

*University of Southern California Law  
School*

Legal Studies Working Paper Series

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*Year 2019*

*Paper 300*

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Is Tort Law “Private”?

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# Is Tort Law “Private”?

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## Abstract

A prominent, important strand of contemporary thinking about tort law—represented most powerfully by the work of Arthur Ripstein and Ernest Weinrib—has coalesced around the thesis that the concept of “private law” is the key to the subject. In one familiar usage of the term, the thesis that tort is private law is innocuous. Tort is private law in the sense that it is concerned with relations among persons in civil society. As the banner under which a school of thought marches, “private law” is a much weightier concept. It asserts that the essence of tort law is encapsulated in the traditional bipolar lawsuit. Within that formal structure, all that matters are the relations between the particular plaintiff and the particular defendant.

This book chapter argues that modern tort law is not private in the way that these theorists claim, for reasons that are both historical and normative. Modern tort took shape in response to the emergence of accidents as a social problem and its rise involved the displacement of traditional bipolar wrongs from the center of the field. Long established intentional wrongs—battery, trespass, defamation, and the like—arise out of episodic, one-off collisions between individual persons going about their lives. In an industrial, technological society, accidents are the recurring byproducts of organized and fundamental social activities. Modern fault liability emerges as the center of modern tort law in response to this social transformation. When this happens, accidents become the focal point of tort law and fault is sharply divorced from moral notions of personal responsibility and blameworthiness. To be sure, negligent wrongs remain genuine wrongs. The fault standard is an attempt to articulate what a right to the physical integrity of one’s person requires in the way of care owed by others. Failures to exercise reasonable care are wrongs when they result in harm to persons who can claim the right to such care. But they are also wrongs that may be blamelessly committed. Negligence is wrongful conduct, not culpable *mens rea*. We require reasonable care not because

failing to be reasonably careful is always and everywhere egregiously blameworthy, but because even blameless and slight negligence can inflict severe harm.

Champions of tort as private law implicitly recast tort in a pre-modern form, thereby obscuring fundamental and significant features of our law. Modern tort law responds to a pressing social problem and protects persons' fundamental interest in physical integrity. It is a part of basic justice concerned with interactions that cannot be avoided in the course of normal modern lives—not a law which addresses random and voluntary individual interactions. And almost since its inception, modern tort law has been only one of a family of institutions that address organized, systematic, risk. Direct regulation of risk and administrative schemes are two others. This family of institutions is not sundered by a radical separation of the private law of torts from the public law of regulation. Tort law, direct regulation of risk, and administrative schemes are complementary and competitive alternatives to one another, responding to overlapping problems and articulating related values.

# Is Tort Law “Private”?

Gregory C. Keating\*

Forthcoming, in Oberdiek J & Miller P (eds.) *Civil Wrongs and Justice in Private Law* (Oxford: OUP, 2019).

## I. *The Emergence of Modern Tort Law*

The tort law that we know took shape in the second half of the nineteenth century, when the writ system was cast aside and substantive law ceased to be subservient to the procedural pigeonholes of the forms of action. Once liberated, the law of torts underwent a profound transformation. It ceased to be a collection of discrete and heterogeneous wrongs bounded by rigid rules, and became a field ruled by general principles of responsibility. The tort law that emerged from this reconstruction was preoccupied with the accidental infliction of physical harm and dominated by the fault principle.<sup>1</sup> This reconfiguration was so sweeping and successful that we now take tort law to have a particular architecture. We assume that it has a core of accidental wrongs governed by negligence liability. That core is flanked by the competing, but subordinate, principle of strict liability on one side, and by the still heterogeneous intentional torts on the other. The standard first-year torts class instantiates this configuration. After a few classes on selected intentional torts—assault, battery and trespass, perhaps—the course turns to accidental harms and to intense immersion in the structure of fault liability. Sections on strict, and perhaps product, liabilities follow. At Yale, first-year classes often dispense with the intentional torts entirely, diving straight into accident law and its contest between negligence and strict liability and stay there for the duration of the semester. Accidents are where the action is.

Because the late 19<sup>th</sup> century reconstruction of the subject was so successful, we tend to experience the architecture that it imposed on the field more as fact than construct. That architecture is part of our pre-theoretical sense of what tort law is. Upon reflection, of course, we recognize it as a construct and one that obscures as well as illuminates. It tends, for example, to conceal the fact that the distinction between strict and fault liability cross-cuts the distinction between accidental and intentional wrongdoing. The intentional torts of battery, trespass, conversion and nuisance are all either characteristically or occasionally strict.<sup>2</sup> And, in presenting fault liability as the opposite of strict liability, it tends to overstate the difference between the two, and to understate the gap between moral fault and legal fault.<sup>3</sup> Even so, this conceptualization has the considerable virtue of placing two fundamental features of modern tort law front and center: it is preoccupied with accidental physical harm and dominated by a general principle of fault liability. Modern tort

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<sup>1</sup> See Grey 2001, 1259-1275; Horwitz 1973, 277-78.

<sup>2</sup> See Keating 2014, 292-311.

<sup>3</sup> See e.g., Goldberg & Zipursky 2016, 744-45; Epstein 1973, 152-53.

law's emergence is inseparable from the emergence of accidental harm as a pressing *social* problem. Oliver Wendell Holmes' famous aphorism that "[o]ur law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like," whereas "the torts with which our courts are kept busy today are mainly the incidents of certain well known businesses . . . railroads, factories, and the like"<sup>4</sup> epitomizes the point. Pre-modern tort law was a law of nominate, mostly intentional, wrongs. Modern tort law is a law of accidents—and of accidents that are recurring byproducts of basic activities in an industrial and technological society. Mining and milling, railroading and driving, are the bread and butter in response to which our tort law of accidents emerged.

Put a bit differently, modern tort law emerged as a response to the law having accidental injury thrust upon it as a pressing social problem. This twin transformation—from preoccupation with intentional wrongs to preoccupation with accidental wrongs, and from preoccupation with individual wrongs to preoccupation with a social problem—had, and continues to have, large implications for torts as a legal field. For one thing, modern tort law was born through a profound transformation of the concept of negligence itself. In pre-modern tort law negligence was a state of mind with which certain torts could be committed.<sup>5</sup> Negligence was the mental state of someone who did not advert sufficiently to what they were doing and who, consequently, did it carelessly. Modern tort law reconfigured negligence into an objective, external standard of conduct and a general principle of responsibility.

This history has something important to teach us about contemporary tort theory. On the one hand, it helps to explain why the modern law of torts is such congenial ground for instrumentalist and economic theories, notwithstanding the fact that torts is a law of rights and wrongs. On the other hand, it helps to explain why the contemporary revival of the idea that tort is "private law" is mistaken, notwithstanding the fact that theorists of tort as "private law" have powerfully illuminated the implausibility of instrumentalist and economic analyses of torts. Modern tort law is an aspect of "background justice"—not "foreground justice". It governs interactions which are woven into the basic fabric of modern life—interactions which can be avoided only on pain of foregoing a normal life. Its core domain is not optional, essentially voluntary interactions, as private law theorists suppose. Even when accidental injuries attributable to basic productive activities are not at issue, the law of torts protects persons against various forms of impairment and interference by others as they go about their lives as members of civil society. The responsibilities that it imposes, and the rights that it recognizes, play central roles in establishing the security necessary for people to shape their own lives and are enforced through the coercive powers of the state. Tort law's role as a component of background justice is further reinforced by the fact that modern tort law emerges to cope with the rise of accidental injury as a pressing social problem.

Or so this paper shall argue. We begin by explaining why the reconstruction of the field in the latter of half of the nineteenth century made it fertile ground for instrumentalist theories.

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<sup>4</sup> Holmes 1920, 167, 183. The paper itself was originally delivered in 1897.

<sup>5</sup> Grey 2001, 1259. The basic state of mind is culpable inadvertence.

## A. Blameless Wrongs

The transformation of tort in response to the emergence of accidents as a social problem put pressure on our very understanding of what torts are. From Blackstone down to the present, prominent scholars have characterized torts as a law of wrongs.<sup>6</sup> Tort negligence is a genuine legal wrong—not just a social cost whose avoidance would have been cheaper than its infliction—but it is a legal wrong of an attenuated sort. The legally negligent may be morally blameless. Their fault need only be a failure to take a precaution for the protection of others against physical harm that an objectively reasonable person would take. In contradistinction to core criminal wrongs—murder, rape and the like—tortious negligence is a very mild wrong. Those who are merely legally negligent may not even be morally blameworthy, much less deserving of punishment for their wickedness. Accidental wrongs are wrongs because people have a right to the physical integrity of their persons. They command the attention of the legal system, however, not because they are characteristically very *wrongful* but because they are characteristically seriously *harmful*. Accidents kill, maim, and paralyze people.

When the most common form of tortious wrong is accidental—and when accidents are a pressing problem for society as a whole—the very concept of “torts as wrongs” comes under attack from two directions. First, the connection of tortious wrongs to core moral concepts such as culpability and responsibility becomes ripe for contestation. Accidents happen. The blame associated with being responsible for one is often quite attenuated. Inadvertently taking one’s eyes off of the road while driving is a canonical example of carelessness; it is also the kind of lapse that all of us suffer at one time or another.<sup>7</sup> The moral culpability involved in such lapses is usually slight. More importantly, *the divorce of legal fault from moral fault is not just an empirical regularity; it is a normative commitment of modern negligence law*. Richard Epstein puts the point well:

[T]he law of negligence never did conform in full to the requisites of the ‘moral’ system of personal responsibility invoked in its behalf. In particular, the standard of the reasonable man, developed in order to insure injured plaintiffs a fair measure of protection against their fellow citizens, could require a given person to make recompense even where no amount of effort could have enabled *him* to act in accordance with the standard of conduct imposed by

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<sup>6</sup> Blackstone 1765; Goldberg & Zipursky 2010, 918.

<sup>7</sup> A well-known example of Jeremy Waldron’s illustrates this attenuated blameworthiness:

Two drivers, named Fate and Fortune, were on a city street one morning in their automobiles. Both were driving at or near the speed limit, Fortune a little ahead of Fate. As they passed through a shopping district, each took his eyes off the road, turning his head for a moment to look at the bargains advertised in a storefront window. . . . In Fortune’s case, this momentary distraction passed without event. The road was straight, the traffic in front of him was proceeding smoothly, and after a few seconds he returned his eyes to his driving and completed his journey without incident. Fate, however, was not so fortunate. Distracted by the bargain advertised in the shoe store, he failed to notice that the traffic ahead of him had slowed down. His car ploughed into the motorcycle ridden by a Mr. Hurt. Hurt was flung from the motorcycle and gravely injured. His back was broken so badly that he would spend the rest of his life in a wheelchair.

Waldron 1995, 387. While Waldron’s basic point here is comparative, the example of Fortune shows incidentally that we do not blame people much for lapses which, as luck has it, prove harmless.

the law. Certain defenses like insanity were never accepted as part of the law of negligence, even though an insane person is not regarded as morally responsible for his actions.<sup>8</sup>

The fact that negligence law divorces wrongful conduct from blameworthiness does not undermine the claim that negligence is a species of conduct-based wrong.<sup>9</sup> Indeed it is quite right to say that negligence in tort law is conduct which is wrongful because it is insufficiently careful with respect to the imposition of risks of physical harm on others. It is a commonplace that people have a right to the physical integrity of their persons and only a short step to say that this right grounds a duty in others to exercise reasonable care for their protection. Failing to exercise such care, and thereby inflicting physical harm on another person, is a wrong because it is the violation of a right. Tortious negligence matters not because it is blameworthy but because it is harmful, and seriously so.

Even so, the fact that negligence law separates wrongful conduct from blame—and is prepared to hold actors responsible for wrongful conduct that they could not have avoided—makes it ripe for reconceptualization in non-moral terms. Because personal culpability is unnecessary to legal negligence—and because the wrongfulness of negligent conduct is often slight—the modern law of negligence is vulnerable to the charge that it has merely inherited a robust language of wrongs and ought now to be re-conceptualized in a more modern and less moral vocabulary. Instrumental interpretations of negligence get a grip on both the legal imagination and the law of torts for good reason. The genius of the economic interpretation of negligence lies in offering a pithy account of how and when conduct can be unjustifiable even if it is not blameworthy. Conduct which does more harm than good—conduct whose costs outweigh its benefits—is unjustifiable even if those who behave that way are not to be blamed. Corrective justice and civil recourse theory have offered many telling criticisms of the economic analysis of tort law, but they have struggled to offer a comparably crisp and concise account of tortious negligence. Because it is so sharply and self-consciously divorced from blame, legal fault seems to invite explication in non-moral terms.

The transformation of the law of torts in response to the emergence of accidental injury as a pervasive social problem opened tort up to instrumental interpretation in another way as well. A tort law of “isolated, ungeneralized wrongs”—batteries, trespasses, slanders, and the like—is a law of bilateral wrongs. Lawsuits which seek to redress bilateral wrongs embody corrective justice in a straightforward way. When the bread and butter of tort law transforms into accidental injuries that are “the incidents of organized activities”, intuitions of corrective justice feel less compelling. Accidental harms have an impersonal quality. We tend to imagine the core case of accidental wronging as a case where attention lapses. When inattention is the personal failing beneath the wrong, the case for calling the defendant personally to account feels less compelling than it does when a punch in the nose is at issue. When the daily bread of tort law turns from batteries and slanders to accidental injuries, it is only natural to think that that the theory of tort should undergo a parallel transformation. Just as tort law turned its focus away from isolated, ungeneralized wrongs and towards accidents that are the incidents of industrialized activities, so too tort theory should

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<sup>8</sup> Epstein 1973, 153. This aspect negligence law has attracted fierce criticism at times. For example, The Woodhouse Report recommending that New Zealand replace tort liability for accidental harm with an administrative compensation scheme sharply criticized the “false morality” of the fault-based tort liability. See Matheson 1969, 191-95.

<sup>9</sup> See Goldberg & Zipursky 2010, 918.

shed its old conception of “torts as wrongs” and fashion a new conception of tort law as a technology for addressing the “costs of accidents.”<sup>10</sup>

When accidental injury becomes a significant social problem instrumental conceptions of tort become attractive. Problems beg to be solved, just as wrongs beg to be righted. Social problems cry out for social solutions. The economic conception of torts draws a considerable part of its power from the fact that thinking of accidental injuries in terms of the resources accidents consume is a powerful way of conceptualizing their social cost. Paying for and preventing accidents consumes scarce resources. Scarce resources ought to be put to good use, and that requires minimizing the combined costs of accidents and their prevention.<sup>11</sup> Of course, there are other ways of thinking about the social ends that accident law serves. We might, for instance, focus on the accidental losses that inevitably pile up in an industrial and technological society and take loss-spreading as the most important end to pursue. This, too, is an instrumental conception of the law of torts and it underscores the larger point here. When the law of torts must be reconstructed to cope with the burgeoning social problem of accidents it is tempting for tort theory to take an instrumental turn.

## B. Serious Harms

On closer inspection, however, the allure of instrumentalism fades. When instrumentalism is fleshed out, it makes implausible assertions about the role of tort law. The economic account of tort liability, for example, is committed to the proposition that the role of tort adjudication is to deter the squandering of social resources going forward. On the economic account, backward-looking tort suits only *purport* to call tortfeasors to account for their past wrongs. Properly understood, they are attempts to induce other, unidentified parties not now before the court to avoid future harms to possible future victims. Wrongdoing defendants who have done harm to the plaintiffs before the court are false targets for cheapest-cost avoiders of future harm. Looking backwards is instrumentally irrational. Past losses are sunk costs. The instrumentally rational thing to do is not to cry over spilt milk; it is to avoid spilling more milk going forward. Permitting plaintiffs to recover damages for harms wrongly inflicted on them in the past by the defendant now before the court is not what it seems to be—not an attempt to repair the effects of past wrongdoing. According to law and economics, tort suits are not vindications of individual rights and articulations of correlative responsibilities; they are risk regulation in disguise—institutional devices for enlisting resentment of past wrongs to the cause of minimizing the costs of accidents and their prevention going forward.

The economic theory of torts thus treats the rights and duties of the parties as mere vessels through which the socially desirable end of wealth-maximization is served. This is unpersuasive in two ways. First, the institution of tort adjudication is primarily a backwards-looking exercise in reparation, not an implausibly intricate and tortured exercise in future risk-reduction. Tort plaintiffs sue those who have wronged them *because* those defendants have wronged them and *in order to repair* the harm that those defendants have wrongly inflicted.<sup>12</sup> Tort litigation takes the form that it does because of the substance that it has—because it is about rights and wrongs. It looks backwards because it is about responsibility for harm wrongly done. In both its adjudicative incarnation and its

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<sup>10</sup> See Calabresi 1970.

<sup>11</sup> Along with the costs of operating the system. See Calabresi 1970.

<sup>12</sup> Keating 2012 (“Priority of Respect”), 301-03 (discussing the corrective justice critique of the economic analysis of tort law, especially as articulated by Jules Coleman).

forward-looking, conduct-guiding role, tort is concerned primarily with the rights and interests of individuals.

Accidental physical harm, negligently inflicted, is wrongful. The harm should have been avoided and the conduct of the injurer is subject to legal criticism and the imputation of responsibility for failing to avoid inflicting the harm. But accidental physical harm gains much of its moral significance not from the fact that carelessness is wrong but from the fact that physical harm to persons is, in itself, intrinsically and seriously bad. Harm is a presumptively bad thing to suffer because it impairs basic powers of human agency, and significantly so. Harm is bad *for persons* because it damages capacities that are essential to the exercise of the will and to the leading of a normal human life, a life in which the exercise of one's will to shape one's life and one's world is a basic and important power. The economic analysis of tort law misses the moral significance of harm in two ways. First, in economic terms, accidents inflict "costs." A "cost" is anything of value that has to be given up to attain something else of value. Physical harm is certainly a "cost" in this sense, but this lumping of harm with anything and everything of value that must be given up to gain something else of value is itself costly. It obscures the special moral significance of harm. Harm is no ordinary cost. It has serious, negative moral significance and it has that significance because of its relation to autonomy, not welfare. Harm is especially bad *for persons* because it damages capacities that are essential to the exercise of the will and to the leading of a normal, self-governing, human life.

### C. What We Owe to Each Other

This fact that harm gets its special moral significance from the damage it does to powers that play central roles in individual lives points to the second way in which the economic analysis of torts misses the moral significance of harm. For economic analysis, *social* costs and social benefits are what count. Yet harm gets its special moral significance from the role that it plays in *individual* lives. Harm's presumptive badness is a matter of ordinary moral intuition, but harm's distinctive moral significance can be grasped only within a deontological framework which takes persons and their lives as its fundamental objects of concern, and the relations among persons as the fundamental subject of morality. When people put others at significant risk of physical harm, questions of what those who impose the risks owe to those on whom they impose the risk are the central questions. These are questions about obligations. When instrumentalist theories of tort conceive of questions of due care as questions about what rational prudence requires of society as a whole, they eclipse the moral issue at the heart of negligence law, namely, what do persons owe to each other in the way of reasonable precaution when they put each other at risk of physical harm? Persons make claims on one another in their own names, not as proxies for social interests. They rightly demand reasonable precaution because the physical integrity of their persons is an urgent enough interest to impose duties on others. And when they are carelessly injured they are entitled to demand repair because the obligation owed to them to exercise reasonable care for their protection has been disregarded, not discharged.

Corrective justice and civil recourse critics of economic and instrumental theories of tort have exposed serious shortcomings. Their alternative accounts of tort law's primary, obligation-imposing norms, however, have tended to emphasize formal aspects of tort law over substantive ones. Prominent corrective justice and civil recourse theorists have emphasized that "torts are

conduct-based wrongs.<sup>13</sup> Other corrective justice theorists have insisted that tort is “private law” not “public law” and that this is the key to its moral content.<sup>14</sup> The formalism of these accounts appears to have left these accounts with less to say about the content of tort law than their instrumentalist counterparts. The early writings of Calabresi and Posner, for example, offered both detailed interpretations of tort doctrines and detailed prescriptions for their application going forward. Comparable work by corrective justice and civil recourse theorists is hard to find. Indeed, instead of providing frameworks to guide the articulation and application of tort doctrine, prominent strands of corrective justice theory often seem engaged in fighting a rearguard action against modern tort law *tout court*.

Modern, accident-centric tort law arose in conjunction with two other institutions also addressed to the burgeoning problem of accidental harm—namely, direct risk regulation and administrative schemes for the compensation of victims of accidental harm. In New Zealand, these two institutional instruments have displaced tort law from the domain of accidental harm. Prominent corrective justice theorists, however, have been firmly committed to insisting that these alternative institutions have nothing to do with the law of torts. They have placed enormous weight on the bipolar structure of the normal tort lawsuit, have turned wary eyes on tort law’s attempts to grapple with the phenomenon of mass accidents,<sup>15</sup> and have rallied around the thesis that tort is “private law.” On the first page of the Preface to his important and illuminating book *Private Wrongs*, for example, Arthur Ripstein writes, “[t]he central claim of this book will be that the unity of right and remedy is the key to understanding tort law.”<sup>16</sup> This claim entails that tort is one thing and direct risk-regulation and administrative compensation schemes are something else entirely. The former is private law whereas the latter is public law. Accident compensation schemes and direct risk regulation are the “background justice” of the basic structure of society.<sup>17</sup> They are part of the apparatus that provides the “conditions for free persons to set and pursue their own purposes.” Tort law is the “foreground justice” of voluntary cooperation.<sup>18</sup>

This thesis misunderstands modern tort law and makes a mistake about the domain of background justice. Modern tort law took shape as a response to the rise of accidental injury as a pressing social problem. Almost from its inception, modern tort law has competed with other institutional mechanisms as a way of responding to the risks of physical harm that are the normal and expected byproducts of organized activities in an industrial and technological society.<sup>19</sup> The thesis that tort is private law wrongly divides the domains of “background” and “foreground” justice for several reasons. First, the physical integrity of the person is itself one of the necessary “conditions for free persons to set and pursue their own purposes.” It is one of the rights protected against the State by Rawls’ first principle of justice, and it is equally urgent when relations among citizens in civil society are at stake. Second, it, too, is vulnerable to “the tendency of individual transactions to erode the background conditions necessary for everyone to be a full participant in

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<sup>13</sup> Coleman 1995, 56-57; Goldberg & Zipursky 2010, 918.

<sup>14</sup> See, e.g., Weinrib 2012.

<sup>15</sup> Ripstein & Zipursky 2001, 214-49.

<sup>16</sup> Ripstein 2016, ix.

<sup>17</sup> Ibid. 291.

<sup>18</sup> Ibid.

<sup>19</sup> See Smith 1914, 344.

society.”<sup>20</sup> That is the lesson of the struggles over assumption of risk and workplace safety in the latter half of the 19<sup>th</sup> century, and the moral message imparted by economic tales of races to the bottom in the context of product safety. Third, even when accidental injuries attributable to basic productive activities are not at issue, the law of torts protects persons against various forms of impairment and interference by others as they go about their lives as members of civil society. The obligations that it imposes, and the rights that it recognizes, play central roles in establishing people’s freedom to realize their diverse conceptions of the good and lead independent and equal lives. Those rights and obligations, moreover, are enforced by the coercive powers of the state. The questions that it asks and answers sound in basic justice.<sup>21</sup> The laws of tort and contract are as much a part of the basic structure of society as the laws of taxation and property are.

Consider questions that are the bread and butter of tort. Are people entitled to protect their privacy against violation by calling on the assistance of courts? Are they entitled to be free of severe emotional distress, inflicted by others? If so, are they entitled only to protection against intentionally inflicted distress? Or are they entitled to demand that others exercise due care to avoid severely distressing them? When it moves beyond physical integrity, the law of torts specifies the extent to which essential interests of persons—in their psychological integrity, in their privacy, in their reputations, in their economic expectations—are protected against interference by others, and what kind interference they are protected against. These are questions of basic justice. They are distinguished from questions of public justice only in that they are concerned with what we owe to one another in the way of coercively enforceable responsibilities as members of civil society—and not with our relations to the state. Samuel Scheffler summarizes the distinction:

The public law enables society to discharge, through operations like taxation, its responsibility to provide adequate resources and opportunities to all citizens. Private law, meanwhile, regulates the relations and interactions among private individuals as they take responsibility for trying to realize their respective conceptions of the good. For example, the law of contract regulates the voluntary cooperative activities in which they may engage in pursuit of their ends. And the law of torts protects the ability of each to pursue his or her conception of the good against various forms of interference by others. At the same time, private law remains part of the basic structure, because the obligations it assigns individuals, which are necessary to protect their equal freedom . . . must themselves be enforced by the coercive power of the state.<sup>22</sup>

Part of what we owe to each other in the way of coercively enforceable terms of cooperation is protection of our essential interests against unwarranted interference as we go about our lives in civil society.

## II. *The Vulnerability of Modern Tort Law*

The thesis that tort is “private law” makes linked claims about the architecture of justice and the architecture of law. The claim about justice is that tort is foreground—not background—justice. Tort falls into the domain of the justice of voluntary interactions not into the domain of the justice

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<sup>20</sup> Ripstein 2016, 291.

<sup>21</sup> Scheffler 2015, 19.

<sup>22</sup> Ibid.

of mandatory cooperation. The claim about the architecture of modern tort law is more elusive. In one sense, the claim that tort is private law is a commonplace. The conventional wisdom agrees that tort is private law, taxonomically speaking. Private law addresses the relations among persons as members of civil society; public law addresses the relations between the state and persons as citizens. Tort is therefore private law. This is a real distinction, and it has its uses. One might orient first-year students, for example, by telling them that the law of intentional torts and the law of crime overlap extensively. The essential difference between them is that criminal law is public whereas tort law is private. Criminal law is concerned with the state's authority to respond to various wrongs on behalf of the community as a whole whereas tort law is concerned with the rights of the victims of those wrongs to call to account those who have wronged them. Punishment is the characteristic response of the criminal law, whereas reparation is the characteristic response of tort law. This is a perfectly sensible distinction to draw, but it is not deep theory.

### A. Taxonomy and Tort Theory

The distinction drawn in the previous paragraph between public and private law is a rule of thumb classification. As such, it is perfectly fine. Using “private law” in this way, however, does not commit us to thinking of tort law as autonomous from—and discontinuous with—surrounding fields of law. Indeed, this pragmatic way of drawing the distinction is widely accepted by scholars who regard the line between public and private law as porous. Most contemporary American legal scholars regard the distinction between private and public law as taxonomically useful but substantively unimportant. This is thought to go twice over for tort law. Most torts casebooks, for example, take their topic to be not only the private law of torts but also administrative alternatives to tort. Workers' compensation is the original and most famous such scheme but it is hardly the only one. Activity-specific schemes addressing nuclear power, vaccination, and black-lung disease are other examples. These administrative schemes displace otherwise applicable bodies of tort law and address the kinds of harms that also preoccupy tort. Influence runs in both directions between these legal domains.

It is impossible, for instance, to recount the history of assumption of the risk in American law without addressing workers' compensation. By displacing tort law from the domain of workplace accidents, workers' compensation schemes deprived an important, well-articulated doctrine of its principal domain of application. Worker's compensation thus effected a seismic shift in the landscape of tort law. When the doctrine eventually regrouped and reformed, it was a less important, and discernibly different, doctrine centered on recreational accidents. Workers' compensation was also understood as direct repudiation of the principles of responsibility—namely, fault on the employer's side and assumed risk on the employee's—that the common law of torts brought to bear on workplace accidents.<sup>23</sup> Strict liability replaced fault on the employer's side and assumption of the risk on the employee's side was banished entirely. Moreover, once it was established, workers' compensation exerted a powerful influence on the development of tort law itself. To this day, interpretations of the scope of employment under the doctrine of *respondeat superior* show the explicit influence of the enterprise conception of responsibility found in workers'

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<sup>23</sup> See Smith 1914, 344 (arguing that the workmen's compensation acts were organized on the principle of strict liability, which could not be reconciled with the fault liability of the common law, and prophesying that the common law of torts would be reconstructed to be more compatible with the normative logic of workers' compensation).

compensation law. In both cases, legal doctrines attempt to articulate the zone of harm for which *firms* are responsible.<sup>24</sup> Both doctrines articulate forms of collective responsibility.

Health and safety regulations are also commonly understood to be closely related to the central concerns of the law of torts. It is, for example, perfectly intelligible to say that we need environmental law only because the private laws of tort and property are incomplete. If the private law of property could specify and institute entitlements to physical objects completely and perfectly—and if the law of torts could specify and redress impermissible interferences with property and physical health and integrity perfectly—we would not need environmental law. As it happens, a phenomenon like pollution eludes the grasp of tort law. Pollution in its most characteristic form is a critical mass phenomenon and it therefore presents tort law with intractable causal problems. These kinds of observations about the attractions and disadvantages of various legal regimes are commonplace, and of a piece with the fact that accidental harm is a basic and systemic feature of an industrial society. How we respond to accidents is a matter of collective concern, and we have diverse institutional devices at our disposal for doing so. Among these devices, tort law, administrative schemes, and direct regulation of risk are preeminent and overlap in various ways. To be sure, when we choose among them our choice of instrument implicates value judgments as well as effectiveness concerns. Workers' compensation, for instance, empowers workers to call their employers to account for breaching their duties of care less than the common law of torts does, but it also secures greater assurance of recovery for harm suffered. Participation is traded for protection. Even so, it makes sense to see tort and workers' compensation as alternatives on the same institutional menu.

Formally, there is no conflict between the conventional understanding of tort law's relation to alternatives—such as workers' compensation or direct risk regulation—and the thesis that tort is private law, where “the unity of right and remedy is the key to understanding” private law.”<sup>25</sup> Ripstein's claim is theoretical and it is not refuted merely by the fact that it is at odds with the conventional understanding of participants in the practice of tort law. But claims like Ripstein's come at a high price because they deny, and thereby obscure, deep connections between tort and allied fields. It is a singular, and striking, feature of tort law that alone among the major fields of law it is vulnerable to near total eclipse. Tort can be displaced by direct risk regulation and “social insurance”—as it has been in New Zealand. We would think differently about the criminal law if we knew from extant legal experience that it could be replaced entirely by a regime of therapeutic treatment. We would think differently about property if it could be replaced by an institution composed only of use-rights, and differently about contract if it could be thoroughly displaced by a scheme consisting only of imposed “agreements.” Yet the tort law of accidents is vulnerable to just that sort of replacement. It is reasonable to ask tort theory to help us to understand why this is possible, instead of flatly announcing that tort is radically distinct from regulatory and administrative responses to risk just because tort is “private law” whereas its alternatives are “public law.” Even if it is true, as Martin Stone and Ernest Weinrib have eloquently argued, that tort law responds to a predicament inherent in the structure of human agency itself—namely, the fact that one person's

<sup>24</sup> See Keating 2001.

<sup>25</sup> Ripstein 2016, ix.



doing may be another's suffering—it does not follow that there is only one way to respond to this deep feature of the human condition.<sup>26</sup> Our legal institutions belie that claim.

The celebration of tort as “private law” also runs the risk of being insufficiently sensitive to the dangers attendant on taking any sphere of law or social life to be “private” in one common sense of that term. Part of what Ripstein and Weinrib mean when they call tort law private is that private law concerns itself with matters which are of concern only to the parties to the private lawsuit at hand. Ripstein writes: “I will unashamedly maintain that the point of tort litigation is to resolve the specific dispute between the parties currently before the court, based entirely on what transpired between them.”<sup>27</sup> This comes uncomfortably close to suggesting that private law governs a domain of human interaction which is fully sheltered from larger social and political issues. Yet even in civil society the relations among persons are always entangled with larger questions of justice and injustice. Damage awards in tort lawsuits, for example, may be infected by gender and racial discrimination, past and present.<sup>28</sup> To simply exclude this fact from consideration because social injustice is not something that “transpired between” the parties is to risk injustice.

Weinrib has pushed even harder on the idea that “private law” is an autonomous sphere remarking that it is “just like love” in needing no independent justification.<sup>29</sup> Private law may well realize distinctive values which can only be realized through its practice. Even so, we do well to recall John Rawls pointed remark that “[i]f the so-called private sphere is a space alleged to be exempt from justice, then there is no such thing.”<sup>30</sup> Chess and other games may be legitimately governed almost exclusively by their own internal values, but important domains of social, economic, or political life cannot claim autonomy in that way. Private law legal institutions must be grouped with important domains of social, economic, and political life, not with sports and games. They address issues of fundamental concern such as the ownership and use of external objects and the structure of voluntary agreements, and they are coercively enforceable. Games and sports implicate basic questions of justice when they are workplaces, but they are relatively insulated from such concerns when they are merely amusements. Private law legal institutions, though, are part of the basic structure of society and must answer to generally defensible principles of justice.

It is, therefore, starkly implausible to assert that tort law might be “private” in the sense of being autonomous from the rest of social life. In the case of the law of torts, we must always be prepared to ask if its attempts to secure various interests from wrongful interference at the hands of others are both justified and reasonably successful. In our legal system, the law of torts is the principal legal institution whose role it is to specify which interests of ours as members of civil society are sufficiently urgent to warrant protection against interference at each other's hands

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<sup>26</sup> Weinrib 2012; Stone 2001, 131-82.

<sup>27</sup> Ripstein 2016, 23.

<sup>28</sup> See Avraham & Yuracko 2017, 661-731.

<sup>29</sup> Weinrib 2012, 6 (“Explaining love in terms of extrinsic ends is necessarily a mistake, because love does not shine in our lives with the borrowed light of an extrinsic end. Love is its own end. My contention is that, in this respect, private law is just like love.”)

<sup>30</sup> Rawls 2001, 166. Philosophical libertarians may be the principal exception to the generalization that political philosophers generally reject the thesis that any sphere of social life is beyond the reach of public authority. By assigning great priority to property rights and contractual agreements libertarianism may adopting an essentially private conception of authority. Philosophical libertarianism exists in the legal academy in general, and in tort theory in particular, but it is not the prevailing point of view.

through the coercive mechanism of law. The primary obligations of care and non-interference that tort imposes (and the secondary rights of reparation that it recognizes) secure a significant measure of protection for the interests that tort brings within its domain. *Some* such specification is necessary to enable people to pursue their conceptions of the good as members of civil society. Insofar as the core of tort law is concerned with protecting the physical and psychological integrity of our persons from harm, tort law plays an important role in securing basic justice.

On the face of the matter, it is every bit as important that the terms on which risks of accidental harm are imposed and accepted be fair, as it is that the terms on which basic productive activities are conducted be fair. Accidental physical harm impairs basic powers of human agency, and the law of torts more generally protects interests that have collectively been deemed important enough to be made coercively enforceable. The flip side of this coin is that obligations imposed in order to avoid such harm limit the general liberty of persons as they go about their business. To generalize, the basic role of tort law is to reconcile our competing claims to various forms of security and liberty as members of civil society. In our world, tort is a member of a family of institutions which discharge this responsibility with respect to risks of accidental physical harm. Administrative compensation schemes and direct regulation of risk are its principal siblings in this family. It makes sense, therefore, to seek to understand these institutions as sometimes competitive, sometimes complementary institutions for reconciling liberty and security, not to conceive of them as wholly separate legal institutions, walled off from each other in their own autonomous domains where they live solely by the rule of their own internal ideals.

## **B. Alternative Conceptions of Tort**

Champions of the idea of private law put great weight on tort law's formal structure, but they also make claims about its substance. Indeed, substance is supposed to follow from form. Following in the footsteps of Weinrib, Arthur Ripstein argues that relationality and responsibility are at the heart of private law. Private law's distinctive domain is the direct interactions of persons as members of civil society. It "regulates the relations and interactions among private individuals as they take responsibility for trying to realize their respective conceptions of the good."<sup>31</sup> Those relations are sharply and starkly reflected in the bipolar structure of tort adjudication. The lesson of that bipolar structure is that the only normative considerations that matter to private law are considerations reflected in the bipolar relationship between the parties to a tort lawsuit—between the parties, say, as doer and the sufferer of the same wrong.<sup>32</sup> This, then, is the distinctive sense in which private law theory insists that tort law is private: *only* the relations between the parties should count in determining their respective rights *vis à vis* each other.

Next, both Ripstein and Weinrib take something approaching universal fault liability to be the only proper principle of responsibility in tort.<sup>33</sup> Fault is a kind of golden mean between the extremes of no liability and strict liability. No liability allows the terms on which potential injurers and potential victims interact to be fixed unilaterally by the wills of potential injurers. No liability permits potential injurers to impose any risks that they choose to impose. Strict liability, as Weinrib and Ripstein understand it, errs in the opposite direction. Under strict liability the claims of potential

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<sup>31</sup> Scheffler 2015, 19.

<sup>32</sup> Weinrib 2012; Stone 2001, 131-82.

<sup>33</sup> *See generally*, Ripstein 2016, and Weinrib 2012.

victims to security unilaterally fix the terms of interaction. Fault liability is a golden mean which reconciles the wills of potential injurers and potential victims in a way which is properly mutual.

The normative attractiveness of this thesis depends in part on the persuasiveness of the strongly Kantian perspective it articulates. Its interpretive persuasiveness, however, rests heavily on whether it makes compelling sense of the tort law that we have. On this axis of assessment, there are significant problems. For starters, two forms of strict liability are plainly prominent in American tort law.<sup>34</sup> One form protects powers of discretionary choice. Trespass, conversion, and some batteries are the most prominent examples of this kind of strict liability. Distinctively, this form of tortious wrong can be committed without inflicting harm. The wrong lies in crossing a protected boundary without permission. The other prominent form of strict liability requires the infliction of harm. Whereas negligence liability imposes responsibility on harm that should have been avoided *because it should have been avoided*, harm-based strict liability imposes responsibility on harm that should not have been avoided *on the ground that it was wrong to harm-without-repairing*. The conditional privilege of private necessity, nuisance liability in its most distinctive modern form, strict liability for manufacturing defects, *respondeat superior* in its modern form, and strict liability for abnormally dangerous activities are the most prominent instances of this type of strict liability. Ripstein and Weinrib are disposed either to deny that these forms of liability are truly strict, or to push them out of tort law proper. Weinrib, for example, conceives of the strictness of nuisance liability as an expression of property conceptions—not tort ones—of *respondeat superior* as an expression of agency conceptions—not tort ones—and conditional privilege as the expression of restitutionary conceptions—not tort ones.<sup>35</sup> Ripstein, for his part, recasts strict liability for abnormally dangerous activities as negligence by another name.<sup>36</sup>

These maneuvers to recast tort so that it is not riven by competing principles of fault and strict liability yields the substance of private law as Ripstein and Weinrib conceive it. The upshot of their combined commitments to bipolar relationality, the union of right and remedy, and fault as the governing principle of responsibility is a “traditional” conception of private law. Ripstein and Weinrib cast this law as our law of torts by purging tort law as we know it of those aspects of tort law which do not cohere with their conception. The law that they thus imagine us to have is a pre-modern law of torts. The interactions governed by the law of torts are taken to be interactions among individual persons in civil society whose paths happen to collide as they go about their separate lives and pursue their distinct ends. When these persons and pursuits collide, the question is whether that collision is a case of one person wronging the other through faulty conduct.

The social world that Ripstein and Weinrib implicitly assume is Holmes’ world of “isolated, ungeneralized” wrongs, not our world of organized risk. At best, this social world corresponds to pre-modern moment in the history of tort law. At worst, “private law” so conceived is simply an idea which has never been made actual. Fault, understood as a general principle of responsibility, is a creature of modern tort law, not part of a traditional conception of tort which precedes its modern incarnation. Modern tort law, for its part, is at odds with private law theory’s traditional conception of the subject in fundamental ways. For one thing, the generalization of the fault principle was

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<sup>34</sup> The discussion in the text summarizes matters discussed at more length in Keating 2014.

<sup>35</sup> Weinrib 2012, 171-203.

<sup>36</sup> Ripstein 2016, 167.

accompanied by a generalization of strict liability. Fault was the dominant principle and strict liability the exceptional principle.<sup>37</sup> From its inception, modern tort law has been torn between two principles of responsibility and the ebb and flow of those principles is a large part of its modern history. Reducing tort law to the fault principle denies one of the most salient features of modern tort law. For another, Holmes' famous epigram distinguishing between the old and the new worlds of tort<sup>38</sup> was not just a distinction between two kinds of accidents. It was also a distinction between two kinds of social worlds.

Stylizing and simplifying, we can call these two worlds the "world of acts" and the "world of activities," respectively. In the "world of acts," risks are discrete. The typical actor is an individual or a small firm which creates risk so infrequently that harm is not likely to materialize from any single actor's conduct. The typical accident materializes out of the activity of isolated, unrelated actors, acting independently (i.e., natural persons or small firms separately engaging in activities on an occasional basis). Taken as a whole, the activities of these individual actors are diffuse and disorganized, and quite possibly actuarially small. The dogfight that precipitated *Brown v. Kendall*<sup>39</sup> is a representative tort in this world: It arose out of a chance encounter between unrelated parties, neither of whose activities were large enough to make such misfortunes commonplace and expected. To invoke the polar opposite case, neither of them is in the business of dogfighting. In the "world of acts," then, risks are isolated, "one-shot" events. Harm, when it materializes, is an accidental misfortune. Because actors are small, and risks independent and uncorrelated, liability rules shift, but do not spread, losses.

In the "world of activities," risks are generalized and systemic. Systemic risks arise out of a continuously repeated activity (the manufacturing of Coke bottles, the transportation of gasoline, the supplying of water by a utility) that is actuarially large. "Accidental" harm is statistically certain to result from such risks: If you make enough Coke bottles some are sure to rupture;<sup>40</sup> if you transport enough gasoline, some tankers are sure to explode;<sup>41</sup> if you leave water mains uninspected in the ground long enough, some are sure to break;<sup>42</sup> if you turn loose enough sailors on shore leave, some of them are bound to return to their ships drunk and wreak havoc.<sup>43</sup> In the "world of activities," both actors and activities are large. In the "world of activities," the typical injury arises not out of the diffuse and disorganized acts of unrelated individuals or small firms, but out of the organized activities of firms that are either large themselves, or are small parts of relatively well-organized enterprises. In the "world of activities," accidental harms can be spread across the enterprises that engender those harms. When the law of large numbers is met, risks are not only certain to issue in

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<sup>37</sup> See Grey 2001; Keating 2012 ("Recovering Rylands"), 543-594.

<sup>38</sup> Holmes 1920.

<sup>39</sup> *Brown v. Kendall*, 60 Mass. 292 (1850).

<sup>40</sup> See *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944).

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

<sup>42</sup> See *Lubin v. Iowa City*, 131 N.W.2d 765 (Iowa 1964). The waterworks chose not to replace mains until they broke because it was inefficient to inspect the mains for signs of incipient breakage and replace them before they broke.

<sup>43</sup> The suit in *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968), arose out of an incident in which a drunken sailor, returning from shore leave late at night to his Coast Guard ship, which was being overhauled in a floating dry dock, opened the valves and flooded the dry dock causing the dry dock to sink and the ship to partially sink. The court, in an opinion by Judge Friendly, affirmed that the conduct was within the scope of employment, because the risk of drunkenness was a risk increased by the Coast Guard's "long-run activity in spite of all reasonable precautions" on its part, and hence was fairly charged to the Coast Guard. *Id.* at 171.

harms, they are also very likely to issue in harms with predictable regularity. When activities are actuarially large, the accidents that they engender will likewise be predictable and regular, and the costs of those accidents can be factored into the costs of conducting the enterprise. The costs of manufacturing and distributing Coke can include the costs of injuries from exploding Coke bottles; the costs of supplying water to households and businesses can include the costs of the damage caused by broken water mains.

The move from the “world of acts” to the “world of activities” is a shift of great significance. First, it deepens our understanding of why accidents emerged as a social problem and took center stage within the law of torts. Accidents are a permanent feature of an industrial and technological society. The scale of modern activities makes accidents a permanent and predictable feature of the social landscape. Avoiding accidents and repairing the harm they do are important, but some level of accidental harm becomes unavoidable. Risk is the price of activity, especially where industry and technology are involved, and when risk is imposed on a large enough scale accidental injury is sure to result. Second, it thrusts the problem of *unavoidable* harm to the fore, not just the problem of avoidable harm. It not only seems impossible to avoid all accidental injury in the modern world, it also seems that some level of unavoidable injury is to be expected and statistically predictable. Surfacing the problem of unavoidable harm in this way also surfaces strict liability. Strict liability speaks distinctively to responsibility for harm which should not be avoided. Modern tort law grapples with the choice between negligence and strict liability because it confronts both avoidable and unavoidable harm. And what strict liability does is not to subjugate the wills of potential injurers to those of potential victims. What it does is to place financial responsibility for harms which should not be avoided on those who inflict those harms. Negligence leaves those losses on the shoulders of their victims.

Tort law’s confrontation with the world of organized risk not only makes strict liability a live alternative to negligence and an attractive one in those circumstances where harm that should not be avoided looms large as a “social problem. It also suggests the possibility that accidental harm should be treated as a matter of collective responsibility. In the “world of activities” it makes perfectly good sense to argue that responsibility for harm wrongly done should be lodged at the level of the activity, at least some of the time. If one of the points of Jeremy Waldron’s Fate and Fortune example is that minor fault may result in massive harm, another is that responsibility for particular accidents should sometimes be lodged with the activity of which they are characteristic.<sup>44</sup> At an aggregate level, individual lapses of care are normal and, indeed, inescapable. Rather than treating each such instance as a case of individual fault attracting personal responsibility, it may be more just to impute such accidents to the activity that spawns them and to share financial responsibility for them among all those who participate in the activity. That is what enterprise liability does, both within and beyond the law of torts.<sup>45</sup>

In Ripstein and Weinrib’s hands, the thesis that tort is private law rules out collective, enterprise conceptions of responsibility by formal fiat. They recast the law of torts as a nearly pure instantiation of individual fault liability. There is nothing *formally* wrong with expelling *respondeat superior* from the law of torts proper by taking it to be a foreign legal conception—the expression of

<sup>44</sup> Waldron 1995.

<sup>45</sup> See Keating 2001.

agency ideas within a body of law whose subject is wrongs and responsibility.<sup>46</sup> But the maneuver is tendentious and it comes at a high substantive cost. Within the law of torts *respondeat superior* institutes a form of enterprise responsibility at the level of individual firms. It introduces a principle of collective responsibility into the heart of tort law. Conceptions of collective responsibility are one of the principle connections between tort and the administrative schemes with which it competes for the governance of various domains of accidental injury.<sup>47</sup> In the modern legal landscape, the law of torts is one member of a family of institutions which specify responsibilities for avoiding and repairing harm. Administrative compensation schemes and direct regulation of risk loom large in our world, as both alternatives to tort law and responses to its shortcomings. Workers' compensation arose very quickly after the crystallization of modern tort law as a coherent regime, and it arose in part because of the perceived inadequacies of the common law of torts as a response to the problem of workplace accidents in an industrializing world. Workplace risks are an unavoidable feature of an industrial society. Some level of accidental injury is the unavoidable price of industrial activity. The common law's focus on individual wrongdoing and individual consent to risk of harm was poorly matched to the kind of risk imposition to which it responded.

Workers' compensation, with its distinctive combination of strict liability and diminished damages, was not just an alternative to, and replacement for, the common law of torts. It was also a criticism of the common law of torts. Both institutions we understood as responses to the same phenomenon, namely, accidental injury in the workplace. Rightly or wrongly, workers' compensation was judged to be the better response. Direct regulation of risk also emerges in part from perceived shortcomings of the law of torts. Reparation systems may both swing into action too late and be unable to respond to the most serious harms. They may swing into action too late because they come into play after harm is done, and some harms cannot be satisfactorily repaired. They may be unable to respond to the most serious harms because the most severe harm—death—is also irreparable.

We are in danger of outrunning the point. The point is this: An important fact about our accident-centered tort law is that it can be supplanted by a mix of direct regulation of risk and administrative compensation, as in New Zealand. A conception of tort law which supposes that administrative accident schemes and direct risk regulation are metaphysically distinct legal subjects is a conception which impedes understanding the law that we have. In our law, the private law of torts is one of a family of interconnected responses to the problem of accidental injury in an industrial and technological society. This is cause for celebration, not dismay. The private law of torts is one of the institutions available to us to address wrongs which involve accidental harms. In many cases it may be the proper institutional choice. But it is not the only institution, and for good reason. The issues which the law of torts addresses are matters of basic, background justice, even when the matters with which it deals do not emerge from the "world of activities." The law of torts protects persons against various forms of impairment and interference by others as they go about their lives as members of civil society. The obligations that it imposes, and the rights that it recognizes, play central roles in establishing people's freedom to realize their diverse conceptions of the good and lead independent and equal lives. Those rights and obligations, moreover, are enforced by the

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<sup>46</sup> Weinrib 2012, 185-87.

<sup>47</sup> See Keating 2001.

coercive powers of the state. The questions that it asks and answers sound in basic justice.<sup>48</sup> The laws of tort and contract are as much a part of the basic structure of society as the laws of taxation and property are.

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