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## HUMAN TORTS

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### **Table of Contents**

Introduction .....	1
I. Non State Actors and Human Rights .....	2
A. The Duties of Non State Actors in Human Rights Law.....	4
B. The Duties of Private Individuals in Tort Law .....	10
II. Torts as Violations of Human Rights .....	12
A. Primary Rights in Early American History.....	12
B. The Retreat of Rights in Tort Law .....	23
III. A Rights Revival in torts.....	30
A. Applying a Human Rights Framework to Tort Cases.....	31
1. Domestic and other types of violence against women .....	31
2. Toxic torts and the right to a healthy environment.....	34
B. Re-inserting Rights in the Tort Equation .....	38
IV. Why It Matters: Civil Suits and the Right to a Remedy .....	44

### INTRODUCTION

A suit in tort provides an essential remedy for enforcing human rights norms in the United States. Yet, scholars have yet to fully explore the critical overlap between human rights law and “ordinary” tort law. This article is one of the first to present the case for why civil suits in ordinary

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domestic court brought under tort law are in fact a type of human rights litigation. Certainly, most American torts scholars readily recognize the bridge between national and international tort law in cases brought under the Alien Tort Statute, which requires judges to apply human rights norms but involves only foreign plaintiffs and defendants. Moreover, they may acknowledge that constitutional torts and civil rights may in fact be a form of human rights law since they provide individuals with a remedy for abuse at the hands of state actors. However, American scholars do not conceptualize how everyday tort claims grounded in purely domestic common law doctrine between private, non-state actors (like battery, negligence, nuisance, and privacy) are in fact human rights claims even if never pleaded as such in U.S. courts.

*Human Torts* is one of the first articles to provide an explanation of how torts claims are human rights claims. To develop this concept, I present evidence of growing recognition that international law imposes a duty on non-state, private actors to respect human rights norms. The expansion of human rights law beyond the normal state nexus allows a better conceptualization of domestic tort law as an effective remedy for rights violations. To further illustrate the contours of human torts, I will use a human rights framework to analyze a selection of American torts suits in order to highlight the embedded human rights claims and why it matters to adopt this perspective. For example, individuals who suffer harm from the extractive industry's use of "fracking" may seek civil damages from the private company that polluted their water. This claim may be viewed as a tort of negligence or nuisance as well as a human rights violation based on the right to bodily security. Under both national and international legal theories, the injured individuals have a right to an adequate and effective remedy to enforce their rights. By assuring redress through the civil justice system, the government fulfills both its constitutional and international obligations. We just don't call what is going on "human rights"—yet.

## I. NON STATE ACTORS AND HUMAN RIGHTS

Conceptually speaking, scholars do not typically apply a human rights lens to interpret ordinary tort law scenarios in which an individual seeks redress from another individual. Instead, they may associate human rights abuse with something bad that happens *over there* in another country. Human rights claims arise out of wrongful acts occurring elsewhere. For this reason, it is not uncommon for the association between the concept of "torts" and "human rights" to lead to discussion about litigation arising out

of the Alien Torts Statute (ATS).<sup>1</sup> The ATS gives district courts original jurisdiction to hear “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>2</sup> The language of the statute itself facilitates the conceptual overlay of torts and human rights and offers the clearest examples of U.S. law explicitly incorporating international human rights norms into U.S. law. Since the 1980s, the ATS has led to hundreds of cases of foreign citizens seeking a civil remedy in U.S. courts for human rights violations.<sup>3</sup> And while ATS litigation has produced a unique niche in which U.S. courts are applying human rights courts, these cases reinforce the idea that human rights violations occur abroad, leaving aside the idea that human rights violations occur on U.S. soil.

With regard to conceptualizing human rights violations here in the United States, some academics are more likely to recognize this conceptual overlap between human rights and civil rights cases.<sup>4</sup> The analogy flows more easily since the legal theory of a civil rights action resembles the more traditional human rights analysis that requires the identification of a State actor who breaches international norms. Constitutional torts typically mirror human rights suits, such as in the case of eight amendment claims that might be framed as a human rights claim of torture.<sup>5</sup>

Yet, academics and practitioners rarely apply a human rights lens to understand the function of ordinary tort law between private individuals in the United States. In part, this oversight occurs because the traditional legal analysis of a human rights claim requires the identification of state actions or omissions.<sup>6</sup> Thus a typical fact pattern will involve a situation in which a government actor violates an individual’s rights; or alternatively, a scenario where the government failed to protect an individual from harm caused by a third party.<sup>7</sup> Moreover, all human rights claims brought before international

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<sup>1</sup> 28 U.S.C. § 1350

<sup>2</sup> *Id.*

<sup>3</sup> John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 *Vand. J. Transnat'l L.* 1 (2009). In 2013, the U.S. Supreme Court substantially limited the reach of the ATS in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). This case has led commentators to speculate as to the continued vitality of this law to allow courts to hear human rights claims. See for example, Matteo M. Winkler, *What Remains of the Alien Tort Statute after Kiobel*, 39 *N.C.J. Int'l L. & Com. Reg.* 171 (2013).

<sup>4</sup> Anne Wagley & Ann Fagan, *Powerful Laws for Civil Rights Activists - The Human Rights Treaties Are Part of US Law*, 51 *Guild Prac.* 65 (1993-1994); Douglass Cassel, *Civil Rights and Human Rights: A Call for Closer Collaboration*, 34 *Clearinghouse Rev.* 440 (2000-2001).

<sup>5</sup> Stanley A. Halpin, 30 *Hastings Int'l & Comp. L. Rev.* 1, 17 (2006-2007) (examining how domestic courts apply human rights norms to interpret the eighth amendment); Martin A. Geer, 13 *Harv. Hum. Rts. J.* 71, 95 (2000) (offering a reinterpretation of the eighth amendment through a human rights lens).

<sup>6</sup> PHILIP LEACH, *TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS* 456 (2011).

<sup>7</sup> JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-*

tribunals and monitoring bodies entail a plaintiff seeking damages from a government.<sup>8</sup> In fact, sometimes in these cases the individual perpetrator cannot even be identified.

The origins of the human rights architecture explains, in part, this tendency to focus on the state nexus. Certainly, the drafting of the Universal Declaration of Human Rights and subsequent human rights treaties arose in response to the atrocities of Nazi Germany and the realization that sovereigns could not be fully trusted to protect the well-being of all of its citizens.<sup>9</sup> As an organizing principle of human rights law, the State assumes a focal point in that the system is designed to curb government abuse.<sup>10</sup> The focus on States also makes sense since treaties are signed and executed by sovereigns, yet it managed to blindside the very idea that non-state actors can and do violate human rights.<sup>11</sup>

Yet, as will be discussed in the next section, many of the central human rights instruments that lay the foundation for the human rights system do not make the State the exclusive focus of human rights obligations. Rather, these instruments also recognize that individual, non-state actors are also capable of violating human rights and have duties to refrain from infringing on the rights of other individuals.

#### A. *The Duties of Non State Actors in Human Rights Law*

International human rights law imposes a duty on non-state actors to respect the human rights of other individuals. This is not a novel, contemporary interpretation of human rights law, but rather can be traced back to its origins. From its start, the founding treaties of the International Human Rights System explicitly include reference to a duty incumbent on individuals to respect the human rights of other individuals. For example, Article 29 of the Universal Declaration of Human Rights states that “Everyone has duties to the community in which alone the free and full development of his personality is possible.” It is followed by Article 30

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AMERICAN COURT OF HUMAN RIGHTS 143 (2012).

8 LAURENCE BURGORGUE-LARSEN, AMAYA UBEDA DE TORRES, & ROSALIND GREENSTEIN, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE-LAW AND COMMENTARY* 53(2011).

9 Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 *AM U.L. REV.* (1982).

10 CHRISTIAN TOMUSHCAT, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* 387 (2003) (“In human rights discourse, the state is the key actor”).

11 Philip Alston, *The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?* PHILIP ALSTON, ED., *NON-STATE ACTORS AND HUMAN RIGHTS* 5 (2005) (Writing that until recently the topic of non-state actors only got “passing recognition” from scholars but this attention was not very systematic or coherent).

which clarifies, “nothing in this declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set for the herein.” Although the Declaration is not a binding treaty some argue that it is international customary law that sets forth obligatory norms.<sup>12</sup> Regardless, similar language can be found in hard law instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR).<sup>13</sup>

The articles of these treaties can be read in conjunction with the language of their preambles to reinforce the interpretation that individuals have duties to respect the rights of others. Specifically, the Universal Declaration preamble refers to “every individual and every organ of society” in setting the standard for striving for universal respect for human rights. Similarly, the ICCPR establishes the same code of conduct in its preamble which reads: “*Realizing* that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.”

Despite this clear language in the foundational human rights documents regarding the duties of individuals, this aspect of human rights protection never gained momentum in the decades that followed. The concept of individual duties went to the wayside. Subsequently human rights practitioners were trained to focus on States as the relevant perpetrators in the discussion of human rights issues.<sup>14</sup> This myopic vision blinded us to see how individuals violate the human rights of others on a daily basis.

Yet, a recent line of scholarship has begun to unearth the interpretation that non-state actors can also violate for human rights, and thus should be held accountable. Non-State actors are typically defined as groups “created voluntarily by citizens, are independent of the state, can be profit or non-profit making organization, have a main aim of promoting an issue or defending an interest, either general or specific, and depending on their aim,

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12 Hannum, the Status of the Universal Declaration of Human Rights in National and International Law, 25 GA. J. INT’L & COMP L. (1995).

13 See Article 5(1) of the ICCPR reads: “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.” Article 17 of the ECHR is labeled “Prohibition of abuse of rights” and reads “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

14 August Reinisch, The Changing International Legal Framework for Dealing with Non-State Actors in PHILIP ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 37-8 (2005) (writing that we are “trained to conceive of human rights as fundamental guarantees and standards of legal protection for individuals against the power, and particularly, the abuse of power, of states”).

can play a role in implementing policies and defending interests...”<sup>15</sup> Thus, the categories that qualify as being non-state actors are wide ranging but the literature tends to focus on associations (e.g. labor or religious), armed resistance groups or terrorist bands, and also corporations.<sup>16</sup> Yet, they also include individuals.

Non-state actors are everywhere. Certainly, humans are in more contact with, and thus more vulnerable to, private individuals than they are to state agents. For this reason, the effort to bring more focus on non-state actors arose largely due to the fact that empirical evidence consistently showed how individuals and corporations could negatively impact the rights of others.<sup>17</sup> As Professor Philip Alston observes the world is a “much more poly-centric place than it was in 1945 and that she who sees the world essentially through the prism of the ‘State’ will be seeing a rather distorted image as we enter the twenty-first century.”<sup>18</sup> This new focus on non-state actors requires a “re-imagining” of the nature of the human rights regime and its existing concept and procedures.<sup>19</sup>

In an attempt to challenge the state centric notion of human rights, scholars arguing for a renewed focus on non-state actors point out that human rights are inherent and inalienable to the person and not granted through the discretion or goodwill of the sovereignty states.<sup>20</sup> Thus, if the rights are located in the individual it follows that any action which transgresses these rights, whether undertaken by a private or public person, can be characterized as a violation. For example, if a person has the right to personal integrity then this right will be violated if someone tortures her regardless of whether the perpetrator is a government agent or a private person.

An account that locates the right within the individual also better

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15 Philip Alston, *The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?* PHILIP ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 15 (2005).

16 Philip Alston, *The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?* PHILIP ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 5 (2005).

17 Zehra F. Kabasakal Arat, “Looking beyond the State but not ignoring it”, NON-STATE ACTORS IN THE HUMAN RIGHTS UNIVERSE 9 (George Andreopoulos, Zehra F. kabasakal Arat, and Peter Juviler, eds., 2006).

18 Philip Alston, *The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?* PHILIP ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 5 (2005).

19 Philip Alston, *The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?* PHILIP ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 5 (2005) (pointing out that social conditions and political realities has brought a “new awareness of the need to protect human rights, beyond the classic paradigm of the powerful state against the weak individual, to include protection against increasingly powerful non-state actors”).

20 ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATONAL LAW AND HOW WE USE IT 96 (1994).

explains why governments have international obligations to *ensure* human rights protection. Specifically, State Members to human rights treaties are obligated to “translate” human rights guarantees into their domestic orders to protect the life, liberty, property and other fundamental rights against intrusion by state agents as well as third parties, that is non-state actors.<sup>21</sup> They may accomplish this protection through legislative and other measures to ensure the protection of human rights.<sup>22</sup> Importantly, if states are obligated to regulate the behavior of non-state actors by translating international legal norms into domestic protections, it reinforces the principle that all members of society must take care not to violate the rights of others.<sup>23</sup> Moreover, once the State puts regulations in place it strengthens the legal duty of individuals to refrain from infringing the rights of others.

To illustrate, members of society understand that they can be punished if they commit murder which is against the law. These criminal codes are in place to not only assure an ordered society but also to protect the human right to life of all of society’s members. In effect, the State is fulfilling its duty to protect this fundamental right of individuals by imposing a duty on everyone to refrain from violating this right.<sup>24</sup> On this point, Special Rapporteur van Boven, who spearheaded a decades-long project that resulted in the final version of the Basic Principles, wrote to the U.N. Sub-Commission,

[It] is generally accepted by authoritative opinion that States do not only have the duty to *respect* internationally recognized human rights but also the duty to *ensure* these rights, which may imply an obligation to ensure compliance with international obligations *by private persons* and an obligation to prevent violations. If Governments fail to apply due diligence in responding adequately to or in structurally preventing human rights violations, they are legally and morally responsible.<sup>25</sup>

In fact patterns in which non state actors cause harm that constitutes a

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21 August Reinisch, The Changing International Legal Framework for Dealing with Non-State Actors in PHILIP ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 53 (2005).

22 Art. 2 of the ICCPR

23 August Reinisch, The Changing International Legal Framework for Dealing with Non-State Actors in PHILIP ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 74 (2005).

<sup>24</sup> Jordan J. Paust, *The Other Side of Right: Private Duties under Human Rights Law*, 5 Harv. Hum. Rts. J. 51 (1992).

<sup>25</sup> See, 1993 van Boven Report, supra note 28, at para 41. (citing to (Third) Restatement of the Law, § 702, Reporters’ note 2 and Theodor Meron, Human Rights and Humanitarian Norms as Customary Law, 1989, pp. 165).

human rights violation, a legal analysis will typically look to see if the State failed to protect the victim and if so hold it liable for its omissions.<sup>26</sup> Yet, the same set of facts can also give rise to an analysis of how the non-state actors in fact violated the person's rights. This perspective amounts to what European scholars recognize as the "horizontal effect" in human rights enforcement.<sup>27</sup> United Nations monitoring bodies have recognized how this state duty creates this horizontal effect of human rights protection.<sup>28</sup>

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26 Giuseppe Sperduti, Responsibility of States for Activities of private Persons' in IV ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 216 (2ND ED., 2000). This principle was established in the first cases brought before the Inter-American Court of Human Rights which held, "an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the convention. IACtHR, Velásquez Rodríguez v. Honduras, Ser. C, No. 4 (1988), para 172.

27 Ricardo Neves & Pedro Cabral, *General Principles of EU Law and Horizontal Direct Effect*, 17 Eur. Pub. L. 437 (2011); Eva Julia Lohse, *Fundamental Freedoms and Private Actors-towards and Indirect Horizontal Effect*, 13 Eur. Pub. L. 159 (2007); Kara Preedy, *Fundamental Rights and Private Acts- Horizontal Direct or Indirect Effect – A Comment*, 8 Eur. Rev. Private L. 125 (2000); Marek Safjan & Przemyslaw Miklaszewicz, *The Horizontal Effect of the General Principles of EU Law in the Sphere of Private Law*, 18 Eur. Rev. Private L. 475 (2010); Basil Markesinis, *Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany*, 115 L. Q. Rev. 47 (1999); Mark Tushnet, *Issues of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 Int'l J. Const. L. 79 (2003); Vaios Karavas & Gunther Teubner, <http://companynamesucks.com>: *The Horizontal Effect of Fundamental Rights on Private Parties within Autonomous Internet Law*, 4 German L.J. 1335 (2003); Florian Rodl, *Fundamental Rights, Private Law, and Societal Constitution: On the Logic of the So-Called Horizontal Effect*, 20 Ind. J. Global Legal Stud. 1015 (2013); Gavin Phillipson, *The Human Rights Act, Horizontal Effect and the Common Law: a Bang or a Whimper*, 62 Mod. L. Rev. 824 (1999); Greg Taylor, *The Horizontal Effect of Human Rights Provisions, the German Model and Its Applicability to Common-Law Jurisdictions*, 13 K.C.L.J. 187 (2002); Jennifer Corrin, *From Horizontal and Vertical to Lateral: Extending the Effect of Human Rights in Post Colonial Legal Systems of the South Pacific*, 58 Int'l & Comp. L.Q. 31 (2009).

28 The Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) ¶ 8 (Discussing how the U.N. Human Rights Committee has interpreted article 2 of the International Covenant on Civil and Political Rights to impose an obligation on states to take necessary steps to prevent violations of rights protected by the Convention by private as well as by state actors.) the U.N. Committee against Torture explains that a State Party to the Torture Convention must "afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Art. 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity." General Comment ICCPR 20 (44) 1992 CCPR/C/21/Rev.1/Add.3 Similarly, the U.N. Committee that monitors the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) clarified that governments may be held responsible for "private acts" if it fails to act with due diligence to prevent...or investigate" violence against women. UN Cmt o Elimination of Discrimination against Women, General Recommendation 19, *violence against women* (30 Jan 1992) UN Doc. A/47/38, para 9. CESCR, General Comment 14: "while only States are parties to the covenant and thus ultimately accountable for compliance with it, all members of society—individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector—have responsibilities regarding the realization of the right to health. State parties should therefore provide an environment which facilitates the discharge of those responsibilities." [UN Committee on Economic, Social, and Cultural Rights, General Comment No. 14: "The right to the



One of the most visible expansions of the application of international law to individuals arises with regard to individuals who violate *jus cogen* norms which impose a duty on natural persons under international law not to violate fundamental norms such as piracy, aircraft hijack, forced labor, genocide, war crimes, crimes against humanity.<sup>29</sup> For example, the Second Circuit recognized this legal principle in *Kadic v. Karadzic*, finding a Bosnian Serb politician fighting in the Balkan wars could be held liable for international crimes.<sup>30</sup> Importantly, this case, brought under the Alien Tort Statute, clearly establishes that liability for these types of violations can be civil as much as it can be criminal.<sup>31</sup>

On this point, Celia Wells and Juanita Elias highlight that “[b]reaches of human rights obligations do not necessarily have to be characterized as crimes [even if] the normative nature of the standards makes crime the closest analogy.”<sup>32</sup> In essence, Wells and Elias highlight that individual liability for human rights violations may arise out of both criminal and civil suits, with a remedy resulting either in punishment or damages. For example, the acts that constitute assault and battery could result in both criminal and civil sanctions. In both situations, the aggressor had a duty to refrain from infringing on the rights of the other individual. In both cases, the State provides a remedy for these acts, whether through publicly initiated cases by public prosecutors or privately initiated cases by private prosecutors. In either case, the apparatus in itself is the State fulfilling its international obligation to provide an adequate and effective remedy where it failed to initially prevent the wrongful act. Significantly, the right to an effective and adequate remedy is in itself a recognized human right that the

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highest attainable standard of health’, 11 Aug 2000, U.N. Doc. E/C.12/2000/4, para. 42] In 1999, the UN General Assembly adopted Resolution 53/144, which stipulates that “individuals, groups, institutions and non-governmental organizations have an important role to play and a responsibility in...promoting human rights and fundamental freedoms.” United Nations General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, A/RES/53/144, 8 March 1999.

29 Celia Wells & Juanita Elias, *Catching the Conscience of the King: Corporate Players on the International Stage*, PHILIP ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS (2005). 151

30 *Kadic v Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (“We do not agree that the law of nations, as understood in modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”)

31 August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors* in PHILIP ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 37 (2005).

32 Celia Wells & Juanita Elias, *Catching the Conscience of the King: Corporate Players on the International Stage*, PHILIP ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 161 (2005).

stay must protect.<sup>33</sup> As the next section explores, tort law assures this right to remedy by giving victims a judicial forum to seek damages for the breach of the defendant's duty.<sup>34</sup> Importantly, this duty in tort can be analogized to the non-state actor duty in human rights discussed above.

### *B. The Duties of Private Individuals in Tort Law*

In contemporary tort law, the legal concept of duty is an organizing principle.<sup>35</sup> Certainly, any cause of action in tort law, whether it be intentional torts, negligence or strict liability, requires a plaintiff to demonstrate that the defendant owed a duty to the injured party.<sup>36</sup> For this reason, a line of tort scholars argue that *duty* offers the most coherent account and normative justification for torts law.

Some of these scholars, in particular those falling into the camp of corrective justice, draw support for their argument from the same philosophical texts and reasoning that is often relied upon to justify and explain human rights law. The parallels between theoretical discussion of American tort law and human rights law should not come totally as surprise given that the international system of remedy is largely structured from the knowledge of domestic systems. For example, in the early 1970s, Richard Epstein took the lead in defending tort law by using moral notions of individual liberty and responsibility along with a Lockean concept of natural rights to person and property.<sup>37</sup> Stemming from the theory of Aristotle, justice requires compensation for any harm, and thus a duty of repair, recognized and enforced by the system of tort law.<sup>38</sup> Jules Coleman

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<sup>33</sup> Rodoljub Etinski, *The Right to an Effective Remedy in Light of the Practice of the European Court of Human Rights*, 38 Zbornik Radova 429 (2004); Godfrey M. Musila, *The Right to an Effective Remedy under the African Charter on Human and People's Rights*, 6 Afr. Hum. Rts. L.J. 442 (2006);

<sup>34</sup> Jordan J. Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 Mich. J. Int'l L. 543 (1989).

<sup>35</sup> JOHN C.P. GOLDBERG, ANTHONY J. SEBOK, BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 39(2012, 3RD ED.) ("Tort law...is all about the articulation of the responsibilities that persons (and entities) owe to others...")

<sup>36</sup> *Id.*, at 50-51.

<sup>37</sup> Epstein was not the first to promote the concept of corrective justice but rather build on the work of other scholars like Harry Kalven, Jr. to present a formidable alternative to the dominant instrumental and efficiency approach at that time. See, John C. P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1513 (2002); John CP Goldberg & Benjamin C. Zipursky, *Rights and Responsibilities in the Law of Torts* in RIGHTS AND PRIVATE LAW 254 (Donal Nolan & Andrew Robertson, eds., 2012).

<sup>38</sup> Ernest J. Weinrib, *Corrective Justice in a Nutshell*, U. TORONTO L. J. 52 349 (2002) (providing a full account of the philosophy of Aristotle and its influence on corrective justice theory). See ARISTOTLE, *NICOMACHEAN ETHICS* 120-23 (Martin Ostwald trans., 1962); James Gordley,

argues that the injurer must make the injured party whole and this duty of repair grows out of the defendant's breach of duty of care owed the plaintiff.<sup>39</sup> The prima facie liability of a tortfeasor arises out of a volitional act that caused damage to another person.<sup>40</sup>

Importantly, these accounts recognize that there are two orders of duty. First, an individual has a duty to refrain from causing harm to another individual. Second, in failing to uphold this duty, she then has a duty to make repair, most often in the form of damages. In this sequence, these scholars recognize that the tortfeasor's failure to observe this duty violates a type of "primary right". Ernest Weinrib recognized that a violation of these first order rights gives rise to the secondary right (and duty) to repair and underlies the principle of corrective justice.<sup>41</sup> Weinrib adopts a Kantian concept of self-determining human agency with tort law balancing conflicting needs and interests by turning them into rights and duties. His premise is that all individuals have a correlative right to be free from certain injuries by others and thus also have a duty not to inflict such injuries.<sup>42</sup> Similarly, Arthur Ripstein argues that tort law sets norms of conduct that balance liberty and security by imposing on all people a duty to take care not to interfere with others' well-being and intrudes upon their primary goods.<sup>43</sup> If the loss that transpires results from unjustifiably large risks of harming the plaintiff it would be considered a rights invasion, and it would be shifted to the defendant to repair.<sup>44</sup>

The critical step in successfully drawing the conceptual analogy between human rights and tort law is to draw attention to the fact that a duty corresponds to a right. This relationship between duty and rights exists in both domestic and international law. In other words, person B has a duty to refrain from harming Person B because Person B has a right to physical integrity. This simple fact pattern would create a cause of action in both human rights and tort law. Yet, while human rights law tends to focus more on the rights of individuals and less on their duties, tort law tends to focus more on the duties of individuals and less on their rights. Thus, nowadays few practitioners and only a handful of scholars refer to "rights" and "torts"

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*Tort Law in the Aristotelean Tradition*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 131-58 (1997) (defending quite strict version of Aristotelian corrective justice theory in modern American tort law).

39 JULES L. COLEMAN, RISKS AND WRONGS 374-75, 381, 135 (1992);

40 Add: Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973);

41 ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995) Weinrib....("When the defendant thus breaches a duty correlative to the plaintiffs right, the plaintiff is entitled to reparation. The remedy reflects the fact that even after the commission of the tort the defendant remains subject to the duty with respect to the plaintiffs right.")

42 EJ WEINRIB, THE IDEA OF PRIVATE LAW 84-113 (1995)

43 ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY AND THE LAW 53-58 (1999).

44 *Id.*, at 273.

in the same sentence.

Even if corrective justice scholars eclipse the importance of viewing torts as violations of rights and focus more on the action of the wrongdoer, it is nevertheless significant that their accounts summon the notion of primary rights. As the next section explores, this inclusion of the notion of rights resurrects the spirit of tort law as it was originally conceived.

## II. TORTS AS VIOLATIONS OF HUMAN RIGHTS

Despite contemporary accounts of tort law with a focus on duty and the wrongs of defendants, the notion of primary rights forms the bedrock of American tort law. Digging through the layers of time, it is possible to excavate a genealogy of rights in the development of tort law. This excavation is a critical step in understanding torts law as a means of enforcing human rights. And thus the next section offers a brief overview of the origin of tort law, and the jurisprudence it generated, demonstrates that a rights perspective in torts is not a novel normative understanding of torts, but instead an interpretive analysis of the heritage of this body of law. Indeed, as the following sections demonstrate, the concept of rights is deeply embedded in tort law.<sup>45</sup>

### A. *Primary Rights in Early American History*

American colonists planted the seeds of today's system of tort law in the United States using the traditions they brought with them from English common law.<sup>46</sup> Most standard law textbooks offer first-year law students a primer on the medieval system of "writs" that provided redress for individuals injured by another.<sup>47</sup> Until the sixteenth century, these "legal wrongs" constituted "breaches of the King's peace" and gave rise to an action in "trespass vi et armis" or "trespass-on-the-case" in which an individual could seek redress for the harms caused by another individual.<sup>48</sup> This writ system carved out rules to inform how each individual should

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45 I borrow the idea of rights being "embedded" in tort law from Benjamin Zipursky who likewise viewed the "substantive standing" principle which rests on the idea of rights as "far from eccentric" but in fact the view that has always been embedded in tort law itself." See for example Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 5 (1998). See discussion *infra* ##

46 See JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 14 (abr.ed. 1995); see also LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 36-37, 267 n.9 (2004).

47 TEXTBOOK EXAMPLES .

48 See David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 72-78 (1996). J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 571 (3d ed. 1990). ("The civil law is designed to provide private redress for wrongs to individuals.").

refrain from interfering with the protected interests of other individuals. For example, a writ of trespass for battery would arise through inappropriate touching. Utterance of uncomplimentary statements might support an action on the case.

Importantly the catalogue of conduct prohibited under this system was understood as protecting rights.<sup>49</sup> Seventeenth century jurist Edward Coke interpreted the Magna Carta as requiring the monarch to protect each Englishman's "best birth-right" which included "his goods, lands, wife, children, his body, life, honor, and estimation are protected from injury, and wrong."<sup>50</sup> The English common law system sought to protect the life, liberty and property of citizens by assuring a legal remedy against another private, non-state actor.<sup>51</sup> The rights aspect of tort law was largely influenced by the writings of English Jurist William Blackstone and his *Commentaries on the Laws of England* provided the basic text for early-American legal education and practice.<sup>52</sup> Blackstone viewed tort law as an essential piece of the liberal state's system of law since it stood for the idea that governments owe citizens protection which requires "laws and institutions for declaring and vindicating basic rights, including the right to a law for the redress of wrongs."<sup>53</sup> This basic precept even appears in many of the original states constitutions, with explicit guarantees of private action redress.<sup>54</sup>

Importantly, Blackstone defines a "wrong" as "an infringement or

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49 The term "tort" derives from its medieval meaning of "twisted." D. J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 97 (1999) (noting that medieval usage tended to equate tort, trespass, and wrong).

50 EDWARD COKE, THE REPORTS OF SIR EDWARD COKE (1602), *reprinted in* 1 THE SELECTED WRITINGS OF SIR EDWARD COKE 745, 873 (Steve Sheppard ed., 2003).

51 But J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 478-90 (3d ed. 1990) (observing that nuisance law developed out of recognition of proprietary rights and entitlement to enjoy property appurtenant to such rights).

52 Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 748-49 (1976) (noting that Jefferson came to associate Blackstone with forces of reaction); ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 16 (1975) ("It is impossible to overemphasize the impact of Blackstone on legal education in America.").

53 John C.P. Goldberg, *The Constitutional Status Of Tort Law: Due Process and the Right to a Law For The Redress of Wrongs*, 115 YALE L.J. 524, 560 (2005-2006). (citing to examples of state constitutions such as the 1776 Maryland Declaration of Rights which read "every freeman, for any injury done him in his person or property, ought to have remedy, by the course of the law of the land, and ought to have justice and right freely without sale, fully without denial, and speedily without delay, according to the law of the land.")

54 Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 748-49 (1976) (noting that Jefferson came to associate Blackstone with forces of reaction); ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 16 (1975) ("It is impossible to overemphasize the impact of Blackstone on legal education in America.").

privation of the private or civil rights belonging to individuals."<sup>55</sup> Blackstone understood common law to be grounded on “absolute” rights to liberty, security and property, thus resonating with natural law ideas of rights.<sup>56</sup> Upon the violation of one of these rights, the remedial part of the law provided for the redress of those wrongs, as through the filing of a writ which offered a state sanctioned legal remedy.<sup>57</sup> This interpretation of tort law created an important distinction in the stages of determining a tort claim. Judges first determined whether the plaintiff proved a violation of an individual’s right of person or property; if proven, this private wrong provided the grounds to trigger the claim for a remedy to make the defendant pay for the harm caused by the injury.<sup>58</sup>

Understood in more modern and technical terms, Blackstone’s description of tort law can be understood as consisting of a primary right which refers to a person’s entitlement to be free from interference with rights associated with their life, liberty and property; and secondary rights which refer to a person’s entitlement to a civil remedy and possible compensation in the event of proving the violation of a primary right.<sup>59</sup> Certainly Blackstone recognized the two-step process of adjudicating legal disputes in early American case law, and this interpretation influenced judges as seen in early case law up to and into the Twentieth Century.<sup>60</sup>

#### A. *Primary Rights in Early Tort Case Law*

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55 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 116-17 (photo. reprint 1979) (1765-69). WILLIAM BLACKSTONE, COMMENTARIES 2, 116. Blackstone also refers to these actions as “private wrongs”, “delicts” and “wrongful invasions”. *Id.* at 116-7.

56 *Id.*, at 125, 129, 134, 138. *Id.*, at 129 (“The right of personal security consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, health and his reputation.”). For discussion see Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1242-44 (2001).

57 1 Blackstone, COMMENTARIES, 54, 123; BLACKSTONE, *supra* #, at 115-223 (providing examples of the various actions for wrongs to person and property). 55-56, 120-37

58 WILLIAM BLACKSTONE, COMMENTARIES 2, 115-19 (treating causes of action for infringing the rights of persons or property as articulating private wrongs for which the law provides a remedy to victims).

59 Sometimes the secondary right is referred to as a “remedial right”. See, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 122 (1994). The distinction is explained as: “Every general directive arrangement contemplates something which it expects or hopes to happen when the arrangement works successfully. This is the primary purpose of the arrangement, and the provisions which describe what this purpose is are the *primary provisions*. Every arrangement, however, must contemplate also the possibility that on occasion its directions will not be complied with . . . . The provisions of an arrangement which tell what happens in the event of noncompliance or other deviation may be called the *remedial provisions*.” *Id.*, at 127-38.

60 Henry Melvin Hart, Hart & Sacks’ The Legal Process: Basic Problems in the Making and Application of Law (2001).

Professor John Goldberg refers to the Blackstonian approach to tort law at the time of the founding of the United States as the “traditional account” of tort law.<sup>61</sup> He explains that in these earlier times American jurists “operated with a certain conception of ‘tort’” as the civil side of common law by providing redress for “injurious wrongs committed by a citizen-or, in certain instances, a state actor-against another.”<sup>62</sup> Tort law set “standards of right and wrong conduct.”<sup>63</sup> The traditional account of tort law offers a practical view of a system designed to vindicate rights as opposed to a formalist system bent upon providing “entertaining puzzles for lawyers and academics” or existing for its own sake.<sup>64</sup> Goldberg conjectures: “if one had asked a thoughtful lawyer from the early Nineteenth Century what purpose tort law served, he probably would have answered that it was one part of a system of common law that, overall, aimed to specify and protect individuals' rights to bodily integrity, freedom of movement, reputation, and property ownership.”<sup>65</sup> These “pre-modern” lawyers complacently took tort law for granted as “a system of common law jurisprudence and that this system best served the aims of liberal government.”<sup>66</sup>

Certainly, an examination of early case law reveals a clear recognition of not only the existence of primary rights but also that the first step in torts adjudication was to distinguish the plaintiff’s primary right that the defendant allegedly violated. This idea can be traced back to Judge Story, who while a circuit judge articulated a view of tort law as a system of protecting rights by retroactively enforcing rights through civil actions. In a case *Webb vs. the Portland Manufacturing Company*<sup>67</sup>, which dealt with the diversion or obstruction of water in a stream, he noted:

As to the first question, I can very well understand that no action lies in a case where there is *damnum absque injuria*, that is, where there is a damage done without *any wrong*, or *violation of any right of the plaintiff*. But I am not able to understand how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some *perceptible damage* which can be established as a matter of fact; in other words, that *injuria sine damno* is not actionable. On the contrary, from my earliest reading, I have

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61 John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 517 (2002-2003)

62 John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 516 (2002-2003).

63 John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 517, 517 (2002-2003)

64 John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 517, 518 (2002-2003)

65 John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 517, 518 (2002-2003)

66 John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 517, 518 (2002-2003)

67 *Webb v. Portland Mfg. Co.*, 3 Sumn. 189, 29 F.Cas. 506 C.C.Me. (1838) (Bill in equity for an injunction by the plaintiff to prevent the defendant from diverting a watercourse from the plaintiff’s mill, and for further relief).

considered it laid up among the very elements of the common law, that wherever there is a *wrong*, there is a *remedy* to redress it; and that *every injury* imports *damage* in the nature of it; and if no other damage is established, the party injured is entitled to a verdict for nominal damages. ... Under such circumstances, unless the party injured can protect his right from such violation by an action, it is plain that it may be lost or destroyed without any possible remedial redress. In my judgment, the common law countenances *no such inconsistency*; not to call it by a stronger name. Actual perceptible damage is not indispensable as the foundation of an action. The law tolerates no further inquiry, than whether there has been the *violation of a right*; if so, the party injured is entitled to maintain his action for nominal damages, *in vindication of his right*, if no other damages are fit and proper, to remunerate him.<sup>68</sup>

Importantly, Justice Story's interpretation of a *wrong* is that it constitutes a violation of a plaintiff's right, with the protection and enforcement of these rights being the central concern of the civil justice system. The eminent judge refers to English precedent to justify the basic principle that when a plaintiff's primary right is injured. Regardless of calculable harm or damages, he or she can maintain an action that may result in damages, even if nominal.<sup>69</sup> Specifically, he quotes Lord Holt as saying: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."<sup>70</sup> Justice Story considers this principle to be "so strongly commended, not only by authority, but by the common sense and common justice of mankind, that they seem absolutely, in a juridical view, incontrovertible."<sup>71</sup>

The vibrancy of this principle in early tort law can be seen by State Supreme Courts citing to Justice Story's elocutions in *Webb*.<sup>72</sup> As declared by the Georgia Supreme Court in 1883:

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68 *Webb v. Portland Mfg. Co.*, 3 Sumn. 189, 29 F.Cas. 506, 506-507 (C.C.Me., 1838).

69 *Id.* (refering to *Ashby v. White*, 2 Ld. Raym. 938, 6 Mod. 45.)

70 *Id.*

71 *Id.*

72 The Supreme Court of Georgia in a suit between two riparian owners refers to Justice Story writes: "Justice Story discusses the question of *injury without damage*, in so clear and satisfactory a manner, that we feel entirely persuaded that all who love and reverence the principles of the common law, will be gratified to see them vindicated and maintained by one whose profound learning and wisdom in his profession has commanded the universal approbation of his countrymen." *Hendrick v. Cook* 4 Ga. 241, 1848 WL 1490 Ga. (1848); Cited by the Supreme Court, New York County, New York in an early fraud case in *De Witt v. McDonald*, 58 How. Pr. 411 N.Y.Sup. 1880; Cited by the Supreme Court of Indiana in a case dealing with the disturbance of an easement in *Ross v. Thompson* 78 Ind. 90, 1881 WL 7091(1881). More recent cases in Georgia continue to cite to this principle, see



[W]herever there is a wrong, there is a remedy to redress it; that every injury imports a damage in the nature of it; and if no other damage is established, the party injured is entitled to a verdict for nominal damages.... *The law tolerates no further inquiry than whether there has been the violation of a right.* If so, the party injured is entitled to maintain his action for nominal damages in vindication of his right.<sup>73</sup>

Again, the court implies that the wrong in torts suits relates back to the violation of a right. Therefore, the plaintiff has the initial burden of first proving which primary right was violated as part of whatever general theory of liability he pleads. For example, in 1845 the Supreme Court of New York explained,

[d]amage, in the sense of the law, may arise out of injuries to the person or to the property of the party; as any wrongful invasion of either is a violation of his legal rights, which it is the object of the law to protect. Thus, for injuries to his health, liberty and reputation, or to his rights of property, personal or real, the law has furnished the appropriate remedies. The former are violations of the absolute rights of the person, from which damage results as a legal consequence. *As to the latter, the party aggrieved must not only establish that the alleged tort or trespass has been committed, but must aver and prove his right or interest in the property or thing affected, before he can be deemed to have sustained damages for which an action will lie.*<sup>74</sup>

Interestingly, the New York court establishes the basic elements of proving liability without necessarily explaining from where the plaintiff's "absolute rights" arise. Some courts point towards a type of natural law or social contract theory, as seen in the opinion written by a Pennsylvania judge who wrote:

For myself I can see no reason why our duty towards others ought not to place limits upon our rights of property similar to those which it has put upon our natural rights of person. 'Sic utere tuo non alienum laedas' expresses a moral obligation that grows out of the mere fact of membership of civil society. In many instances it has

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for example, *Land v. Boone*, 265 Ga.App. 551, 594 S.E.2d 741 Ga.App. (2004); *Singh v. Lyday*, 889 N.E.2d 342, Ind.App., June 27, 2008 (NO. 84A05-0709-CV-538).

<sup>73</sup>*Nat. Exchange Bank of Augusta v. Sibley*, 71 Ga. 726, 734(5) (1883).

<sup>74</sup>*W. B. Hutchins v. B. B. Hutchins*, 7 Hill 104, # (N.Y.Sup. 1845) (italics added) (discussing a case of fraud in a real estate).

been applied as a measure of civil obligation, enforceable at law among those whose interests are conflicting.<sup>75</sup>

Indeed, many courts seemed to assume a natural rights origin of these rights, or alternatively relied simply on judge made precedent which already recognized these so-called absolute rights.<sup>76</sup> Certainly property rights were one of the most clearly identifiable rights based on a type of natural justice.<sup>77</sup> Yet, the courts often recognized a given hierarchy in which bodily security and personal liberty rising above all other rights.<sup>78</sup> From this view,

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75 Com. ex rel. Atty. Gen. v. Russell, 172 Pa. 506, 522 (1896) (a town and water company filed suit to enjoin an oil drilling company from polluting the river from where the town drew its water).

76 In *Kosciolek v. Portland Ry., Light & Power Co.*, the Supreme Court of Oregon recognized that, "The natural rights of a person at common law are the right of personal security in the legal enjoyment of life, limb, body, health, and reputation, the right of personal liberty, and the right of private property...Natural rights are those which grow out of the nature of man and depend upon personality as distinguished from such as are created by law and depend upon civilized society, or they are those which are plainly assured by natural law." *Kosciolek v. Portland Ry., Light & Power Co.*, 81 Or. 517, 522-23, 160 P. 132 (1916) (citing to 1 Bl. Com. 129. It is said in Black's Law Dictionary, page 1038).

77 "The case pleaded falls naturally into the classification of an actionable infringement of a property right, i. e., the right to pursue one's business, calling, or occupation free from undue interference or molestation. The wrongful act charged was the malicious interference with appellant's business. .... Natural justice dictates that a remedy shall be provided for such unjust interposition in one's business. The right to pursue a lawful business is a property right that the law protects against unjustifiable interference. Any act or omission which unjustifiably disturbs or impedes the enjoyment of such right constitutes its wrongful invasion, and is properly treated as tortious....This right to pursue one's business without such undue interference, and the correlative duty, are fundamentals of a well-ordered society. They inhere basically in the relations of those bound by the social compact. They have their roots in natural justice." *Louis Kamm, Inc. v. Flink*, 113 N.J.L. 582, 28 Gummere 582, 585-6, 175 A. 62, 99 A.L.R. 1 (1934) (citing 1 Cooley's Blackstone, pp. 109, 113, note).

78 For example, in 1861, the Supreme Court of Errors of Connecticut expressed this view in a wrongful death suit in which the issue was whether the executor of the decedent's estate had sufficiently set out an alleged injury to constitute a cause of action based on the fact that a negligent railroad collided with and killed the decedent.<sup>78</sup> The Court proclaimed: "The intestate's right of personal security has been wrongfully invaded, and that is distinctly alleged as the cause of action. In both cases the law attaches an injury to such a wrongful act. But aside from this inference of law, it is alleged in the declaration that the blow was so violent as to produce the death of the intestate. And is this no injury? If to take one's liberty or one's property without justification is an injury, how much more is the taking of human life? *The elementary books, in speaking of absolute rights, classify them thus:—1st. The right of personal security; 2d. The right of personal liberty; and 3d. The right to acquire and enjoy property.* If these rights are valued in this order of preference, then every man of common understanding would at once pronounce it absurd to hold that it is no injury to a person to take his life, while it is to strike him a light blow. Such a distinction is not worth talking about, and has no foundation or existence in the law, as it has none in common sense." *Michael Murphy, Administrator, v. The New York and New Haven Railroad Company*, 30 Conn. 184, 1861 WL 1083 (1861); In a 1910 case, the Supreme court of Georgia also recognized bodily security as a supreme right: "...All wrongs of the character dealt with in these decisions involve an infringement of one of the primary rights of man, namely, that of "security of person." This class of wrongs notwithstanding the fact that the person upon whom they are inflicted may not suffer any actual injury necessarily violate \*676 the right of the injured party to protection in the security of his person; and, as was pointed out in the cases above cited, are properly classed as "injuries to the person." Mr. Hilliard, in his work on Torts, classifies separately "torts to persons" and "torts to property," treating among the

many different actions in tort may arise out of the general categories of primary rights.<sup>79</sup> For example within the primary rights theory of tort law, the liability theory of the tort “false imprisonment” arises out of the general primary right of liberty, or as viewed by one court “freedom of locomotion.”<sup>80</sup>

Despite their questionable origin, these rights gained a sanctimonious feel, and a violation gave rise to a presumptive injury.<sup>81</sup> The unquestioned centrality of primary rights in tort law can be seen in Judge Cardozo’s opinion in *Palsgraf v. Long Island Railroad Co.*, one of American tort law’s most famous cases. Significantly, academic commentators often overlooked the primary rights account in the *Palsgraf* case or disregarded it as “impenetrable, circular, [or] vacuous.”<sup>82</sup> Yet, interpreting *Palsgraf* in light of earlier jurisprudence helps to not only offer a clear understanding of the function of primary rights in tort adjudication, but also to excavate the true understanding of tort law at that time as a system of rights protection. A careful reading of the opinion reveals that Cardozo made more than just casual reference to the general term primary right, and instead employed the very technical understanding of this times: the torts equation begins with a focus on primary rights to determine whether or not a defendant could be held liable, notwithstanding his limiting approach to foreseeable plaintiffs

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former wrongs of the same and kindred nature with those dealt with in the decisions referred to supra, while among the latter he includes “fraud” as a wrong to property.” *Crawford v. Crawford*, 134 Ga. 114, 67 S.E. 673, 28 L.R.A.N.S. 353, 19 Am. Ann. Cas. 932 (1910); See also, *Kosciolek v. Portland Ry., Light & Power Co.*, 81 Or. 517, 522 (1916) (“The natural rights of a person at common law are the right of personal security in the legal enjoyment of life, limb, body, health, and reputation, the right of personal liberty, and the right of private property”).

<sup>79</sup> In discussing caselaw on torts involving deceit and fraud, the Supreme Court of Georgia explains, “....All wrongs of the character dealt with in these decisions involve an infringement of one of the primary rights of man, namely, that of “security of person.” This class of wrongs notwithstanding the fact that the person upon whom they are inflicted may not suffer any actual injury necessarily violate the right of the injured party to protection in the security of his person; and, as was pointed out in the cases above cited, are properly classed as “injuries to the person”.... it is said: “Torts to the person...include (1) bodily injuries, whether direct, as assault and battery, or consequential, resulting from negligence or otherwise; (2) injuries to the health or comfort of an individual; (3) torts which affect personal liberty.” *Crawford v. Crawford*, 134 Ga. 114, 67 S.E. 673, 675-6, 28 L.R.A.N.S. 353, 19 Am. Ann. Cas. 932 (1910) (citing to Broom’s Common Law (9th Ed.) 782).

<sup>80</sup> *Riley v. Stone Et Al.*, 174 N.C. 588, 94 S.E. 434 (1917) (“False imprisonment is the unlawful and total restraint of the liberty of the person. The imprisonment is false in the sense of being unlawful....The right violated by this tort is ‘freedom of locomotion.’ It belongs historically to the class of rights known as simple or primary rights (inaccurately called absolute rights), as distinguished from secondary rights, or rights not to be harmed. It is a right in rem; it is available against the community at large. The theory of the law is that one interferes with the freedom of locomotion of another at his peril...Unlawful detention by actual physical force is unquestionably sufficient to make out a cause of action.” citing to 19 Cyc. pp. 319 and 323).

<sup>81</sup> J. Story, *Webb, supra at n.* (“whenever there is a clear violation of a right, it is not necessary in an action of this sort to show actual damage; that every violation imports damage; and if no other be proved, the plaintiff is entitled to a verdict for nominal damages”).

<sup>82</sup> Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1,3 (1998)

which is the principle that most lawyers understand the case to stand for.

To begin, Cardozo clearly identifies the two step formula of the torts equation in which a judge must find a violation of a primary right to be able to proceed with the rest of the torts analysis.<sup>83</sup> If a violation is found, the court then may proceed to the other technical elements of the tort equation in order to determine whether and to what extent the defendant is liable for damages (such as proximate cause and damages).<sup>84</sup> In Cardozo's interpretation of tort, a plaintiff's secondary right to a remedy refers to both: 1) the access to a civil procedure to determine the viability of a substantive claims and causes of action (such as negligence or an intentional torts, among others, which derive from the historical claim of trespass); and 2) reparations for any resulting consequences, in the sense of any material or emotional costs associated with the violation of the primary right. Here, Cardozo traces this view that tort law is about protecting plaintiff's rights to bodily security to "the most ancient forms of liability, where conduct is held to be at the peril of the actor."<sup>85</sup>

At the time of writing, Cardozo's approach to the tort equation was the universal approach, as suggested by the fact that while Judge Andrews disagreed with other aspects of Cardozo's opinion, he plainly agreed with the basic precept of tort law being designed to protect primary rights, which when violated give rise to the secondary right to a remedy.<sup>86</sup> Indeed, both judges consistently employ the notion of *protecting* rights in explaining the theory of negligence and tort law generally.<sup>87</sup> The sentiment throughout the opinions of both Cardozo's majority and Andrews' minority opinions conveys that tort law is not merely a device for doling out compensation for incidental damage from human interactions but rather carries the more lofty goal of protecting rights. In fact, Andrews' view of the protective purpose

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83 "Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right." *Palsgraf v. Long Island R. Co.* 248 N.Y. 339, 341, 162 N.E. 99 (1928).

84 The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort. We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary. *Id.* at 346.

85 *Id.*, at 342.

86 *Palsgraf v. Long Island R. Co.* 248 N.Y. 339, 351, 162 N.E. 99 (1928) (*J. Andrews dissenting*). ("The right to recover damages rests on additional considerations. The plaintiff's right must be injured, and this injury must be caused by the negligence.")

87 For example, Cardozo writes "If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as *to entitle him to be protected against the doing of it* though the harm was unintended." *Id.* At 345 (*italics added*). Andrews' view of a system of protecting rights is reflected by his basic definition of negligence. Recall the quote "Negligence may be defined roughly as an act or omission which unreasonably does or may affect the rights of others, or which unreasonably fails *to protect one's self from the dangers* resulting from such acts." *Id.* at 348 (*italics added*).

of tort law leads him to declare his more expansive view of duty as being owed to the world.<sup>88</sup> In essence, if everyone has a right to be free from bodily harm (phrased in the positive the right to bodily integrity) then it logically follows that all people have a duty to all people to take due care. Moreover, *Palsgraf* stands for the proposition that if tort law is about protecting rights, then remedies can be conceived as the means of enforcing them.

Significantly, *Palsgraf's* view that the law of torts is a system of protecting rights leads to a nuanced interpretation of some of the more technical concepts that arise in the tort equation. First, tort law is relational in that a claim for damages can only occur if a tortfeasor's actions cause injury to a plaintiff.<sup>89</sup> Yet, even if a claim for damages is relational and injury specific, a primary right is not. Personal rights recognized in tort law, such as bodily security, remain constant. They do not depend on an act of a tortfeasor to suddenly exist. What the tortfeasor's action does, if it is deemed to have interfered with a constant primary right, is to trigger the plaintiff's right to a remedy to vindicate the primary right.

Second, the vindicatory aspect of the system is the essential means of enforcing (and reinforcing) the existence of primary right, which is the best proxy for creating a legal sense that they are protected by the state. Obviously the retroactive approach of paying for harm after a rights violation is a backward looking approach to enforcement, but given reality and the human condition it is the best the law can do second to preventing the violation in the first place. In theory, however, this system raises awareness and respect for rights in a way that will induce compliance with its dictates, and thus hopefully lead to prevention. In this way, tort contributes to an overall protection of individuals in a society just as criminal law does. However, Cardozo clearly distinguishes a tort action from a criminal prosecution in that a person only has a right of action and can bring a tort claim to a court if her own primary right has been violated.<sup>90</sup>

Third, *Palsgraf* offers a very specific definition of the concept of *wrong*, one that mirrors Blackstone's definition. In fact, Cardozo

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88 "Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone." *Id.*, at 349.

89 *Id.* at 345 ("Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all. Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right....").

90 *Id.*, at 346. ("The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another. Thus to view his cause of action is to ignore the fundamental difference between tort and crime.") *Id.*, at 101 ("The victim does not sue derivatively, to vindicate an interest invaded in the person of another.") *Id.* ("What the plaintiff must show ... is a violation of her own right .... Plaintiff sues in her own right.")

recognizes the “shifting meaning” and instability of the terms “wrong” and “wrongful” and clarifies that “What the plaintiff must show is ‘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, but not ‘a wrong’ to any one.”<sup>91</sup> In this way, Cardozo ascribes a very technical definition to the legal concept of wrong as not reflecting common, every day notions of bad behavior, which ultimately entail a moral judgment. But rather, a very specific moment in which an act transgresses “bounds of her immunity”—an immunity held by the plaintiff which can be understood as the right to be free from interference.<sup>92</sup> Importantly, Cardozo suggests that in a legal sense the concept of wrong is synonymous with the concept of a rights violation.<sup>93</sup> The content of the wrong necessarily flows from the content of the right: to know what is *wrong* conduct requires knowing what right defines its wrongness in the legal sense.<sup>94</sup> We cannot judge a legal wrong based only on the freestanding nature of a defendant’s conduct no matter how much we may disapprove of this behavior from our lay person perspective. The song of torts makes the “[a]ffront to personality is still the keynote of the wrong.”<sup>95</sup>

Again, the universality of this interpretation of the meaning of *wrong* comes through Andrews’ shared view of the legal equation focusing squarely on the hard cold fact of an “act” which affects the rights of another.<sup>96</sup> The moment of ‘engagement’ between a defendant and plaintiff creates the legal relationship that makes tort law suddenly relevant. This moment of realizing a specific act by the defendant against the plaintiff’s person or property causes a “legal injury”—to be distinguished from layperson’s understanding of injury as something like a broken bone.<sup>97</sup> The legal injury is thus a sort of legal fiction to be understood as an injury of a right.<sup>98</sup> Yet, at the damages stage of litigation which upholds secondary rights, the actual detriment caused by this legal injury requires assessing the

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91 *Id.*, at 344-5, 100.

92 *Id.*, at 341.

93 “Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports [read “to mean” or “to signify”] the violation of a right, in this case, we are told, the right to be protected against interference with one’s bodily security.” *Id.*, at 345 [brackets added].

94 “Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one’s bodily security.” *Id.*, at 345

95 *Id.* at 345.

96 Negligence may be defined roughly as an act or omission which unreasonably does or may affect the rights of others, or which unreasonably fails to protect one’s self from the dangers resulting from such acts. *Id.* at 348

97 “Injury” is defined generally as “[t]he violation of another’s legal right, for which the law provides a remedy; a wrong or injustice,” and “[h]arm or damage,” Black’s Law Dictionary (7th ed.)

98 This interpretation comes from Andrew’s own: “The right to recover damages rests on additional considerations. The plaintiff’s rights must be injured, and this injury must be caused by the negligence.” *Id.*, at 351

cost of any broken bones or related injuries, as we understand those concepts in everyday parlance.

As the next section explores, the primary right focus of tort law slowly declined into the Twentieth Century, with modern cases, with a few exceptions, mostly eclipsing the important role of primary rights has been largely eclipsed.<sup>99</sup> Indeed, history buried the foundational core of tort law as a victim-focused system of rights protection.

### B. *The Retreat of Rights in Tort Law*

Curiously, despite this rich history of rights embedded in American tort law, modern lawyers do not immediately associate tort law as a system of vindicating rights. While it is true that most modern lawyers no doubt have some familiarity with the *Palsgraf* case, largely because it is included in most legal textbooks, few will associate it with the account of primary rights explained above. Indeed, law schools rarely teach students that tort law is a system to protect primary rights and respond to their violations.<sup>100</sup> Relatedly, practitioners and scholars seldom adopt this perspective. What caused the marginalization of rights in modern tort law? The answer can be found in a combination of factors, not least of which was the influential theoretical writing of eminent jurists and legal academics who argued for a reinterpretation of the traditional account of torts.

Blackstone's interpretation of tort law with its emphasis on rights remained "conventional wisdom" until the second half of the nineteenth century when the "first modern theorist of tort", Oliver Wendall Holmes, took torts in a whole new direction.<sup>101</sup> In fact, Holmes enjoys credit for the birth of modern tort law, and his ideas continue to shape the current debates in legal scholarship.<sup>102</sup> One of the most relevant impacts of Holmes' thinking (at least with regard to the discussion here) was to promote a "de-

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99 The primary rights focus in caselaw did not end with *Palsgraf*, even if it did wane over the decades. See for example the Court of Appeals of Kentucky's in *St. Matthews Bank & Trust Co. V. Mitchell et al.* 254 Ky. 156, 71 S.W.2d 2 (1934) ("In order to constitute a tort, not only must a right and duty exist, but there must be conduct constituting a breach of duty and a violation of right. There must be a wrong done; the absence of legal injury is fatal to the existence of a tort"). It is still possible to find cases that embody Cardozo's interpretation of primary rights even in modern tort doctrine, even if it not the dominant approach.

100 An exception to this general rule is discussed in section #. The legal community is more likely to think of rights in relation to the body of claims arising out of "constitutional torts" which relate to cases involving an infraction by a government agent. I am calling "ordinary" tort law those cases involving disputes between two private individuals. See, Janet McLean, *Ordinary Law of Tort and Contract and the New Public Management*, 30 COMM. L. WORLD REV. 387 (2001) (distinguishing between the public-governmental realm of liability and that of ordinary tort liability). For a discussion of a rights-revival in torts scholarship see section # infra.

101 John C. P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1504 (2002)

102 See discussion section # infra

moralized” account of tort law that would displace the “moral phraseology...of wrongs”.<sup>103</sup> The purging of the perceived morality of tort law led to the evisceration of most notions of rights in tort debates. As John Goldberg and Benjamin C. Zipursky explain, “the intellectual history of the dominant trend of American tort theory grows out of Holmes’s brash and unapologetic skepticism about concepts of duty and right.”<sup>104</sup>

The Holmesian skepticism inspired the Legal Realism movement which questioned “the supposedly inherent conservatism of judicial talk of ‘rights’ and ‘duties’<sup>105</sup>, which were viewed as pretexts for “regressive formalism.”<sup>106</sup> The realists believed that “premodern” lawyers and judges fooled themselves “into thinking that the rules and concepts of tort law could actually guide the adjudication of tort disputes.”<sup>107</sup> Concepts like “wrong” and “duty” lost their content and grounding to become “empty labels by which judges could purport to justify decisions without actually offering any pragmatic or policy reasons for them.”<sup>108</sup>

Rejecting the formalism of early American law and focusing instead on positivism, empiricism, and utilitarianism, legal theorists considered the “traditional account of tort practically, politically, and intellectually untenable” and sought new ways to explain and defend tort law, abandoning the traditional account.<sup>109</sup> Spearheading this intellectual project that would dominate the majority of the Twentieth Century, Holmes decoupled the notion of rights from tort law by reframing tort jurisprudence to consist of a “scheme” in which judges set rules based on policy of when one person must pay for the losses he causes another, thus giving torts an instrumental function of allocating the cost of accidents.<sup>110</sup> Holmes displaced the concept of “wrong” with that of “harm” and argued that the job of addressing the harms of torts was better left to “man of statistics and the master of economics”.<sup>111</sup>

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103 John C.P. Goldberg\* & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 921 (2009-2010)

104 Benjamin C. Zipursky, RAWLS IN TORT THEORY: THEMES AND COUNTER-THEMES, 72 Fordham L. Rev. 1923, 1927 (2003-2004).

105 John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 564 (2002-2003)

106 John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 520 (2002-2003); John C.P. Goldberg, *Tort in Three Dimensions*, 38 PEPP. L. REV. 321, 324 (2010-2011) (offering as an example the pretext of legal rules like contractual “privity” as a requirement to protect companies from paying for any harm caused by their careless products)

107 John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 520 (2002-2003); John C.P. Goldberg, *Tort in Three Dimensions*, 38 PEPP. L. REV. 321, 324 (2010-2011) (offering as an example the pretext of legal rules like contractual “privity” as a requirement to protect companies from paying for any harm caused by their careless products)

108 John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 520 (2002-2003)

109 John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 564 (2002-2003)

110 THE COMMON LAW, *supra* note, e.g. at 1 (stating that the purpose of torts is “to secure a man against certain forms of harm.”).

111 Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. R. 457 (1897)



Holmes also pushed the focus of tort law away from victim-plaintiffs and towards defendants. Specifically, in *The Path of the Law* Holmes presented the famous archetypical “Bad Man” who need only know the actual consequences of his behavior.<sup>112</sup> This hypothetical client (potential defendant) did not care what he *ought* to do, from a moral duty perspective, but rather what he *should* do from a legal duty perspective.<sup>113</sup> The Bad Man’s only demand of his lawyer would be a reliable prediction of what type of conduct would invite court-ordered sanctions.<sup>114</sup> Perhaps ironically, the descriptive “bad” intended no moral connotation but rather referred to a cold calculating rational character. The world of the Bad Man was animated by political and economic theories of classical liberalism which consisted of legal rules to organize society in a way that “would afford individuals a broad sphere of liberty of action while simultaneously protecting them from excessive interference with their security and liberty.”<sup>115</sup> Common law only served a regulatory function to achieve the public goals of deterring harmful conduct and compensating citizens for invasions of their security through judge declared directives of proper conduct.<sup>116</sup> In this fictional world, the focus shifted away from the Blackstonian plaintiff-victims (and their rights) and towards Holmsonian defendants (and their wallets). It became a Bad Man’s world.

The Holmsonian Bad Man account of tort responded to a new historical context in which the phenomenon of workplace and mechanical accidents of the Industrial Revolution placed new demands on tort law to solve major economic, social and political problems.<sup>117</sup> These new types of industrial accidents as well as defective product designs required a new form of

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112 Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. R. 457 (1897)

113 See OLIVER W. HOLMES, JR., *Book Notice*, 6 AM. L. REV. 723, 724 (1872), reprinted in FREDERIC R. KELLOGG, *THE FORMATIVE ESSAYS OF JUSTICE HOLMES: THE MAKING OF AN AMERICAN LEGAL PHILOSOPHY* 91, 92 (1984) (“The only question for the lawyer is, how will the judges act?”);

114 See OLIVER W. HOLMES, JR., *Book Notice*, 6 AM. L. REV. 723, 724 (1872), reprinted in FREDERIC R. KELLOGG, *THE FORMATIVE ESSAYS OF JUSTICE HOLMES: THE MAKING OF AN AMERICAN LEGAL PHILOSOPHY* 91, 92 (1984) (“The only question for the lawyer is, how will the judges act?”); Holmes, *THE COMMON LAW* (“[A]ny legal standard must, in theory be capable of being known. When a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was.”)

115 John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of McPherson*, 146 U. PA. L. REV. 1733, 1753 (1997-1998).

116 OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 115 (Mark DeWolfe Howe ed., Harv. Univ. Press 1963) (1881) (“[T]he general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms .... [Fault-based liability] is intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury.”). See generally *The Path of the Law* and Its Influence: The Legacy of Oliver Wendell Holmes, Jr. (Steven J. Burton ed., 2000) (essays on Holmes’s jurisprudence).

117 LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 350 (3rd ed. 2005)

redress that did not resemble the more traditional and everyday disputes of *A* hitting *B*. Thus, they did not reflect the clearer social conventions of wrongdoing and responsibility to guide the setting of rules and concepts not all that removed from morality. Negligence began to be the more dominantly litigated tort, and its often controverted, less fixed concepts of reasonableness, foreseeability and proximate cause offered more fertile ground for instrumental theories of tort law.

Indeed, Leon Green and William Prosser carried the legal realism baton onward by further minimizing and restraining the content of tort and making it more of a jurisdictional, procedural, decision-making concept.<sup>118</sup> In fact, Posner even referred to Cardozo's rights analysis in *Palsgraf* as "eloquent bluff", and in one fell swoop marginalized the importance of primary rights and shifting focus to make the case famous for its debate on duty and reasonable foreseeability.<sup>119</sup> It was around this time that the two step equation of torts analysis seemed to go underground. Indeed, tort became predominantly defined with reference to its function as a civil action whose "purpose is to compensate plaintiffs for the damage suffered at the expense of a wrongdoer."<sup>120</sup> This view emptied tort law of its content to make it merely a process of decision-making based on an objective calculation of damages.<sup>121</sup> Any articulation of standards or rules would be based on the policy preference of judges who would just make the law.<sup>122</sup> Tort suits became a new form of social engineering and occasions for judges and juries to legislate and regulate as opposed to adjudicate the types of "cases or controversies" that raised Blackstone's issues of rights, duties and redress. It gave people the power to hail others to court to seek relief and mandated institutions to act in care of the public welfare.<sup>123</sup> This reconceptualization of tort also led to expansive doctrinal developments and increased litigation from 1940 to 1980.<sup>124</sup> Tort law became what Green termed "public law in disguise."<sup>125</sup>

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118 LEON GREEN, RATIONALE OF PROXIMATE CAUSE 195-201 (1927) (arguing that the Legal analysis such as "proximate cause" really just amounted to policy determinations made by judges as to whether liability should attach to a particular instance of harm).

119 Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1,3 (1998)

120 WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 10 (1941).

121 LEON GREEN, THE LITIGATION PROCESS IN TORT LAW (1st ed. 1965) (collected writings on tort); See PATRICK S. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 116-17 (1970).

122 William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953) ("the law [of negligence], "like the Constitution, is what we make it").

123 John C.P. Goldberg, *Tort in Three Dimensions*, 38 PEPP. L. REV. 321, 326 (2010-2011)

124 John C.P. Goldberg, *Tort in Three Dimensions*, 38 PEPP. L. REV. 321 327 (2010-2011) (new causes of action included strict product liability, emotional distress and privacy).

125 John C. P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1511 (2002) (Referring to Leon Green, *Tort Law Public Law in Disguise* (Parts I & II), 38 TEX. L. REV. 1, 257 (1959 & 1960).

Perhaps not surprisingly, this progressive movement met with criticism and a conservative backlash that lambasted the shortcomings of the policy driven compensation-deterrence theory as anticapitalist and promoting redistributive politics.<sup>126</sup> This new positive theory of law and economics, now considered to be the dominant theoretical paradigm in tort law today, offered a reductive instrumentalism account of tort law.<sup>127</sup> Richard Posner, a founding father of the economic approach, famously argued that reasonableness in negligence related to economic rationality relying on doctrine created by Judge Learned Hand's formula in *United States v. Carroll Towing*.<sup>128</sup> In this theory, a microeconomic analysis allocates and spreads costs to maximize wealth by applying penalty-sanctions to incentivize future actors to conduct a cost-benefit analysis of the risk associated with a particular activity.<sup>129</sup> This arrangement supposedly motivated actors to "internalize externalities" by taking precautions up until a point where it will cease to make economic sense because the expense will exceed any anticipated losses.<sup>130</sup> In this scenario, judges were no longer guardians of rights but rather promoters of wealth maximization and the efficient allocation of resources

Building on an efficiency model, Judge Guido Calabresi crafted a set of liability rules designed to incentivize actors to make efficient expenditures on safety precautions to deter accidents, making the idea of a legal wrong further lose any link to rights violation. Instead, a wrong referred to a defendant's faulty economic calculations.<sup>131</sup> Calabresi even rejected the

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126 John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021 (2005) (arguing that the tort reform movement is a political backlash against the progress made by the civil justice system to address major social harms).

127 William Landes and Richard Posner. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1 (1987). Id., at 312 ("[The structure of the common law is economic in character.]; See James J. Heckman, *The Intellectual Roots of the Law and Economics Movement*, 15 LAW & HIS. REV. 327, 328-29 (1997).

128 Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29 (1972). (discussing *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947) which presented the reasonableness in the negligence claim in algebraic terms with the failure to take a precaution, the cost of which (*B*) is smaller than the losses expected to result (*P x L*) from not taking the precaution).

129 For an alternative account of the non-rational motivations behind human decision-making see, Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, cite...

130 WILLIAM M. LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 4 (1987).

131 GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 26 (1970) ("I take it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents."). See also, STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of The Cathedral*, 85 HARV. L. REV. 1089 (1972); Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). See Keith N. Hylton, *Calabresi and the Intellectual History of Law and Economics*, 64 MD. L. REV. 85, 86-87 (2005); John C. P. Goldberg,

idea of accountability for wrongdoing as part of the function of torts.<sup>132</sup> As Keating explains: “Legal economists have argued that tort is a regulatory mechanism designed to minimize the combined costs of accidents and their prevention; corrective justice theorists have replied that tort is the law of redress for harm wrongly done. On the economic view, there are no obligations. There are only incentives intended to affect future behavior. Liability rules are prices and their role is to steer resources to their highest uses.”<sup>133</sup> Everything had a price tag, even the supposed rights of individuals.

Indeed, the main purpose of recognizing plaintiffs’ claims to redress past harm was to enlist their “participation in minimizing the combined costs of harm and its avoidance going forward” and thus “promote the social interest in minimizing the combined costs of accidents and their prevention, going forward.”<sup>134</sup> Plaintiffs became a sort of “private attorney generals deputized to promote the efficient minimization of accident costs. They sue to vindicate the general good, not their own rights.”<sup>135</sup> Ultimately the economist’s principle of efficiency, considered by some to be “the Rosetta Stone of tort law”, minimized tort law to mere instrumental value.<sup>136</sup> In doing so, this theory further sidelined the Blackstonian victim-plaintiff (and her rights) leaving her nowhere to be seen.

The instrumentalization of tort law theory has reduced tort’s substantive concepts to the point where we now hear a loud chorus calling into question whether tort law need even exist.<sup>137</sup> The “elasticity” of tort law, as reflected by the lack of clear consensus and definition over the last century, has led some courts and scholars to infer that tort law has no content or substance other than serving the social ends of “compensating victims and deterring risk-producers.”<sup>138</sup> One hears the challenge: if tort is only a scheme to

*Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 546 (2002-2003) (observing that the concepts of “fault” and “wrong” refer to economic waste caused by “failing to take a precaution that would have been cheaper than the expected costs of the accident).

132 See Guido Calabresi, *The Decision for Accidents: A Nonfault Allocation of Costs*, 78 HARV.

L. REV. 713 (1965) (“I take it as given that the principal functions of “accident law” are to compensate victims and reduce accident costs ..... The notion that accident law’s role is punishment of wrongdoers cannot be taken seriously. Whatever function we may wish to ascribe to punishment in criminal law, it simply will not carry over to civil accident suits).

133 Gregory C. Keating. *The Priority of Respect Over Repair*, *LEGAL THEORY 2* (2012) (forthcoming).

134 Gregory C. Keating. *The Priority of Respect Over Repair*, *LEGAL THEORY 2* (2012) (forthcoming)..

135 Gregory C. Keating. *The Priority of Respect Over Repair*, *LEGAL THEORY 2* (2012) (forthcoming)..

136 John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 546 (2002-2003)

137 Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 605-17 (1992)

138 John CP. Goldberg & Benjamin C. Zipursky, *Tort Law And Moral Luck*, 92 CORNELL L. REV. 1123, 1169 (2006-2007).

distribute payment for accidents, then why not replace it with a private or social insurance scheme like those found in Europe and New Zealand?<sup>139</sup> This “kill-torts movement” carries Calabresi’s torch forward, arguing that a no-fault, liability insurance scheme could use rational, statistically based systems of schedules to reimburse for the costs of corporate accidents.<sup>140</sup> Some feel the policy ends of tort law would be better left to democratically elected legislatures and expert regulators to “adjusts the “burdens and benefits of economic life”, instead of relying on the quasi public administration system of tort law.<sup>141</sup>

The push for tort reform, and even abolishment, enjoys great public support due to the existence of a perceived “tort crisis”, an arguably manufactured situation resulting from years of corporate interests manipulating public perception of the dark side of tort law.<sup>142</sup> Tort law carries a ruffian bad image of an out of control system, plagued by greedy plaintiffs, and run by ambulance chasing personal injury lawyers. All these shady characters allegedly hamper innovations and the economy with “crushing liability” and “sky-high damage awards.”<sup>143</sup> The recriminations against tort law capture the public imagination in a way that leaves the general population either in favor or at least ambivalent to aggressive

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139 See Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 642-64 (1985) (arguing that modern tort law should be altered so that “[d]eterrence would be the domain of administrative agencies”); W. Kip Viscusi et al., *Deterring Inefficient Pharmaceutical Litigation: An Economic Rationale for the FDA Regulatory Compliance Defense*, 24 SETON HALL L. REV. 1437, 1467 (1994) (discussing the failure of tort law as a regulatory mechanism for pharmaceuticals); Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 L. & PHIL. 1, 12-17, 23 (1987) (asking whether tort law makes sense and concluding “[w]e should abolish the tort system.”); Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967); Peter H. Schuck, *Tort Reform, Kiwi-Style*, 27 YALE L. & POL’Y REV. 187 (2009) (describing favorably the no fault insurance system in New Zealand); PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1990); WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991).

140 John C. P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1513 (2002); John C.P. Goldberg\* & Benjamin C. Zipursky, *Accidents of The Great Society*, 64 MD. L. REV. 364, 364 (2005)

141 See John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 290-91 (2007) (concluding that the private tort bar has “created a massive private administration system with many of the same attributes” as a public administration system); John C. P. Goldberg, *What Are We Reforming? Tort Theory’s Place in Debates over Malpractice Reform*, 59 VAND. L. REV. 1075, 1080 (2006).

142 Rustad, In Defense of Tort Compare See, Lawrence Chimerine & Ross Eisenbrey, *The Frivolous Case for Tort Law Change: Opponents of the Legal System Exaggerate its Costs, Ignore its Benefits*, 2005 ECON. POL’Y INST. 1, 6, available at <http://epi.3cdn.net/27399496d31825244f.wgm6bx18j.pdf> (rejecting the idea of tort law being in a crisis), with F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 524 (2006) (arguing that various societal factors contribute to the currently lamentable state of tort law).

143 John CP. Goldberg & Benjamin C. Zipursky, *Tort Law And Moral Luck*, 92 CORNELL L. REV. 1123 (2006-2007)

reform that shackles the reach of tort law.

As John Goldberg describes in his article, *Unloved: Tort in the Modern Legal Academy*, this pervasive anti-tort sentiment has diminished the status of torts in the legal academy, leaving some of its members to believe that “tort deserves to be treated as a second-class citizen among modern departments of law.”<sup>144</sup> Some want it banished from the first year law courses, viewing it with suspicion and even hostility. Unlike the “ancestral” and “essential” subjects of property and contract, tort is the “poor relation” and the “odd man out”.<sup>145</sup>

In response to this trend, this Article proposes that we return to the original account of torts as a mechanism to protect fundamental rights, and that individuals have a right to this remedy.

### III. A RIGHTS REVIVAL IN TORTS

Adopting a rights perspective in tort law requires a rights renaissance in tort adjudication. Surely it is helpful for torts scholars to bear in mind the primary rights account of tort law, but the true realization of rights protections occurs daily in courtrooms. Keating, one of the few scholars to have fully endorsed the primary rights perspective in torts, adopts an Andrew’s type concept of duty. He argues for an “omnilateral” primary obligation that are owed to everyone.<sup>146</sup> In his critique of corrective justice theory as being too focused on the remedial phase of a structural feature of tort law, he proposes that “the first question of tort law is just what it is that we owe to others in the way of respect for their persons, their property, and

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144 John C. P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1505, 1517 (2002).

145 John C.P. Goldberg\* & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 917 (2009-2010); John C. P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1516, 1519 (2002)

146“Remedial responsibilities, by contrast, are bilateral. They are owed to named plaintiffs by named defendants on the basis of a wrong done the former by the latter. The fact that primary obligations are omnilateral, not bilateral is of immense importance. Primary obligations in tort are owed by everyone, and primary rights in tort are good against everyone. This fact must play a decisive role in determining the character and content of tort obligations. To put the matter in a Kantian idiom, primary responsibilities must be articulated by asking if they could be willed generally— as binding law for a plurality of persons— not whether they could be willed bilaterally, between one particular plaintiff and one particular defendant.” Gregory C. Keating, *The Priority of Respect Over Repair*, LEGAL THEORY 20, fn. 40 (2012) (forthcoming). (Available at: <http://works.bepress.com/gregorykeating/26>); “Primary obligations in tort are omnilateral not bilateral, they are owed by everyone and to everyone else. The wrong at the center of modern tort law— negligence liability for the infliction of accidental physical harm— is an abstract and general wrong, not a personal one. Negligence is the failure to exercise reasonable care in order to protect an indefinite plurality of potential victims whose persons and property one might otherwise unreasonably endanger by one’s actions.” Id. at 33.

a diverse set of their ‘intangible interests’...”<sup>147</sup> In his approach “[t]he first task of tort is the articulation of primary obligations.”<sup>148</sup> Alternatively, I propose that even before identifying the obligations of defendants, a rights model must identify the primary rights of victim-plaintiffs. Beginning with a clear articulation of primary rights helps determine not only duty but also whether a legal wrong has occurred (e.g. a rights violation).

### A. Applying a Human Rights Framework to Tort Cases

The following section provides examples of types of suits in tort to show how they can be reconceptualized as human rights claims.

#### 1. Domestic and other types of violence against women

A human rights lens can be applied to interpret torts claims brought against perpetrators of violence against women. In the United States, one in four women experience domestic violence during their lifetime.<sup>149</sup> Every year, between two and five million women suffer violence at the hands of a partner.<sup>150</sup> Unlike men, women are generally victimized by acquaintances.<sup>151</sup> Not only are women more likely than men to experience

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147 Gregory C. Keating. *The Priority of Respect Over Repair*, *LEGAL THEORY* 34 (2012) (forthcoming).

(Available at: <http://works.bepress.com/gregorykeating/26>).

148 Gregory C. Keating. *The Priority of Respect Over Repair*, *LEGAL THEORY* 34 (2012) (forthcoming).

(Available at: <http://works.bepress.com/gregorykeating/26>). (“The structure of primary obligations, therefore, has a better claim to be the core of tort than the structure of remedial responsibilities does. And that structure is quite different from the bilateral, backward-looking structure that corrective justice theory emphasizes”)

<sup>149</sup> See generally The National Institute for Justice and the Centers for Disease Control and Prevention, *Extent, Nature, and Consequences of Intimate Partner Violence* (2000). Women account for 85% of the victims of domestic violence. ELIZABETH M. SCHNEIDER, CHERYL HANNA, JUDITH G. GREENBERG & CLARE DALTON, *DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE*, supra note 20, at 10.

<sup>150</sup> Centers for Disease Control and Prevention, *Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey 5* (1998) (Female victims averaged 3.1 assaults per year, which equate to approximately 5.9 million physical assaults perpetrated against women). For example, a 2009 study revealed that 68% of women knew their offenders. U.S. Dep’t. of Justice, *NCJ-231327 National Crime Victimization Survey, Criminal Victimization, 2009* (October 2010).

<sup>151</sup> *Id.* at 7 (Discussing the greatest difference between violent crime committed against males and females was the percentage committed by intimate partners).

violence at the hands of an intimate partner, they are also more likely to be murdered by their partners.<sup>152</sup> For many years, domestic violence was relegated to the private sphere, considered beyond the reach of human rights law, resulting in feminist critique.<sup>153</sup> In recent times advocates have helped to bridge the private-public divide to hold states accountable for domestic violence as a human rights violation.<sup>154</sup>

Significantly, this work has been made possible by the framework established by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which is the most comprehensive international treaty on women's issues.<sup>155</sup> Similar to most human rights treaties, CEDAW puts an affirmative duty on states who have ratified the Convention to eliminate any "distinction, exclusion, or restriction based on sex."<sup>156</sup> CEDAW's focus is on improving civil rights and the legal status of women, including reproductive rights.<sup>157</sup> Although CEDAW does not explicitly prohibit violence against women, it defines discrimination against women as "... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."<sup>158</sup> It also mandates that states must take steps to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and

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<sup>152</sup> See Colorado Coalition Against Domestic Violence, Law Enforcement Training Manual 1, 1-5 (2d ed. 2003) (reporting that 42% of all female homicide victims were killed by an intimate partner).

<sup>153</sup> Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 Const. Comment. 319 (1993); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992); Catherine MacKinnon, *TOWARDS A FEMINIST THEORY OF STATE* (1989).

<sup>154</sup> DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE 27, 28 (CARIN BENNINGER-BUDEL ED., 2008).

<sup>155</sup> U.N. Div. for the Advancement of Women, Convention on the Elimination of All Forms of Discrimination Against Women, *available at* <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited May 22, 2011) (stating that states that have ratified CEDAW are legally bound to put its provisions into practice);

<sup>157</sup> See Rebecca Adams, *Violence Against Women and International Law: The Fundamental Right*, 20 N.Y. INT'L L. REV. 57 (2007).

<sup>158</sup> *Id.*; See also Rebecca Adams, *Violence Against Women and International Law: The Fundamental Right*, 20 N.Y. INT'L L. REV. 57 (2007).



women.”<sup>159</sup> Parties to CEDAW have an affirmative obligation to ensure that there are no violations under CEDAW in domestic law. Failure to comply is a violation of international law.

Other human rights treaties also strive to protect the rights of women. These conventions include the American Convention on Human Rights, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol, and the International Covenant on Economic, Social, and Cultural Rights.<sup>160</sup> Significantly, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women defines and prohibits violence against women.<sup>161</sup> It also reaffirms the right of every woman to have her physical, mental, and moral integrity respected, and guarantees the right to personal security.<sup>162</sup>

In U.S. courts, tort actions are available to those who suffer physical or emotional harm at the hands of abusive partners.<sup>163</sup> For many years abusers were virtually judgment proof due to marital immunity and other bars to recovery resulting in a small number of cases going forward in the courts.<sup>164</sup> But recent developments in domestic tort law have begun to carve out remedies for victims of domestic abuse.<sup>165</sup> Applicable torts for a battered litigant would be assault and battery.<sup>166</sup> For example, in *Lusby v. Lusby*, the court permitted a battery action in tort to proceed against the plaintiff's husband on the grounds that he had raped her.<sup>167</sup> Defamation may be available in instances where a partner humiliates his spouse in public through false accusations.<sup>168</sup>

Other torts may include the relatively new tort of intentional infliction of emotional distress where injuries arise out of emotional rather than

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 70

<sup>161</sup> Article 7(d), 33 I.L.M. 1534 (1994), *entered into force* March 5, 1995.

<sup>162</sup> *Id.* at 7(d); Gonzales Petition, *supra* note 1, at 53

<sup>163</sup> Jennifer Wriggins, *Domestic Violence Torts*, 75 S. Cal. L. Rev. 121 (2001); Martha Chamallas and Jennifer B. Wriggins, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (2010).

<sup>164</sup> Douglas D. Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C.L. Rev. 543(1992); Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 New. Eng. L. Rev. 319 (1997).

<sup>165</sup> DOMESTIC VIOLENCE AND THE LAW 777 (Elizabeth M. Schnieder, Cheryl Hanna, Emily J. Sack and Judith G. Greenberg, eds., 2013)

<sup>166</sup> *Id.*, at 783

<sup>167</sup> 390 A.2d 77 (Ct. App. Md. 1978). Maryland had a criminal law exemption to tort immunities for marital rape. Md. Code, Criminal Law §3-318 (2010).

<sup>168</sup> *Id.*, at 784.

physical abuse.<sup>169</sup> In *Feltmeier v. Feltmeier*, the Supreme Court of Illinois found on public policy considerations that an action for intentional infliction of emotional distress between spouses or former spouses based on conduct occurring during marriage should not be barred.<sup>170</sup> Significantly, part of the court's reasoning rested on a gap in state law criminalizing domestic crime. The court explained,

“...the Illinois legislature, in creating the Illinois Domestic Violence Act of 1986 (Act) has recognized that domestic violence is a ‘serious crime against individual and society’ and that ‘the legal system has ineffectively dealt with family violence in the past, allowing abusers to escape effective prosecution or financial liability.’ However...while the Act created a crime of domestic battery and ‘provides a number of remedies in an effort to protect abused spouses and family members, it did not create a civil cause of action to remedy the damages done.’ Thus, it would seem that the public policy of this state would be furthered by recognition of the action at issues.”<sup>171</sup>

Returning to a human rights analysis with regard to this tort for spousal abuse, it is important to recognize that the state is in effect providing a remedy to an individual who suffered the violation of her right to personal integrity. While the court does not explicitly talk about her spouse violating this human right (and thus breaching his duty), such an interpretation can be imposed on the case to elucidate the human rights issues at hand. Moreover, as discussed, the same set of facts also give rise to criminal liability which leads the court to recognize that this should entail also a “financial liability” in the form of civil damages which arrives through a tort suit.

## 2. Toxic torts and the right to a healthy environment

Environmental harms caused by companies which result in personal injury constitute another area where tort law provides a necessary remedy. In fact, a whole area of “toxic torts” emerged as cases were litigated to

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<sup>169</sup> DOMESTIC VIOLENCE AND THE LAW, at 783. *See also*, Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 Md. L. Rev. 1268 (1996).

<sup>170</sup> 798 N.E.2d 75 (2003).

<sup>171</sup> *Id.*

address certain environmental injuries over the past century.<sup>172</sup> These cases involve a finding direct injury and harm to a specific person or class of persons.<sup>173</sup> For example, the use of hydraulic fracking has become what some predict to be “the new asbestos” in tort litigation.<sup>174</sup> Technological developments have made it possible to release gas trapped deep in the impermeable shale rock formations in states like New York, Pennsylvania, Ohio, Tennessee, West Virginia, among others.<sup>175</sup> This method entails shooting millions of gallons of water mixed with sand and chemicals up to ten thousand feet below the Earth’s surface to extract natural gas.<sup>176</sup>

Stories began to emerge to reveal that this new innovation did not come without a price. The documentary *Gasland* brought national attention to tap water being ignitable.<sup>177</sup> Residents of communities near fracking complained of black water with gas odors and rainbow swirls of gasoline. Many report losing smell and experiencing nerve pain and other neurological nerve pain.<sup>178</sup> Scientific studies have revealed some of the serious health consequences associated with the chemical used in the fracking process.<sup>179</sup>

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<sup>172</sup> Mark Latham, Victor E. Schwartz, & Christopher E. Appel, *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 *Fordham L. Rev.* 737, 749 (2012).

<sup>173</sup> Mark Latham, Victor E. Schwartz, & Christopher E. Appel, *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 *Fordham L. Rev.* 737, 750 (2012).

<sup>174</sup> Rosalie D. Morgan, *What the Frack?: An Empirical Analysis of the Effect of Regulation on Hydraulic Fracturing*, 16 *Quinnipiac Health L.J.* 77, 90 (2013).

<sup>175</sup> *Avoidable “Fraccident”: An Argument Against Strict Liability for Hydraulic Fracturing*, 60 *U. Kan. L. Rev.* 1215, 1215-6 (2012)

<sup>176</sup> Rosalie D. Morgan, *What the Frack?: An Empirical Analysis of the Effect of Regulation on Hydraulic Fracturing*, 16 *Quinnipiac Health L.J.* 77 (2013).

<sup>177</sup> *Gasland: A Film by Josh Fox* (HBO 2009).

<sup>178</sup> Rosalie D. Morgan, *What the Frack?: An Empirical Analysis of the Effect of Regulation on Hydraulic Fracturing*, 16 *Quinnipiac Health L.J.* 77 (2013).

<sup>179</sup> A recent study by The Endocrine Disruption Exchange (TEDX) examined 353 different chemicals used in fracking and found health consequences in these areas: skin, eye, sensory organ, respiratory, gastrointestinal and liver, brain and nervous system, immune, kidney, cardiovascular and blood, cancer, mutagenic, endocrine disruption, and even death. other ecological effects. *Summary Statement*, THE ENDOCRINE DISRUPTION EXCH. 1, 1 (2011) <http://www.endocrinedisruption.com/files/multistatesummary1.-27-11Final.pdf>.; Theo Colborn et al., *Natural Gas Operations from a Public Health Perspective*, 17(5) *INT’L J. HUM. ECOLOGICAL RISK ASSESSMENT* 1039, 1040-41 (Sept. 4, 2010) (reporting problems with eye and skin irritation, nausea and/or vomiting, asthma,

The serious consequence of fracking has led to tort litigation. Often these claims relate directly to the contamination of water sources but rest on claims of property and personal injury invoking common law theories of trespass, nuisance, strict liability for abnormally dangerous activity.<sup>180</sup> For example, in a largely agricultural county in Pennsylvania, members of the community filed lawsuits against companies participating in hydraulic fracturing for allegedly contaminating well water.<sup>181</sup>

In *Beris v Southwestern Energy Production Co.*, the plaintiffs alleged that “due to releases, spills, and discharges from hydraulic fracturing they were exposed to “hazardous gases, chemicals, and industrial wastes” which caused “[p]laintiffs to incur health injuries, loss of use and enjoyment of their property, loss of quality of life, emotional distress, and other damages”<sup>182</sup> In *Fiorentino v. Cabot Oil & Gas Corp.*, the plaintiffs allege that they were exposed to “combustible gases, hazardous chemicals, threats of explosions and fires” and as a result, they are “in a constant state

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coughing, sore throat, flu-like symptoms, tingling, dizziness, headaches, weakness, fainting, numbness in extremities, and convulsions).

<sup>180</sup> See, e.g., *Berish v. Sw. Energy Prod. Co.*, 763 F. Supp. 2d 702, 704 (M.D. Pa. 2011) (noting that plaintiffs alleged “pollutants and other industrial waste, including the fracking fluid and other hazardous chemicals such as barium and strontium, were discharged into the ground and contaminated the water supply used by the Plaintiffs”); *Fiorentino v. Cabot Oil & Gas Corp.*, 750 F. Supp. 2d 506, 509 (M.D. Pa. 2010) (“Plaintiffs allege that Defendants improperly conducted hydrofracturing and other natural gas production activities that allowed the release of methane, natural gas, and other toxins onto Plaintiffs’ land and into their groundwater.” (footnote omitted)). For more cases in which plaintiffs allege groundwater contamination or personal injury from fracking activities, see *Bombardiere v. Schlumberger Tech. Corp.*, No. 1:11 -CV-50, 2011 WL 2443691, \*1 (N.D. W. Va. June 14, 2011); Plaintiffs Original Petition at 1, *Parr v. Aruba Petroleum, Inc.*, No. 1 1-02650-E (Dallas Cnty. Ct. March 8, 2011); Plaintiffs Original Complaint at 3-4, *Mitchell v. Encana Oil & Gas (USA), Inc.*, No. 3:10-CV-02555-L (N.D. Tex. Dec. 15, 2010); Plaintiff’s Original Complaint at 2-3, *Harris v. Devon Energy Prod. Co.*, No. 4:1 0-CV-00708-MHSALM (E.D. Tex. Dec. 15, 2010); See also, Keith B. Hall & Lauren E. Godshall, *Hydraulic Fracturing Litigation*, THE ADVOCATE (2011).

<sup>181</sup> Hannah Coman, “Balancing the Need for Energy and Clean Water: The case for Applying Strict Liability in hydraulic fracturing suits”, 39 B.C. Env’tl. Aff. L. Rev. 131, 142 (2012)

<sup>182</sup> Complaint for petitioner, *Berish et al. v. Sw, Energy Prod. Co.*, No 210-1882CP, 2010 WL 4230599 (sept 14, 2010) para 2.

of severe emotional distress consistent with post traumatic syndrome.”<sup>183</sup> With the increasing dependence on natural gas as a reliable source of energy with volatile energy prices, torts claims for property and personal injuries caused by fracking will only rise.<sup>184</sup>

It is possible to view toxic torts through a human rights framework. In particular, there are two conceptual frameworks for understanding environmental claims using tort law as a form of human rights litigation. First, the environment is often viewed as a precondition for the enjoyment of other human rights or alternatively their degradation. This view was expressed in a separate opinion of the Vice-President of the International Court of Justice in the *Gabcikovo-Nagymaros* case:

“the protection of the environment is...a vital part of contemporary human rights doctrine, for it is sine qua non for numerous human rights such as the right of health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the *Universal Declaration on Human Rights* and in other human rights instruments.”<sup>185</sup>

Second, a newer line of interpretation views the right to a healthy environment as a stand-alone entitlement.<sup>186</sup> This understanding is still relatively new although various scholars have offered arguments for the recognition of this emerging right.<sup>187</sup>

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<sup>183</sup> See also, Amended Complaint, *Fiorentino v Cabot Oil & Gas Corp.*, No 3:09-cv-02284-TIV, 2010 WL 931974 (MD PA Mar. 5, 2010), para 43.

<sup>184</sup> Hannah Coman, “Balancing the Need for Energy and Clean Water: The case for Applying Strict Liability in hydraulic fracturing suits”, 39 B.C. Env'tl. Aff. L. Rev. 131, 132 (2012) (By 2020, a predicted 20% of natural gas will come from hydraulic fracturing).

<sup>185</sup> (*Gabcikovo-Nagymaros Project (Hungary v Slovakia)*)(Separate Opinion of Vice-President Weeramantry), [1997] ICJ Rep. 92

<sup>186</sup> Bridget Lewis, *Environmental Rights or a Right to the Environment? Exploring the Nexus Between Human Rights and Environmental Protection*, 8 Macquarie J. Int'l & Comp. Env'tl. L. 36, 37 (2012).

<sup>187</sup> See generally, Sumudu Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Human Right to a Healthy Environment Under International Law' (2002-2003) 16 *Tulane Environmental Law Journal* 65; Phillipe Sands, *Principles of International Environmental Law* (Cambridge University Press, 2nd ed, 2003); Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 3rd ed, 2008); Dinah Shelton, 'Human Rights, Environmental Rights and the Right to Environment' (1992) 28 *Stanford Journal of International Law* 103; Fatma

Often the environment is linked to the right to health and even life through the treaties that explicitly protect these human rights.<sup>188</sup> In the General Comment No 14, the United Nations Committee on Economic, Social and Cultural Rights elaborated on the meaning of article 12 stating that article 12 includes a 'wide range of socio-economic factors and underlying determinants of health' including 'food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment'. Article 12 also requires 'the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health'. General Comment No 14 clearly indicates that the environment is considered a significant contributing factor to achieving an adequate standard of health, and environmental problems such as pollution are constructed as barriers to the full enjoyment of the right.<sup>189</sup>

Importantly, the tort claims brought to seek damages for injury caused by toxic torts provides an essential remedy for protecting the human right to a healthy environment within the domestic context.

### *B. Re-inserting Rights in the Tort Equation*

The analysis of a tort claim to dissect the primary right ultimately requires a return to the original conception of torts with a focus first on

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Ksetini, Special Rapporteur for Human Rights and the Environment, *Final Report to Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities: Human Rights and the Environment*, UN Doc E/CN.4/Sub.2/1994/9, 6 July 1994; Donald Anton and Dinah Shelton, *Environmental Protection and Human Rights* (Cambridge University Press, 2011); Wolfgang Sachs, 'Environment and Human Rights' (2004) 47(1) *Development* 42.

<sup>188</sup> *The International Covenant on Economic, Social and Cultural Rights* (ICESCR) article 12 establishes a 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. A similar right is also enshrined in the *Convention on the Rights of the Child* *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *The Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); and the *International Convention on the Elimination of All Forms of Racial Discrimination*. *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

<sup>189</sup> Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, UN Doc No E/C.12/2000/4, 11 August 2000.

primary rights followed then by the breach of a duty to respect those rights. To achieve this reinsertion we should revisit the Restatement (First) of Torts § 281, elaborated in 1934, which defined the elements of negligence as:

- (a) plaintiff has an interest that is protected against unintentional invasion;
- (b) defendant engages in conduct that is negligent with respect to that interest or some other similar interest;
- (c) the conduct legally causes an invasion of plaintiff's interest....<sup>190</sup>

Despite using the substitute term of “interests” instead of rights, the earlier Restatement offers a more central focus on the victim-plaintiff in each step of the analysis compared to the Second and draft Third Restatement. Even though the Restatement (Second) of Torts (1965) still integrates the notion of invading an interest of the victim-plaintiff in its first clause, it then turns its attention to the defendant’s conduct, evidencing the historical movement away from the victim-plaintiff rights and towards the defendant’s duty. Specifically, the first elements in section § 281 declares that in negligence: “The actor is liable for an invasion of an interest of another, if: (a) the interest invaded is protected against unintentional invasion...”, but the next two elements focus on evaluating the behavior of the defendant.<sup>191</sup> Moreover, in its comments, the Restatement (Second) equates interest with the specific legal theories of torts and does not offer any type of broader principle of how these interests equate with rights.<sup>192</sup> Thus, while ostensibly the same language, the revised wording has consistently become a duty analysis in cases without really examining the question of a measured interest and the primary right it corresponds to. At the far extreme, the more recent draft Restatement (Third) of Torts which completely eliminates the interests of victim-plaintiff putting the focus entirely on the conduct of the defendant.<sup>193</sup>

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190 Restatement (First) of Torts §281. This definition also included “(d) plaintiff is not contributorily negligent” which would no longer be relevant given the more moderate comparative negligence regime which does not bar recovery upon evidence of any fault of the plaintiff.

191 Sections (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and (c) the actor's conduct is a legal cause of the invasion, and (d) the other has not so conducted himself as to disable himself from bringing an action for such invasion.”

192 In its comment on Clause (a) the Restatement explains “the requirement that the interest which is invaded must be one which is protected, not only against acts intended to invade it, but also against unintentional invasions. The extent to which particular interests are protected is considered in those Chapters which deal with the various interests, and no catalogue is here given of the interests which are protected against unintentional invasions and those which are not so protected.

193 Section § 3 defines negligence as “A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will

More sufficient recognition of plaintiff's rights would entail a modification of the Restatement (First) approach with the textual addition of primary rights. The altered text would read as follows:

- (a) plaintiff has a *primary right* that is protected against unintentional invasion;
- (b) defendant engages in conduct that is negligent with respect to that *primary right and related interests*;
- (c) the conduct legally causes an invasion of plaintiff's *primary right and related interests*....<sup>194</sup>

Significantly, this reformulation embodies the "primary right theory" currently used by some courts to establish venue but which was applied around the time that the First Restatement was drafted. For example, in 1932 the Supreme Court of Montana explained, "For the purpose of venue, a cause of action is composed of, first, 'the primary right of plaintiff,' and, second, 'the act or omission on the part of defendant without which there would be no cause of action or right of recovery against him'."<sup>195</sup>

A model for how this analysis would work can be found in cases decided by Californian courts, which currently apply the primary right theories to tort suits at the procedural stage of deciding venue and questions of *res adjudicata*. In 1943, the Supreme Court of California set out the elements for determining a cause of action while deciding *Panos v. Great Western Packing Co.* in which the plaintiff was injured in a meat packing house when he was struck by a large piece of meat being conveyed on an overhead trolley.<sup>196</sup> After the plaintiff lost his first claim based on a theory of negligence because the packing house allowed third parties to operate the equipment, the court had to decide if a second claim based on a different factual theory of negligence in that the defendant negligently operated the equipment could proceed:

"Where an action is brought to recover damages for injury to the person or property of the plaintiff caused by the defendant, and the plaintiff in his complaint alleges certain negligent acts of the defendant, and at the trial he is unable to prove these negligent acts

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result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm."

194 Restatement (First) of Torts §281. This definition also included "(d) plaintiff is not contributorily negligent" which would no longer be relevant given the more moderate comparative negligence regime which does not bar recovery upon evidence of any fault of the plaintiff.

195 *KALBERG v. GREINER*, 91 Mont. 509, 8 P.2d 799 (1932) (Citing 40 Cyc. 82-83). The court determined that Plaintiff's primary right was invaded when the truck was stolen but that the complete accrual of the cause occurred where the defendant's wrongful act was done. *Id.*

196 21 Cal.2d 636, 134 P.2d 242 (CA. 1943).



and a verdict and judgment are given for the defendant, the plaintiff is precluded from maintaining a subsequent action based upon the same injury, although in that action he alleges other acts of negligence. *There is in such a case a single cause of action, based upon the primary right of the plaintiff to be free from injury to his person or property and a violation by the defendant of that right through his failure to use proper care.* The plaintiff is not permitted to maintain successive actions for the same injury by alleging different acts of negligence on the part of the defendant.’<sup>197</sup>

A California Appeals court further elaborated on the primary right theory in *Sawyer v. First City Financial Corp.* while deciding an issue of *res adjudicata* as a ban to future litigation on the same set of alleged facts.<sup>198</sup> The court clarified that the presence of more than one possible liability theory or remedy does not create additional primary rights nor give rise to a new cause of action.<sup>199</sup> Alternatively, one primary right if violated may give rise to multiple theories of liability, or conversely, different primary rights may be violated by the same wrongful conduct.<sup>200</sup> One primary right such as the right to be free from bodily harm (or stated in the positive the right to bodily integrity) might encompass various theories of liability.<sup>201</sup>

For example, malpractice and sexual battery may occur during a single transaction but give rise to a different “harm” in that the former involves bodily injury (and thus violates the right to bodily integrity) and the latter involves harm to a plaintiff’s dignitary and privacy rights.<sup>202</sup> The only way to establish a new cause of action for future claims is to analyze

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197 21 Cal.2d 636, 134 P.2d 242 (CA. 1943) (italics added)(citing to Restatement of the Law of Judgments, section 63, comment a.). That same year the court expounded upon the primary right theory by relying on the Restatement of the law of Judgments sec. 63, comment b. to justify its approach. *See, Slater v. Shell Oil Co.*, 58 Cal.App.2d 864, 137 P.2d 713 (Cal.App. 1 Dist.,1943) (“There is in such a case a single cause of action, based upon the *primary right* of the plaintiff to be free from injury to his person or property...The plaintiff is not permitted to maintain successive actions for the *same injury* by alleging different acts of negligence on the part of the defendant”(Emphasis added by court)).

198 124 Cal.App.3d 390, 177 Cal.Rptr. 398 (Cal.App., 1981). (Action brought by sellers of land alleging a conspiracy to cause a default on development lender's note and first deed of trust and to hold a sham foreclosure sale for the purpose of eliminating the purchasers' obligation to sellers on nonrecourse note secured by a subordinated deed of trust).

199 *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-2 (1994). (explaining that the primary right is distinct both from the legal theory and from the remedy sought).

200 *Branson v. Sun-Diamond Growers*, 24 Cal.App.4th 327, 342, 29 Cal.Rptr.2d 314 (1994).

201 *Id.*, at # (“The theoretical discussion of what constitutes a “primary right” is complicated by historical precedent in several well-litigated areas establishing the question of “primary rights” in a manner perhaps contrary to the result that might be reached by a purely logical approach. For instance, the primary right to be free from personal injury has been construed as to embrace all theories of tort which might have given rise to the injury”).

202 *Friedman Prof. Management Co., Inc. v. Norcal Mutual Ins. Co.*, 120 Cal.App.4th 17, 29 (2004).

the original set of facts to find a new primary right violation.<sup>203</sup> This approach places the focus on the legal injury of a right violation (harm suffered) before analyzing the particular liability theory presented by the plaintiff.<sup>204</sup> Importantly, “[t]he most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action.”<sup>205</sup>

California employs the primary right theory as a form of “code pleading”<sup>206</sup> based on principles of equity law.<sup>207</sup> The justification rests on public policy considerations such as preserving the integrity of the judicial system and giving certainty to legal proceedings by protecting litigants from unfairly repetitive litigation and promoting judicial economy.<sup>208</sup> Yet, by virtue of identifying and parsing out separate causes of action the court may also need to carve out substantive law as it identifies new causes of action based on broader primary rights arising from precedent as well as statute.<sup>209</sup> Certainly, even if the primary rights theory is used by California courts for purely procedural matters, this approach is instructive for illuminating how a primary rights approach would proceed in tort adjudication. For example, the appropriate steps in determining a cause of action requires identifying and proving: “1) a primary right possessed by the plaintiff, 2) a corresponding primary duty devolving upon the defendant, and 3) a delict or wrong done by the defendant which consists in a breach of such primary right and duty.”<sup>210</sup> Unlike a purely transactional approach that just looks at the facts of a case to determine overlapping theories of liability and the wrong conduct of a defendant, the primary rights theory fully conceptualizes the notion of the primary rights that define the defendant’s duty.<sup>211</sup>

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203 *Id.*, at 403 (“A ‘cause of action’ is conceived as the remedial right in favor of a plaintiff for the violation of one ‘primary right.’ That several remedies may be available for violation of one ‘primary right’ does not create additional ‘causes of action.’ However, it is also true that a given set of facts may give rise to the violation of more than one ‘primary right,’ thus giving a plaintiff the potential of two separate lawsuits against a single defendant.”)

204 *Slater v. Blackwood*, 15 Cal.3d 791, 795, 126 Cal.Rptr. 225, 543 P.2d 593 (1975).

205 *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681, 34 Cal.Rptr.2d 386, 881 P.2d 1083

206 *Crowley v. Katleman*, 8 Cal.4th 666, 681 (1994).

207 *International Evangelical Church of Soldiers of the Cross of Christ v. Church of Soldiers of the Cross of Christ of State of Cal.*, 54 F.3d 587 (C.A.9 ,Cal.,1995)( Explaining that primary rights theory comes from John Norton Pomeroy, 1 *Equity Jurisprudence* (5th Edition 1941), “The Constituent Parts of Equity,” Sec. 91, p. 120).

208 *Zapata v. Department of Motor Vehicles*, 2 Cal.App.4th 108, 115, 2 Cal.Rptr.2d 855. (1991); *Johnson v. City of Loma Linda*, 24 Cal.4th 61, 77 (2000).

209 *Id.*, at 403.

210 *Gamble v. General Foods Corp.*, 229 Cal.App.3d 893, 280 Cal.Rptr. 457, 460 (Cal.App. 1 Dist.,1991) ((citing to 4 *Witkin, Cal. Procedure* (3rd ed. 1985) *Pleading*, § 23, pp. 66–67).

211 Compare the “transactional analysis” used by federal courts to decide if two suits constitute a single cause of action if they both arise from the same “transactional nucleus of facts.” *Derish v. San Mateo–Burlingame Bd. of Realtors*, 724 F.2d 1347, 1349 (9th Cir.1983) or a single “core of operative facts.” *Shaver v. F. W. Woolworth Co.* 840 F.2d 1361, 1365 (7th Cir.1988).

Significantly, beyond the pleading stage of litigation, the California courts already recognize that “the concept of ‘duty’ may actually focus upon the rights of the injured plaintiff rather than upon the obligations of the defendant.”<sup>212</sup> Indeed, the California Supreme Court famously carved out a new theory of liability in a case based on the idea of protecting the rights of plaintiffs in *Dillon v. Legg*.<sup>213</sup> In justifying the expansion of protection, the court referred to Prosser’s famous words:

‘The assertion that liability must nevertheless be denied because defendant bears no ‘duty’ to plaintiff ‘begs the essential question - whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct. ... It [duty] is a shorthand statement of a conclusion, rather than an aid to analysis in itself. ... But it should be recognized that ‘duty’ is not sacrosanct in itself, but only an expression of *the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.*’<sup>214</sup>

In discussing the *Dillon* case and the power to open or sanction new areas of tort liability, a California appeals court points out,

‘Protection’ of the plaintiff is the initial element in the Restatement formula defining the requisites of a cause of action for negligence. The formula’s essentials include negligence, causation, and injury (the “invasion of an interest” of the plaintiff) but, unlike the California formula, the first element is not a “duty of care” in the defendant: it is the condition that the *‘interest invaded is protected.*’<sup>215</sup>

Despite the terminology of “interest” employed by the state court, its focus on the victim-plaintiff fits squarely within the proposed model of primary rights. Importantly, this focus reorients the purpose of the law to protect the rights of victim-plaintiffs.

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<sup>212</sup> *Peter v. San Francisco Unified School District*, 60 Cal.App.3d 814, 824, 131 Cal.Rptr. 854 (1976).

<sup>213</sup> *Dillon v. Legg*, 68 Cal.2d 728, 734 (1968) (recognizing the “spectator” shock of witnessing the death of a loved one).

<sup>214</sup> *Id.* at 734 (quoting from Prosser, *Law of Torts* (3d ed. 1964) pp. 332-333 [court added italics]).

<sup>215</sup> *Peter v. San Francisco Unified School District*, 60 Cal.App.3d 814, 824 (fn. 3), 131 Cal.Rptr. 854 (1976) (citing Rest.2d Torts, § 281, italics added by court).

## IV. WHY IT MATTERS: CIVIL SUITS AND THE RIGHT TO A REMEDY

Interestingly, one of the conceptual hurdles to imagining the application of human rights to private actors is the presumed unavailability of adequate procedural remedies to enforce these entitlements.<sup>216</sup> This perception even leads some experts to struggle to claim the legitimacy of the human rights regime. For example, U.N. Special Rapporteur Olivier De Schutter argues that “the lack of an institutional mechanism in international human rights law authorizing legal persons other than States to be sued directly can by no means be interpreted as meaning that the international law of human rights does not at present impose obligations on legal persons, and in particular corporations.”<sup>217</sup> De Schutter’s comment reflects the conundrum of how to explain the appearance of a lack of accountability mechanisms which contributes to a perception that non-state actors not only enjoy complete impunity but that human rights norms do not even apply to them. The absence or availability of a remedy thus becomes the lynchpin to actualizing the framework of non-state actor accountability for human rights violations.<sup>218</sup> Yet, in recognizing this hurdle, scholars seem to assume that it requires new procedures or laws, or that it requires resorting to an international body of some sort.<sup>219</sup> I would argue that we can find such a remedy in ordinary tort law. Moreover, ordinary tort law goes towards proving that the U.S. government (through the actions of local state level governments) is in fact fulfilling its duty to provide an adequate and effective remedy to individuals seeking redress for violations of their rights.<sup>220</sup>

As mentioned in Part II, States have an affirmative duty to guarantee victims of human rights harms access to an adequate and effective remedy.

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216 August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors* in PHILIP ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 71 (2005).

217 Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, PHILIP ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 232 (2005).

218 August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors* in PHILIP ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 87 (2005) (“as long as states do not want non-state actors to be directly accountable for human rights violations, they will not become accountable. When states want them to become accountable, they can achieve this by establishing the required institutions and procedures”).

219 August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors* in PHILIP ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 87 (2005).

<sup>220</sup> Although the U.S. has not ratified many of these treaties, it is nonetheless bound by the customary norms they embody which includes the right to a remedy. Moreover, on December 10, 1998, on the fiftieth anniversary of the Universal Declaration, President Clinton released Executive Order 13107.<sup>220</sup> This order mandates that the United States fully respect and implement its obligation under the human rights treaties that have been ratified.

For example, the Universal Declaration of Human Rights provides, "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."<sup>221</sup> Similarly, Article 25(1) of the American Convention confers on individuals "the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention. This article also requires state parties to provide a legal system that possesses authority to enforce remedies for victims."<sup>222</sup> From this duty to repair arises the duty to assure reparations in the form of damages for unlawful acts that constitute human rights violations.<sup>223</sup>

Where there is not an explicit "right to an effective remedy" spelled out in a treaty, monitoring bodies have interpreted other articles to establish such a right.<sup>224</sup> For example, the Inter-American Court reads Articles 1.1, 8 and 25 together to establish the right to a remedy. Article 1.1 serves as an overarching general obligation to ensure "all persons subject to their jurisdiction the free and full exercise of those rights and freedoms" which requires the State to protect, under Article 25, everyone's right to a "simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights" and "to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state." Thus the court must develop the possibility of a judicial remedy

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221 See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, art. 8, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200, art. 3, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); International Convention on the Elimination of All Forms of Racial Discrimination (CERD), G.A. Res. 2106, Annex, art. 6, U.N. Doc. A/6014 (Dec. 21, 1965); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, art. 14, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984); Convention on the Rights of the Child (CRC), G.A. Res. 44/25, art. 39, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989).

222 For further discussion see, Cançado, Current State and Perspectives of the Inter-American System, *supra* note 4, at para.12.

223 See, Shelton, Righting Wrongs, *supra* note 25, at 835, 837-8; see also Christian Tomuschat, Reparation for Victims of Grave Human Rights Violations, 10 Tul. J. Int'l & Comp. L. 157, 160 (2002).

224 The Inter-American Court in the *Baruch Ivcher Bronstein Case* stated, "this Court has reiterated that the right of everyone to a simple and prompt recourse or any other recourse to a competent judge or tribunal for protection against acts that violate his fundamental rights is one of the basic pillars, not only of the American Convention but also of the rule of law itself in a democratic society, within the meaning of the Convention [...]. By attributing functions of protection to the domestic legislation of the States Parties, Article 25 is closely related to the general obligation in Article 1.1 of the American Convention... Ivcher Bronstein Case, Judgment of February 6, 2001. Inter-Am Ct. H.R. (Ser. C), No. 74, at para. 135 (2001).[hereinafter, Ivcher Bronstein Case].

that includes the competent authorities to enforce the remedies granted.<sup>225</sup> This duty folds into the general duties under Article 2 to give domestic legal effect of international obligations to take such measures “as may be necessary to give effect to those rights or freedoms.”

Importantly, international treaty law extends the right to a remedy beyond criminal matters and includes civil suits. For example, Article 8 of the American Convention which guarantees everyone has a right to a hearing with due process guarantees by a competent and independent tribunal “for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.” Notably, a remedy can consist of a civil suit as much as a criminal one. Indeed, a state has the obligation to provide a remedy for private wrongs.

The fundamental nature of this general right to a remedy became all the more evident in 2005 when the U.N. General Assembly approved the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Survivors of Violations of International Human Rights and Humanitarian Law (“Basic Principles”).<sup>226</sup> These principles establish that part of the State’s obligation to respect and ensure respect for international human

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225 Art. 2

226. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Survivors of Violations of International Human Rights and Humanitarian Law, G.A. Res. 60/147, pmb., Sec. IX, U.N. Doc. A/RES/60/147 (Mar. 21, 2006). The Principles resulted from almost two decades of work. In 1989, the Sub-Commission of the United Nations Human Rights Commission on Prevention of Discrimination and Protection of Minorities (“Sub-Commission”) appointed a Special Rapporteur Mr. Theo van Boven to consider the issue of how to define the basic obligation under international law to ensure effective means of redress for victims of human rights violations. For more than a decade, beginning with van Boven’s appointment and continuing with the work of his successor Mr. M. Cherif Bassiouni, the body of the draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law were developed through a series of expert meetings, seminars, and state reviews. The development of these Basic Principles helped to stimulate a growing interest among academics and scholars as well as gave rise to a coalition of nongovernmental organizations from around the world who have followed the development of the Basic Principles REDRESS (U.K) leads the “the Reparation Coalition” consisting of a wide representation of human rights groups around the world in order to promote the adoption of the draft of the Basic Principles, supra note 21. See generally, [http://www.redress.org/law\\_reform\\_advocacy.html](http://www.redress.org/law_reform_advocacy.html) as well as their July 2003 published position paper at During the 60th Session of the Commission on Human Rights, resolution E/CN.4/2004/L.53 was adopted to convene a third Consultative Meeting to review and finalize the Draft was adopted. The Office of the High Commissioner for Human Rights will hold the meeting on November 2004. See, <http://www.un.org/News/Press/docs/2004/hrcn1092.doc.htm>. U.N. Resolution 1989/13 of the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities asked Special Rapporteur Theo van Boven to study the right to restitution, compensation, and rehabilitation for victims of human rights violations. After the production of three successive drafts of basic principles and guidelines, the U.N. Commission on Human Rights approved van Boven’s final draft in Resolution 1996/35. The U.N. Commission on Human Rights Resolution 1998/43 appointed Special Rapporteur M.C. Bassiouni to revise van Boven’s final draft, taking into account the views of states and nongovernmental organizations. Bassiouni’s revision also considered the Basic Principles and Guidelines on Impunity by Special Rapporteur Louis Joinet and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, supra note 24.

rights law entails providing those who claim to be victims of human rights law “equal and effective access to justice” and “effective remedies” which will include reparations.<sup>227</sup> This general duty may require the adoption of “appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice.” The Basic Principles specifically emphasize that they “do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norm.”<sup>228</sup>

The concept of an adequate and effective remedy is one of the most important to the Rule of Law, since without enforcement rights mean little.<sup>229</sup> An adequate remedy holds significant strategic importance for assuring the enforceability of all other rights. Without a remedy, a person’s rights lie inert.<sup>230</sup> This principle is reflected in the maxim of law *ubi ius, ibi remedium* (where there is a right, there is a remedy).<sup>231</sup> Certainly, “the most common principle in all legal systems is that a wrongdoer has an obligation to make good the injury caused, reflecting the aim of compensatory justice.”<sup>232</sup> Hence, most national jurisdictions contemplate some form of civil remedy, such as in contract and tort law, to “right” wrongs between private parties.<sup>233</sup> Significantly, these same remedies are the ones that the international system expects States to provide in order to fulfill their

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<sup>227</sup>Basic Principles and Guidelines on the Right to a Remedy and Reparation for Survivors of Violations of International Human Rights and Humanitarian Law, G.A. Res. 60/147, pmb., Sec. IX, U.N. Doc. AfRES/60/147 (Mar. 21, 2006).

<sup>228</sup>Basic Principles and Guidelines on the Right to a Remedy and Reparation for Survivors of Violations of International Human Rights and Humanitarian Law, G.A. Res. 60/147, pmb., Sec. IX, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

<sup>229</sup>Lisa J. Laplante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru’s Political Transition*, 23 *AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW* 51 (2007); Lisa J. Laplante, *Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention*, 22(3) *NETHERLANDS QUARTERLY OF HUMAN RIGHTS* 347 (2004);

<sup>230</sup>Cite *Madison v. Marbury*

<sup>231</sup>Naomi Roht-Arriaza, *Punishment, Redress, and Pardon: Theoretical and Psychological Approaches*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 13, 13-23 (Naomi Roht-Arriaza ed., 1995).

<sup>232</sup>DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* at 58-59 (2d ed. 2005).

<sup>233</sup>See DONALD HARRIS, *REMEDIES IN CONTRACT AND TORT* 21-24, 338-42(2002) (providing an overview of contract and tort law, as well as the remedies that a party may receive in each type of case).

international obligations.<sup>234</sup> For this reason, plaintiffs filing petitions with international bodies must first demonstrate that they exhausted their domestic remedies, which could include a tort suit to recover damages.<sup>235</sup>

The Basic Principles represent the principle that the right to a remedy does not exist at the prerogative of nations but instead is a fundamental obligation under treaty and customary law, and thus a state breaches this obligation by failing to provide an adequate remedy.<sup>236</sup> For that reason, the right to a remedy and reparations forms one of the pillars of international human rights law.<sup>237</sup> Indeed, institutionalizing mechanisms for remedying harm is not discretionary. The Inter-American Human Rights System has developed clear jurisprudence on this issue. Specifically, the Inter-American Court in 1989 clarified this point in its advisory opinion in which it declared, “the absence of an effective remedy for violations of the rights recognized by the Convention *is itself a violation of the Convention* by the State Party in which the remedy is lacking”.<sup>238</sup>

The human rights lens adds a new dimension to current scholarly debates regarding tort theory. Professors Zipursky and Golberg argue that tortious wrongdoing results in a *private* injury and thus gives rise to what they term as “civil recourse”, a term which refers to a private right of action to seek recourse “through official channels against the wrongdoer.”<sup>239</sup>

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<sup>234</sup> See DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW at 58-59 (2d ed. 2005) (characterizing the last 200 years of state jurisprudence on remedies as the precursor to the current body of international human rights law because those cases involved a state's duty to protect an individual's rights).

<sup>235</sup> Riccardo Pisillo Mazzeschi, Exhaustion of Domestic Remedies and State Responsibility for Violation of Human Rights, 10 Italian Y.B. Int'l L. 17 (2000).

<sup>236</sup> The Court established this fact in its first contentious case on Reparations. See Velásquez Rodríguez Case, supra note 10, para 25 (citing, Factory at Chorzow, Jurisdiction, Judgement No. 8, 1927, P.C.I.J., Series A, no. 17, p. 29 ; Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184).

<sup>237</sup> For further discussion see, Christopher C. Joyner, Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability, 26 Denv. J. Int'l L. & Pol'y 591, 592 (1998). [hereinafter, Joyner, Redressing Impunity]; Naomi Roht-Arriaza, Accountability For International Crime And Serious Violations Of Fundamental Human Rights: Combating Impunity: Some Thoughts On The Way Forward, 59 Law & Contemp. Prob. 93, 93 (1996). [hereinafter, Roht-Arriaza, Accountability for International Crime]; See, e.g., Ivcher-Bronstein v. Peru, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, ¶¶ 3, 4, 135 (Feb. 6, 2001) (emphasizing the importance of an individual's right to legal recourse under the Inter-American system and within democratic society, generally).

<sup>238</sup> Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9, at para 24 (1987) (emphasis added) [hereinafter, IACHR, Advisory Opinion 9/87].

<sup>239</sup> John C.P. Goldberg\* & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918 (2009-2010). See also, Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 5 (1998) (What they term writing that the “principle of civil recourse” refers to an individual's entitlement “to an avenue of civil recourse-or redress- against one who has committed a legal wrong against her.”)



Ultimately they argue that tort law delineates “the sort of conduct our legal system defines as wrongfully injurious toward another such that, when committed, the victim is entitled to exact something from the wrongdoer. This is the domain of law that was born centuries ago with the recognition of the writ of *trespass vi et armis*...”<sup>240</sup> Although tort doctrine has expanded over the years, “the two basic ideas at the core of tort law—a scheme of wrongs and rights and a mode of civil recourse through the state—have remained constant.”<sup>241</sup>

The civil-recourse model entitles plaintiffs to take actions against defendants through the coercive machinery of the state.”<sup>242</sup> First writing on this concept in 1998, Benjamin Zipursky writes,

“Tort law articulates rules telling citizens how they may and may not treat one another and how they may expect to be treated by others. In deciding and announcing these rules, *appellate courts are imposing duties on individuals not to treat others in certain ways and creating rights in individuals not to be treated in certain ways*...Rights of action should be understood against the backdrop of these rights, wrongs, and duties. Our system normally prohibits individuals and the state from acting against another individual. However, when the state recognizes a private right of action, it empowers and privileges an individual to act against another through the coercive machinery of the state—to take his property or to force him to behave a certain way. The substantive standing rule states *the conditions under which an individual is so empowered to act against a defendant: only when she has been legally wronged by the defendant, only when her own legal right has been violated by the defendant.*<sup>243</sup>

Zipursky’s model rests squarely on the notion of rights and duties although he never makes reference to the concept of human rights norms. The same observation can be made of Goldberg who argues that tort law “is best theorized as a special kind of victims’ rights law.”<sup>244</sup> Moreover,

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240 John C.P. Goldberg\* & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 919 (2009-2010)

241 Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 93 (1998)

242 Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 81 (1998)

243 Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 4 (1998).

244 John C. P. Goldberg, *What Are We Reforming? Tort Theory’s Place In Debates over Malpractice Reform*, 59 VAND. L. REV. 1075, 1077 (2006). Together with Zipursky he writes, “What is central

Zipursky and Goldberg's justifications for the civil-recourse model echo closely the human rights justification. They argue that plaintiffs have a due process right to redress that arises out of the Constitution.<sup>245</sup>

Also striking, is that these scholars offer the same type of justification for their model as often invoked in human rights law. They view the civil recourse model as representing a "civilized transformation of what is often considered a quite primitive 'instinct' of retributive justice, the instinct that I am entitled to 'settle a score' or to 'get even' with one who has wronged me. In a civilized society, we are not permitted to 'get even'--we are entitled to a private right of action in place of getting even."<sup>246</sup> Litigation can never restore equilibrium in the sense of reinstating the *status quo ante* in material terms in many cases that inflict harm against a person's dignity. However, it can empower victim-plaintiffs and thus restore them in terms of power.<sup>247</sup> Restoring a victim-plaintiff requires that they understand that they were not merely "unlucky" to be injured such as due to a natural disaster but rather to understand the human agency behind the injury and to label that person a "rights violator."<sup>248</sup>

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to torts, we seem now to be suggesting, is not how the injurer conducted himself but instead what has happened to the victim."

245 See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *Yale L.J.* 524, 531-59 (2005).

246 Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 *VAND. L. REV.* 1, 5 (1998)

247 "More fundamentally, the picture of tort law as restoring a balance rings false. Tort suits cannot in fact cancel out wrongs, nor do they typically make the plaintiff whole in any meaningful sense. In short, they do not return the world to a pre-existing equilibrium. Instead, they provide satisfaction, a term that carries connotations of vengeance on the part of the victim. A personal injury complaint, for example, does not simply ask of the defendant that he fix what he has broken or replace what he has taken. The commission of the tort has unalterably changed the world by creating a person who is now, and will forever be, the victim of a wrong. The complaint seeks not to undo or restore but to satisfy the victim not only for her losses, but also for the victimization itself." John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 *GEO. L.J.* 513, 576 (2002-2003)

248 "Our society teaches and institutionalizes norms of responsible conduct. When people violate these norms in a way that injures others, victims are resentful and respond to their wrongdoers. Society is prepared to stand behind these victims, to issue various kinds of responses to and judgments upon the violator, to let the violation and the injury affect the wrongdoer's reputation, and to treat that person as a rights violator and a person who has wronged another. And the violator faces these consequences notwithstanding that it is often a matter of bad luck, not bad character or bad choice, that leads to the wrong being done." John CP. Goldberg & Benjamin C. Zipursky, *Tort Law And Moral Luck*, 92 *CORNELL L. REV.* 1123, 1157 (2006-2007)