

## Two Conceptions of Tort Damages: Fair v. Full Compensation

John C.P. Goldberg

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

John C. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DePaul L. Rev. 435 (2006)

Available at: <https://via.library.depaul.edu/law-review/vol55/iss2/8>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

## TWO CONCEPTIONS OF TORT DAMAGES: FAIR V. FULL COMPENSATION

John C. P. Goldberg\*

### INTRODUCTION

A conference devoted to the subject of noneconomic damages invites us to consider the broader question of what, in principle, a damages award in a tort case is meant to accomplish.<sup>1</sup> On its face, that question seems easily answered. The point of tort damages is to compensate, to restore the *status quo ante*, to make the plaintiff whole. Among modern torts scholars, these stock phrases tend to be understood as different ways of saying that the immediate purpose of a tort suit is to compensate the victim with an amount of money equal to the losses suffered because of the tort. The Harper and James treatise nicely conveys this point: "The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to the plaintiff by defendant's breach of duty" where compensation consists of "repairing plaintiff's injury or . . . making him whole as nearly as that may be done by an award of money."<sup>2</sup>

---

\* Associate Dean for Research and Professor, Vanderbilt Law School. Thanks to Anita Bernstein, Jim Ely, Julie Faber, Richard Nagareda, Tony Sebok, Michael Stein, and Ben Zipursky for helpful comments, and to Isaac Combs for valuable research assistance.

1. The following analysis operates at a high level of generality and is subject to numerous qualifications. For now, I leave aside, among other topics, awards of nominal damages and injunctive relief; the role of comparative fault and failure to mitigate in reducing damages; the theoretical question of the incommensurability of money and certain losses; practical problems of computation; the effect on the plaintiff's recovery of U.S. common law's refusal to embrace the "loser pays" rule; the roles played by first-party and liability insurance; and issues pertaining to collection, bankruptcy, and the like.

2. 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 25.1, at 490, 493 (2d ed. 1986) (internal citations omitted); see also MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 2 (7th ed. 2001) ("[T]he fundamental issue addressed by a system of tort liability for unintended injury is when losses should be shifted from an injury victim to an injurer or some other source of compensation"); CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS § 3, at 7 (2d ed. 1980) ("The central problem in most tort cases is: whether the plaintiff or the defendant should bear a loss."); Harry Kalven, Jr., *The Jury, The Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 160 (1958) (noting in passing that "the function of tort damages [is] to make the plaintiff whole"); Clarence Morris, *Rough Justice and Some Utopian Ideas*, 24 ILL. L. REV. 730, 732 (1929-30) (arguing that, relative to the interests of the plaintiff, tort law substitutes for vengeance an insurance payment by which "[t]he exact sum of the plaintiff's loss is charged to the defendant"). The *Second Torts Restatement* states that the proper measure of tort damages must be derived from the "purposes for which actions of tort

This essay aims to complicate our thinking about the linkage between tort law and the idea of making whole. It suggests, first, that standard modern accounts that draw this link collapse an important distinction between (on the one hand) the immediate reasons for which the law provides a tort victim with a right of action against a tortfeasor and (on the other hand) the proper description of the remedy to which a person who successfully prosecutes a tort action is entitled.<sup>3</sup> Typically, the law makes tort causes of action available in order to enable someone who has suffered a certain type of wrong at the hands of another to vindicate his or her interests as against the wrongdoer by empowering him or her to proceed against the wrongdoer through the legal system. The animating ideas here are relational and retaliatory, involving notions of empowerment, response, and satisfaction. As such, they stand in contrast to standard renditions of the make-whole notion, which treat tort law as a means by which a person who suffers a harm can have that harm annulled, erased, or indemnified.

Second, this essay suggests that by attending to the foregoing distinction, we can better appreciate why the notion of making whole—fully indemnifying the victim for his or her losses—seems to provide a plausible description of the proper measure of tort damages, yet in the end fails to do so. In personal injury cases, tort *damages*—as opposed to tort causes of action—are properly conceptualized at least in part in terms of a backward-looking notion of restoration, as opposed to a forward-looking idea of the sort embodied in contractual expectation damages. In other words, tort law typically does draw *some link* be-

---

actions are maintainable,” and treats the giving of “compensation, indemnity or restitution for harms” as the first and primary purpose of tort. RESTATEMENT (SECOND) OF TORTS § 901(a), at 451 (1979).

Of course, many believe that the compensatory function of tort enables it to serve some additional or alternative function(s) of equal or greater social importance, such as loss-spreading (e.g., Fleming James, Roger Traynor) or deterrence of antisocial conduct (e.g., John Austin, Richard Posner).

3. See Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 748–49 (2003) (emphasizing the importance of distinguishing the question of whether a claimant is entitled to an avenue of recourse against defendant from the question of the nature of the remedy to which a plaintiff is entitled).

It will aid the cause of analysis to be as clear on terminology as possible. I use the plural word “damages” to refer to the monetary payment that a person or entity is obligated to pay to a victim who successfully prosecutes a civil action against that person or entity. I will use the terms “harm,” “loss,” and “damage”—the latter in the singular only—to refer to setbacks or adverse effects that a person might suffer, whether as the result of wrongful conduct or other causes. These effects include bodily harms (including death), harm to tangible property, out-of-pocket expenditures, loss of present and future wealth, loss of reputation, loss of privacy, pain and suffering, emotional distress, and loss of enjoyment of life.

tween the way in which things have gone worse for the victim and the quantum or degree of satisfaction that he or she may obtain via a tort action. Moreover, it often authorizes the factfinder to award full indemnification as the measure of satisfaction to which a given tort victim is entitled. Yet to acknowledge these points is still not to say that a successful claimant is entitled to receive, and may only receive, an award of damages that fully indemnifies him or her. Many tort victims are neither entitled to nor limited to this measure of damages, and many appropriately obtain a remedy in the form of less-than-full compensation or more-than-full compensation.

To render these abstract and contrarian thoughts clearer and more concrete, I will turn to history. Specifically, I will offer evidence suggesting that, in the eighteenth and nineteenth centuries, Anglo-American jurists appreciated and accepted the foregoing points. I will also provide evidence indicating that the tight linkage of tort to the idea of making-whole did not emerge until the mid- to late nineteenth century. As it turns out, a handy way to capture the difference between the older and the newer view, and to help explain how the latter emerged from the former, is to focus on a longstanding and crucial ambiguity in the legal term “injury.” In one standard usage, the term refers to *a completed wrong* that has been committed by one person against another. In another usage, it refers to *a loss or setback* that a person has suffered.<sup>4</sup> An understanding of torts as a law of injury, where injury is used in the first sense above, depicts tort as a law for the redress of wrongs, which in turn supports a conception of tort damages as *fair compensation*.<sup>5</sup> The idea of fair compensation in turn requires of the fact-finder an overtly normative determination based on consideration not only of the losses suffered by the victim, but also of the character of the defendant’s conduct, mitigating circumstances that do not rise to the level of recognized defenses, and the power dynamic between the parties.<sup>6</sup> By contrast, an understanding of tort as a law of injury, where injury is meant in the second sense above,

---

4. The *Oxford English Dictionary*’s first definition of the noun “injury” is “[w]rongful action or treatment; violation or infringement of another’s rights,” whereas its third definition is “[h]urt or loss caused to or sustained by a person or thing; harm, detriment, damage.” OXFORD ENGLISH DICTIONARY (2d ed. 1989), [http://dictionary.oed.com/cgi/findword?query\\_type=word&queryword=injury](http://dictionary.oed.com/cgi/findword?query_type=word&queryword=injury).

5. In using the term “fair” I do not mean to invoke or rely on a Kantian or Rawlsian theory of justice. Rather, I use it to convey the commonsense idea of an outcome that is appropriate in the sense of being equitable or reasonable.

6. As this Introduction emphasizes, the historical and theoretical account of tort and tort damages on offer here does not stand in polar opposition to the standard account—it does not define the victim’s entitlement to redress in a way that renders the value of the losses suffered by a tort victim *irrelevant*. Still, because it does not treat the idea of full compensation as defining the

depicts tort as a law of indemnification, which in turn supports a conception of tort damages as *full compensation*, which requires the factfinder to set damages at an amount equal to the losses suffered by the tort victim as a result of the tort.

Part II argues that a conception of tort law built around injury-as-wronging prevails in works such as Blackstone's *Commentaries*, Bacon's *Abridgement*, and some influential early American treatises, including those of Dane and Swift. It further argues that these sources embraced the idea of fair compensation as part of a wrongs-and-redress conception of tort law. Part III then discusses a handful of early nineteenth-century state court decisions, particularly a line of decisions from Pennsylvania, that shed light on how the indemnification model of tort law, and the full compensation conception of damages, began to take root in the first half of the nineteenth century. I also discuss some early treatments of punitive damages that replay and further illuminate the division between the two conceptions of tort damages. In doing so, I argue that scholars who have previously addressed the now famous Sedgwick-Greenleaf debate over the propriety of punitive damages have misunderstood the position that Greenleaf adopted. In Part IV, I offer some speculative explanations for the rise to prominence in modern treatises and law review articles of the make-whole conception of tort by linking the doctrinal developments discussed in Part III to broader trends in nineteenth-century legal theory. I conclude by identifying some present-day implications of the choice between the fair compensation and the full compensation conceptions of tort damages.

## II. INJURY AS WRONG, DAMAGES AS REDRESS (FAIR COMPENSATION)

As we trace our steps backward in time, the fog of ignorance inevitably grows denser. Yet we can readily locate evidence indicating the absence of a linkage of tort law to the modern idea of making whole. Exhibit number one is Blackstone's *Commentaries*. Whatever one thinks of the merits or politics of this work, nobody seems to dispute its influence on English and early American law.<sup>7</sup> So we may assume that the presentation by Blackstone of a conception of tort that does not link it to the idea of loss-shifting or full compensation reveals a common way in which many late eighteenth-century courts and law-

---

redress to which a successful tort plaintiff is entitled, it differs conceptually from the standard modern view and has different practical entailments, as discussed below.

7. See John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 560 n.176 (2005).

yers were thinking about those subjects. As we will see, this assumption is borne out by American treatises.

I have elsewhere described in some detail Blackstone's thinking about law and about tort.<sup>8</sup> The gist is as follows: the *Commentaries* draw a roughly Hartian distinction between two broad types of laws: laws that confer powers and laws that articulate obligations. The first type is covered in Books I and II, respectively titled "The Rights of Persons" and "The Rights of Things."<sup>9</sup> The second type of law, addressed in Books III and IV (respectively titled "Private Wrongs" and "Public Wrongs") prohibits certain forms of conduct and provides remedies or sanctions for violations of these prohibitions.<sup>10</sup> A public wrong is a crime, defined as "a breach and violation of public rights and duties, which affect the whole community, considered as a community . . ."<sup>11</sup> A private wrong is conduct that involves "an infringement or privation of the private or civil rights belonging to individuals, considered as individuals . . ."<sup>12</sup> Whereas private wrongs generate a claim on behalf of the victim against the wrongdoer to redress the wrong done to him or her, public wrongs generate a power in the state to punish the wrongdoer for the common good.

Breaches of contract, nonrepayments of debts, and acts of waste committed by tenants were all deemed by Blackstone to be private wrongs.<sup>13</sup> So, too, were tortious acts such as assault, battery, conversion, false imprisonment, malpractice, negligence, and trespass to land.<sup>14</sup> Each of these torts identified a set of duties owed by an actor to another person (or classes of other persons) that required him or her to act (or refrain from acting) in specified ways toward that other (those others) so as to avoid interfering with his or her (their) rights. Thus, a breach of any of these duties constituted a deprivation of the victim's rights. The linkage of the tortfeasor's commission of a private wrong to the deprivation of the victim's right is evident in Blackstone's use of the phrase "civil injury" as a synonym for private wrong.<sup>15</sup> In this phrase, the word "injury" refers to a *doing*, as opposed to a result or outcome. To suffer an injury is to suffer a deprivation of one's rights at the hands of another. This usage follows in a literal way the Latin *injuria*, which combines the prefix "in," meaning

---

8. *Id.* at 545–59.

9. WILLIAM BLACKSTONE, 1 COMMENTARIES \*117; 2 *id.* at \*1.

10. 3 *id.* at \*1; 4 *id.* at \*1.

11. 3 *id.* at \*2.

12. *Id.*

13. 3 BLACKSTONE, *supra* note 9, at \*116–18.

14. *Id.* at \*120, \*122, \*127, \*208.

15. *Id.* at \*2.

“negation,” with the noun “*juria*,” meaning “right.”<sup>16</sup> Grasping this understanding of injury explains the intelligibility of the familiar maxim *damnum absque injuria*.<sup>17</sup> In cases to which this maxim applied, a victim suffered a bad outcome, but not by virtue of the sort of mistreatment that qualified as a rights-deprivation or wrong.<sup>18</sup>

So tort law was, in Blackstone’s view, law that articulated a cluster of private wrongs. Of course, it was also law that provided a set of remedies appropriate to these wrongs. In some instances, it privileged the victim to respond directly (e.g., by acting in self-defense, or by peacefully repossessing property). More commonly, it empowered the victim to commence a cause of action in the common-law courts. The most important of these were the “personal” actions, which correspond to what we would today call actions sounding in tort and contract. Although personal actions occasionally enabled a victim to obtain a literal restoration of his or her rights (as would an action for what we now call specific performance),<sup>19</sup> they usually offered instead the substitute remedy of “a pecuniary satisfaction in damages.”<sup>20</sup>

That Blackstone framed tort redress in terms of pecuniary satisfaction through law in lieu of self-help or a literal restoration of one’s rights offers an important insight into his conception of torts as private wrongs. By entering into civil society, he supposed, each individual cedes his or her right to retaliate against someone who has deprived that individual of his or her rights to life, liberty, or property owner-

16. Although injury today is more commonly used to describe an effect rather than a doing, it still carries with it a normative connotation largely missing from more straight-forwardly factual notions of harm or loss. Specifically, it is used to refer to a set of individual interests that the law recognizes as worthy of protection and vindication. For example, even though interference with one’s interest in being free from annoyance—or in having aesthetically pleasing surroundings—might fairly be treated as a setback or harm to the victim, neither is treated by tort law as a sufficiently weighty interest to warrant recognition of duties on the part of others to refrain from or avoid interfering with that interest. If *D* acts carelessly with regard to *P*’s interest in not being annoyed so as proximately to cause *P* annoyance, *P* has no tort cause of action against *D* because the law of negligence does not regard the suffering of annoyance as the sort of harm that rises to the level of an injury, even though the annoyance is a loss or harm suffered by *P*. JOHN C. P. GOLDBERG ET AL., *TORT LAW: RESPONSIBILITIES AND REDRESS* 48–49 (2004).

17. *Black’s Law Dictionary* defines *damnum absque injuria* as “[l]oss, hurt, or harm without injury in the legal sense, that is, without such breach of duty as is redressible by an action.” *BLACK’S LAW DICTIONARY* 470 (4th ed. 1968).

18. The adjective “civil” in turn indicated that the rights-deprivation was legally cognizable, as opposed to a mere moral wrong, and that it was a wrong to the victim regardless of whether it was a crime (i.e., a wrong to the public).

19. 4 BLACKSTONE, *supra* note 9, at \*7 (stating that personal actions “redress the party injured, by either restoring to him his right, if possible; or by giving him an equivalent”) (emphasis added).

20. 3 *id.* at \*116–17.

ship.<sup>21</sup> Understandably, government generally declines to restore that right in the form of a broad, positive-law self-help privilege.<sup>22</sup> Instead, the victim is offered the alternative of obtaining satisfaction through an action at law, usually for damages. That the law of private wrongs was offered in recognition of the victim's right to respond to mistreatment at the hands of another explains why that law generates an exclusive power in the victim to seek redress through law. No one other than the victim (or his or her representative), not even the King, could decide to commence or withdraw a personal action.<sup>23</sup>

In sum, according to Blackstone, the commission of a tort was distinguished from the commission of a crime by the type of duty at issue and, correspondingly, the type of response that the law authorized. As public wrongs, crimes involved breaches of duty owed to no one in particular, or to the state, or to the community at large. When they were committed, the appropriate response was punishment for the public good, and the appropriate responder was the state (or, less anachronistically, the individual on behalf of the state).<sup>24</sup> As private wrongs, torts involved a failure to heed duties of noninjury owed by actors to particular persons or classes of persons. When these sorts of breaches were committed, the law responded by empowering the victim to sue to obtain redress from the injurer, usually in the form of a court-ordered damages payment.

Given this understanding of the point of actions for private wrongs, it is perhaps not surprising to find that Blackstone's discussions of "redress" and "satisfaction" do not focus on ideas such as indemnification or compensation. Indeed, so far as I am aware, he never uses phrases such as "make whole" or "making whole."<sup>25</sup> In a personal action, he says, the jury is to award damages adequate to provide sat-

---

21. 2 *id.* at \*438 (discussing how law channels the natural right to seek satisfaction from a wrongdoer).

22. Among other things, declining to do so discourages continuing cycles of vengeance, protects wrongdoers from excessive retaliation, and empowers victims who might otherwise be unable to retaliate.

23. Goldberg, *supra* note 7, at 555 n.153.

24. In Blackstone's time, criminal actions tended to be prosecuted by victims rather than professional prosecutors. Still, when acting in this capacity, the victim proceeded on behalf of the state, rather than himself. Royal officials could thus terminate the prosecution or pardon the offense at their discretion. By contrast, private actions were brought by victims on behalf of themselves and were controlled by them. Thus, even when the English monarch enjoyed the so-called "dispensing" power, he could not invoke it (or the power of pardon) to protect a tortfeasor from being exposed to a private suit brought by the victim. *Id.*

25. Thanks to electronic databases, the *Commentaries* are now searchable. To check my impression, I pulled up the fifteenth edition of the *Commentaries* (which includes all the revisions to the book that Blackstone made in his lifetime) on the Thomson Gale database. See Gale.com, The Making of Modern Law: Legal Treatises 1800-1926, <http://www.gale.com/ModernLaw> (last



isfaction.<sup>26</sup> Likewise, he speaks of the plaintiff's right to recover "damages for the *injury* sustained."<sup>27</sup> Here it must again be stressed that, when Blackstone speaks of a successful claimant recovering damages for an injury, he does not mean that the claimant is entitled to an amount of money equal to the quantum of *loss* suffered. Instead, the money awarded should suffice to provide satisfaction for the *victimization*, including not only the harm caused to the victim, but also the objective fact of having been mistreated by another.<sup>28</sup> Support for this reading comes from Blackstone's observation that claims for particularly heinous or willful wrongs may subject the tortfeasor to a statutory multiplier or "very large and exemplary damages."<sup>29</sup> Nowhere does he suggest that these exemplary damages are different *in kind* from "ordinary" damage awards, or that they are awarded for public rather than private purposes. Quite the opposite, they form part of the redress to which the victim is entitled because of the nature of the tortfeasor's mistreatment of the victim.<sup>30</sup>

Even when Blackstone does invoke the concept of "damages" to refer to the quantum of harm suffered by the plaintiff, he is careful to distinguish that usage from the distinct use of "damages" to refer to the amount that the successful personal injury plaintiff is entitled to obtain. Discussing writs of inquiry, he takes care to note that, while the jurors' verdict "must assess some damages," it may assess them "to what amount they please."<sup>31</sup> It is difficult to see why he would

visited Nov. 29, 2005). For each of the book's four volumes, I entered the queries "make w3 whole" and "making w3 whole." There were no relevant hits for either search.

26. See, e.g., 3 BLACKSTONE, *supra* note 9, at \*128 (noting that the tort remedy for false imprisonment aims at "making satisfaction for it") (emphasis omitted).

27. *Id.* at \*124 (internal citations omitted) (emphasis added).

28. *Id.* at \*125 (describing a slander by means of a truthful statement as falling within the *damnum absque injuria* maxim; the slander may have harmed the plaintiff's reputation, but its truth rendered it privileged, and therefore its utterance was not an "injuring" of the plaintiff).

29. See *id.* at \*121 (treble damages); *id.* at \*139-40 (observing that, because of the gravity of the wrong of adultery, a husband may obtain from an adulterer a "satisfaction" via a trespass action "wherein the damages recovered are usually very large and exemplary," although appropriately adjusted by "circumstances [including] the rank and fortune of the plaintiff and defendant; the relation or connexion between them; the seduction or otherwise of the wife, founded on her previous behaviour and character; and the husband's obligation . . . to provide for those children, which he cannot but suspect to be spurious"); 3 *id.* at \*220 (noting the likelihood that "very exemplary damages" will be given to the victim of a repeated nuisance). Obviously, statutory damage multipliers multiply something, namely the initial damage award. But the damage award was not in the first instance keyed to making whole. It was just the number that the jury came up with based on its all-things-considered assessment.

30. I briefly discuss below how punitive damages figure in the two conceptions of tort damages. See *infra* text accompanying notes 86-108.

31. 3 BLACKSTONE, *supra* note 9, at \*397-98. A writ of inquiry was a court order that followed the entry of certain kinds of interlocutory judgments, particularly default judgments. Such writs directed a sheriff to empanel a jury to determine the damages the plaintiff had sustained.

attribute to jurors a discretion of this breadth if their verdicts were subject to a rule of law specifying that the successful plaintiff is entitled to damages equal in amount to the losses he or she sustained. Instead, Blackstone seems to have supposed that victims who could not literally be restored to their rights were entitled to the sum of money that a jury, proceeding in good faith, determined to be appropriate in light of both the nature of the mistreatment *and* its consequences for the plaintiff. It is true that judges of Blackstone's time were entitled to order new trials on the ground of "exorbitant damages."<sup>32</sup> But he does not describe this power as it is sometimes described today—as an opportunity for a judge to ask whether the jury has made a gross valuation error. Instead, he maintains that the power is properly invoked only if a given damages award is so exorbitant as to provide evidence of a failure of process in the form of corruption or prejudice on the part of the jurors.<sup>33</sup> Thus, he reasons that if, upon a new trial, a second jury were to return a similar verdict to the first, the judge reviewing the second verdict should not order a third trial because even if a third trial were to result in a lower verdict, it would be difficult to see why the third jury—the outlier in the sample of three—should be credited as the noncorrupt one.<sup>34</sup>

The foregoing analysis suffices, I think, to demonstrate that the model of tort damages contained in Blackstone's *Commentaries* was not the full-compensation, make-whole model of today. In his view, the rule for calculating damages, at least for actions seeking satisfaction for the deprivations of rights such as the right to bodily integrity or reputation, was a rule calling for an award that reflects the wrong done to the victim by the injurer. He may, however, have held a different view of damages awards for torts involving *harm to property*, as well as breaches of contract—one that treated full compensation as a *default* measure of damages. As in all personal actions for damages, it

---

*Id.* at \*398. The above discussion may help explain a related passage, in which Blackstone states that jurors who return a verdict indicating that they have found for the plaintiff are to "assess the damages also sustained by the plaintiff, in consequence of the injury" perpetrated against him by the defendant. *Id.* at \*377. Here the seemingly awkward use of the word "also" can be explained as indicating that the jurors' award of damages to the plaintiff should take into account both the nature of the wronging of the plaintiff by the defendant and the quantum of harm the plaintiff suffered because of the wronging.

32. *Id.* at \*387. Courts could not order new trials on the ground that the jury's damages award was too low, although some apparently did issue new writs of inquiry on that basis. See JOSEPH SAYER, *THE LAW OF DAMAGES* 197–98, 205–09 (1770), available at Gale.com, Eighteenth Century Collections Online, <http://gale.com/EighteenthCentury>.

33. *Id.*

34. *Id.* For a discussion of the significance of English common-law practice for modern day new-trial practice, see Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 769–82 (2003).

was the jury's job in these cases to assess damages. But, in discussing them, Blackstone tends not to describe that job in terms of the free-wheeling inquiry outlined above. For example, in one place he suggests that an ordinary action for conversion (such as a conversion without malice) entails that "the plaintiff shall recover damages, equal to the value of the thing converted . . . ."<sup>35</sup> He expresses similar views with regard to awards of damages in actions for breach of contract, as well as actions for restitution.<sup>36</sup> Yet even in these categories of cases, the diminished value of the property, or the value of the performance withheld, is treated as establishing a *guideline*. If, for example, the defendant's interference with the plaintiff's property was willful or malicious, it was clearly within the province of the jury to award damages that exceeded the value of the harm to the property. Again, these broader awards were not styled as "punitive" or "extra-compensatory" damages, but rather as part of the redress to which a claimant was entitled by virtue of the fact that the defendant had deprived the claimant of his right through conduct that constituted egregious mistreatment.

To the extent it is tempting to dismiss Blackstone's views as "foreign," there is in fact good reason to think that his conception of tort falls under the heading of private wrongs, and the view of damages that flowed from that conception made its way across the Atlantic. As noted above, the influence of the *Commentaries* on early American law seems undisputed.<sup>37</sup> More to the point, two early American commentators—Nathan Dane and Zephaniah Swift—explicitly adopt his approach to tort law and damages. Thus, each employs the distinction between public and private wrongs and each includes within the domain of private wrongs "personal" actions to obtain damages for rights that cannot be restored. The latter are in turn divided into actions sounding in *assumpsit* (promise) and actions sounding in tort or

---

35. 3 BLACKSTONE, *supra* note 9, at \*152. It is notable that one of the few instances, if not the only instance, in which Blackstone links the idea of injury to notions of loss and indemnification is in stating the principle that, when Parliament seizes private property for public use, it must provide "full indemnification and equivalent for the injury thereby sustained." 1 *id.* at \*135. Here the forced alienation of the citizen's property, albeit justified by something akin to public necessity, counts as an injuring of the property owner. Instances of this special class of injury will by definition lack any indicia of egregiousness, and will always concern only interference with property ownership. Hence relief for the owner is set, as a matter of law, at the value of the property.

36. *Id.* at \*157 (stating that a disappointed promisee is entitled to a contract damages award equal to the loss sustained as a result of the breach); *id.* at \*161 (explaining that *quantum meruit* plaintiff is entitled the jury's estimate of the value of his efforts on behalf of the recipient of those efforts).

37. See *supra* note 7.

wrongs.<sup>38</sup> (The catalogue of wrongs includes the familiar collection of nominate torts, as well as more extended discussions of the emerging tort of negligence than one finds in Blackstone.) And the gist of these actions is defined in Blackstonian terms. Thus, according to Swift, a private wrong amounts to the infringement of the victim's rights and therefore a suit for the redress of such a wrong is a prosecution "for the recovery of one's right."<sup>39</sup> To effect such recovery, this part of the law operates "by compelling the wrong doer to give some thing to the injured party, by way of amends and satisfaction."<sup>40</sup>

Likewise, as to the computation of damages, both Dane and Swift insisted that juries have discretion to award damages by reference not only to the loss sustained by the plaintiff, but also to the nature of the defendant's wrongdoing. Dane, for example, points to a case of malicious prosecution stating that "the jury may consider the *malice*, and give the plaintiff more in damages than the expenses he was put to, where he sustained no injury in his trade or reputation."<sup>41</sup> Later, he asserted that juries have broad discretion, not cabined by "any rule of computation," in determining the amount of damages in "nearly . . . all cases of *torts* and many in contracts."<sup>42</sup> For his part, Swift stated that "[i]n an action of trespass, the jury are not confined to the actual damages sustained but may consider the malicious intent of the defendant . . ."<sup>43</sup> Today, of course, we might be tempted to treat this sort of statement as supporting the idea that, for certain egregious, tortious conduct, a plaintiff is entitled to ask for punitive damages. But, as was the case with Blackstone, there is no suggestion that Dane or Swift regarded the added increment of damages as a separate category or kind of damage. Rather, each treated the jury as having discretion to set damages in a holistic manner that promises the plaintiff "satisfaction" in light of the nature of his mistreatment at the hands of the defendant, as well as the extent of any losses resulting from that mistreatment.

In reviewing the foregoing works, I do not mean to suggest that lawyers and commentators were fastidious in their use of the concept

---

38. 2 NATHAN DANE, *GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW*, art. 1, §§ 2-3, at 481-82 (Boston, Cummings, Hilliard & Co. 1823); 1 HENRY DUTTON, *A REVISION OF SWIFT'S DIGEST OF THE LAWS OF CONNECTICUT* 481 (1851). Swift's book was originally published in 1823. Both are available at Gale.com, *The Making of Modern Law: Legal Treatises 1800-1926*, <http://www.gale.com/ModernLaw>.

39. 1 DUTTON, *supra* note 38, at 481.

40. *Id.*

41. 2 DANE, *supra* note 38, at art. 8, § 12, at 735.

42. 3 *id.* § 1, at 349.

43. 1 DUTTON, *supra* note 38, at 679.

of injury, such that they never invoked it to refer to loss, and hence never flirted with an indemnification conception of tort damages. Evidence to the contrary can be found, for example, in Bacon's *New Abridgement of the Law*, initially published between 1736 and 1766.<sup>44</sup> Most of Bacon's usage comports with Blackstonian usage. Damages recoverable in personal actions, for example, are said to be "a Compensation given by the Jury for an Injury or a Wrong done the party . . . before the Action brought."<sup>45</sup> Likewise, Bacon introduced his discussion of actions under the writ of trespass as follows:

The Word Trespass, which is derived from the Latin word *Transgredior*, signifies a going beyond what is lawful. It follows, that every injurious Act is, in the large sense of the Word, a Trespass. But, as many injurious Acts are distinguished by particular Names, as Treason, Murder, Rape, and other Names, the legal Sense of the Word Trespass is confined to such injurious Acts as have not acquired a particular Name.<sup>46</sup>

The use of the phrase "it follows" to start the second sentence, in light of the content of the first sentence, strongly suggests that "injurious" should be understood to mean wrongful, as opposed to harmful. As to damages, Bacon was also prepared to confer on juries broad discretion to do justice:

In all Actions which sound in Damages, the Jury seem to have a discretionary Power of giving what Damages they think proper; for tho' in Contracts the very Sum specified and agreed on is usually given, yet, if there are any Circumstances of Hardship, Fraud, or Deceit, tho' not sufficient to invalidate the Contract, the Jury may consider of them, and proportion and mitigate the Damages accordingly . . . .<sup>47</sup>

---

44. See MATTHEW BACON, *A NEW ABRIDGEMENT OF THE LAW* (1736), available at Gale.com, Eighteenth Century Collections Online, <http://gale.com/EighteenthCentury>. Although perhaps not on par with the *Commentaries* in terms of their stature, Bacon's *Abridgment* figured prominently in early American law and legal education. George Wyeth, for example, relied on it as the basis for his law lectures at William and Mary. Craig Evan Klafter, *The Influence of Vocational Law Schools on the Origins of American Legal Thought, 1779-1829*, 37 AM. J. LEGAL HIST. 307, 315 (1993).

45. 2 BACON, *supra* note 44, at 1 (1736).

46. 5 *id.* at 150 (1766) (paragraph breaks omitted). In later editions, this text was revised in a way to tighten the linkage of injuriousness and wronging:

The Word Trespass is derived from the French word *Trespasser*, which signifies to go beyond what is *right*. It follows, that every injurious Act is in the large sense of the Word a Trespass. But as divers injurious Acts are called Felonies, and are distinguished by particular Names, as Treason, Murder, &c. the word Trespass does not, in the legal Sense thereof, extend to any such injurious Acts.

*Id.* at 157 (emphasis added) (paragraph breaks omitted).

47. 2 *id.* at 4.

A later passage, however, may indicate some slippage toward the notion of injury as loss. In discussing an action for battery brought under the writ of trespass, Bacon stated that “[i]f one Man receives any corporal Injury from the voluntary Act of another, an Action of Trespass *Vi et Armis* does sometimes lie; although there was no Design to hurt . . . .”<sup>48</sup> While it is possible to read the word “injury” in the phrase “corporal injury” to mean “wrong”—a wrong involving bodily harm—it seems more natural to treat “injury” in this instance as referring to the harmful consequence suffered as a result of a wrong, rather than the wrong itself. In any event, even if the author intended “injury” to mean “wrong,” the text demonstrates how easy it would be for inattentive readers, writers, or speakers to slide from a notion of injury as wrong to a notion of injury as loss. As it turns out, this potential for slippage was promptly realized in early American case law.

### III. INJURIES AS LOSSES, DAMAGES AS INDEMNIFICATION (FULL COMPENSATION)

In Part II, I demonstrated that Blackstone’s influential late eighteenth-century account of tort law was rooted in the idea of injury, understood to mean a wrongful treatment of one person by another. In turn, this account supported a fair compensation conception of damages. In this Part, I will review early American decisions that provide evidence of a shift in judicial treatment of tort damages from the fair compensation toward the full compensation conception; a shift that in turn would eventually help provoke a fundamental change in standard conceptions of the nature and purposes of tort law.

#### A. *Doctrinal Markers on the Road to Making Whole*

A line of decisions issued by the Pennsylvania courts suggests that an alternative conception of both tort law and tort damages was emerging in the early years of the nineteenth century. We begin with a pair of decisions that were decided in 1786 and 1800, respectively. In the first, *Purviance v. Angus*, the Pennsylvania High Court of Errors reviewed an admiralty court’s decision rejecting a claim for indemnification brought by the owners of a ship against the master

---

48. 5 *id.* at 162. As an aside, it is perhaps worth noting that even in 1766, Bacon’s treatise states that liability for Trespass is not strict, but must be imputed to “Negligence” or “Default” on the part of the injurer. *Id.*

whom they had employed to pilot it.<sup>49</sup> Because of the master's participation in the wrongful seizure of another ship, the owners had incurred (through the operation of *respondeat superior*) a liability to the seized ship's owners in the amount of about £3,800.<sup>50</sup> They then sought reimbursement from the master for this liability on the ground that it was the master's doing that caused the liability. The admiralty court dismissed the claim, but a divided high court reversed, imposing on the master an obligation to reimburse his employers in the full amount, again nearly £3,800.<sup>51</sup>

Counsel for the master moved for rehearing, which prompted Justice Shippen to invite his colleagues to consider the question of whether they were "bound to estimate the [owners'] damages by the real loss, or whether [they] may not mitigate them, according to the circumstances and degree of negligence in the [master]."<sup>52</sup> In extending this invitation, Shippen cited *Russell v. Palmer*,<sup>53</sup> an English decision arising out of a tort action for legal malpractice, in which the client claimed that his lawyer's negligence left him unable to collect from a third party a £3,000 debt. Although the trial judge in *Russell* had instructed the jury that if they found for the client on the merits they were required to award him the full value of the debt, that instruction was later deemed erroneous because for an "action sounding merely in damages, the Jury ought to have been left at liberty to find what damages they thought fit."<sup>54</sup> On retrial, the *Russell* jury awarded the lesser amount of £500 because of "favorable circumstances appearing for the Defendant . . . ."<sup>55</sup> Apparently persuaded by Shippen's invocation of *Russell*, the Pennsylvania Court in *Purviance* proceeded to reduce the amount that the master owed to his employers by approximately two-thirds.<sup>56</sup>

Fourteen years later, Justice Shippen and his colleagues seemed to change their tune. In *Bussy v. Donaldson*,<sup>57</sup> the owner of a ship that sank in a collision brought an action alleging carelessness attributable

49. *Purviance v. Angus*, 1 U.S. (1 Dall.) 180 (1786) (Pa. Ct. Err. & App.). Until 1806, this Court was the highest appellate court in the state, sitting over the Pennsylvania Supreme Court. Edward A. Hartnett, *Not the King's Bench*, 20 CONST. COMM. 283, 292 n.30 (2003).

50. *Purviance*, 1 U.S. (1 Dall.) at 185 (Shippen, J., dissenting) (explaining the basic posture of the case).

51. *Id.* (majority opinion).

52. *Id.* at 186 (Shippen, J., dissenting).

53. (1767) 95 Eng. Rep. 837 (K.B.).

54. *Purviance*, 1 U.S. (1 Dall.) at 186 (Shippen, J., dissenting).

55. *Id.*

56. *Id.* (summarizing subsequent disposition of the case).

57. 4 U.S. (4 Dall.) 206 (1800). Others have discussed *Bussy*, including Professors Horwitz and Schwartz in connection with their debate over whether early eighteenth-century tort liability

to the owner of the other ship involved in the collision. On the issue of damages, the defendant, citing *Purviance*, asked for an instruction indicating that “the amount of the injury actually sustained, is not the measure of damages . . . .”<sup>58</sup> In response, Shippen, the judge who had prompted the court in *Purviance* to recognize the fact-finder’s discretion in setting damages, seemed to backtrack:

As to the assessment of damages: it is a rational, and a legal, principle, that the compensation should be equivalent to the injury. There may be some occasional departures from this principle; but I think it will be found safest to adhere to it, in all cases proper for a legal indemnification, in the shape of damages.<sup>59</sup>

Concurring in part, Justice Smith could not accede to this statement, although he too departed from *Purviance*. In his view, the proper rule was this:

In a case of contract; or in a case of damage by gross negligence; the jury should always, I think, give a compensation to the full amount of the injury actually sustained. But if an injury is done, in a way merely fortuitous and accidental, I think the jury have a legal and salutary discretion upon the subject.<sup>60</sup>

Armed with these instructions, the jury issued a verdict in favor of the plaintiff for \$2,500.<sup>61</sup>

It is possible to reconcile the opinions in *Bussy* with the notion of jury discretion seen in *Purviance*. (For one thing, some information provided at the end of the opinion may suggest that the \$2,500 awarded by the jury did not actually correspond to the actual loss incurred by the owner of the sunken ship.)<sup>62</sup> To do so, however, would require one to read both opinions as using the word “injury” in Blackstone’s sense—to refer to the wronging of the victim, rather than the loss caused by the wronging. This seems a strained interpretation, given that both quoted passages are keen to emphasize that, for a certain class (or certain classes) of cases, there is a relatively precise

---

was “strict” or fault-based. See Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 *YALE L.J.* 1717, 1729–30 (1981).

58. 4 U.S. (4 Dall.) at 206.

59. *Id.* at 207–08. Justice Brackenridge concurred generally with Justice Shippen. *Id.* at 208.

60. *Id.* at 208 (Smith, J., concurring in part).

61. *Id.* (majority opinion).

62. A concluding footnote to the opinion informs us that “the whole expense of raising and repairing the [sunken ship], amounted to [roughly] £1310.” *Id.* at 208 n.1. In the years 1796–1800, one English pound was worth approximately between \$4.13 and \$4.55. See Economic History Services, <http://eh.net/hmit/exchangerates/pound.php> (last visited Nov. 28, 2005). Using the mean rate over these six years (\$4.39), if the plaintiff were to be fully compensated for its expenses, it would have had to recover more than twice as much as it did (\$5,750), not counting prejudgment interest. It may be that the jury simply ignored the majority instruction, or that part of the salvage and repair costs were assigned to persons other than the defendants.



amount for the jury to award, as opposed to a discretionary decision to be made. Moreover, both opinions reject the defendant's contention that the jury should have been instructed that it was free to set its award at an amount less than the actual amount lost by the plaintiff as a result of the tort. More likely, the justices meant to articulate variations on the Blackstonian model that denied jurors the discretion to take into account the circumstances of a wrong as a basis for awarding a successful claimant damages in an amount *less* than the losses he experienced as a result of the wrong, but still left them with discretion to award damages in excess of losses if those losses were occasioned by egregious mistreatment.<sup>63</sup> Supporting this reading is an opinion issued thirty-six years later, in *McBride v. McLaughlin*, in which the justices' successors on the state supreme court articulated a variant on this rule.<sup>64</sup>

Suppose, then, that *Bussy* in fact represents a change of position, one that marks a step toward the idea of linking tort law with the idea of making whole. What light might it shed on the explanations for that move? I would suggest that it offers two clues. The first concerns the ambiguity of the concept of injury, to which I have already alluded. As we have seen, Blackstone used the term to refer to the wronging of the victim. Thus, when he spoke of tort causes of action as providing "satisfaction," he had in mind a notion of empowering victims to retaliate in a particular way. Just as his conception of injury connoted a "doing onto" the victim by the tortfeasor, his idea of satisfaction suggested a "doing onto" the tortfeasor by the victim, as opposed to some sort of erasure or annulment. By contrast, as the judges in *Bussy* seem to use it, the term "injury" refers not to the wrongful conduct of the defendant, but to the consequences of that conduct for the plaintiff.<sup>65</sup> Likewise, the tort action for damages is not understood as a response to the wrong, but as a means of obtaining "indemnification" for the loss.

The ambiguity of the concept of injury was particularly on display in cases that raised the question of whether the defendant's misconduct toward the plaintiff had risen to a level that warranted an extra incre-

---

63. In contrast to Justice Shippen (and Justice Brackenridge), Justice Smith would have permitted jurors to exercise discretion to award less-than-full compensation when liability was predicated on a showing of less-than-gross negligence (i.e., ordinary fault and perhaps strict liability). *Bussy*, 4 U.S. (4 Dall.) at 208 (Smith, J., concurring in part).

64. *McBride v. McLaughlin*, 5 Watts 375, 376 (Pa. 1836) (noting that, in a trespass action, the issue of whether the defendant acted with intent or malice is irrelevant to liability and "even to the *quantum* of the damages, in order to bring it below the actual injury," but can provide the basis for increasing the damages payable by the defendant).

65. *Bussy*, 4 U.S. (4 Dall.) at 207-08.

ment of damages. (As we saw above, Blackstone recognized the propriety of “exemplary” damages, but did not conceptualize them as a separate “head” of damages.) For example, the North Carolina Supreme Court’s 1836 decision in *Duncan v. Stalcup*<sup>66</sup> involved an action for trespass to chattels in which the jury awarded damages that the high court dubbed “vindictive” and “exemplary.”<sup>67</sup> The court upheld the award, rejecting the defendant’s argument that the jury was confined to awarding damages up to the value of the lost property. Such was not the rule, the court reasoned, where there is evidence of malice, in which case the jury could “award damages in respect of the malicious conduct of the defendant, and the degree of insult with which the trespass was committed.”<sup>68</sup> Do we see here the Blackstonian notion that the “injury” to the plaintiff, being a doing rather than an outcome, includes an assessment of the egregiousness of the defendant’s conduct, so as to warrant redress in the form of a payment over and above the value of losses caused? Or is the idea here that exemplary or punitive damages serve a function wholly apart from redressing the private wrong, such as deterrence or punishment on behalf of the public? *Stalcup* seems capable of being read either way.

Again, in noting the ambiguity of the concept of injury, I do not mean to claim that, until 1800, the term injury always meant one thing then suddenly meant another. Both meanings were presumably lurking in the law and in ordinary discourse, which helps explain why the term supported conflicting usages. Indeed, I would speculate that the shift from injury as a wrongdoing to injury as a loss reflected in some cases the substitution of the term as it was used in ordinary discourse for the legal term of art. I also do not mean to suggest that this linguistic shift, in and of itself, precipitated a new way of thinking about torts, damages, and law more generally. Rather, I am supposing that it was one part of a larger set of developments. Still, it does seem important that during the nineteenth century, lawyers and judges became more inclined to use the term injury to refer to an adverse consequence rather than a wrongdoing.

Second, it is probably significant that *Bussy* involved a tort claim for damage to property, as opposed to a claim for bodily injury or for a dignitary tort such as battery. As we saw above, even on the Blackstonian view, cases involving claims for property damage caused without intent or malice presented the strongest case for the adoption of a default rule of damages equal to the value of the victim’s losses. This

---

66. 18 N.C. (1 Dev. & Bat.) 437 (1836).

67. *Id.* at 437–38.

68. *Id.* at 438.

same rule, Blackstone had suggested, should also apply to claims for breach of contract. In both cases, the idea is intuitive enough. When it comes to property or promise-based expectancies, one can more readily suppose that there is a number or a relatively well-defined range of numbers that corresponds to the loss. There may also be less reason to suppose that the victim regards the wrongful destruction of his or her property, or a failure to deliver on a promised performance, as the sort of affront that demands a form of satisfaction beyond replacement. (That is, at least if we are dealing with unintentional damage of property not carrying some special, personal significance.) With these rationales in mind, it is easy to imagine a court moving from Blackstone's idea of a default rule for property and contract cases to the identification of a mandatory rule for them. In fact, there is no need to imagine. In the 1808 decision of *Coffin v. Coffin*,<sup>69</sup> the Massachusetts Supreme Judicial Court made exactly this move. There, the court opined that judges are empowered to set aside jury damage awards in two sets of cases:

[O]ne case is where the law recognizes some fixed rules and principles in measuring the damages, whence it may be known that there is an error in the verdict. In this case are included actions on contracts, or for torts done to property, the value of which may be ascertained by evidence. The other case includes actions for personal injuries, where no rules are prescribed by law for ascertaining the damages, but from the exorbitancy of them the Court must conclude that the jury acted from passion, partiality, or corruption—causes which naturally produce error or injustice.<sup>70</sup>

And, from a case like *Coffin*, only one further doctrinal step was required to reach the full-compensation conception of tort damages. All it would take is for a court or commentator to miss or gloss over the fact that *Coffin's* mandatory rule applied only to a subset of tort cases, as opposed to all of them.

That the ambiguous concept of injury, particularly when combined with the idea of a special rule of damages for property torts, had the potential to give rise to the full compensation conception is vividly on display in another Massachusetts decision, issued three years after *Coffin*. *Rockwood v. Allen*<sup>71</sup> arose from the second of two litigations. In the first, Rockwood won a judgment against Patch that resulted in

69. 4 Mass. (1 Tyng) 1 (1808).

70. *Id.* at 9, 43; compare *May v. Wright's Adm'rs*, 1 Tenn. (1 Overt.) 385, 389 (1809) (suggesting, in keeping with Blackstone, that personal actions for contract breaches are governed by a default rule of full compensation that can be overridden if there is evidence of malice or intent on the part of the defendant). For a later New Jersey decision embracing *Coffin's* approach, see *Berry v. Vreeland*, 21 N.J.L. 183 (1847).

71. 5 Mass. (1 Tyng) 254 (1811).

the attachment of certain chattels belonging to Patch, which were to be delivered to Rockwood.<sup>72</sup> Unfortunately for Rockwood, the deputy who was supposed to secure the chattels for him failed to do so, as a result of which Rockwood lost his claim to them.<sup>73</sup> Rockwood then sued the sheriff (the employer of the careless deputy) in negligence, and the jury rendered a verdict for Rockwood in an amount equal to the value of the property that had been attached as a result of the initial litigation.<sup>74</sup> In reviewing this damage award against a challenge for excessiveness, the Court offered the following:

As to the question, respecting the measure of damages, it is a general and very sound rule of law, that where an injury has been sustained, for which the law gives a remedy, that remedy shall be commensurate to the injury sustained. The damages in this case are the value of the goods attached, it being understood that such value did not exceed the amount of the plaintiff's judgment in the suit upon which they were attached.<sup>75</sup>

The phrase "injury sustained" is ambiguous as between the two meanings discussed above. The notion that the plaintiff's remedy "shall be commensurate" to the injury could mean that it shall be commensurate to the wrong suffered by the plaintiff at the hands of the defendant, or it could mean that it shall be commensurate to the losses flowing from that wrong. The court's application of its "general rule" is likewise ambiguous. Does it generate an award for the plaintiff equal to the value of the property he lost because that measure is the rule for property damage cases? Or because it is the rule for all tort cases? Even if the justices in *Rockwood* meant to endorse a Blackstonian view, or *Bussy's* or *Coffin's* variations on it, a later court could perhaps be forgiven for reading it to endorse the idea that, in every tort action, the measure of damages is full compensation.

Starting in the 1830s, one begins to see fairly clear instantiations of the full compensation view. Again, the Pennsylvania courts shed interesting light here. In 1836, the Pennsylvania Supreme Court decided *McBride v. McLaughlin*, a trespass action that seems to have struck the justices as posing a conundrum under the Blackstonian conception of torts and damages, and in doing so, may have induced the court to break with that conception.<sup>76</sup> The defendants in that case had by means of an earlier suit illegitimately secured a judgment that ena-

---

72. *Id.*

73. *Id.*

74. *Id.* at 255.

75. *Id.* at 256.

76. *McBride v. McLaughlin*, 5 Watts 375 (Pa. 1836).

bled them to seize the property of plaintiff John McLaughlin.<sup>77</sup> It turned out, however, that they had meant all along to seize property owned by John's brother James.<sup>78</sup> John commenced an action against them for abuse of process and for recovery of the value of the property.<sup>79</sup> The question facing the *McBride* court was whether the aggravating fact of the defendants' malice toward James ought to affect John's recovery, given that the defendants apparently harbored no malice toward John.<sup>80</sup> Perhaps concerned that a Blackstonian conception of tort law and damages would warrant a negative answer to that question, the court drew a sharp distinction between compensatory and punitive damages, which in turn permitted it to sidestep the problem of misdirected malice.<sup>81</sup> That the defendants had behaved so reprehensibly was a matter of *public* concern, and a ground for punishment via a private action in the name of the public, "for the sake of example . . . ." <sup>82</sup> The court said: "There are offences against morals to which the law has annexed no penalty as public wrongs, and

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 376 (suggesting that the failure to award damages in vindication of the public aspect of the defendants' wrong would permit them to get off too lightly).

Such a worry was understandable, but probably unfounded. Suppose that, out of spite toward his neighbor *N*, *A* poisons and kills a pet dog that he mistakenly believes to be *N*'s, but that is in fact *V*'s. It is true that *A* has acted differently toward *V* than toward *N*—his action was prompted by a desire to inflict misery on *N*, not *V*. In this sense, *A* has committed a different sort of wrong against *V* than he would have committed against *N* had he been correct in supposing the dog was *N*'s. Still, even though *V* would not be able to argue that *A* acted with malice toward him, he could still argue that the intentional killing of his dog for no reason other than malice toward another is sufficiently heinous misconduct as to him (and anyone else who might prove to be the owner of the dog) as to warrant an extra increment of damages.

In this respect, *V*'s claim would resemble the sort of claim that often gets handled under the rubric of "transferred intent." Suppose *X* and *Y* get into a heated argument on the sidewalk of a residential street. *X* pulls out a gun, at which point *Y* flees. *X* shoots at *Y* as he is running away, but ends up hitting innocent bystander *B*, whom *X* had no intent to shoot. Although courts might treat this as a "transferred intent" battery of *B* by *X*, it is less fictionally described as an instance of negligence toward *B* that happens to be accompanied by the sort of recklessness toward the victim that would warrant an award of punitive damages. *B*'s cause of action would thus sound in negligence, because the gist of his complaint is that *X*'s shooting in a residential neighborhood, even if intentional as to *Y*, was careless as to the physical well-being of persons such as *B*. But, because of the extreme dangerousness of the activity for anyone near to the scene of the argument, as well as *X*'s utter lack of justification for inflicting that danger on such persons, *B* can ask for punitive damages on the ground that *X* acted with reckless indifference toward the well-being of persons such as him.

Analogously, *McBride* could claim that the defendants' scheme for the theft of his brother's property was sufficiently risky to other owners whose property they might mistakenly take, and so completely unjustified in imposing that risk on them, as to count as the sort of "aggravated" wrong against *McBride* that warranted a jury award of greater-than-make-whole damages.

82. *McBride*, 5 Watts at 377.

which would pass without reprehension, did not the providence of the courts permit the private remedy to become an instrument of public correction."<sup>83</sup> Here we see an early instantiation of the modern idea that tort damages come in two forms—compensatory damages that indemnify the victim for his or her losses, and punitive damages that have no compensatory function, and instead serve the public goals of punishment and deterrence.

*McBride's* recasting of tort damages in terms of a categorical division between compensatory and punitive damages would soon be solidified in Pennsylvania and elsewhere. In 1843, the circuit court in *Bishop v. Stockton* offered the following instruction to a jury faced with a suit by a passenger against a common carrier:

If the defendants [are found liable], then the enquiry will be what amount of damages shall be given? Shall they be compensatory or exemplary? Compensatory damages are given to restore or make whole again, or make reparation for loss, injury, or suffering, past and future. . . . But further vindictive or exemplary damages may be given to indemnify the public for past injuries and damages, and to protect the community from future risks and wrongs.<sup>84</sup>

Insofar as *Bishop's* invocation of "make whole" can be taken as representative of Pennsylvania usage, it suggests that the state's law concerning tort damages had evolved markedly since 1806, when *Purviance* was decided.<sup>85</sup>

### B. Full Compensation, Fair Compensation, and Punitive Damages

*Bishop's* drawing of a sharp distinction between compensatory damages (indemnification) and punitive damages (punishment) would

83. *Id.* at 376.

84. 3 F. Cas. 453, 454–55 (Pa. Cir. Ct. 1843).

85. This is not to say that other states' law followed the same path as Pennsylvania's. For example, in *Bateman v. Goodyear*, 12 Conn. 575 (1838), the Connecticut Supreme Court of Errors stated that a plaintiff suing for a trespass to land "is to be indemnified, for what he has actually suffered," but then proceeded to make clear that this would require

all those circumstances, which give character to the transaction . . . to be weighed and considered. Thus, whether the entry was violent or quiet, whether through malice or mistake, whether under colour of right, or without any pretence of title, are all proper subjects of consideration. And if a person, acting without pretence of right, would be subject to greater damages than one acting under a *bona fide* claim of title, surely such claim, accompanied by proof of actual title, should be submitted to the triers. For instance, if a tenant at sufferance was holding over, and the lessor ejected him by force, under an execution, which was technically defective, ought that man to recover the same damages as if he had been dispossessed, in the night season, by an armed ruffian, whose object was plunder?

*Id.* at 575 (internal citations omitted).

soon be enshrined in Theodore Sedgwick's influential 1847 treatise on damages. According to Sedgwick,

[I]n all cases of civil injury, or breach of contract, with the exception of those cases of trespasses or torts, accompanied by oppression, fraud, malice, or negligence so gross as to raise a presumption of malice, where the jury have a discretion to award exemplary or vindictive damages; in all other cases the declared object is to give *compensation* to the party injured for the actual loss sustained.<sup>86</sup>

Here, unmistakably, we see a full-blown rendition of the modern, full-compensation conception of tort damages.<sup>87</sup>

As is now well known, some of Sedgwick's key claims—in particular his claim about the propriety of awarding punitive damages in tort cases—were immediately contested by Simon Greenleaf in the second edition of his treatise on evidence.<sup>88</sup> What is less understood are the precise terms on which Greenleaf objected. The Sedgwick-Greenleaf fight is typically cast as *presupposing* the full compensation conception of tort damages, with Greenleaf insisting that tort plaintiffs cannot get anything more than indemnification for their losses, and Sedgwick insisting that they can in addition recover punitive damages to serve the public goals of punishment and deterrence.<sup>89</sup> This interpretation of Greenleaf's side of the debate is understandable. As is discussed briefly below, his manner of using the troublesome term “injury” at times invites it. Still, close inspection reveals that he instead advocated a variant on the Blackstonian idea that the nature of the defendant's mistreatment of the victim affects the severity of the victim's “injury” and therefore the compensation to which the latter is entitled.

The standard view of Greenleaf's position seems amply supported by his opening remarks on the law of evidence as it pertains to damages, which emphasize damages' compensatory role and the precision

86. THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 26–27 (1st ed. 1847) (internal citations omitted), available at Gale.com, The Making of Modern Law: Legal Treatises 1800–1926, <http://www.gale.com/ModernLaw>. Note that it is not quite right to attribute the full compensation conception to Sedgwick, who bemoaned the fact that, given the American rule on attorney's fees, as well as the uncompensated hassles associated with litigation, a plaintiff could never expect truly to obtain “full” compensation. *Id.* at 37–38.

87. For an earlier appearance, see *Randel v. President, Dirs. & Chesapeake & Del. Canal*, 1 Del. (1 Harr.) 233, 316 (Del. Super. Ct. 1833) (providing a transcript of trial-level proceedings, which include an instruction to the jury stating that “[t]he only guide that the court can give you on [the subject of damages] is the legal rule, that whatever loss or damage naturally and immediately results from the wrong complained of, the wrong-doer is bound to compensate”).

88. 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253, at 242 n.2 (2d ed. 1848). On the dispute, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 82–83 (1977).

89. HORWITZ, *supra* note 88, at 82–85.

with which they ought to be calculated: “Damages are given as a compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him, from the defendant. They should be precisely commensurate with the injury, neither more, nor less; and this, whether it be to his person or estate.”<sup>90</sup> Yet the remainder of the discussion of evidence pertaining to damages makes clear that Greenleaf did not treat the concept of “injury” as limited to the victim’s losses caused by commission of the tort—that is, at least if by losses one has in mind lost income, bodily harm, pain and suffering, humiliation, and the like. This much is clear in his claim that evidence of a defendant’s malice, or his intention to defraud, is relevant to the jury’s assessment of the victim’s *injury*: “where an evil intent has manifested itself in acts and circumstances, accompanying the principal transaction, *they constitute part of the injury*, and, if properly alleged may be proved, like any other facts material to the issue.”<sup>91</sup> Likewise, although he denied the relevance to damages of evidence of the wrongdoer’s ability to pay, he allowed that wealth evidence can be admitted to establish the defendant’s “*rank and influence in society, and therefore the extent of the injury*”—the notion being that it is worse for a victim to suffer a wrong involving abuse of power than it is to suffer a comparable wrong lacking that dimension.<sup>92</sup> On the flip-side issue of mitigation, he noted that, in certain actions, evidence of “the extreme youth, or partial insanity of the defendant, may be shown to convince the Jury, that the plaintiff suffered but little injury.”<sup>93</sup> It is difficult to see how the foregoing considerations—which all concern characteristics of the tortfeasor or his actions toward the victim—have any bearing on a damages calculation that is concerned exclusively to assess losses suffered by the plaintiff as a consequence of the tortfeasor’s misconduct.

And yet what makes Greenleaf most prone to being misread as a full-compensation theorist is that he sometimes did seem to reduce Blackstone’s active notion of injury-as-victimization to an “end-state” description of the condition in which the victim finds himself when the

---

90. GREENLEAF, *supra* note 88, § 253, at 242 (internal citations omitted). Greenleaf later makes clear that he, like Blackstone, recognizes that personal injury tort claims often generate claims for damages that do not admit of precise specification, and instead must be determined by an exercise of jury discretion. *Id.* § 255, at 257.

91. *Id.* § 272, at 285 (emphases omitted and added); *see also id.* § 266, at 271 (in actions *ex delicto*, evidence can be admitted in aggravation or mitigation of the injury itself).

92. *Id.* § 269, at 274 (internal citations omitted).

93. *Id.* § 275, at 282.



dust has settled.<sup>94</sup> In one instance, for example, he says that jurors in a libel case may rightly consider evidence concerning the gravity of the defendant's misconduct toward the victim because it bears on the "degree of *injury to the plaintiff*, either in his feelings, or in his character. . . ." <sup>95</sup> The last clause, at least, suggests an inclination to reduce the concept of injury to a notion of adverse consequences of the sort expressed in the full compensation view, and hence possible support for the idea that Greenleaf conceived of damages in terms of what happened to the victim *as a consequence* of the defendant's wrong, apart from the wronging itself. Again, however, appearances are misleading. For although Greenleaf at times invoked the term "injury" to refer to the consequences or losses suffered by the victim, he only did so because he adopted a very capacious notion of what can count as a consequence or loss. In particular, he was prepared to treat *the fact of having been badly mistreated* as part of the "loss" caused to the victim by the tortfeasor. Thus, in discussing a case of forcible trespass, Greenleaf first explained that "[t]he party is to be indemnified for what he has actually suffered."<sup>96</sup> By itself, this passage reads as if it endorses the full compensation conception of tort damages. Yet the passage in its entirety reads as follows: "[t]he party is to be indemnified for what he has actually suffered; and then all those circumstances, which *give character to the transaction*, are to be weighed and considered."<sup>97</sup> In other words, damages should correspond in part to the nature of the mistreatment (the "character" of the "transaction"), but only because the relative wrongfulness of the mistreatment can be fully captured as part of a description of the post-tort condition of the victim (rather than as part of a description of what the tortfeasor did to the victim).

---

94. Greenleaf also generated confusion by occasionally conflating issues of liability and damages. For example, he at one point asserted that, for actions brought under the writ of trespass *vi et armis*, evidence of the defendant's "secret intention" is "wholly immaterial." What he meant by this was that a plaintiff does not have to prove intent to make out a *prima facie* case of trespass so as to earn an entitlement to at least "some" damages. GREENLEAF, *supra* note 88, § 270, at 274-75; see also *id.* § 267, at 271-72 (conflating the issue of when damages should include compensation for emotional distress with the issue of when "pure" emotional distress will support a cause of action). Elsewhere he observed that damages in an action for trespass on the case are measured by the loss suffered by the victim, regardless of whether the defendant acted intentionally or carelessly. *Id.* § 266, at 271. Here I think he meant to emphasize that the plaintiff's "injury" (understood in the broad sense discussed in the text) is always the touchstone for determining damages, and hence the fact that a tortious act has been intentionally done does not of itself tell us that the victim has suffered a worse form of mistreatment at the hands of the wrongdoer.

95. *Id.* § 253, at 244, n.2.

96. *Id.*

97. *Id.*

In short, it is anachronistic to read Greenleaf as a make-whole purist. He adamantly rejected Sedgwick's claim that English and American case law supported recognition of a separate head of damages, called exemplary or punitive damages, by which juries could go beyond providing redress to the victim for the wrong done to him so as to punish the wrongdoer on behalf of society. But, in doing so, he took the position that the character of the defendant's mistreatment of the victim ought to help determine the measure of damages, in that egregious forms of mistreatment amounted to "aggravation of the *injury itself* which the plaintiff had received."<sup>98</sup> Rightly read, his work thus attests to the continued vitality into the mid-nineteenth century of the Blackstonian conception of tort as a law of wrongs and redress, which in turn gives rise to a damages rule of fair, rather than full, compensation.

Was Greenleaf right about his reading of the older English cases on punitive damages? Yes and no. The most famous of these, of course, was *Huckle v. Money*.<sup>99</sup> In *Huckle*, royal agents acting on a general warrant seized and briefly detained, under pleasant conditions, a printer employed by a newspaper that had been critical of the government.<sup>100</sup> Despite the lack of physical or psychological harm to the plaintiff, the jury awarded him £300 in his action for battery and false imprisonment.<sup>101</sup> The King's Bench refused to reduce the award.<sup>102</sup> Lord Chief Justice Pratt conceded that "the personal injury done to [the plaintiff] was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps [£20] damages would have been thought damages sufficient . . ."<sup>103</sup> But the court also said:

[T]he small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on

---

98. GREENLEAF, *supra* note 88, § 253, at 250 n.2 (emphasis added).

99. (1763) 95 Eng. Rep. 768 (K.B.).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 768-69.

the trial; and I think they have done right in giving exemplary damages.<sup>104</sup>

Although this language is not free from ambiguity, I think Greenleaf was right to argue that *Huckle* is not best read as creating a separate category of "exemplary" or "punitive" damages that stands apart from the category of "compensatory" or "make-whole" damages. Instead it suggests (in keeping with Blackstone) that the jury ought to set damages at an amount that will constitute a satisfaction or vindication of the plaintiff's rights, which in turn requires them to adjust their damages award in light of their assessment of the nature of the wrong committed by the defendant against the plaintiff. On this interpretation, the court's reference to the £20 award that might otherwise have been appropriate does *not* refer to the amount that would have indemnified the victim for the welfare or utility he lost (such that the remaining £280 would then be seen as serving the separate purpose of "punishing" the defendant).<sup>105</sup> Rather, the point is that the jury was entitled to find that this particular act of battery and false imprisonment constituted a wronging of the victim different in kind from otherwise similar wrongs committed by private actors. The difference resides not only in the fact that it was the government agents who seized and confined the victim, but also in the fact that the government's representatives maintained, both when they seized the plaintiff and at trial, that they were *entitled* to act in this manner toward the victim. Given this evidence, the jury was justified in assessing the large award it did because it was warranted in seeing something more in the case than a brief and relatively harmless confinement of one man by another. Instead, what "appeared to them at the trial" was a wrong committed against a private citizen by agents of an entity that enjoyed a unique claim of authority to exercise power over citizens, and that had explicitly disavowed well-established limits on that authority.<sup>106</sup> In other words, the jury acted appropriately "in giving ex-

---

104. *Id.* at 769.

105. Notice in this regard that the court deems the plaintiff's low social status as a ground for reducing his award that stands *independently* of the magnitude of the "injury" done to him. It is hard to see how the use of status as a *separate* criterion fits with a notion of compensatory damages keyed only to the losses suffered by the plaintiff.

106. To appreciate this point, imagine an ordinary action for battery by the victim of a physical attack. Now suppose that, when questioned at trial as to his reasons for attacking the victim, the attacker blithely asserted that he was in all ways a superior person to the lowly victim, such that he enjoyed a right to beat him with impunity. Presumably a jury armed with this information would be entitled to treat this attacker's behavior as a worse manner of treating the victim than a comparable attack lacking this dimension of arrogance toward the victim. Two centuries later, the U.S. Supreme Court recognized the especially problematic nature of physical seizures by persons claiming the authority of government as a ground for rejecting the idea that Fourth

emplary damages” because a relatively large award accurately reflected the enormity of the wrong that the victim had suffered at the hands of his government captors.

So Greenleaf was on the right track, in my view, in suggesting that Sedgwick had misread *Huckle* and some other early, punitive damage cases. Sedgwick was not totally off base, however, for another prominent opinion by the same judge who wrote the opinion in *Huckle* seems to embrace a Blackstonian, fair-compensation conception of tort damages while also identifying punitive damages as a separate head of damages. This hybrid position might at first blush seem hard to sustain. After all, as we have seen, under the fair compensation view, the egregious nature of the defendant’s misconduct is already supposed to be accounted for in the jury’s award of fair compensation. If so, what is left for punitive damages to do? The answer is familiar: they serve to vindicate the interests of the public, rather than the victim, by making an example of the defendant so as to reinforce norms of appropriate behavior and to deter such conduct in the future. This, I take it, is the position staked out by Lord Chief Justice Pratt in *Wilkes v. Wood*, the famous companion case to *Huckle*:

[A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as proof of the detestation of the jury to the action itself.<sup>107</sup>

In sum, *Wilkes* offers a (perhaps unstable) mixture made up of the wrongs-and-redress model of tort (tort as private wrong; injury as wrongdoing), the fair compensation conception of damages (damages as satisfaction), and a public-law conception of punitive damages.<sup>108</sup>

---

Amendment rights are adequately vindicated by state-law trespass and false imprisonment claims. See *Bivens v. Six Unknown Agents*, 403 U.S. 388, 391–92 (1971) (recognizing a distinct constitutional tort action for victims of such misconduct).

107. (1763) 98 Eng. Rep. 489, 498–99 (K.B.).

108. It may helpful to chart the various positions I identify here in a simple matrix. None of the eighteenth- and nineteenth-century lawyers or scholars in my small sample seem to have occupied the lower-left quadrant (i.e., the position that tort compensation ought to be full compensation but that there ought not to be punitive damages). I therefore attribute that position to “Greenleaf misread,” by which I refer to the modern miscasting of Greenleaf discussed in the text. Of course, numerous jurists and scholars have since advocated it.

Fair Compensation, No Separate Punitives (Blackstone, Greenleaf)	Fair Compensation, Separate Punitives (L.C.J. Pratt in <i>Wilkes</i> )
Full Compensation, No Separate Punitives (Greenleaf misread)	Full Compensation, Separate Punitives (Sedgwick)

To say the same thing, *Wilkes* supposes that tort law both empowers the victim to seek redress for conduct amounting to a wrong to him or her, and the jury to police and make examples of particularly antisocial behavior on behalf of all of us.

#### IV. MAKING WHOLE, TORT LAW, AND TORT THEORY

The foregoing has examined some caselaw and treatises for clues about how the full compensation conception of tort damages emerged in the early nineteenth century. The story it tells is an "internal" one, operating entirely at the level of lawyerly usage and doctrine. In offering such an account, I do not mean to suggest that it is complete, or that conceptual and doctrinal shifts within law happen independently of other changes. (I have not yet found connections between the particular development I have described and other important contemporaneous developments, such as the breakdown of the writ system and the accompanying emergence of the tort of negligence.) Why at this time would the concept of injury drift away from the idea of a wrongdoing and toward the idea of a loss? And why would a default rule of damages for property cases spread to tort cases generally? I have suggested that a certain conceptual sloppiness was at work, but why did the sloppiness point in one direction? On quick inspection, the movement in the understanding of "injury" from wrongful mistreatment to adverse consequence, and the generalization from property cases to all tort cases, seem to share a couple of characteristics. First, both may reflect an increasing judicial and lawyerly inclination to think of law in observable and quantifiable terms. The idea of a wrongful mistreatment is normative and elusive. The idea of a loss seems more tangible. Likewise, the emergence of a hard-and-fast rule for property damage, as we have seen, was explicitly defended on the ground that property losses admit of relatively precise valuations. Both trends are thus consistent with an inclination to render law in terms more empirical, less overtly normative, and (in principle) more certain.

Relatedly, there is probably at work a concern to assert greater judicial control over juries. The Blackstonian depiction does not completely cede the job of awarding damages to juries. Still, for judges who are looking to control juries, it helps to be able to point to legal rules and harder-edged concepts like "amount of loss" instead of being left to second-guess the jury for having grossly misapprehended the nature of the wrong done by the tortfeasor to the victim. Interestingly, although the idea of a trend toward increasing judicial control over juries in the nineteenth century is (thanks to Morton Horwitz,

among others) a familiar one among legal historians,<sup>109</sup> these tort cases—which by and large seem not to have involved commercial interests—suggest that this development may have been fueled less by the demands of business for greater predictability in awards than by an inclination among judges to place the law on a (supposedly) more solid and certain basis.

Regardless of the explanation, it seems that the idea of full compensation flowered in the mid-eighteenth century. Still, it would take some time before this doctrinal development was integrated into an overall theory of tort law. The roots of this broader and deeper shift are traceable, I think, to a jurisprudential development running from Bentham through Austin to Holmes, in which analyses of law shifted their focus away from rights and wrongs to remedies and sanctions. Here, I can only nod to the theoretical development I have in mind by briefly canvassing some of the basic features of Austin's and Holmes's views on torts.

As we have seen, Blackstone's conception of tort compensation as fair compensation was connected to a theory of torts that was rights-and wrongs-driven. In this picture, the basic rights of the individual (e.g., to bodily integrity) give rise to a right to retaliate against wrongdoers for actions that constitute wrongings of the victim, which in turn gives rise to a legal power to sue the wrongdoer that generates a claim to fair compensation. In his lectures on jurisprudence, Austin turned this framework on its head.<sup>110</sup> Rather than reasoning from the nature of the duty to the appropriate mode of remedy, he reasoned from the real party in interest—the person or entity on whose behalf the law authorized suit—to the category of wrong that had been committed. In his view, it is only when the sovereign enacts laws that authorize persons to bring private suits in response to others' actions that the Blackstonian category of private wrongs—and the rights and “relative” duties underlying them—come into existence. (Likewise, it is only insofar as the sovereign authorizes sanctions at the behest of government officials that one can identify nonrelative or “absolute” duties.)

Austin's top-down, remedy-driven conception of torts went hand in hand with a reconceptualization of the purpose of tort actions. He conceded to Blackstone that the immediate purpose of a tort suit was to empower the victim to obtain redress. But, he supposed, this does not tell us all that much. For once we recognize that torts exist only

---

109. See, e.g., HORWITZ, *supra* note 88, at 28–29.

110. 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE §§ 577–95, at 278–84 (Robert Campbell ed., 1875).

because of the sovereign's decision to arm people with the power to sue others, we will want to inquire why a sovereign would make that decision. The answer, Austin supposed, was to be found in the sovereign's interest in deterring people from engaging in wrongful conduct. The "paramount" point of a private right of action, he concluded, "like that of a criminal sanction[,] is the prevention of offenses generally."<sup>111</sup>

In the 1870s, Holmes would link Austin's inversion of Blackstonian thinking to full compensation. Following Austin, Holmes supposed that tort law was about duties imposed and enforced by the sovereign as against its subjects through the courts.<sup>112</sup> Unlike either Blackstone or Austin, however, Holmes supposed that the imposition of sanctions through private suits had nothing to do with breaches of "relative" or "relational" duties owed by one person to others, and indeed nothing whatsoever to do with wrongs.<sup>113</sup> Indeed, Holmes criticized Austin for being insufficiently positivistic and overly moralistic in supposing that modern law would be interested in what he took to be the somewhat childish and barbaric practices of blaming, retaliating, and punishing on the basis of wrongdoing.<sup>114</sup> Thus, the key move in *The Common Law* is its claim that late nineteenth-century criminal law and tort law had identified the *same* rule of conduct as the trigger for sanction and liability, namely the rule that attaches adverse legal consequences to unreasonable acts undertaken by actors in a position to foresee that their conduct might cause harm to another.<sup>115</sup> That both criminal and tort law deployed an "objective" standard of reasonableness—one that did not track notions of moral blame<sup>116</sup>—confirmed for Holmes that the state's reasons for issuing sanctions had nothing to do with the wrongfulness of a citizen's acts. Instead, the modern, liberal state was now setting a standard of conduct for another purpose—that of giving each person enough room in which to act, as well as relatively clear notice as to the point at which that room would run out, thus exposing the actor to adverse legal consequences.<sup>117</sup> This in turn would permit people (with the help of their lawyers) to order

---

111. *Id.* § 722, at 360.

112. See John C. P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 148 U. PA. L. REV. 1733, 1756 (1998) (discussing Holmes's conception of duties).

113. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 144 (38th prtg. 1945) (1881). Holmes stated: "[T]he general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms." *Id.* at 149.

114. *Id.* at 81–82.

115. *Id.* at 53.

116. *Id.* at 107–09.

117. *Id.* at 79.

their affairs and make rational decisions about how to go about their lives.

But if, in Holmes's view, criminal and tort law were concerned with setting the same standard of conduct, what was the point of differentiating between them? Austin, following Blackstone, had an easy answer to that question, one that focused on the identity of the party seeking to have sanctions imposed on the defendant (private citizen or government). That option, however, was not available to Holmes, because he rejected the idea that there was a distinction to be drawn between "relational" and "absolute" duties.<sup>118</sup> So instead he focused on the *nature of the consequence* that the state had attached to unreasonable conduct in these two classes of legal proceedings. In criminal cases, judges ordered fines and imprisonments out of a Benthamite and Austinian concern for "prevention"—albeit prevention of harms, not wrongs.<sup>119</sup> In tort cases, the government, through its courts, ordered actors who had exceeded the bounds of liberty set by law to *assume losses* incurred by others as a result of their unreasonable conduct. In short, what made tort law a department of the law in its own right was that it attached to violations of the state's code of conduct the particular consequence that the violator would have to indemnify others for any adverse consequences caused by the violation: "The business of the law of torts is to fix the dividing line between those cases in which a man is liable for harm which he has done, and those in which he is not."<sup>120</sup> Tort is a unique branch of the law because it is uniquely a law of indemnification; a law that enforces standards of conduct by holding actors who violate those standards *responsible to pay for the losses* that those violations have caused.<sup>121</sup>

With Holmes, then, one sees the idea of full compensation integrated into a theoretically self-conscious account of torts, one that has been in the ascendancy in the academy ever since. Still, to observe this important development is hardly to concede the field of play to the full compensation conception of damages or to theories of tort inspired by Holmes. Indeed, the issue remains very much alive, in part because the tendency to treat making whole as part of the essence of tort continues to raise serious problems and confusions. To take an

---

118. See Goldberg & Zipursky, *supra* note 112, at 1756.

119. HOLMES, *supra* note 113, at 46.

120. *Id.* at 79; see also *id.* at 96, 144.

121. It is possible that, by making tortfeasors indemnify victims, the state would reduce the incidence of tortious conduct. But Holmes did not offer or develop a deterrence-based theory of tort. Rather, he treated it as a system for allocating losses as between an innocent victim and an actor who had taken more than his fair share of liberty (where "fairness" was determined by the standards of conduct set out by judicial decisions in negligence cases).



obvious example (to which I have already alluded), consider the institution of punitive damages. On the full compensation conception, punitive damages must be regarded as a bizarre vestige of tort's criminal-law roots, or a gerry-rigged device for achieving public-law goals such as deterrence. By contrast, if making whole is not the be-all and end-all of tort law, then there is nothing necessarily odd (or un-tort-like) in courts sometimes recognizing claims to "exemplary" redress for certain forms of wrongdoing.<sup>122</sup> Moreover, the fair compensation model promises a more coherent framework by which to assess the propriety of punitive awards than do deterrence and punishment models.<sup>123</sup>

This same theoretical decoupling of substantive and remedial law could also explain why a fact-finder might be entitled to award less-than-fully compensatory damages, even to a not-at-fault tort plaintiff. Given the prevailing make-whole conception of tort, whenever jurors informally adjust damage awards downward from that target to reflect what they take to be the equities of a given case, their actions must be portrayed as a subtle form of nullification. The alternative, "decoupled" conception stands to put a more positive light on this sort of adjustment. Consider in this regard the eggshell skull rule. Under the full compensation approach, this rule is treated as a corollary to the make-whole principle. It therefore is presented as an entitlement on the part of the plaintiff. But, within a conception of tort that

---

122. See Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005) (providing a conception of punitive damages within a wrongs-and-redress conception of tort law); see also Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 615–16 (2003) (observing that punitive damages were in the eighteenth and nineteenth centuries often deemed owed to the victims of wrongs that added insult to the victim's injury); John C. P. Goldberg, *Tort Law for Federalists (and the Rest of Us): Private Law in Disguise*, 28 HARV. J.L. & PUB. POL'Y 3, 7–10 (2004). While Colby's excellent article rightly emphasizes that many cases in which large damages were awarded involved wrongs that included a component of insult, his analysis demonstrates the pitfalls of reading old cases armed with the "presentist" supposition that seventeenth and early-eighteenth century judges had already settled on the make-whole conception of damages. Thus, one of the English cases he cites as an early punitive damages case appears instead to express the Blackstonian view that damages for insult on top of injury do not fall under some separate head of damages, but instead form a component of the unitary notion of compensation commensurate to "the value of [the] injury done to [the victim]." Colby, *supra*, at 615 (quoting *Leith v. Pope*, 96 Eng. Rep. 777, 778 (C.P. 1779)) (internal quotation marks omitted). In another instance, Colby goes so far as to insert the adjective "punitive" into a judicial opinion, thereby converting an expression of the fair compensation conception to a modern notion of damages as dividing up into compensatory and punitive damages. See *id.* ("Along similar lines, the courts explained that 'the circumstances of time and place, when and where the insult is given, require different [punitive] damages; as it is greater insult to be beaten upon the Royal Exchange, than in a private room.'") (quoting *Tullidge v. Wade*, 95 Eng. Rep. 909, 910 (C.P. 1769)).

123. I am not suggesting that decoupling tort from the idea of making whole logically entails that punitive damages be made available in tort cases. Rather, it removes a facial objection to punitive damages as an anomaly.

decouples substantive and remedial law, it can be given an alternative and perhaps more intuitive characterization as a *permissive* rule of damages. So construed, the eggshell skull rule would stand for a rejection of the idea that certain defendants—namely, those who are subject to liability for losses that result in part from a victim's hidden vulnerability—are entitled to have that liability capped at the amount of harm that a reasonable person in their position could have foreseen. It would *not* be understood to generate a positive entitlement in the thin-skulled plaintiff to compensation for all of her losses. Instead, it would leave the fact-finder discretion to determine whether, given all the facts of the case, it is fair or reasonable to compensate the plaintiff for some or all of the unforeseeable quantum of harm he or she suffered.<sup>124</sup>

More broadly, as I have already suggested in this Part, detaching the idea of tort from the idea of making whole may have important implications for tort theory. I will conclude by mentioning two. Historians and historically inclined scholars including Lawrence Friedman and Thomas Grey have claimed that there really was no tort law until the mid- to late nineteenth century.<sup>125</sup> In their minds, this “fact” defeats any claim that tort law is deeply rooted in our legal traditions. And when this historical claim is combined with a policy-based condemnation of tort as an inefficient system of insurance or deterrence, the argument for abolishing tort in favor of alternative regulatory and insurance schemes is complete.<sup>126</sup> The present analysis may suggest that what they describe as an absence of tort law is more accurately described as an absence of a *particular theory* of tort law, by which tort is viewed as providing make-whole compensation to those injured by others' unreasonable conduct. In turn, this may provide the basis for a riposte both to the claim that tort law is a recent innovation and the claim that tort law is nothing more than a lousy system of insurance and deterrence. Conceived of as a law of private wrongs, tort law can claim an impressive lineage, and can be seen to make a good deal more sense than critics have supposed.<sup>127</sup>

---

124. An appreciation of the fair compensation view may also help make sense of, and perhaps might even justify, the apparent willingness of nineteenth-century jurors (with at least the tacit blessing of the judges who upheld their awards) to adjust tort damages in light of the whereabouts of the defendant. PETER KARSTEN, *HEART V. HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA* 264–75 (1997).

125. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 467 (2d ed. 1985); Thomas C. Grey, *Accidental Torts*, 54 *VAND. L. REV.* 1225, 1230–32 (2001).

126. See generally STEPHEN SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* (1989) (offering these critiques, among others).

127. See generally Goldberg, *supra* note 7 (exploring the roots and continued intelligibility and value of a redress-based conception of tort law).

Finally, since the 1970s it has been standard in academic discussions of tort—and many other branches of law—to divide the world of tort theory into justice-based theories on the one hand and welfarist or utilitarian theories on the other. The issue of whether making whole has something essential to do with tort reveals a different axis along which to bisect the field. On one side are theories that, by linking tort law tightly to making whole, treat tort law as a law of *loss-shifting*—as specifying the circumstances under which government, at the behest of a claimant, may order another to pick up a “tab” that the claimant is presently facing.<sup>128</sup> On the other side are theories that view tort law as a law of *wrongs and redress*; one that obligates actors to avoid (or refrain from) causing certain types of injuries to certain others and that, in the event those obligations are breached, empowers the beneficiaries of those obligations to invoke the legal system to obtain redress as against the breaching party. Although on a wrongs-and-redress view, a make-whole damages payment *might* constitute appropriate redress in a range of cases, that determination is one of remedy—it is, as we have seen, not built into the very definition of a tort claim. In this way, we can see that debates about the proper conceptualization of tort damages plug into, and help define, ongoing large-scale disputes in tort theory.

---

128. The treatment of tort as a law of loss-shifting may be common not only to the work of (supposedly) “pluralistic” or “pragmatic” scholars such as Rabin and Dobbs, but also to more overtly theoretical works of corrective justice theory. For example, Jules Coleman’s more recent work has tended to argue that tort law achieves corrective justice by virtue of redistributing losses that unjustly reside with victims to wrongdoers who have rendered themselves deserving of bearing the loss. Jules L. Coleman, *Second Thoughts and Other First Impressions*, in *ANALYZING LAW* 257, 302 (Brian Bix ed., 1998).