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The Monsanto Lectures: Understanding Tort Law

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ARTICLES

UNDERSTANDING TORT LAW

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I. THE INSTRUMENTALIST PREDICAMENT

My purpose here is to take up the invitation, stated in the terms of the Monsanto lectureship, "to critically re-examine the deep theory of tort law."[1] In making this reference to theory, those who instituted this lectureship wisely realized that theoretical reflection about law is not an exercise in detached and ethereal contemplation. Law fuses theory and practice. As John Wigmore once remarked, "Every institute and principle of law has a philosophy—as every object in the sun has its attendant inseparable shadow."[2] Even if—indeed especially if—our primary aim is to change the legal world, we must first understand it.

Nowhere is the need for theoretical clarity more urgent than in tort law. In the last few years, tort law has been in an extraordinary ferment, especially in the United States. The old controversy about whether tort law should be abolished has continued unabated.[3] The perception of a "liability crisis" has stimulated suggestions of tort reform.[4] Meanwhile, tort law itself has undergone a remarkable expansion: defenses and immunities have been restricted, established categories of liability extended, and new forms of action for mass injuries judicially recognized.[5] Each of these developments implies its own theory of responsibility, institutional role, and juridical justification—in short, each implies a theory of tort law.

Legal scholarship over the past generation has given intensive consider-

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1. The Monsanto Lectures on Tort Law Reform and Jurisprudence is an annual series endowed by a generous gift from the Monsanto Fund, the eleemosynary arm of the Monsanto Company. The gift enables Valparaiso University to invite distinguished scholars and professionals to critically reexamine the deep theory of tort as it has evolved in this country and to explore the avenues for its reform.

2. J. WIGMORE, SELECT CASES ON THE LAW OF TORTS viii (1912).

3. Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 555 (1985).

4. *See* Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987) (discussing the impact that comtemporary tort law and its expanding liability has on the insurance industry); Priest, *Modern Tort Law and Its Reform*, 22 VAL. U.L. REV. 1 (1987) (the 1986 Monsanto Lecture on Tort Law Reform and Jurisprudence, which discusses how a reorganization of modern tort law directed towards accident reduction will eliminate the adverse effects of the insurance crisis).

5. For a survey and interpretation of the most notable of these developments, see Rabin, *Tort Law in Transition: Tracing the Patterns of Socio-Legal Change*, 23 VAL. U.L. REV. 1 (1988) (the 1987 Monsanto Lecture on Tort Law Reform and Jurisprudence, which discusses the reasons for some of the major changes that have occurred in the tort system in its handling of accidental harm cases).

ation to the theory of tort law.[6] This attention to theory has been accompanied by an unparalleled increase in the complexity and sophistication of the academic writing on torts.[7] Economic analysis in particular has spawned an enormous literature of undeniable intellectual virtuosity.[8] Yet, as has often been observed, the law and economics literature rests on flawed normative foundations.[9] Every fresh contribution to the economic analysis of tort law adds a new storey to an edifice whose bottom has long since disappeared into the sand.

Economic analysis is merely the most developed form of the instrumentalism that has long characterized tort scholarship. In the United States, in particular, economic analysis fell on fertile ground. An unbroken line links the realist revolt against Langdell's legacy[10] to Leon Green's characterization of tort law as "public law in disguise"[11] to preoccupation with policy and the weighing of social interests.[12] Economic analysis held out the prospect of specifying and systematizing legal arrangements in accordance with the dominant academic assumptions.

In the instrumentalist approach, one understands tort law by focusing on goals, such as compensation, deterrence, loss-spreading, cheapest cost avoidance, or wealth maximization, that tort law is supposed to further. Because tort law is, at best, a tool for the achievement of such goals, their validity is prior and independent. Normative discourse about tort law thus consists in an appeal to the postulated goals and an assessment of the effectiveness of tort law in realizing them.

The instrumentalist approach is concerned with tort law only indi-

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6. For surveys and criticisms of the principal strands of contemporary tort theory, see Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27 (1980); Coleman, *Moral Theories of Torts: Their Scope and Limits: Part I*, 1 J. LAW & PHIL. 371 (1982); Coleman, *Moral Theories of Torts: Their Scope and Limits Part II*, 2 J. LAW AND PHIL. 5 (1983). For a recent review of tort theory bearing on the issue of causation, see Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1004-09 (1988).

7. *See, e.g.*, *Causation in the Law of Torts*, 63 CHI.[-]KENT L. REV. 397 (causation discussed from a variety of economic and philosophical perspectives).

8. *See especially* G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); W. LANDES & R. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983); S. SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987).

9. Weinrib, *Economics, Utilitarianism, and Legal Theory*, 30 U. TORONTO L.J. 307 (1980); *Change in the Common Law: Legal and Economic Perspectives*, 9 J. LEGAL STUD. 189 (1980); *Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

10. *See especially* Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

11. *See* L. GREEN, THE LITIGATION PROCESS IN TORT LAW 115 (2nd ed. 1977).

12. PROSSER & KEETON ON THE LAW OF TORTS 15-17 (5th ed. 1984) [hereinafter PROSSER & KEETON].

rectly. The instrumentalist starts by looking past tort law to a catalogue of favored social goals. Tort law matters only to the extent that it forwards or frustrates these goals. However much tort law engages the instrumentalist, it is never the primary object of the inquiry. What the instrumentalist proposes is not so much a theory of tort law as a theory of social goals into which tort law may or may not fit.

Because they are indirect, instrumentalist theories of tort law are also radically incomplete. The instrumentalist is concerned with whether the results of tort cases promote the postulated goals. Tort law, however, is more than the sum of its results. It also has a set of concepts and a distinctive institutional setting that look backward to the injurious incident rather than forward to the achievement of desired goals. Instrumentalists acknowledge that apparently fixed elements of the conceptual structure of tort law, such as the requirement of causation, are superfluous or alien to their analysis.[13] Their accounts thus fail to capture tort law's characteristic conceptual structure and adjudicative framework.

The assumption behind instrumentalist tort theory is that understanding how tort law forwards or frustrates a set of independent goals is equivalent to understanding tort law. The presence in tort law of a conceptual structure that is resistant to instrumentalist analysis, however, suggests that tort law is not exhausted by such goals. Indeed, the greater the importance one ascribes to this conceptual structure, the less satisfactory the instrumentalist approach to tort theory becomes.

Of course, we may be unable to achieve anything better than the instrumentalist's indirect and incomplete understanding of tort law. The recent literature on tort law, at least contains little hint of any other possibility.[14] So ingrained is the dominance of instrumentalist tort theory that an alternative approach is now scarcely imaginable. If tort law is not a matter of deterrence or compensation or some other such goal, what could it possibly be?

This article endeavors to answer that question. I propose to anchor tort law not in prior and independent goals but in the coherence of its own interior structure.[15] My approach differs from the instrumentalist's in two re-

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13. Landes & Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109 (1983) (the economic approach to tort law can dispense with causation); Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 105 (1975) (the language of causation is alien to tort law's goals).

14. A notable exception is George Fletcher's classic article, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). I have briefly criticized Fletcher's views elsewhere. *See* Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. ____ (1989). *See also infra* notes 33-34 and accompanying text.

15. For the broader theory into which this essay fits, see Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988)[hereinafter *Legal*

lated ways. First, I start with tort law and focus on it throughout. Thus, my discussion will contribute, I hope, to an understanding *of tort law* rather than of something else that tort law may or may not forward. Second, I claim that tort law itself provides the keys to its own intelligibility. This conclusion allows us to break free of the incorrect assumption that tort law must be comprehended through the various goals that have been postulated for it. In fact, these goals have nothing to do with tort law.

Behind the instrumentalism of contemporary tort scholarship lies the fundamental question: how is tort law to be understood? As we shall see, one can think of tort law in either of two ways: as an amalgam of unconnected considerations or as a coherent and integrated whole. Instrumentalist accounts take the former approach: they decompose tort law into separate features, to which they attach their favored goals. My criticism of instrumentalist accounts of tort law emerges from a critique of the conception of legal intelligibility that underlies them. Accordingly, this article contrasts the disintegrative and integrating models of understanding, argues for the superiority of the latter, and outlines how tort law can be seen to conform to it.

II. WHAT IS TORT LAW?

A. The Question

Theorizing[16] about tort law is an enterprise in understanding a specific object: tort law. What does this theorizing attempt to understand? What, in other words, is tort law?

In one sense, this question is premature, because one cannot answer it without already having engaged in the theoretical enterprise. Since the aim of tort theory is to understand what tort law is, the question invites us to display the fruits of our theorizing. A satisfactory answer is, accordingly, retrospective on our progress. This is not to say that tort theorizing envisages the formulation of a concise or static truth. The answer to the question, "What is tort law?", may be so complex that it consists in a repetition of the entire process of theorizing to that point. Moreover, the understanding it represents may itself need further clarification. But whatever the answer, the inquiry concerns territory traversed.

In another sense, however, the question points to a journey anticipated. Our theorizing deals with a particular body of law that is the object of our

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Formalism].

16. On the aptness of this unusual word, see OAKESHOTT, ON HUMAN CONDUCT 3 n.1 (1975) ("theorizing" appropriate to signify an engagement that is an activity rather than an outcome and that has an object). Oakeshott's influence on this part of the text will be apparent to anyone familiar with his work.

specific effort. The question, "What is tort law?", goes to the identity of what we are attempting to understand. Unless we have some answer—however blurred, dim, or inchoate—to this question, we will be unable to proceed.

In asking the question, "What is tort law?," I do not mean to suggest that tort law is arcane and mysterious. To the contrary, the question is meaningful only because tort law is within the intellectual experience of any serious student of law. Our familiarity with tort law means that we already have some appreciation of its nature. This appreciation both motivates our interest in further clarifying what tort law is and guides our assessment of any answer. Because we know, however inarticulately or provisionally, what tort law is even before we consciously confront the question, we can insist that the response be true to that knowledge. An inquiry into the nature of tort law is not an exploration of uncharted territory, but a visit to the familiar landmarks of our legal world.

The point of departure for theorizing about tort law—as well as about anything else—is experience.[17] We can understand only that which is familiar to us. I raise the question, "What is tort law?," not to short-circuit the inquiry by stipulating a favored definition, but to direct us to our experience as lawyers. This experience allows us to recognize a tort issue and to participate in the discourse and reasoning that characterize tort law. Tort theory seeks to ascertain whether and in what form rationality is or can be present to this experience. Accordingly, the question, "What is tort law?," turns us toward reflection about what we already know. Tort theorizing involves a transition from the lawyer's understanding of tort law to an inquiry into the nature of this understanding.

This transition is facilitated by the kind of phenomenon that tort law is. Tort law aspires to an intelligible connection between the existence of a particular controversy and its resolution. To this end, the judicial decisions that comprise tort law make manifest how thought is brought to bear on particular factual contingencies. Thus, even the pre-theoretical experience of tort law is highly intellectual. Tort theorizing involves thinking about an experience that is already permeated by thought.[18] By elucidating the

17. HEGEL'S LOGIC: BEING PART ONE OF THE ENCYCLOPEDIA OF THE PHILOSOPHICAL SCIENCES, § 12 (1830) (W. Wallace trans. 3rd ed. 1975).

18. Man—and just because it is his nature to think—is the only being that possesses law, religion, and morality. In these spheres of human life, therefore, thinking, under the guise of feeling, faith, and its generalized image, has not been inactive; its actions and its productions are therein present and therein contained. But it is one thing to have such feelings and generalized images, and another thing to have thoughts about them. The thoughts, upon which afterthought upon those modes of consciousness gives rise, are what is comprised under reflection, general reasoning, and the like, as well as under philosophy itself.

thinking implicit in tort law, tort theory capitalizes on the striving for intelligibility that is indigenous to the object of the theorizing. The transition to theory thus takes place on ground that is particularly adapted to it.

The intimacy of the connection between tort law and tort theory has practical consequences. Because it elucidates the implicit intelligibility of tort law, such theorizing can contribute to the criticism and elaboration of tort doctrine. This criticism does not supervene upon tort law from the outside, but works from within to hold tort law to its own pretensions of intelligibility. The practical relevance of theory is to point to what the positive law of torts ought to be by exhibiting the implications of what tort law already is. In this conception of the relationship of law and theory, tort law has the only purpose it can have as tort law: not (as the instrumentalist thinks) to promote independently justifiable goals, but simply to be tort law and therefore to develop itself in conformity with its own intelligible nature.

The answer I suggest to the question, "What is tort law?", serves both as a rough identification of the object of our theorizing and as the initial step in our theorizing about it. Although that answer points to uncontroversially salient aspects of tort law, it nonetheless has extensive implications. Latent within the lawyer's notion of tort law is a coherence that instrumentalism gratuitously betrays. That coherence allows us to recapture the possibility of a tort law that is intelligible in its own terms.

B. Tort Law as a Mode of Ordering

The most general answer to the question posed is that tort law is a mode of legal ordering. Law is composed of many modes of ordering, each of which features a particular kind of legal operation. Even before we assess the soundness of any tort decision, we can recognize that it belongs to tort law rather than to criminal law or to administrative regulation. One aspect of the distinction among modes of legal ordering lies in the different standards thought to be appropriate to each.[19] Another is the allocation of different modes of ordering to different governmental bodies.[20] Whatever the specific details, lawyers are aware that law is composed of various modes of ordering and that tort law is one of them.

Id.

19. For instance, the negligence standard is unremarkable in tort law but extraordinary in criminal law.

20. The Constitution of Canada, for instance, distinquishes tort law from criminal law by assigning the former to provincial and the latter to federal jurisdiction; see The British North American Act, 1867, 30 & 31 Vict., ch. 3 (U.K.), now renamed The Constitution Act, 1867, § 91 (27) and § 92 (13). It also has a provision that has been interpreted as distinguishing adjudicative from administrative office. *Id.* at § 96. *See also* Reference Re Residential Tenancies Act, [1981] 1 Sup. Ct. Rep. 714.

When characterized as a mode of ordering, tort law is not equivalent to accident or injury law. Accidents or injuries can be subject to many modes of ordering besides tort law: criminal law, insurance contracts, and specialized compensation schemes. Accidents or injuries are the material of tort law, but they are not themselves the mode of ordering. Tort law deals with injuries in a particular way.

I do not mean to suggest that a focus on accidents rather than on tort law is unwarranted. When the same phenomena are subject to different modes of ordering, we should, of course, compare the advantages and disadvantages of each. Whether accidents are better regulated by tort law or by some mix of alternatives is a standard concern of tort scholars.[21] Inasmuch as this issue, however, is about the relative merits of different modes of ordering, it presupposes an appreciation of each of those different modes. Even the decision to replace tort law should be based on an understanding of what tort law is. Thus, a more inclusive concern with accident regulation merely accentuates the need to understand tort law specifically.

As common law lawyers, we make contact with the tort mode of ordering through the study of judicial decisions. Each decision specifies what, in the court's opinion, this mode of ordering requires in a given situation. A judgment is a particular ordering in accordance with the judge's conception of the mode. The mode of ordering is not severable from the operations through which it works. When considering a case, we cannot intelligibly say, "This is the case, but where is the mode of ordering?" Each tort case is a rendering—felicitous or infelicitous—of the mode of ordering in particular circumstances, and the mode of ordering is immanent in and expressed by every episode of tort litigation.

Characterizing tort law as a distinct mode of ordering bears on the understanding of tort law in two ways. First, an order*ing* is an activity and is therefore not intelligible merely in terms of the objects on which the activity operates. Because a mode of ordering cannot be equivalent to what the mode orders, tort law is not to be understood merely as accident law. Second, as a *distinct* mode of ordering, tort law is different from other legal treatments of accidents and injuries, such as insurance arrangements or compensation plans. Both of these observations about tort law are negative: they tell us what tort law is not rather than what tort law is. At most, these observations set the boundaries within which to locate an answer to the question, "What is tort law?"

We must, therefore, proceed to a positive conception of the tort mode of ordering. The elucidation of the positive conception can be broken into two steps. First, we need to ascertain the distinctive features of this mode of

21. *See* PROSSER & KEETON, *supra* note 12, at 584-616.

ordering. Second, we must examine the relationship between these features. The following two sections deal with these issues in turn.

C. *The Features of Tort Ordering*

How are we to specify the features essential to tort law? What we call tort law is a mass of cases, doctrines, principles, procedures, policies and standards. All the elements of this mass are expressions of the tort mode of ordering, and yet our task requires us to select from this mass certain aspects that have special significance for understanding tort law. On what basis can the selection be made?

To answer this question we must keep in mind our purpose in asking it. We wish to understand that which legal experience identifies as a distinct mode of ordering. Our selection should, accordingly, go to this distinctness. The features that matter for present purposes are those without which tort law would evaporate into a different mode of ordering. The issue can be formulated as follows: "What features of tort law are such that their systematic absence would mean the loss of our entire mental representation of tort law?"[22]

Not all aspects of tort law are equally essential to the lawyer's sense of tort law as a distinct mode of ordering. Some aspects are sufficiently particular and localized that we would still regard the field in which they presently figure as tort law even if they were systemically modified or removed. For instance, modern tort law is in flux about such issues as whether and to what extent there should be liability for emotional harm[23] and whether occupiers' liability should be governed by a general standard of reasonableness or by more discrete categories of the entrant's status.[24] The controversies about these aspects take place within tort law; they do not involve a choice between tort law and some other mode of ordering.

In contrast, other aspects of tort law are so general and pervasive that they are indispensible to our conception of what tort law is. They characterize tort law in the literal sense of providing the indicia of its distinctive character. If they were completely removed, we would no longer be able to recognize what remained as tort law at all. These features together consti-

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22. This formulation is suggested by Rudolph Stammler's description of form as the "elements of a conception [that] are for other constituents of the same conception logically determining in the sense that they cannot be left out of account, if one is not to lose the entire mental representation which is directly under discussion." Stammler, *Fundamental Tendencies in Modern Jurisprudence*, 21 MICH. L. REV. 862, 883 (1922-23).

23. McLoughlin v. O'Brien, [1983] 2 App. Cas. 410 (recovery for nervous shock for plaintiff not present at scene of the disaster). For the American jurisprudence, see PROSSER & KEETON, *supra* note 12, at 359-67.

24. *See* PROSSER & KEETON, *supra* note 12, at 432-34.

tute what can be termed the basic structure of tort law. Because it is impossible for us to conceive of tort law without them, a theory of tort is necessarily a theory of these features.

Whether a feature is part of the basic structure depends on the role the feature plays in our conception of tort law. Consider, for instance, the issue of whether liability should be strict or fault-based. No question has been either historically more durable or doctrinally more important. Yet, because we could recognize as tort law a regime that was either strict or fault-based, the issue does not go to the basic structure of tort law. Strict liability and fault are competing liability regimes *for* tort law. The controversy between them does not affect our consideration of what tort law is.

On the other hand, the defendant's payment of damages to the victorious plaintiff is a feature of the basic structure of tort law. Changing the form of damages would move us from tort law to a different mode of ordering. For example, requiring the injuror to pay the state rather than the victim would be the sign of a system of penal fines. Similarly, a system under which the plaintiff received money, but not from the defendant, would strike us as a compensation scheme that has replaced tort law. The direct remedial connection of defendant and plaintiff seems to be essential to our conception of tort law in a way that the choice between strict and fault-based liability is not.

Two features are particularly salient to our conception of tort law. The first is the bipolar procedure that links plaintiff and defendant. In tort litigation the plaintiff sues the defendant and, if successful, is entitled to the defendant's performance of a remedial act. A system of disbursements out of a central fund to which victims applied and potential injurers contributed, would not be tort law, however desirable such a system would be from the standpoint of administration or insurance.

The second feature is the centrality of causation. Liability in tort law depends on the defendant's having inflicted harm on the plaintiff. We would not, I think, identify as tort law a system that ignored causation in compensating for disabilities. We might perhaps rejoice if eliminating the causation requirement allowed a more general treatment of injury, where compensation was triggered by the injury itself rather than by its tortious infliction. Again, however, such a more general treatment would be an alternative to tort law, not a version of it.[25]

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25. The significance of causation has come under intense scrutiny in recent years, spurred by cases where difficulties of proof have caused courts to shift the evidentiary burden to the defendant. For discussions of causation from various academic perspectives, see *Causation in the Law of Torts*, 63 CHI.[-]KENT L. REV. 397 (1987). There are several American cases that relax the requirement of proving causation. *See* Hymowitz v. Eli Lilly Co., 1989 N.Y. Lexis 389; Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr.

Identifying causation and the bipolar procedure as indispensable to our conception of tort law entails neither the moral desirability of these features nor the unimportance of other ones. The desirability of these features is a function of the desirability of tort law itself as compared with alternative modes of legal ordering. Our task here, however, is to identify tort law, not to assess its desirability. Similarly, a feature that does not belong to the basic structure of tort law is not for that reason juridically trivial. Such a feature (that liability is fault-based rather than strict, for example) can be internally important to tort law even though it is not essential to our conception of what tort law is.

D. Two Concepts of Ordering

Having ascertained the characteristic aspects of the tort mode of ordering, we must now turn to the relationship between the aspects. How does the conjunction of bipolarity and causation yield an ordering? The previous section outlined how the basic structure is basic. We must now deal with how it is a structure.

There are two ways to conceive of an ordering of several aspects.[26] In the first way, the aspects are intelligible only through the integrated whole that they form as an ensemble. Every aspect contributes to the meaning of the whole, and the whole gives meaning to its constituent aspects. Since every aspect conditions and is simultaneously conditioned by the others, to refer to one is to presuppose the relevance of the rest. The aspects belong together and are unintelligible in isolation. Such an ordering can be termed "intrinsic."

In the second way, the aspects are independent of one another. Their conjunction in a single ordering arises not from an internal necessity of their own intelligible nature but from a separate and extrinsic operation upon them. The aspects of a legal ordering in this second sense come to-

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132, *cert. denied*, 449 U.S. 912 (1980); Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948). For a discussion of the English and Canadian cases, see Weinrib, *A Step Forward in Factual Causation*, 38 MOD. L. REV. 518 (1975). *See also* Wilsher v. Essex Area Health Authority, [1988] 1 All. E. R. 71 (H. L.) (burden of proving causation does not shift on plaintiff's proof of breach of duty). It would, however, be wrong to infer (as does Calabresi, *supra* note 13, at 86-87) from relaxations in the plaintiff's burden that causation is not a constitutive feature of tort law. What is at stake is the status of causation, not the status of the plaintiff's onus to prove causation. Moreover, if causation did not matter, the courts would not agonize over the burden of proving it.

26. The nature of unity was much discussed among medieval Jewish philosophers, who were concerned in vindicating the unity of God. My outline of the two kinds of ordering follows the distinction between conventional and true unity in the eleventh or twelfth century work of Rabbi Bachya ibn Paquda. *See* RABBI BACHYA IBN PAQUDA, DUTIES OF THE HEART, 90-92 (Hyamson trans. 1962).

gether because positive law happens to bring them together, or because a single designation ("tort law") happens to apply to them in combination. Because the linking of the constituent aspects reflects the contingencies of social practice and linguistic usage, we can call such an ordering "conventional."[27]

The difference between these two concepts of ordering is that an intrinsic ordering is coherent whereas conventional ordering is not. A conventional ordering is a loose confederacy of autonomous elements; an intrinsic ordering is an intimate community in which every constituent is implicated in every other constituent. The constituents of an intrinsic ordering are the reciprocally reinforcing expressions of the single idea that runs through the ordering as a whole. For a normative phenomenon such as law, the coherence of intrinsic ordering entails a coherence of justification; a single justificatory consideration pervades the entire ordering without being limited by a competing justificatory consideration. An intrinsic ordering is thus coextensive with the scope of its underlying justification.

Is tort law to be understood as an intrinsic or as a conventional ordering? Even though we did not notice it at the time, a decision in favor of intrinsic ordering was effectively made when we took tort law to be a mode of ordering. The function of a mode of ordering is to order. The more perfectly it orders, the more satisfactorily the mode discharges its function. Because coherence is a virtue in ordering, a mode of ordering that renders a set of features coherent is superior to one that does not.

For understanding tort law, intrinsic ordering has two advantages over conventional ordering. The first is explanatory. If tort law is a conventional ordering, it can be decomposed into its several aspects without loss of intelligibility. Because these aspects are not intrinsically connected, they can be kept apart at least as easily as they can be brought together. But then the question arises: why *does* tort law bring them together? Even if one accounts for each of the features in isolation, their conjunction in a single mode of ordering remains mysterious. For an intrinsic ordering, in contrast, the conjunction of constituents raises no separate problem. Since all the aspects of the ordering are interrelated, to account for one aspect is to account for the ensemble in which it figures.

A second advantage of intrinsic ordering is justificatory. Each of the features in a conventional legal ordering has its own normative thrust. When the features are combined in a conventional ordering, the justificatory considerations they reflect are also combined. The failure of the features to form an integrated whole means that the justificatory considera-

27. The distinction between intrinsic and conventional ordering is equivalent to the distinction between intrinsic and extrinsic relation adumbrated in Weinrib, *Causation and Wrongdoing*, 63 CHI[-] KENT L. REV. 407, 444 (1987).

tions too are unintegrated. Nothing prevents these justificatory considerations from pulling in different directions or from mutually limiting one another's operation. Thus, the justifications underlying the separate features of a conventional ordering can artificially foreshorten one another's reach. Justifications that can be mutually limiting, however, are not being taken seriously as justifications: a justification justifies whatever falls within its justificatory scope, and it cannot be limited to extrinsically imposed boundaries. Intrinsic orderings are not exposed to this difficulty. Since an intrinsic ordering is a coherent whole, it can express a single justification that embraces everything to which it applies.

These comments trace the broad lines of argument that favor understanding tort law as an intrinsic rather than a conventional ordering. We must now consider more specifically how the distinction between these two conceptions of ordering bears on tort law's basic structure. As we shall see, contemporary tort scholars are almost unanimous in regarding tort law as a conventional ordering. Indeed, most would be mystified by the suggestion that tort law can be anything else. Because intrinsic ordering is now the less familiar of the two kinds, I will first deal with the difficulties in looking at tort law as a conventional ordering. Accordingly, Part III of this article considers some of the ways in which the basic structure of tort law can be fragmented. An intrinsic ordering repudiates all these disintegrative stratagems. Seeing what the intrinsic perspective denies may help us appreciate what it affirms. Part IV then outlines in positive terms what is involved in understanding tort law as an intrinsic ordering.[28]

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28. Critics may object that my initial question, "What is tort law?" may seem to initiate an outdated search for the essence of tort law, whereas tort law may be merely "a cluster of competing principles individuated as a group only for reasons of expositional convenience." Green, *Law's Rule*, 24 OSGOODE HALL L. J. 1023, 1031 (1986). Moreover, my apparent essentialism may seem to cloak an inconsequential or misguided claim about the words "tort law" and how we are entitled to use those words.

The question "what is tort law?" does not, however, deny that tort law may be nothing more than a convenient expositional grouping of competing principles. To the contrary, it sets the stage for considering that possibility. Even if we are initially inclined to think that tort law is a grouping of convenience, we need some way to identify the grouping and some grounds for accepting or rejecting that characterization of it. Attending to the features indispensable to our conception of tort law has the virtue of being both the most minimal and the only possible first step. Once tort law is identified as a mode of ordering that features causation and a bipolar procedure, the way is open to consider which concept of ordering is more consistent with tort law's being an intelligible normative phenomenon.

Nor does my argument involve a semantic shuffle about the words "tort law." This article is concerned with the intelligibility of a certain mode of juridical ordering. It is true that the English term for this mode is "tort law," so that those words provide us with access to the phenomena to which they refer. Nonetheless, our theme is the mode of ordering, not the words. Even if we happened to call the mode of ordering by a different name, or had no general name for the mode of ordering but a number of separately labelled liability fields (occupiers' liability, products liability, and so on) that featured causation and a bipolar proce-

III. Tort Law as Conventional Ordering

A. *Severing Procedure from Causation*

As we have already noticed, the basic structure of tort law is made up of at least two features, the procedural bipolarity of plaintiff and defendant and the doctrinal centrality of causation. One way of construing tort law as a conventional ordering is to think of these two features as mutually autonomous.

Consider, for example, the statement in a foundational case of American products liability: "[T]he cost of an injury and the loss of health and time may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[29] This sentence encapsulates a constant theme of contemporary tort analysis: the best resolution of the plaintiff's tragedy is to dissipate the effect of injury through defendant's insurance, thereby shifting the loss from the one person massively affected to a large group whose members would share—and therefore be less sensitive to—the burden.

The presupposition of this loss-spreading rationale is that tort law is a conventional ordering in which causation and procedure are not intrinsically linked. The bipolar procedure of tort law is seen as a means of securing access to an insurance fund. The justification for such access is that it is better that many persons each suffer a small loss than that one person suffer a large loss. The attractiveness of distributing injury losses through insurance, however, is independent of how the losses are caused. The justification would apply against any member of the insurance pool—indeed, against any member of *any* insurance pool—regardless of who inflicted the injury. The fact that the defendant caused the injury is irrelevant to the justificatory force of loss-spreading. Because loss-spreading and causation are conceptually unconnected, the courts' use of loss spreading to justify liability implies that the procedure that responds to a tort is independent of the causation indispensable to its being a tort.

The causation requirement is an artificial restriction on the reach of loss-spreading. Nothing about loss-spreading makes the defendant's causation of the injury significant. A social insurance scheme under which everyone in the community bore a portion of the costs of accidents, however caused, would spread losses most widely. To insist on causation by the de-

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dure, the questions raised here about the integrity of the features and the relationship between them would still remain.

29. Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring). For an overview of the broader issues involved in this statement, see Weinrib, *The Insurance Justification in Private Law*, 14 J. of Legal Stud. 681 (1985).

fendant is to foreshorten the justificatory reach of loss-spreading.

Under loss-spreading, procedure and causation do not cohere. The fact that the defendant has injured the plaintiff presents the court with an opportunity to lighten the burden of adversity, but the justification underlying the remedy ascribes no moral significance to causation. Causation occasions the plaintiff's suit without grounding the plaintiff's entitlement to recover. Procedure and causation are linked merely by the coincidence that both implicate the defendant in their different ways.

B. Fragmenting Causation

The artificial connection of procedure and causation may not, however, be the only signal of conventional ordering. Causation and procedure may themselves each be understood as internally fragmented. If each element of tort law is a conventional combination, the conjunction of these elements cannot be an intrinsic ordering.

Let me deal first with the fragmenting of causation. Causation refers to the sequence of events from the defendant's act to the plaintiff's suffering of injury as a result of that act. Causation is fragmented when stages of that sequence are pulled apart and understood to have independent normative significance. Assume, for instance, that the defendant injures the plaintiff by driving his vehicle at excessive speed. An analysis in which this episode is regarded as two separate events, one consisting in the defendant's pressing the gas pedal, the other in the plaintiff's being struck by the car, will lead to tort law's being understood as a conventional ordering. For if the defendant's action and the plaintiff's injury are separately intelligible, then we are entitled to wonder why tort law links them. The answer, *ex hypothesi*, cannot be that they form a single sequence susceptible of intrinsic legal ordering.

An outstanding example of causal fragmentation is Guido Calabresi's treatment of causation.[30] Calabresi distinguishes the increased risk created by the defendant's action (what he calls "causal link") from the injury that plaintiff suffers as a result of it ("factual causation"). His analysis treats these aspects of causation not as moments in a single sequence but as mutually independent elements. Calabresi assesses these elements in terms of the different goals (market deterrence, collective deterrence, spreading, and wealth distribution) that tort law might plausibly promote. The ordering that emerges from his account is paradigmatically conventional: tort law is understood as an unintegrated amalgam of competing justifications operating through unconnected legal concepts.

30. Calabresi, *supra* note 13.

Severing the defendant's act from the plaintiff's injury also occurs in the work of scholars who see tort law as a repository of moral notions. Their standard strategem is to focus on the moral status of the defendant's act, regardless of whether it causes injury, and then to question the significance of the plaintiff's injury. For example, Judith Jarvis Thomson has asked why tort liability attaches to negligently caused harm but not to negligence that by fortuity does not result in harm.[31] This question assumes that only the defendant's act engages the defendant's moral responsibility, since the occurrence of the harm is a matter of mere happenstance. Similarly, Jules Coleman, starting with the postulate that justice requires the annulling of wrongful gains and losses, has argued that the negligent actor makes an unjust gain only through failing to prevent the unreasonable risk, and that therefore the occurrence of the plaintiff's injury does not increase the defendant's moral debit.[32] Thomson's question makes the plaintiff's injury morally superfluous; Coleman's position makes it morally detachable. Both present negligence law, which insists on the plaintiff's injury as well as on the defendant's wrongdoing, as a conventional ordering.

George Fletcher's discussion of tort excuses[33] is a variant on the same theme. In Fletcher's analysis, excuses such as compulsion and unavoidable ignorance go to the fairness of holding the defendant liable. They are directed solely at the culpability of what the defendant did in the circumstances. An excuse removes the defendant from the range of the plaintiff's entitlement. The plaintiff's injury is necessary for that entitlement, but plays no moral role in the excusing argument. Excuses, accordingly, presuppose the validity for tort law of moral considerations that apply to the defendant's act independently of the plaintiff's injury. As a consequence of separating the defendant's act from the plaintiff's injury, Fletcher also posits a bifurcation between the defendant's obligation to pay and the plaintiff's right to recover. Thus, the excuse's fragmenting of causation leads to a parallel fissuring of the litigants' remedial nexus. Having severed the defendant's moral position from the plaintiff's entitlement, however, Fletcher fails to account for the connection of the two in tort law. Why, for instance, does the moral force of an excusing condition that pertains solely to the defendant's act (and seems therefore morally irrelevant to the plaintiff) operate at the expense of the plaintiff's right? And how do the competing

31. Thomson, *Remarks on Causation and Liability*, 13 PHIL. & PUB. AFF. 101 (1984); Thomson, *The Decline of Cause*, 76 GEO. L. REV. 137 (1987) (discussing why causation in some cases need not be proven in order to prevail). For an analysis of Thomson's question, see Weinrib, *supra* note 27 at 407, 411-16.

32. Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982). For an exchange on this position, see Weinrib, *supra* note 27, at 432-38. *See also* Coleman, *Property, Wrongfulness, and the Duty to Compensate*, 63 CHI.[-]KENT L. REV. 451, 460-70 (1987).

33. *See supra* note 14.

moral considerations that individually support the defendant's obligation to pay and the plaintiff's right to recover participate in a single mode of ordering?[34]

C. *Fragmenting the Bipolar Procedure*

Just as conventionalist ordering may sever the elements of causation, so may it also separate the poles of the remedial relationship between the parties.[35] The most palpable manifestation of the remedial nexus is the damage award that the losing defendant is obligated to pay the victorious plaintiff. When tort law is understood as a conventional ordering, the damage award is disaggregated into what the defendant pays and what the plaintiff receives. Each of the ends of this process rests on its own justification. The present section of this article concentrates on the standard way of bifurcating the damage award: assigning different social goals to the two segments of the remedy. In this connection, too, the breaking apart of the damage award gives rise to the explanatory and justificatory problems that beset conventional orderings.

To comprehend the gravity of these problems, we must keep in mind that the goals ascribed to tort law represent different and autonomous justificatory considerations. The goal of compensating the plaintiff, for instance, is not intrinsically connected to the goal of deterring the defendant. Deterrence operates on actors *ex ante* by providing incentives to avoid acts that might cause harm. Compensation, on the other hand, focuses *ex post* on the injuries suffered by the victim. Compensation is plausible even for injuries that cannot be deterred, and deterrence is plausible regardless of whether injury occurs. Each goal is intelligible apart from the other.

The mutual independence of the goals generates the following difficulty. Under the system of tort damages, the defendant is obligated to pay exactly what the plaintiff is entitled to receive.[36] Therefore, for an instrumentalist account of tort law to succeed, the transfer of a single amount must simultaneously effect many separate goals. Such a coincidence seems implausible even in a single case; it would be miraculous if it occurred across the board.

Consider again our example of the mutual independence of deterrence and compensation. From the standpoint of deterrence, damages operate ex-

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34. On the incoherence of Fletcher's treatment of excuses, see Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 475 n.10 (1987).

35. Indeed, as we have just seen in connection with Fletcher's analysis of excuses, conventionalist ordering may do the one because it does the other.

36. "A money judgment punishes the violator one dollar for every one dollar of compensation to the victim and vice versa." Berner, *Fourth Amendment Enforcement Models: Analysis and Proposal*, 16 VAL. U.L. REV. 215, 239 (1982).

cessively on some defendants and insufficiently on others. On the one hand, the damage award reflects the severity of the injury suffered by the plaintiff, even though a rational defendant might have been deterred by the prospect of a lower penalty. On the other hand, the deterrent falls only upon those who have actually caused injury, thus passing over wrongdoers whose actions have fortuitously not resulted in harm. Similarly, the plaintiff receives compensation only when the law has failed to deter the defendant, even though the plaintiff's need for compensation does not vary with the rationality of the deterrence. Tort damages tie compensation to deterrence in a way that frustrates the achievement of either.[37]

When interpreted instrumentally, the damage award encounters the difficulties characteristic of conventional ordering. First, there is an explanatory lacuna concerning the amalgamation of the different parts of the damage award. Deterrence accounts for the taking of money from the defendant, compensation for the giving of money to the plaintiff. But nothing accounts for the blending of these goals—or rather, fragments of them—in the sum that the defendant transfers to the plaintiff. Just as deterrence is not intrinsically connected to compensation, so the defendant's obligation to pay is not intrinsically connected to the plaintiff's entitlement to receive. The defendant's obligation and the plaintiff's entitlement are brought together not by the thrust of their underlying justifications but by an unexplained convention regarding the operation of tort damages.

Second, treating tort damages as a compound of unrelated justifications means that the justifications themselves are not taken seriously. A justification should apply to whatever it justifies. Because compensation and deterrence limit each other, neither fills its appropriate space. If compensation is a worthwhile goal, why not compensate regardless of how the injury is produced? If the justificatory force of deterrence is powerful enough to limit compensation, why is its operation triggered only by the occurrence of a compensable injury? Questions like these can be answered only if we know how the justifications that figure in a conventional unity are related. The relationship among justifications, however, is precisely what is unintelligible in a conventional unity.

These difficulties have led some scholars to propose the abolition of tort law.[38] In their view, tort law fails because it incoherently combines the vari-

37. As Professor Berner observes, "Thus, the initially alluring fact that under the Tort Model each dollar of compensation is a dollar of punishment and vice versa has an incurrable downside—*compensation and punishment are mutually limiting.*" *Id.* at 242 (emphasis in original).

38. *See, e.g.*, TERENCE G. ISON, THE FORENSIC LOTTERY (1967) Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 778 (1967) (discussing the fault system and a proposal which would combine nonscheduled social insurance with selective reimbursement as an alternative to the fault system); Sugarman,

ous goals ascribed to it. They argue that instead of having a mode of ordering that entrenches the purposeless mutual interference of different goals, we should translate each goal into the legal ordering appropriate to its particular requirements. We would then have one set of institutions that deals with deterrence and another that deals with compensation. Whatever mutual restrictions are necessary (e.g., not setting compensation so high that deterrence suffers) would be dealt with on the merits rather than remitted to the haphazard operation of tort law.

The proposal to abolish tort law on these grounds follows inexorably from the instrumentalist's approach. Because the posited goals are independent both of one another and of tort law, tort law is dispensable. For tort law optimally to accomplish its different goals would be the merest fluke. Directly pursuing these goals, therefore, makes more sense than fortuitously combining them in tort law. Scholars who make this criticism correctly understand the incompatibility of tort law and instrumentalist goals. However, the unintelligibility of tort law follows only from their assumption that tort law brings such goals together in a conventional ordering. Ignored is the possibility that tort law may be understood non-instrumentally as an intrinsic ordering.[39]

D. Wealth Maximization

1. Single Goal Instrumentalism

In the previous section I pointed out that the standard version of instrumentalism severs the plaintiff's role from the defendant's by ascribing different goals to each. Such instrumentalism, I argued, exhibits the defects characteristic of a conventional ordering. When tort law is construed as a combination of independent goals, we are left to wonder what accounts for the juxtaposition of these goals and how the justifications underlying them

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supra note 3 (discussing the feasibility of doing away with ordinary tort actions for personal injury); Owen, *Deterrence and Desert in Tort: A Comment*, 73 CALIF. L. REV. 772 (1985) (arguing for having different legal mechanisms to reflect different tort policies).

39. So far my sketch of the ways in which the features of tort law can be decomposed has dealt with the severing of causation from procedure, and then with the fragmentation of causation and of procedure. The process of fragmentation could be carried further. Having fragmented procedure into the defendant's obligation to pay and the plaintiff's entitlement to receive, an adherent of conventional ordering could further fragment the role of each litigant. *See* Fiss, *The Supreme Court 1978 Term—Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1978) (arguing for the fragmentation of litigants' roles). The role of the defendant could itself be understood as a conglomerate of the independent roles of injurer and conduit to an insurance fund. Similarly, the role of the plaintiff could be understood as a conglomerate of the independent roles of victim and private prosecutor. The first is another way of describing the problem with the loss-spreading rationale, treated above as a severing of procedure and causation. A version of the latter will be discussed under wealth maximization in the following section.

co-exist in a single legal ordering.

One might object that the difficulty lies not with instrumentalism as such but with an instrumentalism that posits many goals. If coherence requires that tort law be the expression of a single normative idea, an instrumentalism of multiple goals is obviously doomed to failure. It does not follow, however, that instrumentalism should be dismissed. An instrumentalism that posits only one goal might succeed where the standard instrumentalism fails.

Richard Posner's theory of tort law is a conspicuous example of single goal intrumentalism.[40] In Posner's approach, wealth maximization is the only goal at which tort law systematically aims. Tort law maximizes wealth by creating incentives for the prevention of injuries where the cost of prevention is less than the cost of the injury.[41] Assume, for instance, that the defendant can by an expenditure of $100 avert a $1000 injury that has a 25% chance of occurring. By imposing liability on the defendant, tort law creates an incentive to expend $100 in order to avoid an injury presently valued at $250. If, on the other hand, this injury could be avoided only by the defendant's expending $300, liability would be unjustified, since spending more money to prevent an injury than the injury itself costs would be wasteful.

The goal of tort law under wealth maximization is to deter uneconomical accidents. Posner thinks that this goal justifies not only the payment of damages by inefficient defendants, but also the receipt of damages by victorious plaintiffs. Whereas the standard instrumentalist account ascribes the separate aims of deterrence and compensation to the two poles of the remedial nexus, under wealth maximization deterrence alone encompasses both poles. Even the victim's receipt of compensatory damages is not justified by

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40. *See* POSNER, ECONOMIC ANALYSIS OF LAW 127-46 (3rd ed. 1986). In some of his more recent writings, Posner has denied that efficiency, construed as wealth maximization, is the only principle of justice. For his protestations and the collection of references, see Posner, *The Ethics of Wealth Maximization: Reply to Malloy*, 36 KANSAS L. REV. 261, 263 (1988). As Professor Malloy points out, Posner has never systematically elaborated the relationship between wealth maximization and the other justice goals that he professes to acknowledge. *See* Malloy, *The Merits of the Smithian Critique: A Final Word on Smith and Posner*, 36 KANSAS L. REV. 267 (1988). At any rate, Posner still maintains that efficiency is particularly relevant to courts. *See* Posner, *Wealth Maximization and Judicial Decision-Making*, 4 INT'L REV. LAW & ECON. 131 (1984). Posner also mentions that economics supplies (with a few exceptions not relevant to the present discussion) the implicit logic of the common law. *See* POSNER, ECONOMIC ANALYSIS OF LAW 229-33 (3rd ed. 1986). Whatever the status of the other goals, his analysis of tort law does not make use of them. His method, therefore, is that of a single goal instrumentalist even if his private beliefs no longer are. In treating Posner as a single goal instrumentalist, I do not mean to set up a straw figure: as should be evident, my view is that single goal instrumentalism presents the possibility of a more coherent version of instrumentalism than does the standard muddle of independent purposes.

41. *See* POSNER, ECONOMIC ANALYSIS OF LAW 147-51 (3rd. ed. 1986).

a discrete goal of compensation. In Posner's view, both parties are subject to wealth maximizing incentives that can be expressed in the single sum that the defendant is obligated to pay the plaintiff.

Is the theory of wealth maximization free of the deficiencies of conventional ordering? In particular, does Posner satisfactorily account for the damage award, which most concretely represents the parties remedial bond? The rest of this section deals with these questions. I first outline how Posner construes the damage award as a network of incentives. Following through on Posner's own arguments, I then criticize his failure to supply a plausible reason for making the plaintiff whole. Finally, I relate this criticism to the distinction between intrinsic and conventional ordering. The incentives Posner postulates supposedly serve a single goal, but they operate independently on the two parties and thereby sever the procedural link between them. Like other instrumentalist approaches, the theory of wealth maximization does not intrinsically connect what the defendant pays to what the plaintiff receives. Thus, Posner's theory shows that, although a coherent tort law is animated by a single normative idea, the presence of a single normative idea does not guarantee coherence.

2. Damages as Incentives

For Posner, the point of damages is to induce the defendant to avert the injury when, and only when, injury costs exceed precaution costs. Damages are the legal mechanism that prevent the defendant from omitting wealth-maximizing precautions.[42] The theory of wealth maximization makes the *defendant* the ultimate focus for the incentives supplied by tort law.

The *plaintiff's* role under the wealth maximization theory is to ensure that the incentive to incur precaution costs actually operates on the defendant. This incentive can be ineffective either because damages are not enforced or because the precaution costs are incurred by someone other than the defendant. In the former case, accidents will occur that, from an economic standpoint, should have been prevented; in the latter, such accidents will not occur, but only because they have been prevented at greater cost than they should have been. Awarding damages to the plaintiff disposes of both of these possibilities. The plaintiff, who is the one immediately harmed by the tort, has the opportunity and the motivation to enforce the defendant's obligation to take precautions. The prospect of receiving damages thus induces the most strategically located persons to act as private prosecutors. Moreover, if the damages paid by the defendants did not go to the victims, those who might be injured would themselves be tempted to incur precau-

42. *Id.* at 176-77.

tion costs. As a result, the defendants who, *ex hypothesi*, could avert the injury more cheaply would be spared the need to do so. The plaintiff's receipt of damages ensures that less efficient precautions are not substituted for more efficient ones.

Plaintiffs figure in this account not in their own right but as adjuncts to the imposition of incentives on defendants. Posner denies that compensation for the plaintiff's injuries is a direct basis for the plaintiff's receipt of damages. Compensation serves only to forward the enforcement of the defendant's obligation or to prevent the defendant's being relieved of that obligation by someone else's discharge of it. The important thing is that the defendant should be penalized for failing to take the efficient precaution. As Posner once put it, "that the damages are paid *to the plaintiff* is, from the economic standpoint a detail."[43]

Posner's account thus postulates a network of incentives that serve the single purpose of wealth maximization. The prospect of liability functions to induce the defendant to incur precaution costs when these are cheaper than injury costs. The receipt of money induces the plaintiff to enforce the defendant's liability and thereby keep the defendant's incentive operative. The prospect of compensation means that the plaintiff will not be induced to take precautions that would subvert the defendant's incentive. Together these inducements funnel the behavior of defendants toward incurring damage prevention costs where economical.

3. Some Criticisms

It is important to notice what Posner has explained and what he has failed to explain. Posner has provided economic reasons for taking money from the defendant and for giving money to the plaintiff. He has not, however, accounted for taking from the defendant the very sum that is given to the plaintiff and for setting this sum, as tort law does, at a level that makes the plaintiff whole. In other words, wealth maximization does not explain the very feature that most distinctively characterizes the tort remedy.

To see this, consider each of Posner's incentives in turn, starting with the defendant's incentive to take precautions. Assume the same illustrative figures mentioned above, that an expenditure by the defendant of $100 will avert a $1000 injury that has a 25% chance of occurring. A penalty that is valued at over $100 *ex ante* will induce the defendant to spend $100 on precautionary measures. Because in a tort framework the penalty is not exacted until after the injury occurs, the probability of the defendant's having to pay damages (disregarding, for the moment, the problem of securing enforcement) is tied to the probability of the injury. In our example, there-

43. POSNER, ECONOMIC ANALYSIS OF LAW 143 (2nd ed. 1977) (emphasis in original).

fore, we must ask what figure is such that a 25% chance of being liable to pay it will induce a rational actor to expend $100? The answer is: any figure over $400. A 25% probability of having to pay more than $400 will induce a rational defendant to take precautions costing $100.

As these figures show, the wealth-maximizing incentive on the defendant does not yield the compensatory damages that characterize tort law. Whereas tort law mandates damages of $1000 in our example, the logic of Posner's approach requires only any amount greater than $400. Of course, $1000 is an amount greater than $400, but as an incentive on the defendant $1000 has no advantage over any of the other amounts greater than $400. The $1000 on which tort law categorically insists becomes merely one of the damage awards whose prospect would deter a rational defendant. Wealth maximization transforms a specific requirement of tort law into one of an infinite range of possibilities.

Posner needs a further argument based on wealth maximization for making the award neither higher nor lower than the compensatory amount. Posner thinks that the first part of this task—limiting the award to the plaintiff's loss—is accomplished by an argument against overdeterrence.[44] Posner notes that the legal system is not infallible. Actors who have not acted inefficiently might be concerned about the possibility of being wrongly held liable. The higher the damages to which defendants are exposed, the more grievous are the consequences of legal error, and the greater the temptation to take precautions even when the cost of these precautions exceed the potential damage. Actors might rationally prefer the expense of inefficient precautions to the chance of exposure to excessive liability. Accordingly, high damage awards will overdeter by causing the avoidance of accidents that are economical.

This overdeterrence argument fails to justify compensatory damages. Perhaps Posner is right in claiming that unduly high damages will cause the taking of precautions where none are economically indicated. His argument, however, presupposes a determination of what makes damages unduly high; it does not itself supply that determination. Posner gives no reason for assuming that compensation is the precise level above which actors will begin to take inefficient precautions.

Moreover, even if the overdeterrence argument justifies not going above the compensatory amount, it provides no reason for not going below it. To the contrary, it would indicate that damages should be set at the minimum amount that would accomplish proper defendant deterrence. Under the overdeterrence argument, actors will be least tempted to take inefficient precautions when the consequences of being held liable are as

44. POSNER, *supra* note 41, at 176-77.

small as possible. In our example, this amount is not the $1000 damage that the plaintiff has suffered (and that tort law in fact awards) but the $401 that would cause a rational defendant to expend $100 to prevent the accident. Posner has failed to notice that his argument against punitive damages is also an argument against compensatory damages.

Let us next examine the incentives on the plaintiff. Posner argues that awarding damages to plaintiffs induces victims to enforce the norm of efficiency. This argument, however, fails to account for two crucial aspects of the phenomenon of damages, one dealing with the identity of plaintiffs, the other with the amount that they recover. First, not only does tort law give the victim standing to sue, but it also excludes suits by anyone else. What must be explained, therefore, is not why the victim can recover damages, but why *only* the victim can do so. On the hypothesis that wealth maximization requires that someone be induced to sue, why should the incentive be restricted to the injured party? One would think that private enforcement would be more effective if more persons were encouraged to take up the task.

Second, the amount required to bribe the plaintiff to act as a private prosecutor is not the amount of money that would make good the plaintiff's loss. The compensatory damages of tort law involve a comparison between what the plaintiff has and what the plaintiff would have had without the tort. This comparison is irrelevant to determining the amount that would provide an incentive to sue. Once the injury occurs, the relevant comparison is between what the plaintiff would have with the incentive and what the plaintiff would have without it. Any amount that improves the plaintiff's net position after the injury should induce the plaintiff to sue regardless of whether it makes good the loss. Of course, plaintiffs will in fact be induced by the prospect of recovering compensatory damages, but only because they will be induced by any amount that leaves them with a net gain. The incentive function is discharged by compensatory damages no better than it would be by double damages, triple damages, half damages,[45] or by a conventional sum of $10,000 after costs. Thus, even if Posner's incentive argument explained why the plaintiff gets something for a successful suit, it does not explain why the plaintiff gets the compensatory damages that tort law awards.

Posner's other argument for paying damages to the plaintiff is that otherwise the plaintiff might take precautions more costly than those availa-

45. In Mishnaic law, half damages were awarded for harm done by an ox that had not been attested to be dangerous. *See Baba Kamma* 1.4 in THE MISHNAH 332 (H. Danby trans. 1933). The Talmud discusses whether half damages should be conceptualized as compensation or as a penal incentive. *See Baba Kamma* 15a in THE BABYLONIAN TALMUD, SEDER NEZIKIN, Vol. 1, 64 (I. Epstein ed. 1935).

ble to the defendant. Assume in our example that the injury could be avoided either by the defendant's spending $100 or by the plaintiff's spending $200. Unless the damages assessed against the defendant went to the plaintiff, the plaintiff would spend $200 rather than risk a 25% chance of losing $1,000. As a result of the plaintiff's expenditure, society would be $100 poorer than it should. This argument obtains, however, only when the cost of precautions for the plaintiff is less than the costs of the injury. In our example the plaintiff would be tempted to take the precautions rightly incumbent on the defendant only if the plaintiff could avoid the 25% chance of a $1000 injury at a cost between $100 and $250. Yet tort law does not restrict the award of damages to the plaintiff to such circumstances. Even if the plaintiff had to expend more than $250 to avoid the injury—and therefore would be under no temptation to do so—the plaintiff would nevertheless be awarded damages. Under Posner's explanation, tort law provides plaintiffs with incentives to avoid taking the precautions into their own hands even when no incentives are needed.

Moreover, compensatory damages are not required even when the plaintiff's avoidance costs are less than the present value of the injury costs. Assume again that the plaintiff could avoid the injury by expending $200, so that unless the plaintiff can expect compensation, the plaintiff will spend $200 to avoid a 25% chance of loosing $1000, thus sparing the defendant the need to expend $100. The need to discourage the plaintiff from spending $200 does not support setting the plaintiff's award at the compensatory sum of $1000. The inefficiency of the plaintiff's preempting the defendant's precautions would be avoided if the plaintiff received an amount sufficient to induce him not to spend $200. In our example, this could be accomplished by an award of $800.[46] Although the plaintiff would be left with a loss of $200, it would not be economically rational for him to spend $200 to avoid it. The incentive on the defendant to spend $100 would thus remain operative.

Accordingly, Posner's theory of wealth maximization fails to account for the amount of the damages that the defendant is obligated to pay to the successful plaintiff. The arguments justify various sums to be taken from the defendant or given to the plaintiff. But nothing necessitates taking the same sum from the defendant as is given to the plaintiff, let alone fixing that sum at tort law's compensatory damages.

4. Wealth Maximization and Conventional Ordering

We started our consideration of wealth maximization by comparing it

46. Here too any sum above $800 would accomplish this result and $1,000 is, of course, above $800; but $1,000 is merely one of an infinite number of amounts over $800, and there is no reason to single it out as tort law does.

to the standard instrumentalism of multiple goals. When understood in terms of many independent and mutually limiting goals, the tort remedy is the mechanism of a merely conventional ordering. In contrast, wealth maximization aims at a single goal. Does it for that reason yield a more coherent understanding of tort damages?

The answer is "no." Wealth maximization postulates a network of incentives aimed at deterring the defendant from wasting social resources. Although geared to a single purpose, these incentives do not operate on the parties in an integrated way. Considerations of defendent deterrence, private enforcement, the undesirability of overdeterrence, and the avoidance of the plaintiff's less efficient precautions function as independent subgoals under the banner of a single maximizing idea. Accordingly, they do not all yield the identical sum. The separate operation of the various incentives plays the same decomposing role for wealth maximization that the different goals play for standard instrumentalism.

Wealth maximization recapitulates the tensions evident in the instrumentalism of multiple goals. Since each incentive is discrete, why not simply award to the plaintiff and fine the defendant the minimum amounts that would produce the appropriate behavior in each? If, as in our example, the defendant would be induced to take the cheapest precautions by the prospect of having to pay $401 and the plaintiff would be discouraged from taking more expensive precautions by an award of $800, all that is needed, it seems, is a set of legal arrangements that take $401 from the defendant and give $800 to the plaintiff. Tort law, which takes $1000 from the defendant and gives $1000 to the plaintiff, is excessive. Because the incentives operate independently, there is no reason to insist either that the defendant pay the same amount that the plaintiff receives or that the amount be adequate to compensate the plaintiff.

The tort remedy is characterized by the transfer of a single sum from defendant to plaintiff. Yet no single sum can systematically achieve all the incentive effects that wealth maximization requires. Of course, some of the incentives permit an award higher than the minimum amounts that would produce the various desired effects; the $1000 damage award of our example will induce the defendant's precautions and deter the plaintiff from preempting those precautions as surely as $401 and $800, respectively. Posner's stricture against overdeterrence, however, precludes exceeding the minima. As in the standard instrumentalism of multiple goals, the various justificatory considerations cut in different directions.

IV. Tort Law as Intrinsic Ordering

A. The Requirements of Coherence

Intrinsic ordering repudiates the fragmentation that conventional or-

dering allows. For intrinsic ordering, the whole of tort law's basic structure is implicit in any individual feature. Causation and bipolar procedure are neither severable from each other nor internally fissured. To see what intrinsic ordering requires, let us again first consider the relationship between causation and the bipolar procedure and then focus on the internal character of the procedure and causation in turn.

When the basic structure of tort law is understood as a coherent whole, its two characteristic features, causation and the bipolar procedure, are not separately intelligible. The defendant's injuring of the plaintiff and the plaintiff's recovery of damages from the defendant are mutually connected, so that the procedure is the precisely appropriate response to what the defendant has done to the plaintiff. The causation on which tort law fastens implies the necessity for this kind of procedure, and the procedure in turn presupposes the causation. Unless completed by the procedure, the normative implications of the defendant's conduct have not run their full course. And except as a response to the causation, the procedure has no necessary reason for existing. The procedure is thus the juridical reflex of what the defendant has done to the plaintiff.[47]

The intertwining of the causation of injury and the court's response is expressed through the justifications for granting or denying a remedy. The procedure would not be a necessary consequence of the causation, nor would the causation be presupposed in the procedure, unless the procedure mirrored what was normatively relevant in the infliction of harm. The arguments that can legitimately figure in the litigation must follow through on the moral implications of the injurious act. Accordingly, the justifications applicable to the plaintiff's claim must treat the causation as essential to their normative force. A justification such as loss spreading that is indifferent to causation has no place in a coherent tort law.

Moreover, just as procedure is not severable from the injury to which it responds, so the procedure is not internally divisible into independent components. In an intrinsic ordering the various aspects of the tort remedy—that the defendant pays, that the plaintiff is paid, and that the amount restores the plaintiff to the *status quo ante*—must be understood as constituting a single whole. The origin, destination, and quantum of the damages must be understood together, so that it makes no sense to take

47. The nexus between doctrine and procedure is what distinguishes tort liability from a tax. Liability expresses an intrinsic connection between the outcome of the litigation and the conduct of the defendant. A tax, however, is unconnected to the taxed activity except through a contingent decision of the political authorities. The connection between a tax and that which is taxed is conventional, not intrinsic. A coherent tort law cannot, accordingly, be conceived as a tax on activity but only as a judgment that follows through on what the causation of injury implies. For tort law as an activity tax, see Henderson, *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 915 (1982).

that particular quantum amount from that particular defendant unless it is paid to that particular plaintiff. Similarly, the taking of money from the defendant and the giving of money to the plaintiff cannot be ascribed to independent justifications that make their conjunction in tort law a merely conventional arrangement. Rather, the justification for obligating the defendant to pay must be correlative to justification for entitling the plaintiff to be paid, so that neither is intelligible without the other.

Finally, the causation that figures in an intrinsically ordered tort law is not fragmentable into two independent segments, one dealing with what the defendant did and the other with what the plaintiff suffered. Causation refers to a sequence stretching from the defendant's act to the plaintiff's injury. The defendant's act is understood from the standpoint of its potential for injuring the plaintiff, and the injury for which the plaintiff recovers is a materialization of that potential. The doing and the suffering of harm constitute a single unbroken process.

This conception of causation has the following implications. First, the doing and the suffering of harm are correlative; each is understood only through the other and, thus, through the relationship that they together constitute. Doing is significant inasmuch as someone suffers thereby, and suffering is significant inasmuch as someone has inflicted it. A doing that results in no suffering and a suffering that is the consequence of no-one's doing fall beyond the concern of tort law.

Second, because doing and suffering are correlative, any justificatory consideration that pertains to the doing of harm will also implicate the suffering of harm, and vice versa. The plaintiff and the defendant are locked in a reciprocal normative embrace. Factors, such as deterrence and compensation, whose justificatory force applies to only one of the parties play no justificatory role. The only pertinent justificatory considerations are those that capture and reflect the relational quality of doing and suffering.

Third, these justificatory considerations, whatever they are, themselves yield a normative structure that mirrors the correlative nature of doing and suffering. The plaintiff has a right against the defendant that is correlative to the defendant's duty to the plaintiff. This normative correlation fully reflects the correlative nature of doing and suffering when the defendant's duty and the plaintiff's right are each intelligible through the other. For such a normative correlation to obtain, the juridical position of both parties must be determinable by the same justificatory considerations.

Fourth, since the actor's duty is owed to the potential sufferer from the action and is correlative to the sufferer's right, an injurious breach of duty by the actor is also a violation of the sufferer's right. A tort is a wrong, not a permissible act that an award of tort damages retrospectively prices or

licenses.[48] Moreover, the wrong is not against the world at large[49] but against the injured plaintiff specifically.[50]

Fifth, because the defendant has wronged the plaintiff, the plaintiff can sue to have the wrong set right. The plaintiff does not step forward as a private enforcer of a public interest in wealth maximization or in anything else. Nor is the defendant singled out as a convenient conduit to an accessible insurance pool. The plaintiff sues literally in his or her own right as victim of the defendant's wrongful act.

Sixth, the successful plaintiff is entitled to a remedy that the defendant is obligated to discharge. The damages represent a quantification of the wrong done by the defendant and suffered by the plaintiff. At the remedial stage too there is a correlation, this time between the defendant's duty to pay and the plaintiff's right to receive the payment. The defendant's liability to pay damages is unintelligible apart from the plaintiff's entitlement to be compensated, and vice versa. Intrinsic ordering, therefore, is incompatible with the instrumentalist's strategy of focusing on the amount appropriate to the defendant's conduct separately from the amount appropriate to the plaintiff's suffering. Because the defendant's doing and the plaintiff's suffering are the mutually dependent constituents of a single relationship, the consequences of the defendant's wrong can be expressed by the transfer of a single sum from the defendant to the plaintiff. The damage award is not the mysterious blending of various independent goals or incentives, but the remedial embodiment of the correlative nature of doing and suffering harm.

We have come from causation back through the bipolar procedure to the mutual dependence of causation and procedure. If the basic structure of tort law is coherent, the doing and the suffering of injury can be conceived as a normative unit from which tort law necessarily arises. The intrinsic ordering of tort law can be summed up in the requirement that the bipolar procedure be—in its structure, argumentation, and remedy—a reflection of what is normatively implied in the defendant's having injured the plaintiff. The causation of injury has a normative structure parallel to the procedural structure of tort law. Just as the institution of damages represents a duty to pay that is correlative to an entitlement to be paid, so in the tortious caus-

48. *See* Coleman & Krauss, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986) (discussing the analytic implications of construing torts as permissible acts).

49. As Justice Andrews thought, in his dissenting opinion of Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N.E. 99 (1928). See especially the statement in Andrews' opinion that "[e]very one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." *Id.* at 350, 162 N.E. at 103.

50. As Chief Justice Cardozo thought. See especially the statement in Cardozo's opinion that "[w]hat the plaintiff must show is 'a wrong' to herself, i.e., a violation of her own right." *Id.* at 343-44, 162 N.E. at 100.

ing of injury the defendant violates a duty that is correlative to the plaintiff's right, and so the wrongfulness of the injury arises from the correlative nature of doing and suffering when causation is understood as a single sequence from act to injury. Otherwise, the procedure would not be following through on the normative implications of the injury. Thus, a coherent tort law makes a juridical reality out of the relationship of doer and sufferer.

B. Doing and Suffering

So far, the causation that pertains to an intrinsically ordered tort law has been described in general terms as the doing and suffering of a harm. Formulated negatively, causation is not the conjunction of two discrete events, one of which is the defendant's doing and the other the plaintiff's suffering. Formulated positively, it is a single normative sequence that begins in the defendant's act and ends in the plaintiff's injury. Can these ideas be rendered more specific and concrete?

Tort law itself can assist us here, as it has all along. Our entire discussion has arisen out of tort law. To identify the object of our theoretical attention, we sought the basic structure of tort law, i.e., those features of tort law indispensable to our conception of it. Causation is one of those features. The superiority of intrinsic over conventional ordering followed from our characterization of tort law as a mode of ordering. Intrinsic ordering, however, is not a merely theoretical desideratum. Inasmuch as tort law is truly a mode of ordering, the traces of intrinsic ordering should be present in tort doctrines, even those not themselves part of the basic structure. The doctrinal and conceptual organization of tort law may itself express the notion of doing and suffering that pertains to intrinsic ordering.

Indeed, anything else would be surprising. Juristic activity, which proceeds with sustained intellectual effort over long periods of time and with diffuse personnel, manifests a deep and persistent striving toward the coherence that legal systems value. Once we put aside the instrumentalist lenses through which scholars usually look at tort law we may see that tort law articulates the intrinsic unity of the doing and suffering of harm.

For intentional torts, intent links the defendant's doing with the plaintiff's suffering. Liability ensues when the plaintiff suffers the tortious consequence that is the intended point of the defendant's action. The consequence the plaintiff suffers is not considered independently of the consequence whose achievement informs the defendant's act; the wrong to the plaintiff consists in the defendant's acting to produce the very consequence that occurred. Of course, the law of intentional torts involves further issues, such as the specification of wrongful consequences,[51] the role of con-

51. *See, e.g.*, I. de S. Wife v. W. de S., Y.B. 21 Edw. 3, fo. 99, pl. 60 (1348) (appre-

sent in negating the wrongfulness of an intended consequence, and imperfect matchings of consequence and intent, as where the injury is more severe than intended[52] or harms a different person than intended.[53] These issues, however, presuppose the significance of intention as the normative link between the defendant's action and the plaintiff's suffering.

Negligence law is more complex and problematic than the intentional torts. One can summarize negligence law as follows: The defendant is liable for an act of misfeasance that breaches a duty of care owed to the plaintiff by falling below the standard of reasonableness and that is the factual and proximate cause of the plaintiff's injury. The organizing concepts of negligence law are act, misfeasance, reasonable care, duty, proximate cause, and factual cause. Do these concepts together form a conventional or an intrinsic ordering?

The instrumentalism that understands tort law as a conventional ordering dominates scholarship about negligence. The almost universal assumption is that the concepts of negligence law are the elements of a rhetoric that facilitates the operation of tort law's various goals. The possibility that negligence law represents an intrinsic ordering is barely bruited. Even the most rudimentary sketch of how negligence law is explicable in non-instrumental terms is lacking.

My suggestion is that the concepts of negligence law should be interpreted as the constituents of an intrinsic ordering. These concepts (so I shall now argue) trace a moral sequence originating in the actor's doing and completed in the victim's injury. They represent aspects of the doing and suffering of injury that are the interconnecting and mutually dependent members of a single set. For purposes of legal analysis we may focus now on this concept and now on that one. Nonetheless all these concepts are implicitly engaged in our reflection on any one, for through them we can understand as a single normative phenomenon the progression from the defendant's performance of an action to the plaintiff's suffering of an injury. The concepts of negligence law make sense not in isolation or as the vehicles of separate justificatory impulses but in the light of the entire sequence from doing to suffering.

The following survey of the negligence concepts attempts to substantiate this position.

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hension of battery a legally relevant harmful consequence); Wilkinson v. Downton, 2 Q.B. 57 (1897) (infliction of mental suffering a legally relevant harmful consequence); Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909) (predatory competition a legally relevant harmful consequence).

52. *See, e.g.*, Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891).

53. *See, e.g*, Talmadge v. Smith, 101 Mich. 370, 59 N.W. 656 (1894); Carnes v. Thompson, 48 S.W.2d 903 (Mo. 1932).

ACT. The requirement of an act signifies the kind of doing relevant to tort law: no liability is imposed unless the behavior of the defendant is a manifestation of his or her volition.[54] The doing that falls under tort law is not mere physical movement, but is the outward expression of an inwardly determined purpose. Actors can, so tort law assumes, stand back and consider the purposes they are attempting to realize through their acts, compare them with other possible purposes, and modify or abandon them. Thus, the free will of the actor is the starting point of the sequence from doing to suffering. The actor must have aimed at an effect—not necessarily the effect that in fact occurred (since there can be negligent as well as intentional torts)—but at *some* effect. Tort liability is excluded if the circumstances are such that the actor's physical movement cannot be construed as expression of an inwardly determined purpose—as when he strikes someone during an epileptic seizure or when his behavior is ascribable to the insane delusion that his movements are controlled by another.[55]

As the threshold for liability, the requirement of an act represents two potentialities that are completed in the rest of the sequence of negligence concepts. The first is the potential for normative assessment. As we have seen, an intrinsically ordered tort law has a structure of correlative rights and duties that is the normative counterpart to the correlation of doing and suffering. The very notion of duty is inapplicable, however, to any entity whose acts are not the expression of its self-determining agency. If the defendant's act is not a manifestation of the defendant's volition, the sequelae of the act cannot be normatively related to what the defendant has done.

The second is the potential for external effect. In acting, actors strive to bring a world external to them into conformity with their inwardly determined purposes. Acts thus involve the possibility of extending oneself out into the space beyond oneself and imprinting one's purposes there. Since this space can be populated by other actors, an act is a doing that involves the possibility of someone else's suffering.

MISFEASANCE AND FACTUAL CAUSATION. The distinction between misfeasance and nonfeasance[56] gives further specificity to the relationship of doing and suffering. The absence of liability under circumstances of nonfeasance means that the suffering for which the defendant is liable is a consequence of what the defendant has done to the plaintiff, not of what the defendant has failed to do. For the defendant to be liable, the defendant's act must have participated in the creation of the risk that materialized in the plaintiff's injury. The injury suffered by the plaintiff is thus tied to the

54. Restatement (Second) of Torts § 2 (1965).

55. Buckley v. Smith Transport, [1946] Ont. Rep. 798 (C.A.); Breunig v. American Family Ins. Co., 45 Wis. 2d 536, 173 N.W. 2d 619 (1970).

56. PROSSER & KEETON, *supra* note 12, at 373-85.

defendant's doing in a particularly intimate way. That the plaintiff would not have been harmed had the defendant done something else is irrelevant. The plaintiff's suffering must mark the fruition of an injurious possibility implicit in the defendant's act.

The misfeasance requirement is essential if tort law is to represent the ordering intrinsic to doing and suffering. The requirement signals that consequences do not attract obligations except as they arise out of the risk inherent in a particular act. Suffering by the plaintiff that is independent of the defendant's doing has no significance for tort law. Accordingly, no liability lies for failure to prevent or alleviate suffering. The defendant's duty reflects the correlative morality of doing and suffering, and thus arises only from the potency of injury in the defendant's act. The plaintiff's unilateral need for assistance, no matter how urgent, falls outside the relationship of doing and suffering. The exclusion of liability for non-feasance ensures that the normative implications of a tortious act depend not on the undesirability of plaintiff's suffering as such but on the suffering being the materialization of a risk inherent in the defendant's action.

By insisting on misfeasance, tort law understands doing as transitive with respect to suffering: the plaintiff is the recipient of the effects that the defendant has generated. Tort law can therefore not be conceived on the Coasian model as involving a reciprocal relationship of two parties who impose effects each the other.[57] For tort law, one party is active and the other passive as the effects move from their origin in the defendant's act to their resting point in the plaintiff's injury.

Factual causation connects the misfeasance of the actor to the injury of the sufferer. Just as misfeasance has us consider what the defendant does from the standpoint of the potential for suffering, so factual causation has us consider the actuality of the suffering from the standpoint of the doing sufficient to produce it. Misfeasance and factual causation are the legal categories that frame the progression from doing to suffering.[58]

REASONABLE CARE. The requirement that the actor exercise reasonable care provides the normative standard distinctive to negligence law. This standard is usually explained in instrumentalist terms.[59] One can understand it more coherently, however, as the norm implicit in the doing and

57. *See* Coase, *The Problem of Social Cost*, 3 J. LAW AND ECON. 1 (1960). *See also* Weinrib, *Right and Advantage in Private Law* 10 CARDOZO L. REV. 1283 (1989) (Symposium on Hegel's Legal Philosophy).

58. It is therefore no criticism of the but-for test of factual causation that it does not exclude liability for omissions. (For an instance of this criticism, see Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 191 (1973)). As a test for factual causation, it has significance only in a context of misfeasance where liability for omissions has already been excluded.

59. *See, e.g.*, Posner, *supra* note 41, at 147-52.

suffering of harm.

Doing and suffering form a normative, as well as a physical, unit. The moral contours of this unit are shaped not by the instrumentalist's extrinsically imported goals, but by considerations internal to the very nature of doing in its relation to suffering. Two considerations are pertinent to the morality of doing and suffering, one dealing with the elements to be included, the other with the terms of their inclusion. First, a morality of doing and suffering must grant standing to both poles of the sequence. Accordingly, the norm can neither imply the illegitimacy of acting nor evince indifference to the suffering that results. Second, the norm must reflect the correlative nature of doing and suffering. Since doing and suffering are each understood through the other, each has equal status in the relationship as a whole. The justificatory arguments relevant to the relationship cannot, therefore, center on either doer or sufferer taken individually.

The requirement of reasonable care in negligence law also has two aspects, one concerned with the risk of harm that the defendant creates, the other with the objective nature of the standard. These two aspects correspond to the two normative considerations just mentioned.

The first aspect, the treatment of risk under the negligence norm, must grant both the legitimacy of the action and the illegitimacy of indifference to the suffering that action can cause. Risk—the potentiality for suffering inherent in the doing of an act—is the relational concept that links the doing of an act to the suffering the act might cause.[60] On the one hand, all doing involves some risk that someone else will suffer. An act is an externalization of the actor's purpose in a world that the actor cannot completely control, as natural forces and the behavior of others drive the act's effects beyond the consequence intended by its author. Thus, tort law cannot forbid the creation of risk without thereby forbidding action itself. On the other hand, action implies the possibility of revising one's purpose in the light of its foreseeable effects. To fail to do so is to evince indifference to the suffering by behaving as if there were no potential sufferers from one's doing or as if the doing were unconnected to the suffering it causes. Treating doing and suffering as a single normative unit thus precludes the doer's having a general immunity for the suffering occasioned by his or her doing.

The standard of reasonableness deals with the level of the risk that the defendant can impose on the plaintiff. The common law allows action that does not expose potential sufferers to a *substantial* risk, understood as a function of the likelihood of the injury's occurring and the seriousness of

60. "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation." Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) (Cardozo, C.J.).

the injury if it should occur.[61] This general standard is not susceptible of precise measurement and is applied by the trier of fact on a case by case basis. The permissibility of imposing risk up to this level preserves the legitimacy of action. The impermissibility of imposing a greater risk reflects the duty to modulate one's action in view of its potential to cause suffering.[62] In this way negligence law recognizes that inherent in action is both the inevitability of risk creation and the possibility of risk modulation.

The second aspect of reasonable care, that the standard is objective rather than subjective, is an expression of the equal status of the parties as correlative doer and sufferer. The correlativity means that no justificatory consideration can focus on either party in isolation. A defendant who could successfully plead that he acted to the best of his poor abilities[63] would unilaterally set the terms for the whole relationship. The plaintiff would be confined to the normative space left unoccupied by the operation of the defendant's subjective capacities.

What justifies the standard of reasonable care also disqualifies strict liability, negligence's historical competitor. Strict liability is incompatible with the inherent riskiness of action because it adjudges the very suffering of injury at the hands of another to be, at least in principle, tortious. Since the possibility of harming another is inherent in action and since the materialization of risk into injury is a contingent matter that is not itself a wrong, strict liability must construe the wrong to be the act that creates the

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61. This statement of the negligence standard is taken from Lord Reid's opinion in the leading English case of Bolton v. Stone, [1951] A. C. 850. Lord Reid expressly states that it would not be right to take the difficulty of remedial measures into account; if the activity cannot be carried on without creating a substantial risk, it should not be carried on at all. For Lord Reid, the burden of precautions is relevant only to insubstantial risks, because an actor who can easily eliminate even such risks should not impose them. See Lord Reid's gloss on his Bolton v. Stone judgment in Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. (Wagon Mound, No. 2), [1967] 1 App. Cas. 617, 641. This treatment of the burden of precautions distinguishes Lord Reid's formulation from Learned Hand's test in United States v. Carroll Towing, 159 F.2d 169 (2d Cir. 1947), which is usually cited by American legal academics. See the lucid discussion of Perry, *The Impossibility of General Strict Liability*, 1 CAN. J. LAW & JURISPRUDENCE 147, 169-70 (1988). The Learned Hand test permits the defendant to act when the value of the defendant's gains from the act exceeds the value of the plaintiff's suffering. The defendant's surplus of gain, however, is a unilateral consideration not relevant to the correlative nature of doing and suffering.

62. For the connection between this argument and the broader philosophical conceptions that underlie it, see Weinrib, *supra* note 57, at 1122-26.

63. In the original case establishing the objective standard in common law, the court rejected the argument that the defendant "ought not to be responsible for the misfortune of not possessing the highest order of intelligence." *See* Vaughan v. Menlove, 132 Eng. Rep. 490 (C. P. 1837).

For a fuller statement of the argument here and in the two paragraphs that follow, see Weinrib, *Liberty, Community, and Corrective Justice*, 1 CAN. J. LAW & JURISPRUDENCE 3, 13-16 (1988).

risk. But every act creates risk, and so for strict liability every act is implicitly a wrong. Strict liability thus implicitly denies the legitimacy of action.

The defectiveness of strict liability also emerges from consideration of the correlative status of doer and sufferer. Under strict liability the boundaries of the plaintiff's person or property is demarcated by what the defendant can do. Liability does not attach to the defendant so long as what was done does not penetrate the space occupied by the plaintiff. Strict liability has the same defect as the subjective standard, but with the parties reversed. By placing its justificatory weight on something particular to the sufferer and confining the doer to the space left over, strict liability allows something peculiar to the sufferer to determine the metes and bounds of what the doer can legitimately do.

PROXIMATE CAUSE AND DUTY. The concepts of proximate cause and duty normatively link the wrongfulness of the defendant's unreasonable risk-creation with the wrongfulness of the plaintiff's suffering. The standard of reasonable care signifies what wrongfulness is from the standpoint of doing. If doing and suffering are to be treated as correlatives, the normative considerations operative on the doer must also be applicable to the sufferer. The doer acts wrongfully by imposing a substantial risk of injury on the potential sufferer. The sufferer suffers wrongfully when that risk materializes.

This excludes liability when the plaintiff is injured by the defendant's wrongful act without being wrongfully injured. *Palsgraf*,[64] the leading United States decision on duty, is a case in point. There the action of the defendant's employee fell below the standard of care, because his shoving the passenger into the train created an excessive risk of injury to that passenger and his property. The negligent act dislodged the passenger's package, causing it to explode and to overturn the scales under which Mrs. Palsgraf was sitting. The defendant committed a wrong and the wrong caused Mrs. Palsgraf's injury, but since the prospect of her injury was not what made the defendant's act wrongful, no wrong was done to her. Because the doing was wrongful but the suffering was not, the wrongfulness did not link doer and sufferer correlatively. The plaintiff's injury was physically consequent on the defendant's wrong but normatively independent of it.

The absence of normative correlation in the *Palsgraf* facts originates in the standard of reasonable care. The negligence standard entails dividing the possible consequences of the defendant's acts into those that are the materialization of a substantial risk and those that are not.[65] A negligent

64. 248 N.Y. 339, 162 N.E. 99 (1928).

65. All the injurious consequences of an act are within the risk created by the actor. Risk being the potentiality of injury, the injury could have occurred unless it had formerly been a possibility.

actor creates both substantial and insubstantial risks, but the negligence consists only in the former. In *Palsgraf* the defendant's employee created a substantial risk of damaging the property of the shoved passenger but an insubstantial risk of injuring Mrs. Palsgraf. As it happened, the insubstantial risk materialized. Since this risk was not wrongful, its materialization did not make the plaintiff the victim of a wrong.

Proximate cause and duty express the requirement that, for the defendant to be liable, the wrongfulness of the defendant's risk-creation must be correlative to the wrongfulness of the plaintiff's injury. The concepts of proximate cause and duty connect wrongful doing to wrongful suffering by requiring the plaintiff's injury to be the fruition of the unreasonable risk that renders the defendant's action wrongful. The function of these concepts is to span the normative space between the parties by describing the injury that occurred in terms of the wrongful risk out of which it materialized.

This function involves viewing the plaintiff's suffering from the standpoint of an appropriately general description of the risk created by the defendant. The plaintiff's injury has a very specific nature: *this* plaintiff suffered *this* damage in *this* particular way. The risk created by the defendant is always more general than the specific characteristics of the injury. Risk signifies the potentiality of injury, and what *might* occur necessarily includes more than what *did* occur. The linking of doing to suffering requires describing the risk at a level of generality appropriate both to what the defendant did and what the plaintiff suffered. Proximate cause and duty are the legal concepts under which the general description of the risk links doing and suffering in particular cases.[66]

These concepts deal with two overlapping aspects of the sequence from risk creation to injury. Duty focuses on the class of persons affected by the defendant's negligence, proximate cause on the kind of accident or injury generated by that negligence. The two concepts cover, respectively, the questions of risk to whom and risk of what.[67] Since one cannot characterize the class of persons affected by the risk apart from the kind of accident or injury that they might suffer, and vice versa, the two questions are frequently interchangeable.[68]

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66. *See* McCarthy v. Wellington City, [1966] N.Z.L.R. 481, 521 (C. A.) (holding that "the injury which happened to the respondent was of the *general* character which a reasonable person would have foreseen as being likely to happen to the *class* of which the respondent was one, and that *class* was so closely and directly affected by the appellant's acts that the appellant owed a duty of care to those in it.") (emphasis added).

67. C.A. WRIGHT, CASES ON THE LAW OF TORTS 172 (4th ed. 1967).

68. The three questions, duty, causation, and remoteness, run continually into one another. It seems to me that they are simply three different ways of looking at one and the same question, which is this: Is the consequence fairly to be regarded within the risk created by the negligence? If so, the negligent person is liable for it:

Formulating a risk description of appropriate generality features the same considerations encountered in the determination of reasonable care. This is not surprising, since proximate cause and duty trace the wrongfulness of the defendant's risk-creation through to the maturation of the risk. The description of the risk should therefore reflect the wrongful quality of the act. As with the reasonable care standard, the rubrics of proximate cause and duty must neither delegitimize action nor legitimize indifference to the suffering that results from action.

On the one hand, too particular a description would legitimize indifference to suffering and thus fail to reflect the wrongfulness of the act. What makes a given act wrong is not that it might produce a particular wound in a particular person through a particular sequence, but that it might produce a type of wound in a class of persons through a certain kind of accident. Although the clinical details of the wound might be of interest to a doctor, the identity of the victim to his family, and the itemized sequence of events to a chronicler, none of these particulars is relevant to the wrongful quality of the defendant's risk-creation. At the time of the defendant's action, there could never be a substantial risk of the injury turning out *precisely* the way it in fact did. To require that the risk be described in terms of its particular impact would immunize any act from liability. If it conditioned the defendant's liability on such detail, the law of negligence would be indifferent to the suffering consequent on action.

On the other hand, an excessively general risk description would also fail to mirror the wrongfulness, but with the opposite effect of implicitly delegitimizing action. Take the most general description of the risk, that the risk is simply "of injury." Since all action produces such a risk, allowing liability on the materialization of this risk would be equivalent to judging action itself to be illegitimate. The wrongful quality of the defendant's act evaporates in so general a description. What we need is a characterization of the risk that allows us to distinguish the potential for harm in the defendant's act from the background harms that are part and parcel of all action. The very characterization of the risk as unreasonable means that the qualification takes place with respect to a more limited category of injury than injury *simpliciter*.

Proximate cause and duty do not themselves set the level of generality. They are the legal vehicles for the expression of such generality as seems

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> but otherwise not . . . Instead of asking three questions, I should have thought that in many cases it would have been simpler and better to ask the question: Is the consequence within the risk? and to answer it by applying ordinary plain common sense.

Roe v. Ministry of Health, 2 All E. R. 131, 138 (C.A. 1954) (Denning, L.J.). *See also* Fleming, *Remoteness and Duty: The Control Devices in Liability for Negligence*, 31 CAN. BAR REV. 471, 494 (1953).

appropriate for individual cases or for groups of cases.[69] Since these categories connect specific accidents to the risks out of which they materialize, the application of the categories varies according to the circumstances of the injury. Accordingly, no determining formula can be laid down in advance that satisfactorily captures the nuances of every possible occurrence. The most that the courts can accomplish through abstract prescription is point out that foreseeability of "the precise concatenation of events" is irrelevant,[70] while also cautioning against setting up excessively broad tests of liability. The description of the risk can be formulated only case by case in terms of what is plausible in any given fact situation as compared with analogous fact situations.[71]

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69. Morris, *Duty, Negligence, and Causation*, 101 U. PA. L. REV. 189, 196-98 (1952). Morris puts the point in terms of the rhetoric of litigation, but this rhetoric reflects the conceptual requirements of negligence law as an intrinsic ordering.

For an example of the approach to proximate cause outlined here, see the judgment of Chief Justice Magruder in Marshall v. Nugent:

> [T]he effort of the courts has been, in the development of this doctrine of proximate causation, to confine the liability of a negligent actor to those harmful consequences which result from the operation of the risk, or a risk, the foreseeability of which rendered the defendant's conduct negligent.
>
> Of course, putting the inquiry in these terms does not furnish a formula which automatically decides each of an infinite variety of cases. Flexibility is further preserved by the further need of defining the risk, or risks, either narrowly or more broadly, as seems appropriate or just in the special type of case.

Marshall v. Nugent, 222 F.2d 604, 610, (1st Cir. 1955). For a theoretical consideration of the indeterminacy evident in proximate cause, see Weinrib, *Legal Formalism*, *supra* note 15, at 1000-12.

70. *See, e.g.*, Lord Guest in Hughes v. Lord Advocate, [1963] App. Cas. 837.

71. The recoil from excessive generality in the duty formulations of recent English cases is instructive. In Home Office v. Dorset Yacht, [1970] App. Cas. 1004 (H.L.), the House of Lords was confronted with the novel question of whether borstal officers were responsible for damage done by borstal boys in the course of their escape from supervision. Members of the Court who favored liability adopted two different approaches. Lord Reid, arguing from the general to the particular, held that the reasonable foreseeability of injury should yield liability unless there was some justification for an exception. Lord Diplock, in contrast, proposed that one must start with "the relevant characteristics" of the present situation as compared to previous decisions; the general conception of reasonable foreseeability is to be "[u]sed as a guide to characteristics which will be found to exist in conduct and relationships which give rise to a legal duty of care", but not "misused as a universal." *Id.* at 1060. Lord Diplock was explicitly concerned to distinguish the damage suffered here from "the general risk of damage from criminal acts of others which [the plaintiff] shares with all members of the public." *Id.* at 1070. Unique among judicial opinions, Lord Diplock's judgment sets out a methodology for arriving at the appropriate general description of the risk on a case-by-case basis. Lord Reid's approach triumphed in Anns v. London Borough of Merton, [1977] 2 All E.R. 492 (H.L.). That this leads to an excessively general description of the risk became evident in Junior Books Ltd. v. Veitchi Co. Ltd., [1982] 3 All E.R. 201 (H.L.) (liability of a contractor for the substandard quality of floor laid by a sub-contractor), a decision that lower courts have—remarkably in the English context—treated as a dead letter. See, for instance Simaan General Contracting v. Pilkington Glass Ltd. [2], [1981] 1 All E.R. 79 (C.A.). In the last few years, the English courts have retreated from *Anns* to an approach that is close to Lord

This completes our survey of the concepts of negligence law. In each of these concepts doing is understood as a potential for causing suffering, and suffering as the culmination of the possibilities released by what the actor does. Negligence law so conceived reflects the correlative nature of doing and suffering.

These concepts represent negligence as a single sequence that extends from the potentiality to the actuality of injury. Misfeasance and factual causation capture the physical aspect of this sequence, the movement of energy from the initiation to the reception of effects. Reasonable care, proximate cause, and duty comprise the normative aspect of the sequence, the materialization in harm of unreasonably created risk. The notion of an act has both a physical and normative dimension, since the rooting of external effects in the volition makes the sequence amenable to moral assessment.

The physical and the normative are tied to each other. Without the physical aspect of the doing and suffering of harm, the normative aspect would refer to nothing; the very idea of unreasonable risk creation is unintelligible unless the risk can culminate in physical injury. Conversely, without the normative aspect, the doing and suffering of harm could not be bracketed as a single unit; locating the beginning of this unit in the defendant's negligence and the end in the plaintiff's injury prevents the two termini of the physical sequence from dissolving into a infinite extension backward and forward of causes and effects.[72]

The result is that negligence law, usually construed in instrumental terms, can be non-instrumentally understood as an intrinsic ordering. Causation is embedded in a conceptual structure that traces the progression from doing to suffering. The normative aspect of this progression allows the defendant's act to count as a wrong to the plaintiff. The bipolar procedure transforms the victim's right to be free from wrongful suffering at the actor's hand into a remedy whereby the actor undoes, so far as is possible, the injurious consequences. The bipolarity of doing and suffering matches the bipolarity of the procedure. The conceptual structure of negligence law enables the court to trace the progression from doing to suffering and to reverse it by making the wrongdoer compensate the victim of the wrong. The correlative nature of doing and suffering is elaborated in the negligence concepts, replicated in the bilateral procedure, and vindicated in the remedy.

Diplock's. *See, e.g.*, Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co., [1984] 3 All E.R. 529 (H.L.); Yuen Kun-Yeu v. Attorney General of Hong Kong, [1987] 2 All E.R. 705 (P.C.).

72. For an extended treatment of the relation of the normative and physical aspects of the sequence, see Weinrib, *Causation and Wrongdoing, supra* note 27.

V. Conclusion

In this article I have suggested a way of understanding tort law on its own terms rather than, as the instrumentalist does, by looking past it to the goals that tort law might serve. I began by identifying tort law as a mode of ordering whose constitutive features were the causation of injury and a bipolar remedial procedure. I then distinguished conventional from intrinsic ordering, noting the coherence that gives the latter its explanatory and justificatory superiority. An examination of how conventional ordering dismembers tort law and intrinsic ordering integrates it confirmed this superiority. Finally, I interpreted the conceptual structure of negligence law as the elaboration of a single normative sequence in which doing and suffering are correlative.

This argument is internal in every possible respect. It operates from within tort law, in that it starts from the features that are indispensable to our notion of tort law and makes sense of tort law's conceptual and institutional structure. It draws on the coherence that is internal to a sophisticated legal system. The intrinsic ordering it proposes as the law's intelligibility represents the most internal form of understanding for the aspects of an integrated whole. It locates a notion of doing and suffering internal to tort law. And it explicates doing and suffering without reference to any extrinsic goals.

In contrast, instrumentalism both is alien to tort law and makes the elements of tort law alien to each other. Instrumentalism starts with goals that are independent of tort law and subjects tort law to explanations that make nonsense of its conceptual and institutional structure. The conventional ordering of instrumentalism hacks tort law into discrete elements that it cannot coherently reassemble. Causation is detached from procedure, doing from suffering, and plaintiff from defendant. Instead of being an intelligible normative phenomenon, tort law becomes a battleground of mutually limiting justifications.

Central to this article is the distinction between conventional and intrinsic ordering. These two forms of ordering are, literally, rival syntaxes, two different ways of arranging-in-association (syn-taxis) the elements of tort law. Whereas intrinsic ordering treats those elements as the mutually illuminating bearers of a coherent meaning, conventional ordering makes tort law a normative gibberish in which the components of the discourse, when combined, lose whatever sense they have.

In tort law properly understood, the doing and suffering of a harm constitutes a normative unit that matches the bipolar procedure of tort recovery. Tort law does not forward independently justified goals. Rather, it gives juridical expression to the coherence of this normative unit. When tort law reflects and elaborates the intrinsic ordering of its basic structure, tort

law has the only purpose it can coherently have: to be tort law.

This understanding of tort law has roots in an intellectual tradition that stretches from Aristotle's account of justice to Kant's and Hegel's philosophies of right. Contemporary legal scholarship ignores this tradition or vilifies it as formalism, offering instead the economist's proliferation of technique, the radical's trashing of reason, and the visionary's yearnings for utopia. These alternatives abandon the project of understanding law. Perhaps the time has come to return to the possibilities for coherence in the law itself—and in the most ambitious tradition of philosophical reflection about law.[73]

Meanwhile, the starkly non-instrumental understanding of tort law presented here may be more familiar if we reflect on the non-instrumental values in our ordinary lives. We readily recognize the absurdity, for example, of understanding love as a means for minimizing the transactions costs of gratification.[74] Explaining love in terms of ulterior ends is necessarily a mistake, because a loving relationship has no ulterior end. Love is its own end. In that respect, tort law is just like love.

73. For treatments of the broader philosophical background of my view of tort law, see Weinrib, *Aristotle's Forms of Justice*, 1 RATIO JURIS ____ (1989); Weinrib, *supra* note 34; Weinrib, *supra* note 57; Weinrib, *Legal Formalism*, *supra* note 15.

74. Posner, *supra* note 41, at 238-39.