2017

Wrongs Without Rights. Review of *Wrongs, Rights, and Third Parties*, by N. Cornell.

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Wrongs Without Rights

http://torts.jotwell.com/wrongs-without-rights/

Nicolas Cornell, *Wrongs, Rights, and Third Parties*, 43 **Phil. & Pub. Aff.** 109 (2015), available for purchase at Wiley Online Library.

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The word "wrong" is the source of much confusion, in part because it does double duty. "You set the table wrong," I might say, noting that you've misplaced the forks and knives. When I say that, I imply that there's a standard against which place settings are properly judged, and that you've mucked things up by failing to match it. This use of the word "wrong" pops up all over the place: "You took a wrong turn." "That's the wrong answer." "Why do I get everything wrong?"

But there's another way to use the word "wrong": "You wronged Tom," I might say, "and you really ought to do something about it." When I say that, I imply that Tom had a right that you not do what you did, and, moreover, that you owe him something for having breached his right. This usage is related to the first. Tom's right sets a standard, against which your action is properly judged. What you did was wrong, relative to that standard. But since the source of the standard was Tom's right, you didn't just do something wrong, you also wronged Tom.

This second notion of "wrong" is central to tort law. Indeed, it figures in the most famous torts case, *Palsgraf v. Long Island Railroad Co.* An employee of the Long Island Railroad Company did something wrong: he pushed a passenger carelessly, and in doing so, dislodged the package that the passenger was holding. The package concealed fireworks. They exploded, injuring poor Helen Palsgraf, who was standing thirty feet down the platform. Palsgraf sued. Could she hold the railroad accountable for her injuries? No, said Justice Cardozo, because she could not show "'a wrong' to herself, i.e., a violation of her own right." Why not? She was so far down the platform that no one would anticipate that the push would pose her any danger, so she wasn't in a position to demand that it be done carefully. As Cardozo put it, "[t]he risk reasonably to be perceived defines the duty to be obeyed."

Justice Andrews dissented. He argued that it shouldn't matter whether Palsgraf could show that a right of hers was breached. It was enough, in his view, that the employee did something wrong, and that Palsgraf suffered as a result. Andrews has his defenders, especially among those who take an economic orientation to tort. But most philosophers sign up to Cardozo's view, reasoning that Palsgraf is entitled to a remedy only if she was wronged, and that she was wronged only if some right of hers was breached.

Nico Cornell, however, thinks that the philosophers have got this all wrong.[1] In *Wrongs, Rights, and Third Parties*, he argues that rights and wrongs come apart. You can be wronged, he says, even if you did not have a right that was breached. And one of his leading examples is Helen Palsgraf. Cornell agrees with Cardozo that Palsgraf did not have a right that the railroad employees take care for her safety when they pushed the

passenger; after all, nothing about the situation signaled any risk to her. But he does not think Palsgraf's lack of a right implies that she was not wronged. Indeed, he says that she was wronged, since she was injured by an act that was wrong (in the first sense noted above).

To start his argument, Cornell presents a series of cases—*Palsgraf* among them—in an effort to pump the intuition that rights and wrongs can come apart. One of his more compelling cases is *Flanders* v. *Cooper*, decided by the Maine Supreme Court. The plaintiff was a father, whose daughter was hypnotized by the defendant physical therapist, in a misguided effort to treat pain in her jaw. The father alleged that the hypnosis implanted fake memories, and as a result, he claimed, his daughter falsely accused him of sexual abuse. The father sued the physical therapist for negligence, but the court dismissed the complaint on the ground that duties regarding medical treatment are owed exclusively to the patient. This is the *Palsgraf* Principle in action: if no right of the father's was breached by the defendant, then the father was not wronged, and he cannot maintain a suit, even though he was injured by the defendant's negligent treatment of his daughter.

Cornell agrees that the therapist owed no duties to the father when selecting a medical treatment for his daughter. But he nevertheless argues that the father was wronged. It would make sense, Cornell suggests, for the father to resent the physical therapist and to demand an apology from him. And those are ways of responding to wrongdoing, so if we accept that the therapist might owe the father an apology—for what he did to the father, and not the daughter—then we must either find some right held by the father that the therapist breached, or back off the thought that wrongs just are rights violations.

Cornell argues for the latter view, and I cannot do justice to the scope or power of his argument here. He's got lots and lots of cases, and theoretical arguments alongside. He argues, for instance, that rights and wrongs play different roles in our moral lives. Rights tell us who can demand what sorts of action in advance. Wrongs, in contrast, pick out the people who have special standing to complain about an action after the fact. And there is no reason to think, Cornell says, that the wronged must have been the rights holders. The mere fact that they were injured, he says, is sufficient to confer the special standing necessary to complain about conduct that was wrong.

There's a lot more to Cornell's argument, including an intriguing attempt to resolve the conflict between interest-based and will-based theories of rights. (Cornell says there's a grain of truth in each, but that we should see the interest-based theory as an account of wrongs, and the will-based theory as an account of rights.) I think that everyone who has ever puzzled over the conflict between Cardozo and Andrews would do well to read Cornell. He offers a far more sophisticated defense of Andrews's take on tort than Andrews himself. And his defense will speak to those who think tort aims to right wrongs, in a way that economic defenses of Andrews's framework generally don't.

That said, Cornell has not yet sold me on Team Andrews, for reasons that are latent in many of the cases he presents. Consider, for example, a riff on *Flanders*. When the daughter goes for treatment, the physical therapist tells her, "I'm out of sorts because the patient before you—the woman you just saw leaving—was sexually abused by her father, and her injuries are terrible." The therapist goes on to provide competent care for the daughter (no hypnosis here), but that stray comment—which was a HIPAA violation, and hence a wrong to the previous patient—gets the daughter thinking about sexual abuse, and she later comes to think that she was sexually abused and falsely accuses her father. Cornell seems committed to thinking that the father was wronged by the HIPAA violation. That doesn't sound right to me, but if it strikes you as plausible, just carry the chain out further—the father is on his way to meet his defense attorney, driving carefully, when he hits a young child who ran into the crosswalk just a bit too early. Was the child wronged by the HIPAA violation? At some point, you might be tempted to cut off the chain by denying proximate causation. But if you don't think an antecedent right controls which consequences are attributable to the wrongdoer, then proximate causation is the dog's breakfast on display in Andrews's dissent.

Cornell flags the problem in a footnote, noting that legal systems might have reasons for "cutting off inquiry into circuitous causal chains at some point." That's just what Andrews took to be the point of proximate cause. But it's a mistake to think that proximate cause is a solution to a peculiarly legal problem. Would it be fair, for instance, for the parents of the child just mentioned to blame the therapist for the death of their daughter? I don't think so. There was nothing he should have done to guard against it; it's just happenstance that his HIPAA violation set the stage for her death.

I'm inclined to think that rights and wrongs really do have the tight connection that Cornell denies. But he's got me wondering whether that's right. And if it's wrong, then we need to rethink a lot about tort law.

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1. Full disclosure: Cornell is not yet my colleague, but he is joining the Michigan faculty next year. [?]