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Wrongs to Us

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WRONGS TO US

Steven Schaus*

A huge number of tort suits in the United States are captioned Plaintiff & Spouse v. Defendant. Why? The answer is at once completely obvious and deeply puzzling. The plaintiff's spouse is part of the case because, in almost every U.S. state, she has a claim against the defendant too—not for battery or negligence, as her spouse might, but for the loss of her spouse's "consortium." And yet, it's not at all clear why a spouse should have a tort claim of this kind. A plaintiff who sues in tort, Judge Cardozo once explained, must always identify "a wrong" to herself; i.e., a violation of her own right." By this standard, however, a spouse's consortium claim seems strange. The defendant violated her injured spouse's rights, perhaps, but is it right to say the defendant violated hers too? At one point, tort law took the view that a husband had property rights in his wife, so that a wrong to his wife was a wrong to him too. That can't be the right answer today, however, and it's not clear whether there's a more egalitarian rights-based answer to give. For that reason, rights-based theories of tort law tend to say that consortium claims have no proper place in a law of private wrongs, and critics of those theories can cite consortium claims as evidence that tort isn't (all) about rights in the first place. In this Article, I suggest that both conclusions miss the mark. Consortium claims may have a natural place in a rights-based picture of tort law, so long as we have the right picture of rights (and rightsholders) in view. Partners in marriage-like relationships act together to construct a shared life, and that puts them in a position to hold joint claims against certain interferences with that life. Consortium suits make more sense, I propose, if we see them as a response to the violation of these joint claims—as a means to redress what partners in marriage-like relationships would rightly regard as "wrongs to us."

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INTRODUCTION

We sometimes talk as though tort suits involve just two parties, but the truth is that the caption of a tort suit can get crowded. In addition to the injured party and the alleged injurer, for instance, there's often a spouse in the mix. In fact, a huge number of tort cases in the United States work their way toward judgment as *Plaintiff & Spouse v. Defendant*.¹ Why? The answer is at once completely obvious and deeply puzzling. The spouse is there because, in just about every state, she has a tort claim against the defendant too—not for battery or negligence, as her spouse might, but for “loss of consortium.”² And yet, it's not clear why that should be, because it's not clear that spousal consortium claims make any doctrinal or normative sense.

To see the puzzle, consider what Judge Cardozo had to say about the nature of a tort claim in *Palsgraf v. Long Island Railroad Co.*³ A plaintiff who brings a claim in tort, Cardozo explained, must always show “‘a wrong’ to herself; i.e., a violation of her own right, and not merely a wrong to someone else, nor conduct ‘wrongful’ because unsocial.”⁴ This is sometimes called the “*Palsgraf* principle,” and it is central to the view that tort is a law of wrongs—the view, in short, that tort law aims to redress the rights infringements that plaintiffs suffer at the hands of defendants, not simply to compensate plaintiffs for the losses that wrong-acting defendants cause them. This view of tort law is not an eccentric one either, it should be said, even if it is not the economist's view of the institution. Indeed, it's black-letter law in most jurisdictions, and a well-known position in tort theory too.

If we treat the *Palsgraf* principle as fixed, though, then consortium claims seem more than a little strange. The principle tells us that a plaintiff who brings a consortium claim must identify “a violation of her own right.” But which right, exactly? It would be odd to say that she had a right over the way that the defendant related to her spouse, no? At one time, tort law wasn't troubled by thoughts of this kind. Indeed, the traditional view of consortium

1. In addition, a huge number of cases are captioned something like *Deceased's Representative & Deceased's Spouse v. Defendant*. I return to wrongful death claims in Part VII.

2. I default to the personal pronouns “she” and “her” to refer to a generic partner in this Article—in part to create a stylistic bridge to Cardozo's references to Helen Palsgraf (e.g., “the violation of *her* own right”) and in part because I treat Kathleen Lundgren's consortium suit as a touchstone throughout. But I realize this choice has both stylistic and substantive drawbacks too.

3. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

4. *Id.* at 100–01.

claims, conceived in the context of coverture, took for granted that a husband had a property right in his wife (but not the other way around), akin to the right he had in his servants.⁵ By this patriarchal logic, a wrong to a married woman was a wrong to her husband too—a violation of his own right. As a result, a husband’s consortium claim was once a straightforward instance of the *Palsgraf* principle, rather than a seeming departure from it.

Today, courts reject the traditional view, and rightly so. Despite that, courts here in the United States haven’t given up on consortium claims, even as courts and legislatures in other countries have.⁶ If anything, courts here have set out in the other direction—extending consortium claims to married women, to parents, to children, and sometimes still others. How should we understand these developments in U.S. tort law? Have courts simply cut themselves loose from the *Palsgraf* principle, at least in this pocket of tort doctrine? That’s not what courts tend to say about their own decisions, for what it’s worth. By and large, courts continue to say that spousal consortium claims rest on rights—except now, they’re apt to say that the claims rest on the right of each spouse in (something like) the “marital relationship,” rather than the right of each spouse in the other.⁷ Now, I suspect that courts are onto something with this thought, and one of my goals in this Article is to say what that might be. But you’d be forgiven for thinking that this apparent shift in doctrine—from rights in people to rights in the relations between them—is an artful evasion of the tort’s problematic past rather than a credible answer to the key question: Which right, exactly?

Tort theorists, for their part, seem to doubt that courts have a good answer to give. Proponents of rights-based accounts of tort law argue that consortium claims are every bit as strange as they seem. They are irredeemable relics of a patriarchal past, or else they are claims of a different vintage that have been left in place to promote policy ends of some other kind. Either way, these theorists say, consortium claims have no proper place in a law of private wrongs today.⁸ Opponents of rights-based accounts, by contrast, can cite consortium claims as evidence that tort law isn’t all about rights today, if it ever was. If tort

5. See, e.g., John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 723–24 (2000).

6. See, e.g., Administration of Justice Act 1982, c. 53, § 2 (UK).

7. See, e.g., *Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978) (“The marital relationship is the primary familial interest recognized by the courts. The remedy for the negligent . . . impairment of this relationship is a tort action for loss of consortium.”); *Mist v. Westin Hotels, Inc.*, 738 P.2d 85, 90 (Haw. 1987) (“The legal right emerges and is derived from the marital relationship. . . . [This] basis for recovery for loss of consortium is “interference with the continuance of a healthy and happy marital life” and “injury to the conjugal relation.””) (quoting *Eggert v. Working*, 599 P.2d 1389, 1391 (Alaska 1979)); *Buckley v. Nat’l Freight, Inc.*, 681 N.E.2d 1287, 1288 (N.Y. 1997) (“[A]n action for loss of consortium . . . arises out of an injury to the marital relationship.”).

8. See, e.g., ROBERT STEVENS, TORTS AND RIGHTS 174 (2007); JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 202 n.34 (2020); Zoë Sinel, *Consortium as a “Right” in the Law of Torts*, 93 SUP. CT. L. REV. (2d) 227 (2019).

law (also) aims to induce an efficient level of precaution or to provide a fair measure of compensation, for instance, then consortium claims may have a natural part to play.⁹ The “puzzle” of consortium claims, from this perspective, is simply the product of a wrongheaded focus on rights.

In my view, however, both of these responses miss the mark, because both credit the conclusion that consortium claims can’t be understood to rest on rights. And I think that’s a mistake. Tort theorists have been right to worry that consortium claims are different from other tort claims. But I think they have been wrong about what this difference comes to, and about what it means for the prospect of treating torts as wrongs—both in practice and in theory. In this Article, I’ll suggest that consortium claims have a natural enough place in a rights-based picture of tort law, so long as we have the right picture of rights (and rightsholders) in view. I will offer a more detailed roadmap of the argument in a moment. To give you a glimpse of where we’re headed, though, let me tell you about Alan and Kathleen Lundgren.

In the summer of 1976, Alan Lundgren was in a frightening accident when his brakes failed on a highway exit ramp. Alan survived, but damage to his spinal cord left him with recurring back pain and difficulty moving one foot. As a result, Alan struggled to meet the physical demands of the small business he co-owned, and he was forced to give up many of the physical activities he loved. Alan sued Whitney’s, a local auto repair shop, for negligence. Kathleen Lundgren, his wife of a decade at that point, added a claim for loss of consortium.¹⁰ At trial’s end, a jury had no trouble finding Whitney’s liable to both Alan and Kathleen—to him for his personal injuries, and to her for the loss of Alan’s “society and services.”¹¹ Now, as tort cases go, *Lundgren & Lundgren v. Whitney’s, Inc.*, is not particularly remarkable.¹² In part for that reason, though, I think that Kathleen’s view of what Whitney’s carelessness cost her might help us see what consortium cases are all about.

At trial, Kathleen’s testimony focused on the many ways that Alan’s injuries had “altered” their “social life” and “limited the[ir] activities.”¹³ She mentioned dancing, bowling, weekend boat trips with their two children, and walks on the beach as some of the losses she found difficult to bear.¹⁴ How should we understand Kathleen’s point here? To state the obvious, her point wasn’t that, in the wake of Alan’s accident, she couldn’t take walks on the beach anymore. Rather, her point was presumably that, because he can’t take walks anymore, *we* can’t take walks anymore—and that taking walks *together* was

9. As these examples suggest, both efficiency-oriented economic theories and policy-oriented moral theories (typically) count as non-rights-based theories, in the relevant sense.

10. *Lundgren v. Whitney’s, Inc.*, 614 P.2d 1272 (Wash. 1980) (en banc).

11. *See id.* at 1274; RESTATEMENT (SECOND) OF TORTS § 693 (AM. L. INST. 1977).

12. The case is notable because it marked the first time the Washington Supreme Court extended consortium claims to married women, but the underlying facts and claims are common as could be. 614 P.2d at 1274.

13. *Lundgren*, 614 P.2d at 1274.

14. *Id.*

something that mattered.¹⁵ Of course, taking walks wasn't the only thing that Alan and Kathleen did together. It seems they danced together, ran a home together, cared for their children together, and more, just like countless other couples. After Alan's accident, they couldn't manage some of these things at all, and they could manage others only with added difficulty or expense. Alan survived the accident, fortunately, so he and Kathleen had the opportunity to reimagine and remake their life together. But the life they had already imagined and made for themselves was altered forever by Whitney's carelessness.

I think the point implicit in Kathleen's testimony—that Whitney's carelessness derailed the life she *shared* with Alan, whatever else it did—is an important one. In fact, I will suggest that taking this point seriously is the key to a better rights-based understanding of consortium claims. In the end, I hope to be able to tell a story in which Kathleen joined Alan's lawsuit against Whitney's to redress a wrong to the "us" they constituted, and to hold Whitney's to account for the harm she suffered as one of that us. To get there, though, I'll first need to make it plausible that partners in marriage-like relationships, by acting together in intensive, long-term ways, constitute a genuine "we," and that this kind of collective agency puts partners in marriage-like relationships in a position to have joint aims and interests—and to hold joint rights to protect those shared aims and interests. The hypothesis I'll explore, then, is that partners in marriage-like relationships often have jointly held rights of this kind, and that tort law can be understood to give legal effect to these rights by recognizing claims for loss of consortium.

Seeing consortium claims this way will enable us to make better sense of their doctrinal logic, I'll suggest, and it will put us in a position to understand their continuing appeal too, even to avowed egalitarians. To maintain that partners in marriage-like relationships constitute a "we" in a real and morally significant sense is not to re-indulge the fiction of marital unity or re-embrace the autonomy-obliterating gender norms that came with it. On the contrary, I believe the sort of "we-ness" that I'll appeal to is a feature of even egalitarian, autonomy-preserving ideals of long-term romantic partnership. At the same time, seeing consortium claims as vehicles for redressing wrongs that a "we" suffers will give us a new vantage from which to evaluate existing doctrinal rules too—rules about who counts as a "spouse," for instance, or about how consortium claims are to be brought, adjudicated, and remedied.

Although my immediate aim is to put ideas about shared agency, romantic partnership, and rights to work to make progress on a particular doctrinal puzzle, the solution this Article develops promises to have broader doctrinal and theoretical implications too. To start with, spousal consortium claims aren't the only relationship-based tort claims that make trouble for the rights-based picture of tort. There are also claims for nonspousal consortium, claims for wrongful death, and claims by relatives for the infliction of emotional distress too. The wrongs-to-us model gives us a way to think through this broader

15. Cf. Margaret Gilbert, *Walking Together: A Paradigmatic Social Phenomenon*, 15 *MIDWEST STUD. PHIL.* 1 (1990).

category of relationship-based tort claims and (I hope) make better sense of them.¹⁶ What's more, the wrongs-to-us model matters for debates in legal and moral theory. It bears directly on current debates about the nature of rights and the (a)symmetry between rights and wrongs, for example.¹⁷ If the model is tenable, finally, it helps to sharpen a challenge to certain familiar, strongly individualistic ways of thinking about rights.

Here is the plan for the rest of the Article. Part I introduces spousal consortium claims in more detail. Part II explains the *Palsgraf* puzzle. Parts III and IV outline the problems I see with the standard rights-based solutions to it. Part V attempts to develop Kathleen's point—that partners in a marriage-like relationship stand to suffer wrongful interferences with the life they share—wrongs, that is, with respect to the “us” they constitute. Part VI argues that we are better able to understand consortium claims if we see them as the law's effort to recognize and redress these kinds of wrongs. It also works out some of the doctrinal consequences of seeing consortium claims this way. Part VII outlines some broader implications of this view.

I. CONSORTIUM CLAIMS

Let's begin with a brief sketch of consortium claims—of where they came from and of how they work today—so that we have a better understanding of what, exactly, a theory of consortium claims is supposed to be a theory of. By the early seventeenth century, a husband was deemed to have a right to his wife's services at common law, akin to the right that a “master” had to his “servant's.”¹⁸ As a result, a third party who intentionally or negligently injured a married woman was understood to have committed a wrong with respect to her husband too—to have wrongfully interfered with his property interests.¹⁹ In other words, “[t]he husband was allowed to sue for loss of consortium”—and entitled to recover the pecuniary value of his wife's services—“because of the wife's status as a chattel of her husband.”²⁰ A married woman had no equivalent “right of consortium” in this patriarchal framework, however, and thus

16. In this way, I echo and underscore the concern that rights-based tort theory too often marginalizes “relational” injuries. MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 113–17 (2010); see also Martha Chamallas, *Beneath the Surface of Civil Recourse Theory*, 88 IND. L.J. 527, 537 (2013).

17. Nicolas Cornell, *Wrongs, Rights, and Third Parties*, 43 PHIL. & PUB. AFFS. 109, 109 (2015) (using consortium claims and other examples to argue that “having a right and standing to be wronged are distinct and separable moral phenomena”).

18. Jacob Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 653 (1930) (suggesting these claims date to around 1620, at the latest); see also John H. Wigmore, *Interference with Social Relations*, 21 AM. L. REV. 764, 765 (1887); Witt, *supra* note 5, at 723–24.

19. E.g., Evans Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 2 (1923); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 527 (1998).

20. *Schreiner v. Fruit*, 519 P.2d 462, 463 (Alaska 1974).

no claim against a third party who wrongfully injured her husband.²¹ In Blackstone's telling, for instance, a married woman, as the "inferior" in the legal relation, "hath no kind of property in the company, care, or assistance" of her husband.²²

Over time, changes to legal rules and social norms made the narrow, property-based understanding of a husband's consortium claims untenable.²³ But courts didn't give up on consortium claims. Instead, they developed a different understanding of the husband's right. The "loss of the wife's services or earnings could no longer figure in a right of consortium on the part of a husband," one court later explained, "but the other components of the right—the wife's society or companionship or assistance and her sexual availability—could remain."²⁴ At that point, a husband's claim was "no longer an action complaining of interference with a quasi-property interest, but instead an action for tortiously caused injury . . . that adversely affects the relationship of a husband and wife."²⁵ Despite this shift in theory, however—despite the fact that an injury that "adversely affects the relationship of a husband and wife" will presumably affect both husband and wife—courts continued to deny that married women held the "other components of the right" of consortium on terms equal to their husbands.²⁶

As late as 1950, in fact, married women lacked the right to sue for loss of consortium. In *Hitaffer v. Argonne Co.*,²⁷ however, the D.C. Circuit—then acting as the highest court of the District of Columbia—held that married women could sue for loss of consortium based on negligent injuries to their husbands.

21. Holbrook, *supra* note 19, at 2.

22. 3 WILLIAM BLACKSTONE, COMMENTARIES *142–43.

23. After legislatures enacted the Married Women's Property Acts in the nineteenth century, for instance, women were able to retain a separate legal identity in marriage, and with it the ability to hold property, including in (some of) their labor. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 843 (2004). These acts ended some of the formal legal incidents of "coverture," a system of legal rules, developed and maintained over several centuries, which treated marriage as the creation of a "unity"—as the merger of husband and wife into a single legal person or unit, the husband. *See id.* at 841–43. I should stress, though, that incidents of coverture lived on for a long time in gendered assumptions about the rights, duties, and immunities of married partners—indeed, by some accounts they make themselves felt in the law to this day. *See, e.g.*, Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2142–47 (2019) (summarizing the incidents of coverture and their lingering influence).

24. *Diaz v. Eli Lilly & Co.*, 302 N.E.2d 555, 557 (Mass. 1973). By some accounts, the husband's right of consortium had included "society" and sexual relations earlier, so the shift was primarily one of emphasis. *See* Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1052 (1965).

25. JOHN C.P. GOLDBERG, ANTHONY J. SEBOK, BENJAMIN C. ZIPURSKY & MARIA KENDRICK, *TORT LAW: RESPONSIBILITIES AND REDRESS* 476 (Wolters Kluwer 2021) (2004).

26. *Diaz*, 302 N.E.2d. at 557. Curiously, courts took the view that married women had *some* right of consortium, because they granted married women the right to sue for *intentional* interferences with the marriage relationship. These "heartbalm" torts were available to married women well before they could bring injury-based consortium claims. *See, e.g.*, Lippman, *supra* note 18, at 662–63.

27. 183 F.2d 811 (D.C. Cir. 1950).

Consortium, the court explained, should be understood to “include[] love, affection, companionship, sexual relations, etc., all welded into a conceptualistic unity.”²⁸ Given that, the court reasoned, “logic, reason and right” all favor the conclusion that “the husband and the wife have equal rights in the marriage relation”—an equal “interest in . . . undisturbed relation[s] with [their] consort.”²⁹ *Hitaffer* marked a dramatic turning point in U.S. law. Between 1950, when *Hitaffer* was decided, and 1980, when the Supreme Court of Washington recognized Kathleen Lundgren’s claim for loss of consortium, the *Hitaffer* approach became the view of almost every jurisdiction in the United States, and the Restatement rule too.³⁰

Today, the Restatement provisions reflect the conventional understanding of spousal consortium claims, so it’s worth spending a moment with them. In outline, the Restatement adopts the view that, if a defendant tortiously injures one spouse (“the injured spouse”), the other spouse (“the consortium spouse”³¹) may bring an action for loss of consortium against the defendant.³² The consortium spouse’s claim seeks compensation for the loss of the injured spouse’s “society and services,” a notion understood to include “any loss or impairment of the other spouse’s society, companionship, affection and sexual relations.”³³ There is some question—or perhaps disagreement—about how to

28. *Hitaffer*, 183 F.2d at 814.

29. *Id.* at 816, 818–19.

30. RESTATEMENT (SECOND) OF TORTS § 693 (AM. L. INST. 1977). The Restatement (Third) of Torts is re-drafting the consortium provisions now. Because the draft has not been finalized—and because it for the most part tracks the approach taken by the Restatement (Second)—I’ll focus on the existing provisions above the line. See RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 48A (AM. L. INST., Tentative Draft No. 1, 2022).

31. RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 48A cmt. a (AM. L. INST., Tentative Draft No. 1, 2022). I prefer these terms to the labels “impaired spouse” and “deprived spouse” used in the Restatement (Second). RESTATEMENT (SECOND) OF TORTS § 693 cmt. a (AM. L. INST. 1977).

32. RESTATEMENT (SECOND) OF TORTS § 693 (AM. L. INST. 1977). There is some disagreement about whether the injured spouse must suffer a physical injury, or whether any injury actionable in tort law suffices. The law seems to be moving toward the second position. See, e.g., RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 48A cmt. n (AM. L. INST., Tentative Draft No. 1, 2022) (proposing to follow the “slim majority” of jurisdictions that take this view); 2 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 392 (2d ed. 2011). (“A few courts have said that the spouse who is a direct victim must suffer some physical, not merely emotional injury, but this limitation does not have much support in current decisions.”).

33. RESTATEMENT (SECOND) OF TORTS § 693 (AM. L. INST. 1977); see also, e.g., *Gates v. Foley*, 247 So. 2d 40, 43 (Fla. 1971) (“Consortium means much more than mere sexual relation and consists, also, of that affection, solace, comfort, companionship, conjugal life, fellowship, society and assistance so necessary to a successful marriage.”). Consortium claims have a striking shortcoming: they are cut off by the injured spouse’s death. That is, a consortium spouse can recover for the relationship-based harm they suffer for as long as their spouse is injured, but not for “permanent” loss of consortium if the defendant’s tortious conduct kills their spouse. This wrinkle is a remnant of common law rules that had gained widespread support by the early 1800s. DON HERZOG, DEFAMING THE DEAD 127–35 (2017); Malone, *supra* note 24, at 1058. I will briefly touch on this again in Part VII.

frame the measure of this impairment, though it's not clear it makes a difference in practice. Some courts—including the D.C. Circuit in *Hitaffer*—seem inclined to ask whether the third party's actions interfered with the spouses' performance of the duties owed to each other, in virtue of being married.³⁴ More often (and more recently), however, courts seem inclined to ask simply whether the third party's actions interfered with an ongoing "marital relationship"—whether the defendant interfered with the "continuance of a healthy and happy marital life," for example.³⁵ To remedy the consortium spouse's loss (however precisely it's judged), the Restatement says, the factfinder should focus not only on the consortium spouse's "pecuniary" losses, but also (and increasingly) on her less "tangible" losses, including the loss of her relationship as such and the emotional harms this sort of loss tends to cause.³⁶

A consortium claim is distinct from an injured spouse's underlying claim in some respects but constrained by it in others, and this dual identity raises difficult doctrinal questions. The Restatement regards loss of consortium as an individual claim, for instance, grounded in an invasion of the consortium spouse's personal interests.³⁷ As the *Hitaffer* court put it, "Invasion of the consortium is an independent wrong directly to the spouse so injured."³⁸ A consortium spouse does not simply (re)assert her spouse's rights, in other words, but rather asserts her own. In this way, courts sometimes say, a consortium claim is "independent" rather than "derivative."³⁹ At the same time, a consortium claim depends on the injured spouse's underlying tort claim in striking ways: if the injured spouse's claim fails on the merits, for example, the consortium spouse's claim fails too; and if a defendant has a defense good against the injured spouse (e.g., comparative fault), his defense is typically good against

34. *Hitaffer*, 183 F.2d at 816 ("Any interference with these rights [of each married partner], whether of the husband or of the wife, is a violation . . ." (quoting *Bennett v. Bennett*, 23 N.E. 17 (N.Y. 1889))).

35. See, e.g., *Schreiner v. Fruit*, 519 P.2d 462, 465 (Alaska 1974) ("[A claim for loss of consortium] should be recognized as 'compensating the injured party's spouse for interference with the continuance of a healthy and happy marital life.'" (quoting *Millington v. Se. Elevator Co.*, 239 N.E.2d 897, 900 (N.Y. 1968))).

36. RESTATEMENT (SECOND) OF TORTS § 693 cmt. f (AM. L. INST. 1977); see also DOBBS ET AL., *supra* note 32, § 392; RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 48A cmts. a, b (AM. L. INST., Tentative Draft No. 1, 2022); *Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978) ("Consortium . . . primarily consists of the emotional or intangible elements of the marital relationship.").

37. RESTATEMENT (SECOND) OF TORTS § 693 cmt. g (AM. L. INST. 1977) ("The invasion of the [consortium] spouse's interests in the marriage is a separate tort against that spouse."); see also RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 48A cmt. i (AM. L. INST., Tentative Draft No. 1, 2022) ("The consortium spouse has suffered a distinct legally compensable harm and asserts his or her own claim for that injury.").

38. *Hitaffer v. Argonne Co.*, 183 F.2d 811, 815 (D.C. Cir. 1950) (emphasis omitted).

39. See, e.g., *Steele v. Botticello*, 21 A.3d 1023, 1027 (Me. 2011) ("[A] loss of consortium claim may be brought separately from the underlying tort claim and, in that respect, is more accurately described as being capable of being asserted independently.").

the consortium spouse too.⁴⁰ In these ways, a consortium claim is “derivative” rather than “independent.”⁴¹ In any event, because the two claims generally rise and fall together, and because courts are alive to the possibility of duplicative damage awards, courts encourage (and often require) joinder, even courts that regard the claims as distinct in principle.⁴²

Spousal consortium claims are a well-established feature of U.S. tort law today, even if there was a time in the middle of the twentieth century when their fate was less certain.⁴³ Consortium claims can be brought in every U.S. state except Virginia, for instance, and in pockets of federal common law too.⁴⁴ These claims work (more or less) the same way in all of these jurisdictions, and that’s been true for several decades at this point. (The current draft of the Third Restatement proposes few significant changes to the Restatement provisions published in 1977, for example.) The doctrine is stable, then, but that’s not to say it’s static. It’s not the case that courts, having fixed the historical anomaly that empowered one spouse to sue but not the other, have left the common law of consortium claims alone.

On the contrary, courts have empowered new kinds of plaintiffs to bring claims for loss of consortium. A handful of courts have extended “spousal” consortium claims to unmarried partners in “stable and significant” relationships, for example—including both engaged couples and long-term unmarried couples—but only a handful.⁴⁵ In contrast, courts have been more comfortable extending consortium claims in other directions.⁴⁶ In about half

40. RESTATEMENT (SECOND) OF TORTS § 693 cmt. e (AM. L. INST. 1977).

41. The Third Restatement draft regards these labels as unhelpful—as mere conclusions about the proper relationship between the two claims, not as tools that can help us reason our way to conclusions about the proper relationship—and that seems right to me. RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 48A cmt. i (AM. L. INST., Tentative Draft No. 1, 2022).

42. RESTATEMENT (SECOND) OF TORTS § 693 cmt. g (AM. L. INST. 1977).

43. See, e.g., *Helmstetler v. Duke Power Co.*, 32 S.E.2d 611 (N.C. 1945) (abolishing consortium claims in North Carolina); *Nicholson v. Hugh Chatham Mem’l Hosp., Inc.*, 266 S.E.2d 818 (N.C. 1980) (reversing course).

44. Michael Green & David M. Layman, *Consortium and Workers’ Compensation: The Demolition of Consortium*, 80 LA. L. REV. 777, 787 n.38 (2020); *Am. Exp. Lines, Inc. v. Alvez*, 446 U.S. 274, 276 (1980). To be clear, these facts make the United States a bit of an outlier. For example, the U.K. abolished consortium claims by statute in the 1980s, and we’ll get a better sense of why in the next two Parts.

45. E.g., *Lozoya v. Sanchez*, 66 P.3d 948 (N.M. 2003) (extending consortium claims to an unmarried couple), *overruled in part by* *Heath v. La Mariana Apts.*, 180 P.3d 664 (N.M. 2008); *Butcher v. Superior Ct.*, 188 Cal. Rptr. 503 (Ct. App. 1983) (same), *overruled by* *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988). Courts have been quite reluctant to relax the traditional rule requiring a valid marriage, a fact that had dramatic consequences for same-sex couples before *Obergefell v. Hodges*, 576 U.S. 644 (2015). See generally John G. Culhane, A “Clanging Silence”: *Same-Sex Couples and Tort Law*, 89 KY. L.J. 911 (2001). The Third Restatement appears to take the view that more equal access to the institution of marriage makes the traditional rule more defensible, not less. RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 48A cmt. e (AM. L. INST., Tentative Draft No. 1, 2022).

46. GOLDBERG ET AL., *supra* note 25, at 411.

of U.S. states, for example, parents can now bring loss of consortium claims against third parties who tortiously injure their children.⁴⁷ In a significant minority of states, children can now bring loss of consortium claims against third parties who tortiously injure their parents.⁴⁸ And at least one state—New Mexico—recognizes rights of consortium in all “close familial relationships,” whether or not those relationships have an official legal status.⁴⁹

My focus here is on spousal consortium claims, not their more recent offshoots. Still, my hope is that, by getting a better grip on spousal consortium claims, we’ll put ourselves in a better position to make sense of this broader network of consortium claims too, and I’ll say just a bit about whether and how the view I’ll develop here might be extended to explain other relationship-based tort claims in Part VII. Before any of that, though, we need to get a clearer sense of why spousal consortium claims present such a puzzle and whether there’s a good way out of it. *Palsgraf v. Long Island Railroad Co.*, one of the most famous cases in the canon, is our way in.

II. THE PALSGRAF PUZZLE

In August 1924, Helen Palsgraf and her daughters stood on the platform of the Long Island Railroad in Brooklyn, waiting for a train to Rockaway Beach.⁵⁰ A passenger carrying a package of powerful fireworks—a package wrapped in paper, obscuring its contents—hurried to catch another train.⁵¹ Two railroad attendants tried to help the package-carrying passenger aboard the already departing train, one by pulling from the train, the other by pushing from the platform.⁵² In the process, the attendants dislodged the package, which fell to the ground and exploded.⁵³ The explosion (or perhaps the ensuing commotion) caused a coin-operated scale on the platform to fall and hit

47. See, e.g., *Gillispie v. Beta Constr. Co.*, 842 P.2d 1272 (Alaska 1992) (recognizing a parent’s claim). These “child consortium” claims have gained new traction since the 1980s, though claims by parents (fathers, historically) for the loss of a child’s “services” have long been recognized. RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 48B cmt. b (AM. L. INST., Tentative Draft No. 1, 2022).

48. See e.g., *Reagan v. Vaughn*, 804 S.W.2d 463 (Tex. 1990) (recognizing a child’s claim for loss of consortium). These “parental consortium” claims have little historical precedent. Compare RESTATEMENT (SECOND) OF TORTS § 707A (AM. L. INST. 1977) (declining to recognize these claims thanks to a lack of judicial authority), with RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 48C (AM. L. INST., Tentative Draft No. 1, 2022) (recognizing these claims because there’s been a “clear and substantial trend” in that direction since the 1970s).

49. Eg., *Lozoya*, 66 P.3d at 957 (“A person brings this claim to recover for damage to a relational interest, not a legal interest. To use the legal status as a proxy for a significant enough relational interest is not the most precise way to determine to whom the duty is owed.”); *Fernandez v. Walgreen Hastings Co.*, 968 P.2d 774 (N.M. 1998) (recognizing a grandparent’s claim for loss of consortium).

50. William H. Manz, Palsgraf: *Cardozo’s Urban Legend?*, 107 DICK. L. REV. 785, 796 (2003).

51. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928).

52. *Id.*

53. *Id.*

Palsgraf, causing her injuries that ultimately prevented her from working.⁵⁴ Palsgraf sued the railroad for negligence, and she prevailed at the trial court and in the initial appeal.⁵⁵

But Judge Cardozo, writing for the New York Court of Appeals, held that, even if the attendants were careless in their efforts to help the package-carrying passenger, and even though Palsgraf was harmed as a result of the unexpected explosion, Palsgraf did not state a claim of negligence.⁵⁶ Strictly speaking, Cardozo explained, a plaintiff in a tort action “sues in her own right for a wrong personal to her”—for “a violation of her own right”—“and not as the vicarious beneficiary of a breach of duty to another.”⁵⁷ Put differently, it was on Palsgraf to show that the railroad’s conduct was careless with respect to someone in her position, not only careless with respect to someone else on the platform or careless in general. And with respect to Palsgraf, Cardozo reasoned, the attendants had been careful enough. They had no reason to foresee a risk to someone in Palsgraf’s position in what they were doing, since she was standing some distance across the platform, and thus no reason to take any more care on her account as they attempted to help the package-carrying passenger aboard the departing train.⁵⁸

As we saw at the start, Cardozo’s central premise—that a wrong to one party that causes a harm to a second is not a tort against the second, unless she can identify “a violation of her own right” too—is sometimes called the *Palsgraf* principle.⁵⁹ This principle is generally accepted by courts (if only implicitly), and it plays an essential role in rights-based theories of tort law too.⁶⁰ As rights-based theories see it, the point of tort law is to recognize private rights and impose liability to remedy the violation of those rights, not to promote other policy ends.⁶¹ Arthur Ripstein gives voice to a strong version of this commitment, for example, when he says that, properly understood, “tort law’s only ‘policy’ is doing justice between private persons.”⁶² If that weren’t tort law’s only policy—if courts were free to impose liability on defendants for other reasons (e.g., deterrence, compensation), without a plaintiff’s rights to

54. Manz, *supra* note 50, at 809.

55. *Id.* at 828–29.

56. *Palsgraf*, 162 N.E. at 100–01.

57. *Id.* at 100.

58. *See id.*

59. *See, e.g.*, John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 380 (2013); HERZOG, *supra* note 33, at 137; *see also* Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 10 (1998) (describing it as the “substantive standing” requirement); GOLDBERG & ZIPURSKY, *supra* note 8, at 198–99 (“proper-plaintiff principle”); STEVENS, *supra* note 8, at 173 (privity requirement); Sinel, *supra*, note 8, at 233 (same).

60. For the argument that courts embrace this principle too, if only implicitly, see Zipursky, *supra* note 59, at 15–40.

61. This claim is compatible with the claim that, in recognizing rights and awarding remedies, tort law does in fact promote other policy ends.

62. ARTHUR RIPSTEIN, *PRIVATE WRONGS* 11 (2016).

ground and shape their decisions—then the law of torts would (it’s argued) lose its doctrinal shape and normative sense, and become little more than policymaking by other means. For that reason, proponents of the rights-based view argue that “[t]he *Palsgraf* principle is no mere formalism,” but rather “is crucial to holding tort law together as a distinct department of law.”⁶³

If this view of tort law is on the right track, though—and here I’m going to assume for the sake of argument that it is, at least broadly speaking—then the law’s embrace of consortium claims presents a puzzle. Think back to *Lundgren & Lundgren v. Whitney*’s. At first blush, Kathleen Lundgren’s complaint seems to be that Whitney’s breached its duty to Alan by failing to repair his brakes competently, and that Whitney’s carelessness with respect to Alan harmed her too. But if that’s right—if Kathleen’s tort suit should be understood as a claim by a plaintiff against a defendant for conduct that was careless with respect to some other person, but which harmed the plaintiff too—then it’s flatly inconsistent with the *Palsgraf* principle, isn’t it?⁶⁴ If Helen Palsgraf can’t recover, in other words, then why should someone like Kathleen Lundgren?

It’s a good question, and it’s right there in *Palsgraf*. In his famous dissenting opinion, Judge Andrews outlined a different vision of negligence law, one focused on the relationship between a defendant’s careless acts and the persons “he does in fact injure,” not only those “he might reasonably expect his act would injure.”⁶⁵ In Andrews’s picture, a tort plaintiff does not have to show “a wrong” to herself, as Cardozo would have it—at least, not if that means showing that the defendant breached a duty “owing to” her “because as to h[er] harm might be expected.”⁶⁶ Instead, Andrews suggested, a tort plaintiff must show only that the defendant was careless—and thus breached a duty to “the world at large”—and that his carelessness caused her some injury, because in tort “all those in fact injured may complain.”⁶⁷ To support his take on tort doctrine, Andrews cited the rule that “[a] husband may be compensated for the

63. Goldberg & Sitkoff, *supra* note 59, at 381.

64. It might be tempting to think that Lundgren’s claim should be interpreted differently—for instance, as an allegation that Whitney’s violated her own right against the careless infliction of emotional distress. There are two problems with that interpretation. First, courts have for the most part declined to recognize a freestanding duty of that kind. *See, e.g.*, JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 128–35 (2010); Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990). Second, that interpretation would misrepresent the crux of many consortium claims, including Lundgren’s, which focus only in part on the plaintiff’s emotional injuries. *See, e.g.*, Stephen D. Sugarman & Caitlin Boucher, *Re-Imagining the Dignitary Torts*, 14 J. TORT L. 101, 132 (2021).

65. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 102–03 (Andrews, J., dissenting).

66. *Id.* at 103.

67. *Id.* Of course, a defendant might yet prevail, even in Andrews’s view, but that will be a proximate cause ruling in his favor—a matter of “practical politics.” *Id.*

loss of his wife's services," among other things.⁶⁸ How, he asked, could the fact of consortium claims be reconciled with Cardozo's putative principle? Andrews doubted that Cardozo could reply by saying that "the wrongdoer was negligent as to the husband as well as to the wife."⁶⁹ To say that, Andrews thought, was "merely [to] attempt to fit facts to theory."⁷⁰

Cardozo didn't offer an account of consortium claims in *Palsgraf*, at least not directly. At one time, we know, no particular response would have been called for, because the prevailing view of consortium claims rendered them perfectly consistent with the *Palsgraf* principle. If a husband has property rights in the services of his wife, then there is no *Palsgraf* puzzle to speak of. But the property-based view of consortium claims was well in doubt by 1928, when *Palsgraf* was decided, so that wasn't (or anyway shouldn't have been) the answer that Cardozo had in mind.⁷¹ A better guess, perhaps—a suggestion we'll return to—is that Cardozo thought of loss of consortium as an anomaly—as the rare "tort" doctrine that permitted a person to sue "as the vicarious beneficiary of a breach of duty to another," rather than as a proper plaintiff.⁷² To be sure, Andrews might have had doubts about this answer too. Indeed, without more, it looks like just another attempt to fit facts to theory.

In any event, this dispute between Cardozo and Andrews might be of little more than historical interest—a glimpse of an issue that preoccupied courts in another time and social context—if consortium claims had disappeared in the decades after *Palsgraf*. As we've seen, though, consortium claims have not died out in the United States. They've survived, even thrived, and they've spawned new kinds of relationship-based claims too. Andrews's question remains a live one, then, for the rights-based theories that pick up where Cardozo left off.

68. *Id.* at 102. Andrews offered two other examples: the fact that "[w]e now permit children to recover for the negligent killing of the father" and the fact that insurers can sue those who wrong the insured via subrogation. *Id.* at 102–03.

69. *Id.* at 102.

70. *Id.*

71. To be clear, the property-based conception of consortium claims was well into its decline, but that's not to say that courts were out from under the long shadow of coverture. See Gretchen Ritter, *Gender and Citizenship After the Nineteenth Amendment*, 32 *POLITY* 345, 349 (2000) (stating that the "displacement of coverture . . . continued for decades" after the Nineteenth Amendment was ratified).

72. *Palsgraf*, 162 N.E. at 100 (Cardozo, J., majority opinion). Cardozo distinguishes plaintiffs who sue to vindicate their own rights and those who "sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another," and this seems to be an implicit account of the examples Andrews offers. *Id.* at 101. A decade earlier, though, Cardozo seemed to suggest that wrongful death statutes simply overrode a common law limitation and "embodied" the principle "that the next of kin are wronged by the killing of their kinsman." *Loucks v. Standard Oil Co.*, 120 N.E. 198, 199 (N.Y. 1918). "The family becomes a legal unit," he continued, "invested with rights of its own, invested with an interest in the continued life of its members, much as it was in primitive law." *Id.* I think this Cardozo, not the "vicarious beneficiary" Cardozo of *Palsgraf*, gets closer to the truth of both wrongful death and consortium claims. I'll return to this thought in Part VII.

III. WHY NOT RIGHTS?

So can spousal consortium claims be reconciled with the *Palsgraf* principle? Today, even proponents of rights-based theories tend to side with Andrews and answer “no.” In their telling, however, that’s not because Andrews had the better of the debate with Cardozo in the end. Rather, they say, it’s because consortium claims are merely vestigial.⁷³ They’ve retained the form of tort claims, but not their essential rights-asserting function. Consortium claims should be abandoned, then, or at least seen for the anomalies they are. Either way, the thought goes, they present no deep challenge to the *Palsgraf* principle. In the next Part, I will return to these standard rights-based readings of consortium claims and argue that they’re less compelling than their proponents suggest. At a minimum, I’ll submit, rights-based theories should hope for a better account of such a familiar and persistent feature of the law.

Before that, however, it’s important to understand why rights-based theories tend to think that spousal consortium claims are incompatible with the *Palsgraf* principle in the first place. What would it mean for spousal consortium claims to respect the *Palsgraf* principle? It would mean that a plaintiff suing for loss of consortium would have to be able to identify “‘a wrong’ to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct ‘wrongful’ because unsocial.”⁷⁴ Again, the traditional view of consortium claims purports to identify the relevant right. But no one defends the traditional view today (so far as I know), and for good reason: our loved ones aren’t our property. The worry, though, is that the traditional answer reflected something real about individual rights, such that any attempt to give a more egalitarian account of the right asserted in a consortium claim will run into a similar problem. Can we explain how it is we have individual rights with respect to the ways third parties relate to our spouses, in other words, without invoking ideas that seem implausibly retrograde?

To get a sense of the difficulty, let’s consider Arthur Ripstein’s recent account of the rights recognized in tort law. Ripstein argues that tort law aims to realize a principle of mutual independence—the principle, in short, that “no person is in charge of any other person.”⁷⁵ Ripstein regards this as a moral principle, not just a principle inscribed in the law, and he attempts to show that it explains the familiar wrongs of tort law.⁷⁶ What does it mean to say that no other person (qua person) is in charge of you? It means you are free to use your “means”—your body and your property, principally—to “pursue purposes that you, rather than others, determine.”⁷⁷ Another person wrongs you,

73. See *infra* Part IV.

74. *Palsgraf*, 162 N.E. at 100–01.

75. RIPSTEIN, *supra* note 62, at ix.

76. *Id.* at x–xi.

77. *Id.* at 9, 33.

Ripstein argues—commits a tort against you—if he uses your means without authorization or destroys your means by taking excessive risks with his own.⁷⁸

It would take more work to get Ripstein's entire theory in view, but we're already in a position to worry whether Ripstein's story could be extended to offer a rights-based account of consortium claims. If I, as a deprived spouse, claim the violation of my own individual right in a suit for loss of consortium, and if Ripstein is right that my rights protect my ability to use my means "for whatever purposes [I] see fit,"⁷⁹ then in Ripstein's reconstruction, I would claim that, by failing to watch out for my spouse, the defendant failed to watch out for my means. To my ear, that makes my complaint come out all wrong—as something like, "I'm in charge of my spouse, not you," or "my spouse is my means, not yours." That's not a promising start.

And it's not clear there's a simple fix. For example, adding my relationship to my "means" does not seem that much more promising. For one thing, it's not clear this sidesteps the worry at all. What is it for a relationship to be my means—a thing I can use "to pursue purposes that [I], rather than others, determine"—if not (in part) for the person with whom I have the relationship to be my means too? And even if it avoids that objection, the proposed fix seems to misconstrue my relationship to my relationship. My relationship with my partner is valuable to me in many ways, to be sure, and my partner's love and support puts me in a better position to achieve many of my ends. Perhaps that makes my relationship *a* means, in some sense—a valuable feature of the context in which I act, to sound a Kantian note—but not *my* means. It's not something I am in charge of, that is, at least not in the way I'm in charge of my body or property.

I am picking on Ripstein to make a point, but the truth is I suspect it's a point he would be happy to grant. As best I can tell, Ripstein doesn't even mention consortium claims in his work, let alone try to explain them.⁸⁰ I doubt that's an oversight, or even just a reflection of the fact (discussed in a moment) that some of the jurisdictions Ripstein writes about have done away with common law consortium claims.⁸¹ Rather, my hunch is that Ripstein thinks the rights-based case for consortium claims is something of a nonstarter, and so much the worse for consortium claims.⁸² In this respect, Ripstein's view would

78. *Id.* at 48.

79. *Id.* at 24.

80. *See generally id.*

81. *See infra* note 90 and accompanying text.

82. Ernest Weinrib also says next to nothing (that I have found) about relationship-based tort claims. *See generally* ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (Oxford Univ. Press 2012) (1995). Both Ripstein and Weinrib draw on Kant, and Kant viewed marriage as a relationship of status, in which each spouse "ha[s] possession of the other." ARTHUR RIPSTEIN, *FORCE AND FREEDOM* 74 n.22 (2009). You might wonder, then, whether Kant's picture of marriage, together with a Kantian picture of rights, is simply a nonstarter for purposes of explaining consortium claims today. That could be, but I'm not so sure. Indeed, the picture I sketch below sounds some Kantian notes. At the end of the previous paragraph, for instance, you might have caught yourself thinking, "yes, but *we're* in our charge of our relationship." If so, you have a good sense

be entirely representative of rights-based thinking about tort law.⁸³ If tort theorists defending rights-based theories of tort law pause to consider consortium claims at all, it's usually to write them off as relics. For example, Robert Stevens, another proponent of the rights-based picture, spends just a page (in a book of nearly four hundred) on spousal consortium claims before concluding that they have no place in tort law today because "[w]e do not have (moral) rights to our spouses."⁸⁴ Even Nico Cornell, who's more sympathetic to consortium claims than most, agrees that "the right [of consortium] itself—implying that one has a right over one's spouse—is a problematic holdover from a time when wives were seen as husband[s'] property."⁸⁵

Tort theorists aren't the only ones with doubts about consortium claims, I should say, even if my focus on U.S. tort law to this point might have suggested otherwise. In England, for example, plaintiffs pressed the courts to extend consortium claims to married women, just as plaintiffs did here. There, however, courts came to a different conclusion. In *Best v. Samuel Fox & Co*, the House of Lords declined to extend consortium claims to married women.⁸⁶ The House of Lords seemed to suggest that, if the question were one of first impression, they wouldn't recognize a husband's claim either, as there was no longer any rights-based foundation for that claim. But in the face of centuries of precedent, the House of Lords elected to leave the husband's "anomalous" claim in place.⁸⁷ A husband's claim, one judge suggested, "is now so firmly established that it could only be abolished by statute."⁸⁸ And in England, that's

of the kind of view I'm after. And there's some reason to think that Kant's ideas could help us develop such a view—could help us understand how it is that *we* could be in charge of our relationship. CHRISTINE M. KORSGAARD, *SELF-CONSTITUTION* 186–87 (2009) (suggesting that, in Kant's view, marriage involves a "unity of will"). It might turn out, then, that my complaint is that Ripstein hasn't made enough of his Kantian tools, not that his Kantian tools aren't up for the job, even if that's not the official argument of the Article.

83. It's hard to prove a generalization of this sort, but there's no question that consortium claims get little (to no) attention in collected editions or leading journals. *See, e.g.*, *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* (John Oberdiek ed., 2014) (collecting recent work that includes no discussion of consortium claims); *PHILOSOPHY AND THE LAW OF TORTS* (Gerald J. Postema ed., 2001) (same).

84. *See* STEVENS, *supra* note 8.

85. Cornell, *supra* note 17, at 128 n.37; *see also, e.g.*, GOLDBERG & ZIPURSKY, *supra* note 8, at 202 n.34, 204 (suggesting that consortium spouses are not wronged—that they do not have their rights violated).

86. *See Best v. Samuel Fox & Co.* [1952] AC 716 (HL) (appeal taken from Eng.).

87. *Id.* at 733.

88. *Id.* at 735.

exactly what happened: a law reform commission agreed that spousal consortium claims were archaic, and Parliament abolished them soon after.⁸⁹ England isn't an outlier, either. Spousal consortium claims have met a similar fate in other common law jurisdictions too.⁹⁰

In all, then, tort theorists are reluctant to explain consortium claims in terms of rights, and courts that take rights seriously are reluctant to recognize consortium claims. I'm not convinced that the lesson is that a rights-based account of consortium can't be made to work, let alone that tort law isn't (all) about rights. But I do think that, if the rights-based approach wants to treat spousal consortium claims as tort claims like any other, it owes us an account of the content and grounds of a consortium spouse's rights, and it's not obvious how that story might go.⁹¹ What is it about rights that creates this difficulty? It's hard to give a simple answer to that question, because there remain deep philosophical disagreements about the nature of rights. That said, I think our discussion of Ripstein's account of rights helps us see the general shape of an answer, even if we're not on board with his account in all its particulars.

My individual rights, you might think, must in some way reflect or involve my individual normative standing—my standing to expect that I play a certain role in the practical deliberation of those I hold claims against, if not a more expansive authority over their conduct with respect to me (e.g., via the power to waive or demand performance). And the fact that I have this standing, you might be inclined to add, must in some sense be explained by facts about me—by facts about my agency, for instance, or my interests. In short, it's natural to suppose that my rights ultimately protect, empower, reflect the value of, and

89. ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY, REPORT, 1978, Cm. 7054-I, at 100–01 (UK); Administration of Justice Act 1982, c. 53, § 2 (Eng.), <https://www.legislation.gov.uk/ukpga/1982/53/section/2/data.pdf> [perma.cc/D2RE-GMJ8].

90. Family Relations Act, R.S.B.C. 1996, c 128, s 123 (Can.) (abolishing consortium actions in British Columbia); Family Law Reform Act, S.O. 1978, c 2, s 69 (Can.) (doing likewise in Ontario). In many of these jurisdictions, including (for instance) Ontario, the legislature replaced common law consortium rights with statutory rights that perform much the same function. See, e.g., Sinel, *supra* note 8, at 231. That makes it more difficult to interpret the state of consortium claims in these jurisdictions. Were legislatures simply re-recognizing the consortium rights of family members, free of the patriarchal common law baggage? Or were legislatures providing family members with rights to sue grounded in different considerations, given that they can't have consortium rights? If the former, I hope to help explain what those underlying rights might be. If the latter, my suggestion will be that the statutes were enacted based on a mistaken premise.

91. At least, not if we want the notion of a right to be anything more than a “placeholder.” Cornell, *supra* note 17, at 133. If the claim that a consortium spouse has an underlying right just meant that there are good reasons to give her the option to sue and recover too, then we might have no trouble reconciling consortium claims with the *Palsgraf* principle. The problem, though, is that this “Prosserian” conception of tort law's rights and duties—one that treats them as a mere “shorthand statement of a [policy] conclusion”—isn't one that rights-based theories of tort law can avail themselves of, because their ambition is to *explain* tort doctrine in terms of rights. See WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 31, at 180 (1941); see also John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1762–64 (1998) (explaining and criticizing Prosser's view of duty).

focus deliberative attention on, well, *me*. And yet, the way third parties relate to my spouse, you might reasonably worry—that isn't about me in these ways, at least not obviously. It's about *her*, and the constraints that *her* aims and interests impose on third parties. That's the basic shape of the difficulty, I think. Now, I don't mean to suggest this difficulty can't be met, whether by satisfying the terms I just outlined, or by rejecting these terms as ill-formed or incomplete.⁹² The important point, at least for now, is simply that these plausible-seeming thoughts about rights have led courts and commentators alike to conclude that consortium claims can't be grounded in the individual rights of consortium spouses, whatever else might be said for them.

IV. IF NOT RIGHTS, WHAT?

So what do rights-based theories make of consortium claims, if they don't think they can be reconciled with the *Palsgraf* principle? In short, the prevailing view is that consortium claims are not tort claims in the full or focal sense, precisely because a plaintiff bringing a consortium claim cannot identify a wrong to themselves. At its most revisionary, this view implies that consortium claims should be abandoned or abolished. Robert Stevens, who (we've seen) maintains that “[w]e do not have (moral) rights to our spouses,” also contends that consortium claims were “correctly abolished by legislation” in the U.K. for that very reason.⁹³ At its least revisionary, the view implies that, if spousal consortium claims are to be retained, we need to interpret them as performing some other, non-rights-vindicating function.

John Goldberg and Benjamin Zipursky have taken this second, less revisionary approach. Goldberg and Zipursky have written less about consortium claims than other relationship-based claims, like statutory claims for wrongful death—claims we'll return to in Part VII— but they have suggested that their interpretation of wrongful death claims extends to consortium claims.⁹⁴ As

92. In his recent book, R. Jay Wallace seems to say that we do have individual moral claims to our family members, given the way that their mistreatment affects our interests. R. JAY WALLACE, *THE MORAL NEXUS* 196–98 (2019). I can't do justice to Wallace's arguments here, I'm afraid, or rule out the possibility that he's right. My suspicion, for what it's worth, is that he's wrong to think these interests can ground rights (in a nonplaceholder sense) with respect to the way third parties relate to our family members, *see id.* (discussing the possibility that these moral claims might be only “secondary”), or else that our views will converge in important ways. Wallace will need an account of why some attachments (e.g., mine to my partner) implicate suitably “personal” interests and others (e.g., mine to Taylor Swift) don't, for instance, *see id.* at 161, 197, and I suspect that relationships will play a role in sorting them out. And I think the story I tell about relationships here—that among other things relationships involve a practical union, a shared project—will help explain the sense in which harms to some of those we love implicate our personal interests in the right way. It's just that I believe that a story of this sort will also suggest that the claims against third parties will be *both of ours*, in the first instance, even if we can also be said to have individual claims *as one part of the us* that stands to be affected.

93. STEVENS, *supra* note 8, at 174.

94. *See, e.g.*, GOLDBERG & ZIPURSKY, *supra* note 8, at 202 n.34, 204; GOLDBERG & ZIPURSKY, *supra* note 64, at 133–34; John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1664 n.99 (2002); Zipursky, *supra* note 59, at 37.

they see it, a spouse suing under a wrongful death statute should not, strictly speaking, be understood to claim a wrong to herself. Rather, she should be understood to sue only as a “vicarious beneficiary” of a wrong to her spouse, to use Cardozo’s phrase.⁹⁵ In Goldberg and Zipursky’s telling, then, a wrongful death statute “overrides” the *Palsgraf* principle, and it does so to provide deprived relatives with a mechanism to secure financial support in the aftermath of a tragedy, not to recognize an additional tort to them.

Goldberg and Zipursky suggest that, if consortium claims are tenable at all, it is only because these claims can be understood on the same “vicarious beneficiary” model. As a matter of “political and historical reality,” Zipursky writes, it was easier to make consortium doctrine more equitable and generous over time.⁹⁶ In doing so, however, courts did not recognize a new, more generous set of primary entitlements, for—as our discussion to this point has suggested—there is no plausible set to recognize. Rather, courts granted some relatives of a tort victim “a special dispensation to sue as the vicarious beneficiary of a wrong causing physical harm to the victim.”⁹⁷ What Goldberg and Zipursky suggest, in effect, is that courts have continued to recognize consortium claims not because they located a more plausible rights-based foundation for them, but rather because doing so advanced the same policies that were by then embodied in duly enacted wrongful death statutes, policies that had nothing to do with recognizing additional wrongs.

In short, then, rights-based theories of tort law tend to recommend that we abolish spousal consortium claims, or else they suggest that we tolerate their existence, so long as we’re clear that they’re not tort claims in the full sense. These might be the right positions to take, of course, if we have good reasons to think tort law is about rights and good reasons to think consortium claims can’t be. In the rest of this Part, though, I want to briefly suggest that tort theorists defending rights-based accounts should have misgivings about these skeptical solutions to the *Palsgraf* puzzle—that they raise nontrivial questions about doctrinal fit and theoretical unity—even if it turns out they’re the best solutions available.

To start with, these skeptical solutions come at some theoretical cost, if part of the ambition is to fit and explain the law of torts we have. Rights-based theories of tort law seem to find themselves saying that a well-entrenched set of tort claims should be abolished or regarded as alien to tort law. (Later, I’ll suggest that rights-based theories will find themselves saying much the same thing about other relationship-based tort claims.)⁹⁸ Why treat consortium claims as such an outlier? Consortium doctrine is alive and well in the United

95. GOLDBERG & ZIPURSKY, *supra* note 8, at 202 n.34.

96. Zipursky, *supra* note 59, at 37.

97. Goldberg & Zipursky, *supra* note 94, at 1664 n.99. They take the same view of negligent infliction of emotional distress claims brought by “bystanders.” *See id.*; GOLDBERG & ZIPURSKY, *supra* note 64, at 133–34. We will return to these related claims in Part VII.

98. *See infra* Part VII.

States today, after all.⁹⁹ And the doctrine is not static either, as it might be if consortium claims were genuinely vestigial. In some ways, we've seen, consortium doctrine remains a site of common law innovation.¹⁰⁰ I'm not sure how satisfying it is to say that consortium claims are a departure from definitional tort principles, rather than a natural expression of them (whatever they might be), unless you've already got a thumb on the scale for that view. It is one thing for a theory of tort law to dismiss this case or that rule as mistaken. In practice, any theory must, because tort law is a messy human institution. It seems like another thing, though, to dismiss an entire category of claims in this way—indeed, to doubt that there could even be a deep logic to case captions like *Lundgren & Lundgren*. Maybe we should dismiss these claims, in the end, but we should be alive to the possibility that the problem lies in our theory of the doctrine, rather than in the doctrine itself.

In addition, I want to suggest that consortium claims are not so different from other tort claims in one key respect, and that should make us cautious about treating consortium claims as such a departure from the rest. It's not clear how consortium claims could rest on rights, for reasons we've explored at length, but it's nevertheless plausible to think that a consortium spouse is right to relate to the defendant as though she, too, has been wronged—as though she, too, has a distinctive standing to hold the defendant answerable for what they did. Nico Cornell has pressed a version of this point in recent years. Cornell has argued, for instance, that a family member of a person wrongfully injured or killed by a third party stands in a position with respect to the wrongdoer that is strikingly like the position the victim stands in.¹⁰¹ If you injure or kill my spouse or child through your carelessness, for example, it seems that I may appropriately resent you for it, demand an apology from you, and press you to make amends. It takes some care to interpret these judgments, I think, because it may also be true that, as a spouse or family member of the victim, I have a distinctive standing to call you to account *on behalf of* my loved one, a standing that a stranger lacks.¹⁰²

Still, it does seem to me that, in at least some cases, I can intelligibly think of myself as a “secondary victim” of your wrongful conduct, in virtue of my close relationship to the primary victim, my loved one.¹⁰³ As Cornell points out, it seems difficult to deny that I, too, have been wronged by a drunk driver who injures or kills my child or spouse, if what that means is that it is fitting for me to resent them for what they did to both my loved one and to me, for

99. See *supra* text accompanying notes 45–49.

100. See *supra* text accompanying notes 45–49.

101. See Cornell, *supra* note 17, at 127–28, 142.

102. For discussion of these points, see Rosalind Chaplin, *Taking It Personally: Third-Party Forgiveness, Close Relationships, and the Standing to Forgive*, in 9 OXFORD STUDIES IN NORMATIVE ETHICS 73, 80–81 (Mark Timmons ed., 2019).

103. See *id.* (distinguishing primary from secondary victims and exploring the several ways that we might take a wrong to a loved one “personally”).

the driver to make some kind of amends to me too, and so on.¹⁰⁴ If these observations are on the right track, it seems like consortium claims *do* have something important in common with paradigmatic tort claims. A deprived spouse's felt grievance strikes us as legitimate, that is, not antiquated; a deprived spouse's lawsuit seems like a fitting response to having been a genuine (if secondary) victim, not only a means by which to make a defendant pay survivors' benefits. If so—if consortium doctrine is a well-established part of the law, and one that seems to reflect and embody the same distinctive standing to hold to account that we see across tort law—it seems like no credit to rights-based theories of tort that they try to tell a different story.

V. WRONGS TO US

If we treat consortium claims as tort claims in good standing, are we forced to conclude that tort law isn't all about rights? Not just yet. I believe there's a different rights-based story to tell about consortium claims—a story that allows for a consortium spouse's sense of having a legitimate, nonantiquated grievance against the defendant (unlike the "vicarious beneficiary" model) but does not require us to say that she had "rights over" her spouse in an objectionable sense (unlike the rights-based stories we've encountered so far). I want to begin to develop that story in this Part, then put it to work in the next. In outline, the story is that married partners act to coauthor a shared life, and that coauthoring a shared life is valuable in ways that make it legitimate for partners (as partners) to expect that third parties will not interfere with their coauthored project in certain ways—and for partners (as partners) to complain and hold them to account when they do.

To get started, let's go back to Alan and Kathleen Lundgren. Whitney's negligence cost Alan quite a bit. The spinal cord injury he suffered left him unable to pitch in at work and unable to participate at home. And that's to say nothing of the medical procedures and enduring back pain. Whitney's carelessness cost Kathleen a lot too, of course. It's a safe guess that the immediate aftermath of the accident was frightening and stressful, and that the many months that followed were full of anxiety, fear, despair, distraction, and countless inconveniences. In her lawsuit, though, Kathleen leveled a somewhat narrower charge—that Whitney's carelessness had "altered" their "social life" and "limited" the "activities" they could engage in.¹⁰⁵ No more dances, no more walks along the beach, no more weekend outings on the boat with their children, and no more taking care of their home and children in the way they had before.¹⁰⁶

At the outset, I suggested that the crux of Kathleen's complaint is not that *he* can't take walks or that *she* can't take walks, but that *we* can't take walks. Taking walks, you might imagine Kathleen saying, is something that mattered

104. Cornell, *supra* note 17, at 126.

105. Lundgren v. Whitney's, Inc., 614 P.2d 1272, 1274 (Wash. 1980) (en banc).

106. *Id.*

to us—and something that mattered to me, as one of that us. And again, taking walks was just one of the many things that she and Alan did together.¹⁰⁷ Kathleen's complaint makes these points effectively, but she is far from the only consortium plaintiff to press them. If you glance through other consortium cases, you're bound to find plaintiffs who are aggrieved by the many things they can no longer do *with* their spouses—things like walking, dancing, hiking, camping, fishing, cooking, going to movies, having sex, having children, staying up late, doing yardwork, and more.¹⁰⁸

I have no doubt that each of these examples represents a real and painful loss to the plaintiff who voiced it. But I also think it's a mistake to fixate on any specific example of this sort (as you might in a cross-examination) because I suspect that many plaintiffs with consortium claims use examples of this kind to get at a more fundamental, harder-to-articulate point—something like the point that we're attributing to Kathleen Lundgren. By wrongfully derailing one spouse's life, the defendant derailed the life the spouses *shared* too, and that is the more fundamental complaint being addressed to the defendant. Staying up late with your partner, working your way through television shows, taking walks, cooking dinner, keeping a home, raising children, taking in rescue animals, supporting each other's careers, traveling abroad—these activities illustrate, exemplify, and partly constitute the life that partners in marriage-like relationships share, but they don't explain what it is to share that life.

I will try to make the notion of a "shared life" more precise in a moment. But it's worth dwelling on just how familiar and intuitive the imprecise thought is. Indeed, our everyday experience suggests that marriage-like relationships involve a kind of "jointness." It's the feature of these relationships that we try to capture using words like "we," "couple," "partnership," "unit," and more. We're saving up for a new house; we're raising children together; we're taking up tennis; we're moving closer to our parents to help them as they get older; and more. These expressions are common as could be. It's hard to avoid talking in these terms, in fact, and not just because grammar forces our hand. The notion that partners form a "we" is central to many partners' own

107. It appears that Kathleen did not claim that Whitney's negligence had deprived her of the ability to engage in sexual activities as she once had, but of course many plaintiffs who sue for loss of consortium do. To some, that gives consortium claims a prurient feel. Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 48–49 (1989) (observing that students often regard consortium "somewhat pruriently, and misleadingly, as simply recovery for loss of sexual services"). But it shouldn't, and a deprived spouse's grievance sounds quite different, I think, if we hear it partly in Kathleen's terms. The complaint is that *we* can't have the sexual relationship we once had, and that's a harm to us, whether or not the consortium spouse can have sexual relationships with others.

108. Here are some examples from a quick search of Louisiana cases, by way of illustration: *Marie v. John Deere Ins. Co.*, 96-1288 (La. App. 1 Cir. 3/27/97), 691 So. 2d 1327, 1334 (dancing, fishing, having sex); *Bacle v. Wade*, 607 So. 2d 927, 937 (La. Ct. App. 1992) (dancing, hunting, having sex, having fun); *Whitaker v. Mullinax*, 628 So. 2d 222, 230 (La. Ct. App. 1993) (playing cards, dancing, going to the movies, having sex); *Gaunt v. Progressive Sec. Ins. Co.*, 2011-1094 (La. App. 4 Cir. 6/8/12), 92 So. 3d 1250, 1273 ("staying up late," walking, dancing, cooking, having sex).

self-understanding, and it is often essential to understanding partners from the third-party perspective too.¹⁰⁹

This same basic thought—that partners in marriage-like relationships form a “we”—figures in philosophical thinking about loving relationships too, and I think that drawing on that work can help us articulate the idea we’re after. Robert Nozick has suggested that romantic partnership involves a partial merger of individual identities to create a “new entity,” for example, and that in forming this “we” the partners’ wellbeings become “tied up” and their individual autonomies “pool[ed].”¹¹⁰ Nozick’s metaphors are striking, but it can be difficult to say what they come to. What’s more, a “union” view of love like Nozick’s risks giving a distorted and unappealing picture of the relationship between adult partners.¹¹¹ If we say the partners’ interests literally merge, for instance, we may struggle to explain how one partner loves the other for the other’s own sake, rather than as an extension of themselves.¹¹² If we say that the partners’ identities merge, we may lose the ability to say that the partners remain distinct, autonomous individuals.¹¹³

Still, I am inclined to think the problem lies in how union views are spelled out, rather than in the animating idea that marriage-like relationships involve the formation of a “we.” A more promising place to start, I think, is with Andrea Westlund’s suggestion that the union of romantic partners is a *practical* one. To explain this thought, let’s focus on one familiar kind of marriage-like relationship of “mutual love and intimacy” between moral equals. The relationship we’ll focus on “combines elements of romance and physical intimacy with something more like close friendship and ongoing companionship,” and it is pursued in light of the “legal and moral possibility of its dissolution.”¹¹⁴ Partners in this kind of relationship have “a mutual desire to share experiences, projects, and plans over the course of an indefinite period (at the limit, over the course of a life).”¹¹⁵ Even so, Westlund explains, “no specific set of projects or plans provides the rationale for the relationship.”¹¹⁶ Instead, their

109. See, e.g., Marilyn Friedman, *Romantic Love and Personal Autonomy*, 22 MIDWEST STUDS. PHIL. 162 (1998); MARGARET GILBERT, *ON SOCIAL FACTS* (Princeton Univ. Press 1992) (1989).

110. Robert Nozick, *Love’s Bond*, in *THE PHILOSOPHY OF (EROTIC) LOVE* 417, 417–19 (Robert C. Solomon & Kathleen M. Higgins eds., 1991). Nozick is not the only philosopher to propose a “union” theory of romantic partnership. See, e.g., Robert C. Solomon, *The Virtue of (Erotic) Love*, in *THE PHILOSOPHY OF (EROTIC) LOVE*, 492 (Robert C. Solomon & Kathleen M. Higgins eds., 1991); ROBERT C. SOLOMON, *ABOUT LOVE* (Madison Books 2001) (1988).

111. See Andrea C. Westlund, *The Reunion of Marriage*, 91 *MONIST* 558 (2008).

112. See *id.*

113. Alan Soble, *Union, Autonomy, and Concern*, in *LOVE ANALYZED* 65 (Roger E. Lamb ed., 1997).

114. Westlund, *supra* note 111, at 558–59; see also Neil Delaney, *Romantic Love and Loving Commitment: Articulating a Modern Ideal*, 33 *AM. PHIL. QUART.* 340 (1996); Friedman, *supra* note 109.

115. Westlund, *supra* note 111, at 558.

116. *Id.*

shared projects and plans implement, and over time give shape to, a more fundamental shared aim, which is simply “to be (and do) together.”¹¹⁷ As Westlund puts it, what partners of this kind “do[] together is less important than the fact that they do whatever it is together.”¹¹⁸

For now, let’s call the people in this kind of relationship “spouses” or “married partners,” though of course it’s not true that all and only married partners (in this sense) are in legal marriages.¹¹⁹ (We’ll return to the significance of this divergence in the next Part.) Married partners, so understood, “set themselves up to behave as a unit.”¹²⁰ They “embark[] on a *shared life*, which will necessarily involve ongoing engagement in shared decision-making and action.”¹²¹ It is an essential feature of married partners, then, that they act *together* in intensive, long-term, open-ended ways. To be clear, this does not mean that married partners set themselves up to operate “as a unit” for all purposes, or that their “shared practical perspective” is so all-encompassing that it eclipses their individual practical perspectives. Indeed, married partners can (and should) maintain separate identities and retain their powers (and domains) of individual agency, even as each identifies with being part of the union and each commits to sharing decisionmaking powers and responsibilities over certain matters. Marilyn Friedman, who articulates a view that’s broadly similar to Westlund’s, likens the practical union of married partners to a “federation of states,” which remain “capable of separate agency and retain a substantially separate identity.”¹²²

Spouses can ensure that their practical union preserves space for their individual agencies and distinct identities, Westlund argues, by forging their shared practical perspective in a particular way—through open-ended conversation between “moral equals, for whom a life counts as legitimately shared only insofar as neither party’s interests or ends are swamped by the other’s.”¹²³ If partners govern their shared life in this way, their shared practical perspective is in a deep sense the “*joint* product of their *collective* deliberative

117. *Id.*

118. *Id.* at 559 (quoting STANLEY CAVELL, *PURSUIITS OF HAPPINESS* 88 (1981)).

119. Nor is it true, of course, that married partners in this sense must be persons of any particular assigned sex or gender identity. In addition, married partnership may well involve more than two partners, for all I’ve said so far. That said, I am going to focus on pairs of spouses to establish my conceptual and normative points. But I am open to generalizing the argument. For discussion, see, for instance, Sally F. Goldfarb, *Legal Recognition of Plural Unions: Is a Non-Marital Relationship Status the Answer to the Dilemma?*, 58 *FAM. CT. REV.* 157 (2020) and Elizabeth Brake, *Recognizing Care: The Case for Friendship and Polyamory*, *SYRACUSE J.L. & CIVIC ENGAGEMENT*, 2013–14, <https://slace.syr.edu/issue-1-2013-14-on-equality/recognizing-care-the-case-for-friendship-and-polyamory/> [perma.cc/9ZAH-3GCX].

120. Westlund, *supra* note 111, at 566.

121. *Id.*

122. Friedman, *supra* note 109, at 165, 170.

123. Westlund, *supra* note 111, at 567.

agency.”¹²⁴ In outlining and defending these last requirements, Westlund offers a compelling picture of the kind of shared agency that married partners ought to realize, if their practical union is to approximate an attractive ideal.¹²⁵ For the moment, though, the important point is simply that married partners realize a kind of collective agency—and in doing so constitute a kind of collective agent—in the first place.¹²⁶

Margaret Gilbert offers a well-known framework for understanding shared agency of this sort, and it might be useful to put these points in her terms too, though I mean for my claims here to be compatible with a range of views about shared agency. In Gilbert’s view, a well-defined group of individuals constitutes a “plural subject” when “they are jointly committed to doing something as a body, where ‘doing something’ is construed broadly enough to include intending, believing, [valuing, adopting principles of action,] and the like.”¹²⁷ Joint undertakings of this kind must also have mechanisms through which the members act to form their joint views and carry out their joint intentions, but these mechanisms can be as informal as “conversation-based consensus.”¹²⁸ As Gilbert herself points out, partners in marriage-like relationships routinely satisfy these conditions and constitute plural subjects—indeed, she says, marriage is “liable to produce an intensive, long-term” plural subject, the members of which have “major long-term joint projects, such as living together harmoniously for the rest of their lives . . . , creating and maintaining a comfortable home, raising a family, and so on.”¹²⁹ In Gilbert’s view, it is being part of a plural subject that tends to enable kinds of intimacy, trust, solidarity,

124. *Id.*; see also ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 151–53 (1993).

125. In practice, then, long-term romantic partners can and do form a practical union on less-than-ideal terms. Marilyn Friedman examines the many ways that an “interpersonal federation” may be less than “mutual” and “fair,” and how, given existing social conditions, these asymmetries tend to operate to the disadvantage of women. Friedman, *supra* note 109, at 170–75.

126. In an important sense, the kind of partnership I’m describing here is a lot like, well, the partnerships that the law recognizes in other contexts. And I’m hardly the first to see and explore a connection between the two. See, e.g., Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 79 (2001) (“The law governing intimate relationships would benefit from exploring the metaphorical and doctrinal analogies between business and intimate affiliations.”); Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as A Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN’S L.J. 141 (2004).

127. MARGARET GILBERT, *Collective Guilt and Collective Guilt Feelings*, in JOINT COMMITMENT: HOW WE MAKE THE SOCIAL WORLD 229, 252 (2014).

128. I take this phrase from STEPHANIE COLLINS, GROUP DUTIES 14 (2019) (emphasis omitted).

129. MARGARET GILBERT, *Fusion: A Sketch of a “Contractual” Model*, in JOINT COMMITMENT, *supra* note 127, at 266. It is worth noting that marriage-like relationships plausibly satisfy the conditions of joint agency offered by many other accounts too. See, e.g., CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY 42 (2011); COLLINS, *supra* note 128, at 11, 159.

and other relational goods that (for many people) make marriage-like relationships so valuable.¹³⁰

Now, it goes almost without saying that being part of a plural subject (or a practical union¹³¹) of this kind is normatively significant, even normatively transformative, for the partners *in* the relationship. For the partners, that is, married partnership has profound effects on what it makes sense for them to think, feel, attend to, and do, and for what it makes sense to expect and demand of one another, as they live their shared life together. What's more, each partner tends to identify with being part of that "us," and thus with the couple's joint interests and aims. In this way, partners come to have some interests that "can be neither defined nor satisfied independent of . . . being joined with [their] partner."¹³²

But the fact that married partners constitute a "we" is often normatively significant for third parties to the relationship too, and that's what I want to focus on here. A plural subject, as a collective agent, is competent to perform "in the space of obligations."¹³³ The individuals who constitute a plural subject can in principle have shared duties to others, that is, and others can have duties to them. Married partners, to the extent they constitute a plural subject, are no different. If we're partners acting together, that is, *we* can owe things to others, and others can owe things to *us*.¹³⁴ Indeed, ordinary moral experience

130. See GILBERT, *supra* note 129, at 265–70.

131. From here forward, I'll treat these ideas as equivalent, or near enough for our purposes. The suggestion, in other words, is that married partners who form a practical union of the sort Westlund cares about thereby constitute a plural subject with characteristic aims (e.g., "to be (and do) together" in a relationship of mutual love and intimacy) and a characteristic decisionmaking structure—one involving a kind of ongoing joint deliberation that aspires to respect each partner's equality and individual autonomy. See Joseph Kisolo-Ssonko, *Love, Plural Subjects & Normative Constraint*, PHENOMENOLOGY & MIND, Nov. 26, 2012, at 46, 46–48 (interpreting Westlund in a similar way).

132. ANDERSON, *supra* note 124, at 151.

133. LIST & PETTIT, *supra* note 129, at 173; COLLINS, *supra* note 128, at 14.

134. To *us*, or to *it*? I've suggested that married partners constitute a plural subject, and that a plural subject is a kind of collective agent. If a plural subject performs in the space of obligations, then, aren't the duties owed and the rights held by "it," not "we"? I don't think so. Some philosophers have suggested that there is a need for at least two conceptions of group rights—a "corporate" conception, on which rights and duties are held by the "it" that is constituted by the collective agency of individuals; and a "collective" conception, on which rights and duties are held jointly by the individuals engaged in collective agency. See, e.g., Peter Jones, *Group Rights and Group Oppression*, 7 J. POL. PHIL. 353, 362 (1999) (drawing a slightly different version of this distinction). It is difficult to say what this distinction comes to, exactly, and it may be that the corporate conception is simply a special case of the collective conception (e.g., in which formal procedures and roles enable collectives to retain their identity through dramatic changes in membership such that it makes sense to posit an "it" to play the relevant moral role). Still, I think many everyday examples, including those involving married partners, illustrate the coherence and appeal of saying that shared undertakings put people in a position to hold rights and duties jointly, not only to assert claims and discharge responsibilities on behalf of the "it" they constitute. What's more, I believe the law gives partial recognition to the collective conception of group rights—and embodies a tug of war between that and the corporate conception—in the law of partnership, among other places. See, e.g., Harwell Wells, *The Personification of the Partnership*,

suggests that married partners can, and do, figure in relationships of right and duty in this way. Consider the role that married partners can play within our practice of promising, for example.¹³⁵

I've made promises to couples to check on their cats while they're away, and I suspect you've probably done the same (or similar enough). The precise moral upshots of these familiar acts can be unclear, of course—maybe I have individual relationships with each of them too; maybe they sometimes find it difficult to say when they're acting “as one of us” and when not—but I've often concluded that I owe it to them, jointly, to look after their cats, and not that I've made pairwise promises to do so. And that makes a difference. It means I should take my cues from actions that represent their joint view of the matter. I should conclude my duty is waived if they represent that as their joint decision, for instance, but not otherwise. And if I breach my promise to them, I should expect them to hold me to account for wronging them, I should seek their forgiveness, and so forth.¹³⁶ If anything, these points—about the familiar way that married partners can figure in relationships of promissory right and duty—are clearer if we imagine ourselves as a couple making a promise to an individual—saying sure, we'll check on your cats while you're away. We might conclude from this that we have a shared duty to the promisee, and I think that's often (even ordinarily) the right interpretation.¹³⁷

I am using promising to illustrate the idea that married partners figure in our ordinary moral experience of rights and duties, but the point extends further. Imagine, for instance, that we are married partners who have decided to share a house or a car. Our shared decisions and actions will pose foreseeable risks to third parties, just as the decisions of an individual in charge of a house or car might. For that reason, we will sometimes share a duty to third parties to watch out for them—to ensure that others can safely navigate our front walk, that the taillights on our car remain in working order, that we alert our social guests to any hidden dangers in our home, and so on.¹³⁸ As in the case

74 VAND. L. REV. 1835, 1837 (2021) (explaining debates about whether a partnership is an “aggregate” or an “entity”); Alan R. Bromberg, *Enforcement of Partnership Rights—Who Sues for the Partnership?*, 70 NEB. L. REV. 1, 2 (1991) (cataloging some of the complex consequences of these competing conceptions).

135. Like others, I think of promissory duties, and the claims that correlate with them, as paradigms of relational morality. See WALLACE, *supra* note 92, at 5.

136. There are also interesting questions here, akin to questions of agency law, about when either partner can effectively alter my normative situation for the both of them—about circumstances in which one “speaks for us,” in the relevant sense.

137. To be sure, we may then decide that you'll be the one to stop and see the cats, since you already pass nearby on your way to work. That joint decision would alter the division of moral labor between us, but it wouldn't change the fact that it is *we* who owe the duty, or the moral consequences that flow from that fact. If you fall ill one day, it's on me to go for us instead. And if you fail to go for us one day but forget to tell me, I'm not off the hook with the promisee because we're not off the hook with him.

138. For a recent account of group duties that would include married partners in our sense, see, for example, COLLINS, *supra* note 128.

of our shared promises, our shared nonpromissory duties will generate (perhaps together with conversation-based consensus about the best division of labor, perhaps via other principles) individual duties to play our parts and see to it that the other is playing theirs, so that we can together play ours. Still, the responsibilities will be *ours* (as would be some of the legal liabilities).¹³⁹

Might we, as married partners, have certain nonpromissory claims against third parties that they watch out for us, just as we have certain nonpromissory duties to them? I'm inclined to think so. In fact, there's at least one corner of private law that appears to take this view already. Property law recognizes various forms of co-ownership among spouses and nonspouses alike, but many jurisdictions also permit (or require, through community property rules) spouses to make use of special forms of joint ownership.¹⁴⁰ Carolyn Frantz and Hanoch Dagan have offered a theory of this sort of "marital property" that is grounded in a conception of the relationship between spouses quite like Westlund's practical union theory that we are drawing on here. To "secure the[] unique goods of marriage," Frantz and Dagan say, married partners must "perceive themselves at least partially as a 'we,' a plural subject [in Gilbert's sense], that is in turn a constitutive feature of each spouse's identity as an 'I.'"¹⁴¹

Like Westlund, however, Frantz and Dagan contend that sharing a life by constituting a long-term, intensive plural subject is only the start—partners should also, in constituting this "community," act to preserve the individual autonomy of each and to relate to one another as equals.¹⁴² Frantz and Dagan call this "marriage as an egalitarian liberal community," and argue that this conception of marital relationships favors a "rule of equal sharing of the marital estate broadly defined."¹⁴³ They explain why, as partners, we have a joint or communal interest in certain resources that make our shared life and the relationship-based goods in it possible—and why our being partners who have joint interests of this kind is ordinarily in our individual interests as well.¹⁴⁴ Frantz and Dagan tell a compelling story about why the law of property should reflect, and give effect to, the value of egalitarian liberal community by recognizing certain jointly held rights.¹⁴⁵

139. Think, for instance, about premises liability cases involving married partners who have (one or another form of) joint ownership over their home. Just when these joint responsibilities should be enforced by the law is a difficult question.

140. For discussion of this and related points, see Emily J. Stolzenberg, *Properties of Intimacy*, 80 MD. L. REV. 627 (2021).

141. Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 82 (2004).

142. *See id.* at 81–94.

143. *Id.* at 94–95.

144. *See id.* at 85.

145. Plausibly, then, the conception of "marriage as an egalitarian liberal community" already makes itself felt in tort law through property torts to certain kinds of married partners. In effect, I am outlining a story in which tort law recognizes a different, non-property-based facet of that community.

I suspect there is a similar story to tell about why, as married partners, we would have joint interests in still other resources that make our shared life and its distinctive goods possible—in particular, about why we should have a joint interest in the physical wellbeing and agential capacities of each of us. It seems clear that these things will be important to *us*, for several reasons. To start, we are assuming that married partners are in a relationship of mutual love, and that means (among other things) that I will care about your wellbeing for your sake and you will care about mine for my sake. As a result, no jointly acceptable set of beliefs, values, priorities, or plans would treat either of our respective wellbeings as unimportant. Indeed, facts about our respective wellbeings will typically have a direct (and often weighty) importance when we deliberate and act together. If you're experiencing a new and worrisome pain, for instance, that will be a reason for you to act and a reason for me to act (as someone who cares about you), but it will also be a reason for us to act—for us to adjust or cancel shared plans, to reshuffle shared responsibilities while you figure things out, to see to it that we can get you to a doctor if necessary. In doing my part in this, I act “as one of us,” and see to it that we are responsive to our reasons, even if I am responsive to my individual reasons at the same time.

Our respective wellbeings will matter to us for another reason. No matter what plans we have for our shared life—from raising children, to maintaining a home, to traveling the world, to simply sharing experiences and wasting time together—our joint aims will typically involve, and depend for their realization on, each of us remaining alive and in reasonably good physical and agential condition. (There may be some forms of collective agency in which individual members are largely expendable or exchangeable, as far as the collective's interest and aims are concerned, but a married partnership is not one of them.) To suggest that the import of our respective conditions is less direct in these cases is not to say that it is less significant. On the contrary, many of the most distinctive and valuable goods of close relationships—intimacy, trust, solidarity, mutual love and care, mutual commitment, and more—depend on each partner's remaining alive and continuing to have certain capacities. That gives us, as partners, a strong interest in these conditions obtaining.

There is a straightforward sense, then, in which the physical and psychological integrity of each of us is an interest of *ours*, not only an interest of yours and an interest of mine. If we can have shared interests in this way, then we might also have joint claims on others against certain kinds of interferences with these joint interests. Now, the precise connection between interests and rights is a difficult and contested philosophical question. Many philosophers argue, plausibly, that interests are not the full story of rights (and I'm inclined to agree). We may hold some rights, for instance, simply because we are the kinds of beings we are, or because certain choices should be ours to make, or because we occupy important social roles, whether or not our individual interests are at stake.¹⁴⁶ That said, many regard the interests of potential

146. See generally F. M. KAMM, *Rights Beyond Interests*, in *INTRICATE ETHICS: RIGHTS, RESPONSIBILITIES, AND PERMISSIBLE HARM* 237 (2007).

rightsholders as one important consideration that underwrites the ascription of rights, even if there is some “daylight” between the form and content of the resulting rights and the interests that they serve.¹⁴⁷

At this point, I’m going to venture a hypothesis. I’m more confident in the general shape of the proposal than I am in the details, in part because I mean for it to be compatible with different underlying views about shared agency, interests, and rights, and in part because I am simply less sure about the right underlying view. My conjecture is that we—married partners who constitute an intensive and long-lasting plural subject—are a collective of the right sort to hold rights in common. What’s more, I’ll venture, our shared interest in living a life that we author together, and in the essentially relational goods that sharing a life makes possible, are interests of the right kind and importance to ground shared rights—rights we hold together. I suspect that this will be true on any theory that allows for plural subjects to perform in the “space of obligations” and treats the joint interests of their constituent members as (at least partial) grounds of jointly held rights.¹⁴⁸ I don’t have a compact argument for this conjecture, let alone a comprehensive one, but here are two considerations that seem to me to count in favor of the view that married partners (in our sense) have a jointly held right against certain interferences with their shared life, a right that is infringed if a third party fails to watch out for either partner.

First, and most important, recognizing a right of this sort would promote the interests of the individual partners too, insofar as they identify with and value being part of a relationship involving shared agency and interests.¹⁴⁹ It’s

147. For a helpful recent discussion of rights and interests in tort law, see Gregory C. Keating, *Form and Substance in the “Private Law” of Torts*, 14 J. TORT L. 45, 60–63 (2021).

148. Consider, just for example, Joseph Raz’s well-known account of the connection between interests and rights. For Raz, the critical question is always whether “X can have rights and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty” to X. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 166 (1986). For “collective rights”—rights held in common by members of a suitably structured collective—Raz adds that the “the interests in question are the interests of individuals as members of a group in a [collective] good . . . because it serves their interest as members of the group,” and that “the interest of no single member of that group in that [relevant] good is sufficient by itself to justify holding another person to be subject to a duty.” *Id.* at 208. Put in Raz’s terms, then, the conjecture is that a practical union is a suitably structured collective, and the interests we have in living a shared life with specific others are sufficient to hold others to be under a duty not to interfere in certain ways. In this footnote, I am using Raz’s well-known approach to illustrate the hypothesis I am offering, but I do not mean to commit to Raz’s view or to any strong version of the “interest theory” of rights. Indeed, you can think that interests play a role in justifying rights without committing yourself to the interest theory of rights, in the classic sense of that term. See, e.g., WALLACE, *supra* note 92 (sketching a contractualist theory of reasoning from individual interests to moral claims).

149. See ANDERSON, *supra* note 124, at 151; LIST & PETTIT, *supra* note 129, at 186–201. In effect, the argument of this paragraph is that the joint claims we’re considering plausibly satisfy the requirement, pressed by some, that we countenance collective rights only where they tend toward the good of individuals. See, e.g., DWIGHT NEWMAN, *COMMUNITY AND COLLECTIVE RIGHTS* (2011); RAZ, *supra* note 148, at 208 (calling this view “humanism”).

important not to gloss over this point, even if I haven't stressed it so far. I am suggesting that the practical union involved in certain relationships explains why these relationships can ground a shared normative standing, but the role that these unions play in the lives of the individuals who constitute them will (presumably) make a difference to the shape and strength of the normative constraints they place on third parties. And there are good reasons to think that married partnership typically plays a central role in the lives of the individual married partners (even if other practical unions play less central roles in their constituents' lives and tend to exert less normative force on third parties as a result). Indeed, I am inclined to think that recognizing shared rights would promote, and perhaps even be essential to the realization of, the partners' individual rights in the context of marriage-like relationships. That would be true, for example, if respect for a person's individual agency requires that we respect their participation in certain kinds of shared agency, and if certain kinds of shared agency require the existence of shared claims and powers in order to be carried out on morally acceptable terms.¹⁵⁰ It would be true, in other words, if respect for individuals' efforts to author their own lives requires us to respect their efforts to coauthor "vital" chapters of those lives,¹⁵¹ and if respect for coauthorship can require us to relate to coauthors *as* coauthors—to relate to them in the moral community as they relate to themselves, as the holders of certain jointly-determined views and values, and as the possessors of certain shared moral powers, claims, and responsibilities.¹⁵²

So part of the case for the conjecture focuses on the ways in which shared rights are valuable for the persons who share them. A second part, I'll suggest, focuses on the third parties who might be burdened by them—and on the reasons for thinking that those burdens will not be unreasonable. In principle, we can imagine collective rights that would be unfairly burdensome to those required to respect them—rights that would limit our degrees of freedom or burden our deliberative capacities in ways that would seem hard to reconcile with

150. Cf. Steven Wall, *Collective Rights and Individual Autonomy*, 117 ETHICS 234 (2007) (outlining a liberal case for collective rights focused on the thought that collective rights are sometimes essential to the realization of individual autonomy rights).

151. See *id.* at 256–57 (explaining that some options are (or become) "vital" to a person living an autonomous life, often in virtue of that person's past connection to and investment in a project).

152. Here I draw on some remarks Seana Shiffrin makes about coauthorship, though I don't presume she'd endorse putting them to this use. See SEANA VALENTINE SHIFFRIN, DEMOCRATIC LAW 22 n.6 (Hannah Ginsborg ed., 2021); see also Adam Lovett & Jake Zuehl, *The Possibility of Democratic Autonomy*, 50 PHIL. & PUB. AFFS. 467, 475, 479 (2022) (summarizing a related view of joint authorship and its value, which encompasses interpersonal cases like the ones I'm concerned about here). I believe this is also the place where my project touches on (and would benefit from further engagement with) Kantian ideas about agency, relationships, and rights. See KORSGAARD, *supra* note 82, at 186–87; see also Barbara Herman, *Could It Be Worth Thinking About Kant on Sex and Marriage?*, in A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 49, 53 (Louise M. Antony & Charlotte E. Witt eds., 2d ed. 2002); Lina Papadaki, *Kantian Marriage and Beyond: Why It Is Worth Thinking About Kant on Marriage*, 25 HYPATIA, Spring 2010, at 276.

our underlying equality as individuals. We would have grounds for rejecting principles that assigned collectives certain kinds of rights, then, but I'm not convinced that we have grounds for rejecting every principle that does so. In this case, for instance, we're imagining quite modest shared rights—rights that demand that strangers watch out for us and the life we share simply by watching out for each of us. In effect, these rights shift the boundaries of recognition and respect to better reflect the fact that, in failing to watch out for people, you risk harms to valuable projects that those people are coauthoring with others. But they don't further restrict the freedom of third parties, or overburden their deliberative capacities, and that makes the case for the right more straightforward.¹⁵³

Let's suppose for a moment that married partners have these jointly held claims. In that case, if a third party fails to discharge their duty to me—for example, by seriously injuring me through their negligence—that will amount to a failure to watch out for the “us” of which I'm an essential part. I will have been wronged as an individual right holder, and it will be appropriate for me to relate to the wrongdoer in those terms. *We* will have been wronged, too, I'm suggesting, but what does that mean for each of us? In outline, if we have a claim to certain conduct by a third party, then each of us is entitled to act, to the extent it is possible and appropriate, with a view to seeing that that *we* are accorded that conduct.¹⁵⁴ For instance, each of us might object to a third party's threatened infringement, each of us might resent him in the wake of an infringement, and each of us might seek to hold him accountable for the wrong and the harm it caused. In “seeing to it that we are accorded” what we

153. There are difficult questions, though, about how much further the partners' jointly held claims could plausibly extend. All else equal, do you have reason to save Alan Lundgren instead of his unattached neighbor because, in doing so, you'll be saving the Lundgrens too? When can you wrong just one Lundgren without thereby wronging the Lundgrens? Can you wrong the Lundgrens without wronging either Lundgren as an individual? I regard these as open and interesting theoretical questions about the wrongs-to-us model. In fact, the last is a question that tort law has to some degree wrestled with, and I think appropriately so, because it's at least plausible that we face certain additional constraints when we knowingly interact with those who have partners and families. Most (in)famously, the common law permitted one spouse to sue a third-party defendant for “criminal conversation” and “alienation of affections,” complaints typically (but not always) grounded in one spouse's romantic or sexual relationship with a third party. See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 683, 685 (AM. L. INST. 1977) (explaining some of the principles of criminal conversation and alienation of affections). Today, these “heartbalm” torts have been abolished in most jurisdictions, with the notable exception of a handful of U.S. states. See RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS §§ 48D cmt. a, 48E cmt. a (AM. L. INST., Tentative Draft No. 1, 2022). Although I will not focus on these claims here, I do think an account of spousal consortium claims should help us explain why claims grounded in a physical injury to one spouse should strike us as more compelling and less complicated (at least on balance) than claims grounded in romantic rivalry or heartbreak, as well as help us see what (if anything) remains plausible about heartbalm claims—as a matter of both morality and law.

154. This sketch is based in part on Stephanie Collins's account of the duties that members of a collective have, in virtue of their membership in that collective. See COLLINS, *supra* note 128, at 181–205.

are owed, each of us will have to make it legible that we act “as one of us,” each of us will have to be sensitive to what the other has already done, and more. For that reason, the precise manifestation of our shared standing to press our claim will often depend on the context. Still, the abstract contours of our shared claim—and of our shared standing to press it—should seem familiar enough.

Let’s take stock. At this point, we have the outline of a story in which married partners typically constitute a tight-knit collective agent for a wide range of purposes, and in which they have an important shared interest in the physical wellbeing of each partner. What’s more, we’ve seen why this shared interest, and the many relational goods that depend on its being secured, could be sufficiently important to hold third parties to be under a duty to the partners to look out for each partner’s physical wellbeing. I believe this story draws on plausible views about romantic partnership, collective agency, and rights, and that it reaches a plausible conclusion too, quite apart from the law. That said, it’s only an outline of a story, and it would take much more work to fill in the detail. If this story is on the right track, though, can it help us understand spousal consortium claims in tort law too?

VI. CONSORTIUM CLAIMS EXPLAINED?

Consortium claims make better doctrinal and normative sense, I submit, if we see them as tort law’s attempt to come to grips with the moral significance of the shared undertaking at the core of marriage-like relationships. Seen this way, consortium claims give legal form and protection to the partners’ joint moral claims against third parties. In my telling, then, Kathleen Lundgren sued Whitney’s to redress a “wrong to us”—a wrong to her and Alan together—and to demand that Whitney’s account for the harm that she suffered “as one of us.” To put the point in a way that foregrounds the “practical union” that puts Kathleen and Alan in a position to suffer these shared interferences, Kathleen sued Whitney’s for an injury *to the consortium* that she and Alan constituted. In doing so, she sought redress for the harm she suffered as someone with an equal stake in that consortium.

The main virtue of this “wrongs-to-us” model, as I see it, is that it can explain why consortium claims should have a place in the law of private wrongs at all—indeed, why these claims should be so persistent and should strike so many as compelling. If consortium claims assert jointly held claims—rights that reflect and protect the practical union involved in marriage-like relationships—then they are a straightforward instance of the *Palsgraf* principle, not a seeming departure from it. And this model of consortium claims manages this result without supposing that one spouse is the property of the other or that one spouse has unilateral say-so over how third parties relate to the other. In this way, the model enables rights-based theories of tort law to avoid

saying that consortium claims are archaic, anomalous, or mere add-ons. Given how entrenched consortium claims are in U.S. law, that is no small thing.¹⁵⁵

A further virtue of the wrongs-to-us model, in my view, is that it can fit and explain much of what courts have said in their attempts to give consortium claims a more modern, less patriarchal foundation. As we saw at the outset, courts sometimes talk as if the injured party in a consortium case is the “marital relationship.” For example, the New York Court of Appeals has said that consortium claims “do[] not rest on any medieval theory but on the real injury done to the marital relationship.”¹⁵⁶ The Texas Supreme Court, for its part, has said that a consortium claim is “[t]he remedy for the negligent or intentional impairment of [the marital] relationship.”¹⁵⁷ This thought makes a certain intuitive sense, but it is also obscure. What is “a relationship,” such that it can be injured? A historical pattern of interactions? Of attitudes and emotions? Something else? The wrongs-to-us model provides one potential answer. A relationship, in the relevant sense, involves the creation of a practical union—a distinctive kind of plural subject. And a plural subject is (plausibly) the kind of thing that a third party can injure. If we suppose that courts are trying to articulate this thought when they speak of injuries “to the marital relationship,” then we do not have to say that they are simply evading the tort’s patriarchal past or giving voice to a policy conviction. Rather, we can say that they are articulating a plausible rights-based foundation for the tort.¹⁵⁸

Last, but not least, I submit that the wrongs-to-us model provides a better framework for understanding a consortium spouse’s grievances—and for bringing the injured spouse’s relationship-related grievances back into view. If we cast a consortium spouse’s complaint in purely individual terms, her grievances against a third-party defendant can sound like veiled grievances

155. It’s at this point that I part ways with Nico Cornell. Judge Cardozo treated the idea of “a wrong” and “the violation of a right” as equivalent (or at least as mutually entailing). Most philosophers who’ve considered the issue have agreed with Cardozo. Cornell, *supra* note 17, at 110–11. In recent years, however, Cornell has argued that not all wrongs reflect rights violations. *Id.* at 133. And he has cited spousal consortium claims as an example meant to help us to see the conceptual space between these notions. *Id.* at 127–28. Like others, Cornell finds it implausible to say that you have a right over your spouse, and yet he thinks it’s clear that you’ve been wronged when a third party tortiously injures your spouse. If the view I’ve offered is tenable, however, then supporters of Cardozo have an answer to give: the nature and value of the project you share with your spouse gives you a shared claim against that kind of harmful interference. Spouses have rights, in other words, but not rights “over”—rights *with*.

156. *Millington v. Se. Elevator Co.*, 239 N.E.2d 897, 900 (N.Y. 1968).

157. *Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978).

158. I believe the wrongs-to-us model fits with the way that courts tend to think about damages in consortium cases too. For instance, if legally married spouses are partners in name only, then they will not be awarded damages because there was no shared life to derail. In addition, defendants cannot introduce evidence of a consortium spouse’s potential or actual remarriage, and that provides some support for the thought that the suit addresses the loss to *this relationship*, rather than to relational interests more generally. Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1392, 1392 n.17 (2003) (collecting cases).

against her injured partner too. This interpretation is encouraged by the adversarial form of civil litigation, to be sure, but it also seems implicit in the account that some courts give of the tort. In *Hitaffer*, for instance, the court said that a consortium claim aims to remedy a third party's "interference with [the] rights" that each spouse has against the other.¹⁵⁹ Making the spouses' nexus of entitlements the crux of the tort encourages us to hear the deprived spouse's grievances in these two registers. In effect, the complaint to a defendant becomes: thanks to you, my spouse can't fulfill her obligations to me.

Of course, my point is not that partners never resent or feel frustrated with each other, either because their legitimate expectations have been disappointed or because they lapse into unjustified annoyance or self-pity. Still, that isn't what a consortium spouse should be understood to say to the person who wrongfully injured his partner, at least not by default. It seems more charitable, and more fitting, to picture the consortium spouse standing with the injured spouse against the defendant, saying that *we* had important plans for sharing a life—for dancing, for cooking and cleaning, for sexual intimacy, for weathering the normal ups and downs, for much else—and you interfered with them in ways that have taken choices away from us and caused us to suffer too.¹⁶⁰

In short, then, embracing the wrongs-to-us model appears to defuse the principal doctrinal and theoretical objection to including consortium claims in a law of private wrongs, and it portrays these claims in an appealing light too. That is the basic reason to think that we should see consortium claims as tort law's attempt to recognize the underlying moral picture I've sketched. Still, you might have questions about what consortium doctrine would look like if the model I've offered is correct—and perhaps doubts about whether it has much in common with the doctrine we have. Who, for instance, should be able to sue—the noninjured spouse alone, or only the spouses together? Who should have claims in the first place—married spouses, or any partners in marriage-like relationships? And how should these claims be litigated if they're in fact held jointly by multiple people? My goal, in the rest of this Part, is to grapple with these questions, at least in a preliminary way.

But first, a point to anchor expectations in the right place: I hope to show that the wrongs-to-us model offers a helpful way to think about these questions. That said, I doubt that the model yields unequivocal answers to them—or to many others like them. The reason, in short, is that there are many choices to make on the path from moral claim to legal recognition of that

159. *Hitaffer v. Argonne Co.*, 183 F.2d 811, 816 (D.C. Cir. 1950) (emphasis added) (quoting *Bennett v. Bennett*, 23 N.E. 17, 18 (N.Y. 1889)), *overruled in part by* *Smither & Co. v. Coles*, 242 F.2d 220 (D.C. Cir. 1957).

160. To be clear, a deprived spouse is also there to articulate how the wrong to the "we" has had specific effects on his or her "me," such that there's a full accounting of the harms to "us"—a full accounting of how each of us is worse off, in light of having had our claim infringed. But the fundamental aim of the inquiry should be to determine what *you* did to *us*, not what you did to *me* by interfering with my spouse's ability to give me what was by right mine.

claim—and some of these choices are only constrained, not resolved, by features of the moral phenomenon that the law is attempting to recognize. The law must also attempt to recognize moral claims in a way that makes institutional sense, for example, and that might lead—and, I'll suggest, has led—different legal systems to implement the logic of consortium claims in different ways. Still, I think the wrongs-to-us model can help us to think about these choices in an illuminating way, and that it can help us see why (for example) certain features of consortium doctrine should have seemed difficult or puzzling in the first place. In my view, that's a mark in the model's favor—one that illustrates both its normative appeal and (perhaps unexpected) descriptive bite.

Let's start here: If the wrongs-to-us model is correct, which spouse(s) should be able to bring consortium claims? The most natural answer, you might think, is that married partners should enjoy a shared power to sue a third party for the violation of their shared claim. That way, a consortium claim's legal structure would directly reflect its moral structure and exhibit all the virtues I just outlined. That answer should give you pause, though. As we saw earlier, the Restatement rule reflects the dominant approach,¹⁶¹ and the Restatement rule says that a consortium claim is the consortium spouse's alone—that it's her underlying claim, and her power to sue too.¹⁶² Doesn't that count against the wrongs-to-us model as an account of consortium doctrine, however appealing the model might be apart from the law? If the wrongs-to-us model calls for doctrinal reform on this point, I am happy to embrace reform (and its theoretical costs). In this case, however, I don't think the objection is as deep as it looks. The reason, in short, is that I believe the Restatement approach can be understood as one way of *implementing* the wrongs-to-us model.

To see how this might work, let's first consider a jurisdiction that straightforwardly embraces the wrongs-to-us model—a jurisdiction quite a bit like Maryland, as it turns out. Maryland, seemingly alone among the fifty states,¹⁶³ takes the view that the “the right to sue for loss of consortium is . . . available only to the [spouses] jointly.”¹⁶⁴ In other words, a claim for loss of consortium in Maryland can “only be asserted in a joint action for injury to the marital relationship.”¹⁶⁵ In adopting this rule, the Maryland Court of Appeals explained itself in a way that resonates with the discussion to this point. The court rejected the “medieval concept” that, in marriage, “the legal existence of the wife is . . . incorporated into that of the husband.”¹⁶⁶ But rejecting the existence of a marital *unity*, the court reasoned, does not require us to reject the existence of a “marital entity.” As the court put it, there is “a basic and vital

161. See *supra* Part I.

162. See RESTATEMENT (SECOND) OF TORTS § 693 (AM. L. INST. 1977).

163. See Green & Layman, *supra* note 44, at 801, 802 n.97.

164. Deems v. W. Md. Ry. Co., 231 A.2d 514, 521 (Md. 1967).

165. *Id.* at 525.

166. *Id.* at 521.

reality” that is “not sufficiently recognized” by jurisdictions that elect to give each spouse an individual claim: a “continuing marital relationship,” the court said, involves “an inseparable mutuality of ties and obligations, of pleasures, affection and companionship, which makes that relationship a *factual entity*.”¹⁶⁷ To recognize that basic and vital reality, the court concluded, Maryland should adopt a legal framework that treats spouses “as the partners they are in fact.”¹⁶⁸

On its face, Maryland’s approach to spousal consortium claims—one that provides married partners with a joint claim “for injury to the marriage relationship,” to the “factual entity” that the partners constitute—is quite different from the more familiar Restatement approach—an approach that provides a consortium spouse with an individual claim to redress an injury to their “relational interest.” In operation, however, I want to suggest that Maryland’s approach and the Restatement approach come to much the same thing, in at least two important respects.

First, recall that the Restatement approach requires an injured spouse’s individual claim to be joined to the consortium spouse’s individual claim and litigated in a single action, with only rare exceptions.¹⁶⁹ In Washington state, whose consortium doctrine embraces the basic Restatement rule, the Lundgrens’ individual claims were litigated in a joint action as *Lundgren & Lundgren v. Whitney’s, Inc.* In Maryland, by contrast, their suit would have been captioned *Lundgren & Lundgrens v. Whitney’s, Inc.*, to reflect the fact that their joint action included a joint claim too. I think this formal difference in caption is important, of course, because I think it reflects a real difference in the conceptual and normative underpinnings of the claims being asserted. At the same time, the hard-headed among us might look at these captions and wonder whether these formal differences amount to much in practice, and it would be hard to deny that they have a point. For all practical purposes, you might think, the Lundgrens would have confronted Whitney’s together in either scenario.

Second, the Restatement approach (in effect) permits courts to compensate each spouse for the setback each suffers to their “relational” interests—the consortium spouse as part of her damages for loss of consortium, the injured

167. *Id.* (emphasis added).

168. *Id.* When courts and commentators notice Maryland’s distinctive approach at all, they often dismiss it as a “fiction,” a “hold-over,” even a “throw-back.” *E.g.*, *Clouston v. Remlinger Oldsmobile Cadillac, Inc.*, 258 N.E.2d 230, 235 (Ohio 1970). The grounds for saying so, it seems, is the idea that, in saying the *injury* is to the relationship, the Maryland approach denies that the deprived spouse “suffer[s] a direct and a real personal loss.” *Id.* That seems wrong, though. The wrongs-to-us model need not deny that each spouse suffers the wrong to us in distinctive ways, given that each is a distinct one of an *us*.

169. RESTATEMENT (SECOND) OF TORTS § 693 (AM. L. INST. 1977).

spouse as part of his separate damage award (e.g., via damages for lost enjoyment of life's goods).¹⁷⁰ In this way, the Maryland Court of Appeals has observed, the Restatement approach winds up “award[ing] separate damages for losses which, in some respects, are essentially indivisible.”¹⁷¹ In Maryland, by contrast, courts treat the spouses' relationship-based losses as indivisible and the injured spouse's losses as divisible into individual components (which are compensated in his separate claim) and relational components (which are not). In other words, Maryland seeks to compensate the spouses for the setback to their relational interests—for the injury to their relationship—in a joint damage award, which means the injured spouse is not permitted to recover for damage to his relational interests in his separate, individual claim. Here, too, you might reasonably wonder whether these approaches are really all that distinct in practice.¹⁷² Either way, you might think, courts strive to compensate the Lundgrens for the same relational harms, even if they understand what they're up to a bit differently.

Indeed, Maryland takes the view that these competing doctrinal frameworks are similar enough that they can be mapped onto each other with relatively little loss or distortion, and I think Maryland is onto something.¹⁷³ (North Carolina, for its part, agrees that its Restatement-like approach is akin to Maryland's joint-claim approach, and that both approaches “recognize[] that, in a very real sense, the injury involved is to the marriage as an entity”—to the “marital partnership.”¹⁷⁴) Of course, Maryland also contends that its joint-claim view provides the more accurate *rendering* of the relevant facts about the partners, including the facts about the harm they've suffered, and I am inclined to agree. But the more important point, in this context, is simply that the wrongs-to-us model and the Restatement model tend to agree on the facts that need to be rendered—namely, the fact that the partners are both seeking compensation for the harm to the relationship and that, in the usual

170. See DOBBS ET AL., *supra* note 32, § 479 (explaining that many courts award damages for loss of enjoyment of life); *Kan. City S. Ry. Co., Inc. v. Johnson*, 798 So. 2d 374, 380–81 (Miss. 2001) (“The loss of enjoyment of life should be fully compensated and should be considered on its own merits as a separate element of damages, not as a part of one's pain and suffering. . . . This type of damage relates to daily life activities that are common to most people. There are numerous activities that courts have held constitute daily life activities: going on a first date, reading, debating politics, the sense of taste, recreational activities, and family activities.”); *Payton v. City of New Orleans*, 96-0109 (La. App. 4 Cir. 6/26/96), 679 So. 2d 446, 452 (upholding an award of general damages based in part on the need to compensate the injured plaintiff (i.e., the nonconsortium plaintiff) for the “deteriorat[ion]” of the emotional and sexual dimensions of her marriage).

171. *Deems v. W. Md. Ry. Co.*, 231 A.2d 514, 523 (Md. 1967).

172. Maryland seems to think *its* sorting exercise is “less difficult.” *Id.* I'm not at all sure about that. But I believe that the approaches converge in their aims, and that courts will have to be tasked with avoiding the same kinds of double recovery in either case.

173. *Id.* (noting that the standard joinder rule “comes close to the [view] that the cause of action for loss of consortium is only a joint one”).

174. *Nicholson v. Hugh Chatham Mem'l Hosp.*, 266 S.E.2d 818, 821, 823 (N.C. 1980).

case, they are (and ought to be) seeking to hold the defendant to account together.¹⁷⁵

So which spouse(s) should be empowered to bring the consortium claim, in the end? My tentative answer is that both spouses should be empowered to sue for loss of consortium together, much as they are in Maryland. That makes the normative logic of consortium claims more legible, I think, and it does so without introducing prohibitive administrative difficulties (if Maryland's fifty-odd-year experiment is any guide). Still, things aren't as different in Maryland as they seem, if the discussion above is on the right track. Indeed, there's reason to think that the Restatement approach closely approximates Maryland's approach (and is animated by the same wrongs-to-us logic)—only it does so by positing connections between (ostensibly) individual claims, rather than by recognizing joint claims. It could be, for all I've said so far (or will say here), that there are good reasons to implement consortium claims the way the Restatement does—good reasons to think that giving each spouse (what amounts to) a fractional claim strikes a better balance of costs and benefits to third parties, to courts, and to the spouses themselves, all without compromising the normative foundations of these claims. If that's the case, the value of the wrongs-to-us model is not in the reforms it recommends, but rather in the rational reconstruction of existing doctrine it makes possible.

Let's turn, now, from one question of standing to another—to the question of who should have these claims in the first place. To this point, we've focused on married partners in our stipulated, somewhat idealized sense. But not all married partners in this sense are legally married, and not all partners in legal marriages are partners in our sense. What, doctrinally, follows from the fact that the wrongs-to-us model is motivated by, and to this point premised on, this picture of partners in marriage-like relationships? My basic question here has been whether the law's recognition of something like spousal consortium claims could be morally fitting, if tort law is indeed a law of rights and wrongs. To answer that question, I've focused on marriage-like relationships between adult partners and tried to identify the features of those relationships that seem to make sense of partners' legitimate grievances with a third party who tortiously injures one of them.¹⁷⁶

175. If a consortium claim seeks to redress a wrong to us, however, why is the second spouse needed at all? Couldn't these claims be filed by the injured spouse "on behalf of us" in the process of litigating his individual tort claim? In theory, a jurisdiction might implement the wrongs-to-us model in this way. And not only in theory—that's essentially how consortium claims work in Kansas. KAN. STAT. ANN. § 23-2605 (West); *McGuire v. Sifers*, 681 P.2d 1025, 1038 (Kan. 1984). For several reasons, however, it is better to require the parties to be joined for purposes of the lawsuit, because that arrangement better represents the partners' formally equal stake in the right that has been violated and encourages the partners to come to a joint decision about whether and how to vindicate that right. See *Frantz & Dagan*, *supra* note 141, at 124–26 (suggesting, plausibly, that joint decisionmaking power should be exercised jointly when decisions will have serious consequences).

176. In part, I started there because I don't think it's all that plausible to suppose that the relationship's legal status could provide a sufficient explanation of why it's morally perceptible (if it is), not obtuse (if it isn't), to say that a person like Kathleen Lundgren belongs on the case

To the extent that the law of spousal consortium claims can be understood to track the same features of marriage-like relationships, however, that gives the law a kind of moral aptness. And I do think the law can be understood to track these features in a broad range of cases. I expect that most legally married partners would recognize themselves in the story I've told about the practical union at the heart of long-term romantic partnership, even if they'd also recognize that it represents an ideal that's only imperfectly realized in practice. Of course, the law can track these morally relevant features only to the extent the legal status it relies on is a reliable proxy. And in practice, that means that the law of spousal consortium claims is both underinclusive and (probably) overinclusive too, relative to the central moral phenomenon. (This gap between the moral significance of a relationship and its legal status is all too familiar, unfortunately.)¹⁷⁷

Does that mean that the law is wrong? It would make sense, in my view, to reform consortium doctrine so that it treats the morally relevant features of marriage-like relationships as sufficient for legal recognition too. Indeed, I think the wrongs-to-us model supports this reform by giving us grounds to think that it is the importance of the partners' actual shared life, and not the legal status of their relationship, that does the bulk of the moral work in explaining why it is that partners stand to suffer shared wrongs.¹⁷⁸ That said, I doubt the wrongs-to-us model settles this question of institutional design. The courts that deny unmarried partners the right to sue for loss of consortium know perfectly well that marriage-like relationships are marriage-like in the ways that matter most. Even so, these courts are moved to draw the line at marriage for other reasons: some courts suggest that we have distinctively legal reasons—reasons related to the design and operation of a legal system—to rely on simpler-to-administer standards;¹⁷⁹ others suggest that courts shouldn't frustrate the state's interest in steering people toward the institutional form it

caption too. See *Lozoya v. Sanchez*, 66 P.3d 948, 957 (N.M. 2003), *overruled in part* by *Heath v. La Mariana Apts.*, 180 P.3d 664 (N.M. 2008); see also *Butcher v. Superior Ct.*, 188 Cal. Rptr. 503, 512 (Ct. App. 1983) (suggesting that consortium claims should be available to anyone in a relationship that is “stable” and “has those characteristics of significance which one may expect to find in what is essentially a de facto marriage”), *overruled* by *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988); *Bulloch v. United States*, 487 F. Supp. 1078 (D.N.J. 1980); *Ratcliff v. Good Times Rests., Inc.*, No. 19-cv-00077, 2019 WL 2774217, at *2–4 (D. Colo. July 2, 2019).

177. See generally *Culhane*, *supra* note 45.

178. I don't mean to suggest that legal status *couldn't* do moral work too. One possibility, which I hope to explore in the future, is that legal recognition of certain relationships plays a role in our own understanding of the projects we're engaged in—and in making the value and boundaries of those projects legible to third parties whom the law seeks to hold accountable for interfering with them.

179. See *Elden*, 758 P.2d 582.

has created for the purpose of recognizing “the fundamental relational rights and responsibilities of persons in organized society.”¹⁸⁰

In my view, there are good reasons to doubt that the state has much of an interest in steering people toward marriage as such.¹⁸¹ And those reasons for doubt are stronger, I suspect, when the question is how the law should deal with unmarried partners in lawsuits over their private rights, rather than in (say) the administration of public benefit programs. (The thought that couples might be less inclined to marry because courts have granted them rights to sue for loss of consortium seems especially implausible, for example.) What’s more, I’m inclined to think that the administrative benefits of relying on a bright-line rule are somewhat modest in this context, not least (but not only) because courts are already required to engage in fact-intensive inquiries to assess the closeness and quality of relationships for purposes of awarding damages.¹⁸² Still, the proper scope of consortium doctrine is only one aspect of a broad, ongoing debate about the proper legal treatment of (un)married partners.¹⁸³ The view I’ve defended here represents a real but ultimately modest intervention in that broader debate.

To close this Part, I want to turn, briefly, from questions about standing—spouse or spouses? marriages or marriage-like relationships?—to questions about whether the wrongs-to-us model has implications for how consortium claims should adjudicated. A basic question about consortium doctrine, recall, is how the adjudication of the consortium spouse’s claim should mirror, or depend on, the adjudication of the injured spouse’s individual claim.¹⁸⁴ I think the wrongs-to-us model can help us understand these questions too. As before, though, I’ll suggest that the model (as a model) may be compatible with several different doctrinal rules.

Let’s focus on defenses. Courts agree that at least some defenses good against the injured spouse’s individual claim are good against the consortium spouse’s claim too, though courts struggle to sort out which are which. Can the wrongs-to-us model shed any light? Consider the standard comparative fault rule: if the injured spouse’s claim is adjusted by his fault, the consortium

180. *Id.* at 587 (quoting *Laws v. Griep*, 332 N.W.2d 339, 341 (Iowa 1983)); see also *Hutchinson v. Broadlawns Med. Ctr.*, 459 N.W.2d 273, 278 (Iowa 1990) (explaining that recognizing certain consortium claims “would be contrary to our public policy which encourages formalization of . . . informal relationships”).

181. See, e.g., ELIZABETH BRAKE, *MINIMIZING MARRIAGE* (2012).

182. *Lozoya v. Sanchez*, 66 P.3d 948, 957 (N.M. 2003), *overruled in part by* *Heath v. La Mariana Apts.*, 180 P.3d 664 (N.M. 2008). It is true, though, that making this inquiry a threshold matter would force courts (and judges) to confront it more often.

183. See, e.g., Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67 (2021); Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 915 (2019); Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013 (2018); June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55 (2016); William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881 (2012).

184. See, e.g., RESTATEMENT (SECOND) OF TORTS § 693 (AM. L. INST. 1977); DOBBS ET AL., *supra* note 32, § 392.

spouse's claim must be too.¹⁸⁵ If the injured spouse is no part of the consortium spouse's claim, however—if “[i]nvasion of the consortium is an independent wrong directly to the spouse so injured”¹⁸⁶—it is not clear that the standard rule makes much sense.¹⁸⁷ On the wrongs-to-us model, however, the injured spouse *is* a part of the consortium claim—as a member of the wronged *us*. It is at least plausible, then, that whatever theory of comparative fault you adopt, it should extend to the consortium claim too. After all, if I'm the at-fault spouse, I've made it more difficult for the defendant to avoid wronging me *and* us, and if fairness demands that I bear some cost for my part in that, then it seems that fairness would demand that we bear some too.¹⁸⁸ True, this answer assumes my actions can be ascribed to us, and in some cases that will be a treacherous inference.¹⁸⁹ When the spouses sue for loss of consortium, however, they assert that the injured spouse was one of us, for the purpose at hand. For that reason, they should not be heard to deny it when it's to their disadvantage. That is just a sketch of a theory, of course, but it provides us with some reason to think that the wrongs-to-us model could offer a quite natural explanation of this (otherwise strange) doctrinal point.

What about other (broadly speaking) procedural defenses? Imagine, for example, that I am injured by the negligence of river-rafting company. If I signed a liability waiver beforehand, should that bar you, my spouse, from bringing a consortium claim in the event I'm injured and our relationship suffers? If I release my claim in an enforceable settlement agreement after the fact, should that bar you, my spouse, from proceeding with your consortium claim? Courts disagree about both questions, though the majority seem to come down against the idea that the injured spouse can waive the consortium

185. RESTATEMENT (SECOND) OF TORTS § 693 cmt. e (AM. L. INST. 1977).

186. *Hitafter v. Argonne Co.*, 183 F.2d 811, 815 (D.C. Cir. 1950).

187. See, e.g., Jo-Anne M. Baio, *Loss of Consortium: A Derivative Injury Giving Rise to a Separate Cause of Action*, 50 FORDHAM L. REV. 1344 (1982).

188. See *Eggert v. Working*, 599 P.2d 1389, 1391 (Alaska 1979); accord *Lee v. Colo. Dep't of Health*, 718 P.2d 221, 232 (Colo. 1986) (approving of *Eggert* and suggesting that married partners are a “single social and economic unit” for certain purposes).

189. See, e.g., Sarah L. Swan, *Conjugal Liability*, 64 UCLA L. REV. 968 (2017) (cataloging the many forms of “conjugal liability”—circumstances in which one partner is held responsible, “directly or indirectly,” for the other's conduct—and explaining the conceptual and normative difficulties that this form of liability presents).

spouse's claim.¹⁹⁰ And the argument for that position is quite strong, if a consortium claim is the noninjured spouse's.¹⁹¹ On the wrongs-to-us model, by contrast, it is at least intelligible that the injured spouse, as joint holder of the consortium claim, would have the power to waive a claim on behalf of the spouses. In this way, the wrongs-to-us model can help us understand the pull of the minority position on unilateral waivers—indeed, can explain why courts have found the issue so tricky.

At the same time, the model does not require us to endorse the conclusion that the injured spouse can waive “our” claim as well as her own. As we noted above, there are often good reasons to require the say-so of both partners in order to exercise a normative power—to better reflect the structure of the underlying rights and to encourage joint decisionmaking, among other things. And that is plausibly true here too. If the point is to structure the legal rule to ensure that spouses make a joint decision about whether to vindicate their shared right, we should require a consortium spouse's participation in both the decision to file suit and in the decision to waive that option.¹⁹² It's worth pointing out, though, that this may be only a default rule. It remains open to defendants to argue, as a matter of contract and agency law, that the injured spouse had the actual or apparent authority to exercise the partners' joint authority, for example.¹⁹³ And it remains open to courts to design the rule to penalize partners who should be on the same page but aren't.¹⁹⁴

190. See *Voris v. Molinaro*, 31 A.3d 363 (Conn. 2011) (holding that settlement of the injured spouse's claim bars the consortium claim); *Buckley v. Nat'l Freight, Inc.*, 681 N.E.2d 1287 (N.Y. 1997) (same); *Jones v. Elliott*, 551 A.2d 62, 65 (Del. 1988) (holding the opposite); *Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978) (same); *Deese v. Parks*, 276 S.E.2d 269 (Ga. Ct. App. 1981) (holding that wife's liability waiver did not bar husband's consortium claim); *Conradt v. Four Star Promotions, Inc.*, 728 P.2d 617, 621–22 (Wash. Ct. App. 1986) (holding the contrary, though in a context involving assumption of risk and other policy considerations); *Hall v. Gardens Servs., Inc.*, 332 S.E.2d 3, 5 (Ga. Ct. App. 1985) (same, with no mention of the contrary Georgia precedent).

191. *Jones*, 551 A.2d at 64–65 (“The physically injured spouse may not unilaterally extinguish the loss of consortium claim of the other spouse by signing a general release, for the loss of consortium claim is not his to extinguish.”).

192. See, e.g., *Frantz & Dagan*, *supra* note 141, at 124–32 (discussing the choice of “governance” rules for married couples who share title to property).

193. Even so, you might worry that the joinder requirement for liability waivers would have unacceptable consequences. Imagine, for example, that in a world where joint waivers are required, would-be defendants, like our river outfitter, sought these waivers as a condition of conducting business with any individual spouse. In addition to the practical burdens of this regime, one worries about the threat it could pose to each partner's individual autonomy, if their ability to contract for services in the world is effectively conditioned on their partner's express okay. Cf. *Brooks v. Burkeen*, 549 S.W.2d 91, 93 (Ky. 1977). I am not sure this fear is well-founded as an empirical matter, but I think there's a good conceptual and normative point here. If one spouse's stake in the partners' joint right gave her effective veto over the other spouse's interactions with third parties, that would pose a real threat to the vetoed spouse's autonomy—and real difficulties for third parties too.

194. For example, some states will treat the injured spouse's settlement as nonbinding on the consortium spouse, but only if the consortium spouse can show it was done without his

VII. EXTENSIONS AND IMPLICATIONS

As I see it, I've only scratched the surface of the decisions (and difficulties) involved in working out the detailed doctrinal implications of the wrongs-to-us picture.¹⁹⁵ Even so, I want to switch gears and take a slightly broader view to close this Article. I want to begin to explore how the view I've developed here might be extended to help us understand other puzzles in tort law, and perhaps in private law more generally. To get a sense of how the wrongs-to-us model might extend beyond spousal consortium claims, and why that might matter, let's return to Alan and Kathleen Lundgren one last time.

As it happened, Kathleen claimed only loss of consortium in her lawsuit against Whitney's. But that is not the only claim she might have filed, had things gone a bit differently. If Alan had succumbed to his injuries after a month in the hospital, for instance, Kathleen might have sued Whitney's both for loss of consortium and for wrongful death.¹⁹⁶ If she had witnessed Alan's accident too, and suffered emotional distress in the aftermath, then she might have added a claim for negligent infliction of emotional distress (NIED).¹⁹⁷ In other words, there's a good chance that Whitney's failure to competently repair Alan's brakes was going to result in a lawsuit like *Lundgren & Lundgren*, one way or another.

These three "spousal claims"—claims for loss of consortium, for wrongful death, and for NIED brought by a person who's a "bystander" to their partner's tortious injury—strike many courts and commentators as closely related, both in their doctrinal requirements and in their apparent rationales.¹⁹⁸ For just that reason, however, all three present a similar puzzle for the rights-based approach to tort law, and all three have prompted similar responses by proponents of that view. As we saw already, for example, John Goldberg and Benjamin Zipursky have argued that wrongful death claims are not tort claims, strictly speaking. Instead, they contend, wrongful death statutes have "overridden" the *Palsgraf* principle to empower parties who have suffered no wrong

knowledge. See, e.g., *Rosander v. Copco Steel & Eng'g Co.*, 429 N.E.2d 990, 992 (Ind. Ct. App. 1982).

195. For example, it is not clear how limitations and filing rules should work, how discovery rules should work, or how consortium claims interact with statutes that preempt one spouse's individual tort claims. See Green & Layman, *supra* note 44.

196. See WASH. REV. CODE §§ 4.20.046(1)–(2), 4.56.250(1)(b); see also RESTATEMENT (SECOND) OF TORTS § 925 (AM. L. INST. 1977); Malone, *supra* note 24.

197. See *Gain v. Carroll Mill Co.*, 787 P.2d 553, 557 (Wash. 1990) (en banc); see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 48 (AM. L. INST. 2010).

198. See, e.g., Culhane, *supra* note 45, at 942 ("Three torts deal specifically with injuries to relationships: negligent infliction of emotional distress, loss of consortium, and wrongful death."); see also Stephen D. Sugarman & Caitlin Boucher, *supra* note 64, at 132–33; CHAMALLAS & WRIGGINS, *supra* note 16, at 114; Goldberg & Zipursky, *supra* note 94, at 1664 n.99; Portee v. Jaffee, 417 A.2d 521, 527 n.6 (N.J. 1980).

themselves to sue as the “vicarious beneficiary” of a wrong to their loved one.¹⁹⁹ Goldberg and Zipursky have taken the same view of “bystander” claims: “certain bystanders,” they say, should be understood to “enjoy a power not ordinarily conferred by tort law to sue *derivatively*, as the ‘vicarious beneficiary’ of the defendant’s breach of a duty owed to the relative.”²⁰⁰ In other words, the claim is that none of these relationship-based claims are tort claims in the strict sense, because none of them seeks recourse for a wrong to the person who brings them.

Rights-based theories of tort law should be reluctant to double down in this way. If they do, they’ll wind up casting doubt on quite a bit of tort law (with more to come, when we turn to claims by parents and children)—and on a part of tort law that many people find especially valuable. To be sure, it would take more work to decide whether wrongful death and bystander claims are in fact puzzling in the same way as consortium claims and, if so, whether the “vicarious beneficiary” approach might have something going for it here that it didn’t before.²⁰¹ For now, the key point is that wrongful death and “bystander” NIED claims are entrenched features of tort law in the United States today, at least as it’s conventionally understood. If so, and if rights-based theories struggle to reconcile these claims with the *Palsgraf* principle, that seems as much a reason to take the *Palsgraf* principle less seriously as an organizing rule of tort law as it does to insist that tort law is not competent to redress relational harm.

If the wrongs-to-us model is on the right track, however, it promises to explain and vindicate both spousal bystander claims and spousal claims for wrongful death. Here is just a glimpse of how these explanations might go. Wrongful death claims might be understood as a straightforward extension of the view developed here—as claims seeking redress for wrongs that destroyed

199. See, e.g., GOLDBERG & ZIPURSKY, *supra* note 8, at 202 n.34, 204; GOLDBERG & ZIPURSKY, *supra* note 64, at 133–34; Goldberg & Zipursky, *supra* note 94, at 1719 n.99; Zipursky, *supra* note 59, at 37–38.

200. GOLDBERG & ZIPURSKY, *supra* note 64, at 133–34.

201. For example, wrongful death claims might be regarded as alien to tort law on separate grounds, given their statutory basis. True, wrongful death claims are primarily a creature of statute, both at their inception and today. But not entirely. Some courts in the states recognized common law wrongful death claims in the late 1700s and early 1800s, before wrongful death statutes were enacted, and some courts regard wrongful death claims as part of the common law today, in no need of a statutory foundation. *E.g.*, Malone, *supra* note 24, at 1062–67; Witt, *supra* note 5, at 731–33; see also Haakanson v. Wakefield Seafoods, Inc., 600 P.2d 1087, 1092 n.11 (Alaska 1979); Hun v. Ctr. Props., 626 P.2d 182, 187 n.3 (Haw. 1981); Gaudette v. Webb, 284 N.E.2d 222, 229 (Mass. 1972); Wilbon v. D.F. Bast Co., 382 N.E.2d 784, 785 (Ill. 1978); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 385 (1970). What’s more, there is good reason to think that it was other common law doctrines in England, and not the gravitational force of the *Palsgraf* principle, that stood in the way of courts fully developing common law claims for “permanent” loss of consortium. See, e.g., Malone, *supra* note 24, at 1065 (“[U]ntil Lord Ellenborough’s decision in *Baker v. Bolton* in 1808 the felony merger argument constituted the only recognized obstacle to a recovery for the death of a wife or child.”).

“us-es,” not only impaired them.²⁰² In effect, the proposal is that we should understand wrongful death claims as “permanent” loss of consortium claims.²⁰³ Bystander claims present a slightly less straightforward case. Still, I think they might be understood as something like special-circumstances consortium claims—as claims seeking redress for a wrong to us that was so emotionally and psychologically damaging to the noninjured partner that he should be able to recover, even if he would be prevented from recovering under background rules governing consortium and death claims (as was the case in some of the earlier, influential bystander decisions).²⁰⁴

I would need to say more to establish these points, of course, but I want to press on just a bit further. At the outset, I noted in passing that Alan and Kathleen Lundgren had two children at the time of Alan’s accident. Because the accident occurred in 1976, the children played no official role in the case. If the accident had happened just a few years later, however, the caption in the case might have been even more crowded: *Lundgren & Lundgren & Lundgren & Lundgren v. Whitney’s*. That’s because, in 1984, the Washington Supreme Court joined a growing list of jurisdictions that empower children to sue third parties who have tortiously injured their parents.²⁰⁵ These claims for loss of “parental” consortium are not as well-established as claims for spousal consortium, but the trend favors their expansion.²⁰⁶ As I noted above, moreover, courts have occasionally gone even further than this—recognizing claims by parents for tortious injuries to their children, for example, and even by grandparents for injuries to their close grandchildren.²⁰⁷ This broader network of consortium claims—which is supplemented by a broader network of wrongful death and NIED claims that move in (something close to) doctrinal lockstep—create similar puzzles for any rights-based theory of tort law. My parents, my children, my grandchildren—none is any more *my* means than my spouse is.

202. See Jeffrey A. Pojanowski, *Private Law in the Gaps*, 82 *FORDHAM L. REV.* 1689, 1739–40 (2016) (suggesting that wrongful death claims might be reconceived as claims based on “a breach to” the decedent’s family members, given the “unity of interests between the deceased and the family”); *Loucks v. Standard Oil Co.*, 120 N.E. 198, 199 (N.Y. 1918) (“Nearly everywhere, the principle is now embodied in statute that the next of kin are wronged by the killing of their kinsman.”).

203. Remember, claims for loss of consortium are limited to cases where one spouse is injured—or, if the spouse eventually dies, to the time between the time the spouse was injured and the time he died. For more on this (somewhat bizarre) doctrinal quirk, see *supra* note 33.

204. Cf. *CHAMALLAS & WRIGGINS*, *supra* note 16, at 114 (suggesting that NIED and consortium claims are both grounded in relational harm). If this is the right account of bystander claims, however, then there’s a question of whether they would (or should) continue to play an important role if consortium claims and wrongful death claims allowed recovery for emotional distress as a matter of course (as seems to be increasingly the case). See *supra* note 36.

205. *Ueland v. Reynolds Metals Co.*, 691 P.2d 190 (Wash. 1984) (en banc).

206. This remains an evolving area of the law. Compare *RESTATEMENT (SECOND) OF TORTS* § 707A (AM. L. INST. 1977) (taking the position that deprived children lacked consortium claims), with *DOBBS ET AL.*, *supra* note 32, § 392 (explaining that these claims are now recognized “in a substantial number of . . . states”).

207. See, e.g., *Fernandez v. Walgreen Hastings Co.*, 968 P.2d 774 (N.M. 1998).

My hunch is that the wrongs-to-us model can help us think through this broader network of relationship-based tort claims too, though these extensions of the model will almost certainly be less straightforward than the last. Is it plausible, for instance, to say that parents and children *also* function “as a unit” for certain purposes, such that they, too, might constitute a “practical union” or “plural subject” in the relevant sense? I do think it’s at least plausible, though it’s by no means obvious. Even if the parent-child relationship involves a practical union, the resulting “we” will be distinct from the “we” of marriage-like relationships in important ways. For one thing, the shared undertaking will have different aims. For another, the union’s decisionmaking structures will be different and will change over time too, as parents exercise first more and then less authority as trustees with respect to their children. And of course, the distinctive relationships will be sources of distinctive kinds of goods for the persons in them. Despite these differences, I believe that the “shared life” model is worth exploring here too—that it promises to explain why people have rights in their closest relationships, much as tort law seems to assume (and many others seem to deny).

I’ve focused on close, interpersonal relationships in this Article, because I believe the wrongs-to-us model captures something important about these relationships—about their practical structure and moral import. For all I’ve said so far, though, the basic ideas I’ve explored here may extend even further than that. For example, tort law recognizes claims for wrongful interferences with contractual relationships too.²⁰⁸ It’s worth exploring whether that tort might be understood on a wrongs-to-us model too—as a wrongful interference with the (much more limited) us created by parties to a contract. And that is just one example of a “third-party wrong”—of a case in which the plaintiff appears to sue a defendant based on the defendant’s conduct with respect to a third party—that have long puzzled courts and private law theorists. I don’t mean to suggest that the wrongs-to-us model can explain them all. I’m sure it can’t. But if we take seriously the idea that individuals can organize themselves into plural subjects, and that in constituting these plural subjects, individuals can position themselves to hold rights jointly, then we might discover that other doctrines in private law are implicitly attuned to, and can be illuminated by invoking, these features of human relationships.

CONCLUSION

If I wrongfully injure your spouse, tort law gives you the option to sue me too. I believe that it makes sense for tort law to do this—that you have a moral grievance against me that is quite like the moral grievance your spouse has

208. See, e.g., RESTATEMENT (SECOND) OF TORTS § 766 (AM. L. INST. 1977); see also Sarah Swan, *A New Tortious Interference with Contractual Relations: Gender and Erotic Triangles in Lumley v. Gye*, 35 HARV. J.L. & GENDER 167, 198–206 (2012) (explaining the puzzles associated with the tort’s triangular structure, puzzles it shares with certain torts grounded in romantic relationships, but offering a distinct account on which the “outsider” and the at fault “insider” are held to a “mixed” form of joint liability).

against me, and that both warrant legal recognition. Still, skeptics have been right to wonder whether your complaint is *exactly* like any other complaint that tort law would credit, and what the answer would mean for tort doctrine and theory. To see why these claims are both so compelling and distinctive, I've argued, we must understand how these claims trace to the shared endeavor that you and your spouse have embarked on. If I wrongfully injure your spouse, I injure the "us," the practical union, that you and your spouse constitute. In that case, it makes sense that you would be entitled to lodge a complaint with me, *as* one part of that us whose shared life has been tragically altered. Relational harm needn't be "invisible" in a rights-based picture of tort law (or morality), then, so long as we take a broader-than-normal view of the kinds of shared undertakings whose interests, capacities, and claims matter.²⁰⁹

In this way, I believe the wrongs-to-us model enables us to make progress on one puzzle in tort law, but to close I want to suggest that it leaves us with another. In their recent book, John Goldberg and Ben Zipursky say in passing that tort law is "[c]oncerned . . . with the interactions of individuals and firms."²¹⁰ If the point I've pressed here is on the right track, that's already one category too simple: tort law is concerned with the interactions of "us-es" too. But if tort provides some avenues for redressing wrongs to us-es, why not others? If philosophers like Andrea Westlund and Margaret Gilbert are right, and the world is full of plural subjects, why do so few of them register on tort law's radar? We can imagine (can't we?) a tort law that lets us sue for injuries to us-es, almost as a matter of course: a law that lets families sue for injuries to families; friends for injuries to friendships; teammates for injuries to teams; congregants for injuries to congregations; and more. Would a tort law of this sort be worth having, assuming the details could be worked out? And if not, what can that teach us about the point and limits of private law institutions like tort?

209. See Chamallas, *supra* note 16, at 537; see also Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, 11 *HYPATIA*, Winter 1996, at 4, 5–6 (1996) (suggesting a conception of "relational rights," or rights grounded in relationships, to address the inadequacies of traditional rights-based theories).

210. GOLDBERG & ZIPURSKY, *supra* note 8, at 2.

