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## The Distorted Reality of Civil Recourse Theory

Alan Calnan  
*Southwestern Law School*

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# THE DISTORTED REALITY OF CIVIL RECOURSE THEORY

ALAN CALNAN\*

## ABSTRACT

*In their recent article Torts as Wrongs, Professors John C.P. Goldberg and Benjamin C. Zipursky offer their most complete and accessible explanation of the civil recourse theory (CRT) of tort law. A purely descriptive account, CRT holds that tort law is exclusively a scheme of private rights for the redress of legal wrongs and is not a pragmatic mechanism for imposing strict liability or implementing public policy. The present paper challenges this view by revealing critical errors in its perspective, methodology, and analysis. It shows that Goldberg and Zipursky do not objectively observe tort law and uncritically report what they see; instead, they employ a partial perspective to interpret the facts and rely on their own predilections to support their subjective conclusions. Constrained by this biased outlook, Goldberg and Zipursky misinterpret the concept of strict liability, grossly underestimating its pervasiveness, embeddedness, and practical and structural significance. For similar reasons, the authors simply ignore the prodigious presence of instrumental considerations in the core wrongs-based action of negligence, viewing them as marked departures from tort law rather than accretive adaptations to its evolving content. Having exposed the distorted reality of CRT, the paper encourages the authors to recast that theory as a normative enterprise—one which prescribes a treatment for unprincipled instrumentalism and a plan for restoring rights and wrongs to tort law.*

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## I. INTRODUCTION

Over the last decade or so, Professors John C.P. Goldberg and Benjamin C. Zipursky have incrementally developed a descriptive theory of tort law called civil

recourse theory.<sup>1</sup> In their recent article *Torts as Wrongs*,<sup>2</sup> they present their most complete and accessible account of that theory. In short, civil recourse theory holds that “[t]orts are legal wrongs for which courts provide victims a right of civil recourse—a right to sue for a remedy.”<sup>3</sup>

Embedded within this ostensibly simple account are a number of complex challenges to Torts’ reigning theoretical orthodoxies. The claim that torts are *wrongs* is actually a direct attack upon the commonly held pragmatic conception of Torts as accidentally caused *losses* that the law seeks to prevent, administer, and allocate to promote social welfare.<sup>4</sup> Conversely, the contention that torts are *legal* wrongs is a pointed rebuke of the corrective justice view of Torts as *moral* transgressions that the law punishes or annuls in accordance with deeply ingrained ethical principles.<sup>5</sup> Finally, the assertion that torts are *private rights* of recourse counters *both* the pragmatists’ image of Torts as *public behavioral directives* or

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\* Professor of Law, Southwestern Law School. I would like to thank Christopher Miller, Adam Houtz, and Jahmy Graham for providing helpful research and technical assistance on this article.

<sup>1</sup> Professor Zipursky first introduced civil recourse theory in his 1998 article *Rights, Wrongs, and Recourse in the Law of Torts*. Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 6 (1998) (hereinafter Zipursky, *Rights, Wrongs, and Recourse*). Since that time the authors, both individually and together, have described and applied this theory in numerous pieces. See, e.g., Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW (Jules Coleman & Scott Shapiro eds., 2002); John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364 (2005); 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 (2006) (hereinafter Goldberg & Zipursky, *Internal Point of View*); John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other “Quaint” Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329 (2006); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) (hereinafter Goldberg, *Constitutional Status*); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998) (hereinafter Goldberg & Zipursky, *MacPherson*); John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 (2001); John C.P. Goldberg & Benjamin Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002) (hereinafter Goldberg & Zipursky, *Unrealized*); John C.P. Goldberg, *Wrongs Without Recourse: A Comment on Jason Solomon’s Judging Plaintiffs*, 61 VAND. L. REV. EN BANC 9 (2008) (hereinafter Goldberg, *Wrongs Without Recourse*); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003) (hereinafter Zipursky, *Civil Recourse*).

<sup>2</sup> See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010) (hereinafter Goldberg & Zipursky, *Torts as Wrongs*).

<sup>3</sup> *Id.* at 985.

<sup>4</sup> *Id.* at 920-25, 926-28, 954-57.

<sup>5</sup> See *id.* at 932; see also Zipursky, *Civil Recourse*, *supra* note 1, at 726-27.

liability rules<sup>6</sup> and the opposed moralist vision of Torts as specific private duties to repair personal injuries.<sup>7</sup>

Though controversial,<sup>8</sup> civil recourse theory is factually accurate in many respects. Tort law is concerned about wrongs like negligence and intentional torts.<sup>9</sup> The wrongs of Torts—which generally exclude even the worst forms of nonfeasance<sup>10</sup>—are legal and not necessarily moral.<sup>11</sup> And wrongs do afford private

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<sup>6</sup> See Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 1, at 44, 55-60.

<sup>7</sup> See Zipursky, *Civil Recourse*, *supra* note 1, at 718-26.

<sup>8</sup> Goldberg and Zipursky's civil recourse theory has been the subject of numerous critiques. See, e.g., Alan Calnan, *In Defense of the Liberal Justice Theory of Torts: A Reply to Professors Goldberg and Zipursky*, 1 N.Y.U. J.L. & LIBERTY 1023 (2005) (hereinafter Calnan, *In Defense*); W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671 (2008); Dilan A. Esper & Gregory C. Keating, *Putting "Duty" in Its Place: A Reply to Professors Goldberg and Zipursky*, 41 LOY. L.A. L. REV. 1225 (2008); Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765 (2009); Jane Stapleton, *Evaluating Goldberg and Zipursky's Civil Recourse Theory*, 75 FORDHAM L. REV. 1529 (2006).

<sup>9</sup> See DAN B. DOBBS, *THE LAW OF TORTS 2* (2000) (noting that "[i]n the great majority of cases today, tort liability is grounded in the conclusion that the wrongdoer was at fault in a legally recognizable way" and that legal fault in Torts usually consists of intentional or negligent wrongs). Even Goldberg and Zipursky acknowledge that "[t]here is nothing new or even surprising about these statements; hornbook authors have said it all along." Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 985.

<sup>10</sup> Nonfeasance is the failure to act on behalf of another. In Torts, a person generally has no duty to aid another, even if she could provide that aid with very little risk or burden to herself, unless she creates the risk endangering the other party, undertakes to provide assistance and thereby increases an existing risk, or enters into a special relationship with the endangered party or someone who poses a foreseeable risk to that party. See DOBBS, *supra* note 9, at 854-55.

<sup>11</sup> I argued this point in my 1997 book *Justice and Tort Law*. ALAN CALNAN, *JUSTICE AND TORT LAW* (1997) (hereinafter CALNAN, *JUSTICE*). After recounting Tort's movement from trespass to negligence to strict liability, I explained their common normative basis:

How can these very different types of conduct all be considered wrongful? Certainly, moral fault is not the key, since past and present versions of tort law have imposed liability without it. Likewise, if the outcome-responsibility of causation were alone sufficient, the requirement of fault or ultrahazardousness would be superfluous. The answer to this enigma is that these activities are all wrongful in the political sense of being irresponsible.

To be irresponsible in the manner I propose, three conditions must be met. First, there must be a duty or responsibility to perform or refrain from performing a particular activity. Second, the responsibility must be just—that is, it must not be unduly restrictive of freedom. Finally, the responsibility must be breached by the act or omission of the party subject to it. If these conditions are met, the offending conduct is wrongful, even if it did not proceed from an evil motive or wanton demeanor.

*Id.* at 123 (footnote omitted).

rights to sue and not simply grounds for public sanctions.<sup>12</sup> There is only one problem. Taken as a whole, civil recourse theory is *fundamentally* wrong because it distorts rather than describes Torts' essential truth.

It pains me to say this. Like Goldberg and Zipursky, I am a Torts foundationalist.<sup>13</sup> In prior works, I have argued that early tort law (or, more precisely, the law that preceded modern tort law) was essentially a law of wrongs,<sup>14</sup> and have offered my own normative theory, called liberal-justice theory, suggesting how it *should* be reconstituted.<sup>15</sup> So I am naturally sympathetic to any work that

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<sup>12</sup> This right, too, was discussed in-depth in *JUSTICE IN TORT LAW*. See *id.* at 23-30, 38-53, 62-71, 124-29. In the following passage, I describe the unique, relational nature of that right:

To establish a right, it is not enough that the aggrieved party sustain harm from an action which violates a general or special duty. It also must be shown that she was an intended beneficiary of the applicable duty. The beneficiary status of the claimant establishes her unique entitlement to affect the actions of the duty-holder, and thus links the parties in a special relationship.

Tort law contains a similar requirement. One seeking redress for the harmful effects of a transaction may not prevail simply by showing that the alleged perpetrator acted wrongfully. She must also show that the action was wrongful as to her. To meet this burden, it must appear that she was owed a duty not to be subjected to the injury-producing conduct. In essence, the claimant must be one of a class of individuals who were to enjoy the benefits of the duty's protection. Where this connection is established, the claimant possesses a distinctive power to sanction the perpetrator's exercise of autonomy by forcing her to pay compensation for the harm it has caused.

*Id.* at 129.

More recently, I have elaborated on the right to recourse in Torts, arguing that it actually includes three subsidiary rights: the right of unilateral personal response, which permits endangered parties to take immediate preemptive action to stop the threats against them; the right of state-assisted response, which bestows upon aggrieved parties the power to institute litigation against their suspected offenders if they can show probable cause for their actions; and a right of state-assisted redress, which arises when the plaintiff establishes the required elements of proof for a recognized tort. See Alan Calnan, *The Instrumental Justice of Private Law*, 78 *UMKC L. REV.* 559, 585-89 (2010). While Goldberg and Zipursky's theory of civil recourse addresses the right of state-assisted redress, it mostly ignores the right of unilateral personal response, and it completely fails to account for the right of state-assisted response. See *id.* at 588 n.130.

<sup>13</sup> Generally speaking, foundationalists are interested in the law's structures, practices, principles, concepts, and values. By contrast, functionalists are concerned with the law's goals and usages.

<sup>14</sup> See ALAN CALNAN, *A REVISIONIST HISTORY OF TORT LAW* (2005) (hereinafter CALNAN, *REVISIONIST*) (refuting the Holmesian view that tort law radically transformed from a primitive, retributive system into a sophisticated engine of public policy, and defending the revisionist thesis that the law gradually evolved with great continuity and consistency from Greco-Roman concepts of justice, first taking root during the Twelfth-Century Renaissance as a form of morally strict law and equity, then developing rigorous rules of social responsibility, and finally, adding a general standard of reasonable care).

<sup>15</sup> See ALAN CALNAN, *DUTY AND INTEGRITY IN TORT LAW* (2009) (hereinafter CALNAN, *DUTY AND INTEGRITY*) (critiquing the *RESTATEMENT (THIRD) OF TORTS'* pragmatic conception of duty and proposing an alternative, liberal-justice approach called "duty as integrity," which

highlights Torts' conceptual coherence. But today's tort law is not the relatively simple collection of trespasses (originally meaning "wrongs") we inherited from our English forbears.<sup>16</sup> It is something far more complex, political, and pluralistic.

Indeed, the muddled state of modern tort law should not be surprising to any tort scholar, least of all Goldberg and Zipursky, who query "[h]ow is it that academics have lost their feel for this basic legal category?"<sup>17</sup> As Goldberg and Zipursky themselves acknowledge, the Blackstonian scheme of rights, wrongs, and remedies that allegedly grounds civil recourse theory<sup>18</sup> was repudiated by instrumental theorists in the late nineteenth to early twentieth centuries.<sup>19</sup> Led by an influential group of scholars, these instrumentalists sought not just to promote a public agenda, but also to remove any obstacles that stood in their way.<sup>20</sup> Their charge was quickly embraced by a growing group of eager judges, who battled a rising tide of tort cases in the wake of the industrial revolution. Staunchly antiformal, these judges sought to break free of the law's wrongs-based limits to fix the social problems presented or reflected by such litigation. Gradually, they began to do just that, reinterpreting, modifying, abolishing, or supplementing many of Torts' traditional concepts and doctrines.<sup>21</sup> After a century of sculpting, it would not be shocking to find the

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builds upon the work of Ronald Dworkin to provide a fully integrated and comprehensive methodology for analyzing tort duty questions); CALNAN, JUSTICE *supra* note 11 (demonstrating how Aristotelian justice concepts and liberal political and moral principles shape the structure and content of modern American tort law); Alan Calnan, *Anomalies in Intentional Tort Law*, 1 TENN. J.L. & POL'Y 187 (2005) (hereinafter Calnan, *Anomalies*) (demonstrating the common, liberal-justice characteristics of intentional tort, strict liability, and negligence, and suggesting a new liberal-justice framework to help explain, justify, and differentiate these theories); Calnan, *In Defense*, *supra* note 8 (rehabilitating the concept of corrective justice, and showing how that concept completes a broader liberal-justice theory of Torts that explains and justifies many of the law's key features); Alan Calnan, *Distributive and Corrective Justice Issues in Contemporary Tobacco Litigation*, 27 SW. U. L. REV. 577 (1998) (arguing that liberal-justice concepts, which are often missing from the dialogue about tobacco litigation, discourage the use of such litigation as a means of regulating the tobacco industry and compensating potentially undeserving claimants); Alan Calnan, *The Fault(s) in Negligence Law*, 25 QUINNIPIAC L. REV. 695 (2007) (hereinafter Calnan, *Fault(s)*) (arguing that tortious fault is not a strong moral concept, but is a soft liberal idea epitomized by the notion of unreasonableness, and demonstrating how negligence law distorts this notion, both by including within its ambit strict liability doctrines it should exclude and by excluding some intentional tort and strict liability doctrines it should include); Alan Calnan, *Strict Liability and the Liberal-Justice Theory of Torts*, 38 N.M. L. REV. 95 (2008) (hereinafter, Calnan, *Strict Liability*) (revealing the historical and classical origins of strict liability, explaining its inherent morality, and proposing a new, liberal-justice paradigm of tort law).

<sup>16</sup> See CALNAN, JUSTICE *supra* note 11, at 104-05 (trespass meant wrong); ROBERT C. PALMER, ENGLISH LAW IN THE AGE OF THE BLACK DEATH: 1348-1381 152 (1998) (same).

<sup>17</sup> See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 919.

<sup>18</sup> See *id.* at 928; see also Goldberg, *Constitutional Status*, *supra* note 1, at 549-59.

<sup>19</sup> See Goldberg & Zipursky, *MacPherson*, *supra* note 1, at 1753-66 (discussing the development of this view and its influence on modern American Tort theory).

<sup>20</sup> See *id.* at 1762-64 (discussing the infusion of public policy considerations into negligence's duty concept).

instrumentalists' handiwork indelibly etched into Torts' still malleable form.<sup>22</sup> In fact, it would be shocking if the law remained intact.

Despite their incredulity, Goldberg and Zipursky do acknowledge one of instrumentalism's key Torts legacies: the theory of strict liability for abnormally dangerous activities. Noting that strict liability explicitly disavows "having anything to do with wrongs," Goldberg and Zipursky concede that this theory may represent a "true exception[] to the otherwise wrongs-based nature of tort law" and poses "the sharpest challenge" to their wrong-centric theory of civil recourse.<sup>23</sup> However, they quickly minimize the importance of this "sui generis" exception, arguing that it "sits at the margin of tort law" and thus is "hardly substantial."<sup>24</sup> Because strict liability for abnormally dangerous activities is not "emblematic of a broad area of tort law,"<sup>25</sup> they conclude, "its existence does not count as evidence against [their] general interpretive account."<sup>26</sup>

But this is precisely what is wrong with civil recourse theory. Goldberg and Zipursky not only ignore most of the evidence that *does* count against them, they drastically misjudge its significance. In the remainder of this essay, I shall marshal the proof debunking their theory, first identifying their perspectival errors in Part II, and then showing how these errors taint their analysis. Thus, Part III argues that the authors undervalue strict liability's theoretical status; Part IV contends that they misconstrue strict liability's relationship to wrongs-based theories and concepts; and Part V asserts that they disregard instrumentalism's prevalence in the wrongs-based action of negligence. When these errors are corrected and *all* the facts are revealed and examined, a far different picture of tort law emerges. Torts is not, as Goldberg and Zipursky allege, a cohesive, unitary system of civil wrongs and private justice,<sup>27</sup> but is more of a disjointed patchwork of moral and instrumental canons haphazardly interwoven into a decidedly diverse institution serving both public and private objectives.<sup>28</sup>

<sup>21</sup> I discuss these changes in Part V of this article. See *infra* text accompanying notes 147-202.

<sup>22</sup> Surprisingly, Goldberg himself appears not to be surprised by this development. In describing the emergence of instrumentalism in Torts, Goldberg acknowledges that it is "no surprise to find that judges filled [the law's concepts] with their own beliefs as to sound policy." See John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 520-21 (2003) (hereinafter Goldberg, *Twentieth-Century Tort*).

<sup>23</sup> Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 951.

<sup>24</sup> *Id.* at 951-52.

<sup>25</sup> *Id.* at 952.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 978 ("We have offered the idea of civil recourse and the ideas of relational, legal, injury-inclusive wrongs as unifying features of tort law and tort theory . . .").

<sup>28</sup> In rejecting Goldberg and Zipursky's unitary theory, noted pragmatist and current Co-Reporter for the RESTATEMENT (THIRD) OF TORTS, Professor Michael Green, cogently summarized this pluralistic view:

[T]ort law is better explained by recognizing that it contains strands of both corrective justice and deterrence. Indeed, . . . [t]ort law is too multi-variegated, too influenced by the fortuity of the development of a "paradigm" (to borrow from Thomas Kuhn)

In reaching this conclusion, I am not suggesting that civil recourse theory has no value. Only a valuable theory deserves this sort of scrutiny and criticism. What I *am* saying, however, is that civil recourse's value remains unrealized because its mission is misconceived. While civil recourse is not an accurate snapshot of Torts' present condition, it may offer a blueprint for a new (or renewed) edition. Once Goldberg and Zipursky recognize this fact, they no longer will have to struggle to explain the chaos that tort law has become, but can finally join the fight to fix it.<sup>29</sup>

## II. A DISTORTED PERSPECTIVE

Goldberg and Zipursky's problems begin with their perspective. They hold themselves out as legal scientists who impartially observe tort law and objectively report and interpret the facts to ascertain the truth. The reality, however, is quite different. In presenting civil recourse theory, Goldberg and Zipursky seem to collect *and judge* the facts, validating those that support their viewpoint and explaining away those that do not. These are the tactics of the polemicist, not the measured methodology of the scientist.

Consider Goldberg and Zipursky's treatment of strict liability. As noted above, Goldberg and Zipursky acknowledge the fact of strict liability, but they summarily dismiss it as an insubstantial aberration to the theory of Torts as Wrongs.<sup>30</sup> Even if one accepts the accuracy of their characterization of strict liability, a point I will refute below, their refusal to address this anomaly is itself scientifically suspect.<sup>31</sup> Unlike the fields of astrophysics or quantum mechanics, where flawed speculative theorizing is necessitated by limitations on direct observation,<sup>32</sup> Torts is easily

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established by an academic and judicial movement, such as led to the adoption of strict products liability; by something as serendipitous as an influential judge coining a memorable phrase, as Cardozo did with "danger invites rescue"; by changes in culture, political winds, or media coverage, as has been prevalent during the decades of tort reform; by popular dissatisfaction with the operation of the tort system, which produced workers' compensation and thereby withdrew a substantial swath of the accidental-injury universe from the tort domain; by a scholarly article; or by numerous other contingencies or fortuities that affect the course that the tort river follows.

Michael D. Green, *Apportionment, Victim Reliance, and Fraud: A Comment*, 48 ARIZ. L. REV. 1027, 1042-43 (2006) (footnotes omitted).

<sup>29</sup> As Goldberg and Zipursky freely admit, "[o]ur point in [*Torts as Wrongs*] is not to set forth a normative theory of adjudication in the common law or to defend a jurisprudential view about how much is already 'in' the common law." See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 976. Instead, their objective, as Goldberg has defined it elsewhere, is simply to explain "what is tort and what does it do." See Goldberg, *Wrongs Without Recourse*, *supra* note 1, at 13.

<sup>30</sup> See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 951 (admitting that certain strict liability theories may create "true exceptions to the otherwise wrongs-based nature of tort law," but countering that "[t]o allow as such is hardly to make a substantial concession").

<sup>31</sup> See, e.g., THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 70-72 (2d ed. 1970) (arguing that anomalies in scientific theories compel scientists to alter the way they explain or classify natural phenomena).

studied and readily tested. A tort either requires a wrong or it does not. If it does not, the existence of the wrong-free tort still must be explained. One cannot simply disregard the wrong-free anomaly until a better theory comes along, much in the way phlogiston theorists ignored evidence that burned substances often gain weight.<sup>33</sup> Instead, the Torts scientist must amend her description to account for the misfit facts, or propose a new, comprehensive theory to take its place.

To put the point in practical terms, suppose a scientist is handed a liquid-filled test tube and asked to report its contents. After subjecting the liquid to chemical testing, she discovers a large amount of Substance A and a small amount of Substance B. Each substance possesses its own independent properties, which remain intact when the two are mixed together. To accurately describe the mixture, the scientist, as observer and truth-seeker, must account for the presence of both substances. She cannot describe the solution as Substance A, and offer a justification for excluding Substance B from her report.

Yet this is exactly what Goldberg and Zipursky have done in their descriptive theory of tort law. After examining the murky mixture of Torts, they discovered a great deal of wrongs and a little bit of strict liability. Rather than describing the concoction in a way that accounts for both ingredients, they simply dismissed the strict liability component on the ground that it is less deserving of recognition. Their resulting conclusion—that Torts is essentially a law of Wrongs—is thus more editorial opinion than factual finding. Calling that conclusion “interpretive” may make it appear less susceptible to refutation, but it still lacks the hallmarks of good science—natural, legal, or otherwise.

Even as a strictly interpretive endeavor, civil recourse theory is decidedly near-sighted. Goldberg and Zipursky oversimplify their description of tort law because they mistake interpretive theorizing for basic taxonomy. For years, these scholars have battled a group of instrumental thinkers for “descriptive superiority” in tort theory.<sup>34</sup> As noted earlier, Goldberg and Zipursky argue that the tort system is a

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<sup>32</sup> See *Quantum Gravity*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Dec. 26, 2005, <http://plato.stanford.edu/entries/quantum-gravity/> (noting the difficulties of conducting experiments to test theories of quantum gravity which seek to eliminate the conflict between these fundamental fields of science).

<sup>33</sup> See, e.g., STEPHEN F. MASON, A HISTORY OF THE SCIENCES 302-13 (1962) (describing the now-antiquated theory that fire resulted from burning a natural, physical element called phlogiston). Ironically, Goldberg and Zipursky subscribe to the same principle using virtually the same analogy, noting that “[t]he fading of an idea is sometimes warranted: it is good that scientists no longer talk of phlogiston.” See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 929.

<sup>34</sup> See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 920. In a separate article, Goldberg catalogues various theories of tort law, including Compensation-Deterrence, Enterprise Liability, Economic Deterrence, Corrective Justice, and Social Justice. See Goldberg, *Twentieth-Century Tort*, *supra* note 22. At the end of that piece, he urges his readers to “[r]ecognize that the domain of tort theory is not exhausted by a two-sided fight between economic theories and justice-based theories,” but consists of a “five-way” battle for supremacy. Goldberg, *Twentieth-Century Tort*, *supra* note 22, at 582. However, in the current piece, Goldberg and Zipursky find the battle lines more narrowly drawn, noting that “scholars have convinced themselves that the subject of Torts is really about accidentally caused losses, not wrongs, and that the central task of tort law is to reallocate such losses in the most justifiable manner,” and adding that “a civil-recourse theory that predicates rights of

private process for redressing personal wrongs,<sup>35</sup> while their adversaries contend that it is a public mechanism for allocating social losses.<sup>36</sup> Given this conflict, Goldberg and Zipursky are not solely or even primarily interested in describing what they see, but, like natural scientists who have gathered all the facts, are more concerned about controlling its classification.

Tort litigation, they have found, contains a number of distinctive characteristics, including its private instigation, bipolar structure, proof of agency or causation, existence of personal injury, range of remedies, requirement of wrongdoing, and sometimes, liability without fault.<sup>37</sup> While some of these features—like the wrongdoing requirement—may appear more suitable to a system that redresses wrongs, other characteristics—including the strict liability standard—may be shared by loss spreading systems like worker’s compensation.<sup>38</sup> The question for Goldberg and Zipursky is whether tort law’s characteristics overall place it more clearly in one category than the other. If Torts is either a law of Wrongs or a law of Losses, then they need not account for all things Tort; they need only search for the closest fit, choosing the category which best describes the greatest number of Torts’ most important characteristics.<sup>39</sup> In their view, Wrongs match better than Losses, so they can confidently classify Torts as Wrongs without explaining misfit, Loss-based doctrines like strict liability. These anomalies, it seems, lack any significant taxonomic effect.

What Goldberg and Zipursky overlook is that tort jurisprudence is not a natural science, and tort law is not susceptible to such scientific classification. Natural science studies the physical world of nature. Human science, by contrast, studies the world that human beings create for themselves. Jurisprudence, in particular, is a human science that examines the rules that people use to regulate their behavior,

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action on wrongs, not losses, comfortably shows how tort law hangs together.” See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 986.

<sup>35</sup> Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 937-53.

<sup>36</sup> See *id.* at 920-28.

<sup>37</sup> See *id.* at 937-71 (discussing all features except bipolarity); see also Zipursky, *Civil Recourse*, *supra* note 1, at 699-709 (discussing bipolarity).

<sup>38</sup> See DOBBS, *supra* note 9, at 1098 (noting that under most worker’s compensation statutes, “[t]he employer . . . is strictly liable for injury incurred in the course and scope of employment”).

<sup>39</sup> The process here resembles that used by natural scientists to describe newly discovered species. For example, the scientist who first encountered a school of dolphins would need to consult existing taxonomies of living creatures to determine their true nature. On the surface, dolphins resemble fish because they possess sleek, smooth bodies, and use fins and flippers to swim in water for long periods of time. See *Dolphin*, THE COLUMBIA ENCYCLOPEDIA (6th ed. 2008), <http://www.encyclopedia.com/topic/dolphin.aspx>. Yet these denizens of the deep also bear the characteristics of mammals in that they are warm blooded, have hair, breathe air, bear live offspring, and nurse their young with milk. *Dolphin Frequently Asked Questions*, THE INSTITUTE FOR MARINE MAMMAL STUDIES, <http://www.imms.org/dolphinfaq.php#q1>. After examining the class characteristics for fish and mammals, the scientist would need to see how many of the dolphin’s attributes are covered in each category, and how important these characteristics are in defining the creatures in that group. Using this process, she would conclude, as scientists traditionally have, that dolphins are mammals because their mammalian traits predominate over their other, nonconforming characteristics. *Id.*

with tort jurisprudence specifically governing behaviors that result in noncontractual, civil injuries.

As philosopher Isaiah Berlin observed, the fundamentally different worlds of natural and human science require fundamentally different methods and standards of investigation.<sup>40</sup> Unlike the natural scientist, who studies her subject from without, the human scientist looks at her subject from within.<sup>41</sup> In this respect, the human scientist's own values, customs, culture, beliefs, and experiences—including her biases and prejudices—become part of the object of study.<sup>42</sup> Thus, her perspective frames her vision and inhibits her objectivity. While this filtered lens bedevils all social scientists, it is particularly acute for legal jurisprudes, who typically belong to, and often attempt to influence, the very field of law they purport to describe.

Given these perspectival limitations, Berlin argues that human scientists should not seek to emulate natural scientists, but should make three adjustments in their mode of inquiry. First, they must change their point of view, abandoning their own preconceptions so far as possible, and imagining the thoughts and emotions of their subjects.<sup>43</sup> Second, they must invoke their common sense to guide these reflections and to assemble them into plausible accounts of the institutions or events in question.<sup>44</sup> Finally, because of the complexity of human motivation, human scientists should seek primarily to understand and explain each human practice as a unique and independent phenomenon and not “ignore or twist . . . particular events, persons, [or] predicaments, in the name of laws, theories, [or] principles derived from other fields[—]logical, ethical, metaphysical, [or] scientific[—]which the nature of the medium renders inapplicable[.]”<sup>45</sup>

Civil recourse theory—presented as the new human science of Torts—abides none of these prescriptions, relying instead on the miscast methodologies of natural science. Goldberg and Zipursky treat the paradigms of Wrongs and Losses as fully realized and mutually exclusive classifications—much in the way natural scientists distinguish animals from plants under the Linnaean taxonomic system.<sup>46</sup> This treatment, however, is far from justified. Prior to the nineteenth century, Torts was

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<sup>40</sup> See Isaiah Berlin, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 26, 2004, revised May 25, 2010), <http://plato.stanford.edu/entries/berlin/#4.1>.

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* As Berlin noted, “[w]ithout a capacity for sympathy and imagination beyond any required by a physicist, there is no vision of either past or present, neither of others nor of ourselves.” ISAAH BERLIN, *The Concept of Scientific History*, in CONCEPTS AND CATEGORIES: PHILOSOPHICAL ESSAYS OF ISAAH BERLIN 103, 136 (Henry Hardy ed., 1978).

<sup>44</sup> See Isaiah Berlin, *supra* note 40.

<sup>45</sup> BERLIN, *supra* note 43, at 141-42.

<sup>46</sup> The Linnaean classification system is the modern method of classifying living organisms. See *Taxonomy*, THE ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/584695/taxonomy>. Developed by Swedish biologist Carolus Linnaeus in 1758, the Linnaean system divides all things into five separate kingdoms—animals, plants, bacteria, fungi, and protozoans—and classifies members of each kingdom according to six characteristics—phylum, class, order, family, genus, and species—which range from the general to the specific. *Id.*

not considered an independent field of law, let alone one worthy of classification.<sup>47</sup> Instead, it consisted of a loose assemblage of noncontract cases litigated under a diverse array of ancient forms of action.<sup>48</sup> When Oliver Wendell Holmes Jr. presented the first true theory of Torts in the late 1800s, he did not clearly delineate the law's fundamental characteristics. If anything, he made them more opaque.

Holmes divided all torts into two distinct categories—fault and strict liability<sup>49</sup>—but grounded both in the same objective community standard.<sup>50</sup> This taxonomy reflected the dynamism, volatility, and uncertainty of the moment. Although pre-modern tort law had relied heavily on Aristotelian and Roman concepts of justice,<sup>51</sup> Holmes and a rising group of realist thinkers believed the law should be gradually stripped of its moral veneer and rededicated to serving the public welfare.<sup>52</sup> Nevertheless, Holmes still found a minor role for morality in this new legal regime, noting that “the law, if not a part of morality, is limited by it.”<sup>53</sup>

So conceived, modern tort law did not begin exclusively as a law of Wrongs. Nor, for that matter, did it start as a law of Losses. In fact, since its founding by Holmes, it has never known unity, harmony, or consistency of any sort. Instead, it has always been something of an unlikely *mélange*. The synthesis of classical philosophy and contemporary ideology, tort law emerged as a unique, inscrutable, and impetuous child with a complex and conflicted personality. Golberg and Zipursky see in this progeny the traits of one parent alone and say that these attributes completely define who she is. But, unlike in the natural sciences, where ancestral lineage strongly informs a subject's classification,<sup>54</sup> the human sciences lack such a definitive standard of evaluation. To understand a human subject, one must look beyond her DNA.

Goldberg and Zipursky's myopic view is exacerbated by their first-person perspective. When it comes to tort theory, these scientists are not neutral observers, but rather are active and interested participants. They have demonstrated an affinity for corrective justice theory and have used many of its insights to construct their own wrongs-based theory of Torts.<sup>55</sup> At the same time, they have strongly criticized

<sup>47</sup> See CALNAN, REVISIONIST, *supra* note 14, at 4-5.

<sup>48</sup> See *id.* at 5.

<sup>49</sup> See *id.* at 12-18.

<sup>50</sup> See *id.* at 18.

<sup>51</sup> See generally *id.* (tracing the development of these concepts in the early English common law of Torts).

<sup>52</sup> See *id.* at 5 n. 11, 7 nn. 21-23, 8-9 nn. 28-33.

<sup>53</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897).

<sup>54</sup> See *Taxonomy*, *supra* note 46 (discussing the modern scientific classification system of cladistics, in which organisms are defined and grouped by the possession of one or more shared characteristics derived from a common ancestor and that were not present in any other ancestral group).

<sup>55</sup> See Goldberg & Zipursky, *MacPherson*, *supra* note 1, at 1739, 1771 (crediting corrective justice theory with offering “powerful and insightful critiques” of instrumentalist theories and with making “important strides” toward the development of an alternative); John C. P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1515-17 (2002) (registering broad sympathy with Professor Weinrib's efforts to provide a theory

instrumental theories of tort law and have repeatedly refuted their arguments.<sup>56</sup> In fact, much of their current piece is devoted to that purpose.<sup>57</sup> While their partisanship may reflect confidence in their descriptive account, it also may suggest an ulterior motive. Elsewhere, Goldberg has argued that civil recourse is not just an explanation of the tort system: It is a constitutional requirement securing a structural right of due process.<sup>58</sup> Thus, it is the type of concept that one might defend on principle as well as the facts.

This does not mean that Goldberg and Zipursky have deliberately slanted the truth to suit their theory. I certainly make no such claim. But it does raise doubts about their objectivity and their capacity to recognize and reconstruct the subjective motivations of their subjects. This concern stems from the authors' interpretive choices. Throughout their descriptive enterprise, Goldberg and Zipursky have made several hard decisions about how to gather and read their data—decisions that not only have directly and dramatically impacted their conclusions, but which consistently seem to favor a wrongs-based interpretation.

Three of these choices are especially revealing. After acknowledging the existence of both wrongs-based and strict liability theories of recovery, and noting the relative scarcity of strict liability actions, Goldberg and Zipursky determine that strict liability is merely a marginal and insignificant tort concept.<sup>59</sup> Yet, as I shall discuss in the next part, they might have examined strict liability's structural importance, long history, and extraordinary liberty-inhibiting potential, and reached exactly the opposite conclusion.<sup>60</sup> Next, in support of their conclusion, Goldberg and Zipursky argue that many strict liability theories or doctrines actually may be explained as types of wrongs.<sup>61</sup> However, as we shall see below, the authors do not

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that treats tort law as a coherent practice that centrally concerns responding to wrongs); Goldberg & Zipursky, *Unrealized*, *supra* note 1, at 1647 n.56 (praising corrective justice theory for emphasizing the importance of “bipolarity” to tort law (citing ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 134-36 (1995))).

<sup>56</sup> See Goldberg, *Twentieth-Century Tort*, *supra* note 22, at 531-37, 540-44, 553-60 (arguing that deterrence theories cannot explain the following Torts concepts: the private initiation of lawsuits, because no sanction is imposed if the victim chooses not to sue; the fault requirement, because it is too ambiguous to provide a certain deterrent threat; the causation requirement, because unduly risky conduct that requires deterrence may not result in harm; the availability of punitive and noneconomic damages, because they do not promote efficient deterrence; and the use of juries, because they lack the expertise necessary to make sophisticated judgments of efficient deterrence); Zipursky, *Civil Recourse*, *supra* note 1, at 699-702 (arguing that economic theories cannot explain Tort's structural bipolarity because no victim is needed to judge the inefficiency of the actor's conduct, and no wrongdoer is needed to assess, extinguish, or spread the victim's accident costs).

<sup>57</sup> See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 953-71.

<sup>58</sup> See Goldberg, *Constitutional Status*, *supra* note 1, at 594-95, 606-07, 625.

<sup>59</sup> See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 951-52.

<sup>60</sup> See *infra* text accompanying notes 68-83.

<sup>61</sup> See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 951 & n.177 (contending that “[a] faultless trespass or a ‘Menlovean’ act of negligence still constitutes the breach of a norm set by tort law” and that “it is erroneous to see in doctrines such as respondeat superior and ‘strict’ products liability a judicial embrace of tort liability without regard to wrongdoing”).

explain or even consider why courts persist in describing these concepts in strictly instrumental terms.<sup>62</sup> Most telling, Goldberg and Zipursky look primarily to the law's structures and practices,<sup>63</sup> and occasionally to its theorists,<sup>64</sup> to discern Torts' true nature. But they disregard what human science depends on the most: the thoughts, emotions, and motivations of the lawyers and judges who have created, interpreted, and applied the law, and thus have made it what it is today.

When Berlin's "imaginative understanding" is applied to the history of Torts, the law's true nature soon emerges. Holmes, the law's creator, saw Torts as a tool of the judicial elite. Under this view, judges were the masters of law, not slaves to it. They could break free of the law's formal restraints whenever social necessity and public policy so required. Holmes preached this sermon to an already receptive congregation. Schooled in the philosophies of realism, pragmatism, empiricism, logical positivism, and progressivism,<sup>65</sup> nineteenth-century judges were naturally predisposed to seize their new-found power to legislate from the bench.

<sup>62</sup> See *infra* Part IV, at 20-25.

<sup>63</sup> See Goldberg, *Twentieth-Century Tort*, *supra* note 22, at 581 (arguing that a successful tort theory must make "as much sense as can be made of the practices and principles of tort law as we find it"); see also Zipursky, *Civil Recourse*, *supra* note 1, at 706-07 (asserting that because "our practices are partially constitutive of our ways of thinking . . . the understanding of legal concepts requires an understanding of the structure of practical inferences in which our legal concepts and principles are involved," and terming this process of inquiry "pragmatic conceptualism"). Such "pragmatic conceptualism" has serious limitations. As Holmes noted, "the law is always approaching, and never reaching consistency" because "[i]t is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 36 (1881). Thus, at any given time, the law will possess some principles, practices, or structures that may look important because of their longevity and embeddedness, but which actually are anachronistic; and it will also contain other principles, practices, or structures that appear insignificant because of their novelty, but which actually are vital to the law's current operation. See *infra* text accompanying notes 207-10. Even when these vestigial and transitional features are minimized, pragmatic conceptualism's descriptive accuracy and usefulness is only temporary. To quote Holmes once more, "[h]owever much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 37 (1881).

<sup>64</sup> See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 921-29 (discussing in their treatment of pragmatism and instrumentalism, the views of Oliver Wendell Holmes Jr., Professors William Prosser, John Fleming, Patrick Atiyah, Guido Calabresi (a professor and judge), Richard Posner (a professor and judge), and Fleming James, Jr.; and discussing in their treatment of justice-based theories, the views of Professors George Fletcher, Jules Coleman, Richard Epstein, Stephen Perry, Arthur Ripstein, Ernest Weinrib, Robert Stevens, and John Gardner); see also John C. P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1237 & n.40 (2008) (discussing early U.S. treatises by Francis Hilliard and Charles Greenstreet Addison); John C. P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 444-45, 456-59 (2006) (discussing the adoption of a Blackstonian view of Torts by treatise writers Nathan Dane, Zephaniah Swift, and Simon Greenleaf).

<sup>65</sup> See Goldberg & Zipursky, *MacPherson*, *supra* note 1, at 1757-58, 1800-02 (describing how nineteenth-century jurists influenced by emergent strands of pragmatism, empiricism, and logical positivism rejected the previous formalist conception of law and judicial decisionmaking); Goldberg, *Twentieth-Century Tort*, *supra* note 22, at 520 (noting how

If Goldberg and Zipursky are correct, judges historically and uniformly resisted this temptation, opting instead to preserve their Blackstonian shackles by serving merely as disinterested referees in private disputes over rights and wrongs. But common sense and human nature say otherwise. As Bertrand Russell once observed, “the fundamental concept in social science is Power, in the same sense in which Energy is the fundamental concept in physics.”<sup>66</sup> Like energy, power is kinetic: never dormant or idle, but always active and impelling—constantly imposing its force until it is stopped or redirected. Thus, even if tort law were preoccupied with wrongs, as Goldberg and Zipursky contend, it seems doubtful that its judicial stewards would relinquish any part of their power to combat such transgressions. More likely, they would respond with their entire arsenal, punishing current culprits while deterring future transgressors, and spreading their losses to minimize the harm to society. In fact, the more people their power benefitted, the more irresistible they would find it to be. For as H.L. Mencken has noted, “[t]he urge to save humanity is almost always only a false-face for the urge to rule it.”<sup>67</sup>

This interpretation is hard to reconcile with Goldberg and Zipursky’s monistic theory of Torts. Torts targets Wrongs, but it also distributes Losses. While it provides victims a right of recourse, it also affords government a power of social reform. Using the highly particularized perspective of the human sciences, tort law appears more pluralistic, attempting to do different things depending on the people, problems, and places involved. At the very least, it seems to fuse Wrongs and Losses into a completely independent hybrid concept—one that inextricably intertwines private rights and public policies, using each to define, reinforce, alter, and limit the other. Perhaps Goldberg and Zipursky can find a wrongs-based account for this phenomenon. But until they do, it appears that they have not described the intricate and unique detail of Torts’ structure and content so much as they have stuffed it into their own theoretical box, distorting much of what appears within and ignoring all that does not fit.

### III. DISTORTING STRICT LIABILITY’S SIGNIFICANCE

Although Goldberg and Zipursky’s perspective problem permeates their entire theory, it is most evident in their flawed assessment of strict liability, as noted above. In their view, strict liability is rightly overlooked because it is an insubstantial fringe concept.<sup>68</sup> Although they do not provide an explicit basis for this characterization, their reasoning seems to be mostly quantitative, as they spend much of their article cataloguing the wide variety of torts that fit within their theory.<sup>69</sup> Because the most

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populism, progressivism, pragmatism, empiricism, and logical positivism shaped modern tort law).

<sup>66</sup> BERTRAND RUSSELL, *POWER: A NEW SOCIAL ANALYSIS* 12 (W.W. Norton & Co., Inc. 1938).

<sup>67</sup> H.L. MENCKEN, *MINORITY REPORT: H.L. MENCKEN’S NOTEBOOKS* 247 (1956).

<sup>68</sup> See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 951-52.

<sup>69</sup> See *id.* at 938-71 (discussing civil recourse theory’s consistency with the tort actions of assault, battery, false imprisonment, trespass to land and chattels, conversion, nuisance, medical malpractice, fraud and misrepresentation, negligence, products liability, intentional and negligent infliction of emotional distress, malicious prosecution and abuse of process, defamation, invasion of privacy, tortious interference with contract and with prospective

common tort of negligence and the great majority of torts overall require some sort of wrong, they suggest, the wrong-free theory of strict liability is relatively unimportant.

The trouble is, neither popularity nor usage definitively measure a theory's significance. There are other reliable metrics of importance, and they all seem to point toward a different conclusion.

One such criterion is the theory's role in the broader structure of Torts. Since its formal emergence in the nineteenth century, tort law has consistently recognized three grounds for holding people liable: acting with a wrongful intent, behaving negligently, and engaging in strict liability activities.<sup>70</sup> These theories of liability, in turn, traditionally have been categorized as either fault-based (intentional torts and negligence) or fault-free (strict liability).<sup>71</sup> By either measure, the wrongless theory of strict liability has played a key role, claiming one-third of Torts' theoretical spectrum and one-half of its conceptual paradigm. Though its litigation presence may be modest, strict liability's place within the grand scheme of Torts could hardly be more prodigious.

The core status of strict liability is further confirmed by its longevity. According to Goldberg and Zipursky,<sup>72</sup> as well as most other tort theorists,<sup>73</sup> the theory of strict liability for abnormally dangerous activities first emerged in the 1866 English case of *Rylands v. Fletcher*.<sup>74</sup> Since that time, it has been adopted by an overwhelming majority of American jurisdictions<sup>75</sup> and has been incorporated into all three Torts restatements, including the latest edition just recently completed.<sup>76</sup> If it had no other credentials, this theory's endurance and proliferation for nearly a century and a half would provide reason enough to take it seriously.

But this is only half the story. In *Rylands*, Judge Blackburn, writing for the Exchequer Chamber, premised the court's holding on a much older line of cases. "The case that has most commonly occurred, and which is most frequently to be

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economic advantage, injurious falsehood, slander of title, and various forms of unfair competition, and with the tort concepts of compensatory and punitive damages, injunctive and declaratory relief, predicate injuries and parasitic damages, duty, misfeasance and nonfeasance, and superseding cause).

<sup>70</sup> See CALNAN, REVISIONIST, *supra* note 14, at 22-23.

<sup>71</sup> See *id.* at 23; Jeremiah Smith, *Tort and Absolute Liability—Suggested Changes in Classification*, 30 HARV. L. REV. 241, 255-56 (1917).

<sup>72</sup> See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 951-52 (discussing *Rylands v. Fletcher*, (1865) 159 Eng. Rep. 737 (Ex.), *rev'd*, *Fletcher v. Rylands*, [1866] 1 L.R. Exch. 265, *aff'd*, [1868] 3 L.R.E. & I. App. 330 (H.L.)).

<sup>73</sup> See DOBBS, *supra* note 9, at 950-51 (discussing *Rylands*); PROSSER AND KEETON ON THE LAW OF TORTS 545-48 (W. Page Keeton et al. eds., 5th ed. 1984) (same).

<sup>74</sup> *Rylands v. Fletcher*, (1865) 159 Eng. Rep. 737 (Ex.), *rev'd*, *Fletcher v. Rylands*, [1866] 1 L.R. Exch. 265, *aff'd*, [1868] 3 L.R.E. & I. App. 330 (H.L.).

<sup>75</sup> See DOBBS, *supra* note 9, at 954 ("Courts now have generally accepted the principle that for some activities involving special dangers, especially those not commonly pursued, liability can be imposed without fault . . .").

<sup>76</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOTIONAL HARM § 20 (2005); RESTATEMENT (SECOND) OF TORTS § 520 (1965); RESTATEMENT OF TORTS § 520 (1938).

found in the books,” Blackburn noted, “is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief.”<sup>77</sup> This obligation was not novel, but was “perfectly settled from early times.”<sup>78</sup> Because of the abnormal dangers posed by cattle, “the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape.”<sup>79</sup>

At the very least, the cattle cases demonstrate that strict liability for abnormally dangerous activities is not, as Goldberg and Zipursky have described it, *sui generis*.<sup>80</sup> Indeed, it is merely the latest iteration of a widespread liability principle—one that also extended to dog owners, fire starters, and masters of servants.<sup>81</sup> But more importantly, this history shows that strict liability is no trivial fad. Instead, it is an ancient principle with a pedigree as long and distinguished as Torts itself. Thus, it deserves as much respect and recognition as its wrong-based counterparts.

One might take this point even a step farther. Because of strict liability’s extraordinary liberty-restricting effect, it warrants special consideration. Wrong-based torts merely regulate the specific details of individual acts, sanctioning intentionally harmful or negligent behavior only when it is inappropriate for the prevailing circumstances.<sup>82</sup> Strict liability, by contrast, regulates entire activities, like blasting explosives or spreading toxic chemicals.<sup>83</sup> Once a strict liability activity results in harm, its restraint on the actor’s freedom is automatic and severe, forcing her to pay for the loss regardless of her level of care. Since the abnormally dangerous designation is categorical, each finding of strict liability is socially significant. Besides fining the actor already in court, it imposes a risk tax on all who pursue the same enterprise. In these respects, strict liability for abnormally dangerous activities is a lot like capital punishment. It may not be implemented very often, but the magnitude of its sanction makes it worthy of serious attention.

Indeed, strict liability’s wrongless approach should be especially pertinent to legal scientists like Goldberg and Zipursky. Returning to our earlier metaphor, Goldberg and Zipursky conclude that the vial of tort law is filled primarily with Substance A (Wrongs), an ingredient, like water, essential to existence. However, they also have detected traces of Substance B (Strict Liability), an element, like arsenic, that contaminates Substance A and threatens the entire system it supports. To the true scientist, the discovery of the arsenic-like theory of strict liability in the pristine (Wrongs laced) water of Torts should be an alarming development warranting further investigation and scrutiny. To Goldberg and Zipursky, however, it is but a trifling and forgettable curiosity. By touting the mixture’s organic quality, they have offered us a tainted tonic with the promise of purity. But just because they are skillful importuners does not mean we should blindly take a drink.

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<sup>77</sup> *Rylands*, [1866] 1 L.R. Ex. 265, 280 (Blackburn, J.).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 952.

<sup>81</sup> See CALNAN, REVISIONIST, *supra* note 14, at 248-74.

<sup>82</sup> See Calnan, *Strict Liability*, *supra* note 15, at 118.

<sup>83</sup> See Calnan, *Anomalies*, *supra* note 15, at 242-43.

## IV. DISTORTING THE RELATION BETWEEN STRICT LIABILITY AND WRONGS

Even if Goldberg and Zipursky were correct in their assessment of abnormally dangerous activities, their conclusion still would not prove Wrong's supremacy. Tort law abounds with strict liability theories of all stripes. While some of these theories may contain aspects of wrongs—a contention I shall address in a moment—they present a formidable challenge to civil recourse's exclusivity thesis, and cannot be casually dismissed or consciously circumvented.

Strict liability covers most subjects of human interest and endeavor. Besides abnormally dangerous activities, strict liability has long applied to *animals*, including livestock as mentioned above,<sup>84</sup> but also wild beasts and vicious pets.<sup>85</sup> In addition, strict liability historically has applied to *property*, using conversion to redress personal property invasions,<sup>86</sup> and trespass to land and nuisance to protect rights in real estate.<sup>87</sup> More recently, strict liability has been extended to *products*, particularly those containing defects in design, manufacture, or marketing.<sup>88</sup> Finally, strict liability may even apply to *people*, making principals vicariously liable for the harmful acts of their agents.<sup>89</sup>

Goldberg and Zipursky do not dispute the existence of these theories. Instead, they dispute whether these theories truly impose strict liability. Using their interpretive approach, Goldberg and Zipursky argue that such actions are better understood as wrongs-based theories in disguise, specifically pointing to respondeat superior and strict products liability in their current piece,<sup>90</sup> and elsewhere including the actions of trespass, conversion, and nuisance.<sup>91</sup>

As a normative proposition, Goldberg and Zipursky's "interpretation" is noncontroversial and even surprisingly compelling. One *could* find fault concepts in such actions, and *could* assimilate them into a wrongs-based system of Torts.<sup>92</sup> In

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<sup>84</sup> See DOBBS, *supra* note 9, at 942-43.

<sup>85</sup> See *id.* at 945-49.

<sup>86</sup> See JOHN C. P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 797-98 (2d ed. 2008) (discussing *Ranson v. Kitner*, 31 Ill. App. 241 (Ill. App. Ct. 1889)).

<sup>87</sup> See DOBBS, *supra* note 9, at 101, 1324-25.

<sup>88</sup> See DAVID G. OWEN, PRODUCTS LIABILITY LAW 344-45 (2d ed. 2008).

<sup>89</sup> See PROSSER AND KEETON, *supra* note 73, at 500-01.

<sup>90</sup> See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 952 n.177.

<sup>91</sup> See Goldberg & Zipursky, *Internal Point of View*, *supra* note 1, at 1586 n.72.

<sup>92</sup> Regarding respondeat superior, Professor Gregory Keating notes that, depending on one's perspective, this theory might be classified either as fault-based or as imposing strict liability, and how one views this theory will affect her interpretation of tort law in general:

If we believe, say, that the strict liability of masters for the torts of their servants under the doctrine of respondeat superior is part of the law of agency proper—and that it is incorporated into the law of torts only to solve the problem of identifying the legal “persons” to whom liability attaches—we will find it easier to see the law of torts itself as constructed around a general commitment to fault liability. The strict liability of respondeat superior will appear essentially anomalous. Conversely, if we see respondeat superior as an ancient common-law redoubt of strict liability in tort, we will find it easier to see the law of torts itself as torn between competing principles of

fact, I have offered just such an account in a previous article.<sup>93</sup> For example, the animal torts formally eschew fault, but routinely employ a negligence-like standard of normalcy that condemns animal owners who unfairly jeopardize their neighbors by exposing them to unusually and thus excessively dangerous creatures.<sup>94</sup> While the actions of trespass and conversion occasionally impose liability without fault, they often are classified and analyzed as intentional torts because they frequently proceed from the actor's deliberate decision to interfere with the property interests of others.<sup>95</sup> Similarly, though private nuisance can be framed as a strict liability tort, it typically involves an actor's intentional challenge to her neighbor's property rights, and is always resolved by assessing the reasonableness of the actor's interference.<sup>96</sup> A similar reasonableness analysis commonly determines the issue of product defectiveness, despite the contradictory promise of the nominally deceptive theory of "strict" products liability.<sup>97</sup> Even the doctrine of respondeat superior, which holds employers strictly liable for the acts of their employees, conditions that liability on the relatively high degree of control exercised by principals over their agents, and the abnormally high degree of danger posed by these commercial armies to the public at large.<sup>98</sup>

From a purely descriptive standpoint, however, Goldberg and Zipursky's wrongs-based construction of these strict liability theories seems counterintuitive

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responsibility for harm done. Instead of seeing the law of torts as a realm of fault liability punctuated by exceptional pockets of strict liability, we will be more inclined to see it as terrain contested by competing principles of fault and strict responsibility. The way in which we categorize the doctrine of respondeat superior both expresses an understanding of its place in the law of torts and affects our understanding of the entire law of torts.

Gregory C. Keating, *Is Negligent Infliction of Emotional Distress a Freestanding Tort?*, 44 WAKE FOREST L. REV. 1131, 1134 (2009).

<sup>93</sup> See generally Calnan, *Strict Liability*, *supra* note 15 (discussing how various strict liability doctrines can be grounded in the "fault" concept of reasonableness, and proposing a liberal-justice paradigm for restructuring such doctrines).

<sup>94</sup> See *City of Tonkawa v. Danielson*, 27 P.2d 348, 349 (Okla. 1933) (stating that owners or possessors of wild animals may be negligent for "keeping an animal belonging to a class which, from the experience of mankind, is dangerous"); DOBBS, *supra* note 9, at 949 (noting that owners or possessors of wild animals are subject to liability because "these animals and the risks they bring with them are uncommon or abnormal in the community" and that wildness is determined by "whether, by local custom, [these animals are] devoted to the service of mankind or commonly treated by the community as a tame or domestic animal[s]").

<sup>95</sup> See *id.* at 98-99, 123, 128-30.

<sup>96</sup> See *id.* at 1324-30 (noting that unreasonableness is grounded in custom and community standards and is determined, like negligence, by balancing various considerations, including the activity's utility and potential gravity of harm).

<sup>97</sup> See OWEN, *supra* note 88, at 266-68, 312-18, 508-14 (indicating that defectiveness often is determined by the same cost-benefit analysis used in negligence, and that a finding of defectiveness means that something is "wrong" with the product).

<sup>98</sup> See Calnan, *Strict Liability*, *supra* note 15, at 124 (comparing employers to army commanders, and noting that their power and capacity to harm increases with the size of their army of agents).

and incomplete. If, as Goldberg and Zipursky suggest, Torts is overwhelmingly a law of Wrongs, one would expect courts both to be aware of its essential nature and to conform the law to its core concepts whenever possible. Thus, in cases where the controlling liability principle is even remotely in doubt, a judge's first instinct should be to revert to the default rule of Wrongs. So why, then, have judges so frequently gone the other way—rejecting a wrongs-based interpretation and adopting the concepts and nomenclature of strict liability? If they are simply mistaken, how could so many jurists be so foolish for so long? If they truly understand tort law, why would they conspire to conceal so many wrongs so completely? Unfortunately, Goldberg and Zipursky can have no answers to these questions, because it is they, not the judges, who have sidestepped the obvious. In fact, their failure to account for these anomalies violates their own first principle of descriptive theorizing: namely, “to work with, rather than dismiss as empty, the ways in which those acting within a practice make sense of it.”<sup>99</sup>

Working with all the facts, the commonsense explanation for these phenomena is that courts apply strict liability because they believe in its independent legitimacy; and when its theoretical lines become stretched or blurred, they are quick to correct the problem. The best and most recent example of this appears in the field of products liability. Originally, strict products liability applied to all types of product defects.<sup>100</sup> To assess design cases, courts employed a risk-utility analysis similar to the Hand formula of negligence.<sup>101</sup> In warning cases, they adopted a test of adequacy or reasonableness.<sup>102</sup> Eventually, courts recognized that fault was the true basis of liability in both actions.<sup>103</sup> Accordingly, many jurisdictions now openly acknowledge the “functional equivalence” of negligence and strict liability for design and warning defects, and some apply negligence principles explicitly and exclusively in such cases.<sup>104</sup> Recognizing this trend, the *Restatement (Third) of Torts* soon followed suit, and strict products liability was practically laid to rest.<sup>105</sup>

<sup>99</sup> Goldberg & Zipursky, *The Internal Point of View*, *supra* note 1, at 1577.

<sup>100</sup> See OWEN, *supra* note 88, at 33-38, 265-71, 344-45 (noting that the general requirement of defectiveness eventually split into separate theories of manufacturing, design, and warning defect).

<sup>101</sup> See *id.* at 33, 312-17, 508-14 (showing that both analyses balance the defendant's burden (B) of taking additional precautions against the potential accident costs to the plaintiff and society (as measured by the probability (P) and magnitude of the expected loss (L)) if such precautions are not taken, and impose liability when the burden is less than the risk of loss—a calculation expressed by the formula  $B < P \times L \rightarrow$  negligence or defectiveness).

<sup>102</sup> See *id.* at 594-95 (“[I]t might be said that to be adequate, a warning must provide a reasonable amount and type of information about a product's material risks and how to avoid them in a manner calculated to reach and be understood by those likely to need the information.”).

<sup>103</sup> See *id.* at 33.

<sup>104</sup> See *id.* at 107-10 (citing and discussing cases).

<sup>105</sup> See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (b)-(c) (1998) (adopting reasonableness concepts to determine design and warning defects); see also OWEN, *supra* note 88, at 110 (“These developments in the courts are mirrored by the *Products Liability Restatement*, which acknowledges that liability for both defective design and defective warning is based on principles of negligence.”).

Ironically, so was a key assumption of civil recourse theory. If, as this experience proves, courts can disentangle and prune back strict liability for products, Goldberg and Zipursky are hard-pressed to explain why judges cannot and have not done similar groundskeeping to all of the other strict liability theories that allegedly camouflage their scheme of wrongs.

But this is the least of Goldberg and Zipursky's worries. Assuming fault *does* lurk within strict liability, and reasons *do* exist for keeping it concealed, civil recourse theory still only tells a half-truth. While it accounts for the wrongs within strict liability, it ignores the strict liability encasing these wrongs. This omission appears founded in the belief that the two concepts are mutually exclusive, with wrongs always trumping their strict liability competitors in cases of comingling. The evidence, however, supports a different conclusion. Strict liability concepts not only can coexist with wrongs within the same cause of action, they can influence that mixture in way that defies Goldberg's and Zipursky's bright-line scheme of categorization.

Aside from trespass and conversion, which typically are regarded as wrongs-based intentional torts,<sup>106</sup> all of the strict liability theories eschewed by Goldberg and Zipursky contain distinctive no-fault features that override, offset, or transform the latent wrongs buried within. In animal cases, for example, courts generally invoke purely instrumental (nonwrongs-based) considerations to interpret and apply the theory's substantive elements.<sup>107</sup> So disposed, they routinely broaden their construction of proximate causation beyond the normal limits of foreseeability.<sup>108</sup> Quite frequently, they forbid analysis of the plaintiff's fault, limiting defendants to the defense of voluntary assumption of risk—a theory both widely disfavored and notoriously difficult to prove.<sup>109</sup>

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<sup>106</sup> See DOBBS, *supra* note 9, at 95-96, 122-27 (classifying trespass torts as intentional interferences with exclusive possession of real or personal property, and conversion as the intentional and substantial exercise of dominion and control over personal property).

<sup>107</sup> See, e.g., *Isaacs v. Powell*, 267 So. 2d 864, 865-66 (Fla. Dist. Ct. App. 1972) (“[O]ur society imposes more than enough risks upon its members now, and we are reluctant to encourage the addition of one more particularly when that one more is increasingly contributed by those who, for profit, would exercise their ‘right’ to harbor wild animals and increase exposure to the dangers thereof by luring advertising.”); KEETON ET AL., *supra* note 73, at 536-37 (noting that “new reasons of social policy” have been used to justify strict liability for animal keepers, including the keeper's profit motive and her ability to shift or distribute the loss to others).

<sup>108</sup> See RESTATEMENT (SECOND) OF TORTS § 510 (1977) (providing that one who possesses a wild or abnormally dangerous domestic animal shall not be relieved of strict liability by unforeseeable forces of nature or the unforeseeable, innocent, negligent, or reckless conduct of another, and expressing no opinion whether such liability would be superseded by an intentional intervening act).

<sup>109</sup> See *Isaacs*, 267 So. 2d at 866 (holding that the plaintiff's conduct only bars her recovery if she voluntarily brings the calamity upon herself); see also RESTATEMENT (SECOND) OF TORTS § 524 (1977) (providing that contributory negligence is not a defense to a strict liability action unless the plaintiff knowingly and unreasonably subjects herself to the risk posed by the activity in question); Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 UCLA L. REV. 481, 482 (2002) (“The modern conventional wisdom is that assumption of risk should be completely merged or assimilated within comparative fault and abolished as a distinct doctrine.”).

Nuisance's strict liability signature is even more pronounced. While nuisance requires proof of an unreasonable interference with property, its conception of unreasonableness bears little resemblance to private wrongs.<sup>110</sup> According to section 826 of the *Restatement (Second) of Torts*, such an invasion is unreasonable if either "the gravity of the harm outweighs the utility of the actor's conduct" or "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible."<sup>111</sup> Under the first test, "[t]he process of weighing the gravity of the harm against the utility of the conduct assesses the *social value* of the actor's activity in general."<sup>112</sup> Thus, conduct that otherwise might amount to a private wrong could be justified, under the right circumstances, as serving the greater public good.<sup>113</sup> However, such socially valuable conduct still might be actionable under the second test of unreasonableness if the actor could pay for its harmful effects without jeopardizing her enterprise.<sup>114</sup> But here, as in the theory of strict liability for abnormally dangerous activities,<sup>115</sup> the liability does not punish or preempt such conduct, which is not wrongful at all.<sup>116</sup> Instead, it merely forces the actor to treat these losses as ordinary business expenses and to distribute them through insurance and price adjustments.<sup>117</sup>

A similar pattern exists in products liability cases. Outwardly, the theory of strict products liability for design defects, like the theory of nuisance, exudes the moral architecture of private wrongs. Both rely on a risk-utility analysis to determine liability.<sup>118</sup> But just like nuisance, strict design liability does not focus exclusively on the relationship of the parties. It also looks to the world beyond. Part of this global perspective is systemic. Because strict products liability was founded on instrumental concerns, public policy tends to permeate the interpretation of each

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<sup>110</sup> See DOBBS, *supra* note 9, at 1326.

<sup>111</sup> See RESTATEMENT (SECOND) OF TORTS § 826 (1965).

<sup>112</sup> *Id.* cmt. b & §§ 827, 828.

<sup>113</sup> See *Carpenter v. The Double R Cattle Co., Inc.*, 701 P.2d 222, 228 (Idaho 1985) (holding that a cattle feedlot, which the dissent described as an "odoriferous quagmire," was not liable for nuisance to an adjacent homeowner because such agricultural enterprises were vital to the state's economy and thus had a high social utility).

<sup>114</sup> See RESTATEMENT (SECOND) OF TORTS § 826 cmt. f (1965) ("It may sometimes be reasonable to operate an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying.").

<sup>115</sup> See *id.* § 822 cmt. k (favorably comparing this form of nuisance to strict liability for abnormally dangerous activities by noting "[a]n abnormally dangerous enterprise is required to pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character").

<sup>116</sup> See *id.* § 826 cmt. f (indicating that such a nuisance action "does not seek to stop the activity; it seeks instead to place on the activity the cost of compensating for the harm it causes").

<sup>117</sup> See *id.*

<sup>118</sup> See OWEN, *supra* note 88, at 266-68, 312-18, 508-14.

element of every defect theory.<sup>119</sup> The other part of this social outlook is strictly doctrinal. In applying the risk-utility test, most jurisdictions typically rely on a long list of analytical factors.<sup>120</sup> One notable list, known as the Wade factors, contains an explicitly social consideration with a decidedly instrumental objective: to force manufacturers, where feasible, to spread product-related losses by increasing the price of their goods or carrying liability insurance.<sup>121</sup>

In addition to these substantive differences, strict design liability often implements a unique procedural scheme that blurs its true identity. A central feature of wrongs-based actions is their requirement that plaintiffs *prove* defendants' fault. Strict design liability, however, may relax or shift all or part of this burden. For instance, some jurisdictions do not require plaintiffs to prove the manufacturers' actual or constructive knowledge of their product risks, something otherwise demanded by the Hand formula for negligence.<sup>122</sup> Instead, they automatically impute such knowledge to manufacturers, and consider whether the makers acted reasonably in marketing their goods with these known dangers.<sup>123</sup> Other jurisdictions, meanwhile, relieve plaintiffs of the entire burden of proving defectiveness. Once plaintiffs show that their injuries were caused by a product's design features, the burden shifts to the manufacturers to justify those designs by presenting evidence that the design's utility exceeds its accompanying risks.<sup>124</sup> In each situation, the focus remains on the manufacturers' design choices, but the process for judging the product, and thus for imposing liability, is far stricter than most anything found in the fault paradigm.<sup>125</sup>

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<sup>119</sup> *See id.* at 259-64, 288-97 (discussing the policy concerns that spawned strict products liability and that continue to influence its application).

<sup>120</sup> *See id.* at 317, 510, 514-17.

<sup>121</sup> *See id.* at 516. The Wade factors include a product's utility to the user and to the public as a whole, the safety aspects of the product including its likelihood to cause injury, the availability of an alternative product that would be equally efficacious and not as unsafe, the manufacturer's ability to eliminate the product's unsafe character without eliminating its usefulness or causing it to become too expensive to maintain its utility, the user's ability to avoid danger by exercising care, the user's awareness of the dangers and their avoidability based on common knowledge and product warnings, and most importantly for our purposes, the feasibility of the manufacturer to spread product losses by increasing its price or carrying liability insurance. *Id.*

<sup>122</sup> *See id.* at 548 (discussing the Wade-Keeton test for defectiveness, which "reliev[es] an injured plaintiff of the burden of proving the foreseeability of [product] risks . . . [and] imposes on the seller 'constructive knowledge' of any dangers its products may possess").

<sup>123</sup> *See id.* at 547-48, 550-51.

<sup>124</sup> *See, e.g.,* Quintana-Ruiz v. Hyundai Motor Corp., 303 F.3d 62, 69 (1st Cir. 2002) (shifting the burden of proof); *see also* Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 885 (Alaska 1979) (same); Barker v. Lull Eng'g Co., 573 P.2d 443, 456 (Cal. 1978) (same); Ontai v. Straub Clinic & Hosp., Inc., 659 P.2d 734, 739-40 (Haw. 1983) (same).

<sup>125</sup> There are rare situations where wrongs-based theories do shift burdens of proof to defendants. As I shall discuss within, however, these instances of burden-shifting are not true examples of fault-based liability, but rather are proof that even wrongs-based torts can be infiltrated and changed by nonwrongs-based, instrumental considerations. *See infra* notes 181-87 and accompanying text.

Sometimes strict products liability lacks even this token of fault. In manufacturing defect cases, a product is considered defective if it deviates from the manufacturer's intended design, regardless of the level of care exercised by the manufacturer in its production.<sup>126</sup> Here, as in the cost-of-business nuisance cases, liability requires no wrong at all. Instead, manufacturers of all products, including goods with high social utility, are simply expected to treat unexpected and unavoidable manufacturing flaws as an ordinary business risk, and to absorb and spread the losses caused by these defects to their insurers, customers, employees or shareholders.<sup>127</sup> To Goldberg and Zipursky, these nonwrongs-based, strict products liability cases apparently are too insignificant to mention. But to the manufacturing industry, where production flaws mar every product line, they are a serious concern and a constant source of litigation. Thus, they occupy a conspicuous niche in the jurisprudence of Torts.

Even more troublesome for Goldberg and Zipursky's interpretive analysis is the theory of respondeat superior. Unlike other strict liability actions, which account for a relatively modest percentage of the total Torts docket, respondeat superior is a prime-time player. Today, most tort suits are filed against businesses, and most businesses—apart from product sellers—are sued for the acts of their employees.<sup>128</sup> In many cases, such enterprises are accused of negligently hiring, training, or supervising their workers.<sup>129</sup> But more frequently, their liability is premised on the concept of respondeat superior.<sup>130</sup>

Besides their obvious prevalence, respondeat superior actions possess an uncertain normative basis that resists Goldberg and Zipursky's definitive fault ascription. By definition, respondeat superior holds an employer liable for an employee's wrongful conduct when that conduct occurs within the scope of

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<sup>126</sup> See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (a) (1998) (providing that a product contains a manufacturing defect when it departs from the manufacturer's intended design, even though all possible care was exercised in its preparation and marketing).

<sup>127</sup> See *id.* § 2 cmt. a (“[M]any believe that consumers who benefit from products without suffering harm should share, through increases in the prices charged for those products, the burden of unavoidable injury costs that result from manufacturing defects.”); see also OWEN, *supra* note 88, at 292-93, 295 (generally discussing the loss-spreading rationale of strict products liability).

<sup>128</sup> See Mark E. Roszkowski & Christie L. Roszkowski, *Making Sense of Respondeat Superior: An Integrated Approach for Both Negligent and Intentional Conduct*, 14 S. CAL. REV. L. & WOMEN'S STUD. 235, 235 (2005) (“Lawsuits brought by third parties against employers for injuries caused by employees are among the most common civil lawsuits in the United States.”).

<sup>129</sup> See *id.* at 235-36 (“[T]he employer may be held liable for its own intentional or negligent conduct[:] for example, the employer's negligent hiring, training or supervision of the employee.”).

<sup>130</sup> See *id.* at 236 (indicating that it is much more common for an employer to be held vicariously or derivatively liable for the employee's tortious conduct under the doctrine of respondeat superior than to be sued for the negligent hiring, training, or supervision of its employees); Amy D. Whitten & Deanne M. Mosley, *Caught in the Crossfire: Employers' Liability for Workplace Violence*, 70 MISS. L.J. 505, 516-38 (2000) (discussing the various “emerging” theories of direct employer liability for employee misconduct and noting their secondary status to the primary theory of respondeat superior).

employment.<sup>131</sup> While the employee's fault is critical to this theory, the employer's fault is not. Indeed, the employer may be held liable even though she did not direct, ratify, or even know of the employee's act.<sup>132</sup> Ultimately, the imposition of liability turns on the interpretation of "scope of employment."<sup>133</sup> Over the years, courts and commentators have offered a wide variety of justifications for construing that test broadly or narrowly, with the broader interpretations leaning towards strict liability and the narrower ones favoring fault.<sup>134</sup>

On the fault side, one theory holds that "scope of employment" merely serves as a proxy for the employer's negligence, since the employer exercises greater control over behavior directly related to its business purpose.<sup>135</sup> Goldberg himself offers an alternate theory in a different article, contending that the employee and employer represent a single "fused agent" whose culpable conduct is rightfully attributed to its dual constituents.<sup>136</sup>

But these approaches certainly do not dominate the literature on the subject. For every fault-based interpretation, there are several strict liability counterparts competing for acceptance. Baty, who wrote one of the earliest and most influential treatises on vicarious liability, argued that respondeat superior was simply a means of accessing the wealth of deep-pocket entities like corporations.<sup>137</sup> Meanwhile, courts have defended this strict liability interpretation on the grounds "(1) that an innocent person, either the plaintiff or the employer, must bear the loss, (2) that the employer had formal right of control over the employee's work, or (3) that the employer benefits from the employee's work."<sup>138</sup> Increasingly, respondeat superior has been justified on the openly instrumental theory of enterprise liability, which forces employers to pay for employee accidents, not because they have done something wrong, but because they have the ability to pass along such losses to their customers.<sup>139</sup> This explains why employers often bear responsibility for reckless or

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<sup>131</sup> See DOBBS, *supra* note 9, at 905 (noting that employers generally are jointly and severally liable for the torts of employees committed within the scope of employment).

<sup>132</sup> See *id.* at 907 ("The master is liable for the servant's negligent acts even though [the] master did not command those acts and could not foresee them in any specific way.").

<sup>133</sup> See *id.* at 910 ("[R]espondeat superior liability is imposed only for acts of the servant committed within the scope of his employment.").

<sup>134</sup> See *id.* at 907-10 (discussing the rationales for respondeat superior).

<sup>135</sup> See *id.* at 908. Professor Dobbs cautions, however, that such presumed "control is doubtful in many cases and the connection between the employee's tort and the employer's benefit is often tenuous." *Id.*

<sup>136</sup> See John C.P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211, 1233 (2009).

<sup>137</sup> See T. BATY, VICARIOUS LIABILITY 154 (1916).

<sup>138</sup> DOBBS, *supra* note 9, at 908 (footnotes omitted) (citing cases).

<sup>139</sup> See, e.g., *Fruit v. Schreiner*, 502 P.2d 133, 140 (Alaska 1972) (adopting an enterprise liability theory of respondeat superior); see also *Hinman v. Westinghouse Elec. Co.*, 471 P.2d 988, 991 (Cal. 1970) (same); *Leafgreen v. Am. Family Mut. Ins. Co.*, 393 N.W.2d 275, 280-81 (S.D. 1986) (same); *Kenyon v. Second Precinct Lounge*, 442 N.W.2d 696, 700-01 (Mich. Ct. App. 1989) (endorsing this approach). See generally DOBBS, *supra* note 9, at 908-09

even intentionally harmful employee conduct<sup>140</sup>—conduct wrongs-based theories consider so powerful and unforeseeable that it typically forecloses the liability of anyone else.<sup>141</sup>

In sum, there are far more “pure” strict liability theories than Goldberg and Zipursky care to acknowledge, and these examples of nonwrongs-based liability are far more substantial than civil recourse theory can reasonably withstand. Indeed, even when strict liability contains remnants of wrongs, the combination cannot be characterized by either of its components, but creates a hybrid species of Torts with liability characteristics all its own. Interestingly, and quite ominously for Goldberg and Zipursky, evidence of this synthesis is not exclusive to strict liability, but, as we shall see next, already appears within the realm of Wrongs.

#### V. A DISTORTED CONCEPTION OF WRONGS

Goldberg and Zipursky define wrongs as “violations of legal norms not to mistreat others in various ways.”<sup>142</sup> This definition has three parts. As Goldberg and Zipursky explain, “[f]or every tort, there is an inquiry into the nature of the tortfeasor’s actions . . . , the nature of the setback suffered by the victim, and the connection between the two.”<sup>143</sup> These parts are not self-sustaining, but interdependent. Granted, all wrongful conduct has a distinct normative dimension, eliciting society’s “disdain” by transgressing a mandate that it “not . . . be performed.”<sup>144</sup> But, ultimately, a bad act is a tort only if it produces a legally forbidden harm to a legally protected person.<sup>145</sup> Because the act, the harm, and the victim are causally integrated, the determination of “wronging” must proceed from the unique circumstances of each tortious event. It cannot, and according to Goldberg and Zipursky, does not depend on factors external to that relationship.

Putting aside their claims about legal duties and relationality, which have been attacked elsewhere,<sup>146</sup> there is a lot wrong with Goldberg and Zipursky’s descriptive

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(discussing the use of enterprise liability theory as a basis for respondeat superior); Gregory C. Keating, *The Theory of Enterprise Liability and the Common Law of Strict Liability*, 54 VAND. L. REV. 1285, 1307 (2001) (arguing that “[r]espondeat superior liability is—and should be—liability for the ‘characteristic risks’ of an activity,” which the author describes as enterprise liability).

<sup>140</sup> See DOBBS, *supra* note 9, at 913 (“[A]t least since the middle of the 20th century, courts have often . . . recognize[d] that intentional torts committed by an employee are within the scope of employment when employment furnishes the specific impetus for or increases a general risk of employee misbehavior.”).

<sup>141</sup> See *id.* at 470-71 (“If an intervening and unforeseeable intentional harm or criminal act triggers the injury to the plaintiff, the criminal act is ordinarily called a superseding cause, with the result that the defendant who negligently creates the opportunity for such acts escapes liability.”).

<sup>142</sup> Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 986.

<sup>143</sup> *Id.* at 944.

<sup>144</sup> *Id.* at 949.

<sup>145</sup> See *id.* at 943-44.

<sup>146</sup> See Stapleton, *supra* note 8, at 1531 (rejecting their relationality thesis as overly discretionary, unnecessarily awkward, and distastefully discriminatory and recommending a conception of Torts that provides general, nonrelational guidance directives to citizens).

account of Torts as Wrongs. In my view, what they fail to observe is even worse than what they think they see. In fact, their omissions here erode the very foundation of civil recourse theory. When one's eyes are open to the truth it quickly becomes apparent that wrongs-based torts are routinely influenced by a host of nonwrongs-based social considerations, with the most prominent and pervasive infiltration occurring in the theory of negligence—the tort most symbolic of wrong's supposed domination. Indeed, as we shall see below, public policy does not just patrol the periphery of negligent wrongs; it penetrates each and every one of negligence's elements of proof and even invades its affirmative defenses.

The clearest example of this encroachment—and the one most damaging to Goldberg and Zipursky's theory—appears in the element of duty. According to Goldberg and Zipursky, duty is mostly a private ideal. It establishes the terms under which accident victims are authorized to enforce against their offenders certain norms of noninjury.<sup>147</sup> But for most courts, duty is not so limited. They see duty more as a public mechanism, which enables judges to create and contour negligence rules to promote the general welfare. To fulfill this function, courts faced with difficult duty questions regularly employ some form of multifactor analysis.<sup>148</sup> Admittedly, this analysis may include “private” considerations like the foreseeability and magnitude of the plaintiff's injury, the extent of defendant's burden of precaution, the overall blameworthiness of the defendant's conduct, or the nature of the parties' relationship.<sup>149</sup> However, the analysis does not stop there. It also weighs

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<sup>147</sup> See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 919, 941-45.

<sup>148</sup> See CALNAN, DUTY AND INTEGRITY, *supra* note 15, at 83.

<sup>149</sup> See, e.g., *HealthONE v. Rodriguez ex rel. Rodriguez*, 50 P.3d 879, 888 (Colo. 2002).

In determining whether a duty should be recognized, a court must consider many factors, including: (1) the risk involved, (2) the foreseeability and likelihood of injury as weighed against the social utility of the actor's conduct, (3) the magnitude of the burden guarding against injury or harm, and (4) the consequences of placing the burden upon the actor.

*Murillo v. Seymour Ambulance Ass'n, Inc.*, 823 A.2d 1202, 1205 (Conn. 2003).

[T]he test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case.

*Happel v. Wal-Mart Stores, Inc.*, 766 N.E.2d 1118, 1123-24 (Ill. 2002).

In determining whether a duty exists, courts look to certain relevant factors. These include: (1) the reasonable foreseeability that the defendant's conduct may injure another, (2) the likelihood of an injury occurring, (3) the magnitude of the burden of guarding against such injury, and (4) the consequences of placing that burden on the defendant.

*Heck ex rel. Heck v. Stoffer*, 786 N.E.2d 265, 268 (Ind. 2003) (Duty “analysis involves a balancing of three factors: (1) the relationship between the parties, (2) the reasonable

a wide variety of public policy concerns, including, often explicitly, the duty's potential deterrent effect and the parties' respective abilities to spread the loss through insurance or otherwise.<sup>150</sup>

Thus, contrary to Goldberg and Zipursky's assertion, duty is not just about defining private wrongs, but is also about solving or ameliorating some very public problems. This social mission is no casual side job, nor are the effects insubstantial. Instead, it is a permanent and pervasive aspect of negligence's lawmaking process.

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foreseeability of harm to the person injured, and (3) public policy concerns.”); *Danler v. Rosen Auto Leasing, Inc.*, 609 N.W.2d 27, 32 (Neb. 2000).

[I]n determining whether a duty was to be imposed, this court employs a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.

*Sisson v. Jankowski*, 809 A.2d 1265, 1267 (N.H. 2002) (“When determining whether a duty is owed, we examine the societal interest involved, the severity of the risk, the likelihood of the occurrence, the relationship between the parties, and the burden upon the defendant.”); *Alloway v. Bradlees, Inc.*, 723 A.2d 960, 964 (N.J. 1999) (“[T]he determination of such a duty ‘involves identifying, weighing, and balancing several factors—the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.’”); *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc.*, 750 N.E.2d 1097, 1101 (N.Y. 2001).

The existence and scope of a tortfeasor's duty is, of course, a legal question for the courts, which ‘fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.

*Sharpe v. St. Luke's Hosp.*, 821 A.2d 1215, 1219 (Pa. 2003) (“The concept of duty is rooted in public policy, and the determination of whether a duty should be imposed upon an alleged tortfeasor involves a balancing of the following factors: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.”).

<sup>150</sup> See *Castaneda v. Olsher*, 162 P.3d 610, 615 (Cal. 2007) (finding that in analyzing duty, a judge must weigh

[t]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved).

See also *Kallstrom v. United States*, 43 P.3d 162, 167 (Alaska 2002) (adopting this list of factors); *Vincent v. The Safeco Ins. Co. of Am.*, 29 P.3d 943, 945 (Idaho 2001) (same); *Bowman v. Two*, 704 P.2d 140, 143 (Wash. 1985) (same); *Drwenski v. McColloch*, 83 P.3d 457, 464-65 (Wyo. 2004) (same).

From the most intimate cases of domestic privacy<sup>151</sup> to the most commercial cases of premises liability,<sup>152</sup> multifactor policy analysis creates the rules that determine what constitutes a wrong, and which wrongs are legally cognizable. Indeed, because duty produces the *law* of negligence and because negligence occupies the broad middle ground of the Wrongs spectrum, the injection of policy in this element does more than merely threaten negligence's supposed relational integrity; it strikes at the very core of the wrongs-based theory of Torts.

Bad as this duty dilemma is, matters only get worse in the companion element of breach. Besides establishing duties, public policy also informs the standards of care that accompany them. For example, negligence law holds people with mental disabilities to the standard of ordinary adults, even though they often are incapable of meeting that standard.<sup>153</sup> According to Goldberg and Zipursky, this standard, though strict, is still wrongs-based because it is based on norms of noninjury that express society's disapproval for the offending conduct.<sup>154</sup> But this explanation is rarely advanced by courts. Instead, they typically rely on functional arguments, often decrying the difficulty of litigating the issue of insanity,<sup>155</sup> endorsing the tactic of forcing disabled persons to absorb the social costs of their accidents,<sup>156</sup> and touting the standard's potential for creating a safety incentive for the caretakers of the mentally infirm.<sup>157</sup>

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<sup>151</sup> See *J.S. v. R.T.H.*, 714 A.2d 924 (N.J. 1997) (recognizing a spouse's duty to protect others from the sexual misconduct of her mate after balancing public policies combating child sexual abuse and those promoting marriage and marital privacy).

<sup>152</sup> See *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993) (rejecting a shopping center's duty to prevent the rape of a lessee's employee after balancing public policies promoting public safety and those limiting the economic and social costs of private security measures).

<sup>153</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOTIONAL HARM § 11 (2005) (stating that an adult actor's mental or emotional disability is not considered in the standard of care for determining whether her conduct is negligent); RESTATEMENT (SECOND) OF TORTS § 283B (1965) (providing that mental deficiency does not relieve an actor from liability for conduct which does not conform to the standard of a reasonable person under like circumstances).

<sup>154</sup> Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 949 (arguing that Torts' directives convey "disdain" for the acts to which they apply and "express[] an injunctive message that such acts are not to be performed").

<sup>155</sup> See *McGuire v. Almy*, 8 N.E.2d 760, 762 (Mass. 1937) ("[C]ourts are loath to introduce into the great body of civil litigation the difficulties in determining mental capacity which it has been found impossible to avoid in the criminal field.").

<sup>156</sup> See *id.* ("[Just] as an insane person must pay for his support, if he is financially able, so he ought also to pay for the damage which he does; . . . an insane person with abundant wealth ought not to continue in unimpaired enjoyment of the comfort which it brings while his victim bears the burden unaided.").

<sup>157</sup> See *id.* ("[A] rule imposing liability tends to make more watchful those persons who have charge of the defendant and who may be supposed to have some interest in preserving his property."); see also DOBBS, *supra* note 9, at 287 (noting that "some authorities have suggested that tort liability will provide proper incentives to those 'in charge' of the insane person to control his conduct").

Similar reasoning supports the standard of care for children. Normally, negligence law judges children by comparing them to other kids of similar age, intelligence, maturity, and experience.<sup>158</sup> Like the standard for the mentally disabled, the child's standard *could* be based on norms governing juvenile behavior. But usually it is not. Rather, courts routinely invoke the familiar policy refrain that letting kids be kids is good for society because it lets them learn from their mistakes.<sup>159</sup> When kids venture into adult activities, courts raise the behavioral bar accordingly, imposing an ordinary adult standard of care.<sup>160</sup> Yet even here, the change is based more on public policy than any norm of noninjury, with courts determined to discourage kids from doing adult things to protect society from the extraordinary hazards of such activities.<sup>161</sup>

Once the standard of care is settled, policy immediately reappears to help assess its breach. Under the *Restatement (Second) of Torts* conduct is in breach, and thus unreasonable, if its risks outweigh its utility.<sup>162</sup> In theory, this formula *could* be essentially wrongs-based, intending simply to balance the parties' competing rights to liberty.<sup>163</sup> In reality, however, it is much more. Specifically, it provides still another opportunity to promote the public good. According to the *Restatement*, an act's utility depends substantially on its *social* value,<sup>164</sup> while its risk depends heavily on its *public* impact, because of both the number of people it endangers and the social desirability of their threatened interests.<sup>165</sup> Admittedly, the *Restatement (Third) of Torts* now softens these considerations,<sup>166</sup> and they often are not presented

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<sup>158</sup> See *id.* at 293.

<sup>159</sup> See *id.* at 296 (describing the "welfare rationale" that the child's standard of care allows children to gain experience by acting in the world freely so they can mature into reasonable adults).

<sup>160</sup> See *id.* at 298-300 (indicating that most courts hold children to an adult standard of care when they engage in adult or inherently dangerous activities).

<sup>161</sup> See *Dellwo v. Pearson*, 107 N.W.2d 859, 863 (Minn. 1961) ("We may take judicial notice of the hazards of automobile traffic, the frequency of accidents, the often catastrophic results of accidents, and the fact that immature individuals are no less prone to accidents than adults."); *Robinson v. Lindsay*, 598 P.2d 392, 394 (Wash. 1979) ("Such a rule protects the need of children to be children but at the same time discourages immature individuals from engaging in inherently dangerous activities.").

<sup>162</sup> See RESTATEMENT (SECOND) OF TORTS § 291 (1965) (providing that if the risk is of such a magnitude as to outweigh what the law regards as the utility of the act then the act is considered negligent and the actor is considered unreasonable).

<sup>163</sup> See CALNAN, JUSTICE, *supra* note 11, at 177-89; Calnan, *Fault(s)*, *supra* note 15, at 702-10; Calnan, *Strict Liability*, *supra* note 15, at 99-104.

<sup>164</sup> See RESTATEMENT (SECOND) OF TORTS § 292 cmt. a (1965) (stating that the social value of an act is the most important factor in determining its utility).

<sup>165</sup> See *id.* § 293 (a), (d) (listing these factors specifically as relevant in assessing an act's dangerousness).

<sup>166</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOTIONAL HARM § 3 cmt. h (2005) ("While negligence law is concerned with social interests, courts regularly consider private interests, both because society is the protector of private interests and because the general public good is promoted by the protection and advancement of private interests."); see also *id.* cmt. j ("In those cases in which a plaintiff does allege negligence in the actor's

to juries even where they still survive.<sup>167</sup> But there is no denying that appellate courts purportedly following traditional negligence principles *have* entertained nonrelational factors in the determination of breach, and these factors *have* added a distinctly political dimension to the judgment of private wrongs.<sup>168</sup>

In fact, the politics of negligence has not been confined to duty or breach, but has extended deep into the element of causation. The concept of proximate causation, in particular, has long flaunted its political propensities, dating all the way back to the Torts casebook classic of *Palsgraf v. Long Island Railroad Co.*<sup>169</sup> There, Judge Andrews, in a famous dissent, eloquently opined that proximate cause “is not logic” but “practical politics” which uses “convenience,” “public policy,” and “a rough sense of justice” to “arbitrarily decline[] to trace a series of events beyond a certain point.”<sup>170</sup> Echoing and updating Andrews’ view, which has since become widespread, the Tennessee Supreme Court recently explained that

[p]roximate or legal cause is a policy decision made by the legislature or the courts to deny liability for otherwise actionable conduct based on considerations of logic, common sense, policy, precedent and “our more or less inadequately expressed ideas of what justice demands or of what is administratively possible and convenient.”<sup>171</sup>

In short, proximate cause is, and always has been, the arch nemesis of civil recourse theory, plying its political influence to alter, abate, or annul existing norms of noninjury. It is no wonder, then, why Goldberg and Zipursky have failed to account for its insidious instrumentalism. Far from supporting a purely wrongs-based conception of negligence, this corrosive force only serves to discredit or destroy it.

Policy’s role in the supposedly objective doctrine of factual causation is less obvious, though no less momentous. Typically, factual causation is based on a fairly straightforward, seemingly factual, determination: but for the defendant’s negligence, the plaintiff would not have been harmed.<sup>172</sup> However, the “but for” test is neither as clear nor as factual as it first appears. In many cases, especially those involving negligent omissions, the analysis of factual causation requires a good bit of judgment, and this judgment derives from a good dose of policy.

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decision to engage in an activity, the overall utility of the activity is a factor the court needs to consider.”).

<sup>167</sup> See Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1016-17 (1994) (“[R]ather than telling juries to balance the costs and benefits of greater care, courts ordinarily instruct them to determine whether the actor behaved as a ‘reasonably prudent person’ would have under the circumstances.”).

<sup>168</sup> See DOBBS, *supra* note 9, at 340, 344-48 (noting the often competing economic, moral, and administrative concerns surrounding this analysis).

<sup>169</sup> *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

<sup>170</sup> *Id.* at 103 (Andrews, J., dissenting).

<sup>171</sup> *Snyder v. LTG Lufttechnische GmbH*, 955 S.W.2d 252, 256 n.6 (Tenn. 1997).

<sup>172</sup> See DOBBS, *supra* note 9, at 409.

The California case of *Saelzler v. Advanced Group 400*<sup>173</sup> aptly illustrates this trend. In *Saelzler*, a group of unidentified men committed a daylight attack against a delivery woman in a common area of a low-rent apartment complex. The delivery woman sued the apartment owner for negligence, claiming the owner failed to implement adequate security measures on its premises. The owner moved for summary judgment on the ground that its negligence, if any, was not a factual cause of the attack. The trial court granted the motion and dismissed the delivery woman's action. After the Court of Appeals reversed, the California Supreme Court reinstated the trial court's judgment, finding that the delivery woman could not establish factual causation in this case.<sup>174</sup>

At first blush, the Supreme Court's holding appears to rest on a faithful application of the "but for" test.<sup>175</sup> Noting that the complex was located in a high crime district, and that the attackers could have lawfully entered the premises as tenants of the owner, the Court found insufficient evidence to conclude that added security would have prevented the crime.<sup>176</sup> However, elsewhere in its opinion, the Court revealed the true basis for its decision. To fully resolve the question of factual causation, the Court asserted, it had to "balance two important and competing policy concerns: society's interest in compensating persons injured by another's negligent acts, and its reluctance to impose unrealistic financial burdens on property owners conducting legitimate business enterprises on their premises."<sup>177</sup> Indeed, in striking this balance, the Court both deepened and expanded its policy analysis. A finding of factual causation under these facts, the Court warned, not only would force landowners to become virtual insurers of their property's safety—effectively compelling them to raise rents for low-income families—but also would stifle the fair and efficient administration of justice by creating intractable problems of proof and line-drawing.<sup>178</sup>

Even when the "but for" test cannot be satisfied, courts often rely on policy to create a special exception to avoid an unpalatable result. For example, the lost chance of survival doctrine<sup>179</sup> relaxes the traditional causation requirement to incentivize doctors to comply with their fiduciary duties to gravely ill patients.<sup>180</sup> In

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<sup>173</sup> *Saelzler v. Advanced Grp. 400*, 23 P.3d 1143 (Cal. 2001).

<sup>174</sup> *Id.* at 1155.

<sup>175</sup> Although California uses the substantial factor test of causation, that test incorporates the but-for test. See RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965) ("In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent[;] [t]his is necessary, but it is not of itself sufficient.").

<sup>176</sup> *Saelzler*, 23 P.3d at 1155.

<sup>177</sup> *Id.* at 1145.

<sup>178</sup> *Id.* at 1152.

<sup>179</sup> Under the lost chance of survival doctrine, when a doctor misdiagnoses or mistreats a patient with less than a fifty-one percent change of survival—and who thus was likely to die from her underlying illness—she (or her estate) may establish causation by proving that the doctor substantially reduced her chance of surviving that illness. See DOBBS, *supra* note 9, at 434-38 (generally discussing the doctrine).

<sup>180</sup> See *Herskovits v. Grp. Health Coop. of Puget Sound*, 664 P.2d 474, 477 (Wash. 1983) (noting that refusing to recognize the lost chance doctrine would create "a blanket release

extreme situations, the doctrine of *res ipsa loquitur* forces defendants to disprove factual causation<sup>181</sup> to encourage them to reveal facts solely within their possession.<sup>182</sup> Finally, the doctrines of alternative liability<sup>183</sup> and market share liability<sup>184</sup> employ the same burden-shifting technique to further the same disclosure policy,<sup>185</sup> but also seek to spread devastating losses<sup>186</sup> and punish and deter blameworthy actors, even though their agency is unclear.<sup>187</sup>

Of course, none of this shows that causal concepts are irrelevant to wrongs, or that wrongs are irrelevant to the theory of negligence. To the contrary, causation

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from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence”).

<sup>181</sup> This may occur in medical malpractice actions where the plaintiff is unconscious during treatment and thus unable to determine how she was injured. *See Ybarra v. Spangard*, 154 P.2d 687, 688 (Cal. 1944) (a patient placed under anesthesia for an appendectomy operation awoke with an unexplainable neck injury). In this scenario, the court shifts to the defendant-health care practitioners the burden of proving that they did not cause the plaintiff's injury. *See id.* at 690.

<sup>182</sup> *See id.* at 689 (“Without the aid of the doctrine a patient who received permanent injuries of a serious character, obviously the result of some one's [sic] negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability.”); DOBBS, *supra* note 9, at 650-52 (discussing the *Ybarra* rule and its policy basis).

<sup>183</sup> In alternative liability cases, two or more defendants have behaved negligently toward the plaintiff but only one defendant actually causes the plaintiff harm. *See Summers v. Tice*, 199 P.2d 1, 2 (Cal. 1948) (finding that two hunters negligently fired their shotguns at the plaintiff, but only the shot of one hunter actually struck the plaintiff in the eye). If the plaintiff sues all possible tortfeasors, who are few in number, but cannot after reasonable diligence identify the causally responsible party, the court shifts to the defendants the burden of exculpation. *See id.* at 4. Any defendant who cannot meet this burden is held jointly and severally liable for the loss. *See id.* at 5 (stating that “defendants in cases like the present one may be treated as liable on the same basis as joint tort feasers”).

<sup>184</sup> Where a large number of product manufacturers market essentially the same defective product, but the product of only one manufacturer actually causes a consumer's injury, market share liability shifts to the defendant-manufacturers the burden of disproving causation if the manufacturers in court represent a substantial share of the market for the item. *See Sindell v. Abbott Labs.*, 607 P.2d 924, 936-37 (Cal. 1980). Manufacturers unable to eliminate their product as a potential cause are held liable in proportion to their market share. *See id.* at 37.

<sup>185</sup> *See Summers*, 199 P.2d at 4 (“Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury.”); DOBBS, *supra* note 9, at 427 (noting the “dubious” policy argument that the “defendants might know more than [the] plaintiffs”).

<sup>186</sup> *See Sindell*, 607 P.2d at 936 (“From a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product . . . [because] ‘the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.’”).

<sup>187</sup> *See Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989) (“[W]e choose to apportion liability so as to correspond to the over-all culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large.”); *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 52-53 (Wis. 1984) (apportioning market share liability on the basis of comparative fault principles).

links and activates the parties' rights and duties, thereby authorizing one party to take coercive action against the other.<sup>188</sup> Yet this discussion does show that causation is not *solely* about wrongs. Instead, it is frequently about the pragmatic pursuit of purely social objectives. Thus, while it is wrong for skeptics to ignore causation's connection to wrongs, it is equally wrong for Goldberg and Zipursky to ignore the politics underlying that relationship.

This oversight is all the more pernicious because it blends into the element of damages. To establish causation, a plaintiff must show that the defendant's conduct resulted in some forbidden harm. Indeed, the existence of a personal injury is what culminates the wrong and makes the encounter tortious. However, tort law neither protects every interest nor redresses every wrong. Negligence law, in particular, restricts recovery to only certain types of harms. Although these limits help to define wrongs, they are not based on relational considerations or norms of noninjury. Instead, they are consistently determined by practical necessity and public policy.

Historically, two harms have been singled out for special attention. When plaintiffs suffer emotional injuries or economic losses unaccompanied by any physical harm, courts routinely deny relief altogether or impose significant obstacles to their recovery.<sup>189</sup> Casting these decisions as no-duty rules, judges rely on various policy arguments to curtail the categories of cognizable harms. In cases of pure emotional distress, they point to the speculative nature of the plaintiff's injury and the difficulties of proving psychic harm,<sup>190</sup> the potential for fraudulent claims,<sup>191</sup> the fear that the volume of claims will be great and will clog an already overburdened justice system,<sup>192</sup> and the possible disparity between the defendant's culpability and the amount of her financial responsibility for the plaintiff's loss.<sup>193</sup> Similar policy concerns surround pure economic losses. Besides raising questions of conjecture, proof, floodgates, and proportionality,<sup>194</sup> courts often invoke the classic instrumental policy of loss spreading, noting that businesses in jeopardy of suffering such damages typically can insure against them, and can incorporate their premium costs into the prices of their goods or services.<sup>195</sup>

We see, then, that nonwrongs-based considerations of policy influence every element of the tort of negligence, and in so doing, shape our very notion of an unintentional wrong. But policy's insurgence in negligence is even more

<sup>188</sup> See CALNAN, JUSTICE, *supra* note 11, at 47-49 (explaining the linking and activating functions of causation).

<sup>189</sup> See DOBBS, *supra* note 9, at 822-24, 1282-87.

<sup>190</sup> See *id.* at 822-23.

<sup>191</sup> See *id.* at 822.

<sup>192</sup> See *id.* at 824.

<sup>193</sup> See *id.*

<sup>194</sup> See *People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 110 (N.J. 1985) (noting that judicial skepticism towards pure economic loss claims stems from a "fear of fraudulent claims, mass litigation, and limitless liability, or liability out of proportion to the defendant's fault").

<sup>195</sup> See *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1029 (5th Cir. 1985) (observing that businesses can insure against pure economic losses and/or pass them onto their customers).

transcendent. It does not just define negligence, but also helps to excuse or mitigate it.

Policy's exculpatory effect is most evident in the affirmative defense of assumption of risk. Originally, assumption of risk consisted of a plaintiff's voluntary choice to encounter a known danger—a decision, like other forms of contributory negligence, that imbued her with full responsibility for her own injuries.<sup>196</sup> But after the adoption of comparative fault, which merely diminished the plaintiff's recovery, courts began to re-conceptualize the defense. Some courts emphasized its fault-like qualities and simply merged it into comparative negligence.<sup>197</sup> Others, however, recognized its independent status and continued using it as a complete bar to relief.<sup>198</sup>

While a number of jurisdictions in the latter camp justified the bar on the plaintiff's expression of consent,<sup>199</sup> the remaining members relied on good old policy. Under this approach, when a plaintiff engages in an inherently dangerous activity or occupation, the law automatically eliminates the duty of care owed by those creating such dangers, even if the plaintiff herself does not choose to waive their liability.<sup>200</sup> In the case of recreational activities, this no-duty rule is designed to encourage citizen participation, which in turn promotes social fellowship, good health, and much-needed stress relief.<sup>201</sup> Where dangerous occupations are involved, the policy adapts accordingly. Rather than stimulating behavior, the duty limitation here is calculated to prevent excessive litigation by and overcompensation of individuals whose salaries and administrative remedies already protect them against the extraordinary hazards of their jobs.<sup>202</sup>

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Putting this all together, it soon becomes apparent what is truly wrong with *Torts as Wrongs*. The theory it proposes is a stereotype and not a personality profile. By focusing on Torts' general features, Goldberg and Zipursky have created an interesting and alluring caricature of the field, but they have not described a real being with all its quirks and foibles. Negligence, in particular, resists such broad characterization. Far from fitting the image of moral and legal integrity, negligence's persona is fickle if not schizophrenic, endowing its elements and defenses with fault concepts, but destabilizing them with policy agendas that are

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<sup>196</sup> See DOBBS, *supra* note 9, at 535-36.

<sup>197</sup> See *id.* at 539.

<sup>198</sup> See *id.* at 539-40.

<sup>199</sup> See *id.* at 539-41.

<sup>200</sup> See *id.* at 537-38.

<sup>201</sup> See *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992) (expressing the fear that imposing liability for ordinary sports-related injuries "might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in [the] activity"); DOBBS, *supra* note 9, at 550 (noting that the no-duty rule is based in part on the policy of encouraging vigorous physical competition).

<sup>202</sup> See *Krauth v. Geller*, 157 A.2d 129, 131 (N.J. 1960) (indicating that worker's compensation benefits and increased salaries compensate employees such as firemen who take on extraordinary risks as part of their profession); DOBBS, *supra* note 9, at 771-72 (discussing these policy arguments).

incompatible or even contradictory. One may call this amalgamation many things, but “one thing” is the one thing it is not.

Goldberg and Zipursky miss the devil in these details because they believe—quite optimistically—that tort law is immune from such corrupting influences. As Goldberg has explained, “judges sometimes have the opportunity and power to advance [instrumental] goals in the course of presiding over tort cases[,] [b]ut when they do so purposefully, they are not applying and developing the law of tort, but departing from it.”<sup>203</sup> Torts’ impenetrability supposedly comes from its conceptual solidarity. Tort law is intelligible only as a group of structures and practices that “hang[] together” in a logical and predictable way.<sup>204</sup> Concepts like litigation bipolarity, legal fault, causation, and damages define Torts because they combine harmoniously and function symbiotically to create a right of civil recourse for the redress of private wrongs.<sup>205</sup> Instrumental doctrines and policies, by contrast, fall outside Torts because they are inhibited rather than advanced by many of the law’s other essential attributes.<sup>206</sup>

But judging reality by form, function, and fitness is perhaps Goldberg and Zipursky’s biggest mistake. It ignores the evolutionary nature of both life and law. Some very prominent structures—like human hair, a defining mammalian characteristic that has steadily receded in human beings and seems virtually destined for extinction<sup>207</sup>—remain in existence long after they have lost most or all of their practical usefulness. Similarly, some deeply ingrained practices change functions over time, retaining their old forms while serving a myriad of new and different purposes that they are surprisingly ill-suited to accomplish. This would seem to be the case with the customary handshake, which many believe began as an assurance of nonbelligerence,<sup>208</sup> but later became an expression of vulnerability or respect, and now is everything from a casual greeting to a serious confirmation of agreement<sup>209</sup>

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<sup>203</sup> See Goldberg, *Twentieth-Century Tort*, *supra* note 22, at 581. Goldberg’s argument appears to be something of a tautology. It says, in essence: Torts is not instrumental (even in part, and even if judges deliberately try to make it so) because instrumentalism is not (and can never be?) a characteristic of Torts. *Id.*

<sup>204</sup> See *supra* note 63 and authorities cited therein; see also Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 920.

<sup>205</sup> See *supra* note 37 and authorities cited therein.

<sup>206</sup> See *supra* note 56 and authorities cited therein.

<sup>207</sup> See Nicholas Wade, *Why Humans and Their Fur Parted Ways*, N.Y. TIMES (Aug. 19, 2003), <http://www.nytimes.com/2003/08/19/science/why-humans-and-their-fur-parted-ways.html?sec=health&spon=&pagewanted=1> (attributing human hair loss to various theories, including the need to keep cool and the elimination of fur-infesting parasites—functions increasingly served by human technologies like clothing, fixed shelters, medications, and pesticides).

<sup>208</sup> See Andrea D’Cruz, *The Handshake*, ASSYRIA TIMES (May 13, 2005), <http://assyriatimes.com/engine/modules/news/article.php?storyid=63>.

<sup>209</sup> Jesse Bering, *Limp Wrists and Tight Fists: What Your Handshake Says About You*, SCIENTIFIC AMERICAN (Feb. 18, 2010), <http://www.scientificamerican.com/blog/post.cfm?id=limp-wrists-and-tight-fists-what-you-2010-02-18>.

and even “our most important non-verbal communicative contrivance.”<sup>210</sup> Thus, just because tort law maintains the structures of a wrongs-based system does not mean they are essential to its existence, much less determinative of its character. Likewise, the fact that Torts’ practices could serve a system of civil recourse does not mean that this is their only, or even their most important function. On the contrary, it may merely suggest that tort law is constantly evolving from one state to another, slowly shedding its hoary vestiges while developing new characteristics as it adapts to changing social conditions, but mixing the expedient with the obsolete at every stage of the process.

#### VI. RIGHTING THE WRONGS OF CIVIL RECOURSE THEORY

Civil recourse theory is a valiant effort by well-meaning theorists to put tort law “back on track” by offering a unified theory of wrongs-and-recourse and destroying the instrumentalist misconception that the law is nothing more than a formal means for allocating the costs of accidents.<sup>211</sup> Ironically, however, this theory is its own worst enemy. By arguing that tort law currently *is* a law of wrongs, with only a few negligible specks of nonwrongs-based strict liability randomly scattered along its vast frontier, Goldberg and Zipursky help to hide instrumentalism’s systematic dismantling of the law’s inner framework. Indeed, to deny this onslaught is to deny the existence of the very malady they seek to cure, thus obviating the need for further examination or future treatment. To stop the surge of instrumentalism, Goldberg and Zipursky must first acknowledge Torts’ present state of pathology. Once they correct their own descriptive errors, they then can redirect civil recourse theory down a more promising normative path—one that not only restores rights and wrongs to tort law, but also rights the wrongs of their instrumentalist adversaries.

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<sup>210</sup> D’Cruz, *supra* note 208; see Bering, *supra* note 209 (noting that handshakes can create powerful, lasting impressions of one’s personality and aptitude for employment).

<sup>211</sup> See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 2, at 918.