or *instrumentalize* the plaintiff. To shoot another person in order to eliminate him as a romantic rival is classic battery — but it cannot be understood as “using” him except by defining a sense of the term that is so capacious that it is essentially stipulative and conclusory.¹⁸⁶ Even waiving this objection and granting that intentionally making contact with an object to eliminate it can count as “using” it, the proposal fails to track well-settled law. It is well-established that if a defendant intentionally makes contact with an object that she mistakenly regards as an animal or inanimate object, and the object is in fact the plaintiff’s body, the plaintiff’s action will sound in negligence, not battery.¹⁸⁷ Nor does the Kantian view make room for the fact that a defendant can batter a plaintiff entirely as a side effect of pursuing her own goals, by unintentionally imposing on the plaintiff a “substantial certainty” of harm.¹⁸⁸ To be sure, the law equates such

¹⁸⁴ Cf. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 971 (2010) (explaining the law’s refusal to allow comparative fault as a defense to intentional torts on the basis that negligence and intentional torts are “different forms or classes of wrongings, subject to different definitions and defenses”).

¹⁸⁵ See RIPSTEIN, *supra* note 17, at 29–53.

¹⁸⁶ Cf. Scott Hershovitz, *The Search for a Grand Unified Theory of Tort Law*, 130 HARV. L. REV. 942, 950 (2017) (book review) (“Ripstein needs to interpret ‘use’ capaciously if he wants to vindicate his suggestion that the wrong involved in battery is using the plaintiff’s body without permission.”).

¹⁸⁷ See, e.g., *Webster v. Seavey*, 138 A. 541, 543 (N.H. 1927); *Rudd v. Byrnes*, 105 P. 957, 958–59 (Cal. 1909).

¹⁸⁸ Simons & Cardi, *supra* note 138, at 351 & n.9 (“[O]n Ripstein’s theory, it would seem that purposely contacting a person would be an impermissible battery while knowingly contacting the person ordinarily would not, since a knowing interference with a person’s rights that is a mere side effect of the actor’s purposes is not readily conceptualized as an impermissible *using*. Yet either circumstance supports battery liability.”).

“substantial certainty” to intent,¹⁸⁹ for the purpose of imposing liability in battery and the other intentional torts. But this equivalence is plainly a fiction.

The existence of such a fiction, moreover, tells against another tempting account of the distinctive moral wrong of battery, on which the wrong consists in *deliberately* harming or offending (or deliberately touching in a foreseeably harmful or conventionally offensive way) another person.¹⁹⁰ Suppose that the defendant is a hit man seeking to murder *A* with a sniper rifle. *A* is in his line of sight, but then *B*, whom the defendant has no desire to kill, moves in front of *A*. As the defendant knows, therefore, if he pulls the trigger of his rifle, the bullet will unavoidably kill *B* on its path to killing *A*. When he pulls the trigger and kills both *A* and *B*, the defendant seriously wrongs both of them. And it does not seem that the defendant’s wrong to *A* is significantly graver than, or in some important respect morally distinct from, his wrong to *B*: These victims are more or less equally mistreated. Certainly these culpable and wrongful injurings do not seem morally distinct in any way that bears upon the defendant’s remedial moral liabilities: The defendant is liable to *B*’s estate no less than *A*’s estate, and it would not be morally permissible or proper for the defendant, if rendered insolvent, to give any significant priority to satisfying one liability over the other.

The common law’s fictional contrivance to treat “substantial certainty” of harm as equivalent to an intention of harm, for purposes of liability in battery and the other intentional torts, is in part an implicit recognition that substantially certain injurers are often no less culpable than intentional injurers and thus properly exposed to a similar scope of liability. To be sure, this fictional contrivance serves multiple ends; so, for example, substantial certainty can function as an evidential proxy for an actual intention of harm, thus obviating the difficulties that might attend a plaintiff’s attempt to establish that the defendant actually intended her harm. But such a function could also be served by treating substantial certainty as raising an extremely strong but defeasible *inference* of actual intent and imposing upon the defendant the burden of undercutting this inference. That no such modification of the current regime has been entertained is some further indication that the fiction also serves other ends.

In particular, the fictional assimilation of substantial certainty to intention enables the law to enforce ordinary moral convictions that its

¹⁸⁹ RESTATEMENT (SECOND) OF TORTS § 8A (A.L.I. 1965) (“The word ‘intent’ is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”). English case law is more sparse, but the English courts have similarly suggested that “subjective recklessness” can satisfy the intent element of intentional torts. See *Wilson v. Pringle* [1987] QB 237; *Iqbal v. Prison Officers Ass’n* [2009] EWCA (Civ) 1312, [2010] QB 732.

¹⁹⁰ See Goldberg & Zipurksy, *supra* note 184, at 971; John Finnis, *Intention in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 229, 237 (David G. Owen ed., 1995).

formal structure would otherwise leave unenforced. Thus, for example, it allows the law to deny the defendant, as an intentional tortfeasor, the ability to plead the plaintiff's own fault in order to eliminate or diminish her recovery;¹⁹¹ precludes the defendant from discharging the liability in bankruptcy;¹⁹² and allows the law to readily widen the scope of the tortfeasor's liability beyond the bounds of reasonable foreseeability.¹⁹³ These results seem proper when the batterer is highly culpable, as will often be true of the substantially certain injurer (just as it will often be true of the intentional injurer). It is widely recognized by thoughtful legal commentators that these results are more difficult to defend when the batterer is *not* highly culpable.¹⁹⁴ That fact helps to confirm what reflection on the battery tort otherwise suggests: The distinction between intentional and nonintentional harm set up by the law's distinction between battery and negligence is a rough proxy for culpability, rather than the law's reflection of distinct classes of relational moral wrongs or mistreatments.

It is an open question whether using intention (and substantial certainty) as a proxy for culpability, in these various contexts, is ultimately defensible. Especially in light of developments such as the shift from contributory negligence to comparative fault, it is arguable that the law ought to determine the availability of the comparative fault defense, bankruptcy discharge, and similar matters through a direct inquiry into the defendant's level of culpability.¹⁹⁵ For interpretive purposes, the point is that the moral reasons against retaining the proxy are considerations widely recognized by participants in legal practice as integrally connected to the purpose (to register defendant culpability) the proxy is thought to serve.

In short, while the concepts that lie on the formal surface of the battery tort — intention, apparent consent, and so on — suggest that the tort's function is to identify and redress relational wrongs or mistreatments, there is good reason not to take this surface language at face value. It is because the battery tort is largely performing the same normative function as the tort of negligence — identifying and enforcing remedial moral liabilities that arise from the culpable and foreseeable infringement of rights against bodily injury — that battery doctrine must make use of fictional devices such as assimilating substantial

¹⁹¹ See generally Aaron D. Twerski & Nina Farber, Essay, *Extending Comparative Fault to Apparent and Implied Consent Cases*, 82 BROOK. L. REV. 217 (2016) (describing the role of comparative fault in tort law).

¹⁹² See, e.g., *In re Kane*, 755 F.3d 1285, 1293 (11th Cir. 2014).

¹⁹³ See *supra* sections II.A–B, pp. 1035–48.

¹⁹⁴ See, e.g., Twerski & Farber, *supra* note 191, at 218.

¹⁹⁵ Whether to allow certain intentional tortfeasors to plead their victims' comparative fault apparently proved an "issue of great controversy" in the American Law Institute's most recent attempt to restate the law of apportionment in tort. Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1065 (2006).

certainty to intent and transferring intent between victims. The civil law codes have little need for such fictions, for clauses such as BGB section 823(1) and CC 2043 seek to perform this function on their face.

The vast majority of nonprivileged batterers are at least somewhat at fault, even if the fault is slight.¹⁹⁶ There is, however, a small residuum of battery cases that do not involve fault at all. In some of these, the defendant justifiably imposes a heightened risk of harm, so as to satisfy the “substantial certainty” prong of battery’s intent element. Such liability can be grounded in a non-fault-based form of moral responsibility, the same sort of moral responsibility that underlies strict liability for abnormally dangerous activities and the doctrine in *Vincent v. Lake Erie Transportation Co.*¹⁹⁷

Other cases may require a different account, however. In particular, battery law typically holds liable a mentally insane defendant who acts on an intention to make contact with a plaintiff for the resulting harm or offense, even if the defendant is incapable of appreciating *that* this contact might harm or offend.¹⁹⁸ This fact might be adduced as evidence that battery law truly is concerned with a type of relational wrongdoing or mistreatment — intentionally touching another person, in a harmful or conventionally offensive manner, without that person’s consent — whether or not the defendant can be regarded as at fault or otherwise responsible for engaging in that conduct.¹⁹⁹

The argument is ultimately unconvincing, in my view. Battery law’s insensitivity to insanity is entirely of a piece with tort law’s general insensitivity to cognitive disability,²⁰⁰ including in the heartland of negligence. In the case law, this general insensitivity is most often explained by administrative, evidentiary, and practical considerations,²⁰¹ as well as suggestions that the cognitively disabled should in fairness be strictly liable for the heightened risks they impose on others by going through

¹⁹⁶ The classic case of slight fault is *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955).

¹⁹⁷ 124 N.W. 221 (Minn. 1910); see *infra* section II.F, pp. 1067–76.

¹⁹⁸ See, e.g., *White v. Univ. of Idaho*, 797 P.2d 108, 109 (Idaho 1990). But see *White v. Muniz*, 999 P.2d 814, 815 (Colo. 2000) (adopting an understanding of the intent element in battery that precludes this result).

¹⁹⁹ See John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 *FORDHAM L. REV.* 743, 750 (2016); cf. Mark A. Geistfeld, *Conceptualizing the Intentional Torts*, 10 *J. TORT L.* 159, 163 (2017) (“Aggressive interactions are governed by the intentional torts, each of which protects the rightholder’s interests in security, dignity, and autonomy for reasons that are normatively distinct to this type of interaction.”).

²⁰⁰ See *McGuire v. Almy*, 8 N.E.2d 760, 762 (Mass. 1937) (“[C]ourts in this country almost invariably say in the broadest terms that an insane person is liable for his torts. As a rule no distinction is made between those torts which would ordinarily be classed as intentional and those which would ordinarily be classed as negligent . . .”).

²⁰¹ See *Williams v. Hays*, 38 N.E. 449, 450 (N.Y. 1894) (“It is said that public policy requires the enforcement of the liability, that the relatives of a lunatic may be under inducement to restrain him, and that tortfeasors may not simulate or pretend insanity to defend their wrongful acts, causing damage to others.”).

the world in their condition.²⁰² Both lines of explanation may be dubious, on reflection.²⁰³ It is arguable that, like most of the civil law codes,²⁰⁴ the common law should decline to impose tort liability on defendants that truly lack mental capacity except where their lack of capacity has been self-induced through responsible actions they previously performed. The point for present purposes is that, by its own lights, the common law does not appear to impose tort liability on defendants lacking mental capacity because it believes they have genuinely mistreated or morally wronged the plaintiffs they have injured. Whether or not justifiable, the common law's harshness toward mentally incapable defendants is a departure from its general policy — operative across torts including battery and negligence — of holding defendants liable for infringing others' rights in a morally responsible manner.

D. *Wrongful Death and Loss of Consortium Actions*

The divergence between formal structure and moral substance is even more glaringly apparent in the domain of the derivative actions for wrongful death and loss of consortium, an area with far greater significance than the infrequently litigated law of battery. Suppose the defendant negligently drives into a pedestrian, injuring or killing her, and leaving the pedestrian's wife bereaved. The pedestrian's wife may recover against the driver on behalf of the pedestrian's estate.²⁰⁵ But she may also recover on her *own* behalf, for losing the social, financial, and inherent benefits of her relationship with her wife, and (in many states, at least) for her resulting emotional distress.²⁰⁶ So, too, if she loses such benefits because her wife is grievously injured rather than killed.²⁰⁷

Such actions for wrongful death and loss of consortium are *derivative*, rather than freestanding: They allow the kin of a primary victim to recover but only upon demonstration that the primary victim was tortiously injured. These causes of action are not torts, but doctrinal appendages to the various torts.²⁰⁸ Thus it might be suggested they are best understood as an inaccurately taxonomized variant of survival

²⁰² This is perhaps the most morally plausible interpretation that can be given to the Second Restatement's jarring assertion that "if mental defectives are to live in the world they should pay for the damage they do." RESTATEMENT (SECOND) OF TORTS § 283B cmt. b(3) (A.L.I. 1965).

²⁰³ See generally James Goudkamp, *Insanity as a Tort Defence*, 31 OXFORD J. LEGAL STUD. 727 (2011) (arguing for an affirmative insanity defense in tort law).

²⁰⁴ See, e.g., Art. 2046–48 Cod. Civ. [Italian Civil Code] (It.); CODE DES OBLIGATIONS [CO] [CODE OF OBLIGATIONS] Mar. 30, 1911, RS 220, art. 54 (Switz.); BGB §§ 827, 829, 832 (Ger.); ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] §§ 1306–07, 1310 (Austria).

²⁰⁵ See RESTATEMENT (SECOND) OF TORTS § 926 (A.L.I. 1979).

²⁰⁶ See 22A AM. JUR. 2D *Death* § 3, Westlaw (database updated June 2025).

²⁰⁷ See RESTATEMENT (SECOND) OF TORTS § 693 (A.L.I. 1977).

²⁰⁸ See William E. Crawford, *Torts*, 55 LA. L. REV. 657, 658 (1995) ("The claim for loss of consortium is almost indistinguishable from the claim for wrongful death in that both causes of action are dependent on a primary tort to another person.").

actions (which are brought on behalf of a decedent's estate rather than in the name of her kin, even if the estate's assets are then predictably distributed to the decedent's kin, and even if a kinsman might serve as the estate's representative).²⁰⁹ In the large majority of states, however, this suggestion does not comport with the remedial legal consequences of wrongful death suits. Wrongful death damages are not swept up into a decedent's estate; the decedent's creditors cannot lay claim to them.²¹⁰ Similarly, the tortfeasor cannot set off debts owed to him by the decedent against the wrongful death damages that he owes to the decedent's kin, as would be possible if these damages formed part of the decedent's estate.²¹¹

These remedial legal implications of wrongful death suits comport with the plausible moral judgment that the decedent's kin have claims against the tortfeasor in their own right, although he has not breached any legal duty of care owed to them. The same goes, *mutatis mutandis*, for loss of consortium actions. The availability of these kinds of actions is readily explicable if the common law is implementing a moral principle such as CFD*. When the defendant negligently kills or injures his primary victim, he does not only infringe the primary victim's moral rights; he infringes moral rights held by the victim's kin. These parties have moral rights that the defendant not cause a sort of damage (the death or injury of the primary victim) that will destroy or injure the morally valuable intimate relationship they share with her.²¹²

That is why kin are legally empowered to recover for the defendant's foreseeable injuring of the primary victim, even if they are unforeseeable victims. Suppose that Amelia is a cop, who has been deep undercover in a drug syndicate for many decades. Ron, a member of the syndicate, spends virtually all of his time together with Amelia — and it is thus exceptionally improbable, on Ron's evidence, that Amelia has any kin. If one day Ron negligently and foreseeably injures Amelia, he will still

²⁰⁹ Something like this understanding is briefly suggested in RIPSTEIN, *supra* note 17, at 13 n.20. On survival actions, see DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 585–99 (9th ed. 2022).

²¹⁰ RESTATEMENT (THIRD) OF TORTS: REMEDIES § 23 cmt. q (A.L.I., Tentative Draft No. 2, 2023) (describing the rule that wrongful death damages in a large majority of states are “payable directly to the plaintiffs, without passing through the decedent's estate, and thus [are] free of the claims of decedent's creditors”).

²¹¹ See, e.g., *McLaughlin v. Winner*, 23 N.W. 402, 404 (Wis. 1885); N.C. GEN. STAT. § 28A-18-2 (2025); VA. CODE ANN. § 8.01-54 (West 2025).

²¹² See Schaus, *supra* note 17, at 1189 (arguing that “partners in marriage-like relationships often have jointly held rights” and that “tort law can be understood to give legal effect to these rights by recognizing claims for loss of consortium”); see also *Millington v. Se. Elevator Co.*, 239 N.E.2d 897, 899 (N.Y. 1968) (“The loss of companionship, emotional support, love, felicity and sexual relations are real injuries. . . . [And] to describe these damages as merely parasitic is inaccurate and cruel.”).

be liable to compensate her kin, both in morality and in tort.²¹³ The common law recognizes and enforces their moral rights only indirectly — not in the form of any primary legal right held by the kin, but only by means of the derivative actions for wrongful death and loss of consortium — but it recognizes and enforces these rights all the same.

The derivative actions for wrongful death and loss of consortium are thus strong and pervasive counterexamples to the *Palsgraf* perspective, for they involve plaintiffs suing for injuries sustained through defendants acting wrongfully toward other people. It is surprising, then, that Cardozo does not deign to discuss wrongful death suits or loss of consortium actions at all in his opinion. Some defenders of the *Palsgraf* perspective follow suit, simply ignoring the threat to their view that such cases pose.²¹⁴ But others, such as Goldberg and Zipursky, have heroically sought to ward off this threat. Their main argument is that — as infamously laid down by Lord Ellenborough in the early nineteenth-century English case *Baker v. Bolton*²¹⁵ — the common law did not provide for wrongful death suits until legislative intervention forced it to.²¹⁶ The ingenious claim is that reflection on wrongful death suits thus *supports* the *Palsgraf* perspective: Because predicating liability on a relational wrong to the plaintiff is so central a pillar of the common law's architecture, a statutory wrecking ball was required to (partially) demolish it.²¹⁷

One problem with this argument is that the history is much less tidy than Goldberg and Zipursky suggest. While English courts remained hostile to wrongful death suits until Parliament intervened, the courts of many American states allowed husbands and fathers to claim against the killers of their wives and children even before the passage of wrongful death statutes by state legislatures.²¹⁸ In fact, there are plausible arguments — as the eminent Judge Baron Bramwell suggested sixty-five years after *Baker*,²¹⁹ and as suggested afterward by leading

²¹³ Cf. RESTATEMENT (SECOND) OF TORTS § 693 (A.L.I. 1977) (imposing loss of consortium liability based on liability for underlying tort to spouse). Examples involving unforeseeable kin tell against Professor Steven Schaus's valiant attempt to reconcile wrongful death suits with the *Palsgraf* perspective. See Schaus, *supra* note 17, at 1189, 1229–32. But Schaus's discussion, from which I have much learned, provides many valuable insights about the nature of close kin's moral rights against the killing or injuring of primary victims.

²¹⁴ As an example, see WEINRIB, *supra* note 17.

²¹⁵ (1808) 170 Eng. Rep. 1033, 1 Camp. 493; *see id.* at 493.

²¹⁶ See GOLDBERG & ZIPURSKY, *supra* note 6, at 204–05.

²¹⁷ *See id.*

²¹⁸ For example, *see* *Ford v. Monroe*, 20 Wend. 210, 210–11 (N.Y. Sup. Ct. 1838); *Cutting v. Seabury*, 6 F. Cas. 1083, 1085 (D. Mass. 1860) (No. 3,521); *The Sea Gull*, 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578) (quoting *Cutting*, 6 F. Cas. at 1084); and *Lynch v. Davis*, 12 How. Pr. 323, 325 (N.Y. Sup. Ct. 1855), all illuminatingly discussed in John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 731–32, 732 n.30 (2000).

²¹⁹ *See* *Osborn v. Gillett* (1873) 8 LR Exch. 88, 94–96 (Bramwell, B., dissenting).

historians of English law²²⁰ — that *Baker v. Bolton* was itself “a careless overstatement of the law.”²²¹ It is not obvious, therefore, that *Baker* fairly reflected the broader corpus of English common law, even if it was binding precedent for a time. To take the case as divining a deep truth about the normative character of the common law may be suspect, even in England.

Leaving these objections aside, Goldberg and Zipursky’s argument relies on a strong interpretive distinction between the judicially created common law of torts and the body of tort law that is produced by statutory enactment. That distinction seems dubious; tort law, like the private law more generally, has been a creature of statute as well as judicial decision for many centuries. More importantly, at least for our purposes, the argument seems to run roughshod over the intuitive character of the moral instinct behind the wrongful death statutes. The instinct was not (only) that wrongful death actions might better deter wrongdoing, or punish wrongdoers, or secure humanitarian assistance for the innocent victims of misfortune. It was (also) that interpersonal fairness and justice supported recognizing the decedent’s kin’s claims to redress as against the tortfeasor.

So, for example, the seminal New York wrongful death statute maintains that “in every such action the jury may give such damages as they shall deem *fair* and *just*, with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person.”²²² The language of such an enactment precludes construing it as an exercise in engineering social incentives or a humanitarian gambit for distributing the costs of misfortune. Rather, it reflects the widespread moral sentiment that we often have a claim, in justice, to redress for the injuries we suffer through the killing or injuring of our loved ones. It is simply that the formal structure of the common law, as (perhaps infelicitously) described and cemented by *Baker v. Bolton*, did not permit this prosaic sentiment even rough expression.²²³

Now the common law does permit this, of course, with the benefit of statutory intervention; but even now the derivative character of the actions for wrongful death and loss of consortium refracts the sentiment only obliquely. By contrast, many of the civil codes explicitly permit

²²⁰ See T.A. Smedley, *Wrongful Death — Bases of the Common Law Rules*, 13 VAND. L. REV. 605, 614 n.46 (1960) (“I should like to suggest, therefore, that when Lord Ellenborough gave his ruling in *Baker v. Bolton* he was the victim of the same confusion of ideas.” (quoting 3 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 335 (3d ed. 1923))); JOHN W. SALMOND, *THE LAW OF TORTS* 393 (11th ed. 1953) (“The rule as laid down by Lord Ellenborough is obviously unjust; . . . it is based upon a misreading of legal history.” (quoting Holdsworth, *supra*, at 393)).

²²¹ Smedley, *supra* note 220, at 614.

²²² Act of Dec. 13, 1847, ch. 450, § 2, 1847 N.Y. Laws 526, 526 (amended 1849) (emphases added).

²²³ See Roscoe Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 697 (1913) (describing nineteenth-century European and American law as not allowing for a judge’s conception of justice); *id.* at 712–13 (describing the disadvantages of law’s rigidity, including its inability to achieve justice).

secondary victims to recover in their own right for such injuries.²²⁴ By taking the common law's doctrinal architecture "at face value,"²²⁵ the *Palsgraf* perspective obscures how it is founded in ordinary moral sensibilities that do not differ as between common law countries and the European continent.

Understanding the normative logic of such derivative actions opens up intellectual and conceptual space for doing practical justice elsewhere in tort law. Suppose that a therapist negligently treats his patient, a child, and thereby induces in her false memories of abuse at the hands of her parent. It is plain that the child may recover from the therapist, but may the parent? Courts that have addressed such cases are split. Some recognize a duty of care to the patient's parent; others do not.²²⁶ All of these courts agree that whether the parent may recover turns on whether the therapist owes a duty of care to her, on top of the duty of care inarguably owed to her child.²²⁷

These courts tend to frame the duty analysis in nakedly instrumental terms, as a matter of "whether the social benefits of imposing a duty outweigh the social costs of imposing a duty."²²⁸ Defenders of the *Palsgraf* perspective are not amenable to this mode of analysis;²²⁹ after all, much of the early impetus for the *Palsgraf* perspective's development was its aversion to collapsing duty analysis into a "blunderbuss" judicial weighing of social costs and benefits.²³⁰ Rather than reverse engineering conclusions about the duty of care by way of instrumental calculations about liability, defenders of the *Palsgraf* perspective believe that judges should closely examine the existing legal materials and the customary moral norms that they embody in order to discern whether those materials and norms are best understood to recognize that the defendant owes the plaintiff a duty.²³¹ Conclusions about duty, so reached, should drive conclusions about liability rather than vice versa.

In the sort of case at hand, defenders of the *Palsgraf* perspective have suggested, liability to the parent should *not* be imposed.²³² That is because recognizing a duty of care to the parent would be incompatible

²²⁴ See BUSSANI, SEBOK & INFANTINO, *supra* note 14, at 123–26, 139.

²²⁵ RIPSTEIN, *supra* note 17, at 23; GOLDBERG & ZIPURSKY, *supra* note 6, at 46.

²²⁶ See, e.g., *Ramsey v. Yavapai Fam. Advoc. Ctr.*, 235 P.3d 285, 293–94 (Ariz. Ct. App. 2010) (collecting cases on each side); John C.P. Goldberg & Benjamin C. Zipursky, *Triangular Torts and Fiduciary Duties*, in CONTRACT, STATUS, AND FIDUCIARY LAW 239, 242–44 (Paul B. Miller & Andrew S. Gold eds., 2016) (same).

²²⁷ See *Ramsey*, 235 P.3d at 293–94.

²²⁸ *Roberts v. Salmi*, 866 N.W.2d 460, 465 (Mich. Ct. App. 2014) (quoting *In re Certified Question from the 14th Dist. Ct. of Appeals*, 740 N.W.2d 206, 211 (Mich. 2007)).

²²⁹ See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1839 (1998) ("We are suggesting that courts take the question of duty in negligence law at face value, rather than reducing it to a blunderbuss policy question.")

²³⁰ *Id.*; see *id.* at 1813.

²³¹ See *id.* at 1845.

²³² See GOLDBERG & ZIPURSKY, *supra* note 6, at 301.

with the therapist's fiduciary obligations to his patient, which require that his attention in treating her be focused exclusively on her interests rather than the interests of third parties.²³³ Not only *may* the therapist not take care as to the interests of others, he *must not* take care as to the interests of others. So there is no duty of care to others, such as a parent, on which the parent might found a claim to redress if she is injured by the therapist's mistreatment of her child.

The pigeonhole perspective suggests a different way of approaching these cases and duty analysis more generally. It is probably true, in such a case, that the therapist ought to be more or less exclusively attentive to his patient's interests: In making decisions about how to treat his patient, he ought not to act on any concern for the interests of third parties. Probably he should attempt to screen such concern from his deliberative radar entirely. In this sense, it is accurate to describe him as lacking any moral duty of care to third parties. Yet it seems perverse to infer from this observation that, if the therapist carelessly induces in his patient false memories of severe abuse at her parent's hands, her parent ought to be precluded from recovery, as a matter of moral principle.

That conclusion does not follow if a defendant's remedial legal and moral liability toward a plaintiff is ultimately grounded in his wrongfully and culpably acting in a manner that foreseeably causes damage that infringes her rights. That is plausibly the case here. After all, the parent's interests in avoiding a serious injury to her relationship with her child, and the resulting reputational and emotional injuries, would seem amply sufficient to ground a strong moral right against the therapist's action.

That the therapist should not direct his *attention or care* toward satisfaction of this right does not imply otherwise. For it is a mistake, in general, to connect duties of care too closely with rights against injury or remedial liability for their infringement. Suppose a therapist has undertaken contractual and promissory obligations that he cannot discharge compatibly with discharging his fiduciary obligations to his patient. Absent exceptional circumstances, he should exclude this fact from his deliberation about how to treat his patient — his care, in treating her, should concern her interests alone. From this it does not follow that, if somehow he breaches his promises in the course of treating his patient, he is not morally liable to compensate the promisees (or ought not to be legally liable). That the therapist should be liable to compensate the patient's parent is similarly plausible.

It is then a further question how this sort of remedial moral liability ought to be recognized and enforced in the doctrinal architecture of the negligence tort. The standard strategy would be to recognize a legal duty of care running between therapist and parent, as some courts have

²³³ *Id.* at 298; Goldberg & Zipursky, *supra* note 226, at 256.

done.²³⁴ But this strategy risks the perverse effects that have led other courts (along with defenders of the *Palsgraf* perspective) to decline to recognize any such duty of care²³⁵: It risks perverting the proper shape of the therapist's deliberation, by conveying to him that he ought in treating his patient to incorporate a substantial concern for the interests of another party. And it risks generating legal incentives for him to act on such a concern, including in circumstances where it would conflict with a concern for the interests of his patient.

The more elegant and plausible solution is simply to allow the parent in such a case to bring a claim for her injury and join it to her child's action — in the manner of a wrongful death or loss of consortium claim — and allow the parent to recover on this derivative claim *if but only if* the therapist is found to have breached his duty of care to the child.²³⁶ Nothing about the parent's interests is folded into the content of the defendant's duty or the determination of breach. These interests come in only at the remedial stage, once breach has been established on independent grounds. Thus this structure does not impose upon the therapist deliberative duties incompatible with his fiduciary role, convey to him that he must entertain a concern for third-party interests in the course of treating his patient, or risk incentivizing him to attend to such interests in cases where they conflict with the interests of his patient. In this way, the law can recognize and enforce the plaintiff's underlying moral rights against injury in a more subtle way: It need not, and should not, predicate the plaintiff's recovery on the defendant's breach of any duty of care or other legal duty to her, as the *Palsgraf* perspective would insist.

The example helps to illustrate why the divergence between tort law's moral substance and conceptual structure might, despite its propensity to inhibit perspicuous analysis and understanding, nevertheless sometimes be desirable. The relational structure of the duty of care in negligence allows us to entertain remedial structures such as the above, in which the injured plaintiff gets to piggyback on the defendant's breach of duty to another. If the law had to supply such a recovery through an omnilateral duty of care, of the kind urged by Judge Andrews²³⁷ and the Third Restatement,²³⁸ it might risk inducing the sort of problematic moral deliberation just discussed.

²³⁴ See, e.g., *Hungerford v. Jones*, 722 A.2d 478, 482 (N.H. 1998); *Sawyer v. Midelfort*, 595 N.W.2d 423, 436 (Wis. 1999) (quoting *Hungerford*, 722 A.2d at 482).

²³⁵ See, e.g., *Althaus v. Cohen*, 756 A.2d 1166, 1171 (Pa. 2000); *Goldberg & Zipursky*, *supra* note 226, at 256.

²³⁶ Another solution, embraced by the Utah Supreme Court, is to recognize a highly specific duty of care not to perform "the affirmative act of *recklessly* giving rise to false memories or false allegations of childhood sexual abuse by that parent." *Mower v. Baird*, 422 P.3d 837, 841 (Utah 2018) (emphasis added).

²³⁷ See *Palsgraf*, 162 N.E. at 102 (Andrews, J., dissenting).

²³⁸ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 33 (A.L.I. 2010).

E. The Borderland Between Negligence and the Intentional Torts

The torts of negligence and battery figure heavily in defenses of the *Palsgraf* principle, but other torts sometimes make an appearance as well. Suppose a defendant builds a hideous fence on *A*'s land, without her consent, and thereby causes the value of neighboring land owned by *B* to drop; or that the defendant defrauds *A* of her life savings and thereby prevents *A* from financially supporting the indigent *B*; or that the defendant makes a defamatory statement regarding *A* and thereby causes *A*'s business partner, *B*, to lose out on lucrative business opportunities.²³⁹ In each case *A* has an action against the defendant — in trespass, deceit, and defamation, respectively — but *B* does not. According to scholars who defend the *Palsgraf* perspective, it is the *Palsgraf* principle that explains these kinds of asymmetries: A tort defendant must behave wrongfully toward the plaintiff, by mistreating her in the manner articulated by the relevant tort, in order for her to recover.²⁴⁰

But these asymmetries are equally explicable on the view that the fundamental normative basis of compensatory tort liability is the defendant's moral responsibility for infringing some right against injury held by the plaintiff. In each of the preceding cases, the defendant may be morally responsible for causing *B* to suffer a *loss*, for such loss is a foreseeable consequence of the defendant's wrongful behavior. But in none of these cases does *B* have a *right* against the loss in question; in general we do not have a right against being deprived of future profit or otherwise caused to suffer economic loss.²⁴¹ Thus, each of these results is as ably explained by supposing that common law torts such as defamation are remedial pigeonholes — which obliquely implement normative principles about moral responsibility for rights infringement — as they are by supposing that torts are legally recognized relational moral wrongs. It is because the civil law's general clauses are (somewhat more transparently) implementing the same principles that in each of these cases the civil law reaches the same result as the common law.

In other cases, however, the formal structure of common law intentional torts *does* appear to produce different implications from the structure of the general clauses in the civil codes. Take the tort of defamation. Suppose that a defendant engages in the following behavior, and thereby negligently causes reputational injury to the plaintiff: The defendant makes a certain true communication regarding the plaintiff's wife to *X*, which foreseeably leads *X* to form a belief in a different proposition and communicate that proposition to *Y*, on which basis *Y* foreseeably forms the belief that the plaintiff is a serial killer and communicates this belief

²³⁹ These examples are drawn, with minor modifications, from GOLDBERG & ZIPURSKY, *supra* note 6, at 201.

²⁴⁰ See *id.* at 202–03.

²⁴¹ See *supra* notes 90–94 and accompanying text.

to Z. Because the tort of defamation affords redress only where a defendant's communication is "of and concerning" the plaintiff,²⁴² the plaintiff will have no redress for this "reputational injury."²⁴³ Without such a communication, injuring the plaintiff's reputation by initiating a chain of foreseeable inferences does not engage the terms of the defamation tort. Similarly, suppose that a defendant negligently and foreseeably causes another person to intentionally confine the plaintiff. Since a defendant can commit the tort of false imprisonment only by intentionally confining the plaintiff,²⁴⁴ here the plaintiff will have no false imprisonment claim against the defendant for negligently and foreseeably depriving him of his liberty (or any consequential economic loss).²⁴⁵

How should we understand the common law's restrictions on recovery for negligent injury to reputation and liberty? By the lights of the *Palsgraf* perspective, such restrictions reflect the content of the relational wrongs that defamation and false imprisonment aim to recognize and redress. Thus, defamation is a wrong that essentially consists in making a defamatory communication about the plaintiff.²⁴⁶ To suppose that negligently inflicted reputational injury might properly be recoverable is simply to misconstrue the nature of the wrong.²⁴⁷ Similarly, the wrong of false imprisonment "consists in asserting control over" a person, thus treating that person "as subject to [one's] choice."²⁴⁸ To negligently cause a false imprisonment is not to morally mistreat another person in the manner recognized by the tort of false imprisonment.

But these moral understandings of defamation and false imprisonment are implausible, it seems to me, and cannot make sense of the law. Take them in turn. It is certainly morally intelligible for the law to narrowly draw the boundaries of negligence liability for communicative activity in order to refrain from unduly impinging on the free flow of information and expression. Thus it is intelligible for the law to restrict fault-based liability for communicatively injuring another's reputation — whether under the aegis of defamation or negligence — to statements "of and concerning" the plaintiff, just as the law tightly draws the

²⁴² Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 17, at 17 (quoting ROBERT D. SACK & SANDRA S. BARON, *LIBEL, SLANDER, AND RELATED PROBLEMS* § 2.8, at 149 (2d ed. 1994)).

²⁴³ *Id.*

²⁴⁴ RESTATEMENT (SECOND) OF TORTS § 35(1)(a) (A.L.I. 1965).

²⁴⁵ If the false imprisonment in question has caused the plaintiff physical injury, the general duty to take care against causing physical injury will give the plaintiff a cause of action in negligence. *Id.* § 35(2).

²⁴⁶ Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 17, at 17; GOLDBERG & ZIPURSKY, *supra* note 6, at 200–01; RIPSTEIN, *supra* note 17, at 192.

²⁴⁷ See RIPSTEIN, *supra* note 17, at 202.

²⁴⁸ *Id.* at 48; see also ALLAN BEEVER, *A THEORY OF TORT LIABILITY* 114 (2016) (characterizing false imprisonment as "wrongful because it is an assertion of control over [another person's] body").

boundaries of fault-based liability for causing physical injury by communicative means.²⁴⁹

By contrast, it would *not* be morally intelligible for the law to suppose that negligent communicative activity cannot in principle ground a plaintiff's claim to compensation unless some communication has been made "of and concerning" him. Any such view would fetishize the "of and concerning" requirement in a manner that can claim little support from ordinary moral intuition. We care about false and derogatory statements "of and concerning" us simply because such statements are particularly likely to injure something — our reputation — to which we are entitled.²⁵⁰

Communicative activity of other kinds will generally be much less likely to falsely injure reputation. Thus, it may be unwise to expose all such activity to the specter of litigation. But that is not because the law limits its principled moral concern for the negligent infliction of reputational injury to statements of and concerning injured plaintiffs. After all, in cases involving *noncommunicative* activity that negligently injures reputation, the law is much less wary of affording redress, which it generally affords under the auspices of the negligence tort rather than defamation.²⁵¹ So, for example, courts have allowed physicians to recover in negligence for reputational injury foreseeably inflicted by the negligent servicing or design of medical products.²⁵²

Whether and when the tort of negligence ought to allow recovery for reputational injury is a difficult issue.²⁵³ It implicates technical doctrinal questions about the analytical relationship between the elements of negligence and defamation, predictive questions about the possibility that negligence plaintiffs might make an end run around important values encoded in restrictions on defamation recovery, and philosophical questions about how to weigh the importance of protecting free communication against the importance of enforcing remedial moral liabilities that arise from the careless infringements of rights against reputational injury. It is not obvious how these trade-offs should be struck.

The important point for our purposes is that, once we observe that infringements of rights against reputational injury will often generate

²⁴⁹ See, e.g., *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1035 (9th Cir. 1991); *Herceg v. Hustler Mag., Inc.*, 814 F.2d 1017, 1020 (5th Cir. 1987); *Braun v. Soldier of Fortune Mag., Inc.*, 968 F.2d 1110, 1116–17 (11th Cir. 1992).

²⁵⁰ See RIPSTEIN, *supra* note 17, at 192–95.

²⁵¹ See generally Bryson Kern, Note, *Reputational Injury Without a Reputational Attack: Addressing Negligence Claims for Pure Reputational Harm*, 83 *FORDHAM L. REV.* 253 (2014) (surveying the law on negligent reputational harm and identifying areas of tension); Kate Silbaugh, Comment, *Sticks and Stones Can Break My Name: Nondefamatory Negligent Injury to Reputation*, 59 *U. CHI. L. REV.* 865 (1992) (same).

²⁵² See, e.g., *Kennedy v. McKesson Co.*, 448 N.E.2d 1332, 1333 (N.Y. 1983); *Oksenholt v. Lederle Lab'ys*, 656 P.2d 293, 295, 299–300 (Or. 1982).

²⁵³ See Kern, *supra* note 251, at 255; Eric Descheemaeker, *Protecting Reputation: Defamation and Negligence*, 29 *OXFORD J. LEGAL STUD.* 603, 619–21 (2009).

powerful remedial entitlements to redress *in principle*, that will change how we understand those elements of the defamation tort that regularly operate to preclude such relief. So, to return to the example above,²⁵⁴ when someone foreseeably suffers grievous reputational and economic injury because her intimate has been defamed, we will not interpret the law's bar on her recovery as founded upon the deep normative nature of the defamation tort. Rather, we will treat it — far more plausibly — as a concession to institutional limitations, a recognition that a widened defamation tort might unduly suppress communication, or an unwillingness to allow the secondary victims of defamation to drag its primary victims into potentially costly and embarrassing court battles that they would rather avoid.

Recognizing that the normative considerations that support the restriction are less deeply rooted in the nature of the tort than the *Palsgraf* perspective supposes should, in turn, open up room to relax or remodel those restrictions in appropriate cases. Take the live issue of whether the developers of large language models may be held liable to persons injured by their models' "defamatory" outputs.²⁵⁵ It may be dubious to characterize these outputs as communications or publications made by the developers,²⁵⁶ and the models themselves are not (for now, at least) legally cognizable as agents who can commit torts and subject developers to vicarious liability.²⁵⁷ Thus, the tort of defamation arguably supplies no redress for the victims of such defamatory outputs. Contra the logic of the *Palsgraf* perspective, however, nothing in the normative nature of the defamation tort precludes extending either the tort of defamation or negligence (or negligence-like forms of products liability) in order to afford such redress.

So, too, with false imprisonment. It is understandable that the law should be wary of recognizing claims for negligently imposed false imprisonment, given how readily liability for minor and relatively harmless detentions might then attach.²⁵⁸ But it would be a mistake to suppose that a company that negligently designs or deploys an artificial

²⁵⁴ See *supra* pp. 1065–66.

²⁵⁵ Nina Brown, *Bots Behaving Badly: A Products Liability Approach to Chatbot-Generated Defamation*, 3 J. FREE SPEECH L. 389, 392 (2023).

²⁵⁶ Dan L. Burk, *Asemic Defamation, Or, The Death of the AI Speaker*, 22 FIRST AMEND. L. REV. 189, 200 (2024). But see Eugene Volokh, *Large Libel Models? Liability for AI Output*, 3 J. FREE SPEECH L. 489, 508 (2023).

²⁵⁷ The increasingly powerful agent-like capabilities of artificial intelligence models may require significant changes to our laws and institutions. See Alan Chan et al., *Harms from Increasingly Agentic Algorithmic Systems*, in PROCEEDINGS OF THE 2023 ACM CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY (FACCT 2023) 651, 655 (2023). It is not clear, however, that the law will treat language models as agents any time soon, or that the propriety of recovering for a model's defamatory outputs, from its developer, should depend on the model's degree of agency.

²⁵⁸ See, e.g., *Vumbaca v. Terminal One Grp. Ass'n L.P.*, 859 F. Supp. 2d 343, 380 (E.D.N.Y. 2012) (dismissing the false-imprisonment and negligence claims of a plaintiff confined in a plane during a severe storm).

intelligence model in order to surveil suspected shoplifters, and thereby foreseeably causes innocent customers to be imprisoned without cause, is insulated from claims to redress by the deep normative logic of tort law. The structure of civil law clauses such as BGB section 823(1)²⁵⁹ straightforwardly accommodates claims for negligently and unjustifiably infringing rights against liberty-depriving detention. Common law development might prudently do the same — whether by recognizing such detentions as a new form of actionable damage in negligence²⁶⁰ or by recognizing a new and delimited tort, such as a tort of recklessly causing false imprisonment.

The point is not just that such developments would be normatively attractive. These developments would be the sort of “modest but principled extension[s]”²⁶¹ of existing doctrine that are recognizably within the legitimate boundaries of the judicial role. That is because these doctrinal developments would give expression to a principle of common morality — that a defendant who negligently, foreseeably, and unjustifiably infringes a plaintiff’s right against deprivation of reputation or liberty is liable to compensate her — that is already recognized and implemented, even if indirectly and imperfectly, by the common law of torts.

F. Torts Without Wrongs and Intra-Doctrinal Moral Inconsistency

We have discussed many cases in which a plaintiff injured by a defendant’s culpable and unjustifiable action can recover from him, notwithstanding that he has not mistreated her. The propriety of relief in such cases undercuts the *Palsgraf* perspective. But so, too, does the vast amount of tort doctrine in which the law empowers a plaintiff to obtain relief from a defendant who has not acted culpably or unjustifiably at all.

The situations I have in mind are familiar ones. If a defendant uses a plaintiff’s dock to save his ship in a storm, the defendant will be liable to compensate her for the resulting damage, although the trespass was entirely reasonable.²⁶² If a defendant reasonably decides to conduct some ultrahazardous blasting in order to demolish an abandoned shack and build a new house on her land, and foreseeably ends up injuring her neighbor as a result, the neighbor will be able to recover.²⁶³ If a defendant runs a small business, and hires and trains a new employee who negligently causes a customer to suffer harm a few weeks into the job, the defendant will be liable to the customer even if she cannot be

²⁵⁹ Bürgerliches Gesetzbuch [BGB] [Civil Code], § 823, para. 1, [https://www.gesetze-im-internet.de/](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p4209)

<https://perma.cc/QT2P-7TTW> (Ger.).

²⁶⁰ Donal Nolan, *New Forms of Damage in Negligence*, 70 MOD. L. REV. 59, 64 (2007).

²⁶¹ OBG Ltd. v. Allan [2007] UKHL 21, [233], [2008] 1 AC (HL) (appeal taken from Eng.).

²⁶² Vincent v. Lake Erie Transp. Co., 124 N.W. 221, 222 (Minn. 1910).

²⁶³ Exner v. Sherman Power Constr. Co., 54 F.2d 510, 513 (2d Cir. 1931).

accused of any fault in hiring, training, or supervising the employee.²⁶⁴ The doctrines that secure recovery in these cases are familiar features of tort law.

The *Palsgraf* perspective struggles with all of these doctrines because none of them involve the defendant engaging in wrongful behavior toward anyone, let alone the plaintiff. In response, defenders of the *Palsgraf* perspective reject the legitimacy of these doctrines (and the powerful moral instincts embedded in them),²⁶⁵ or relegate them to the interpretive margins of tort law;²⁶⁶ or rely on metaphysical claims, such as the claim that an employer acts through the employee for whom it is vicariously liable,²⁶⁷ that are legal fictions (and thus call for a substantive normative rationale that the defenders of the *Palsgraf* perspective do not then supply²⁶⁸); or appeal to the claim that (some of) these defendants are committing *legal* wrongs, which is a formal observation that does not address the substantive objection that these putative legal wrongs are not tracking moral wrongs.²⁶⁹

These are all existing criticisms,²⁷⁰ and I am not trying to add to the stock of criticism here.²⁷¹ My point is that the *Palsgraf* perspective is only impelled to engage in such strained interpretive maneuvers because of its fundamental assumption that tort liability is essentially about redressing wrongs. All of these doctrines make more sense if tort liability seeks to enforce remedial moral liability, and remedial moral liability is grounded in a defendant's moral responsibility for infringing the plaintiff's rights against injury. In the preceding cases, of course, the defendant does not exhibit the sort of fault-based moral responsibility that is tracked by the tort of negligence. But an agent's exercise of her responsible agency can sometimes be morally significant for reasons other than its wrongfulness and culpability: because (say) the agent has responsibly decided to pose a substantial and nonreciprocal risk of infringing others'

²⁶⁴ See *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968).

²⁶⁵ John Oberdiek, *The Trouble with Trespass*, in 5 OXFORD STUDIES IN PHILOSOPHY OF LAW 180, 186 (Leslie Green & Brian Leiter eds., 2024).

²⁶⁶ See, e.g., Goldberg & Zipursky, *supra* note 199, at 787.

²⁶⁷ See, e.g., WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 17, at 186; John C.P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211, 1232–33 (2009) (characterizing respondeat superior vicarious liability as reflecting a “[f]usion of [a]gency” between employer and employee, *id.* at 1232); STEVENS, *supra* note 17, at 244.

²⁶⁸ See Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1752 (1996) (“[I]nsofar as [respondeat superior] does rest on a fiction, the rule itself obviously calls for normative justification.”)

²⁶⁹ See, e.g., John C.P. Goldberg, *Inexcusable Wrongs*, 103 CALIF. L. REV. 467, 501 (2015). For illuminating criticism on this front from within the *Palsgraf* perspective, see Oberdiek, *supra* note 265, at 200.

²⁷⁰ See, e.g., sources cited *supra* notes 7, 138.

²⁷¹ I do so a bit later, at this end of this section. See *infra* notes 301–04 and accompanying text.

rights against injury²⁷² or because she has innocently engaged in a certain sort of collective enterprise with someone who *has* culpably and wrongfully infringed the rights of another person.²⁷³

Arguably, ordinary moral thought recognizes non-fault-based species of remedial moral responsibility less confidently and robustly than it does fault-based remedial responsibility. There is, after all, a recurring impulse in moral philosophy to reject non-fault-based species of moral responsibility on considered reflection.²⁷⁴ The same impulse recurs in the history of normative reflection on tort law, sometimes with profound effects on the shape of doctrine. In Germany, for example, this impulse has led to a significant curtailment of the scope of strict liability and the reconceptualization of old strict liability doctrines in terms of fault.²⁷⁵ In America, this impulse may have helped to curtail the twentieth-century expansion of enterprise liability and to reinstate the historical dominance of the tort of negligence.²⁷⁶

The impulse reflects the appeal of explanatory unity and simplicity in legal doctrine and moral theory. But it also derives its force from the fact that our moral judgments about fault-based and non-fault-based (“strict”) species of remedial moral responsibility may well prove to be inconsistent with one another — generating incoherence in legal doctrine and ordinary moral thought and reflective pressure to tame this incoherence by pruning the species of remedial moral responsibility that we ultimately recognize. Consider an agent who saves her own life from a credible threat by turning her car in the direction of a pedestrian, knowing that it is extremely likely to collide with him and inflict a moderately serious injury on him (but not intending to do so).²⁷⁷ The agent will be held liable in battery to her victim, on the basis that she was “substantially certain” her action would injure him.²⁷⁸ Neither the law’s articulation of the battery tort, nor any of the battery tort’s defenses, will allow the agent to escape liability to her victim on the basis that her action was permissible and faultless. Yet if the agent saves her own life by imposing (say) only a five percent chance of inflicting such an injury, her action will be treated under the tort of negligence, and she will easily evade liability, without even needing to plead her absence of fault as an

²⁷² George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 542 (1972); Alex Stein, *The Domain of Torts*, 117 COLUM. L. REV. 535, 569 (2017); KEATING, *supra* note 17, at 142.

²⁷³ SABA BAZARGAN-FORWARD, AUTHORITY, COOPERATION, AND ACCOUNTABILITY 197–200 (2022).

²⁷⁴ See, e.g., Kimberly Kessler Ferzan, *Culpable Aggression: The Basis for Moral Liability to Defensive Killing*, 9 OHIO ST. J. CRIM. L. 669, 673 (2012).

²⁷⁵ MARKESINIS, BELL & JANSSEN, *supra* note 87, app. 2, at 443–47.

²⁷⁶ See G. Edward White, *The Unexpected Persistence of Negligence, 1980–2000*, 54 VAND. L. REV. 1337, 1344–45 (2001).

²⁷⁷ Compare the facts in *Cordas v. Peerless Transp. Co.*, 27 N.Y.S.2d 198, 199–200 (N.Y. City Ct. 1941).

²⁷⁸ See RESTATEMENT (SECOND) OF TORTS § 8A (A.L.I. 1965).

affirmative defense: The law articulates the content of the tort of negligence such that performing a permissible and faultless action, however injurious, does not even *count* as committing the tort.

There does not obviously exist any coherent, consistent, and reflectively plausible set of moral principles that implies that the agent should be liable in the first scenario but not in the second.²⁷⁹ And, if we attempt to iron out the inconsistency so as to produce consistent moral and legal principles, we may well produce a fearfully broad account of the conditions of strict remedial liability (under which we are strictly liable to compensate for the vast majority of the injurious consequences of our actions, far more often than almost all of us assume and far more often than the law currently holds us liable²⁸⁰) or else an implausibly anemic account, according to which we are hardly ever strictly liable to compensate for such consequences.²⁸¹ Some tort theorists have adopted such revisionary normative accounts in an attempt to follow principled consistency where it leads. But ordinary moral intuition and tort doctrine both balk at following in their steps.

If the common law of torts were ever to be comprehensively remodeled in the manner of a civil law code, the various tensions and inconsistencies between its underlying ordinary moral sensibilities about fault-based and strict moral liability — which seem to be reflected by the law's gallery of torts and the doctrinal tensions between them, as we have seen — might face greater pressure to be ironed out. But to date, at least, the pigeonhole structure of the law has largely defused any such pressure toward general and systemic normative consistency and its potentially revisionary effects on the doctrine. There is generally little appetite in common law decisionmaking or scholarship “to put the entire law into systematic and exhaustive order,” as there was in European legal culture in the decades preceding and during the drafting of the civil codes.²⁸²

As an interpretive matter, the most plausible position may be that the moral principles regarding remedial moral liability that underlie the various torts are sometimes genuinely inconsistent with one another. Some of these tensions are much more than surface deep. It is an

²⁷⁹ There are, of course, moral accounts of tort law that seek to explain the scope and incidence of both fault-based and strict liability on the basis of a unified, consistent set of moral principles. See, e.g., Fletcher, *supra* note 272, at 556; Stein, *supra* note 272, at 611. But such accounts do not seem to succeed in capturing even the broad contours of the doctrine. Fletcher's account, for example, implies that justifiably imposing a five percent risk of serious property damage on another person should incur liability, given that it is a “nonreciprocal” risk. See Fletcher, *supra* note 272, at 542. But the law conspicuously declines to impose such liability except in limited domains.

²⁸⁰ See, e.g., Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 160–61 (1973).

²⁸¹ See, e.g., Larry Alexander & Kimberly Kessler Ferzan, *Confused Culpability, Contrived Causation, and the Collapse of Tort Theory*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS, *supra* note 39, at 416–25.

²⁸² WIEACKER, *supra* note 124, at 257.

interesting and important normative question about the design of tort doctrine whether and how such recalcitrant normative tensions between the principles about remedial moral liability recognized in different parts of the law should be ironed out. An interpretive theory of tort law need not (and probably should not) resolve these first-order normative questions about the revision of doctrine, but it should at least frame them perspicuously.²⁸³

Defenders of the *Palsgraf* perspective have, by and large, skirted any serious engagement with such issues about inconsistency between the moral principles underlying different torts. Pragmatic constructivists such as Goldberg and Zipursky do so by adopting a sort of philosophical quietism, according to which they need not offer any systematic account of the moral principles that underlie the various torts: “[W]e do not need a substantive theory of wrongs if we have a positive account of what the wrongs of tort law are and a normative theory of adjudication appropriate to this domain of law.”²⁸⁴ That is because common law adjudication is “not a matter of finding the objective truth as to which acts really are wrongs, but of constructively carrying forth ideas, principles, and norms that are already in the law.”²⁸⁵

But this claim relies on a false dichotomy. The intellectual pressure to articulate the relationship between tort law’s legal structures and its underlying moral principles is not simply an alien demand imposed upon pragmatic common law judges by legal theorists with a taste for overly nice philosophical abstraction. It is a pressure that arises from within the enterprise of principled and consistent common law adjudication (and academic reflection on it), for such adjudication unavoidably encounters the evident normative tensions between different planks of tort doctrine — such as the tension between the rule in *Palsgraf* and the doctrine of transferred intent, or the tension between the conditions under which negligence and battery (respectively) enable plaintiffs to recover for harm that is justifiably inflicted.

The former tension proves only superficial once we see that foreseeability limitations on duty and proximate cause in negligence and the doctrine of transferred intent in battery together implement, if only roughly, a coherent set of complex moral principles about fault-based remedial responsibility. The latter tension is more recalcitrant, as we have just seen. The suspicion thus arises that an important portion of negligence doctrine implements a conception of remedial moral responsibility that *cannot* be reconciled with the conception of remedial

²⁸³ Cf. Leo Boonzaier, *Is a Tort a Failure to Do What One Ought?*, in *NEW DIRECTIONS IN PRIVATE LAW THEORY* 165, 190–91 (Fabiana Bettini et al. eds., 2023).

²⁸⁴ John C.P. Goldberg & Benjamin C. Zipursky, *Thoroughly Modern Tort Theory*, 134 *HARV. L. REV. F.* 184, 189 (2021).

²⁸⁵ *Id.*

responsibility underlying the relevant battery doctrine.²⁸⁶ In both cases, the relationship between the torts of negligence and battery and the underlying moral principles they implement is far less tidy than pragmatic constructivists assume. That is true whether the underlying principles are internally coherent or incoherent, jointly consistent or irremediably in conflict.

By contrast to pragmatic constructivists, who attempt to skirt these issues through philosophical quietism, philosophical formalists often handle these issues by subtly misconstruing the doctrine. Thus, Ripstein, following a similar argument by Weinrib,²⁸⁷ argues that both the tort of negligence and the strict liability torts can be understood as prohibiting the wrong of harming another person by subjecting her to an “excessive risk” (that is, a risk greater than the background risks that attend ordinary social life).²⁸⁸ The argument is intolerably strained. Someone who imposes an unusually large risk on another person does not seem to treat her wrongfully (in any recognizable and nonfictive sense) if that risk is justifiably imposed. The argument is also unfaithful to a vast swath of settled doctrine. Notwithstanding a couple of famous old English cases, such as *Bolton v. Stone*²⁸⁹ (on which Ripstein²⁹⁰ and Weinrib²⁹¹ heavily rely), it is black-letter law that a plaintiff will not recover in negligence against a defendant who has injured him by

²⁸⁶ For an incisive discussion of similar interpretive issues in products liability, see generally Gregory C. Keating, Essay, *Is the Third Restatement of Design Defect a Defective Product?*, 52 SW. L. REV. 399 (2024) (describing and critiquing the *Restatement (Third) of Torts: Products Liability*'s treatment of deep normative tensions within products liability doctrine).

²⁸⁷ WEINRIB, *supra* note 17, at 148–51.

²⁸⁸ RIPSTEIN, *supra* note 17, at 88–89, 144–45.

²⁸⁹ [1951] AC 850 (HL) (appeal taken from Eng.). In *Bolton*, Lord Reid famously proclaimed that “[i]f cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all.” *Id.* at 867. Insofar as the case categorically condemns any imposition of a substantial risk as negligent, it is both normatively implausible and out of step with the rest of negligence doctrine. See Stephen G. Gilles, *The Emergence of Cost-Benefit Balancing in English Negligence Law*, 77 CHI.-KENT L. REV. 489, 563–66 (2002). Even as an interpretation of *Bolton*, moreover, Ripstein and Weinrib’s position is unconvincing. It is much less plausible to understand Lord Reid as claiming that injuring a plaintiff by imposing any substantial risk upon her will constitute the tort of negligence than as claiming that doing so by *playing cricket* will constitute negligence, in light of the relatively trifling reasons that typically support playing cricket. Thus, it is unsurprising to see Lord Reid articulate a much different, and far more orthodox, conception of negligence in *Morris v. W. Hartlepool Steam Navigation Co.*, [1956] AC 552 (HL) 574 (appeal taken from Eng.), which states that the negligence defendant must “weigh, on the one hand, the magnitude of the risk, the likelihood of an accident happening and the possible seriousness of the consequences if an accident does happen, and, on the other hand, the difficulty and expense and any other disadvantage of taking the precaution.” See Gilles, *supra*, at 497–98. Pragmatic constructivists, to their considerable credit, do not attempt to bowdlerize such aspects of the law. See, e.g., Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 2033–41 (2007).

²⁹⁰ RIPSTEIN, *supra* note 17, at 49 n.31, 103 n.53, 106 & n.57.

²⁹¹ WEINRIB, *supra* note 17, at 148–51.

reasonably and carefully imposing a risk upon him, unusually large though that risk may be.²⁹²

What may produce the distortion is the insistence that all causes of action in tort law be understood as encoding wrongs. That insistence requires treating strict liability causes of action such as strict liability for abnormally dangerous activities as encoding a sort of wrong, strange as the putative wrong may be — injury through the imposition of an excessive risk, reasonable or not. This implausible characterization of strict liability for abnormally dangerous activities in turn requires mischaracterizing negligence doctrine, since the philosophical formalist must then maintain that negligence doctrine does not permit the reasonable imposition of unusually large risks on others, which plainly it does.

Again the lesson, I believe, is that the core moral function of torts is *not* to encode and redress wrongs. Rather, a cause of action such as strict liability for abnormally dangerous activities implements common moral judgments according to which *justifiably and nonculpably* risking infringement of others' rights against injury can generate moral liability to compensate them. This cause of action is, like negligence, a remedial pigeonhole that roughly tracks and enforces widely recognized remedial moral liabilities, grounded in a certain species of moral responsibility for rights infringement — one that is very different from the fault-based species of moral responsibility recognized by civil law clauses such as CC 2043 and BGB section 823(1) and the common law tort of negligence.

That said, there are certain instances of strict liability in tort that cannot be entirely understood as reflecting a defendant's moral responsibility for rights infringement, whether fault-based or non-fault-based. The property torts,²⁹³ in particular, resist explanation along these lines. These torts are famously prepared to impose strict liability on a defendant who unforeseeably causes harm, such as by crossing land²⁹⁴ or converting a chattel that he could not reasonably have predicted might belong to anyone other than him.²⁹⁵ To be sure, it is possible to culpably commit trespass or convert a chattel. Similarly it is possible, as *Vincent* shows, to commit a property tort in a manner that imposes a substantial and nonreciprocal risk of infringing another person's rights against property damage.²⁹⁶ In *large* part, therefore, the property torts can be seen as identifying and enforcing remedial liabilities resting on both

²⁹² The position emerges most clearly in judgments that absolve a defendant of liability for justifiably imposing a large risk on another person in order to avoid or mitigate an emergency. *See, e.g.,* *Cordas v. Peerless Transp. Co.*, 27 N.Y.S.2d 198, 199, 202 (City Ct. 1941); *Watt v. Hertfordshire Cty. Council* [1954] 2 All ER 368 (AC) at 370 (Eng.).

²⁹³ *See* RESTATEMENT (SECOND) OF TORTS § 871 (A.L.I. 1965) (defining property torts).

²⁹⁴ *See, e.g.,* *Dougherty v. Stepp*, 18 N.C. (1 Dev. & Bat.) 370, 370 (1835) (“[E]very unauthorized, and therefore unlawful, entry into the close of another, is a trespass.”).

²⁹⁵ *See, e.g.,* *Haslem v. Lockwood*, 37 Conn. 500, 501, 506 (1871).

²⁹⁶ *See* *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910).

fault-based and non-fault-based forms of moral responsibility for rights infringement. As the case of the unforeseeable and innocent trespass shows, however, that is not all they do.

One response to this observation is to conclude that the *Palsgraf* perspective is right: The unforeseeable trespasser *does* commit a moral wrong, and the tort of trespass aims to recognize and redress this wrong. But it is difficult to identify any plausible candidate for what such a wrong would be. There is an exceptionally thin sense (the fact-relative sense) in which infringing another person's right, however unforeseeably, is a moral wrong.²⁹⁷ But tort law nowhere else holds a defendant liable simply for committing a moral wrong in this exceptionally thin sense.

Philosophical formalists have suggested that the wrong is a more specific one: It is the wrong of using another person's means, what belongs to them, without their consent.²⁹⁸ But neither ordinary moral thought nor the rest of tort law appears to suppose that *unforeseeably* using another person's means exposes a defendant to compensatory liability. Suppose a defendant is camping in a forest, and he burns some large logs, lying on the ground, for a campfire. Unforeseeably, the logs are persons whose bodies have been masterfully disguised by a villain. Neither battery, nor negligence, nor any other tort would provide a cause of action against the defendant; the battery claim would fail because the defendant has not intended to contact the person of another.²⁹⁹ The absence of any such action comports with the common moral intuition that such utterly unforeseeable harm lies beyond the scope of "how far the responsibility of [a] defendant ought fairly to extend."³⁰⁰

The interpretive task is to explain why, unlike battery or negligence, property torts such as trespass and conversion *do* impose liability for harm without any inquiry into fault or foreseeability. As judges have recognized, dispensing with any such inquiry can offend against "notions of 'elemental justice.'"³⁰¹ For example, if in the preceding hypothetical the defendant had burned a log of wood that unforeseeably belonged to the plaintiff, rather than an apparent log of wood that unforeseeably constituted the plaintiff's body, the law *would* hold the

²⁹⁷ See, e.g., Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 405, 438 (2017) (noting that defenses of unforeseeability "do[] not undermine the judgment that the defendant committed a wrong, if all we mean by that is that she breached the plaintiff's right").

²⁹⁸ See, e.g., RIPSTEIN, *supra* note 17, at 9 (arguing that "the law of torts focuses on means" in part "by precluding one person from using means that belong to another without that other's authorization").

²⁹⁹ Cf. cases cited *supra* note 187 (collecting cases where a defendant who intentionally shoots an object that he mistakenly takes to be an animal, but which turns out to be a human, is liable in negligence rather than battery).

³⁰⁰ *Kuwait Airways Corp. v. Iraqi Airways Co.* [2002] UKHL 19, [71], [2002] 2 AC 883 (appeal taken from Eng.).

³⁰¹ *Burns Philp Food, Inc. v. Cavalea Cont'l Freight, Inc.*, 135 F.3d 526, 529 (7th Cir. 1998).

defendant liable. Rather than conjuring up a strained sort of moral wrong to supply the explanation of this starkly counterintuitive position, the better view is that the explanation does not sound in wrongdoing or responsibility at all.

The most plausible explanation instead rests on the way that the common law has called upon tort law to protect property. Property torts such as trespass and conversion serve remedial purposes that have little to do with any compensatory moral liability incurred by the defendant — purposes such as settling disputes to title³⁰² and allowing for the recovery of property that has fallen into a defendant's hands (however innocent).³⁰³ These noncompensatory remedial purposes are facilitated by defining the scope of the actions for trespass and conversion entirely in terms of the plaintiff's property right, rather than anything about the defendant.³⁰⁴ "You have encroached on land that is in fact mine" is a pleading more suited to settling title than "you have encroached on land that you should reasonably have foreseen might belong to another person, such as me."

In modern civil law systems, as in classical Roman law, these other remedial functions are served by distinct "proprietary" actions directly designed to serve them.³⁰⁵ Unsurprisingly, then, the civil law does not impose liability upon an innocent defendant who unforeseeably trespasses on, or converts, the property of a plaintiff.³⁰⁶ That the common law *does* impose compensatory legal liability on such a defendant — liability to make good any losses the plaintiff has sustained, not just an obligation to return the property in question or refrain from further interference — is a side effect of the common law's use of liability rules, such as trespass and conversion, for these noncompensatory purposes,³⁰⁷ not an indication that it takes a fundamentally different position on the elemental justice of compensatory liability for innocent and unforeseeable interference with property than it does with respect to innocent and unforeseeable interference with person.

If the material circumstances of human life were different, causes of action such as negligence and battery might be structured along similar lines as trespass and conversion. If, for example, disputes about the ownership of bodies arose as often as disputes about ownership of land and chattels, the intent element in battery might look more like the

³⁰² HOLDSWORTH, *supra* note 220, at 467.

³⁰³ Andrew Tettenborn, *Conversion, Tort and Restitution*, in INTERESTS IN GOODS 825, 825 (Norman Palmer & Ewan McKendrick eds., 2d ed. 1998).

³⁰⁴ *Poggi v. Scott*, 139 P. 815, 816 (Cal. 1914) ("The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results.").

³⁰⁵ Andrew Tettenborn, *Damages in Conversion — The Exception or the Anomaly?*, 52 CAMBRIDGE L.J. 128, 130–31 (1993).

³⁰⁶ Tettenborn, *supra* note 303, at 826 n.12, 827 n.16.

³⁰⁷ Tettenborn, *supra* note 303, at 130–31.

intent element in trespass — requiring only an intent to touch an object that is *in fact* a person’s body (rather than an intent to touch an object that is *believed* to be a person’s body), just as trespass to land or chattels requires only an intent to touch an object that is in fact another person’s property (even if the defendant reasonably believes otherwise).³⁰⁸ Given the actual circumstances of human life, there has been little need for torts to person to serve remedial functions other than holding a defendant legally liable to pay a plaintiff when, because she is morally responsible for infringing his bodily rights, she is morally liable to pay him.

G. Responsibility and Relationality in the Law of Negligence

We have ranged broadly, but we can now return to the heartland of tort law, where we began: liability for the negligent infliction of injury to person and property. The Introduction of this Article offered two cases in which a defendant is intuitively liable to a plaintiff although he has not behaved wrongfully toward the plaintiff, even under some abstract and generic description (such as “the owner of the parcel of land, Blackacre, that might be damaged by this negligent activity”).³⁰⁹ In such cases, the defendant’s liability must in truth be founded on the fact that he has culpably and foreseeably caused a certain rights-infringing outcome, and the right infringed in fact belonged to the plaintiff.

Reflection on plaintiff-focused defenses supports the point. Defenders of the *Palsgraf* perspective have said that plaintiff-focused defenses, such as comparative negligence, indirectly reflect the relational character of the tort of negligence: If the defendant is required to exercise due care toward the plaintiff, it follows that the plaintiff in fairness must be required to exercise similar care toward herself.³¹⁰ But casuistry casts doubt on this relational understanding of plaintiff-focused defenses, and thus casts doubt on the relational conception of the negligence tort that generates them.

Suppose Jacopo is aware that if he races to his office in his Hummer he is very likely to destroy a car parked by the side of the road, and that one of the many cars parked by the road belongs to him.³¹¹ Jacopo

³⁰⁸ See RESTATEMENT (SECOND) OF TORTS § 217 cmt. c (A.L.I. 1965) (“The intention required to make an actor liable for trespass to a chattel . . . is present when an act is done for the purpose of using or otherwise intermeddling with a chattel It is not necessary that the actor should know or have reason to know that such intermeddling is a violation of the possessory rights of another.”). Suppose, for example, that a defendant nonnegligently cremates what is to all reasonable appearances a dead person, but it turns out to be a mannequin owned by a plaintiff. The defendant has committed trespass to chattels and conversion.

³⁰⁹ See *supra* notes 49–51 and accompanying text.

³¹⁰ For versions of this idea, see, for example, WEINRIB, *supra* note 17, at 169 n.53, arguing that such plaintiff-focused “defense[s] express[] an idea of transactional equality: the plaintiff cannot demand that the defendant should observe a greater care than the plaintiff with respect to the plaintiff’s safety,” and RIPSTEIN, *supra* note 17, at 121.

³¹¹ For a structurally similar case put to a different (but related) argumentative end, see Lewinsohn, *supra* note 48, at 199.

chooses to race in order to close a lucrative business deal. The odds that he might hit a car are high, but the odds that the car will belong to him are low, such that Jacopo's expected benefit from wrongfully speeding down the road outweighs the expected cost to him of doing so. Jacopo does, unluckily, hit the car that belongs to him. It is Jacopo's negligence *toward all relevant parties* that will properly diminish his recovery against whoever negligently parked his car by the side of the road. Since the action is perfectly in his rational self-interest, Jacopo cannot plausibly be said to behave negligently *toward himself*.

So, too, a plaintiff can be comparatively negligent although she is an unforeseeable victim of her own negligence. Suppose that a defendant, the custodian of a rare car collection owned by Monty Moneybags, negligently parks one of Moneybags's cars, a rare BMW, by the side of the road. The defendant thereby puts the car at risk of being hit and damaged by a speeding driver. Moneybags dies and in probate his car collection passes to his long-lost third cousin, Clara. As it happens, Clara is at that moment speeding down the road, and negligently crashes into the BMW, damaging it. The custodian should and will be able to plead Clara's negligence in order to reduce his liability to her. But it can hardly be said that by risking damage to cars by the side of the road, Clara has been negligent *toward herself*.³¹² The odds that by speeding she might crash into and damage an expensive car that *she* owns, because she has acquired title to the car through a long-lost relative (or any similarly fantastic mechanism), are so low as to render the possibility unforeseeable. Clara herself, in such a case, is an unforeseeable victim of her own negligence, but her negligence will still diminish her recovery.

These cases suggest that, although in most cases of comparative negligence a plaintiff has been negligent toward herself (among others), the defense reflects a more general moral phenomenon: the plaintiff's responsibility for foreseeably causing the wrongful *rights-infringing outcome* of which she now complains. Indeed, this is an area in which the non-relational character of the underlying moral dynamics lies close to the formal doctrinal surface of the law: Jury instructions on comparative fault often ask whether the plaintiff's negligence was causally responsible for the injury of which she complains without any suggestion that the plaintiff need have been negligent toward herself.³¹³

In other cases, the law of negligence must engage in doctrinal gymnastics to enforce the ordinary moral principles operative beneath its formal structure. Consider the facts in *Shell UK Ltd. v. Total UK*

³¹² Of course, Clara may have been negligent toward herself by putting the car she was driving at risk, and her own life at risk, but these are not the risks that have materialized, and so they will not reduce her recovery. Cf. *Berry v. Sugar Notch Borough*, 43 A. 240, 240 (Pa. 1899) (holding that the fact that tram operator was speeding when hit by falling tree did not affect his right to recover for negligent placement of tree because his speed did not cause accident).

³¹³ See, e.g., JUD. COUNCIL OF CAL., CIV. JURY INSTRUCTIONS (CACI) No. 405 (2025).

Ltd.,³¹⁴ in which the defendant negligently damaged a piece of property held on trust for the plaintiff, preventing the plaintiff from accessing and exploiting this property, thereby causing it to suffer economic loss.³¹⁵ The beneficiary of trust property is not its legal owner: It is the property's trustee who holds title to it, and thus the beneficiary has a legal right against third parties that they not use or interfere with the property against the trustee's will.³¹⁶ Thus, on black-letter principle, the defendant owed no duty of care to the plaintiff, and the economic losses suffered by the plaintiff were pure economic losses that are unrecoverable (rather than economic losses "consequential" upon the defendant's infringement of a duty owed to it, which are standardly recoverable).³¹⁷

Faced with this evidently unjust result, the English Court of Appeal simply refused to follow the operative black-letter rule, on the basis that doing so would be "legalistic"³¹⁸ — the sort of "triumph of form over substance"³¹⁹ that would inhibit "the impulse to do practical justice."³²⁰ Similarly, it would surely be "legalistic" to deny a retiree recovery for economic losses suffered as the result of the destruction of his retirement fund on the basis that, in truth, it is the investment trustee who owns the fund, and the retiree is only its beneficiary (such that the retiree's resulting economic losses are pure rather than consequential). As a matter of common social understanding, it is the trust beneficiary in such cases who is its owner, morally speaking — it is the trust beneficiary who has a moral right against the asset's destruction, not the investment manager or legal entity that legally owns the asset and holds it on trust. Faced with the exceptional case in which the formal structure of the legal duty of care was inadequate to provide a trust beneficiary with just recovery for losses arising from the negligent and foreseeable damaging of an object that was obviously its property — in morality, as recognized in social custom and indirectly in law — the Court of Appeal was readily willing to disregard the relational formal structure of the duty of care in order to enforce the negligence tort's animating moral instincts.

The case is recent, but the general phenomenon is not a novel one. Take the rule announced in *Wagner v. International Railway Co.*,³²¹ another famous Cardozo case decided seven years before *Palsgraf*. In *Wagner*, Cardozo held that a defendant who had negligently endangered another person could be liable to that person's companion, for injuries

³¹⁴ [2010] EWCA (Civ) 180, [2011] QB 86 (Eng.).

³¹⁵ *Id.* at [5].

³¹⁶ RESTATEMENT (THIRD) OF TRUSTS § 3 (A.L.I. 2012).

³¹⁷ See *Shell* [2010] EWCA (Civ) 180 at [137].

³¹⁸ *Id.* at [132].

³¹⁹ *Id.* at [143].

³²⁰ *Id.* (quoting *White v. Jones* [1995] 2 AC 207 (HL) 259 (appeal taken from Eng.)).

³²¹ 133 N.E. 437 (N.Y. 1921).

sustained in the course of attempting a rescue.³²² It might seem that such injured rescuer must sue as the “vicarious beneficiary”³²³ (in *Palsgraf*’s phrase) of the negligent defendant’s breach of his duty of care to the primary victim endangered. Not so, Cardozo maintained: “The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. . . . The risk of rescue, if only it be not wanton, is born of the occasion.”³²⁴ The most natural reconstruction of Cardozo’s thought, as the *Palsgraf* perspective’s defenders have recognized, sounds in foreseeability: “[T]he prospect of a rescuer who might be injured [is] within the scope of the hazards the negligent defendant [can] be expected to foresee.”³²⁵ Because the rescuer is a foreseeable victim of the defendant’s negligent action, the defendant breaches a duty of care owed to him, not just a duty of care owed to the directly imperiled party. “Danger invites rescue,” as Cardozo memorably put it.³²⁶

But foreseeability does not seem to supply the sole or even principal normative basis of the rule. That is why, as an earlier generation of doctrinally oriented torts scholars observed, negligence law often supplies recovery in cases where the assumption that a rescuer is foreseeable seems “artificial and fanciful.”³²⁷ We can construct cases that exhibit the point sharply. Imagine two seamen aboard a ship that contains no other crew or passengers, or so the seamen have every reason to believe. One night the first seaman drinks to excess and, in his drunken stupor, crashes his body into the second seaman, sending him careening into the sea. In an extremely improbable turn of events, another person has been stowed away in the bowels of the ship, in a room with a window onto the sea. Upon seeing the second seaman careen past her window, she jumps out of her window and into the sea in a bid to save him, and suffers injury in the course of the rescue.

The first seaman is liable to compensate the stowaway, under the rule in *Wagner*, even if the prospect of her presence on the scene was so improbable as to be unforeseeable in any natural sense of the term. That is because the rule in *Wagner* bestows a categorical claim to redress on rescuers, so long as their rescue attempts are not grossly irresponsible. No matter how utterly improbable the presence of a rescuer, or the prospect that she might attempt a rescue, the rescuer may avail herself of the rule.³²⁸ If the rule were otherwise, moreover, certain absurd

³²² *Id.* at 438.

³²³ *Palsgraf*, 162 N.E. at 100.

³²⁴ *Wagner*, 133 N.E. at 437–38.

³²⁵ Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 17, at 34 n.140.

³²⁶ *Wagner*, 133 N.E. at 437.

³²⁷ PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 77, § 43, at 289; *see also* FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 14.15, at 373 (3d ed. 2006) (“[R]escuers are treated as if they were foreseeable, although to do so may sometimes involve some stretch of the imagination.” (footnote omitted)).

³²⁸ John Fabian Witt & Morgan Savige, *Foreseeability Conventions*, 44 CARDOZO L. REV. 1075, 1121–22 (2023).

implications would follow: A prospective tortfeasor would be able to conclusively extricate himself from the prospect of negligence liability to rescuers by ensuring that it is sufficiently unlikely that any potential rescuer is on the scene.

To be sure, courts sometimes *stipulate* that “rescuers *always* should be regarded as foreseeable plaintiffs,”³²⁹ such that imperiling one person is always a breach of duty not only toward him but toward his rescuer as well. But the perfectly conclusive and categorical character of this stipulation suggests that it is a semifictive legal construction, by which the law supplies a recovery that is often motivated on other grounds. What those grounds might be is a question that lies outside the scope of this Article. The point is that here, again, the law fictionally deforms the relational structure of the legal duty of care in order to enforce a species of compensatory moral liability that does not *actually* rest on the defendant’s breach of any duty to be careful toward the plaintiff. The same is true, I have argued, in the heartland of negligence and battery: The law uses a relational formal structure (including a relational duty of care) to enforce non-relational moral principles, such as CFD*, about responsibility for rights infringement.

None of this is to say that the idea of a relational duty of care is incoherent or an illusion. The law of negligence does announce a legal duty to take care against foreseeably injuring others, a duty that is most often formulated as owed to those whom one might foreseeably injure, and the expressive effect of this announcement is to recognize such a moral duty as well. It is no illusion to suppose that there can exist such a relational moral duty, or that it may play various roles in ordinary moral thought.³³⁰ Rather, the normative illusion persistently engendered by the place of the relational legal duty of care in the formal structure of the negligence tort is that the breach of any such relational duty is the ground of liability to compensate for negligently inflicted injury (by the lights of either ordinary moral thought or the law of negligence). This illusion is dispelled only by comparative legal reflection, and by closely attending to cases in which relational wrongdoing (breach of relational duty) extensionally diverges from the overlapping but distinct moral phenomenon of fault-based responsibility for rights infringement.

If this is correct, an obvious question to ask is why the legal duty of care in negligence should have assumed a relational form in the first place. The answer is no doubt complex, and ultimately requires sustained historical analysis of a kind that cannot be performed here. Still,

³²⁹ *Herman v. Welland Chem., Ltd.*, 580 F. Supp. 823, 826 (M.D. Pa. 1984) (emphasis added).

³³⁰ Suppose, for example, that *X* foreseeably puts *Y* at risk, almost killing *Y* and (unforeseeably) almost killing *Z* as well. Intuitively, *X* may owe more fulsome an apology to *Y*. Perhaps this is because *X* has breached a duty to be careful toward *Y* but no such duty toward *Z*.

the history of the common law, as it is commonly told, supplies the basis of a plausible answer.³³¹

There is a sort of negligence case — in which a defendant does not cause a plaintiff any damage, that is, does not infringe any right against injury that she holds — in which the defendant's liability to the plaintiff *truly does* rest upon his breach of a duty to be careful toward her, a duty grounded in some morally significant undertaking or other special relationship that he bears toward her and not others. Imagine, for example, that the defendant is a firefighter who undertakes to *A* that he will use reasonable care to safeguard *A*'s lands if it should ever appear that any of *A*'s lands are under threat of fire damage. If the defendant carelessly fails to prevent a fire from burning down a piece of land that belongs to both *A* and *B*, the defendant is liable to *A* and not to *B*.

The early common law of negligence handled situations of this kind — situations in which liability genuinely rests upon the breach of a relational duty of care, one that is grounded in an undertaking or other special relationship, to the plaintiff — alongside situations involving negligently inflicted damage to a plaintiff.³³² Without much intellectual self-consciousness, judges used the language of duty to identify when cases of both kinds were actionable.³³³ Thus it was natural enough, once judges and doctrinal writers started to distill the doctrinal structure of the modern tort of negligence from this catalog of cases, to subsume actionable cases of both kinds under the overarching doctrinal conceit of a relational duty of care.³³⁴

On at least one plausible and common understanding of the common law's history, therefore, that history may explain why we now have a duty of care in negligence with two faces. One face perspicuously discloses the substantively relational, special relationship-based ground of a certain sort of compensatory moral liability. The other face is a mask — a formal device in the nature of a fiction, invoked to enforce a sort of compensatory moral liability that is, in truth, grounded in moral principles of a different kind. And it is this second sort of liability that is at work in the heartland of tort, in *Palsgraf* and other cases of negligently inflicted damage to a plaintiff.

That the common law of tort has not worked itself pure of such fiction — by explicitly putting tort liability in the second sort of case onto a foundation of general principles regarding the defendant's responsibility for causing damage to the plaintiff — is perhaps partly explained by

³³¹ See generally, e.g., James C. Plunkett, *The Historical Foundations of the Duty of Care*, 41 MONASH U. L. REV. 716 (2015) (synthesizing and distilling this body of historical scholarship).

³³² *Id.* at 718 (noting the availability of actions for “the negligent performance of an undertaking,” “the negligent non-performance of an undertaking,” “the negligent loss of control of dangerous forces, . . . and the negligent causing of harm through the application of force to the plaintiff's land, goods or person” (footnotes omitted)).

³³³ See *id.* at 723–24.

³³⁴ See *id.* at 725–27.

the utility of a foreseeability-inclusive duty of care in controlling jury discretion and enabling courts to dismiss less colorable claims at an early stage of litigation.³³⁵ Probably, though, it is also explained by the insistently practical orientation of the common law's juristic culture. The civil law's general tort principles were extracted from the coarse formal structure of classical Roman law, with its common law-like pigeonhole causes of action, by means of extensive conceptual and philosophical reflection conducted over several centuries by doctrinalists, philosophers, and theologians on the European continent.³³⁶ Occasionally, tort scholars propose that the judiciary or the legislature should restructure large swaths of the common law in broadly similar form.³³⁷ But common law jurisdictions have never had much appetite for such an enterprise, and they probably never will.³³⁸ If it is asked why the common law of torts has not worked itself pure, by distilling its normative substance into general legal principles not straitjacketed by its received pigeonhole causes of action, "[w]e . . . have got on well enough without" any such purifying exercise is an answer with great force.³³⁹

CONCLUSION: FORM, FICTION, SUBSTANCE, AND THE MORAL FOUNDATIONS OF TORT LAW

Legal historians have often observed that legal fictions, and other doctrinal mechanisms that create daylight between the common law's formal apparatus and its substantive normative concerns, have played a significant role in the common law's development.³⁴⁰ Medieval actions, such as ejectment and trover, protected property in chattels and land through fictions involving nonexistent lessors and imaginary findings of "lost" property.³⁴¹ Until quite recently, the common law ordered reversals of mistaken payments by fictionally stipulating an implied

³³⁵ *Id.* at 727–29 (“By insisting on the existence of a duty, and then formulating that duty as they saw fit, judges were able to exercise far greater control over questions of liability.” *Id.* at 727–28.).

³³⁶ *See, e.g.*, ZIMMERMANN, *supra* note 110, at 902–1142; JANSEN, *supra* note 34, at 141–288.

³³⁷ *See, e.g.*, Stephen D. Sugarman, *Restating the Tort of Battery*, 10 J. TORT L. 197, 198, 234 (2017). That Professor Sugarman's proposal would bring the common law's structure closer to that of the civil law is perceptively observed in Anthony Sebok, *Doing Away with Battery Law*, TORTS JOTWELL (Dec. 20, 2017), <https://torts.jotwell.com/doing-away-with-battery-law> [<https://perma.cc/TJ47-LDTK>].

³³⁸ Nor is it obvious that it would be prudent for the common law to be remodeled in any such sweeping way; if undertaken incautiously, any such remodeling might inadvertently destabilize the systemic functions of, and structural relationships between, received doctrinal mechanisms. On such systemic functions and structural relationships, see generally Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 J. TORT L., no. 2, 2011, art. 5, at 1.

³³⁹ POLLOCK & MAITLAND, *supra* note 125, at 186.

³⁴⁰ *See, e.g.*, HENRY JAMES SUMNER MAINE, *ANCIENT LAW* 16–18 (London, J.M. Dent & Sons Ltd. 1917); D.J. IBBETSON, *A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS* 97–98 (1999).

³⁴¹ IBBETSON, *supra* note 340, at 107–12; J.H. BAKER, *THE LAW'S TWO BODIES* 33–34 & 33 n.3 (2001).

promise by the recipient to reverse any such payment.³⁴² Creative pleadings asserting injury in breach of the king's peace — pleadings sometimes strained, sometimes outright false — progressively expanded the range of tort actions cognizable in the royal courts.³⁴³ And, concealed beneath the facially strict character of trespass (the central action in medieval tort law), it is likely that a substantive concern for fault-based moral responsibility was opaquely at work.³⁴⁴ In all of these ways and others, “the common law has [engaged] in the abuse of its elementary ideas”³⁴⁵ — manipulating, obscuring, and sometimes ignoring the doctrinal strictures ostensibly imposed by its basic forms — in order to “reach[] reasonable results behind institutions and procedures of quite unreasonable artificiality.”³⁴⁶

It is tempting to believe that, now that the common law has escaped from the old forms of action, it “has outgrown the need for legal fictions,”³⁴⁷ and its formal doctrinal structure can thus “be taken more or less at face value.”³⁴⁸ That is exactly what the *Palsgraf* perspective, and much of contemporary private law theory, seeks to do. On its face, the common law of torts is largely concerned with relational wrongdoing or mistreatment — forms of behavior, such as intentionally and unjustifiably contacting another person in a harmful or offensive manner, that violate ordinary moral norms regarding how we must treat one another. If we take this formal structure at moral face value, the *Palsgraf* principle naturally follows: Only if the defendant has mistreated the plaintiff, treated her wrongfully by breaching a legally recognized moral norm regarding how *she* may be treated, can she recover from him.³⁴⁹

But the *Palsgraf* principle fails to track a good deal of tort doctrine and its underlying moral sensibilities. That is because the common law's conceptual architecture — which largely sounds in the language of relational duties and wrongs — does not neatly map onto its substantive moral concerns. Some tort liabilities truly are grounded in the breach

³⁴² RESTATEMENT OF THE LAW OF RESTITUTION QUASI CONT. & CONSTRUCTIVE TRS. pt. I, intro. note at 9 (A.L.I. 1937) (noting “[t]he fiction that such [sic] actions were based upon implied promises”).

³⁴³ IBBETSON, *supra* note 340, at 97–125; MILSOM, *supra* note 5, at 31–35.

³⁴⁴ IBBETSON, *supra* note 340, at 59 (“It would . . . be a bad mistake to exaggerate the contrast between [the medieval] regime of strict liability (qualified by justificatory defences) and a regime of fault liability. Essentially the same issues of the ascription of responsibility arise in each method of analysis; in the latter method they are discussed openly in terms of fault, while under a regime of strict liability they are largely concealed behind the language of causation.”).

³⁴⁵ S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 6 (2d ed. 1981).

³⁴⁶ MILSOM, *supra* note 5, at 22.

³⁴⁷ OBG Ltd. v. Allan [2007] UKHL 21, [229], [2008] 1 AC (HL) (Lord Nicholls of Birkenhead (appeal taken from Eng.) (“I would like to think that, as a mature legal system, English law has outgrown the need for legal fictions.”).

³⁴⁸ Arthur Ripstein, *Kantian Perspectives on Private Law*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 69, 83 (Andrew S. Gold et al. eds., 2020).

³⁴⁹ See *supra* notes 18–20 and accompanying text.

of relational duties, the commission of relational wrongs.³⁵⁰ But these liabilities sit at some distance from the heartland of tort law. In its heartland, tort law makes use of a wrongs-based conceptual architecture in order to implement a complex set of moral principles regarding the conditions under which a defendant is morally responsible for infringing a plaintiff's rights against injury, such that he is liable to compensate her — whether or not she was foreseeable to him or he has treated her wrongfully. A wrongs-based conceptual architecture can house these substantive principles without undue strain because there is a great deal of overlap between relational wrongdoing or mistreatment (on the one hand) and moral responsibility for rights infringement (on the other). Nevertheless, there is enough divergence between substance and form that the contours of the formal architecture must sometimes be bent by legal fiction in order to implement these underlying principles.

Just as in medieval tort law, then, modern tort law's organizing conceptual structures are sometimes "twisted and tortured to inappropriate uses"³⁵¹ in order to meet the felt requirements of remedial justice — to enforce ordinary moral commitments about remedial moral liability that are widely recognized, often implicitly and somewhat inarticulately, by judges and other participants in the practice. The substantial overlap between relational moral wrongdoing and moral responsibility for rights infringement helps to occlude the artificiality of the legal fictions and doctrinal appendages that the law uses to enforce principles about the latter through a conceptual vocabulary that largely speaks of the former.

Unlike legal historians, contemporary private law theorists tend to pay scant attention to legal fictions, and when they do they often criticize the fictions under scrutiny as regrettable deviations from principled legal decisionmaking.³⁵² In my view, however, the law's use of fictional and quasi-fictional forms — devices that facilitate "legal inferences founded on imaginary facts, but intended to forward the substantial ends of justice"³⁵³ — tells us something quite important about its nature and functions. That the law must make use of such devices reflects the disconnect between the principles of justice that it recognizes and the conceptual structures that it uses to enforce them.

³⁵⁰ See *supra* notes 331–32 and accompanying text.

³⁵¹ F.W. Maitland, *The Forms of Action at Common Law: Lecture I*, in *EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES* 295, 305 (A.H. Chaytor & W.J. Whittaker eds., 1910) ("[T]hese forms of action . . . [were] twisted and tortured to inappropriate uses . . .").

³⁵² See, e.g., RIPSTEIN, *supra* note 17, at 23; STEVENS, *supra* note 17, at 102; BEEVER, *supra* note 17, at 167–68; FINNIS, *supra* note 190, at 243. Some illuminating exceptions include James Lee, *Fictions in Tort*, in *LEGAL FICTIONS IN THEORY AND PRACTICE* 255, 255–74 (Maksymilian Del Mar & William Twining eds., 2015) (examining fictions in the English law of cause-in-fact), and Jane Stapleton, *Two Causal Fictions at the Heart of U.S. Asbestos Doctrine*, 122 *LAW Q. REV.* 189, 189–95 (2006) (examining such fictions in American law).

³⁵³ 1 GEORGE CORNEWALL LEWIS, *A TREATISE ON THE METHODS OF OBSERVATION AND REASONING IN POLITICS* 421 (London, John W. Parker & Son 1852).

It is only when we examine the doctrine in granular casuistical detail that these underlying moral principles become apparent. Once we do, the *Palsgraf* perspective's insistence that tort law's moral core is robustly relational becomes untenable. True, there is a thin sense in which a defendant's moral liability to compensate a plaintiff (and liability in tort) is "irreducibly relational"³⁵⁴: The defendant must infringe some fact-relative moral right, a moral right against actually being injured, held by the plaintiff. But this is a very thin sense of relationality. It need not involve delivering any "[a]ffront to [the plaintiff's] personality"³⁵⁵ or subjecting her to an excessive risk of damaging her body or property. The plaintiff might be unforeseeable to the defendant, or the defendant might treat her with all due care — because, say, she has to all reasonable appearances given consent to his action — and yet the defendant may be liable to compensate her, because he has responsibly risked infringing a certain sort of moral right, he did in fact infringe such a right, and the right in question did in fact belong to her.

All of this invites the question, of course, of *why* moral responsibility for rights infringement should ground remedial moral liability. As an interpretive matter, it is not obvious that any such explanation is required. After all, it is quite possible that the characteristic commitments of ordinary moral thought are in fact mistaken — that the true moral theory is some theory that is radically discontinuous from commonsense morality, such as act utilitarianism.³⁵⁶ Even if that were true, it is unlikely that tort law — a thoroughly human institution — would encode any such moral theory. If this Article's arguments are sound, the law's underlying moral commitments are more than a mishmash of particular convictions; they have a deeper structure that can be elicited through casuistry and cast in the form of general principles. But the principles are ones that are recognized, if only implicitly, in ordinary moral life.

Ultimately, however, ordinary moral principles are worth close attention — and the manner in which tort law encodes them is worthy of close examination — largely because these principles might track or at least substantially illuminate important moral truths. And, when we ask why it should be true that remedial moral liability is grounded in moral responsibility for rights infringement, the answer proves to be elusive.

An initially tempting answer appeals to the simple observation that moral rights are moral reasons. As a general matter, when an agent acts against a moral reason and thereby damages or sets back the value in which it is grounded, the agent can acquire a derivative moral reason to undo the damage or make an offsetting contribution to promoting the

³⁵⁴ RIPSTEIN, *supra* note 17, at 73.

³⁵⁵ *Palsgraf*, 162 N.E. at 101.

³⁵⁶ For such an argument, see generally SHELLY KAGAN, *THE LIMITS OF MORALITY* (1989).

value in question.³⁵⁷ Thus an agent who pollutes a beautiful lake, even unforeseeably, will have a reason to clean it up (if she is able to) or perhaps to clean up other lakes and other polluted parts of the environment (if she is not). So, too, it is plausible to suppose, an agent who infringes another person's right against bodily injury, even if she has done so unforeseeably, will acquire a remedial reason to help undo the injury (such as by financing remedial surgery) or otherwise promote the person's welfare.

But this explanatory strategy is obviously incomplete, for such remedial reasons appear to be comparatively weak. An agent who unforeseeably burns down her neighbor's home by flipping a kitchen switch may have a reason to undo the damage, but this reason is nowhere near as strong as the reason that the agent would have if she had burned down her neighbor's home culpably and foreseeably. Culpably and foreseeably infringing a right (or otherwise causing an outcome that damages something of impersonal moral value) can ground an extensive and onerous remedial moral duty — the sort of remedial moral duty that the law can and should enforce with highly burdensome remedial measures, such as make-whole compensation.

The question is why such an agent's remedial moral reasons are so much stronger than if she is *not* morally responsible, in any such way, for causing the outcome in question. It is not enough merely to suggest that the law should in fairness decline to *enforce* such a moral duty unless the agent has acquired the duty through some exercise of his responsible agency.³⁵⁸ Not only does that suggestion fail to explain the robust and basic conviction at stake — that no such onerous remedial duty exists even in morality — but it is also obscure why, if there *did* exist such a strong and enforceable remedial moral duty, it would be unfair for the law to enforce it. Similarly, it does not gain us much explanatory ground to suggest that the strength of an agent's remedial reasons (and whether they ground a strong and enforceable remedial moral duty) reflect the extent to which the agent is the agent or author *of* the outcome in question.³⁵⁹ Without more, that suggestion simply restates the phenomenon that needs to be explained.

Perhaps the most promising explanation sounds in a line of thought once voiced by Justice Holmes, whose hostility to moralist accounts of tort law (and the commitments of ordinary moral thought) was

³⁵⁷ See John Gardner, *What Is Tort Law For? Part 1. The Place of Corrective Justice*, 30 *LAW & PHIL.* 1, 32–33 (2011); Adam Slavny, *Negating and Counterbalancing: A Fundamental Distinction in the Concept of a Corrective Duty*, 33 *LAW & PHIL.* 143, 145 (2014).

³⁵⁸ Such a view is intimated in JOHN GARDNER, *TORTS AND OTHER WRONGS* 222 (2019).

³⁵⁹ See, e.g., Gideon Yaffe, *Agency in the Law*, in *THE ROUTLEDGE HANDBOOK OF PHILOSOPHY OF AGENCY* 448, 450 (Luca Ferrero ed., 2022) (“If an action is a willed bodily motion or omission, then a person is the agent of anything that is caused by that, provided it does not come to pass in some entirely unpredictable way. The reasonable foreseeability limitation on proximate causation institutionalizes this view of intrinsic agency-of.”).

decidedly inconstant. Holmes suggested that an agent cannot properly be held responsible for an outcome, in morality or in law, unless the agent could have avoided it by choosing differently, for otherwise the agent would lack control over incurring such responsibility.³⁶⁰ It is an attraction of this explanation that it might make sense of the intuitive moral phenomenon embedded in doctrines such as transferred intent and the culpability-sensitivity of proximate cause: Culpability can widen the scope of a wrongdoer's liability beyond the boundaries of reasonable foreseeability. The complaint that one could not have avoided causing an outcome rings more hollow if one has caused it through an egregiously culpable and wrongful action, for such actions are easier to avoid than mildly or moderately culpable ones.

But ultimately even this line of thought comes perilously close to restating what it purports to explain. To see why, suppose that an agent culpably imposes a moderate risk of death on another person through some prosaic means, such as playing around with explosive fireworks. If the agent causes harm to the other person in a predictable way (such as, blowing him up), then she will of course be morally responsible for this outcome and liable to compensate him for it. If, by contrast, she causes him equivalent harm through some freakish and unpredictable way (such as awakening a slumbering and murderous bear), she will not. But there is an obvious sense in which the agent is *equally* able to avoid the injurious and rights-infringing outcome in both cases: She can simply avoid playing with the fireworks, something that she is anyway obligated to do.

From a certain perspective it seems clear, moreover, that this is the only sort of avoidability or control worth caring about. If a parent knows that her child is about to risk killing himself through some imprudent action, she might of course pay good money to reduce the magnitude of this risk. But it would be senseless for the parent to pay any money to ensure that, *if* her child kills himself through his carelessness, the lethal outcome will be of a foreseeable kind rather than an unforeseeable one. Perhaps a parent might sensibly pay good money to ensure that, if her child's culpable wrongdoing is about to kill *another person*, the lethal outcome will be of an unforeseeable rather than a foreseeable kind. If that is so, however, it would seem to be because the

³⁶⁰ O.W. HOLMES, JR., *THE COMMON LAW* 95 (Boston, Little, Brown & Co. 1881) ("The requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen."); *see also* Yaffe, *supra* note 359, at 451 (arguing that if an agent causes an event "in a freakish or unpredictable way . . . the agent [does] not enjoy even a thin sense of control over the event"); Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in *PHILOSOPHY AND THE LAW OF TORTS*, *supra* note 17, at 73–82 (developing such a view, and applying it to tort liability, at greater length); SCANLON, *supra* note 66, at 248–94 (proposing a broadly similar view, in moral theory, about the relationship between avoidability and responsibility).

unforeseeability of an outcome undercuts an agent's moral responsibility for it, and it is in the child's interest that he not be morally responsible for killing another person (in part, perhaps, because it is in his interest that he should not be morally or legally liable to compensate). And, of course, the connection between outcome foreseeability and moral responsibility is the very phenomenon that this Holmesian appeal to avoidability and control is supposed to ground. The explanatory power of this Holmesian account may, therefore, be illusory: Such an account may rely on defining notions such as avoidability and control in a covertly stipulative sense that bakes in the very moral distinctions that these notions are being invoked to explain.

Thus, it may prove difficult to explain and justify ordinary moral sentiments according to which the scope of moral responsibility for causing an outcome is presumptively determined and delimited by the boundaries of reasonable foreseeability. But the intuitive moral phenomenon here is a perfectly general one. It has nothing in particular to do with relational wrongdoing (or the infringement of rights against injury, for that matter). After all, outcome foreseeability seems equally to limit moral responsibility for damaging objects of impersonal value — in precisely the same, reflectively mysterious way.³⁶¹ Here, as elsewhere, some of the most interesting and difficult philosophical questions about tort law come into clear view only if we look beneath the formal surface of the doctrine and its ostensible concern for relational duties and wrongs.

³⁶¹ See *supra* p. 1031. It is perhaps because the intuitive moral phenomenon is a general one, which has nothing to do with relational wrongdoing or rights infringement, that courts have found it natural to read a proximate cause restriction into statutes that impose liability for causing impersonal harm, such as environmental damage. See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 713 (1995) (O'Connor, J., concurring) ("Proximate causation is not a concept susceptible of precise definition. It is easy enough, of course, to identify the extremes. The farmer whose fertilizer is lifted by a tornado from tilled fields and deposited miles away in a wildlife refuge cannot, by any stretch of the term, be considered the proximate cause of death or injury to protected species occasioned thereby." (citing PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 77, at 280-81)).