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### The Search for a Grand Unified Theory of Tort Law.

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BOOK REVIEW

THE SEARCH FOR A GRAND  
UNIFIED THEORY OF TORT LAW

PRIVATE WRONGS. By Arthur Ripstein. Cambridge, Mass.: Harvard University Press. 2016. Pp. ix, 313. \$49.95.

*Reviewed by Scott Hershovitz\**

Theorists like to do a lot with a little. And not just because simple theories seem more elegant: we deepen our understanding when we learn that disparate phenomena are linked together. In physics, for example, the theory of thermodynamics showed us the relationship between mechanics and heat. In economics, the theory of the firm showed us that, across industries that look nothing alike, a simple principle helps explain the organization of economic activity. Of course, there is no guarantee that the disparate phenomena we suspect are linked actually are. Particle physicists continue to search for a Grand Unified Theory, which would integrate gravity with the other fundamental forces. It may be that there is no such theory, or that we are not in a position to discover it, even if there is one. But absent such a theory, our understanding of the way the world works seems incomplete. And our track record of linking disparate physical phenomena (mechanics and heat, electricity and magnetism, space and time) gives us good reason to suppose that there are deeper explanations in the offing.

Legal theorists like to do a lot with a little too, but their track record is decidedly less impressive. John Austin, for example, thought that he could capture the nature of law in a simple slogan: law is the command of the sovereign.<sup>1</sup> H.L.A. Hart showed that Austin's theory was too simple. Among other problems, some laws are not commands,<sup>2</sup> and some legal systems do not have sovereigns, at least in Austin's sense.<sup>3</sup> But Hart had a simple theory of his own: a legal system is a union of primary and secondary rules.<sup>4</sup> Alas, Hart's theory was too simple too. It didn't distinguish law from other systems with

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<sup>1</sup> JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 30–31 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).

<sup>2</sup> H.L.A. HART, *THE CONCEPT OF LAW* ch. 3, at 26–49 (2d ed. 1994).

<sup>3</sup> *Id.* ch. 4, at 50–78.

<sup>4</sup> *Id.* ch. 5, at 79–99.

primary and secondary rules (chess, for example, or a university's regulations). And there are reasons to doubt that rules are the fundamental building blocks of law,<sup>5</sup> or that law even has fundamental building blocks at all. Indeed, it is possible that the connections between the things we regard as legal systems are simply historical, such that there is nothing — or at least nothing significant — that all of them share in common. To make this point, Ronald Dworkin invoked Wittgenstein's image "of a rope composed of many strands no one of which runs for its entire length or across its entire width."<sup>6</sup> If law is like that, then the search for a common thread that runs through it, wherever and whenever it is found, is doomed to fail.

But doom does not entail gloom: you can learn a lot from reading Austin and Hart, even though you cannot learn what law is. And you can learn a lot from reading Professor Arthur Ripstein's provocative new book, *Private Wrongs*,<sup>7</sup> even though his project is just as doomed as theirs. Ripstein's target is tort law, and he aims at nothing less than a Grand Unified Theory. He wants to explain both the rights that tort law recognizes and the remedies that it offers. But he is not satisfied with piecemeal explanations of this or that right or remedy. Rather, he says that recognizing "the unity of right and remedy is the key to understanding tort law" (p. ix). And one simple idea, he says, accounts for all of tort's rights and remedies: no one is in charge of anyone else.<sup>8</sup>

That's a bold claim, and if it strikes you as too simple to be true, you are right; it is too simple to be true. But the book nevertheless merits serious attention, as it makes progress on some of the most perplexing problems about tort law. In the pages that follow, I'll set out Ripstein's account, as well as (some of) the details of the doctrine for which he has failed to account. I'll also suggest that the search for a Grand Unified Theory is misguided; we ought not expect simple explanations for complicated and contingent institutions, like tort. But with a guide like Ripstein, the search is both fun and fruitful, so off we go.

## I. WHAT'S WRONG?

As his title suggests, Ripstein regards torts as wrongs, and that doesn't seem a stretch.<sup>9</sup> But what are the wrongs that constitute torts?

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<sup>5</sup> See SCOTT J. SHAPIRO, *LEGALITY* (2011) (arguing that plans are the building blocks of law); Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967) (arguing that the law includes principles as well as rules).

<sup>6</sup> RONALD DWORKIN, *LAW'S EMPIRE* 69 (1986).

<sup>7</sup> ARTHUR RIPSTEIN, *PRIVATE WRONGS* (2016).

<sup>8</sup> Or, as Ripstein puts it, "no person is in charge of any other person" (p. ix).

<sup>9</sup> See generally John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010).

It's easy enough to recite them: assault, battery, trespass, negligence, and so on. But why, we might wonder, are those the wrongs that tort recognizes? Ripstein has an answer: no one is in charge of anyone else. But it takes a bit of work to move from that proposition to an explanation of what's wrong with battery, trespass, or negligence, such that they ought to be torts.

The first thing to note is that the claim Ripstein regards as central to tort law — no one is in charge of anyone else — is not true, at least not unless we interpret it carefully. I am in charge of my children, and my dean is in charge of me, at least in some respects. So we've got to qualify the claim to exclude children and others who are incompetent, as well as adults who occupy or are subject to roles of authority. Let's say, then, that no one is in charge of their neighbor, at least not qua neighbor, and know that by that we mean that, unless we have certain roles in view, no competent adult is in charge of any other.

How do we get from that proposition to an explanation of the wrongs that tort recognizes? Since no one is in charge of their neighbor, Ripstein says, "It is up to you, rather than others, what purposes you pursue" (p. 33). He adds:

That is just what it is for you to be your own person . . . rather than to be another person's slave, serf, or subordinate. You act in your own name, using your means to pursue purposes that you, rather than others, determine. Others may neither use those means nor deprive you of them. (p. 33)

Your means, Ripstein says, are your body and your property. As he puts it, "Your body and property are just what you use in deciding what purposes to pursue. You don't ever do anything except with your body; what you can do or accomplish depends on the other things you are entitled to use" (p. 30). Thus, your body and your property — or as Ripstein likes to say, "what you already have" — is what tort law protects (p. 34).

The protection comes in two forms. First, tort prohibits others from using your body and property. As Ripstein puts it, "Another person is not entitled to so much as touch your body, or enter your land, or use your chattels without your authorization" (p. 30). Hence, the torts of battery, trespass, and conversion. But tort law also prohibits others from damaging your property, even when they do not make use of it. As we pursue our own purposes, Ripstein says, "[we] must limit the side effects of [our] actions, so that every other person's body and property remain available for their purposes" (p. 30). The prohibition on damaging what another person already has is not absolute. Rather, Ripstein says, "The ordinary activities of careful people are just part of the context in which you have whatever it is that you have" (p. 102). Therefore, tort law doesn't protect us against damage caused by those activities. But it does protect our bodies and property from damage caused by excessive risks, whether those risks are imposed by ordinary

activities carried out carelessly or by abnormally dangerous activities. Hence, the torts of negligence and strict liability.

I'll soon raise worries about Ripstein's account of tort law, but I want to pause for a moment to observe the explanatory power that it has (or at least seems to have, on first glance). In short order, we saw explanations for five torts, and not obscure ones either. And we could easily add more to the mix. False imprisonment, for example, involves an exercise of control over the plaintiff's body, and so might be said to conflict with the claim that no one is in charge of their neighbor.<sup>10</sup> Nuisance requires an unreasonable interference with the plaintiff's use and enjoyment of her property, and so might be said to reflect the same rule that negligence does on Ripstein's rendering: our use of our own property must be consistent with others' abilities to use theirs (pp. 48–51).

But wait, there's more. In addition to explaining those torts, Ripstein's account also explains the absence of a tort that many think missing. At common law, there is no duty to rescue, at least absent certain special relationships.<sup>11</sup> And that's true no matter how serious the danger or easy the rescue. You are under no obligation to toss a drowning swimmer a life preserver, even if you could do so easily from the safety of the pool deck. You don't even have to raise your voice to call for help. Many find this abhorrent, but for Ripstein, it is just another "manifestation of the more general principle that the law of torts never requires you to use your means in a way that is best suited to another person's use of his or her own means" (p. 62). As he explains, "A duty to rescue would just be a duty to use your means to enable another person to succeed in the purpose of preserving his or her means (in this case, him- or herself)" (p. 62).

Well, yes, and some would say there should be such a duty. But Ripstein argues that tort is fully committed to the principle that no one is in charge of their neighbor. If I could demand that you rescue me, then I would, at least in narrow circumstances, be in charge of you. And according to Ripstein, that is what tort won't tolerate, even if my life is at stake. So Ripstein's account offers an explanation of the line tort draws between misfeasance and nonfeasance. And, in one of the most intriguing parts of the book, Ripstein argues that the distinction runs much deeper than the duty-to-rescue cases. For instance, he sees it at work in the line of cases that deny recovery for pure economic loss.

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<sup>10</sup> "In the case of false imprisonment, I treat you as subject to my choice; your legal right to freedom of movement is just your entitlement that others not be in charge of your body" (p. 48).

<sup>11</sup> See RESTATEMENT (SECOND) OF TORTS §§ 314–314A (AM. LAW INST. 1965).

Suppose that you negligently damage a bridge that customers must cross to reach my restaurant. If I own the bridge, then you'll pay me damages for the bridge and for my losses at the restaurant during the time the bridge is out of commission. But if someone else owns the bridge, you're off the hook for my lost customers, even if it was foreseeable that in damaging the bridge you would injure me (p. 63). In the first case, I have a right that you take ordinary care not to cause damage to the bridge; in the second case, I have no such right, since I don't own the bridge. But why would it matter whether I own the bridge, if it's obvious that I stand to be injured by your careless conduct? Ripstein gives an odd answer. He says this is just the misfeasance/nonfeasance distinction at work. If I own the bridge, then your conduct is misfeasance as to me; after all, you've damaged my property. But if someone else owns the bridge, then Ripstein says the most I can accuse you of is failing to use your means in a way that provides me with a favorable context in which to use my means (p. 55). And that's nonactionable nonfeasance (p. 55).<sup>12</sup> Tort law, Ripstein says, does not require you to use your means to benefit me; it simply bars you from using or damaging my means.

To my ears, it sounds a bit odd to say that negligently damaging a bridge is nonfeasance, and I know of no court that would describe it that way. But it is a credit to Ripstein's theory that it explains the absence of a duty in both the rescue and economic loss cases. And even better that it links them as embodiments of the idea that tort protects what you already have without insisting that others help you to use or preserve it. But we have not yet focused on the most important link that Ripstein draws between seemingly disparate areas of tort doctrine — negligence and strict liability.

As we saw earlier, Ripstein argues that tort offers two sorts of protection. Some torts prohibit others from using your body and property; battery, trespass, and conversion fall under this heading. Other torts prohibit others from damaging your body and property, most notably negligence and strict liability. Many commentators treat negligence and strict liability as competitors, and they squabble over which should have priority in tort. But Ripstein sees them as complements; indeed, he sees them as manifestations of the same basic idea. We are not permitted to damage another person's means, Ripstein says, because when we do, we make them less useful and therefore indirectly "determine the purposes they are used to pursue" (pp. 30, 39). But that prohibition could hardly be absolute, because if it were, we could not use our own means to pursue our own ends. After all, every action

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<sup>12</sup> Ripstein credits Peter Benson, *Misfeasance as an Organizing Normative Idea in Private Law*, 60 U. TORONTO L.J. 731 (2010), as the original source of the idea.

carries some risk to others, no matter how careful we are. Some sort of compromise is necessary, and Ripstein says it runs like this: “You are entitled to impose risks on others only to the extent that those are the inevitable concomitant of people using their means” (p. 103). As Ripstein explains, “The ordinary activities of careful people are just part of the context in which you have whatever it is that you have” (p. 102), so you can claim no protection against the risks posed by those activities. But “[i]f you injure another by doing something that carries a greater than background risk of injury to the person or property of others, you are liable because you have wronged that person by interfering with what he or she already has” (pp. 144–45).

On this picture, negligence and strict liability are two different ways of naming the same wrong; the different names reflect different ways of realizing that wrong. The wrong is damaging another’s property by the imposition of “excessive risk” (p. 144). You are negligent when you impose excessive risk by carrying out ordinary activities carelessly. You are strictly liable when your activity is too dangerous, no matter how carefully you conduct yourself. Injuring someone by blasting, according to Ripstein, is wrong for just the same reason that injuring someone by speeding is. Both blasting and speeding impose excessive risk, in the sense that they impose more than the ordinary background risk we must accept as the price of what Lord Reid once called “the crowded conditions of modern life.”<sup>13</sup> Indeed, Ripstein goes so far as to say that strict liability is a species of fault; the fault lies in the imposition of excessive risk (pp. 123–24). So the long tradition of contrasting fault and strict liability is, in Ripstein’s view, just a mistake.

Ripstein’s view is radical.<sup>14</sup> But radical is not necessarily wrong, and I cannot recommend Ripstein’s chapters on negligence and strict liability strongly enough. They are, to my thinking, among the most important contributions that anyone has made to tort theory in quite some time. And there is much of interest in them beyond the proposed unification of negligence and strict liability. The chapter on negligence pushes back on many popular ways of thinking about the tort. Ripstein argues against views that focus on the defendant’s bad behavior and thus generate worries about the role that outcome luck plays in

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<sup>13</sup> *Bolton v. Stone* [1951] AC 850 (HL) 867 (appeal taken from Eng.) (opinion of Lord Reid) (“In the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others. What a man must not do, and what I think a careful man tries not to do, is to create a risk which is substantial.”), *quoted in part in* RIPSTEIN, *supra* note 7, at 102.

<sup>14</sup> The view does have antecedents, most notably Professor George Fletcher’s attempt to link negligence and strict liability through the notion of reciprocity. See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). But even Fletcher did not think that negligence and strict liability were two varieties of the same wrong.

tort (p. 84). Likewise, he argues against views that focus on the plaintiff's need for aid in coping with her injuries and thereby render the fault requirement mysterious (pp. 84–85). And finally, he contests the thought that tort is a system for “distributing burdens in accordance with conduct or character” (p. 85). In all that, he is convincing, and though not every argument in the chapter is original to Ripstein, the compilation of them is helpful.

The chapter on strict liability is every bit as engaging. Ripstein offers intriguing interpretations of *Rylands v. Fletcher*<sup>15</sup> and *Vincent v. Lake Erie Transportation Co.*,<sup>16</sup> persuasively pushing back on the predominant ways those cases are construed (pp. 127–30, 135–55). The chapter also takes up the relationship between fault and culpability, as well as the common thought — which Ripstein rejects — that people who enjoy the benefits of an activity ought to bear its burdens (pp. 156–58). As I said, together these chapters represent a significant contribution to tort theory. By themselves, they make the book worthwhile. And they are bound to be a huge help to anyone who teaches torts, as Ripstein does a wonderful job working through theoretical debates about tort law in the context of the classic cases.

It's also worth noting that Ripstein's proposed unification of negligence and strict liability is detachable from his Grand Unified Theory. You could think that both torts offer protection against injuries caused by excessive risk, without thinking that their doing so is a manifestation of the principle that no one is in charge of their neighbor. And that's good, since shortly we'll see that Ripstein is wrong to regard that as the organizing principle for tort law. But before we turn to the problems with Ripstein's account, I want to make just one more point about it.

Ripstein does not think he's identified *a* principle that helps explain some aspects of tort law. Rather, he thinks he's identified *the* principle that underwrites all of it, or at least all the parts that Ripstein isn't willing to dismiss as aberrational (and there are more than a few of those). And because he thinks he's identified *the* principle that explains the wrongs tort law recognizes, Ripstein categorically rejects the idea that the rights tort law accords us are explained by the interests that those rights serve (pp. 68–73). Indeed, he denies that the rules of tort reflect an effort to reconcile competing interests. And he denies that public interests have any part to play in determining the content of the private rights that tort law recognizes.<sup>17</sup>

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<sup>15</sup> (1868) 3 LRE & I. App. 330 (HL) (appeal taken from Eng.).

<sup>16</sup> 124 N.W. 221 (Minn. 1910).

<sup>17</sup> Ripstein would allow public authorities to restrict private rights, as they do, say, through an exercise of eminent domain, but he insists that public purposes must not pollute tort law. As he puts it:



It is important to keep this in mind as we work through problems with Ripstein's view, because there will be a strong temptation to say, "well, he may not have this or that feature of the institution right, but he's on to something important." And I'd happily agree — witness the praise I just piled on Ripstein's story about strict liability and negligence. But the claim that the institution of tort law has a single organizing principle matters, most of all for the ways we might think about reforming the institution. Ripstein, for example, rejects deterrence as a rationale for punitive damages, because it does not fit his framework (p. 261). And though he does not discuss strict products liability, he seems committed to rejecting that too, at least to the extent it is adopted for the sort of policy-oriented reasons Justice Traynor proposed in *Escola v. Coca Cola Bottling Co.*<sup>18</sup> The upshot is that we must take the ambition of Ripstein's account every bit as seriously as its substance, since the ambition is itself substantive.

## II. WHAT RIPSTEIN GETS WRONG

Let's start with battery, since Ripstein's explanation of it is so alluringly simple. He starts, as always, with the premise that "[n]obody else is in charge of your body or property" (p. 30). That means that "no other person gets to determine the purposes they are used to pursue" (p. 30). "Intentional torts against bodies and property," Ripstein says, "involve using something of which you are not in charge" (p. 46). And touching your body, according to Ripstein, is a way of using it.<sup>19</sup> That's why he says that "[a]nother person is not entitled to so much as touch your body . . . without your authorization" (p. 30).

This would be a fine explanation of battery, if that last bit were true. But it's not. You don't need permission to touch my body unless the way in which you plan to touch me is harmful or offensive.<sup>20</sup> If you see me on the street corner, you are free to tap my shoulder to get my attention. If I'm part of a crowd blocking the exit to a subway car, you may nudge me out of the way as you press past. If I say something funny, you may slap me on the back, so long as you don't hit me too hard. In all of these cases, you've touched my body without my permission, but you haven't battered me.

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[My] account is silent on the further question of what citizens, acting as a collective body through their governments, should do about the distribution of property. A public authority is entitled to restrict private rights for properly public purposes, but any entitlement to do so (or instance in which it declines to do so) does not depend on any consequentialist assessment of costs and benefits. Nor does it show that private rights are just another lever available to government in pursuit of its objectives. (p. 43)

<sup>18</sup> 150 P.2d 436, 440–44 (Cal. 1944) (Traynor, J., concurring).

<sup>19</sup> Ripstein says, "if I run my fingers through your hair without your authorization . . . I am using something of which you are in charge" (p. 46).

<sup>20</sup> RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (AM. LAW INST. 1965).

Could Ripstein say that there is no battery in these cases because you haven't used my body, even though you've touched it? That's a tempting thought, because it sounds odd to say that you're using my body when you tap me on the shoulder, nudge me out of the way, or slap my back in solidarity. (In contrast, if you push me into the path of a trolley car, so as to save a flock of kindergartners further down the track, then it sounds just fine to say that you've used my body.) But Ripstein thinks you use my body whenever you touch it intentionally, and he has to hold that view if he is to have any hope of explaining battery. After all, it sounds equally odd to say that you're using my body when you spit on me, punch me in the nose, or operate on my ear. But, absent permission, all those touchings are batteries. So Ripstein needs to interpret "use" capaciously if he wants to vindicate his suggestion that the wrong involved in battery is using the plaintiff's body without permission. And he does. At one point, he opines that if "you move someone's leg mistaking it for your own, you commit a battery" (p. 67).<sup>21</sup> If that is right, then Ripstein is committed to thinking that the touching involved in moving counts as using, and that's just our subway case. Which is not a battery.<sup>22</sup>

Perhaps we could save Ripstein's account by saying that you have implied permission to tap me on the shoulder, nudge me out of the way, or slap me on the back. This sounds promising, as it recalls the "implied license of the play-grounds" invoked in *Vosburg v. Putney*.<sup>23</sup> But your license to tap, nudge, or slap me is implied by the law, not by me. When I'm standing on the street corner, oblivious to your presence, I haven't done anything that should lead you to believe that you have my permission to tap me on the shoulder. What you should believe is that you don't need my permission to tap me, not that you

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<sup>21</sup> I am not sure Ripstein is right about this example. He doesn't cite a case; rather, he's reasoning from analogy to trespass, which provides no excuse for a mistake about who owns what land. Arguably, the sort of mistake Ripstein is imagining here is different, in that the supposed batterer does not intend to contact anyone. (Your leg is part of you; your land is not.) In any event, the contact would have to be offensive in order to constitute a battery.

<sup>22</sup> See RESTATEMENT (SECOND) OF TORTS § 19 cmt. a, illus. 2 ("A, while walking in a densely crowded street, deliberately but not discourteously pushes against B in order to pass him. This is not an offensive touching of B.").

<sup>23</sup> 50 N.W. 403, 403-04 (Wis. 1891) ("Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful.").

have it.<sup>24</sup> And the same would have been true on the playground in *Vosburg*. The court was not saying that a kick on the playground would have been consensual; it was saying that, on the playground, Vosburg's consent would not have been needed, at least not for the kinds of kicks involved in "the usual boyish sports."<sup>25</sup>

Now, it's worth noting that when the law permits people to touch you without your consent, it also allows you to turn those touchings into battery by putting people on notice that you don't want to be touched.<sup>26</sup> If an Orthodox Jew tells his coworkers that he does not want to be touched by women, then a female colleague who taps him on the shoulder batters him. This is not because his consent was necessary all along; rather, it is because tort law treats the contact as offensive, once she knows that he finds it offensive. But there are almost surely limits on our power to place our bodies off-limits to others. As Prosser once put it, "it may be questioned whether any individual

<sup>24</sup> Several readers have wondered whether my standing on the street corner constitutes consent to a tap on the shoulder. The answer is no. In tort, consent is "willingness in fact for conduct to occur," whether or not that willingness is manifested. RESTATEMENT (SECOND) OF TORTS § 892(1); see also *id.* § 892 cmt. b. In other words, consent is a state of mind, and one need not be in that state of mind when on a street corner. Now, it is true that tort sometimes treats people as if they've consented, even when they haven't. As the Second Restatement explains, "If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact." *Id.* § 892(2). The classic case is *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266 (Mass. 1891), in which the plaintiff, who did not want to be vaccinated, was treated as if she consented to vaccination because she "held up her arm to be vaccinated," knowing full well what the defendant doctor planned to do. *Id.* at 266. But there is an important difference between holding one's arm up for a vaccination and standing on a street corner. The former reads as consent because presenting one's body to be touched is a common way of signaling the willingness to be touched. In contrast, standing on a street corner is not a common way of signaling anything, much less one's willingness to be touched. The upshot is that standing on a street corner is not conduct that is "reasonably understood . . . to be intended as consent." RESTATEMENT (SECOND) OF TORTS § 892(2) (emphasis added).

Ripstein could, I suppose, insist that anyone who appears in public consents to the sorts of touchings that are customary in public. Courts sometimes suggest as much. See, e.g., *McCracken v. Sloan*, 252 S.E.2d 250, 252 (N.C. Ct. App. 1979) (discussed *infra* note 28). To take that view, we'd have to ignore the fact that some people are homeless and do not appear in public by choice, as well as the fact that life as a hermit is not an option, even for most people who have homes. But even if we set all that aside, the insistence that anyone who appears in public consents to customary touchings is an empty slogan, as consent plays no role in determining which touchings are permissible; custom does all the work. And, more to the point, there is no refuge for Ripstein in a view that deems you to have consented to whatever touchings are customary, as that is hardly consistent with the idea that no one else gets to determine the purposes to which your body is put. (If, at this point, you find yourself inclined to defend Ripstein by pointing out that imputed consent can be withdrawn, well, it's a good time to return to the text. But also, think through the practicalities — just how does someone standing on a street corner signal that she doesn't want to be touched? A T-shirt? A sign? And what if the defendant didn't see the message, or read it?)

<sup>25</sup> *Vosburg*, 50 N.W. at 403.

<sup>26</sup> See, e.g., *Cohen v. Smith*, 648 N.E.2d 329, 335 (Ill. App. Ct. 1995) (allowing an offensive battery claim to proceed where a male nurse knew that a female patient did not want to be touched by men but touched her during a cesarean section anyway).

can be permitted, by his own fiat, to erect a glass cage around himself, and to announce that all physical contact with his person is at the expense of liability.<sup>27</sup> At least one court has embraced Prosser's "glass cage" defense, finding that no battery was committed when the defendant smoked a cigar in the presence of someone he knew objected to being contacted by cigar smoke.<sup>28</sup> I am not sure that case would come out the same today — our society may have shifted on the question whether contact with cigar smoke is objectively offensive, especially after one is on notice that it will be found offensive — but neither the court nor Prosser made a mistake about the nature of battery.

Ripstein simply does not have the resources to explain the actual elements of a battery claim. He says "[a]nother person is not entitled to so much as touch your body . . . without your authorization" (p. 30). But as we've seen, that's not true. No one needs your permission to touch you unless the touching is harmful or offensive. And Ripstein has no way of explaining why tort would care whether a particular touching was harmful or offensive. Remember, he starts from the premise that no one is in charge of their neighbor. It follows from that, he says, that no one may use your body without your permission. But if that's what follows, then tort is not starting from the same premise, because tort absolutely allows people to use your body without permission.

The bottom line is that tort does not take the view that any use of your body, absent authorization, is wrongful. Rather, tort attempts to distinguish the uses of your body that are wrongful from the uses that aren't. Or rather, I should say that it attempts to distinguish the touchings of your body that are wrongful from the touchings that aren't. And your consent is just one factor that figures in that determination; it also matters whether the touching was harmful or offensive. It does not matter whether your body was used, in Ripstein's sense or in any other. So Ripstein is wrong to think that the wrong in battery is the unauthorized use of your body. And because he's wrong about that, he's also wrong to think that we can explain battery by appeal to the idea that no one is in charge of their neighbor.

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<sup>27</sup> WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 37 (4th ed. 1971).

<sup>28</sup> *McCracken*, 252 S.E.2d at 252 ("[W]e are left with evidence that defendant smoked cigars in his own office when he knew it was obnoxious to a person in the room for him to do so. . . . We hold this is not enough evidence to support a claim for assault or battery."). In *McCracken*, the court suggested that the reason tort permits us to touch people in ways that are not harmful or offensive is because "[c]onsent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life." *Id.* But the court's own decision shows why that view is mistaken. The plaintiff in *McCracken* made clear that he did not want to be contacted by cigar smoke, so he cannot be construed as consenting to the contact. The upshot of the court's opinion is that the plaintiff's lack of consent was irrelevant to the question whether he was wronged by the touching.

And it's not just battery that poses a problem for Ripstein. He doesn't discuss privacy torts much, and for good reason: they don't fit his framework. Consider, for example, the recent tort suit filed by Erin Andrews. In 2008, Andrews checked into a Nashville Marriott.<sup>29</sup> She was in town to cover a Vanderbilt football game for ESPN. She planned to appear on camera fully clothed, as she always does. But Michael Barrett had a different plan. He got Marriott employees to confirm that Andrews was a guest at the hotel, identified the room she was in, and requested to rent the room next door.<sup>30</sup> Barrett altered the peephole in Andrews's door, and then he filmed her through it.<sup>31</sup> He caught her nude, and he put the video on the internet for all to see.<sup>32</sup>

There are lots of torts here, but I want to zoom in on Andrews's claim for intrusion on seclusion.<sup>33</sup> Did Barrett use Andrews's body or property? It's tempting to say yes on both counts, but as we'll see, the wrong involved in intrusion on seclusion cannot be explained as an instance of unauthorized use. Let's start with property. In altering the peephole, Barrett committed a trespass. But it's not obvious that Andrews was a victim of the trespass. If she had a short-term tenancy in the hotel room, then she would have been. But the room could have been rented to someone else. And more important, contact with the property that Andrews occupied is not an element of intrusion on seclusion. Indeed, if Barrett had rented a room at the hotel across the street and watched Andrews through her window, he would still have committed intrusion on seclusion.<sup>34</sup> So the wrong did not consist in the unauthorized use of Andrews's property.

What about her body? Remember that we're focused on Andrews's claim for intrusion on seclusion, not her claim for public disclosure of private facts, so we can't rely on the fact that Barrett

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<sup>29</sup> See Adam Tamburin & Stacey Barchenger, *Erin Andrews Awarded \$55 Million in Civil Case over Nude Video*, THE TENNESSEAN (Mar. 7, 2016, 9:37 PM), <http://www.tennessean.com/story/news/crime/2016/03/07/erin-andrews-awarded-55-million/81367588> [<https://perma.cc/9QVN-T23B>].

<sup>30</sup> See *Stalker Tells All: How I Peeped on Erin Andrews*, PAGE SIX (Mar. 1, 2016, 8:42 AM), <http://pagesix.com/2016/03/01/stalker-tells-all-how-i-peeped-on-erin-andrews> [<https://perma.cc/X6HG-YHNC>].

<sup>31</sup> See *id.*

<sup>32</sup> See Tamburin & Barchenger, *supra* note 29.

<sup>33</sup> "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

<sup>34</sup> See *id.* § 625B cmt. b ("The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires.").

published a video of Andrews nude in order to explain why his conduct was tortious. Barrett would have committed intrusion on seclusion even if he had never recorded Andrews naked.<sup>35</sup> But it does nevertheless seem that Barrett used Andrews's body. He used her body by viewing it, and he did so without permission. Is that what's wrongful in intrusion on seclusion? Alas, no, as there are circumstances in which tort would have allowed Barrett to view Andrews's body absent her authorization. Indeed, he could have done so anytime she appeared in public.<sup>36</sup> Now, I suppose you could say that, simply by appearing in public, Andrews consents to people viewing her there. But that's a stretch, in just the same way that saying that I consent to be tapped on the shoulder every time I stand on a street corner is. Andrews's permission just isn't required, and this time around, she doesn't even have the power to render viewing her tortious by putting people on notice that she doesn't want to be viewed. If she did, she might choose to be free of the paparazzi, but as every celebrity knows, tort doesn't give people a choice about whether they want to be viewed in public.

Like battery, intrusion on seclusion does not prohibit the unauthorized use of your body. Instead, it attempts to distinguish the uses of your body that are wrongful from the uses that aren't. Or rather, I should say that it attempts to distinguish the viewings of your body that are wrongful from the viewings that aren't. And your consent is just one factor that figures in that determination. It also matters whether you were in a secluded spot.<sup>37</sup> But once again, it does not matter whether your body was used, in Ripstein's sense, or in any other. And that means we've got another tort that cannot be explained by appealing to the principle that no one is in charge of their neighbor.

There's a pattern here, which we could play out across lots of torts. Pick something that Ripstein would call using — touching, viewing, whatever — and it will turn out that tort prohibits some touchings, but not others, some viewings, but not others, and so on. And while consent is often relevant in deciding whether a particular use is per-

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<sup>35</sup> See *id.* § 625B cmt. a (“The form of invasion of privacy covered by this Section does not depend upon any publicity given to the person whose interest is invaded or to his affairs. It consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.”).

<sup>36</sup> See *id.* § 625B cmt. c (“Nor is there liability for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye . . .”).

<sup>37</sup> Though even that is not fully determinative, as there are viewings that are off-limits even when you are out and about. See *id.* (“Even in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters.”).

missible, it is not the be-all and end-all criteria. Except, perhaps, when the tort is trespass. As many people have noted, tort provides more protection to property than it does to bodies.<sup>38</sup> The least bit of contact with land that you do not have permission to be on is a trespass, at least if the contact is intentional. If trespass were typical of tort, then Ripstein's principle might have more purchase. But trespass is atypical, in its insistence that any use absent authorization is tortious.

And it's possible — perhaps even likely — that trespass's atypicality is an accident. Consider, for a moment, an alternative trespass rule that tracks the elements of battery. Under this rule, contact with another's land is permitted, so long as it is neither harmful nor offensive. As it happens, I suspect that many people who live in crowded places treat this as the rule that regulates their behavior. My young children routinely hit Wiffle balls over our fence, and we think nothing of entering our neighbors' yards to retrieve them. By now, we probably have implied permission to enter many of them, but we didn't when we started, and we still don't for all of them. We're trespassing — both when the balls go over the fence and when we retrieve them. But it's far from obvious that tort must regard us as wrongdoers. Instead, it could adopt a more relaxed rule that tolerates trivial incursions on others' property.

Ripstein says a rule like that would violate the principle that no person is in charge of their neighbor. But, as we've learned, that's not a principle that tort law endorses, at least not generally. And it's not a principle that I find attractive, at least if we interpret it, as Ripstein does, to mean that my children wrong our neighbors whenever they hit a Wiffle ball over the fence, even if they don't do any damage. There is, however, another explanation for why trespass is so strict. Over the years, some historians have suggested that trespass actions were a convenient way to settle questions about title, in an era with patchy public records and no quiet title actions. To play that role, trespass had to remain strict; otherwise, cases might have been resolved without determining who had title.<sup>39</sup> If there's any truth to that story, then the right we hold in trespass owes in part to the public interest in clarifying who owns what.

That's just the sort of story that Ripstein wants to rule out. Remember, he insists that tort suits are just about the relationship be-

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<sup>38</sup> See, e.g., W.S. HOLDSWORTH, 8 A HISTORY OF ENGLISH LAW 467 (1925) (“[T]hough in theory liability for trespass to the person and to property rests upon the same principles, yet in practice liability for trespass to property is more severe”).

<sup>39</sup> See *id.* at 467–68 (suggesting that rules relating to trespass to property remained strict even while rules relating to trespass to persons relaxed, on account of the role that property torts had come to play in resolving contested claims of ownership).

tween the parties. They are not, he says, a vehicle for pursuing public aims. But he provides no persuasive reason for thinking that they could not — or should not — be. It may be that, as a matter of interpersonal morality, our property would be adequately protected by a rule that prohibited harmful or offensive contact, just as our bodies are. But if the public would be better served by a rule that granted greater protection, I see no reason why the law should ignore that. Of course, the public benefit may not justify the stricter rule; it depends on the magnitude of the benefits weighed against the imposition on those who are rendered wrongdoers. In the days of digital records and quiet title actions, the benefits are probably slim, so we might do well to relax the rule. But the point is that there's no simple principle that tells us just what a trespass must be.

And trespass is not the only tort that plausibly accommodates a public interest. Ripstein nearly never mentions assault, once again for good reason. You commit an assault when you intentionally cause another to apprehend imminent harmful or offensive contact.<sup>40</sup> Ripstein faces at least two puzzles with assault. First, it's not clear that an assault involves a using, even in Ripstein's capacious sense. After all, assault doesn't require a touching. But let's suppose there's an adequate solution to that problem; perhaps Ripstein would argue that it follows from the principle that no one is in charge of their neighbor that we cannot even so much as threaten to make unauthorized use of another person's body. (But what about their property? There is no analogue of assault that protects against threats to property.) That doesn't sound implausible, but it leaves another puzzle: why is the protection assault provides watered down by the imminence requirement?

Suppose you're sitting with Tony Soprano, outside Satriale's Pork Store. He leans forward, looks at you sternly and says, "I'm going to break your neck." That's an assault. But if instead he'd said, "if I ever see you again, I'm going to break your neck," that's not an assault. And it's hard to see what Ripstein could say to make sense of that. In both cases, Soprano threatens to use your body. And though the second threat is conditional, Soprano is surely attempting to control you. You better make sure he doesn't see you again, lest you find yourself slaughtered in the back of Satriale's. So it's a puzzle for Ripstein that there's no tort here.

Now, to be fair, the imminence requirement is a puzzle for everyone, not just Ripstein. The fact that a threat is conditional, or just targeted toward the future, does not mean it is not disruptive. So maybe Ripstein should simply bite the bullet and deny that there ought to be an imminence requirement for assault. No theory can ex-

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<sup>40</sup> RESTATEMENT (SECOND) OF TORTS § 21 (AM. LAW INST. 1965).



plain everything, at least when we're dealing with the social world, so it's fair game for Ripstein to dismiss some features of tort as aberrational. He could put assault on that list, but it would be a prominent entry. More important, there is a way to explain the imminence requirement, so long as you are willing to appeal to considerations that Ripstein puts off-limits.

We can start with Blackstone, who said that a wrong may be committed by "*threats* [or] menaces of bodily hurt, through fear of which a man's business is interrupted."<sup>41</sup> Why isn't the threat or menace enough? Why does it also matter that one's business is interrupted? There's an important difference between the threat of violence now, which demands retreat or resistance, and a threat of violence in the future, which leaves a wider range of options, including the chance to appeal to authorities for assistance.<sup>42</sup> The imminence requirement, then, might be understood to pick out threats that pose an immediate risk to public order, so as to assure those subject to them that they have a right to redress if they retreat rather than respond. I don't know that this fully justifies the imminence requirement. One sometimes sees modern courts invoke the tort of intentional infliction of emotional distress in an effort to skirt it,<sup>43</sup> and I'm sympathetic to that, since even distant threats can cause severe distress. But the public interest in preserving public order at least makes sense out of the imminence requirement, which is mysterious on Ripstein's account.

### III. MAKING TORT TOO TIDY

I could go on, adducing torts that don't fit Ripstein's framework. But we've seen enough to establish that Ripstein's principle — no one is in charge of their neighbor — does not explain the details of tort doctrine. So what does? I just suggested that the elements of assault and trespass might be partly explained by public interests that are advanced by recognition of those wrongs. And it is natural to assume that many private interests are also protected by the rights that tort accords us.

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<sup>41</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*120.

<sup>42</sup> See THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29–30 (1880) ("And comparing assaults and threats, another important difference is to be noted: In the case of threats, as has been stated, preventive remedies are available; but against an assault there are usually none beyond what the party assaulted has in his own power of physical resistance.")

<sup>43</sup> See, e.g., *Dickens v. Puryear*, 276 S.E.2d 325, 336 (N.C. 1981) (approving a claim for intentional infliction of emotional distress where the defendant told plaintiff that he would be killed if he did not "go home, pull his telephone off the wall, pack his clothes, and leave the state of North Carolina," *id.* at 327).

Take battery, for example. A tap on the shoulder is not tortious, but an uninvited shoulder massage might well be. Why? Well, some forms of touching are more intimate than others. The reasons for that are complicated. Different parts of our bodies are vulnerable in different ways, and they also play different parts in our lives. That affects who we trust to touch us where. And as a consequence, different forms of touch carry different social meanings, which are constructed, in part, by the patterns of touchings associated with different relationships. We have interests in controlling who can touch us intimately, in part because that allows us to form relationships of differing intimacy.

Battery is an elegant way of protecting that interest. Absent authorization, it prohibits touchings that are offensive. The test is objective, so it tracks social meanings.<sup>44</sup> And it is applied in a way that takes account of the relationship between the plaintiff and defendant. A friend may not offend if he massages your shoulders, but a coworker almost surely will. By attending to the context in which the touch takes place, battery is capable of tracking that difference, so it grants intimates more access to our bodies than strangers. Of course, it does not permit anyone unfettered access to our bodies. There are touchings that are always offensive absent authorization, and tort recognizes that too. Put all this together, and it is remarkable how well the prohibition on offensive contact protects our interest in controlling who touches us intimately.

And that's not the only interest protected by that prohibition. We have an interest in having others treat us with dignity. If you spit in my face, or strip away my clothing, you deny me the opportunity to move through the world in a dignified way. Once again, the prohibition on offensive contact protects me from these sorts of indignities. Indeed, it is no accident that battery is often called a dignitary tort. But battery's protection extends beyond our dignitary interests too. It also protects our interest in bodily security. Because battery prohibits harmful touchings, you can't punch, push, or poison me, without my permission.

Now I doubt that Ripstein would deny that we have these interests, or that tort protects them. But he does not think that we can explain any particular tort, like battery, by appealing to them. Why? He points out that not every tort involves a setback to an interest. "[A] battery," he says, "is wrong even if it benefits the victim," and "an unauthorized use of another's horse is a trespass to chattels even if the horse needs the exercise" (p. 71). He also points out that tort law is

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<sup>44</sup> RESTATEMENT (SECOND) OF TORTS § 19 ("A bodily contact is offensive if it offends a reasonable sense of personal dignity.").

inconsistent in its protection of the interests we just outlined. As he explains:

[E]ven dimensions of well-being to which [tort] does attend, such as bodily security or the condition of your property, are only protected against specific setbacks. The law of torts requires me to avoid injuring you, but it does not normally require me to take any affirmative steps to protect you from other dangers, no matter how significant or easily abated, and no matter whether those dangers are natural or created by other persons who are not in my charge. The same . . . interests . . . are at issue when I injure you as when I fail to rescue you or carelessly collide with the ambulance that was rushing to assist you. (p. 72)

We could escape these difficulties, Ripstein observes, by supposing that you have an interest in “being the one who determines the conditions under which others touch your body or your property” (p. 72). But that is just an interest in having a right, he says, so it turns out that the right explains the interest, rather than the other way around (p. 72).<sup>45</sup>

In all this, Ripstein seems to have forgotten that the rights we hold in tort are institutional. And it is a familiar feature of institutional life that our rights sometimes come apart from the interests they protect. This is because the institutionalization of rights introduces distinctively institutional concerns. It may indeed be helpful for you to run my horse, but it is not a surprise that the law would leave that up to me, as it might assume that I am best positioned to decide what uses of my property are best. That won't always be true, but it's a good first guess, and there are reasons not to second guess.<sup>46</sup> More to the point, there is nothing circular in thinking that we might have an interest in holding a right. Just a moment ago, I suggested that we have an interest in controlling who can touch us intimately, in part because that control allows us to form relationships of differing intimacy. That interest precedes the institution of tort law, so it is available to explain the right that tort recognizes. And something similar is true with Ripstein's horse; we have an interest in controlling our property, so that we can plan our affairs free from the intrusion of others. Your unauthorized use of my horse sets back that interest, even if you do not damage it, as it gives me reason to worry that my property will not always be available for my use.

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<sup>45</sup> “That is a genuine interest, but it is not frozen in the right sense; it is an interest in standing in a certain type of relation, that is, in having a certain type of right, and so has no analytical purchase in explaining the rights at issue” (p. 72).

<sup>46</sup> In cases where that is clearly not true — when I am unconscious or otherwise incompetent — the law will supply someone else to make a decision.

What about the fact that tort does not consistently protect the interests that it cares about? It is instructive that Ripstein's example juxtaposes a setback to an interest (injuring you) with a failure to advance your interest (by rescuing you). Many think that harms and benefits are morally asymmetrical,<sup>47</sup> so the fact that tort attends only to setbacks (absent special relationships) does not imply that it does not care about the interests involved. But there is a more general point to make here. When tort decides what rights to recognize, there is rarely just one interest at stake, so it is not a surprise that tort protects interests against setbacks from some sources, but not others. Different situations put different interests in play.

All that said, Ripstein is right to observe that tort cares only about setbacks to interests that arise from wrongs. I have pressed that point too, and I think it decisive against economic interpretations that take cost minimization to be the central concern of tort law.<sup>48</sup> But the fact that tort does not respond to setbacks to interests directly does not imply that interests do not figure in the justification of the rights that it recognizes. Indeed, justification does not work that way. Tort assigns Erin Andrews a right that no one spy on her in her hotel room. Whatever else might be said on behalf of that right, a complete account of its justification must reference the ways in which private spaces contribute to our well-being, as that contribution constitutes a reason to recognize the right.

And for the very same reason, any attempt to figure out what tort ought to look like must take account of our interests too, since they supply reasons for shaping the institution in some ways rather than others. Just think how bizarre it would be for a judge to refuse to consider the contribution that private spaces make to our well-being when deciding whether to recognize the tort of intrusion on seclusion. That would cut her off from any sense of why people might press for a right to privacy in secluded spaces, and it would leave her no basis to judge whether any right that she did recognize responded adequately to the reasons that support it.

To be clear, I do not think that the interests of individuals are the only things that ought to figure in deciding whether to recognize a tort. As I suggested earlier, public interests properly play a part in determining the content of our private rights, as do the institutional concerns adverted to earlier. Judges have to decide what interests are

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<sup>47</sup> See, e.g., Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117, 121 (1999) (defending an account of harm on which harms and benefits are asymmetrical); see also Scott Hershovitz, Essay, *Two Models of Tort (and Takings)*, 92 VA. L. REV. 1147, 1164-67 (2006) (rejecting Shiffrin's account of harm, but agreeing that harms and benefits are asymmetrical).

<sup>48</sup> See Hershovitz, *supra* note 47, at 1167-68 (arguing that tort cares about wrongs, not costs).

worth protecting, and then they have to balance those interests against the interests of others that are implicated by the recognition of a right.<sup>49</sup> So the picture I am offering you is much messier than Ripstein's. But tort law is itself messy.

Take battery, again. It melds two prohibitions that could easily be split apart to mark the difference between harming and offending. There's no reason that a grope and a punch have to constitute the same tort. And if it doesn't seem pressing to pry those apart, pause for a moment and ponder whether rape should be a separate tort, and not just an instance of battery. Rape is a far more serious violation than spitting in someone's face, and not just because it tends to cause more damage.<sup>50</sup> Rape breaches our right to sexual autonomy, which is bound up with more important interests than our more general right not to be touched in ways that are offensive.<sup>51</sup> I think it a serious defect that tort does not allow plaintiffs to vindicate their rights not to be raped, rather than just their rights not to be touched in ways that are harmful or offensive.

Ripstein can, of course, explain why rape is tortious. A rapist uses his victim's body, and thereby violates the principle that no one is in charge of their neighbor. But Ripstein has no ground for distinguishing the wrong involved in rape from the wrong involved in spitting in someone's face. Since tort doesn't presently distinguish those wrongs, that might seem a point in Ripstein's favor. But it's not, because it's a puzzle for Ripstein that even battery is its own tort. After all, we could meld battery and trespass together, so that we'd have one tort — call it trespass, in the more archaic sense — in which the wrong is using what someone else has, absent authorization. Or we could do away with all the differentiation between torts, including the damage-based torts, so that we'd have just one: interfering with what someone else already has. At the end of the day, that is the only wrong that Ripstein thinks tort law addresses,<sup>52</sup> so it is a puzzle for him that there is more than one tort.

To be sure, there are things Ripstein could say to explain the multiplicity of torts. It may be that differentiating torts helps people to learn what counts as interference with what other people already have.

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<sup>49</sup> See Goldberg & Zipursky, *supra* note 9, at 937 (“Tortious wrongdoing always involves an interference with one of a set of individual interests that are significant enough aspects of a person’s well-being to warrant the imposition of a duty on others not to interfere with the interest in certain ways, notwithstanding the liberty restriction inherent in such a duty imposition.”).

<sup>50</sup> On the independence of the wrongness of rape from the harm that any particular rape happens to cause, see JOHN GARDNER, *The Wrongfulness of Rape*, in OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 1, 3–8 (2007).

<sup>51</sup> On the right to sexual autonomy and rape as a violation of that right, see *id.* at 20.

<sup>52</sup> “I wrong you only by interfering with something to which you have a right, or, as I shall put it, something you already have” (p. 29).

But he cannot say that we have separate torts to mark morally significant differences in the ways that we wrong one another. And he cannot even entertain the hypothesis that we should recognize rape as a distinct tort on the ground that we miss its morally salient features if we treat it as just another form of battery. Nor can he consider the possibility that rape victims would find tort suits more satisfying if they could name the wrong they suffered more precisely than a battery claim allows. These sorts of arguments will inevitably appeal to interests — in sexual autonomy and public vindication, among other things — that Ripstein puts off-limits in determining what counts as a tort.

I think there are lots of torts because there are lots of ways of wronging people. And I don't think there's anything sacrosanct about the list of torts that we presently have. Indeed, it would be odd if there were, given the contingency and path dependency with which common law courts operate. The list of torts has shifted over the years. We dispensed with the old forms of action, like trespass *vi et armis* and trespass on the case, and replaced them with a set of torts — assault, battery, negligence, and so on — that better describe the wrongs we regard as worth remedying through courts. The list has also expanded over the years. Privacy torts, like intrusion on seclusion, are relatively recent additions, responsive, at least in part, to technological advances that put privacy at risk. The list has also shifted with social attitudes, as evident in the emergence of emotional distress as an independently cognizable injury, as well as in the abandonment of amatory torts, like alienation of affection and criminal conversation.

We can and should refine the list of wrongs that tort remedies further. Or, at least, we should recognize that we have the power to do so. And we should not feel bound to restrict the domain of tort law to wrongs that can be assimilated to the principle that no one is in charge of their neighbor. Tort law is one of the ways that we work out what we owe each other. And since our views about that are bound to change, tort law is bound to change too. That is good news for tort, but bad news for the sort of tort theory that Ripstein seeks. Professor Jules Coleman made this point many years ago:

I reject the suggestion that an adequate account of tort practices requires that there be a general theory of first-order duties from which we can derive them all systematically. Indeed, I am dubious about the prospects for such a theory. On my view, much of the content of the first-order duties that are protected in tort law is created and formed piecemeal in the course of our manifold social and economic interactions. These generate conventions that give rise to expectations among individuals regarding the kind and level of care they — we — can reasonably demand of one another. The content of these duties is then *further* specified in the practice of tort law itself — in the process of litigation, in the development of case

law, in the writing of restatements, and the like. If I am right about this, then it seems unlikely that we could ever have a general theory from which we might derive the first-order duties protected by tort law.<sup>53</sup>

Coleman was responding to economists, who push their own Grand Unified Theory. But the point he was making is good against Ripstein too. Tort is a messy practice. We don't need — and shouldn't expect — tidy theories of it.

#### IV. STILL WRONG ABOUT REMEDIES

I haven't yet said anything about the remedies part of Ripstein's picture, and I should, because Ripstein says that "the unity of right and remedy is the key to understanding tort law" (p. ix). I have mixed feelings about this part of the book. There is much that's smart in it, but the main argument is a mess. Ripstein goes off the rails right at the start, when he announces that he will defend the "commonsense idea that damages really do make it as if a wrong had never happened" (p. 233). That is not a commonsense idea; it is crazy, and it is no credit to tort lawyers that they say it so often.

Why is it crazy? Well, let's think about Erin Andrews again. After Barrett posted the video he shot on the internet, Andrews sued both Barrett and Marriott. She won a \$55 million judgment.<sup>54</sup> That's a lot of money, but experts told Andrews that the video cannot be removed from the internet,<sup>55</sup> where something on the order of seventeen million people have seen it.<sup>56</sup> And Andrews testified in distressing detail about the impact of the incident on her life. She described feeling "embarrassed, humiliated, mortified."<sup>57</sup> She said that it made it harder for her to interview athletes,<sup>58</sup> and it affected her ability to have romantic relationships.<sup>59</sup> A psychologist testified that Andrews has

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<sup>53</sup> JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 34–35 (2001) (footnotes omitted).

<sup>54</sup> See Tamburin & Barchenger, *supra* note 29.

<sup>55</sup> Harriet Sokmensuer, *Erin Andrews "Living a Nightmare," Says Lawyer in Closing Statement of \$75 Million Civil Trial over Leaked Nude Video*, PEOPLE (Mar. 4, 2016, 5:30 PM), <http://people.com/crime/erin-andrews-trial-lawyer-says-sportscaster-is-living-a-nightmare> [<https://perma.cc/Q499-RVE8>] ("Earlier in the trial, Andrews said of the video, 'It's on the internet now. And I've been told it's going to be on the internet until I die.'").

<sup>56</sup> Ahiza Garcia, *Why Is the Erin Andrews Nude Video Still Online?*, CNN MONEY (Mar. 6, 2016, 8:30 PM), <http://money.cnn.com/2016/03/06/media/erin-andrews-video-online-trial> [<https://perma.cc/6DUK-ZWTW>].

<sup>57</sup> Ahiza Garcia, *Erin Andrews' Tears Mark Two Days of Emotional Testimony*, CNN MONEY (Mar. 4, 2016, 4:33 PM), <http://money.cnn.com/2016/03/01/media/erin-andrews-video-trial> [<https://perma.cc/RA5B-DXTU>].

<sup>58</sup> *Id.*

<sup>59</sup> Meghan Keneally, *Erin Andrews Chokes Up Talking About How Stalker Video Affects Her Relationships*, ABC NEWS (Mar. 1, 2016, 11:53 AM), <http://abcnews.go.com/US/erin-andrews-chokes-talking-stalker-video-affects-relationships/story?id=37308804> [<https://perma.cc/B3YN>].

PTSD.<sup>60</sup> Her lawyer added, “This is a PTSD problem for which there is no ‘post.’ It’s every day. She knows people are looking at her on the internet every day. She gets tweets and social media and emails and cat calls at the stadium all the time.”<sup>61</sup> Andrews worries about having to address the video with her children and grandchildren.<sup>62</sup> “It’s always there,” she said. “It’s always on my back. I can never get rid of it.”<sup>63</sup> Her mother added, “If I had a magic wand that would make this go away and make her feel better, I would make a million of them.”<sup>64</sup>

Andrews and her mother clearly did not think that a damage award would make it as if the wrong had never happened. Indeed, the fact that the incident would follow Andrews forever was one of the reasons she asked for a multimillion dollar verdict. “This is not like a broken arm that heals,” her lawyer told the jury, “it continues to happen, it happens today, it will never stop.”<sup>65</sup> Hopefully, that will turn out to be hyperbole. But even if the consequences fade over time, the incident is indelibly part of Andrews’s life. There is nothing a jury — or anyone else — could do to make it as if the wrong had never happened.

The Andrews case poses this problem starkly, but it is typical of tort suits. Indeed, damages never make it as if the wrong never happened, not even when the injuries involved are the sorts of things that heal. Of course, damages can ameliorate some of the consequences of the wrong. They can replace income and pay off medical bills. They can help people with severe injuries adjust to their new circumstances, by giving them the resources to adapt their environments or take up new activities that fit their capabilities. All of that is to the good, and all of that makes damage awards worthwhile. But none of that makes it as if the wrong never happened. “I wanted to be the girl next door who loved sports,” Andrews said, “and now I’m the girl with a hotel

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-9BPK] (“I feel really guilty he [Stoll] didn’t know me before this happened and to try to explain to someone who has questions about why I have trust issues, why I’m insecure, why I’m embarrassed; he doesn’t understand,” she said . . . .” (alteration in original)).

<sup>60</sup> Harriet Sokmensuer, *Erin Andrews Has “Mild PTSD” from Secretly Filmed Nude Tape, Psychologist for Defense Testifies*, PEOPLE (Mar. 2, 2016, 5:05 PM), <http://people.com/crime/psychologist-testifies-erin-andrews-has-mild-ptsd> [<https://perma.cc/8TDU-FUS9>].

<sup>61</sup> Sokmensuer, *supra* note 55.

<sup>62</sup> Keneally, *supra* note 59.

<sup>63</sup> Raphael Chestang, *Erin Andrews Gives Tearful Testimony in Stalker Video Case: “I Can Never Get Rid of It,”* ET (Feb. 29, 2016, 2:45 PM), [http://www.etonline.com/news/183474\\_erin\\_andrews\\_gives\\_tearful\\_testimony\\_stalker\\_video\\_case\\_i\\_can\\_never\\_get\\_rid\\_of\\_it](http://www.etonline.com/news/183474_erin_andrews_gives_tearful_testimony_stalker_video_case_i_can_never_get_rid_of_it) [<https://perma.cc/HE6Y-HKP2>].

<sup>64</sup> *Id.*

<sup>65</sup> Stacey Barchenger, *Erin Andrews Humiliated by Peephole Video, Lawyer Says*, THE TENNESSEAN (Feb. 23, 2016, 7:02 PM), <http://www.tennessean.com/story/news/2016/02/23/erin-andrews-stalker-focus-trials-opening-day/80506248> [<https://perma.cc/RF4L-LPPH>].



scandal.”<sup>66</sup> That’s how wrongdoing works; it remains part of our lives, and there’s nothing damage awards can do about that.

Ripstein gets this, sort of. Early on, he acknowledges that “[i]t is easy to make this . . . idea look preposterous, because payment of money will never fully replace a treasured piece of property, let alone a limb or a loved one” (p. 27). But he nonetheless insists that, if we interpret the idea carefully, damages really can make it as if a wrong never happened. Here is how Ripstein explains what he means:

The basic idea is straightforward: A wrongdoer cannot render a right irrelevant simply by violating it. Instead the plaintiff is entitled to constrain the defendant’s conduct both before and after the defendant commits a wrong. If the defendant acts contrary to the constraint, the constraint survives in a new form as a remedy. . . . Because the object of the constraint is your having those means subject to your choice, the only way to make the constraint survive is to give you substitute means — means that, from the standpoint of your ability to set and pursue your purposes, come as close as possible to what you would have had if the wrong had never happened. . . . [M]oney, as the closest thing to an all-purpose means, can be understood as restoring to the wronged party the means he or she is entitled to. (p. 234)

This passage makes it easy to see why Ripstein says that “the unity of right and remedy is the key to understanding tort law” (p. ix). A remedy, Ripstein thinks, ensures that a victim has control over her means, which is what tort all along aims to protect, on Ripstein’s picture.

There are cases that seem to fit Ripstein’s story. If you destroy my car, you cannot return it. But you can give me the money to buy a new car, so that I will have similar means at my disposal. Or to take a more challenging case: if you sever my arm, you can give me the money to purchase a prosthetic and rearrange my environment to better fit my capabilities, so that I can continue to pursue my projects as best I’m able. But even in these cases, Ripstein’s story doesn’t quite work the way he suggests. Absent the wrong, it would have been up to me whether to swap my car for cash. Your wrong deprives me of that choice, so a tort remedy doesn’t actually preserve my control over my means. The case is even more clear with the prosthetic arm, since no one makes that trade by choice. Ripstein wants to shift our focus from the facts about injuries — damaged cars and severed arms — to the normative relations between the parties. But even if we follow him that far, it remains true that tort remedies don’t really make it as if the wrong never happened, because they can do nothing to change the fact that the defendant’s action was inconsistent with the plaintiff’s right.

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<sup>66</sup> Michael Sebastian, *Erin Andrews Gives Tearful Testimony About the Leaked Nude Video that Changed Her Life*, COSMOPOLITAN (Mar. 2, 2016), <http://www.cosmopolitan.com/entertainment/tv/news/a54588/erin-andrews-testimony> [<https://perma.cc/3FNW-P8DH>].

And the cases we've considered so far are the easy ones for Ripstein, since the things lost plausibly have substitutes that money might purchase. The hard cases are those that involve truly devastating injuries, where there is no possibility of giving the plaintiff control over similar means to what she had before she was wronged.<sup>67</sup> And the hardest cases are those in which talk of substitute means doesn't make any sense. Andrews didn't sustain any damage to her body or property. Her earning capacity was not even compromised; as the defense attorney suggested, it was probably enhanced.<sup>68</sup> Ripstein says that a defendant's obligation, "both before and after the wrong, is: 'Act in such a way as to leave the plaintiff secure in what he or she already has'" (p. 246). But Barrett can't restore what Andrews had, and there's no reason to think money an adequate substitute.

I am baffled by Ripstein's insistence that damages can make it as if a wrong never happened. So far as I can tell, he is dug in because he thinks it important to deny that a right can be extinguished by a wrong (pp. 247-48). A right survives its own violation, he says, because the victim remains entitled to constrain the defendant's conduct with respect to the object of the right (p. 243). Ripstein even goes so far as to say that wrongdoing "does not change the normative situation" (p. 234). In fact, he says that wrongdoing is "entirely without normative significance" (p. 248). That is a wild claim, and it has to be false. If you've ever had the thought that you ought to apologize, then you've noticed one of the many ways in which wrongdoing changes the normative situation. And even Ripstein seems to sense that he's wrong, since he sometimes slips in qualifiers that blunt the force of his claim. Just five lines after announcing that wrongdoing doesn't make a normative difference, Ripstein says that a right that is violated "survives *in a new form* as a remedy" (p. 234).<sup>69</sup> Well, if the right has taken on a new form, then the wrongdoing did indeed make a normative difference.<sup>70</sup>

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<sup>67</sup> In cases like this, pain and suffering damages figure prominently, though they play a role in cases with less serious injuries too. Ripstein says nearly nothing about pain and suffering damages, and it is doubtful that they could be made to fit within his framework.

<sup>68</sup> See Sebastian, *supra* note 66; Harriet Sokmensuer, *Erin Andrews Trial: Lawyers for Hotel Suggest Sportscaster's Career Has Thrived Since Release of Secretly Taped Nude Video*, PEOPLE (Mar. 2, 2016, 12:10 PM), <http://people.com/crime/erin-andrews-trial-defense-suggests-sportscasters-career-has-thrived> [https://perma.cc/G853-NEBD].

<sup>69</sup> Emphasis has been added.

<sup>70</sup> And nine pages later, there's this:

[Your right] survives . . . in modified form . . . . The modification reflects the ways in which I have changed the normative situation: Your antecedent right was *in rem*, that is, it held against all others. By interfering with the object of your right, I changed the situation as between the two of us, so the surviving form of your right as against me is *in personam*, that is, it holds only against me. (p. 243)

In any event, Ripstein is wrong to dig in. Some rights do, in fact, survive their own violation. Andrews still has a right to privacy in secluded spaces; Barrett did not strip her of that right when he violated it. But when the object of a right is destroyed, then the right disappears along with it. That does not, however, mean that the right is rendered irrelevant, because the breach of a right triggers a new set of normative relations, whether or not the right survives its breach. After the wrong, Andrews had a right to a remedy. That's a different right than the one she held before. We know in part because that earlier right — her right to privacy in secluded spaces — still exists and will continue to do so even after her right to a remedy is discharged. We also know that because the right to a remedy is a right to something different than what Andrews had before. And we know that because her right to a remedy rests on the fact that she was wronged; otherwise it wouldn't be a right to a *remedy*.

Acknowledging that there is no sense in which damages make it as if a wrong never happened ought to be table stakes for tort theory, because only then can we have a clear conversation about what tort damages actually do. Elsewhere, I have argued that tort law is an expressive institution.<sup>71</sup> A tort judgment says *this defendant wronged that plaintiff*, and thereby reasserts that the plaintiff had a right not to be treated the way she was. That sort of public vindication is important, because wrongdoing often gives victims reasons to doubt their social standing. And damages are expressive too. They are not just expressive: sometimes, compensatory damages can ameliorate the consequences of the wrong. But whether or not repair is possible, they shift the social meaning of the plaintiff's injuries by symbolically assigning them to the defendant, and making them something for which the defendant was made to pay. In all that, damages serve to mark the wrong and respond to it, rather than make it as if the wrong had never happened.

Ripstein says that I've written about these issues wistfully (p. 5 n.13),<sup>72</sup> and I suppose that's true. But I'd also like to get a little anger

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Ripstein never tells us how he individuates rights. On a more suitable occasion, I'd defend the view that they are individuated by (at least) the following criteria: (1) the parties involved in the relationship; (2) the content of the right; and (3) the grounds of the right. (Roughly: who owes whom what and why.) If this is right, Ripstein is not describing a modification; rather he's describing a new right that arises upon breach of the old one.

<sup>71</sup> See Scott Hershovitz, *Tort as a Substitute for Revenge*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 86, 87–102 (John Oberdiek ed., 2014); Scott Hershovitz, *The Expressive Function of Tort Law* (Sept. 2, 2016) (unpublished manuscript) (on file with the Harvard Law School Library).

<sup>72</sup> Ripstein quotes Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107, 117 (2011) ("We cannot undo what we have done. No matter how hard we wish that we could turn back time when a trigger is pulled or a driver hits a child, we cannot.

across, because I think it outrageous to say to someone who has suffered a serious violation, “we can make it as if this never happened.” We can’t, and we should be honest about that. And if we were honest about that, we could avoid all kinds of confusions that afflict conversations about damages — that we should care, for example, what price the plaintiff would have accepted to suffer the injury, or whether the wrong might have benefitted the plaintiff in some fashion. (Some said that Andrews should pay Barrett for increasing her earning capacity;<sup>73</sup> others attempted to justify her damage award on the ground that she could have earned millions by letting people watch her strip.<sup>74</sup>) Ripstein avoids most of this silliness, and he has many sensible things to say about remedies. But the phrase that Ripstein digs in to defend — as if it never happened — is the source of some of our worst ideas about remedies, and we’d do well to leave it behind.

## V. CONCLUSION

Ripstein is not the first to offer a Grand Unified Theory of Tort, and he won’t be the last. There’s something appealing in the thought that a simple idea stitches together all of tort doctrine. That has always been an attraction of the economic interpretation of tort, which suggests that efficiency is the key to understanding the institution.<sup>75</sup> It is not, and one of the joys of reading Ripstein is watching him take apart the economic picture. He’s not the first to cover that ground, but he does it as well as anyone. Ripstein’s own theory is leagues better, in large part because it takes the surface structure of tort doctrine seriously and regards tort as a law of private wrongs. The problem is that Ripstein thinks there’s something lurking beneath the surface that explains all of tort — the principle that no one is in charge of their neighbor. But, as we’ve seen, Ripstein’s story is too simple to make sense of the doctrine.

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The moment one person wrongs another, the wrong is part of our history, indelibly, and we must decide how to go on.”)

<sup>73</sup> See Stacey Barchenger, *In Emotional Plea, Erin Andrews Blames Hotel*, THE TENNESSEAN (Feb. 29, 2016, 8:52 PM), <http://www.tennessean.com/story/news/2016/02/29/stalker-says-he-only-planned-follow-erin-andrews-once/81112104> [https://perma.cc/2BC7-UWMS].

<sup>74</sup> See *Fox’s Ablow: Erin Andrews Could “Make the Same Amount” of Money if She “Let Herself Be Seen Naked” as She Won in Unauthorized Video Lawsuit*, MEDIA MATTERS (Mar. 8, 2016, 9:19 AM), <http://mediamatters.org/video/2016/03/08/foxs-ablow-erin-andrews-could-make-the-same-amo/209071> [https://perma.cc/2BF3-NNJX].

<sup>75</sup> WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1 (1987) (“[T]he common law of torts is best explained as if the judges who created the law . . . were trying to promote efficient resource allocation”).

The internet would have us believe that every problem can be solved by “one weird trick.”<sup>76</sup> That’s always a scam, and most of us know not to fall for it. But when it comes to legal theory, too many of us are tempted to sign up for that one weird trick that explains all of tort (or contract, or law in general). As I said at the start, we should be skeptical of simple theories that purport to explain complicated and contingent bodies of law, especially when the key ideas in those theories do not appear in the doctrine. If the principle that no one is in charge of their neighbor really did drive all of tort doctrine, then we should expect it to show up in judicial opinions — not just here or there, but everywhere — and it doesn’t. I don’t doubt that judges sometimes grasp for principles they can’t quite articulate. But for the most part, they are pretty good at saying what they mean, and the reasons they marshal in their opinions are in fact the grounds for their decisions.

That’s not a popular view among law professors. It’s much more exciting to think that we can pull back the curtain and show it’s all a ruse, or connect the dots and put the law on firmer footing than what’s found in the case reports. But those sorts of projects nearly never succeed. The common law is the creation of thousands and thousands of judges, deciding cases they just happen to have been confronted with. They try out rules, and when the rules don’t work, they refine or replace them. They also show their work at every step, which makes it unlikely that the ideas that really explain what they are up to are off-stage, waiting for someone to find them.

There’s nothing disappointing about that, unless you are a law professor hoping that you can be the one to sort it all out and show that a simple theory really does explain everything about tort law. But legal institutions don’t work that way. The laws of physics are what they are independent of us. If they are simple and elegant, that’s simply because we haven’t had the chance to muck them up. But our institutions are ours. We can make of them what we will. And our wills are often complex and compromised. We should expect our institutions to be the same. There is no question that tort law is. But there is good news here too. Our institutions are ours. We can make of them what we will. And we can will them to be better than they are. The task of tort theory is to show us what tort contributes to our lives, and to help us imagine what it could contribute, if we had the will to improve it.

Ripstein hasn’t given us the Grand Unified Theory of Tort. But we don’t need one, and there is lots to appreciate in what he has given

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<sup>76</sup> See generally Alex Kaufman, *Prepare to Be Shocked! What Happens when You Actually Click on One of Those “One Weird Trick” Ads?*, SLATE (July 30, 2013, 3:00 PM), [http://www.slate.com/articles/business/moneybox/2013/07/how\\_one\\_weird\\_trick\\_conquered\\_the\\_internet\\_what\\_happens\\_when\\_you\\_click\\_on.html](http://www.slate.com/articles/business/moneybox/2013/07/how_one_weird_trick_conquered_the_internet_what_happens_when_you_click_on.html) [<https://perma.cc/HE8K-BJGV>].

us. *Private Wrongs* is a serious and significant book. I have focused on its faults, but there is an awful lot to admire in it. As I said before, the chapters on negligence and strict liability make substantial contributions to tort theory. And throughout the book, there are novel and important insights on a wide range of topics. *Private Wrongs* does not achieve its goal, but it is nevertheless an achievement, for all that it has to teach about tort.