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A SIMPLE MODEL OF TORTS AND MORAL WRONGS

Steven Schaus*

According to the “standard model” of torts and moral wrongs—the model implicit in leading moral theories of tort law—tort law imposes genuine duties that are distinct from, and only roughly coincide with, our preexisting moral duties. A “tort,” on this model, is a distinctive kind of wrong, the breach of a tort-generated duty. In this Article, I suggest that moral theories of tort law start with a simpler story—one that dispenses with a distinct domain of tort-generated duties. According to what I call the “simple model” of torts and moral wrongs, tort law aims to recognize and respond directly to moral wrongs. Because tort law recognizes only certain moral wrongs, however, and then only in a coarse-grained, institutional way, tort law tends to diverge from other forms of moral assessment and accountability. All the same, a “tort” is simply a moral wrong in which tort law takes a distinctive kind of interest, on this model, not a distinctive kind of wrong. I aim to show that the simple model provides a more natural and illuminating way to think about the relationship between tort law and interpersonal morality. And I suggest that the model can fit and explain the law that we have, contrary to what some have supposed. Along the way, I seek to show that the simple model has important implications for tort theory, and inescapable practical significance too.

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INTRODUCTION

If I were to shove you to the ground, or take your laptop, or burn down your house in an ill-advised attempt to burn the paint off mine, I would wrong you (other things being equal), just as a matter of interpersonal morality.¹ By the same token, I would commit torts against you too—the torts of battery, conversion, and negligence (other things again being equal). This partial convergence of torts and moral wrongs is more or less obvious, I take it. Yet, the nature of the relationship between the two—between the wrongs of tort law and the sometimes-coinciding wrongs of interpersonal morality—is far less obvious, at least if we’re to judge by how much has been said about the question. If you weren’t familiar with these debates in tort theory, though—if you weren’t yet burdened by thoughts of reversing unjust transactions, let alone by thoughts of cheapest cost avoiders—you might think the question has a more or less obvious answer—that there’s a simple story to tell about the basic relationship between torts and moral wrongs.

Tort law, in this telling, is an institution that aims to recognize and respond directly to moral wrongs. When you discover that I took your laptop, for instance, you’re entitled to lodge a moral complaint with me. If for some reason that isn’t enough, however—if I do not recognize my own wrong in response, for instance—then you have the option to file a legal complaint against me too. At that point, tort law stands ready, if you make your case, to recognize my wrong against you—that is, to recognize the very moral wrong that you might have complained of outside the courts. Of course, there are often good reasons for tort law to recognize only certain kinds of wrongs, and then only under certain conditions, and then only in a coarse-grained, easy-to-administer way. So we shouldn’t expect tort law to track the moral features of our relationship with total precision, even in this simple story. All the same, you might think, a “tort” is nothing more than a moral wrong in which tort law takes a distinctive kind of interest.

Now, it would take some work to spell this out in any kind of detail—to explain why tort law should recognize certain moral wrongs in the first place, for instance, and when (and to what degree) the law may do so only roughly. Even in outline, though, a story of this kind

1 To wrong a person, as I’ll use the term, is to “infringe” a claim of theirs, to “breach” the duty correlative to that claim, and this failure may or may not be all-things-considered wrong or impermissible. See *infra* Parts II and III.

seems to promise both parsimony and explanatory power. It's striking, then, that the simple story is not the standard one told: It's not the story told by the best-known economic theories of tort law, to no one's surprise.² But it's not the story told by the leading moral theories of tort law either, and that is more puzzling. Instead, moral theories of tort law—theories that emphasize tort law's ability to secure corrective justice or provide civil recourse, for instance³—tend to say that tort law aims to recognize and respond to distinctively legal wrongs, not moral wrongs. Tort law, in the more standard telling, confers primary rights and imposes primary duties that are distinct from, and only roughly coincide with, our preexisting moral rights and duties. Tort law then recognizes and responds to breaches of these tort-generated rights and duties, not their moral counterparts. So, for instance, if you file a legal complaint after I take your laptop, tort law stands ready to impose liability on me for my legal wrong, but not for the distinct moral wrong that you might have complained of outside the courts. A "tort" is a distinctive kind of wrong, in this picture, not simply a moral wrong in which tort law takes a distinctive kind of interest.

I will call this the "standard model" of torts and moral wrongs, because I believe it is implicit in a wide range of tort theories today. To fix ideas, though, take John Goldberg and Benjamin Zipursky's civil recourse theory of tort law.⁴ Goldberg and Zipursky have long

2 There is a lot to say about this fault line in tort theory, but it is not my focus here. In this Article, I seek to reorient tort theory on the moral side of the rift, but I do hope that by firming up the moral model, I will firm up the moral critique of the economic model too. For a sense of the economic story, see, for instance, LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2006), WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987), or GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970). For the worry that this story elides tort law's primary rights and duties, see, for instance, JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* 34–36 (2001) and JOHN GARDNER, *Backwards and Forwards with Tort Law*, in *TORTS AND OTHER WRONGS* 103, 119–23 (2019) [hereinafter GARDNER, *Backwards*]. For the worry that the economic story can't account for tort law's bipolar form or other aspects of its implementation, see, for instance, Jules Coleman, *The Structure of Tort Law*, 97 *YALE L.J.* 1233 (1988) and Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 *STAN. L. REV.* 67 (2010).

3 A "moral theory," as I use the term, holds that tort is a law of genuinely normative duties, rights, and wrongs, and it provides a moral (typically nonconsequentialist) account of tort law's rules, structure, and function. See, e.g., 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, 1563 (2006) (drawing a distinction between duty-skeptical and duty-accepting theories and a cross-cutting distinction between economic and moral theories); see also Gregory C. Keating, *Strict Liability Wrongs*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 292, 293 (John Oberdiek ed., 2014) (providing a similar characterization of "moral" theories of tort).

4 See JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* (2020) [hereinafter GOLDBERG & ZIPURSKY, *RECOGNIZING WRONGS*]; John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 *TEX. L. REV.* 917 (2010) [hereinafter Goldberg &

maintained that tort is a law of genuine wrongs, and they have defended the substance and structure of tort law in moral terms.⁵ At the same time, Goldberg and Zipursky have been anxious to deny that torts *are* moral wrongs.⁶ Instead, they say, a tort is a legal wrong—the breach of a genuine but nonmoral duty that is “generated by,” and “exist[s] by virtue of,” the “entrench[ment]” of a particular kind of norm in our legal practices.⁷ For this reason, civil recourse theory provides a clear example of the standard model, and I will use it as a stand-in for that model here. But I suspect that the standard model is also implicit in other theories that embrace the claim that tort law “creates” or “imposes” its primary duties, for instance, or endorse the thought that these tort-generated duties “overlap with” or are the “counterparts of” our ordinary moral duties.⁸

In this Article, I suggest that the standard model gets moral theories of tort law pointed down the wrong track. The model posits a set of rights and duties in the space between our underlying moral rights and duties, on one hand, and tort law’s distinctive forms of institutional recognition, on the other. And I think that’s a mistake—an unnecessary and misleading epicycle. That said, I think it takes only a small shift in perspective to get back on course. To do so, moral theories of tort law should abandon the standard model and adopt a more streamlined model in its place—a model that dispenses with a distinct realm of tort-generated duties and recovers much of the parsimony and promise of the simple story we started with. According to the “simple model” of torts and moral wrongs, tort law pursues moral ends, just as the standard model says, but it does so by directly recognizing our ordinary moral rights, duties, and wrongs in a distinctively legal way, not by creating a parallel set of distinctively legal

Zipursky, *Torts as Wrongs*]. I say little about the “civil recourse” part of their view because I believe it is largely compatible with the model I defend here.

5 GOLDBERG & ZIPURSKY, RECOGNIZING WRONGS, *supra* note 4, at 111–46, 358–65.

6 See, e.g., GOLDBERG & ZIPURSKY, RECOGNIZING WRONGS, *supra* note 4, at 86, 96; Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 4, at 919.

7 See GOLDBERG & ZIPURSKY, RECOGNIZING WRONGS, *supra* note 4, at 16, 82, 93, 97, 99, 108–09, 111.

8 See, e.g., JOHN GARDNER, *What Is Tort Law For? The Place of Distributive Justice*, in TORTS AND OTHER WRONGS, *supra* note 2, at 79, 84 [hereinafter GARDNER, *Tort Law*] (suggesting legal duties “come into existence” through “imposition”); GARDNER, *Backwards*, *supra* note 2, at 103, 117 (legislatures and courts “create new primary obligations in the law of torts”); Andrew S. Gold, *The Relevance of Wrongs*, in CIVIL WRONGS AND JUSTICE IN PRIVATE LAW 41, 41–44 (Paul B. Miller & John Oberdiek eds., 2020) (“overlap,” “counterparts”); Avihay Dorfman, *Can Tort Law Be Moral?*, 23 *RATIO JURIS* 205, 205 (2010) (“overlaps”); Stephen A. Smith, *Duties, Liabilities, and Damages*, 125 *HARV. L. REV.* 1727, 1752 & n.70 (2012) (“counterparts”); see also ERNEST J. WEINRIB, *CORRECTIVE JUSTICE* 315, 341–42 (Timothy Endicott, John Gardner & Leslie Green eds. 2012) (“distinctive normative order”); *infra* Part II.

rights and duties. The model's claim, then, is not that there's nothing distinctive about tort law, only that tort law's distinctiveness lies in the form of recognition it provides and in its reasons for providing it, not in the normative order that it recognizes.

In my view, the simple model provides a more parsimonious and illuminating way to think about the relationship between the duty-specifying norms of interpersonal morality and the institution of tort law, and a more fruitful framework in which to pose questions about the point and value of that institution. Ultimately, I believe that the simple model has meaningful implications for the practice of tort law too, even if the initial shift in thinking it calls for is quite abstract. I attempt to illustrate some of the simple model's practical and theoretical potential in what follows. But my primary goal in this Article is more preliminary: it's to loosen the standard model's grip on our thinking, so that we're in a position to see the alternative more clearly. My claim, in pressing for this shift in perspective, is not that the simple model is entirely novel, though aspects of it may be.⁹ Rather, my suggestion is that the simple model has been neglected—that the model, and the arguments that can be advanced for it, have been incorrectly discounted or dismissed. By the end, I hope to convince supporters of the standard model to give the simple model another look.

Part I begins with what might seem like a surprising suggestion: we can get a better grip on the simple model of torts and moral wrongs by thinking about how and why a political community might strive to recognize ruptures of a very different kind. Part II sketches the simple model in more detail and explains why it promises to provide a better framework in which to construct and compare moral theories of tort law. Part III turns to tort doctrine—the feature of tort law that makes the standard model seem irresistible to many. I offer several reasons to think that tort doctrine and morality diverge less (and less

9 For one thing, the simple model resonates with old ways of thinking about tort law, the sort that prevailed before Holmes set tort theory on its modern trajectory. For another, the model plays some part in contemporary tort theory too—sometimes serving as an explicit foil, for instance, and other times as an implicit template. See, e.g., Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 4, at 932 (rejecting the possibility that tort law “happens to attach official sanctions to the commission of conduct that is wrongful in the sense of morally wrongful”); ARTHUR RIPSTEIN, *PRIVATE WRONGS* (2016) (defending a view on which tort law actualizes a particular moral principle, a view that arguably lends itself to a simple-model interpretation); Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 1 (2017) [hereinafter Hershovitz, *Treating Wrongs*] (defending a view on which tort law expressively affirms the wrongs that plaintiffs suffer, a view that arguably lends itself to the same). As I will explain in Part II, it can be surprisingly difficult to say for sure which model a theory has in mind, because key terms are often ambiguous and the distinction between the models is not always salient.

objectionably) than is sometimes supposed. Even in cases where tort doctrine is stubbornly (even appallingly) out of step with morality, however, I suggest that tort theorists can explain our predicament in simple-model terms.

I. RUPTURES AND RECOGNITION

California sits at the intersection of the world's two largest tectonic plates.¹⁰ As these plates negotiate their tense meeting, they release a tremendous amount of energy, which radiates outward in waves. As these waves spread across the surface of the Earth, they cause the ground to shake in complex and sometimes violent ways. For the people who live in California, this means earthquakes, lots of them—something on the order of ten thousand a year in Southern California alone.¹¹ Fortunately, the vast majority are imperceptible; others are unnerving but enduring; only a rare few are harrowing. All the same, the people of California must live with the knowledge that the ground beneath them might shift at any moment. To deal with this fact, Californians have created institutions that can recognize earthquakes and respond to them appropriately.¹² Consider just two (slightly stylized) examples.

First, Caltech is home to the Southern California Earthquake Data Center. In that capacity, Caltech pulls in “real-time” signals from “over 600 remote seismic stations”¹³ and keeps fine-grained records of the ruptures beneath California, stretching back to 1932.¹⁴ Caltech is a research institution, so it cares about recognizing and documenting subtle differences among earthquakes.¹⁵ Fault type, wave type, magnitude, and more—all the scientific detail matters. Given these aims, Caltech is careful to avoid false positives and remains open to refining its published records as better information becomes available.

10 See generally JOHN MCPHEE, *ASSEMBLING CALIFORNIA* (1993).

11 See *Cool Earthquake Facts*, U.S. GEOLOGICAL SURV., https://www.usgs.gov/natural-hazards/earthquake-hazards/science/cool-earthquake-facts?qt-science_center_objects=0#qt-science_center_objects [<https://perma.cc/E38F-5JJ4>].

12 I am using the term “institution” in a broad sense, one that can encompass both organizational structures and entrenched social practices.

13 *What Happens When an Earthquake Occurs?*, S. CAL. EARTHQUAKE DATA CTR., <http://scedc.caltech.edu/recent/whathappens.html> [<https://perma.cc/L2VW-TN6N>].

14 *History of the Data Center*, S. CAL. EARTHQUAKE DATA CTR., <https://scedc.caltech.edu/about/dchistory.html> [<https://perma.cc/5FL6-USY3>].

15 I haven't said what “recognizes” amounts to, but consider this account of the Loma Prieta earthquake: “Car alarms and house alarms are screaming. If, somehow, you could hear all such alarms coming on throughout the region, you could hear the spread of the earthquake.” MCPHEE, *supra* note 10, at 277. Spreading alarms might reliably indicate the presence of an earthquake but don't themselves represent an earthquake as an earthquake, and thus they do not “recognize” an earthquake, as I use the term.

It's a safe bet that Caltech's scientific mission informs its broader institutional approach to earthquakes too, like its hiring decisions and work culture, its investments in instruments and infrastructure, and its decisions to partner with like-minded institutions.

Next, the California Department of Transportation is charged with maintaining the state's transportation infrastructure. To discharge that responsibility, Caltrans relies in part on a custom version of a software program called "ShakeCast."¹⁶ In outline, ShakeCast digests raw seismic data and, if the preliminary data indicate a quake with a magnitude of more than 4.0, the software compares expected ground shaking to known bridge tolerances at thousands of locations.¹⁷ ShakeCast then uses this information to broadcast a list of at-risk bridges to help first responders and emergency inspection teams know where to start.¹⁸ In effect, then, Caltrans takes a particular interest in the functional properties of earthquakes, like their intensity—a measure that, in contrast to magnitude, is determined by an earthquake's effects on the human environment, as judged by human standards.¹⁹ Given these aims, Caltrans works fast and errs on the side of safety. As with Caltech, it's safe to assume that Caltrans's mission informs all aspects of its approach to earthquakes, including its hiring decisions and work culture, its investments in new technologies, and its decisions to partner with like-minded institutions.²⁰

Now, imagine that we show up in California after these institutions have been up and running for a long time—long enough, anyway, for these resource-constrained, path-dependent practices to have undergone several on-the-fly recalibrations in response to advances in seismology, changes in infrastructure technology, and shifts in political

16 Loren L. Turner, David Wald & Kuo-Wan Lin, *ShakeCast: Caltrans Deploys a Tool for Rapid Postearthquake Response*, TR News (2009), <http://onlinepubs.trb.org/onlinepubs/trnews/trnews261RPO.pdf> [<https://perma.cc/9QBU-4U9M>]; *see also* *Shakecast Alert System Becomes Model, Mile Marker* (2017), <https://dot.ca.gov/-/media/dot-media/programs/risk-strategic-management/documents/mile-marker/mm-2017-q4-shakecast-a11y.pdf> [<https://perma.cc/FQG7-ES88>].

17 *See* Turner et al., *supra* note 16, at 41.

18 *See id.* The broader public safety response includes many other ingenious details. *See, e.g.*, Katherine Schulz, *The Really Big One*, NEW YORKER (July 13, 2015), <https://www.newyorker.com/magazine/2015/07/20/the-really-big-one> [<https://perma.cc/H8QZ-P888>].

19 *What Is the Difference Between Earthquake Magnitude and Earthquake Intensity? What Is the Modified Mercalli Intensity Scale?*, U.S. GEOLOGICAL SURV., <https://www.usgs.gov/faqs/what-difference-between-magnitude-and-intensity-what-modified-mercalli-intensity-scale> [<https://perma.cc/PK46-G3V7>].

20 Not all these institutions and practices are "public" either. *See, e.g.*, Dieter Bohn, *Android Is Becoming a Worldwide Earthquake Detection Network*, VERGE (Aug. 11, 2020), <https://www.theverge.com/2020/8/11/21362370/android-earthquake-detection-seismometer-epicenter-shakealert-google> [<https://perma.cc/7TBE-XJM3>].

priorities. And suppose we try to make sense of what we find—to identify the real patterns in the accumulated noise. We infer that the activities of Caltech and Caltrans are related. After all, the two institutions are often in sync, and their correlations are tightest right after impossible-to-miss, earth-shattering events. Yet, we can't help but notice striking divergences too. For example, Caltech seems to register thousands of events that seem invisible to Caltrans, and in at least some cases, it's Caltrans that seems to register events that are invisible to Caltech.²¹ And even when both institutions spring into action at the same time, they often disagree about the relative significance of what they're seeing (e.g., when ruptures occur way out in the Mojave Desert)—and they always disagree about the appropriate response.²² If we pay attention to the people working inside each institution, moreover, we'll find them worried about different kinds of problems and drawn toward different kinds of solutions. An argument that strikes the scientists at Caltech as compelling, for instance, might strike the engineers and political appointees at Caltrans as hair-splitting or naive. (The eye-rolls run in both directions, to be sure.)

As we sift through all this evidence, we might be tempted, perhaps for just a moment, to suppose that Caltech and Caltrans are aiming to recognize distinct kinds of things—*Caltechquakes* and *Caltransquakes*, respectively, the existence and properties of which only roughly coincide. But that would be a mistake, to say the least. We know there is a much simpler story to tell, even if we don't yet know all the details.²³ We care about earthquakes for different reasons, from the scientific to the safety-related, and the institutions we create will reflect and embody these distinct concerns, in both form and function. As a result, our rupture-recognizing institutions will not always move in lockstep, even if their essential concern is a shared one. In broad strokes, that is what explains why Caltech and Caltrans are only roughly

21 Because Caltrans aims to recognize earthquakes in a way that promotes public safety, the thought is, the costs of undershooting are quite high, and that might lead the institution to tolerate a higher number of false alarms—cases where bridges get a needless inspection in the hours or days before Caltech makes its final determination. Cf. Rong-Gong Lin II, *Earthquake Warning System Will Come with Some False Alarms and Missed Alerts*, L.A. TIMES (Oct. 11, 2018), <https://www.latimes.com-/local/lanow/la-me-ln-earthquake-early-warning-expansion-20181011-story.html> [<https://perma.cc/6RMB-G52M>].

22 What's worse, it's all too easy to imagine that institutions like Caltrans diverge from those like Caltech by taking the effects of earthquakes more seriously in some parts of the state and less seriously in others, in ways that reflect and reinforce race- or class-based disadvantage.

23 To be clear, the point is not that we can't multiply our terms. For all I've said, we might decide to use the term "Caltransquake" in certain contexts. But we should not let our term draw us into theoretical questions about Caltransquakes—as if they are entities or events to be catalogued alongside the entities and events of seismology.

in sync. And that is what explains why the scientists at Caltech and the engineers at Caltrans think about their roles in different terms. Our final theory should include earthquakes in which our institutions take distinctive kinds of interest, in other words, but no institution-specific kinds of earthquakes.²⁴

* * *

To state the obvious, this model of rupture and recognition is grounded in a very different subject matter, so we will need to be careful not to put too much weight on the analogy. Still, I think the thought experiment highlights some striking similarities—from the central role of ruptures, to the human vulnerabilities that the ruptures implicate, to the individual and collective responsibilities we have to respond to them in fitting ways, to the divergent institutional forms we use to discharge these responsibilities—and I will touch on it again at various points below. As I see it, though, the real benefit of starting here, so far from tort law, is that it enables us to encounter questions about the objects of institutional recognition—questions about what, exactly, our institutions are recognizing—in a context where one set of answers strikes us as unequivocally correct. For that reason, the simple model of seismic rupture and institutional recognition can serve as a useful touchstone when we turn our attention to other social institutions, including the law, where the intentional objects of our institutional responses are often less clear.²⁵

II. WRONGS AND RECOGNITION

As Californians negotiate their lives together, they (like us) don't always live up to moral standards. In particular, they (like us) don't always manage to live up to the standards that specify the duties they owe to one another.²⁶ When one person breaches a duty owed *to* another, as I'll use the terms, they fail to accord a claim that another has *against* them, and for that reason it makes sense to say that what

24 This is true even if we make the institution more “legal.” Imagine, for instance, that a California law grants individuals claims against the Earthquake Authority, the state-backed earthquake insurer, to partial reimbursement for earthquake damage, provided that the damage is not caused by the homeowner's failure to comply with safety recommendations and the claim is filed in time. As before, we should say only that California's institutions recognize ordinary earthquakes in (yet) a(nother) distinctive way.

25 See R.A. Duff, *Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 BUFF. CRIM. L. REV. 147, 155 (2002) (suggesting that “any practice of blame, condemnation, or holding liable” will “require an intentional object on which [such responses] are focused and towards which they are directed”).

26 See T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 6 (1998).

the duty-bearer has done is a wrong to the claim-holder.²⁷ Most of the wrongs that Californians suffer are relatively minor; others are unnerving but endurable; but more than a few, unfortunately, are life-altering. In short, then, Californians must live with the fact that, as both potential wrongdoers and potential victims of wrongs, the ground beneath them might shift at any moment.²⁸ At the same time, Californians, sensitive to the complex “waves of duty” that these moral ruptures generate,²⁹ have found ways to recognize wrongs when they occur and respond to them appropriately.

To start with, Californians participate in our shared practice of moral accountability. This practice enables us to adopt stances toward one another that reflect the existence of, and seek to hold one another to, moral standards.³⁰ We can make demands and lodge complaints, for instance, and we can seek and give explanations, apologies, compensation, and more. We must also decide what to make of those who fail to meet moral standards. Is it appropriate to blame them, for instance—to take up and express “reactive attitudes” like resentment and indignation—or to otherwise think differently of them?³¹ Or do they have justifications or excuses that should deflect blame of this kind, if not our demands for apology and compensation?³² There is of course more to say about this practice—about its internal logic, its function, and its justification.³³ The important point, for our purposes, is that the practice enables Californians to recognize moral wrongs with some precision, and to adopt and express fitting attitudes and stances in response.³⁴

27 I say more in Section III.A.

28 Compare HARRY G. FRANKFURT, *Equality and Respect*, in NECESSITY, VOLITION, AND LOVE 153 (1999) (discussing loss of trust in the stability of reality in the wake of mistreatment), with ELENA FERRANTE, *THE STORY OF THE LOST CHILD* 172 (Ann Goldstein trans., Europa Editions 2015) (discussing the same in the wake of an earthquake).

29 Jeremy Waldron, *Rights in Conflict*, 99 ETHICS 503, 510 (1989) (arguing that our moral duties are “backed up” by “waves of duties” that implicate many individuals and institutions); see also RIPSTEIN, *supra* note 9, 244 (“[A] wrong in violation of [an] obligation will always have a magnitude . . .”).

30 See, e.g., R. JAY WALLACE, *THE MORAL NEXUS* 67–76 (2019).

31 See, e.g., P.F. STRAWSON, *Freedom and Resentment*, in FREEDOM AND RESENTMENT AND OTHER ESSAYS 1 (2008); see also T.M. SCANLON, *MORAL DIMENSIONS* (2008) (emphasizing a broader range of blaming responses).

32 See, e.g., JOHN GARDNER, *The Gist of Excuses*, in OFFENCES AND DEFENCES 121 (2007); Erin I. Kelly, *What Is an Excuse?*, in BLAME 244 (D. Justin Coates & Neal A. Tognazzini eds., 2012).

33 See, e.g., BLAME, *supra* note 32 (collecting essays on many of these issues).

34 By “recognize,” here, I mean that the practice allows them (individually and collectively) to represent a wrong as a wrong—to “mark out [an] event as [a] wrong.” See Pamela Hieronymi, *Articulating an Uncompromising Forgiveness*, 62 PHIL. & PHENOMENOLOGICAL RSCH. 529, 546–47 (2001).

In addition, of course, Californians maintain an institution that lets people file complaints against one another for committing “torts.” The basic operation of this institution is familiar as could be. In short, a plaintiff sets things in motion by claiming that a defendant acted in a way that amounts to a “legal wrong” with respect to them, and that the plaintiff is therefore entitled to a response from the court. If the plaintiff prevails, the court will enter the judgment that the defendant wronged the plaintiff and award a remedy in service of that judgment. The process by which this institution defines “legal wrongs” is no less familiar. By and large, California’s courts articulate, test, and refine their definitions of plaintiffs’ rights and defendants’ duties through a case-by-case, common-law process. Over time, this process has produced a set of legal wrongs, or torts, that bears a rough (and seemingly non-accidental) resemblance to the core wrongs of interpersonal morality.

Now, placing these institutions side by side raises an obvious question: How should we understand the relationship between California’s tort-recognizing, remedy-ordering legal institution, on one hand, and its wrong-recognizing, accountability-demanding moral practice, on the other? And more to the point, perhaps, how should we understand the relationship between the ruptures recognized in each? It is tempting to say that these institutions are organized around distinct kinds of duties, the breach of which constitutes distinct kinds of wrongs. And in fairness, there’s a lot about tort law that seems to support that thought. After all, our moral practices recognize countless ruptures that tort law ignores completely. And tort law, to judge both by its doctrinal tests and its case-by-case verdicts, seems to detect non-trivial ruptures in a range of cases where it is difficult to find much moral fault in defendants or in their actions. (Tort law also responds to wrongs in a comparatively blunt and one-note way, it’s worth noting, even when it is otherwise in sync with our moral responses.) What’s more, participants in the two practices focus on different kinds of problems and reason their way toward different kinds of solutions. An argument that strikes a judge as compelling, for instance, might seem artificial or even obtuse to those in the broader moral practice. Against this backdrop, the thought that the institutions are centered on distinct kinds of duties may seem as parsimonious as it does familiar.

In effect, the standard model refines and formalizes this familiar way of thinking about torts and moral wrongs. According to the standard model, recall, the institution of tort law creates (in some sense, and for some purpose) a set of genuinely normative rights and duties that are distinct from, and (for various reasons) only roughly coincide with, our ordinary moral rights and duties, and that tort law then recognizes (in some sense, and for some purpose) the breach of

these distinctive rights and duties, not their moral counterparts.³⁵ Of course, the rough overlap of moral and legal duties is not an accident, even on the standard model. If tort law has moral aims (as many standard-model views claim), then tort law may need to reflect and reinforce at least some basic moral norms. Indeed, the duties imposed by tort law may even be constrained, in some contestable sense, by what is morally intelligible.³⁶ Because tort law creates its primary duties, however, and because in doing so the institution is pursuing its own distinctive ends, tort law's duties and hence its wrongs sometimes diverge from their moral counterparts in ways that make them both under- and overinclusive, from the perspective of ordinary interpersonal morality.

As I noted at the outset, John Goldberg and Benjamin Zipursky defend an influential account of tort law that exemplifies the standard model's core features.³⁷ Goldberg and Zipursky are among the leading proponents of the view that tort is a law of genuine wrongs, not simply a law of (say) cost-optimizing liability rules. But they have been anxious to deny that torts *are* moral wrongs, even as they argue that the practice of tort law has moral underpinnings.³⁸ Instead, Goldberg and Zipursky maintain that the duties of tort law are "generated by" and "exist by virtue of" the institution of tort law, which renders them distinct from our moral duties, even where their content coincides.³⁹ Take the tort of battery. Goldberg and Zipursky propose that a "battery" is an action inconsistent with a hypothetical relational directive—a norm detailing treatment that is owed to, and can be claimed by, another⁴⁰—"specifying that a person must not intentionally touch another in an offensive or harmful manner."⁴¹ Battery is a tort in our actual legal system, they continue, because this relational norm has been affirmed in authoritative judicial decisions, and is thus "entrenched" in our

35 I include the parenthetical phrases to stress that the standard model is only a model, which might be filled in by different theorists in different ways.

36 See, e.g., GARDNER, *Backwards*, *supra* note 2, at 121 ("Legal obligations must also satisfy what I like to call the 'moral intelligibility' condition. They must be such that, if only the law were justified, they would be moral obligations.").

37 See GOLDBERG & ZIPURSKY, *RECOGNIZING WRONGS*, *supra* note 4; Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 4.

38 See, e.g., GOLDBERG & ZIPURSKY, *RECOGNIZING WRONGS*, *supra* note 4, at 87, 96; Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 4, at 919; see also John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS*, *supra* note 3, at 17, 27.

39 See GOLDBERG & ZIPURSKY, *RECOGNIZING WRONGS*, *supra* note 4, at 16, 82, 93, 97, 108–09, 111.

40 See *id.* at 92–93.

41 *Id.* at 111.

practice.⁴² And what this means, in their account, is that tort law has brought into existence a parallel set of duties not to touch people in harmful or offensive ways, not that tort law has incorporated a set of moral duties into a parallel practice of accountability.⁴³

Civil recourse theory is perhaps the standard-bearer of the standard model, then, in part because Goldberg and Zipursky are so clear about the mechanics of their view. In my view, however, civil recourse theory is not the only position in contemporary tort theory that embraces or draws on the standard model. For instance, Ernest Weinrib contends that the rights and duties of tort law are part of a “distinctive normative order” made determinate by the institution of tort law, and expressly rejects the thought that tort law provides a distinctively legal way of recognizing or rendering determinate an underlying moral order.⁴⁴ John Gardner, though difficult to place in some ways, often wrote as if the standard model were true too—as though the institution of tort law “created” or “imposed” genuine duties that existed alongside the duties of “raw” morality.⁴⁵

I don’t mean to rest too much on any one example, but I do think that these (and other) examples illustrate a more general pattern in moral theorizing about tort law—a pattern that suggests the influence of the standard model. If you read through contemporary work in tort theory, you’re bound to encounter a version of the claim that tort law “imposes,” “creates,” or “establishes” its primary duties, as well as a version of the (seemingly related) claim that tort law’s duties “overlap with,” “exist” alongside, or are the “counterparts of” our moral duties.⁴⁶ To be fair, these phrases can be read in multiple ways—to

42 See *id.* at 4, 111.

43 In a moment, though, I will suggest that their ideas might be redeployed in this way.

44 WEINRIB, *supra* note 8, at 315, 341–42; see also ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 50 (1995) (“[W]e cannot start with morality—even noninstrumental morality—and consider [tort] law merely a means of implementing it.”).

45 See, e.g., GARDNER, *Tort Law*, *supra* note 8, at 84 (“Legal rights and legal duties . . . are respectively *conferred* and *imposed* by someone . . . [C]onferral and imposition (whether intentional or accidental) is how legal rights and duties respectively come into existence.”); GARDNER, *Backwards*, *supra* note 2, at 103 (explaining the “textbook” view that tort law’s obligations are “imposed directly by the law”); *id.* at 117 (suggesting that legislatures and courts “create new primary obligations in the law of torts”). In at least one place, Gardner expressed a slightly different view, one that seems much closer to the simple model. See, e.g., JOHN GARDNER, *Breach of Contract as a Special Case of Tort*, in *TORTS AND OTHER WRONGS*, *supra* note 2, at 345 [hereinafter GARDNER, *Breach*] (“According to the law, many tort-law obligations would exist apart from the law and the law only tries to give effect to them. The law may of course give them a curious legal interpretation in the process, thereby crossing the line from legal recognition to legal creation.”).

46 See, e.g., Stephen Darwall & Julian Darwall, *Civil Recourse and Mutual Accountability*, 39 FLA. ST. U. L. REV. 17, 27 (2011) (suggesting that torts “involve violations of bipolar legal

“impose” an obligation, for instance, might be to *press a norm on you* rather than to *create a norm for you*—so the thought that the standard model is what stands behind these expressions is not a sure thing.⁴⁷ Still, the widespread use of these phrases suggests to me that the standard model is treated as something like common ground by moral theories of tort law—that it serves as an implicit template or schema, even for tort theorists who do not expressly embrace it.

To be clear, I don’t think it’s an accident that the standard model exerts this kind of gravitational force. There is no question that tort law and morality coincide only roughly, along several important dimensions, and one plausible way to account for this is to suppose that tort law establishes a distinct normative order—that it creates distinct norms, which exist alongside moral norms. What’s more, the standard model seems well-positioned to explain the aspects of tort law that are practice-based and artificial. For instance, to say whether a defendant’s conduct is a tort, we typically need to know whether courts around here have treated similar conduct as a breach of duty, and that is what the standard model seems to predict. In a similar way, if we’re to convince a court that a defendant’s conduct was a tort, we’ll have to present arguments about precedents, the principles implicit in them, and the

obligations, not moral ones,” and allowing that legal obligations “are not themselves moral or even”—departing from Goldberg and Zipursky—“necessarily *de jure* in some broader nonmoral sense”); Avihay Dorfman, *supra* note 8, at 205 (2010) (suggesting that private law’s “subject matter—the legal obligations of persons *inter se*—overlaps substantially with the normative sphere demarcated by the moral question of what we owe one another”); Gold, *supra* note 8, 41–44 (suggesting that civil wrongs, including torts, “overlap” with moral wrongs or have “moral counterparts”); Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1878 (2011) (“Strictly speaking, private law enforces legal rights and legal duties, not moral rights and moral duties.”); Gregory C. Keating, *The Priority of Respect Over Repair*, 18 LEGAL THEORY 293, 295, 313, 324–25 (2012) (describing tort law as “imposing” certain duties and suggesting that duties “rooted in tort [law] . . . are fixed by the law itself”); Liam Murphy, *Purely Formal Wrongs*, in CIVIL WRONGS AND JUSTICE IN PRIVATE LAW, *supra* note 8, 19, 22 (suggesting that the rights, duties, and wrongs of private law are part of “purely formal” “normative order”); Smith, *supra* note 8, 1752 & n.70 (2012) (suggesting that the law creates legal duties “that reflect the law’s view of citizens’ moral duties,” leaving some moral duties with “legal counterparts”); Jean Thomas, *Which Interests Should Tort Protect?*, 61 BUFF. L. REV. 1, 2, 7 (2013) (suggesting that tort law “establishes” legal obligations and takes account of moral obligations “in deciding which [legal] obligations to impose”).

47 As with “Caltransquakes,” the point is not that we could never sensibly *talk* in these terms. I have no objection to using “tort” or “legal wrong” to refer to a complex state of affairs involving a moral wrong that also satisfies the further conditions that entitle a person to a distinctive institutional response (and so forth). Given this possible meaning, it can be difficult to say which model lies behind such terms in any specific case. The important point, for now, is that these ways of talking, even if tenable on some interpretation, would not vindicate the standard model, which embraces a more extravagant metaphysics. *Cf.* Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160 (2015).

reasons that the court should (or shouldn't) hesitate to extend those principles to cases like this one, and these kinds of arguments can seem artificially constrained, from a moral point of view. In contrast, the thought might be, this deliberative practice makes sense on the standard model, because we are reasoning about a distinctive normative order created in part by those very precedents.⁴⁸

* * *

For all its intuitive appeal, however, I believe the standard model involves a mistake. In their effort to draw out, specify, and explain the very real differences between our practices of moral accountability and our practices of tort law, proponents of the standard model seem to have lost sight of a different, simpler, relationship that the two institutions might stand in. In effect, I think the standard model seizes on the wrong pattern in the (admitted) noise of our here-converging, there-diverging practices of moral accountability and tort law. In the rest of this section, I want to highlight a different pattern we might fix on—one that's more in line with the simple model of rupture and recognition we encountered in the last section. Here, too, I'll suggest, we should see how far we can get with a model that's stingy with the kinds of ruptures it contemplates and generous with the kinds of practices and institutions it surrounds them with. In other words, I'll suggest that tort law makes more sense if we see it as an institution that aims to recognize moral wrongs directly—as the realization of a model on which there are ordinary moral rights, duties, and wrongs, on one hand, and distinctively legal forms of recognition and response, on the other, but no rights, duties, or wrongs of a distinctively legal sort.

To illustrate this idea, and to set up my argument for treating the simple model as our starting point, I want to introduce a hypothetical institution—one that is framed as a potential solution to a familiar set of problems with pre-institutional morality. To start, the content of moral principles is not always determinate, especially (but not only) when it comes to questions of enforcement and remedies.⁴⁹ In a similar way, ordinary interpersonal morality provides incomplete guidance about what to do when we disagree about what to do.⁵⁰ As a result, an informal, pre-institutional practice of moral accountability will be ill-equipped to address certain recurring problems posed by life

48 See, e.g., GOLDBERG & ZIPURSKY, *RECOGNIZING WRONGS*, *supra* note 4, at 245.

49 See, e.g., Mark Greenberg, *The Moral Impact Theory of Law*, 123 *YALE L.J.* 1288, 1320 (2014); Tony Honoré, *The Dependence of Morality on Law*, 13 *OXFORD J. LEGAL STUD.* 1 (1993).

50 See, e.g., LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 11–25 (2001).

together with others.⁵¹ In addition, our informal moral practices tend to be ill-suited for tasks that have a distinctively political dimension—tasks like discharging a political community’s collective responsibility to affirm the equal standing of its members, for instance.⁵² For these (or perhaps still other) reasons, then, a political community may elect (or need) to create institutions to more effectively identify, recognize, and respond to certain breaches of moral duty, especially to those breaches that implicate political values.⁵³

Let’s imagine that Californians choose to create a tort-like institution for this purpose.⁵⁴ I describe the institution as *tort-like* because it works like tort law, except that it unequivocally—legibly, self-consciously—aims to recognize moral wrongs directly. In outline, then, the institution empowers individuals to complain of moral wrongs they’ve suffered at the hands of defendants. Californians, acting through their courts, then stand ready to hear disputes and, when appropriate—when plaintiffs have shown that they’ve suffered moral wrongs of the right, public-implicating sort—to issue judgments and award remedies. As these judgments accrue and stabilize, California’s tort-like institution in effect affirms the existence and basic contours of its residents’ moral rights and duties, and in practice commits itself to recognizing certain breaches of those rights and duties when called on.

By hypothesis, California’s tort-like institution is directly concerned with moral ruptures, just as our ordinary practice of moral accountability is. But that doesn’t mean the two institutions should move in lockstep. Indeed, it is not difficult to see why the two practices should diverge, at least in broad strokes. First and foremost, the tort-like institution provides an expensive, invasive, time-consuming form of public recognition—in effect, what John Gardner called the “tort-law kind of recognition.”⁵⁵ And cost aside, some moral wrongs might

51 See, e.g., SCOTT J. SHAPIRO, *LEGALITY* 170–73 (2011) (describing the “circumstances of legality”).

52 See Seana Shiffrin, *Democratic Law*, in 37 *THE TANNER LECTURES ON HUMAN VALUES* 145, 149–53 (Mark Matheson ed., 2018); see also T.M. SCANLON, *Punishment and the Rule of Law*, in *THE DIFFICULTY OF TOLERANCE* 219 (2003); Hershovitz, *Treating Wrongs*, *supra* note 9.

53 Cf. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 *HARV. L. REV.* 708, 752 (2007) (suggesting that contract law aims to “provide support for the political and public values associated with promising”). I mean for the idea of “moral wrongs implicating public values” to be flexible, to accommodate different substantive theories. I don’t mean to prejudge whether some moral breaches are in principle beyond the public’s concern.

54 To be clear, the claim is not that the tort-like institution is a unique solution to the problem I sketched in the last paragraph. See, e.g., Keating, *supra* note 46.

55 See GARDNER, *Tort Law*, *supra* note 8, at 79, 86.

not implicate public values in the right way or to the right degree. On any plausible accounting, then, it won't make sense for a community like California to recognize every moral wrong in the tort-like way. As Linda Radzik puts it, "[t]he state can get involved" when a party host's negligence seriously injures his guest, perhaps, "but not when he negligently leaves his new colleague off the guest list," even if both actions breach a moral duty to the victim.⁵⁶

Moreover, because the institution's judgments serve as implicit commitments to recognize other, relevantly similar wrongs, courts might be sensitive to forward-looking and distributional considerations, even if such considerations would be out of place if they were tasked with making only "pure" moral judgments.⁵⁷ It is also possible, for all we've said so far, that Californians mean to provide only partial protection of plaintiffs' rights, not to enforce those rights to the hilt, even when they are otherwise rights of the right sort. It's possible, in other words, that California's tort-like institution aims to provide only a "tragic," last-resort form of corrective justice.⁵⁸ Last, but not least, the tort-like institution is a recognizably law-like political institution, and that means that it will ordinarily need to rely on special rules (e.g., of decision, evidence, procedure), special roles, special kinds of justifications, and other special devices to render its actions justifiable to those affected by them. In other words, the people tasked with developing California's tort-like institution will need to be sensitive to "distinctively legal" moral considerations too, the sort "whose range is specifically tailored to the special, normatively salient properties of law and its appropriate content and shape."⁵⁹

In short, then, there is every reason to expect the tort-like institution to diverge from our practice of moral accountability—both in the exact moral wrongs it recognizes, and in how, exactly, it recognizes them.⁶⁰ In sketching the role of this hypothetical institution, however, we have not said that it creates new duties, only that it

56 See, e.g., Linda Radzik, *Tort Processes and Relational Repair*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS, *supra* note 3, at 231, 248.

57 See GARDNER, *Tort Law*, *supra* note 8.

58 See, e.g., Radzik, *supra* note 56, at 246 (suggesting that tort law provides only a "tragic form of corrective justice").

59 See Shiffrin, *supra* note 53, at 733 (emphasis omitted); see also Paul B. Miller, *Juridical Justification of Private Rights*, in JUSTIFYING PRIVATE RIGHTS 105 (Simon Degeling, Michael Crawford & Nicholas Tiverios eds., 2020); Stephen A. Smith, *Intermediate and Comprehensive Justifications for Legal Rules*, in JUSTIFYING PRIVATE RIGHTS, *supra*, at 63 (arguing the courts do, and should, draw on "intermediate" rather than "comprehensive" moral considerations to justify coercive enforcement of rights).

60 A political community might create several institutions that divide the moral labor too, so it is also possible that the tort-like institution would focus only on certain aspects of the wrongs it recognizes.

recognizes moral duties in new ways, and there doesn't seem to be anything incoherent about that. To be clear, I don't mean to suggest that it will be simple to work out a detailed theory of this institution. It is not clear, for instance, what *exactly* the point of the tort-like institution is, nor is it clear why it should take the specific shape it does. Is the point to protect rights by providing a baseline level of deterrence, or to affirm rights by engaging in expressive public action, or something else? And when is the divergence of morality and the tort-like form of recognition grounds for criticism and reform, and when is it justified by the "special" reasons that apply to the actions of law-like political institutions? These kinds of questions will be at the heart of tort-like theory, and tort-like theory is bound to be as difficult as tort theory. Still, our doubts about the shape of a final theory of the institution shouldn't lead us to doubt that it's a coherent and even plausible thing for California to set up. With these caveats in mind, then, let's turn from the tort-like institution back to the institution of tort law.

To adopt the simple model of torts and moral wrongs is to suppose, at least as a working hypothesis, that tort law *simply* is an instance of the tort-like institution we've imagined. It is to commit, that is, to explaining tort law as an institution that pursues moral ends (in some sense, and for some purpose), and does so by aiming to directly recognize our ordinary moral rights, duties, and wrongs in a distinctively legal way, not by creating a parallel set of distinctively legal rights and duties. Tort law may specify, augment, reinforce, and in other ways recognize the norms of interpersonal morality, the thought is, but there is no reason to suppose it does so by first approximating these moral norms in a distinctive normative order.

Still, why take this stance toward tort law? The most basic reason—a point I am trying to illustrate as much as argue for—is that the simple model provides a more illuminating way to think about the relationship between the norms of interpersonal morality and the institution of tort law. We are better able to understand tort law, that is, if we think of it in these terms. Tort law, seen as a (barnacled, time-worn) realization of the simple model, is transformed in a subtle but significant way. The institution's distinctiveness is shifted from the normative order it recognizes to the form of recognition it provides. Tort law's primary rights and duties, a dominating concern on the standard model, come to seem more like an illusion created by looking aslant at the institution. At the same time, tort law's connection to moral norms is rendered more direct and transparent, and this renders its point more comprehensible and our anxieties about its outer reaches more acute too.

But set my claims of transformation and illumination to the side, for the moment. In addition, I want to outline three interrelated reasons to treat the simple model as the default view. First, parsimony: if we can make sense of tort law without positing new kinds of rights and duties, then we should, other things being equal. And theoretical economy is especially compelling if, as seems plausible here, the alternative on offer saddles us with hard-to-discharge explanatory debts.⁶¹ Second, fit: I suggest (especially in the next section) that the simple model can fit and explain what we're inclined to think and say about tort law, including what we're inclined to find puzzling or troubling. The claim is not that the fit is perfect, but then the standard model's fit isn't either.⁶² Third, explanation: *if* the simple model fits, it provides the best explanation of tort law's structure, substance, and role too. After all, I've argued, we can imagine a *tort-like* institution that directly recognizes moral wrongs in a distinctive institutional way, and we can imagine why (in general terms) a political community would create and maintain an institution of that kind. I think it would be surprising, then, if our actual institution of tort law were *not* best understood as an (inevitably imperfect) instance of the tort-like institution, given how similar they are in structure, content, and role. At a minimum, it seems to me that we would need strong reasons to extract a different pattern from the data.

So far, I've offered only a sketch of the simple model and the reasons to favor it. In the next section, I'll turn to questions about fit, because fit seem to some like the real sticking point. Before I do, though, I want to say just a word about what might follow for tort theory, if we were to adopt the simple model. Because the simple model is only a model—a theoretical framework—it cannot (by itself) tell us whether, by directly recognizing moral wrongs in its distinctive way, tort law secures corrective justice, provides civil recourse, instantiates a Kantian order of right, or discharges a community's expressive responsibilities, any more than the standard model can. What the simple model claims to settle, in the first instance, are the terms on which these debates should be carried out. In other words, the simple model is not in direct competition with these views, except in that it insists on an explanatory constraint—that these views locate tort law's distinctiveness in the form of recognition it provides and in its reasons for providing it, not in the normative order that it recognizes.

61 For different objections to Goldberg and Zipursky's effort to make room for genuine but nonmoral duties, see Ahson Azmat, *Tort's Indifference: Conformity, Compliance, and Civil Recourse*, 13 J. TORT L. 1 (2020); Murphy, *supra* note 46, at 19; and others.

62 See, e.g., GOLDBERG & ZIPURSKY, *RECOGNIZING WRONGS*, *supra* note 4, at 190–92 (interpreting some strict liability “torts” as licensing rules).

As a result, the simple model would not require us to scrap standard-model theories of tort law. Indeed, some standard-model ideas might survive the transformation with little loss or distortion. Take civil recourse theory again, to illustrate the point. As we've seen, Goldberg and Zipursky argue that tort law "recognizes" a genuine duty when and because a relational directive has become entrenched in our legal practice. As they see it, this means that tort law "generates" a distinct, non-moral duty with the content of the entrenched relational directive.⁶³ Notice, though, that this same basic story might be repurposed to serve as the beginnings of an account of the conditions under which tort law recognizes a moral duty—of the conditions under which civil recourse, an essential aspect of the tort-law-kind of recognition on the Goldberg and Zipursky picture, is available to plaintiffs by right. This repurposed story might also preserve the sense in which Goldberg and Zipursky think that tort law "conveys disdain for" the actions it deems tortious and "expresses an injunctive message" that they are "not to be performed."⁶⁴ You might have doubts about the merits of this proto-account, of course. For now, the point is only that some standard-model stories might be retold in simple-model terms.⁶⁵

To say that some standard-model ideas might survive the transformation is not to say that tort theory will go on exactly as before, though, only with a change in notation. If the standard model is wrong, and moral theories of tort law should be measured against a different standard, that may have far-reaching implications—for tort theory and, ultimately, for the practice of tort law. Some of these implications flow from the simple model itself. To name the most obvious example, the simple model tells tort theory not to puzzle over tort law's primary rights and duties in quite the same way. In addition, the simple model confirms, and better explains, the thought that the tort-law-kind of recognition is subject to a strong (but contestable) "moral intelligibility" constraint—the idea that tort law's content, and the conditions under which it imposes liability, are defective to the extent that they cannot be understood as a representation of, and fitting response to, the moral features of the relationship between the

63 Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 4, at 946.

64 *Id.* at 949.

65 I believe this also helps to make it clear that the simple model is in principle compatible with different views in jurisprudence. Even if tort law aims to recognize certain moral wrongs, that is, it could still be true that the actual existence and content of the tort-law-kind of recognition, as well as a plaintiff's claim to it, are determined in positivist terms.

parties to a tort suit.⁶⁶ Charting the contours of this constraint, and drawing out its consequences for tort doctrine, are important tasks for tort theory.

But not all (or even most) of the simple model's implications will flow from the model itself, and that is due to the nature of its intervention. The primary claim is not that tort theorists have appealed to the wrong kinds of reasons in giving accounts of tort law's substance and structure, though that is possible too. Rather, the primary claim is that tort theorists have posed the questions in the wrong way, and therefore answered them in the wrong terms. So the simple model, if true, would unsettle things in tort theory: it would force us to see familiar facts and controversies in new ways, and that would force us to reconsider the kinds of questions that a moral theory of tort law should aim to answer, as well as the kinds of answers that should count as compelling.⁶⁷ In the end, of course, things may re-settle in a similar place. But first, if the simple model is right, theories of tort law must re-pose many questions, then re-investigate and re-defend answers to them, and it is hard to say in advance whether and to what degree we might change our minds about doctrine, remedies, or litigation in the process.

Finally, the simple model would have inescapable practical significance, even if the model, and the initial shifts in thinking it recommends, are quite abstract. As we confront new and difficult questions of tort law, we—the participants in the practice, including judges—will have to take a stand, if only implicitly, on foundational questions of tort theory, including questions about the institution's fundamental aims. The simple model, by making some of those aims clearer—by making it transparent that tort law seeks to track aspects of morality directly, just in a distinctively legal way—will help to orient, shape, and constrain our thinking when we're engaged in the practice.

These simple-model constraints may make themselves felt at the level of tort doctrine—for instance, as we continue to confront questions about the nature and scope of strict-seeming forms of liability for harms caused by new technologies, or as we get a clearer grasp of distinctive moral problems, like the problems highlighted by the #MeToo movement, that fit only imperfectly in tort law's existing

66 As noted above, some standard-model theorists accept, implicitly or explicitly, a similar intelligibility constraint. See *supra* note 36 and accompanying text. The point is that the existence and content of this constraint makes better sense on the simple model.

67 Some familiar questions—What place do economic considerations have in decisions to extend the tort-law-kind of recognition? How far can the tort-law-kind of recognition deviate from “raw” morality before it is no longer intelligibly “recognizing” morality at all?—may take on a slightly different character, for instance. Other questions may come to seem trivial or ill-posed; still other questions may arise for the first time.

categories.⁶⁸ These constraints may make themselves felt at the level of institutional design in addition or instead. For example, if our law is best understood as an instance of the simple model, then defendants and courts should perhaps have recourse to safety valves (e.g., through procedural motions, sua sponte dismissal, or, failing that, through merely contemptuous damages) in cases that present only de minimis inconsistency with on-the-book doctrinal tests.⁶⁹ There is much more to say about these issues, of course, but at this point I want to turn to a different question—one that can't be put off any longer.

III. DOES DOCTRINE STAND IN THE WAY?

So why isn't the simple model the standard one? As I've already noted, the simple model is not entirely novel, so the problem is not that it's never been considered. Indeed, the model is familiar enough to serve as a foil for standard-model theories,⁷⁰ and it is (at least arguably) implicit in some contemporary work on tort law, and perhaps in older, pre-Holmesian work too.⁷¹ What, then, inclines tort theorists to reject (or neglect) the simple model? I believe there are several main reasons. It is not clear, for instance, that the simple model can fit and explain our deliberative practices. If the simple model were true, wouldn't tort litigation be an exercise in "applied moral theory," rather than the precedent-elucidating practice that we have?⁷² Nor is

68 See, e.g., Martha Chamallas, *Will Tort Law Have Its #MeToo Moment?*, 11 J. TORT L. 39 (2018); Kenneth S. Abraham & G. Edward White, *Torts Without Names, New Torts, and the Future of Liability for Intangible Harm*, 68 AM. U. L. REV. 2089 (2019).

69 See also *infra* Section III.B; cf. R.A. DUFF, *THE REALM OF CRIMINAL LAW* 67 (2018) (arguing in favor of institutional mechanisms to implement a de minimis exception to broad statutory definitions of criminal offenses, so that criminal liability better tracks *malum prohibitum* wrongdoing).

70 See, e.g., Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 4, at 932 (rejecting the idea that tort law "happens to attach official sanctions to the commission of conduct that is wrongful in the sense of morally wrongful").

71 For instance, I believe this is a plausible reading of Hershovitz, *Treating Wrongs*, *supra* note 9, and perhaps of Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765 (2009), and Linda Radzik, *Tort Processes and Relational Repair*, *supra* note 57, too. John Gardner seems to endorse something like the simple model in one of his final essays. See GARDNER, *Breach*, *supra* note 45, at 333, 345. We can read the simple model into Jules Coleman's work too, as Coleman seems less committed than some corrective justice theorists to the idea that the entitlements *on which* corrective justice operates are distinctively legal. See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 34–35 (2001). Finally, I believe Kantian views, like Arthur Ripstein's, are amenable to a simple-model reading, though some Kantians, like Ernest Weinrib, expressly reject that interpretation. Compare RIPSTEIN, *supra* note 9, with WEINRIB, *supra* note 44, at 50.

72 GOLDBERG & ZIPURSKY, *RECOGNIZING WRONGS*, *supra* note 4, at 245; see also Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 4, at 949 (arguing that legal wrongs are

it clear that the simple model can accommodate all of our theoretical commitments about tort law, like the idea that it creates guidance rules rather than mere liability rules.⁷³ Above all, though, it is not clear that the simple model can be reconciled with black-letter tort doctrine—at least, not without implausible revision or distortion. The worry, in other words, is that settled tort doctrine renders the simple model a bad model of our actual institution, whether or not it’s a good model of a different, tort-*like* institution.

I believe that this doctrine-based objection can be overcome, and that the simple model fits and illuminates the law we have well enough, but these points take some spelling out. In the rest of this section, then, I briefly expand on the features of tort doctrine that are thought to cause trouble, and I argue that they provide less support for the standard model—and can be more straightforwardly reconciled with the simple model—than is sometimes supposed.⁷⁴ To start, though, let’s make sure we have the fit-based objection to the simple model in view. At bottom, the objection is that tort law’s assessment of our actions, as determined by well-settled doctrine, diverges from morality’s to a degree that makes the simple model hard to credit. Tort

distinct from moral wrongs because they invite, indeed typically require, different kinds of answers to a person who asks “says who?” when we allege that they’ve committed a wrong).

73 See, e.g., Goldberg & Zipursky, *supra* note 3, at 1564; Keating, *supra* note 3.

74 I believe the simple model has the resources to answer practice- and theory-based concerns too, though I will not develop those answers here. In outline, though, the story of the tort-like institution told above already suggests why we would reason differently when we’re working in the institution than we would outside of it. First, there is no special puzzle about the idea that morality can require us to pay close attention to facts in the past, or to treat them as decisive, or even to reason about moral problems in role-mediated or otherwise “artificial” ways. See Mark Greenberg, *The Moral Impact Theory, the Dependence View and Natural Law*, in *THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE* 275, 280–81 (George Duke & Robert P. George eds., 2017); see also Hershovitz, *supra* note 47, at 1190 (observing how we use heuristics to figure out our moral obligations in our day-to-day lives). Second, although the simple model suggests that moral questions are at the center of tort law, it takes care to say what those questions are. A proponent of the simple model need not accept that the question is simply how things stand between the parties, as if a judge were a moral philosopher. The story of the tort-like institution suggests, for instance, that a political community, acting through its courts, will need to solve several moral equations at the same time, some of which will require sensitivity to history, public expectations, institutional competencies, and the like. At some point, we should pause to wonder what it would have looked like if it had looked as though courts were engaged in applied moral theory in a complex, role-mediated, institutional context. Cf. G.E.M. ANSCOMBE, AN INTRODUCTION TO WITTGENSTEIN’S *TRACTATUS* 151 (3d ed. 1996) (“‘Well,’ [Wittgenstein] asked, ‘what would it have looked like if it had *looked* as if the earth turned on its axis?’”). In addition, to the extent tort law must be understood to provide normative guidance, I believe that its capacity to recognize our moral rights and duties (in part by recognizing breaches of them and imposing liability for those breaches) enables it to play that role.

law's assessment of our actions comes apart from morality's along several dimensions, but here I will focus on tort doctrine's seeming overinclusiveness, because that presents the most direct challenge to the simple model.⁷⁵ If tort law is overinclusive of morality—if certain tort doctrines imply the existence of wrongs when, in point of moral fact, there are none—and if we should treat those doctrines as a fixed point in our thinking, then there is reason to prefer the standard model to the simple one, simply as an interpretive matter. If we are to say that tort law recognizes genuine wrongs at all, that is, we should say that it recognizes a set of distinctively legal wrongs that more nearly corresponds to the normative order described by tort doctrine and judicial precedents.

Goldberg and Zipursky press this objection against the view that tort law “happens to attach . . . sanctions” to morally wrongful conduct.⁷⁶ As they put it, tort theorists have been “disinclined to cast torts as moral wrongs” for “sound doctrinal reasons.”⁷⁷ Indeed, Goldberg and Zipursky contend that tort theorists “cannot characterize torts as moral wrongs without losing the ability to account for large swaths of doctrine.”⁷⁸ Goldberg and Zipursky give two examples to illustrate the concern, and the examples they give come up often in this context. One is trespass to land. In most jurisdictions, black-letter tort law says that a person commits trespass to land when they intentionally enter (or cause something to enter) another person's property.⁷⁹ Because trespass has so few requirements, cases of

75 To be clear, tort law's underinclusiveness and its approach to remedies raise some difficult questions too, and I don't mean to sidestep them too lightly. By and large, though, I do not believe that these forms of divergence ground especially strong objections to the simple *model* of the institution. As we've seen, underinclusiveness is to be expected, even if it's also to be regretted in some cases. Against that backdrop, any specific charge of underinclusion reads to me as an objection to the moral adequacy of our existing institutions, not to the adequacy of the simple model. I am inclined to treat concerns about the form or scope of tort law's remedial responses in the same way—as concerns about how fittingly or fairly tort law is recognizing moral wrongs, not to whether it is doing so in the first place. Moreover, if tort law is out of step with morality in this way, it's not clear why the standard model would help. What features do legal duties have that makes bankruptcy-inducing liability for breaches apt in a way that it could not be for moral breaches? And is the answer, whatever it turns out to be, in fact incompatible with the simple model? A different objection is that tort law's characteristic responses—judgment and damages, basically—are not even intelligible as responses to wrongs. I agree with Goldberg and Zipursky, though, that this objection fails. See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 4, at 932–34, 945–47.

76 Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 4, at 932.

77 *Id.* at 930; see also *id.* at 930–32.

78 *Id.* at 947.

79 See, e.g., RESTATEMENT (SECOND) OF TORTS § 158 (AM. L. INST. 1965). I ignore certain wrinkles, like the role of possession (rather than ownership).

overinclusion can seem inevitable. A defendant's brief, harmless, reasonably mistaken entry into someone else's property fits the elements of trespass in most jurisdictions, but many of us find it difficult to identify any moral defect in the defendant's conduct, let alone in the defendant.⁸⁰ Goldberg and Zipursky claim, at least plausibly, that a person in that situation "has not acted immorally—indeed, has acted reasonably and blamelessly."⁸¹ And yet, that defendant would be liable in tort law if sued. If that were to happen, it would "look[] as though a morally innocent person [were] legally liable."⁸²

The second example is negligence. In outline, a person commits the tort of negligence if they breach a duty of care to the plaintiff, and that breach is the actual and proximate cause of the plaintiff's injury.⁸³ The problem with the tort, from a moral perspective, is not with treating injury-causing carelessness as a wrong. Carelessness is often a moral wrong, and sometimes a quite serious one, though that point is not always taken to heart.⁸⁴ Instead, the problem with the tort, as some see it, is that it measures a defendant's breach by an "objective" standard of care. In the law's view, a defendant must act with the care that would be objectively reasonable in the circumstances, and the defendant's act is defective otherwise. It is not enough, that is, for a defendant to take care to the absolute best of their abilities. The only question is whether the defendant succeeded in acting as a careful person would have. In practice, then, tort law may require us "not to be awkward or a fool."⁸⁵ As a result, some conclude, the doctrine "drives a wedge between those actors one would deem to have acted

80 See *id.* § 164. A trespass must be a volitional act (e.g., getting thrown across a boundary won't do); and a trespasser must intend to enter the land in question (or cause something to enter). See *id.* § 158 cmt. f. But trespass, as it's ordinarily understood, requires little else. For instance, a trespasser does not have to intend to trespass (under that description), *id.* § 164 cmt. a; does not have to know (or be careless for failing to know) they're trespassing, *id.*; and does not have to cause any physical damage or interfere with the owner's use, *id.* § 163.

81 See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 4, at 930, 932 (using reasonably mistaken trespass as an example of the difficulty of assimilating torts to moral wrongs).

82 RIPSTEIN, *supra* note 9, at 2.

83 See RESTATEMENT (SECOND) OF TORTS § 281 (AM. L. INST. 1965); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 6 (AM. L. INST. 2010).

84 See, e.g., Seana Valentine Shiffrin, *The Moral Neglect of Negligence*, in 3 OXFORD STUDIES IN POLITICAL PHILOSOPHY 197, 201 (David Sobel et al. eds., 2017). In fairness, some philosophers are skeptical about this, but I will assume for now that negligence can be a wrong, and sometimes a quite serious one. See *id.* at 199 & n.13 (collecting "negligence skeptics").

85 W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 169 (W. Page Keeton ed., 5th. ed. 1984).

immorally and those who can be held liable for negligently injuring someone.”⁸⁶

There are no doubt other examples with this same basic form: tort law, as formulated in settled doctrine, coincides with clear moral wrongdoing in central cases, but the doctrine also extends to cases where a would-be defendant is not properly subject to certain kinds of moral criticism, and that fact seems to tell against the thought that their torts simply are moral wrongs. What should we make of this fit-based objection? To state the obvious, the objection depends (at least implicitly) on claims about what both tort law and morality are like. To press the point, that is, we must presuppose something about morality’s assessment of a would-be defendant’s conduct, such that we can say with confidence that tort law’s assessment of it is different. By the same token, of course, we must presuppose something about how tort doctrine—perhaps together with other aspects of the institution—can determine “tort law’s assessment” of a would-be defendant’s conduct in the first place.

In my view, fit-based objections to the simple model tend to rely on views about both tort law and morality that are (at the least) open to doubt. In the next two sections, I bring several of these views to the surface and explain my doubts. In a final section, I suggest that, even where tort law remains overinclusive of morality, we can understand and explain our predicament without giving up the simple model. I want to stress that my goal in these sections is to illustrate how tort law might be reconciled with the simple model—to illustrate how tort theorists sympathetic to the simple model might think about the difficulties presented by our actual institutions, that is, not to say conclusively that tort law is like this or morality like that. I mean for the model (as a model) to be compatible with a range of answers to these questions, and that means that proponents of simple-model views might address objections to the model in the different ways—by relying on different points, and in different measures. My aim here is to say what some of those points might be.

A. *A Bad Model of Tort Law—or a Bad Model of Morality?*

Let’s start on the moral side of the claimed misalignment of morality and tort doctrine. I want to make two suggestions about interpersonal morality—both of which might defuse the overinclusiveness objection, at least to some degree. First, fit-based objections often understate the moral significance of breach as such.

86 Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 4, at 932; *see also* Avihay Dorfman, *supra* note 8, at 207, 211–13 (explaining a version of this objection); Ori J. Herstein, *Nobody’s Perfect: Moral Responsibility in Negligence*, 32 CAN. J.L. & JURIS. 109, 121 (2019).

Second, we must be sensitive, in evaluating fit, to the ways in which tort law itself can affect the moral facts. Both points are familiar, but their significance for the choice between the simple model and the standard model is not always appreciated.

Wrongs and Fault. A central worry about the simple model, we've seen, is that some defendants are faultless—blameless, innocent, even reasonable—but no less tortfeasors for it, and that fact seems hard to reconcile with the thought that, in being held liable for their torts, these defendants are being held liable for their moral wrongs. This is a tempting inference, and a plausible one too.⁸⁷ Still, the problem is that it collapses the distinction between doing something that is a wrong to another person and doing something that is wrong.

John Gardner offers one possible account of this distinction. In Gardner's view, an action is wrong if it is unjustified, and it is a wrong to someone if it is in breach of a duty owed to that person.⁸⁸ Although these ideas are related—in particular, many actions are unjustified and hence wrong because they would be in breach of duty—"there are many actions that are wrong without being [a wrong to another], or [a wrong to another] without being wrong."⁸⁹ If we have this distinction in view, we can also see why a wrong need not involve any fault, if fault "consists in the performance of actions that are both unjustified and unexcused."⁹⁰ Some wrongs to people are justified (i.e., not wrong), we've just said, and some wrongs to them, we know from experience, are excused. In either case, our wrong will not "reflect badly on [us],"⁹¹ but that fact alone will not preclude our conduct from being a wrong to someone—a breach of a duty owed to that person. Many tort theorists have joined Gardner in endorsing a version of these ideas—at least insofar as they're understood as claims about the normative structure of tort law.⁹² But Gardner's point isn't only about tort law. It's about morality too.

Now, this is contestable (and contested) terrain in moral theory, but I am inclined to think that, in focusing on the relational dimension of moral norms, Gardner is on the right track. In outline, a relational

87 After all, many philosophers have drawn conceptual connections between conduct that is blameworthy and conduct that is morally wrongful. See, e.g., JOHN STUART MILL, *UTILITARIANISM* 48–49 (George Sher ed., 2d ed. 2001) (1861); ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS* 40–45 (1992).

88 John Gardner, *Wrongs and Faults*, 59 *REV. METAPHYSICS* 95, 100 (2005) (distinguishing an act that is "a wrong" from an act that is "wrongful").

89 *Id.*

90 See *id.* at 113.

91 See *id.* at 108.

92 See *id.* at 120; see also, e.g., RIPSTEIN, *supra* note 9, at 143; Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 4, at 950–51; Hershovitz, *Treating Wrongs*, *supra* note 9; DON HERZOG, *DEFAMING THE DEAD* 42 (2017); JULES COLEMAN, *RISKS AND WRONGS* 217 (1992).

interpretation of moral norms holds that moral standards are not concerned with a moral agent in isolation—are not concerned (simply) with the quality of a person’s will or motivations, for instance, or with the expected (impersonal) consequences of their actions, or with “each person’s true good.”⁹³ Rather, at least some (and perhaps all) moral standards are interpersonal, in the sense that their fundamental concern is how members of the moral community are to relate *to* one another. At the least, this means that relational moral standards specify the duties we owe *to* one another and the claims we have *against* one another—that is, they specify the structure and content of a “moral nexus” between individuals.⁹⁴

Relational interpretations of moral norms differ in their details, but I think that the most compelling versions share this feature: if you “breach” a moral duty owed *to* another person, on these accounts, you thereby “fail to accord” or “infringe” that person’s claim *against* you, and that failure is (in one ordinary sense) “a wrong *to*” the person whose claim it was.⁹⁵ We can understand this notion—the notion of an action inconsistent with another’s claim, whatever we call it—in part by the role it plays in making sense of complaint, apology, compensation, and other aspects of our practice of moral accountability.⁹⁶ An action that is inconsistent with another’s claim has this interpersonal significance, even in cases—for instance, where you use someone’s unoccupied mountain cabin in an emergency, or fail to deliver on a promise despite your best efforts—where that action is all-things-considered permissible or (otherwise) faultless.⁹⁷ If that’s right, then morality, and not just tort law, cares about the breach of a person’s claims as such, even if morality cares about permissibility and fault too.

93 WEINRIB, *supra* note 8, at 342; *see also* Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 4, at 930, 935–36, 942–45 (describing “dominant ways of thinking about morality” in terms that focus on a defendant’s decisionmaking).

94 Some argue that this is the whole of interpersonal morality, strictly speaking. *See* WALLACE, *supra* note 30. But for now, I will simply suppose that at least part of morality should be characterized that way. For more, *see* the sources cited below and STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT* (2006) and Michael Thompson, *What Is It to Wrong Someone? A Puzzle About Justice*, in *REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ* 333 (R. Jay Wallace, Philip Pettit, Samuel Scheffler & Michael Smith eds., 2004).

95 *See* F.M. KAMM, *INTRICATE ETHICS* 239–41 & 276 n.10 (2006).

96 *See* WALLACE, *supra* note 30, at 67–76 (emphasizing the connection between breach of moral duty and interpersonal accountability). The claim is not that the inconsistency makes sense of our account-seeking responses all by itself. I don’t take a position on that. *See, e.g.*, Nicolas Cornell, *What Do We Remedy?*, in *CIVIL WRONGS AND JUSTICE IN PRIVATE LAW*, *supra* note 8, at 209.

97 *See, e.g.*, JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 231–34 (1990); Gardner, *supra* note 88, at 99–102 (2005); RIPSTEIN, *supra* note 9, at 138, 144–45.

This is not the place to establish that moral norms are relational, of course, let alone that the interpretation I sketched is the right one. Some philosophers will quibble with the details of the framework I've described, to be sure. Some might reserve the phrase "a wrong to" for failures to accord claims that are impermissible too, for instance.⁹⁸ Others might say that, strictly speaking, there are no permissible failures to accord claims; in cases where it seems otherwise, our moral claims give way to competing considerations, even if they would ordinarily be in force.⁹⁹ And there are no doubt other issues to sort through.¹⁰⁰ All the same, I want to suggest that, on the most plausible relational interpretations of moral norms, when one person treats another in a way that is inconsistent with that person's claims (or would be, absent defeating circumstances), that fact typically has moral significance for the parties, even if that treatment is permissible in the circumstances or otherwise faultless.¹⁰¹

If these claims about morality are right, then there is a rich set of moral relations between the parties to a typical tort case, and that may put fit-based objections to the simple model on a different, less secure footing. If the crux of the simple model is that tort law directly recognizes certain moral features of the relationship between plaintiffs and defendants, rather than distinctively legal features, then it is not enough to point out that there is some aspect of that moral relationship that tort law does not track—the defendant's fault, for instance. After all, tort law may be responsive to some other aspect of the relational moral facts. The simple model, in its best form, may claim only that tort law tracks a defendant's failure to accord a plaintiff's moral claim, and no more. If that is all that's meant—or all that need be meant—by the claim that tort law recognizes moral

98 See THOMSON, *supra* note 97, at 122 (allowing for permissible infringements but reserving "wrongs" for impermissible infringements—for violations); see also WALLACE, *supra* note 30, at 9 (arguing that we wrong others only when we "flout[]" their claims).

99 WALLACE, *supra* note 30, at 170–73; John Oberdiek, *Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights*, 23 LAW & PHIL. 325, 336 (2004).

100 See, e.g., Nicolas Cornell, *Wrongs, Rights, and Third Parties*, 43 PHIL. & PUB. AFFS. 109 (2015) (arguing that we can wrong people without violating their claims).

101 On Wallace's view, for instance, violating a claim has interpersonal significance, even if the violation is excusable or otherwise inflicts no "moral injury," WALLACE, *supra* note 30, at 84; and so, it seems, is failing to meet the standard set by a one-time claim, if conditions materialize (e.g., an emergency) that make it the case that the claim is "extinguished." Even then, Wallace suggests, the one-time claimholder typically has "residual claims" based in part, it appears, on the personal interests implicated when a person's moral status must yield to other values. See *id.* at 170–76.

wrongs, then proponents of the standard model may need to say more to make the fit-based objection stick.¹⁰²

I should note, to close this section, that Goldberg and Zipursky seem to accept many of these points, though in a different guise. We owe duties of noninjury to one another, in their account of tort law, and we hold claims of noninjury against one another.¹⁰³ An infringement of a person's claim of noninjury is a legal wrong to that person, and a legal wrong is a genuine wrong in the sense that a moral wrong is, at least in that both mark conduct that "merits some form of accountability."¹⁰⁴ Sometimes, Goldberg and Zipursky say, we'll have breached a duty of noninjury even though we have acted reasonably or faultlessly, and when that's the case the only form of accountability "merit[ed]" will be roughly the form that tort law provides, not blame.¹⁰⁵ Because Goldberg and Zipursky maintain that these ideas are incompatible with "dominant ways of thinking about morality,"¹⁰⁶ they present tort law as a supplemental normative order in which these ideas make sense.

If the discussion in this section is on the right track, however, we have little reason to frame these points as Goldberg and Zipursky do. We can resolve the "moral-legal dilemma" in favor of the moral, without choosing Goldberg and Zipursky's third way.¹⁰⁷ That said, I think Goldberg and Zipursky are right to suggest that, in this case as in others, "tort theory helps moral theory."¹⁰⁸ Here, though, I don't think it helps by analogy. Rather, I believe that tort law helps us to see an existing dimension of morality more clearly. Tort law draws our attention to the significance of breach as such, a moral question that is sometimes obscured or deemphasized in our hurry to get to others—

102 If Wallace and others are right about permissible infringements, as discussed in the previous note, then it could be that tort law incorrectly represents some residue-of-extinguished-claims cases as claims-arising-from-permissible-infringements cases. Still, I want to say that it is more illuminating to model tort law's mistake in simple terms—to diagnose the conflation, and to outline doctrinal reforms to correct it, without supposing that tort law is *correctly* representing how things stand between the parties in a genuine but nonmoral normative order. I return to this thought in Section III.C, *infra*.

103 See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 4, at 973.

104 *Id.* at 941, 950; see also *id.* at 944.

105 See *id.* at 950-51.

106 See *id.* at 930. Goldberg and Zipursky suggest that, on "dominant ways of thinking about morality," "acts are the proper subject of moral evaluation, not consequences." *Id.* (emphasis omitted); see also *id.* at 935-36, 942-45. They resist this idea as it applies to the normative domain marked off by tort law. To the extent their gloss on moral theory is meant to suggest that morality is not relational, a nexus of duties and correlative claims, then I believe they are wrong about (then- or now-) dominant ways of thinking about morality.

107 See *id.* at 930-32.

108 *Id.* at 944.

like questions about fault or blame. Goldberg and Zipursky proceed as though this question is only adjacent to, not a part of, interpersonal morality. I think that is a mistake, for the reasons sketched above. Even if Goldberg and Zipursky are mistaken on this point, though, standard-model views, including theirs, may have a lot to teach us about the aspects of morality that tort law aims to recognize.

Tort Law's Moral Effects. I want to draw attention to a second source of noise in our judgments about whether tort law can be understood as recognizing and responding directly to moral wrongs. The content of the rights and duties recognized by tort law is often tied to a particular time, place, and legal practice. This fact can seem to support to the idea that tort law is recognizing its own distinct normative order, even if we would never make an analogous inference from the time- and place-bound features of earthquake-recognizing institutions. But we need to be careful, because it is no part of the simple model that tort law is morally inert. Indeed, there may be various ways in which tort law, as implemented by political institutions, changes the moral context in which we act. For example, tort law may trigger characteristic changes in the normative relationship between the parties and their tort-implementing institutions.¹⁰⁹ In addition, the existence and operation of tort law may affect the primary rights and duties of the parties. If it does, then tort law may come to recognize moral duties whose existence and content are explained (in part) by the posits, precedents, and practices of tort law.

For example, civil litigation is an instrument that we can use to mistreat one another—to harass, extort, and the like. Suppose (as seems plausible) that we have moral claims against one another not to use the civil process for these purposes, if we find ourselves in a social context where this kind of instrument is available to us. If the institution of tort law then recognizes abuse of process as a tort,¹¹⁰ we might say that tort law is simply recognizing an ordinary, context-dependent moral duty, not creating its legal counterpart. True, this specific link between the institution of tort law and the content of our moral claims won't generalize very far. But it serves to illustrate the point. In some cases, we would not have moral claims against one another—or claims with precisely the same content—if not for our legal institutions, including tort law.

109 For all I've said so far, theories of tort law could explain this change in different terms. The claim that tort law aims to recognize moral wrongs does not, as best I can tell, require us to tell an anti-positivist story about the content of the tort-law-kind of recognition at any place or time, unless attributing moral aims to social institutions is itself anti-positivist. See *supra* note 65.

110 See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 674, 682 (AM. L. INST. 1977).

In some cases, we might be able to trace a more direct connection between the standards that tort law adopts and the content of our moral claims. That's because tort law, like other practices and institutions, may have the ability to help settle the content of moral principles that are vague, abstract, or context-sensitive.¹¹¹ For instance, when legislatures and courts adopt and enforce safety standards, they can change the content of our moral duties to take care, given the way that these standards (as adopted and enforced) shape the context in which we act.¹¹² We might tell a similar story about torts with practice-sensitive variables—torts like battery (“offensive touching”), IIED (“outrageous conduct”), or nuisance (“unreasonable use”). As courts enforce certain standards by entering judgments and articulating precise remedial obligations, and as those standards shape our social interactions, the social meanings of our actions and our expectations of one another can change too. And changes to these downstream facts can change the content of our moral claims—perhaps to (nearly) coincide with the content of the court-enforced standards. If courts then treat infringements of these claims as wrongs, they might be correct to do so. (Notice that, in principle, this context-shifting process can change the moral facts even when courts adopt the wrong standard to start with.)

As John Gardner sometimes put it, legal institutions like tort law have the capacity to “crystallize” vague or abstract moral norms.¹¹³ If so—and if you'll forgive another metaphor—then perhaps tort law should be understood to recognize some of these law-dependent moral crystals alongside law-independent ones, rather than crystals of a distinctively legal sort.¹¹⁴ Now, I don't mean to minimize the difficulty

111 See, e.g., Greenberg, *supra* note 49, at 1310–19, 1341; Honoré, *supra* note 49; JOHN GARDNER, *FROM PERSONAL LIFE TO PRIVATE LAW* 13 (2018). This “dependence of morality on law” point does not depend on any specific view in jurisprudence, though it is a point that proponents of single-system views often depend on.

112 See, e.g., RIPSTEIN, *supra* note 9, at 115–16 (suggesting that “the statutory specification of a safe way to do things ordinarily shows that there was a safe way to proceed”).

113 See, e.g., GARDNER, *Backwards*, *supra* note 2, at 103–04.

114 Courts elaborating tort law may have an even more direct role to play in “crystallizing” abstract moral norms. If, for instance, you think that common law courts in a democratic political community can contribute to the “articulate generation” of our commitments to one another as members of that community, then we can see some of their decisions as directly selecting one of several possible moral norms to govern a situation. Cf. Shiffrin, *supra* note 53, at 157–63. I am intrigued by the possibility that certain strict liability norms are selected in this manner. Seen this way, they are akin to the strict liability norms we that select for ourselves in day-to-day life, and they perform a similar function for us in dividing the moral labor and in facilitating healthy and trusting relationships. Cf. Seana Valentine Shiffrin, *Enhancing Moral Relationships Through Strict Liability*, 66 U. TORONTO L.J. 353 (2016).

of giving a detailed moral explanation of each tort that does not directly reflect a practice- or institution-independent moral wrong, especially when it comes to certain property torts. My point is simply that, in deciding whether it's plausible to model torts as moral wrongs, we should keep in mind that tort law might be called on to recognize the breach of claims whose existence and content are explained (in part) by existing tort practice and precedent. This kind of moral feedback, from wrong-recognizing practices to wrongs and back, can help to explain cases where the standard model seems most plausible. In short, tort law can sometimes make a difference to what we owe one another morally, and that's an important fact about it, but it's a fact that offers little support for the view that tort law always makes a normative difference to what we owe one another, just in a parallel normative order.¹¹⁵

B. A Bad Model of Tort Law—or a Bad Model of Tort Doctrine?

I've now made several suggestions about the structure and content of interpersonal morality that, if true, promise to account for some of the claimed divergence of tort law and morality. But maybe not all. You may still find it hard to credit the idea that a reasonably mistaken trespasser or a person who was “objectively” careless despite every effort has violated a plaintiff's moral claim, even if we allow that a defendant's reasonable mistakes or best efforts deflect blame entirely.¹¹⁶ Let's suppose that's right, at least for the sake of argument. At this point, I want to shift to the tort side of the misalignment and raise a doubt about the model of tort doctrine implicit in the objection.

So far, I've discussed the overinclusiveness objection as if the role of tort doctrine were straightforward—as if we could look at the elements of a tort as set forth in judicial opinions and Restatements, ask whether a person's conduct satisfies them, and, if the answer is

115 This is the beginning of a response to Liam Murphy's argument that we should dispense with the pernicious “illusion” that private law doctrine, and especially property and contract doctrine, reflect the parties' underlying “natural rights”—for “[w]e cannot justify a body of doctrine by appealing to what does not exist.” Liam Murphy, *The Artificial Morality of Private Law: The Persistence of an Illusion*, 70 U. TORONTO L.J. 453, 454 (2020); see also Murphy, *supra* note 46, at 19, 22. In short, my response is that the simple model does not require moral rights to be “natural rights” as Murphy seems to use the term. As I'll explain below, moreover, tort doctrine, and the tort-law kind of recognition more generally, might be justified in in partly instrumental terms, even if the wrongs recognized by the institution are grounded in context-sensitive but non-instrumental principles. In my view, that is something the two stories of rupture and recognition have in common.

116 See Gardner, *supra* note 88, at 111 (treating a reasonable mistake as a canonical excuse); Hershovitz, *Treating Wrongs*, *supra* note 9, at 34 (suggesting that best efforts to take care can serve as an excuse).

“yes,” conclude that they have committed a wrong, indeed the very wrong defined by the doctrine. Of course, this story about the role of tort doctrine glosses over some complications (e.g., that the doctrine defines only “prima facie” wrongs, strictly speaking). Still, the animating idea—that doctrine defines the wrongs that tort law recognizes—seems difficult to doubt.¹¹⁷

All the same, I worry that this picture of tort doctrine is misleading. The reason, in short, is that I find it plausible that the wrongs recognized by the law come apart from the wrongs defined by the law’s doctrinal elements. If and when that happens in tort law, the *institution* might track moral wrongs, as the simple model suggests, even in cases where tort *doctrine* does not. Gabriel Mendlow makes a related point about interpreting criminal law, and his arguments can help us make the hypothesis about tort law more precise. In short, Mendlow suggests that there is an unappreciated degree of “uncertainty about the identity of the wrong a [criminal] statute aims to punish,” even when there is no disagreement over that statute’s elements.¹¹⁸ Consider two potential sources of uncertainty.

First, it is difficult to say, of any set of statutory elements, which of them define the object of criminal liability and which of them establish mere conditions of liability. An object of liability is the thing *for which* a person is held accountable—a particular wrong, for instance.¹¹⁹ A condition of liability, in contrast, is a condition that must be satisfied if an account-holding stance toward that person is to be justified. Conditions of liability serve various functions—some function to ensure a tribunal’s authority, for instance, some to shape a prosecutor’s discretion, and others to define or characterize the wrong for which criminal liability is imposed.¹²⁰ In principle, these distinctions are clear, but the elements of crimes are not self-interpreting, and it is not always clear which role(s) to assign them in practice. For example, do drunk-driving statutes license criminal liability for the *malum prohibitum* wrong of *driving while over the statutory blood-alcohol limit*? Or for the *malum in se* wrong of *driving while unreasonably impaired by alcohol*, but only on the condition that a defendant’s blood-alcohol

117 See, e.g., GOLDBERG & ZIPURSKY, *RECOGNIZING WRONGS*, *supra* note 4, at 3–4; JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 4 (4th ed. 2016) (“Tort law consists of the rules and principles that define wrongful conduct . . .”).

118 Gabriel S. Mendlow, *The Elusive Object of Punishment*, 25 *LEGAL THEORY* 105, 106 (2019).

119 See *id.* at 108–09.

120 See *id.* at 117–18 (explaining the possibility of authority-determining, evidentiary, severity-screening, and clarity-screening elements); see also Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *HARV. L. REV.* 625 (1984) (suggesting that it is sometimes difficult to distinguish decision rules from conduct rules).

level exceeds the statutory limit? In effect, one answer interprets the blood-alcohol element of the crime as a wrong-defining condition, the other as a discretion-shaping condition—as a condition that focuses prosecutors on especially provable and unequivocal instances of the *malum in se* wrong.¹²¹

Second, Mendlow argues that a statute's elements do not always settle the wrong for which liability is imposed, even if we categorize the elements properly, for it is possible that “the object of [liability] takes its identity less from the statute's [wrong-defining] elements than from the manner in which the statute is administered and understood.”¹²² In criminal law, for instance, prosecutors have enormous discretion over who they charge and how (far) they pursue their cases, and for that reason the actions of prosecutors can (at least plausibly) help to fix the objects of criminal liability under a given statute. In practice, that is, a statute “can condemn a wrong different from that which its terms describe,” if that's how the statute is used and understood.¹²³ When that happens, Mendlow suggests, it would be “dogmatic” to insist that the object of criminal liability is the wrong literally described by the statutory elements (or a proper subset of them), rather than the wrong stably singled out by the practice.¹²⁴ In effect, Mendlow points out, statutory definitions of crimes can also serve as discretion-enhancing conditions of liability, which empower those charged with administering the law to fix the objects of liability more precisely, consistent with certain express conditions being met.¹²⁵

121 See Mendlow, *supra* note 118, at 120–23.

122 See *id.* at 126.

123 *Id.* at 130. As Mendlow points out, we might make a similar point in different terms. See, e.g., Nicola Lacey, *Historicising Criminalisation: Conceptual and Empirical Issues*, 72 MOD. L. REV. 936, 943 (2009) (distinguishing between what the law criminalizes in “legislation [and] judicial decisions” and what it criminalizes through the “[a]ctual implementation of formal norms”); see also Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910) (distinguishing “law in books” from “law in action”).

124 See Mendlow, *supra* note 118, at 126.

125 For example, this is how Mendlow interprets a UK terrorism statute. On its face, Mendlow observes, this statute seems to make a “normal background condition in human life” into a (trivially satisfied) element of a crime, so that a person violates the statute as soon as they have a wrongful intention. Mendlow, *supra* note 118, at 127–28. But, he argues, whether the statute renders intentions punishable in this way is “not solely a function of [its] text.” *Id.* at 130. If prosecutors, as a matter of entrenched practice or policy, never bring charges “unless the offender has actively raised or segregated funds for terroristic purposes,” *id.*, Mendlow thinks it would be “dogmatic” to insist that the object of criminal liability is the wrong literally described by the doctrine, rather than the wrong stably singled out by the practice, *id.* at 126. Of course, there is also a question about when and to what degree a scheme of discretion-enhancing conditions of liability can ever be justified, given the importance of notice and equal treatment to the rule of law.

Both of these points, if sound, have implications for tort law. Tort law, like criminal law, often relies on element-by-element definitions to establish the conditions of liability. In addition, tort law, like criminal law, aims to impose liability *for* something—for committing one or another wrong, we're assuming. So the same structural question arises: What is the relationship between the conditions specified by the doctrinal elements, on one hand, and the wrongs for which liability is imposed, on the other? It is tempting to think that the elements of a tort—or some readily identifiable subset of them—define the wrongs for which liability is imposed, establishing a straightforward connection between tort doctrine and the objects of tort law's responses. And in some cases, it might be that simple.

But we're now in a position to see how tort doctrine and the wrongs of tort law might come apart. To start, the elements of torts are no more self-interpreting than the elements of crimes, and it won't always be clear whether an element of a tort is better understood as (say) a discretion-shaping condition of liability or as a condition that (partly) defines the wrong. For instance, it is not clear, despite a longstanding debate, whether tort law imposes liability for injury-inclusive wrongs or whether, instead, tort law imposes liability for injury-exclusive wrongs, but only on the condition that they result in injuries of the right kind.¹²⁶ To settle the debate, we may even need to work *from* our understanding of the wrongs for which liability should be imposed *to* the function of the doctrinal elements.¹²⁷ (Of course, in tort law, unlike in criminal law, there is rarely a statutory text to start with, and I suspect that only makes the objects of tort liability more elusive.¹²⁸)

In addition, if Mendlow is right, we may need to account for the way that tort law is administered, and that is a bracing possibility. A striking fact about tort law, after all, is that individual plaintiffs have the power to initiate the legal process. That puts all of us, as potential plaintiffs, in a position to help fix the objects of tort liability more precisely, consistent with the black-letter elements recognized in

126 For discussion, see, for instance, Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 4, at 941–45, and JOHN GARDNER, *Obligations and Outcomes in the Law of Torts*, in TORTS AND OTHER WRONGS, *supra* note 2, at 133, 146–47.

127 Mendlow, *supra* note 118, at 113 (“The truth is that we usually cannot classify a statute’s elements as [wrong-defining] or [merely] conditional until we have identified the underlying transgression being punished.”).

128 I think this question—the question of how to extract tort doctrine from the raw materials of judicial decisions—is quite complex, but I will not address it here. Among other difficulties, the project is theory-dependent: a person’s views about the aims of doctrine will inform their views about how to extract doctrine from legal materials. For now, I will assume that authoritative summaries of the doctrine are a good rough-and-ready guide to the actual doctrine.

judicial decisions and other legal sources. It's true, of course, that tort suits are overseen by judges and (often) decided in part by juries, but that just means that plaintiffs' discretionary choices and understandings can't shift the objects of tort liability unilaterally. It will be complicated to sort out, to put it mildly. Still, we should not rule out the possibility that tort law, informed by the moral experience and social understandings of participants in the practice, aims in operation to recognize wrongs that are slightly different from those literally described by the doctrine.¹²⁹

Suppose you thought that, if trespass were to track a moral wrong, it would have to work like battery.¹³⁰ Then imagine that, as a matter of entrenched practice, that's how the tort is administered: plaintiffs only ever sue, and only ever win, when a defendant's intentional boundary-crossing is harmful or offensive too. In that case, it would be "dogmatic" (wouldn't it?) to insist that the *actual* object of trespass liability is the wrong defined by the doctrine, rather than the wrong that is stably singled out by the practice. (If a seismologist decides that Caltech's gatekeeping criteria have failed on account of their generality,¹³¹ and declines to include a candidate event in Caltech's official records, it would be obtuse to insist that, actually, there's been an *according-to-the-rule earthquake* that has, for discretionary reasons, gone unrecognized by Caltech.¹³²) If the express elements of trespass were to remain unchanged despite the practice, then our interpretation of the elements should change to compensate: we should say the elements partly define the wrong and partly function as discretion-enhancing conditions of liability.¹³³

I suspect that this hypothetical tort of trespass works quite a bit like the actual one, and that trespass isn't the only tort whose boundaries are augmented by entrenched practice, but I won't try to

129 To be sure, a proponent of the standard view might agree that tort law's administration softens its edges, so that its overall operation is more attuned to the moral features of the cases it confronts. Even so, the traditional view holds that the objects of tort liability are defined only by the doctrine, and that is what creates the apparent divergence.

130 Cf. Scott Hershovitz, *The Search for a Grand Unified Theory of Tort Law*, 130 HARV. L. REV. 942, 955–56 (2017) (book review) (using this hypothetical tort to make a different point).

131 Cf. ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 1137b (Jeffrey Henderson ed., H. Rackham trans., Harv. Univ. Press rev. ed. 1934) (c. 384 B.C.E.).

132 See generally *Data Center FAQ*, S. CAL. EARTHQUAKE DATA CTR., <https://scedc.caltech.edu/faq/index.html#reviewed> [<https://perma.cc/9AEJ-9JNR>].

133 The elements of property torts might be under pressure to remain expansive for other reasons. See, e.g., Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1162 (2003) (explaining the role of clear and simple property rules in managing information costs); see also Hershovitz, *supra* note 130, at 955 & n. 39 (noting the possibility that, as a historical matter, the elements of trespass remained strict so that tort suits could settle title disputes).

prove these points here.¹³⁴ For now, I just want to linger on the possibility they present. For reasons independent of the simple model, we should be cautious about accepting a too-tidy story about the relationship between the doctrines of tort law and the wrongs of tort law. If there is in fact space between the two, however, then the objects of tort liability and the objects of moral liability might diverge less (and less objectionably) than is sometimes supposed, even where tort doctrine is overinclusive of morality.

C. *A Bad Model of Tort Law—or Just Bad Tort Law?*

At some point, of course, we will confront a discrepancy between the institution of tort law and the requirements of morality that seems hard to account for in any of these ways—a case in which the objects of tort liability (on any plausible interpretation of tort doctrine and practice) are not moral wrongs (on any plausible interpretation of morality). I don't mean to understate the magnitude or persistence of some of the discrepancies we might encounter either. A striking historical example, for instance, is tort law's willingness to treat slaveholders as if they'd suffered property-based "wrongs" when third parties injured the persons they "owned."¹³⁵ That kind of over-inclusiveness (and simultaneous underinclusiveness) is impossible to square with the idea that *those* plaintiffs had suffered moral wrongs, no matter how hard you work. Tort law's historical treatment of women's moral claims, not least (but not only) through its participation in coverture doctrines and its recognition of spousal immunities, has been unjustifiable in similar ways.¹³⁶ Today, we might have moral misgivings about the persistence of heartbalm torts in certain jurisdictions, or again about the objective standard of care in negligence, or about other kinds of strict liability doctrines.¹³⁷

Still, it's not clear to me that these kinds of examples, morally defective as they might be, ground strong objections to the *model* of tort law that we've been considering, rather than to this or that real-

134 It is possible, for instance, that negligence law as administered incorporates a fault requirement—if not fault in failing to meet the standard of care in the first instance, then fault in an upstream failure not to choose an alternative activity, or seek help, or the like. *See, e.g.*, Shiffrin, *supra* note 84, at 213, 220 (arguing that the moral wrong involves a failure of that sort). It is also possible that tort law as administered incorporates a *de minimis* defense—if only via contemptuous damages, as a last resort. *Cf.* DUFF, *supra* note 69, at 67.

135 *See, e.g.*, MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 35 (2010).

136 *See id. passim.*

137 As before, I'm focusing on the misgivings we might have about places where tort law seems to go too far. I don't mean to suggest that we shouldn't have misgivings about where tort law stops short.

world realization of the model. After all, the simple model of torts and moral wrongs is compatible with the existence of bad tort law. The model is an ideal—one that can help us both understand and orient our practice, I've suggested—and no human institution is an error-free realization of its regulative ideal. In fact, this point is so obvious that we might expect the possibility of error and revision—the possibility of refining our understanding of morality, much as we refine our understanding of seismology—to be reflected in our rupture-recognizing institutions. And indeed, both tort law and Caltrans stand ready to correct certain errors that are brought to their attention, at least in principle. In practice, of course, our institutions can be quite slow and stubborn: they might go on treating certain events as ruptures long after their mistakes have been pointed out to them. In that case, we might have little choice but to criticize our institutions from the outside, as it were, since there's something about them in their current form that is getting in the way of recalibration and reform.

That's a regrettable position to be in, to be sure. Still, I struggle to see why the standard model would be better positioned to explain the state of our institutions or what's regrettable about them. If Caltrans were to remain stubbornly mis-calibrated as far as seismology were concerned, what would be gained by understanding the institution in terms of Caltransquakes? To spell this out a bit, let's assume there's a moral defect with the kind of strict liability embraced in *Rylands v. Fletcher* and cases like it. Let's assume, that is, that the practice of imposing liability on people who undertake abnormally dangerous activities for any harms they cause (regardless of their intentions or degree of care) cannot be understood as a practice of imposing liability on them for their moral wrongs, not even of the faultless sort.¹³⁸ Even if *Rylands*-style liability is defective in this way, I suspect that we can diagnose and even respond to the problem in simple-model terms—that is, without invoking a distinctive normative order, as a proponent of the standard model might.

To start, the simple model is well-positioned to diagnose and explain the core moral problem with the practice. At a minimum, the problem is that a court implementing the *Rylands* rule represents a defendant's conduct as having moral features that it lacks or could not possibly have, and imposes non-trivial remedial obligations based on that mistake. Now, it could be that this moral mistake in the practice does not run very deep. Perhaps there is a moral case for the *Rylands*-style liability, for instance, so long as it doesn't depend on the false premise that the defendant wronged the plaintiff. If courts enforced only *conditional* moral duties to pay for damage in these cases, then

138 Cf. *Rylands v. Fletcher* (1868) 3 LRE & I. App. 330 (HL) (appeal taken from Eng.).

perhaps their imposition of liability could be justified after all.¹³⁹ In that case, supporters of the simple model might offer a saving interpretation of the practice, just as proponents of the standard model might (and in fact do). By that, I mean that supporters of the simple model might offer an interpretation that renders “strict liability” more intelligible and defensible, even if that interpretation is at odds with how the tort is typically understood by those in the practice. To take this revisionary stance toward the practice, though, we don’t first have to assume that the typical understanding of the tort is accurate, just of a distinctively legal normative order.

Of course, it could be that the moral mistake involved in imposing *Rylands*-style liability runs deeper than that. (And even the best saving interpretation of the practice wouldn’t vindicate every last decision a court might make in the name of strict liability.) In some cases, then, supporters of the simple model may be forced to say courts are simply mistaken to impose liability, because there are no adequate moral grounds to do so. Is this where the simple model fails, and the need to contemplate a distinctive normative order arises? I don’t think so. What role would these rights and duties play, even here? True, we sometimes think that, even when a court’s decision is mistaken on the merits, it is authoritative for the parties to the case. A defendant can’t ordinarily escape their remedial obligations simply by pointing out that the court’s decision rested on a moral mistake. Still, I am inclined to think that we can explain why this might be so—for example, by appealing to the important role of public courts in resolving disputes on certain terms—without supposing that the court’s decision is authoritative for the parties because the court correctly decided the dispute between them according to a morally-untenable-but-distinctively-legal normative order.¹⁴⁰

139 See, e.g., Keating, *supra* note 3, at 292, 301–04; cf. GOLDBERG & ZIPURSKY, *RECOGNIZING WRONGS*, *supra* note 4, at 190–92 (offering a similar reinterpretation). The fact that both models point in this direction suggests to me that the revisionary impulse is latent in moral theories of tort law—in theories that embrace a moral intelligibility constraint—not in the simple model in particular.

140 Cf. Scott Hershovitz, *The Model of Plans and the Prospects for Positivism*, 125 *ETHICS* 152, 177–78 (2014) (book review). We can of course imagine cases where tort law is even more thoroughly defective. In that case, supporters of the of the simple model may have to concede that some aspects of tort law, like some legal systems more generally, are so off the mark that there’s little to say except that the people in them are proceeding *as if* certain wrongs exist when in fact they do not (indeed, could not). That sounds extreme, perhaps, but proponents of the standard model will have to interpret true outliers in a similar way. It is not clear what the standard model has on the simple model, then, even in the degenerate case.

Bad tort law is a real problem, and the discussion in this section has only scratched the surface of the many choices involved in diagnosing and correcting it. Still, it seems like we can understand defective pockets of tort law in simple-model terms. That is, there's reason to think that we can diagnose the institution's moral mistakes, and explain the kinds of doctrinal reinterpretations or reforms that would be required to correct them, all without ever supposing that the law or those implementing it are correctly representing how things stand between the parties in a separate, distinctively legal normative order. If that's so, and if the simple model is compatible with the fact that the institution of tort law bound to include bits of bad tort law, then tort doctrine that remains stubbornly out of line with the requirements of morality gives us every reason to recalibrate our institution, but little reason to recalibrate our model of it.

CONCLUSION

We should articulate a moral theory of tort law using a model that countenances moral wrongs and the institution of tort law, I have suggested, but no distinctively legal normative order. There is no need to posit a distinctive realm of tort-generated rights and duties, that is, and no need to incur the explanatory debts that come with it. To be sure, this simple model of torts and moral wrongs does not answer all the questions we have about the institution of tort law. What the simple model offers, I've aimed to show, is a better framework—one that highlights a more parsimonious and revealing connection between our practices of moral accountability and the institutions of tort law—in which to think these questions through. If that's true, it has immediate and obvious consequences for tort theory. In the longer run, it may have upshots for tort practice too, for it suggests certain internal constraints on the claims and arguments we can make in pursuit of tort judgments, and certain internal measures we can use in pursuit of tort reform too.

To close, I want to suggest that the discussion here might hold broader lessons too, both for private law theory and for the philosophy of law. For private law theory, the simple model provides, well, a model—a way to understand the relationship between interpersonal morality, on one hand, and those legal subjects (e.g., restitution, contracts, and property, in addition to torts) that appear to reflect, reinforce, and supplement it most directly. If dispensing with distinctively legal rights and wrongs gives us a better grip on tort law, there is reason to suspect that the same is true of at least tort law's

common-law cousins.¹⁴¹ For the philosophy of law, on the other hand, the standard model of torts and moral wrongs serves as a kind of a cautionary tale. It can be tempting to reify the contents of our social practices and the judgments we make in them, and sometimes that's the right way to proceed. But the discussion here helps us see why we must be careful—in the philosophy of law no less than in the philosophy of our scientific and public-safety institutions—about reading our metaphysics off our practices.

141 Compare Shiffrin, *supra* note 53, at 709 (“[T]he contents of the legal obligations [of contract] and the legal significance of their breach do not correspond to the moral obligations [of promising] and the moral significance of their breach.”), with Nicolas Cornell, *A Complainant-Oriented Approach to Unconscionability and Contract Law*, 164 U. PA. L. REV. 1131, 1133, 1163–64 (2016) (“I do not believe that contract law creates norms of legal permissibility that are analogous to norms of moral permissibility.”).