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Treating Wrongs as Wrongs: An Expressive Argument for Tort Law

<https://doi.org/10.1515/jtl-2017-0004>

Abstract: The idea that criminal punishment carries a message of condemnation is as commonplace as could be. Indeed, many think that condemnation is the mark of punishment, distinguishing it from other sorts of penalties or burdens. But for all that torts and crimes share in common, nearly no one thinks that tort has similar expressive aims. And that is unfortunate, as the truth is that tort is very much an expressive institution, with messages to send that are different, but no less important, than those conveyed by the criminal law. In this essay, I argue that tort liability expresses the judgment that the defendant wronged the plaintiff. And I explain why it is important to have an institution that expresses that judgment. I argue that we need ways of treating wrongs as wrongs, so that we can vindicate the social standing of victims. Along the way, I consider the continuity between tort and revenge, and I suggest a new way of thinking about corrective justice and the role that tort plays in dispensing it. I conclude by sketching an agenda for tort reform that would improve tort's ability to serve its expressive function.

Keywords: tort law, expressive function, corrective justice, revenge

The idea that criminal punishment carries a message of condemnation is as commonplace as could be. Indeed, many think that condemnation is the mark of punishment, distinguishing it from other sorts of penalties or burdens.¹ But for all that torts and crimes share in common, nearly no one thinks that tort has similar expressive aims. And for good reason. Tort is not in a position to express condemnation, except perhaps when punitive damages are in play. There are, after all, wide swaths of strict liability in tort, which permit a defendant to be held responsible, no matter how reasonable her behavior. And the tort of negligence employs an objective standard of care, so that a defendant may be

¹ See JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95–118 (1970).

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judged liable even if, through no fault of her own, she could not live up to the law's expectations. These doctrines should not obscure the fact that many tortfeasors deserve condemnation for what they have done. But taken together they ensure that many do not. Thus, if tort liability carries a message, it cannot consist in the condemnation of all those subject to it.

Maybe that means that tort liability does not carry a message. Certainly a student of the last several decades of tort theory could be forgiven for thinking that tort law exists primarily to move money around. Of course, tort theorists differ on the reasons for moving the money. Some think the point is to promote an efficient allocation of resources.² Others think the point is to do corrective justice by restoring successful plaintiffs to their rightful positions.³ But the movement of money has gotten much more attention than any messages that movement might send. And that is unfortunate, as the truth is that tort is very much an expressive institution, with messages to send that are different, but no less important, than those conveyed by the criminal law.⁴

What message does tort liability send? At the least, this: *The defendant wronged the plaintiff*. Now, I suspect this observation will strike some people as trivially true and others as obviously false. Those in the second camp might point to doctrines like the ones just mentioned—strict liability and the objective standard of care—which preclude the possibility that tort liability could, by itself, communicate condemnation. I shall say more about these doctrines later. For now, I'll simply note that a wrong that is excused or justified is still a wrong (*i. e.*, a breach of a right), even if it does not call for condemnation.⁵ But I want to linger longer over the first group: those who would think it true but trivial that tort liability communicates that the defendant wronged the plaintiff.

² See, *e. g.*, WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1 (1987) (defending “the hypothesis that the common law of torts is best explained as if the judges who created the law ... were trying to promote efficient resource allocation”).

³ See, *e. g.*, JULES L. COLEMAN, *RISKS AND WRONGS* 325 (1992); ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* 67 (rev. ed. 2012).

⁴ One of the few essays that attends to the expressive significance of tort law is Jean Thomas, *Which Interests Should Torts Protect?*, 61 *BUFFALO L. REV.* 1 (2013). Thomas is primarily interested in the wrongs that tort protects against, rather than the expressive significance of tort remedies, but much of what she has to say is congenial to the argument here, and vice versa.

⁵ Some think that a justified wrong is not a wrong at all, at least not all things considered. But that is a mistake, for the reasons that JOHN GARDNER explains in *IN DEFENCE OF DEFENCES, IN OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW*, ch. 4 (2007).

Why trivial? Well, as any dictionary will tell you, a tort just is a wrong.⁶ And indeed, tort law is an alphabet soup of them (assault, battery, conversion, defamation, etc.). So when a plaintiff alleges that she suffered a tort at the hands of the defendant, and she wins her suit, one might think that the judgment could not help but communicate that the defendant wronged the plaintiff.⁷ To be sure, there are many who think the moral vocabulary of tort misleading. But to those who take it seriously, it follows rather trivially that tort liability expresses the judgment that the defendant wronged the plaintiff. I count myself among those who take the vocabulary seriously, so I am happy to concede that the central observation of this paper is, in this sense, trivial: the message that tort liability sends is out in the open, plain for all to see, right there on the face of the judgment.

But many will think the observation that tort liability communicates that the defendant wronged the plaintiff trivial in a further sense. The point of tort law, they might say, does not lie in the judgment that the defendant wronged the plaintiff. Rather, it lies in the remedies that follow that judgment: most often, money damages, but occasionally injunctive relief, in addition or instead. The judgment, on this view, is simply a preliminary to the important business that tort law has to do: typically, ensuring that the defendant compensates the plaintiff, so that justice is done, or deterrence put in place, or whatever it is that the movement of money is supposed to accomplish.

This is a hardheaded view, as it locates the importance of tort law in its practical consequences. And it has the appeal that hardheaded views do, for it is hard to deny that practical consequences are important. Tort law exists to do something, not declare something, the hardheaded will say. And if we can do whatever tort law is supposed to do without the declaration, then nothing will be lost, or at least nothing the hardheaded will think important. Thus, the hardheaded suggest substitutes—most notably, safety regulations, no-fault insurance, and administrative compensation schemes—all of which, they say,

⁶ On the idea that torts are wrongs, see John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010).

⁷ In ordinary language, “communicate” and “express” are more or less synonymous. But philosophers often draw a distinction between communication and expression in way that renders the former a subset of the latter. See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1508 (2000) (“To express a mental state requires only that one manifest it in speech or action. To communicate a mental state requires that one express it with the intent that others recognize that state by recognizing that very communicative intention.”). Though nothing in the argument that follows turns on the mode in which tort expresses its messages, my usage will track this distinction, in part to underscore that not all of the messages that tort law sends are sent intentionally.

might engender efficiency, or even justice, at least as well or better than tort, but none of which express anything about particular plaintiffs or defendants.⁸ And that is more or less the point, since much of the attraction in these alternatives lies in dropping litigants from the picture altogether. It might well be true that tort liability communicates that the defendant wronged the plaintiff, but the hardheaded among us will think this truth trivial.

Well, I am here to say that this truth is not trivial. Sometimes we need to say, clearly and loudly, *this defendant wronged that plaintiff*, and our saying so can be significant quite apart from any material consequences that follow. Indeed, I am inclined to think that the hardheaded view has it backwards. The judgment that the defendant wronged the plaintiff is not preliminary to the important business that tort law has to do; it is the important business, and everything that follows after is in service of the judgment, not the other way around. In other words, I am inclined to think that tort is an expressive institution—not just incidentally, but primarily.

But I will not insist on that here. My aim in this paper is more modest. I want to broaden our conversation about tort by calling attention to the messages that it sends and the role that those messages play in our moral lives. But I am happy to allow that tort does more than send messages. The hardheaded are not completely wrongheaded. Tort helps determine how many accidents we will have and what precautions people will take to avoid them. It is also an important source of compensation for people who have been injured, at least if they are (un)lucky enough to have been injured by a tort. I simply want to say that there is more to the story. To fully appreciate the role that tort plays in our lives,

⁸ The hardheaded view is more common among those interested in the economics of tort, but it pops up in justice and fairness oriented accounts as well. In his early work, Jules Coleman argued that justice requires annulling wrongfully caused losses, a task which a no-fault insurance scheme might achieve at least as well or better than tort. See Jules L. Coleman, *Justice and the Argument for No-Fault*, 3 SOC. THEORY & PRAC. 161, 173–78 (1974). And Jeremy Waldron has suggested that we follow New Zealand and adopt an administrative compensation scheme for accidents, on the ground that victims come out just as well or better than they do in tort, while wrongdoers are protected against the risk of massive loss. See Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387–408 (David G. Owen ed., 1995). But even among those who think that justice requires linking wrongdoers to their victims through an institution like tort, the reason given is rarely that tort has something to say about them. Rather, the idea is that tort has a task to do, like seeing to it that the wrongdoer restores his victim to her rightful position, or that the victim's wrongful losses are offset with the wrongdoer's wrongful gains. For examples of these sorts of views, see Coleman's later work, including COLEMAN, *supra* note 3, as well as WEINRIB, *supra* note 3, and John Gardner, *What is Tort Law For? Part 1. The Place of Corrective Justice*, 30 LAW & PHIL. 1 (2011). I criticize these sorts of views below. See *infra* Part VII.

we must learn to see the value in an institution that stands ready to say *this defendant wronged that plaintiff*.

1 Tort and revenge

Why might we need to say that this defendant wronged that plaintiff? I want to start my answer with an old Illinois Supreme Court case, called *Alcorn v. Mitchell*.⁹ The decision was handed down in 1872, but the story starts several years earlier. The first time Alcorn and Mitchell tangled, Alcorn sued Mitchell for trespass.¹⁰ His complaint was that Mitchell took down his fence without permission.¹¹ Mitchell testified, and apparently, he was more persuasive than Alcorn. The trial court entered a judgment for Mitchell, but the glow from his victory could not have lasted long. Just after the court adjourned, Alcorn approached Mitchell and spit in his face.¹²

It's worth pausing here to say something about the spit, because it wasn't just spit. As Mitchell would later recount, Alcorn "squirted into [his] face and eyes ... a large quantity of filthy matter ... consisting of saliva, mingled with divers filthy noisome and disgusting drugs, whiskey and other kinds of nastiness."¹³ The crowd in the courtroom was outraged. They demanded that Mitchell kill Alcorn on the spot, and Mitchell was tempted. But he resisted, he said, "out of respect to the laws of God and the State,"¹⁴ leaving the crowd "indignant that so gross an insult should pass unrevenged."¹⁵

⁹ 63 Ill. 553 (1872). I'll tell most of the story here, but there's a bit more detail in Scott Hershovitz, *Tort as a Substitute for Revenge*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 86–102 (John Oberdiek ed. 2014). The discussion in this section builds on the analysis of the case offered there.

¹⁰ The only published opinion in the litigation between Alcorn and Mitchell is the 1872 Illinois Supreme Court opinion, which stems from the second suit between them. That opinion refers to the parties as plaintiff and defendant, without saying who was who. But the docket in that case (available in the Illinois State Archives) makes clear that Alcorn was the plaintiff in the first suit, and Mitchell the plaintiff in the second. See *Pleas and Proceedings in the Circuit Court, Alcorn v. Mitchell*, 63 Ill. 553 (1872) (Supreme Court Docket No. 88, Agenda No. 15) [hereinafter *Pleas and Proceedings*].

¹¹ Testimony of J.B. Gillaspie, Records from Marion County Proceedings at 3, *Alcorn v. Mitchell*, 63 Ill. 553 (1872) (Supreme Court Docket No. 88, Agenda No. 15).

¹² *Alcorn*, 63 Ill. at 553.

¹³ *Pleas and Proceedings*, *supra* note 10, at 4.

¹⁴ *Id.* at 5.

¹⁵ *Id.*

Though he did not take revenge, Mitchell did file a tort suit. The claim was battery, and his case could hardly have been more clear cut. The jury awarded him \$2,000 in vindictive damages, which the trial court knocked down to \$1,000.¹⁶ But that was still quite the sum. Indeed, if you wanted to hand someone a similar amount of money today, you would need a bit more than \$250,000.¹⁷ In other words, both the jury and the court took the spit seriously, almost shockingly so.

Alcorn appealed, and the question put to the Illinois Supreme Court was whether he had “been made to pay too dearly for [his] indulgence.”¹⁸ The court said no. It gestured at the fact that Alcorn was a wealthy man, but it didn’t dwell on that. Rather, the court emphasized that the damages were a substitute for the revenge that Mitchell refused to take. Here is the pivotal passage:

The act in question was one of the greatest indignity, highly provocative of retaliation by force, and the law, as far as it may, should afford substantial protection against such outrages, in the way of liberal damages, that the public tranquility may be preserved by saving the necessity of resort to personal violence as the only means of redress.¹⁹

To modern ears, there is something peculiar in this passage. Liberal damages, the court says, must be awarded so as to save the “necessity” of resort to personal violence. Nowadays, we rarely think that violence is warranted, let alone necessary. So why did the court think that, absent tort, Mitchell would find it necessary to turn to violence?

One possibility is that the court thought that violence would be necessary in order to deter future indignities. There is surely something to this. Mitchell was humiliated in as public a fashion as one could imagine. If he didn’t respond, people might get the impression that he could be pushed around. But though the court clearly cared about deterrence,²⁰ I suspect it had something different in mind when it worried that Mitchell might have to resort to violence. After all, it’s not obvious that Mitchell had anything further to fear, from Alcorn or anyone else.

¹⁶ *Id.* at 11.

¹⁷ Simply updating for inflation suggests that the equivalent award today would be about \$19,400. But we can get a better read on the social significance of the award by gauging its relationship to per-capita GDP, which was \$195.64 in 1872. Since per-capita GDP in 2012 was \$49,927.74, a similarly sized award today would be roughly \$255,000. See *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount - 1774 to Present*, MEASURINGWORTH, www.measuringworth.com/uscompare/ (last visited 24 September 2017).

¹⁸ Alcorn v. Mitchell, 63 Ill. 553, 554 (1872).

¹⁹ *Id.*

²⁰ *Id.* at 553 (observing that “[s]o long as damages are allowable in any civil case, by way of punishment or for the sake of example, the present, of all cases, would seem to be a most fit one for the award of such damages”).

Remember, the crowd rallied to Mitchell's side, demanding that he kill Alcorn. More important, the court did not say that Mitchell would have to resort to violence in order to deter future indignities. Rather, it said that Mitchell would have to resort to violence because that would be his only means of redress. And that suggests that the court's concern was the indignity that Mitchell had already suffered, not the ones he might suffer in the future.

This poses a puzzle. We must figure out what sort of redress Mitchell got from the damages that he might also have gotten from violent revenge. We might start by noting that Mitchell did not suffer any injury that money might repair, at least not in a straightforward way. He did not incur medical bills, lose wages, or have any other out-of-pocket expenses. And he was not awarded compensatory damages. The court called the damages that were awarded "vindictive."²¹ Today, we would probably call them punitive. But whatever label you put on them, the point is that they were not intended to repair any physical, financial, or even emotional injury that Mitchell might have suffered.

But that does not complicate our inquiry much, as revenge would not have repaired those sorts of injuries either. Indeed, that's why revenge often strikes people as irrational.²² That's a mistake; revenge is not irrational, and we'll see why in a moment. But first, we should take a step back and ask just why it was bad for Mitchell to have Alcorn spit on him. To start, it must have been an unpleasant experience. Indeed, it must have been a disgusting one. And it is bad to suffer disgusting experiences. But they can result from mishap as well as malice, and if that had been the case here, it is difficult to imagine that Mitchell would have considered killing Alcorn, or even filing suit against him.

Why else was the spit bad for Mitchell? Well, remember what I said before: the spit was not just spit. It was saliva, mingled with divers filthy noisome and disgusting drugs, whiskey and other kinds of nastiness. But more than that, the spit was a message. As Jeffrie Murphy explains:

One reason we so deeply resent moral injuries done to us is not simply that they hurt us in some tangible or sensible way; it is because such injuries are also *messages*—symbolic communications. They are ways a wrongdoer has of saying to us, "I count but you do not," "I can use you for my purposes," or "I am here up high and you are there down below."²³

21 *Id.* at 554 ("It is customary to instruct juries that they may give vindictive damages where there are circumstances of malice, wilfulness, wantonness, outrage and indignity attending the wrong complained of.")

22 On the rationality of revenge, see generally Jon Elster, *Norms of Revenge*, 100 *ETHICS* 862 (1990).

23 Jeffrie G. Murphy, *Forgiveness and resentment*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 25 (first paperback ed. 1990).

The messages implicit in moral injury are not always intended.²⁴ But in this case, I suspect that Alcorn actually meant his spit to communicate something like Murphy's last message—that he was up high and Mitchell down low. And the crowd in the courtroom almost surely took it that way. Recall that Alcorn was a wealthy man; estimates of his net worth at trial ranged from \$50,000 to \$200,000, which was a great deal of money back then.²⁵ Mitchell, on the other hand, was said to be worth just \$2,000.²⁶ So people were probably primed to hear the message that Alcorn was up high and Mitchell down low. Indeed, it seems reasonable to suppose that the very point of Alcorn's spit was to reassert that message in the wake of the court crediting Mitchell's testimony rather than his own.

Here then, we have another way in which Alcorn's spit was bad for Mitchell: it said something about him, and what it had to say was surely not welcome. As Murphy observes, “[m]ost of us tend to care what others (at least *some* others, some significant group whose good opinion we value) think about us—how much they think we matter. Our self-respect is *social* in at least this sense, and it is simply part of the human condition that we are weak and vulnerable in these ways.”²⁷ That vulnerability makes messages of the sort Alcorn's spit sent threatening, and the threats linger if we do not respond to them. Here's how Pamela Hieronymi puts it:

[A] past wrong against you, standing in your history without apology, atonement, retribution, punishment, restitution, condemnation, or anything else that might recognize it as a *wrong*, makes a claim. It says, in effect, that you can be treated this way, and that such treatment is acceptable.²⁸

²⁴ See Anderson & Pildes, *supra* note 7, at 1513 (observing that “people’s conscious purposes and intentions, while relevant, are not the sole determinants of what attitudes their actions express”); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996) (“[S]o long as we understand his act to be theft, the wrongdoer’s behavior conveys disrespect for the victim regardless of whether the thief meant to make any particular statement.”).

²⁵ The estimates of Alcorn's net worth appear in transcripts of testimony, contained in Records from Marion County Proceedings at 2, *Alcorn v. Mitchell*, 63 Ill. 553 (1872) (Supreme Court Docket No. 88, Agenda No. 15). If you compare these figures to per-capita GDP, then the present equivalent would range from \$12 to \$50 million. See *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount - 1774 to Present*, MEASURINGWORTH, www.measuringworth.com/uscompare/ (last visited 24 September 2017).

²⁶ Argument and Brief of Appellee, *Alcorn v. Mitchell*, 63 Ill. 553 (1872) (Supreme Court Docket No. 88, Agenda No. 15).

²⁷ Murphy, *supra* note 23, at 25.

²⁸ Pamela Hieronymi, *Articulating an Uncompromising Forgiveness*, 62 PHIL. & PHENOMENOLOGICAL RES. 529, 546 (2001).

The threat that Hieronymi means to highlight is not that you might be subject to the same treatment again, though that might be a worry if people come to think it is acceptable to treat you that way. Rather, the threat is to your social standing, which is diminished if people think that it is acceptable to treat you that way, even if it is not likely to happen again.²⁹

To defend his social standing, Mitchell had to find a way to counter the threat that Alcorn's spit posed. What could he do? Well, he could have demanded an apology. Had Alcorn apologized, and sincerely so, he would have disassociated himself from the message that his spit sent by acknowledging that it was, in fact, wrong to spit on Mitchell. But suppose Alcorn refused to apologize, or worse yet, apologized in condescending fashion. What then? Well, the crowd had an idea. They wanted Mitchell to kill Alcorn and were indignant when he failed to do so. Why did they care? It's possible that they were interested simply for the sport of it. But I suspect that many in the crowd actually felt threatened by Alcorn—if it was okay for him to spit on Mitchell, it might be okay for him to spit on them too—and that gave them reason to want to see Mitchell make clear that Alcorn had wronged him.

That is just what Mitchell would have done had he taken revenge. In killing Alcorn, he would have said that Alcorn wronged him, and more than that, he would have said that the wrong was serious—so serious as to warrant the gravest response. From where we sit, that seems more than a bit strange. We don't take slights of this sort nearly so seriously, or at least most of us don't. And that's a good thing. But for our purposes, it does not matter whether the slight was so serious as to warrant death. What matters is that we can tell how serious the crowd in the courtroom thought the slight was by the response they thought it warranted. And they thought it was dead serious.

Revenge is an expressive act.³⁰ And it is by no means irrational. When you take an eye for an eye, you do not get your sight back. But you do defend your social standing, which you have reason to care about whether or not you can see. Of course, revenge is not just an expressive act; it is often a violent one. And that gives us reason to want to avoid it where we can. But it does not undermine the case for sending the sort of message that Mitchell would have sent had he taken revenge. It just gives us reason to want to send that message differently. And that's what tort law does. When the jury found Alcorn liable for battery, it marked his conduct as a wrong, rebutting any suggestion that it was permissible

²⁹ *Id.* at 548, n.31.

³⁰ See PETER A. FRENCH, *THE VIRTUES OF VENGEANCE* 84 (2001) (“Revenge delivers a message, or, rather, revenge is a message.”).

for him to spit on Mitchell. And when it awarded substantial damages, it said something about how serious that wrong was.

Now, at this point, you might wonder: Why couldn't the jury just say what it had to say with words? Why did it need to award liberal damages too? Whenever anyone suggests that the law might serve an expressive function, this sort of worry quickly follows.³¹ But it is misguided, and Alcorn can help us see why. Alcorn could have hurled insults at Mitchell, but there's nearly nothing he could have said that would have communicated his contempt as clearly as his spit did. And there is nothing odd about that.³² The sacrifices that a parent makes for her child may express her love much more powerfully than anything she might say in words. And a parent who is unwilling to make sacrifices undermines the claim that she loves her child, no matter how often she says she does. Actions may not always speak louder than words, but they often do, and Alcorn understood that.

The jury did too. It could have simply said that Alcorn had wronged Mitchell, entering a nominal damage award, if that was required to find in Mitchell's favor. By attaching substantial damages to its verdict, the jury made its message unmistakable: Alcorn's conduct was wrong, and seriously so. That message still comes through loud and clear today, in no small part because the damages were so generous. Damages can do many things beyond express the jury's judgment about the gravity of a wrong. But they can do that too, and in *Alcorn*, there is no question that they did. Indeed, they did it far more effectively than any words the jury might have used to capture its judgment.

There's lots more to say here, and we'll start in on some of it in a moment, but let's take stock of where we are. We started with a question: why might we need to say that this defendant wronged that plaintiff? And *Alcorn* has pointed us toward an answer. Sometimes, we need to say so in order to vindicate a victim's social standing, and our saying so does so when it is forceful enough to rebut the message implicit in the moral injury. Tort law is not the only way to provide this sort of redress.³³ Indeed, victims can seek it unilaterally, by taking revenge. But if we want to save them—and us—the trouble of that, then tort law is a suitable substitute, because it is capable of sending the same messages.

³¹ See, e.g., ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 371 (1983) ("But if our intention is to mean his act was that (magnitude of) wrong, why don't we just say so and spare him the penalty?"). Nozick's suggestion was that the penalty connected the wrongdoer to the correct values, by giving them "some significant effect in his life." *Id.* at 374–80.

³² See Kahan, *supra* note 24, at 600–01.

³³ As I discuss below, criminal punishment can provide it too. See *infra* Part VII.

2 Beyond revenge

Okay, fine: In 1872, tort served an expressive function, or at least it did in cases like *Alcorn*, where it substituted for revenge. But what does that have to do with us? We don't often take revenge, at least not of the violent sort. And we're not obsessed with honor, in the way that revenge cultures were. Moreover, the mass of modern tort litigation looks little like *Alcorn*. To be sure, plaintiffs still bring battery claims, which put punitive damages in play, but in the twenty-first century, the real action involves claims like negligence and products liability, where compensatory damages are often the only damages on offer. Moreover, most suits settle well before trial, so a court never gets the opportunity to express anything at all. And the burden of the judgment—or settlement—often falls on an insurance company rather than the defendant. Add all this up, and it seems a serious mistake to take *Alcorn* as a model for modern tort law.

Well, obviously, I disagree, or I wouldn't have spit out so many words about *Alcorn*. But these are serious objections to the picture just presented, and we will work our way through them slowly. To start, let's think a bit more about revenge. It's true that we don't seek it much anymore, or at least most of us don't. Though it's hard to know for sure, we probably don't need tort in order to preserve the public tranquility. And if we don't, then we lack some of the reasons the *Alcorn* Court had for wanting to see tort send messages that revenge might send instead. But that does not rule out the need for a substitute. The messages that revenge sends might be worth sending whether or not people are apt to take revenge. Indeed, if we think that the messages are worth sending, and people aren't likely to send them through revenge, then we might have even more reason to press tort into service as a substitute than we would if revenge remained a live option.³⁴

34 This is similar to one of the foundational claims of John Goldberg and Ben Zipursky's civil recourse theory, and you might take the view on offer as one way of elaborating that theory—a way that, as will become clear later, renders it as a kind of corrective justice account of tort. But there is a subtle difference worth noting here. Goldberg and Zipursky suggest that the state is obligated to provide a civil substitute for revenge on account of the fact that it prohibits private violence as a way of responding to wrongdoing. 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, 606 (2005) (“With resort to self-help blocked by the law, government is obligated, at least to some degree, to provide an alternative path for the attainment of satisfaction.”); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 84–86 (1998) (“In other words, where the state forbids private vengeful retribution, fairness demands that an opportunity for redress be provided by the state.”). They sometimes situate this claim in social contract theory—the idea is that people would only agree to give up the power to take private

Are the messages worth sending? I think so, and in a moment, I'll say more about why. But first I want to dispatch one source of doubt. Earlier, I said that revenge is a way of defending your social standing. For anyone familiar with revenge cultures, the talk of social standing will call to mind notions of honor that no longer play a substantial role in our lives, or at least not as substantial a role as they once did. Honor is not an easy concept to capture and I will not attempt to do it justice here. It will only take a thumbnail sketch to remind us why we do not want honor to play an organizing role in our social relations.

Honor was a measure of the value of a person.³⁵ It was regarded as a scarce commodity.³⁶ Many people—women, servants, slaves—could not possess it.³⁷ And those who could were constantly competing for it.³⁸ The competition was zero-sum, as honor could only be acquired at someone else's expense.³⁹ And your honor—or lack of it—affected every aspect of your life. Here's Bill Miller, offering a partial catalogue of the ways in which honor mattered:

Honor was what provided the basis for your counting for something, for your being listened to, for having people have second thoughts before taking your land or raping

revenge if the state provided a civil way to seek satisfaction. See Goldberg, *supra*, at 606; Zipursky, *supra*, at 86–87. To my thinking, the case for civil recourse does not depend on social contract theory, or even on the thought that it would be unfair to restrict private violence without providing an alternative, though it might be. Rather, it depends on the fact that we have moral reasons to maintain institutions that serve the expressive function that both revenge and tort serve, but overwhelming reasons to prefer tort to revenge.

35 Julian Pitt-Rivers, *Honour and Social Status*, in *HONOUR AND SHAME: THE VALUES OF MEDITERRANEAN SOCIETY* 21 (J.G. Peristiany, ed. 1966) (“Honour is the value of a person in his own eyes, but also in the eyes of his society.”).

36 See WILLIAM IAN MILLER, *HUMILIATION* 116–17 (1993) (“Your status in this group was the measure of your honor, and your status was achieved at the expense of the other group members who were not only your competitors for scarce honor but also the arbiters of whether you had it or not.”); Pitt-Rivers, *supra* note 35, at 23 (“The claim to excellence is relative. It is always implicitly the claim to excel over others. Hence honour is the basis of precedence.”). See also THOMAS HOBBS, *DE CIVI* 12 (Kessinger Pub. 2010) (1651) (“[G]lory is like Honour, if all men have it, no man hath it, for they consist in comparison and precellence.”).

37 See Elster, *supra* note 22, at 867 (“Honor is an attribute of free, independent men, not of women, slaves, servants, or other ‘small men.’”).

38 See MILLER, *supra* note 36, at 116–17 (“The shortest road to honor was thus to take someone else's, and this meant that honorable people had to be ever-vigilant against affronts or challenges to their honor, because challenged they would be.”).

39 WILLIAM IAN MILLER, *BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND* 30 (1990) (“Honor was thus, as a matter of social mathematics, acquired at someone else's expense. When yours went up, someone else's went down.”). See also Pitt-Rivers, *supra* note 35, at 24 (“The victor in any competition for honour finds his reputation enhanced by the humiliation of the vanquished.”).

you or your daughter. It even governed how you spoke, how loudly, how often, and to whom and when, and whether you were attended to when you did; it governed how you held your shoulders, how tall you stood—literally, not figuratively—and how long you could look at someone or even dare to look at him at all.⁴⁰

Those concerned with honor, Miller adds, had “[a] keen sensitivity to the experience of humiliation and shame, a sensitivity manifested by the desire to be envied by others and the propensity to envy the success of others.”⁴¹ Indeed, in cultures that prized honor, Miller reports, “revenge was understood as riposte to shame.”⁴²

We resist most all of this. To be sure, there are pockets of our lives in which some simulacrum of honor still plays a part—on playing fields and in faculty lounges, among other places. But that’s not how we think we should organize the basic structure of our social relations. We resist the idea that the victims of wrongdoing are the people who should be shamed by it. Quite the contrary, we think, wrongdoers bring shame on themselves. So if revenge is a riposte to shame, then we should want to dispense with it not just because it is violent, but also because it presupposes an emotional economy that we reject. The worry here is that the picture painted in the last section—on which revenge is a way of defending your social standing—was sanitized of the objectionable conception of social standing that fueled the practice.

Well, that is true. And we have not even scratched the surface of the moral horrors perpetrated in the name of honor. But honor is not the only way to structure social standing. Today, we are more apt to worry about our dignity than our honor. And though dignity is just as difficult to get a grip on, some contrasts are clear. Dignity does not demand social stratification; we can be equals in our dignity, and many think that, as a matter of morality, we are.⁴³ Indeed, many hold that simply in virtue of our humanity, we possess a dignity that cannot be diminished. This dignity—our human dignity—gives us permission to move through the world with a certain sort of bearing, which is exemplified by those we think dignified—those who are confident, composed, and in

40 WILLIAM IAN MILLER, *AN EYE FOR AN EYE* 101 (2006).

41 MILLER, *supra* note 39, at 84.

42 William Ian Miller, *Clint Eastwood and Equity: Popular Culture’s Theory of Revenge*, in *LAW IN THE DOMAINS OF CULTURE* 166 (Austin Sarat & Thomas R. Kearns eds., 1998).

43 To say that dignity does not demand social stratification is not to say that it does not depend on a notion of rank. I agree with Jeremy Waldron that it does. We can all be equals in our dignity because we can all occupy the same rank simultaneously. Indeed, we can all occupy a high rank simultaneously. What makes the rank high is that we are familiar with lower ranks, even if we no longer think they are filled. On the notion of dignity as a status of high rank, see generally JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* (2012).

control of the way they present themselves to the world.⁴⁴ Our human dignity also acts as a constraint on others, who must give us the space to move through the world that way. This is not the only sort of dignity; we'll encounter a more specialized one later. But many torts protect this sort of dignity, and battery is among them. When Mitchell stood with Alcorn's spit on his face, he was far from in control of the way he presented himself to the world.

Now, if this sketch is right, then Mitchell's dignity was not diminished by Alcorn's spit. Or at least, it was not diminished as a matter of morality. But we talk about dignity in different senses, and in some of them, it is subject to loss. For example, we say that people have lost their dignity when they become so frail that they are no longer able to control the way they present themselves to the world. Of course, these people still have dignity in the moral sense, and that constrains the way we treat them. But dignity also refers to the capacity to manifest the moral quality, and all too often, that has an expiration date. Indeed, that is what many of us fear most about old age—the loss of dignity, even more than death. Later on, we will confront a case in which the defendant destroyed the plaintiff's dignity in this sense.

But for now, we should take note of a different way in which we talk about the loss of dignity. We sometimes say that we have lost our dignity when others stop treating us as if we have it. Here, dignity does not refer to the moral status, or even to the capacity to manifest it. Rather, it refers to the degree to which that status is respected. This is the sense in which Alcorn's spit posed a threat to Mitchell's dignity. Remember Hieronymi's point—a wrong, standing in your history, without anything that marks it as wrong, makes a claim. The claim is that you may be treated that way. If people came to think that Alcorn could spit on Mitchell, then Mitchell's dignity would be diminished—not as a moral matter, but as a social matter. Mitchell obviously had reason to resist that, and as we said before, if he wanted to rebut the claim, then he had to find some way to mark the spit as a wrong. He might have taken revenge, but instead he turned to tort.

Now, we can ask: Why should we provide Mitchell an opportunity to rebut the message implicit in the moral injury? Why shouldn't we think that the social recognition of Mitchell's dignity is his problem and not ours? The fact that revenge is violent and sometimes cycles out of control surely provides one reason. But that is not the only reason, or even the most important. A moment ago, I suggested that Mitchell's dignity protected him from insults like Alcorn's spit. But if his dignity conferred any protection, the barrier it posed was normative, not physical. Morality does not operate on the world directly. It has

⁴⁴ *Id.* at 21–22.

influence only to the extent that we recognize and respect its requirements.⁴⁵ And that is the reason that we must make Mitchell's dignity our business.

We are the agents of morality. There is no one else to do the job. If we think that, as a matter of morality, Mitchell's dignity confers on him a right to be free from insult's like Alcorn's spit, then we must live as if he has that right. That means we must treat Alcorn's spit as an offense against Mitchell. Tort is a way for us to do that. That is, tort is a way for us to make sure that Mitchell enjoys the dignity to which he is morally entitled. Alcorn disrespected Mitchell's dignity, and that was bad enough. But Mitchell would have suffered a much graver harm if people had turned their backs, or worse yet, denied that he had any dignity to be disrespected. The jury said that Alcorn had wronged Mitchell, and in doing so, it accorded him the dignity that Alcorn had denied him.

Of course, many people must have known that it was wrong to spit on Mitchell, at least as a matter of morality. And they may have even known that the spit was a legal wrong, and not just a moral wrong, if they were familiar with the basics of battery. If they did, that already helped to invest Mitchell with dignity in the social sense. But if we want to discharge our duty to order our lives as morality requires, then we must do more than say that certain conduct is wrong. We must express that judgment through what we do, as well as what we say. Otherwise, our words will ring hollow. Tort law announces in advance that people may not be battered, and then it backs that up, by treating battery as a wrong when it happens. The fact that we have an institution that does that says something about us. It says that we take ourselves to have a dignity that protects us from insults like Alcorn's spit.

I think this is a terribly important fact about tort law. Indeed, I think it may be the main reason to maintain an institution like tort. Of course, if I am to persuade you of that, we will have to bring the story forward from 1872. We'll take up that task in a moment, but before we leave revenge behind, I want to say just a bit more about it. Some people have anxiety about the relationship between tort and revenge, and they are keen to distance tort from it,⁴⁶ or else quick to condemn tort

⁴⁵ See NOZICK, *supra* note 31, at 369 ("Since an act's moral qualities, qua moral qualities, seem to lack causal power, if something is to happen to someone because of the moral quality of his act, this must occur through another's recognition of that moral quality and response to it."); FRENCH, *supra* note 30, at 80 ("The only power that morality has to affect human affairs resides in the response of moral people, members of the moral community, to the recognition of the moral quality of actions and characters.").

⁴⁶ See, e.g., Goldberg, *supra* note 34, at 602 ("Tort redress is not to be confused with vengeance. Vengeance is an unregulated response by which a victim seeks satisfaction directly and by the means of her choice. For good reasons, Anglo-American law allows almost no room for it.").

for any hint that it provides an outlet for vindictive motives.⁴⁷ The anxiety is misplaced. We can appreciate the continuity between tort and revenge without embracing the honor cultures in which revenge was a routine part of life. A tort suit is not a form of revenge; it is a substitute for revenge. And it is not a very good substitute, at least not for those interested in their honor.⁴⁸ Among other things, a tort suit casts the plaintiff in the role of the kid, who needs to go to his teacher for help, and we all know there is no honor in that.⁴⁹ The fact that tort is the tool that we use to send messages about the social standing of victims is a sign that we care more about dignity than honor. And it is not just a sign that we care about the dignity of victims; it is a sign that we care about the dignity of defendants too. The court castigated Alcorn for his breach of Mitchell's dignity; it declared that he had gratified "his malignant feelings in [a] despicable mode."⁵⁰ And yet, it held him responsible in a way that respected his dignity. Alcorn was not spit upon, or worse. He was merely made to pay money—a princely sum, perhaps, but his person, and the dignity that surrounded it, remained intact. And that is another terribly important fact about tort law.

3 An Alcorn for our age

But still, you might wonder, what does this have to do with us? Maybe nineteenth century tort law aimed to vindicate the social standing of victims. But *Alcorn* is

⁴⁷ See, e.g., Emily Sherwin, *Interpreting Tort Law*, 39 FLA. ST. U. L. REV. 227 (2011); Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387 (2003).

⁴⁸ See Pitt-Rivers, *supra* note 35, at 30 ("The conflict between honour and legality is a fundamental one which persists to this day. For to go to law for redress is to confess publicly that you have been wronged and the demonstration of your vulnerability places your honor in jeopardy, a jeopardy from which the 'satisfaction' of legal compensation at the hands of a secular authority hardly redeems it. Moreover, it gives your offender a chance to humiliate you further by his attitude during all the delays of court procedure, which in fact can do nothing to restore your honour but merely advertises its plight. To request compensation or even to invite apologies are courses of action which involve risk to honour if they are not adopted with the implication that they cloak a demand for satisfaction. If someone steps on your toe inadvertently while getting on a bus, you humiliate yourself by complaining, even if apologies are proffered. The man of honour precedence says nothing at the time but catches his offender a sharp one on the shin as he gets off; his honour is revealed to have been jeopardized only by the action which restores it to grace, and he has circumvented the risks of placing it in foreign keeping.").

⁴⁹ If there is honor when a plaintiff prevails at trial, it almost always accrues to his attorney, who is cast in the role of avenger.

⁵⁰ *Alcorn v. Mitchell*, 63 Ill. 553, 554 (1872).

hardly typical of today's tort suits. Now, there is surely something to this, and we will spend the next several sections sorting it out. But first, I want to push back, because the truth is that it is easy to find contemporary cases that look like *Alcorn*. To start, we still spit on each other. In 2005, Toya Brown was shopping at a Burlington Coat Factory, when a security guard accused her of theft. She showed that she hadn't stolen anything, but that didn't satisfy the guard.⁵¹ He detained her, spit on her, and harassed her with racial slurs.⁵² She filed a battery claim, and the case settled for \$29,000.⁵³ Insofar as the spit goes, Brown might commiserate with a roofing contractor named James Angus. In 1994, he asked Jim Ventura for payment after he completed work at Ventura's house. Ventura refused. Angus started to leave, but Ventura followed him to his car. When Angus rolled down his window, Ventura spit in his face. Angus attached a battery claim to his contract suit, and a jury awarded him \$10,000 for the spit.⁵⁴

But of course, *Alcorn* is not just a story about spit. It is a story about the significance of a court saying *this defendant wronged that plaintiff*. And that can matter even if everyone keeps their bodily fluids to themselves. Indeed, if we wanted to find a modern analogue for *Alcorn*, we could not do much better than the Wisconsin Supreme Court's famous decision in *Jacque v. Steenberg Homes, Inc.*⁵⁵ The defendant in that case wanted to deliver a mobile home to the Jacques' neighbor. The easiest way in was across the Jacques' land, and the defendant's employees asked several times whether they could move the mobile home across it. The Jacques said no, repeatedly, right up until the moment the mobile home was to be moved. After the last request was denied, one of the defendant's managers told an employee "I don't give [a fuck] what he said, just get the home in there any way you can."⁵⁶ And that's what they did. They blocked the Jacques view of the road with their truck, proceeded far enough down that they would be out of sight, and then cut across the Jacques' land to complete the delivery.⁵⁷ Afterward, the manager had a good laugh about it.⁵⁸

51 Interview with Lenny Crone, attorney for Toya Brown (9 July 2014) (on file with author).

52 *Brown v. Mulcahy*, No. CV065001276S, 2007 WL 2363303, at *1 (Conn. Super. Ct. 24 July 2007).

53 Email from Lenny Crone to Scott Hershovitz, Professor of Law, Univ. of Michigan Law Sch. (9 July 2014) (on file with author).

54 *Angus v. Ventura*, No. 2740-M, 1999 WL 33287, at *1–3 (Ohio Ct. App. 27 January 1999). These damages were compensatory, not punitive.

55 *Jacque II*, 209 Wis. 2d 605 (1997).

56 *Jacque v. Steenberg Homes, Inc. (Jacque I)*, 201 Wis. 2d 22, 26 (Ct. App. 1996), rev'd, 209 Wis. 2d 605 (1997).

57 *Jacque II*, 209 Wis. 2d at 611–12.

58 *Id.* at 612.

Now we do not tend to type trespass as a dignitary tort, and for good reason. The sort of dignity that I spoke of earlier—the kind that we possess simply in virtue of our humanity—protects our person, and objects closely connected to it.⁵⁹ Our property rights are grounded in something other than our dignity, and they might even be morally optional, since it is reasonable to suppose that there are several morally permissible property regimes. But once we have the property rights that we do, a new kind of dignity takes hold. It is the dignity of the right-bearer. When you hold a right, you do not need to plead with others to do as you would like. You do not even need to persuade them. In the domain of your right, you are not a supplicant. You decide and others must defer.⁶⁰ Steenberg did not affront the Jacques' personal dignity. But it surely did affront the dignity that attached to their ownership. This was not an accidental trespass. It was contemptuous. Think back to Murphy's messages: Steenberg did not quite say, "We can use you for our purposes," but it surely did say, "We can use your land for our purposes."

If the Jacques wanted to rebut the message implicit in the moral injury, what could they do? Well, their first thought was to summon the sheriff, who issued a citation for \$30. Now, the sheriff's citation communicated that Steenberg had wronged the Jacques; after all, it was a citation for trespass. But it also said something about the seriousness of the wrong. Under the relevant statute, the citation subjected Steenberg to a "Class B forfeiture," which would have permitted the sheriff to take up to \$1,000.⁶¹ But the sheriff didn't come close to that limit. He took a trivial sum, and it is hard to read that as anything but a commentary on the magnitude of the wrong.

The Jacques were not satisfied. They filed a trespass action, and the jury had a harsher reaction than the sheriff did. The Jacques did not have any actual damages, so the jury awarded a dollar in nominal damages. But it tacked on another \$100,000 in punitive damages.⁶² That is no trivial sum. These damages may not be as significant as the damages in *Alcorn*—the jury's award there was about three times as large when adjusted for context⁶³—but they surely

⁵⁹ Tort recognizes this through the doctrine of extended personality. See Restatement (Second) of Torts § 18, cmt. c (1965) ("Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person.").

⁶⁰ See WALDRON, *supra* note 43, at 49–51 (citing other similar arguments).

⁶¹ *Jacque II*, 209 Wis. 2d at 630.

⁶² *Id.* at 609.

⁶³ Remember that the jury in *Alcorn* awarded \$2,000. When you adjust relative to per-capita GDP, the 1997 equivalent would have been more than \$300,000. See *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount - 1774 to Present*, MEASURINGWORTH, www.measuringworth.com/uscompare/ (last visited 24 September 2017).

succeeded in sending the same message: Steenberg wronged the Jacques, and rather seriously so.⁶⁴

For a while, however, it looked like the message the jury sent might be revoked. Wisconsin law appeared to bar punitive damages where there were no actual damages, so the trial court set that part of the judgment aside.⁶⁵ The Court of Appeals refused to reinstate it, but it encouraged the Supreme Court to take up the case, observing that its own decision “implicitly tells [construction firms] that they are free to go where they please, regardless of the wishes of the owner.”⁶⁶ The Supreme Court agreed, and it revived the punitive damage award. Along the way, it said that it was “troubled by Steenberg’s utter disregard for the rights of the Jacques.”⁶⁷ And it took the defendant to task for taking “an arrogant stance, arguing essentially that yes, we intentionally trespassed on the Jacques’ land, but we cannot be punished ... because the law protects us.”⁶⁸

The court also emphasized the need to deter Steenberg—and similarly situated firms—from future trespasses. “In order to effectively do this,” the court observed, “punitive damages must be in excess of the profit created by the misconduct so that the defendant recognizes a loss. It can hardly be said that the \$30 forfeiture paid by Steenberg significantly affected its profit for delivery of the mobile home. One hundred thousand dollars will.”⁶⁹ That was surely right. And that means that the damages did not just say something, they did something. But what they did was lend force to what they said.

Any talk of tort and deterrence inevitably calls to mind the economist’s suggestion that tort damages should be set so as to promote an efficient allocation of resources. Did these damages do that? I have no idea, but I rather doubt that they did. The Jacques’ reason for wanting to keep the defendant off their land was dumb. Years earlier they had lost some land to adverse possession, and only then because their lawyer had failed to file a timely response to a complaint. They didn’t want to run that risk again.⁷⁰ But, of course, there was no risk of adverse possession in granting the defendant one-off permission to move a mobile home. It is far from clear that rights of exclusion so strong as the one

⁶⁴ For a similar analysis of *Jacque II*, see Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1871–74 (2007).

⁶⁵ *Jacque II*, 209 Wis. 2d at 609.

⁶⁶ *Jacque I*, 201 Wis. 2d at 33.

⁶⁷ *Jacque II*, 209 Wis. 2d at 628.

⁶⁸ *Id.*

⁶⁹ *Id.* at 631.

⁷⁰ *Id.* at 610; *Jacque I*, 201 Wis. 2d at 25. To be clear, I don’t mean to say that the Jacques were dumb. They had been burned by the legal system and were rightly wary of it. But in this case, their worry was wholly unwarranted.

the Jacques enjoyed—and so strictly enforced—leave everyone better off. Maybe they do, or maybe they don't. That's in part an empirical question, and the answer will depend on just how often landowners make dumb decisions, like the Jacques did.⁷¹ But the court did not take up that question. It showed no interest in the welfare consequences of its decision, which is not a surprise, since the doctrine gave it no reason to care.⁷²

The deterrence argument was all about putting the defendant's money where the court's mouth was. I will return to this point later, but let me flag it now: those who think that tort is all about efficiency do not own deterrence arguments. The willingness to sanction wrongs severely enough to deter them may be a condition of communicating that the plaintiff really does enjoy the right the court says she does. The point of the punitive damages in *Steenberg Homes* was to make clear that the judgment meant what it said—the Jacques had a right to exclude Steenberg from their land—and boy did the damages succeed in that.

4 The expressive function of accident law

So there are still cases like *Alcorn*. I suspect that all of them are significant to the parties involved, and some of them—like *Steenberg Homes*—manage to attract enough attention that they carry broader social meaning too. But their numbers are surely small, if not in absolute terms, then relative to the full run of tort litigation. Nowadays, the prototypical tort action is a claim for negligence or perhaps products liability, and the damages sought are generally compensatory, not punitive. Can we extend the story to cases like these? We can, but it is trickier to illustrate, as negligence claims cover a wide range of conduct. At one extreme, the defendant callously disregards the possibility of injury, even though he does not aim at it. Here, you might think of the teen who texts while driving, or the truck driver who pushes past the permitted hours and falls asleep at the wheel. Even though these cases will nominally be negligence actions, they put us right back in the world of punitive damages, as the conduct

⁷¹ If you are tempted to think we can rely on landowners to act in their own self-interest, think again: the Jacques simply refused to negotiate. See *Jacque II*, 209 Wis. 2d at 611 (“At that point, the assistant manager asked Mr. Jacque how much money it would take to get permission. Mr. Jacque responded that it was not a question of money; the Jacques just did not want Steenberg to cross their land.”). In the end, the trespass caused no actual damage, and there does not seem to have been any reason to think that it would.

⁷² See Merrill & Smith, *supra* note 64, at 1872–73.

is reckless or worse. At the other end of the spectrum is Holmes's hasty and awkward man, who's congenitally condemned to cause accidents wherever he goes. We'll take him up in a moment, but we won't waste our time with teen texters and tired truckers—they are too easy a target. Let's pick a case somewhere in the middle, and see what we can make of it.

Rosa Kresin went to the Sears Auto Center to purchase a battery for her car.⁷³ As she was leaving the store, Alfredo Jijon was backing a van out of the service bay adjacent the door. Jijon—a Sears employee—would later admit that he did not check the rearview mirror before backing up. He also said he did not remember whether he had looked over his shoulder to see if anyone was behind him. He did say that he glanced at the driveway—though it's not clear how if he neither looked in the mirror nor over his shoulder—and he said that he paused for a moment when the van was even with the doorway, so that traffic could clear. But if he did those things, they did not help: Jijon hit Kresin, and she was crushed beneath the van.

At the time, Kresin was 73 years old. She was in good health, lived independently, drove a car, and handled chores for herself. Jijon ended all that. Here's how a court recounted her injuries:

Kresin suffered ... facial, rib, leg and collarbone fractures, and a skull fracture which caused permanent blindness. She underwent multiple surgical procedures and has a permanent shunt underneath her skin from her head to her abdominal cavity to drain excess fluid.

Kresin is also wheelchair bound and can no longer stand or walk unaided. She is incontinent and cannot shower, bath or use the bathroom without assistance. Furthermore, she is only able to make minimal movements with her left leg and suffers from a flexion contracture in her left arm and hand. This condition leaves her unable to straighten her left elbow and causes her left hand to be bent over with the fingers clinched back in a clawed or fist position.

Kresin remained in the hospital for approximately two months after the accident. During her hospital stay, she developed several infections, including hydrocephalus and meningitis. Kresin also suffered a stroke, which caused paralysis in her left leg and partial weakness in her leg and arm.⁷⁴

Now, let me ask: How would you feel if you were Kresin? In an instant, her life was shattered. And though this was an accident, it would have been avoided had Jijon just looked in the rearview mirror. If you're hesitating to say you'd be angry, that might be out of some sympathy for Jijon, and I don't think that's misplaced. One of the things that's horrifying about stories like this is that you

⁷³ Kresin v. Sears, Roebuck & Co., 736 N.E.2dN.E.2d 171, 173–75 (Ill. App. Ct. 2000).

⁷⁴ *Id.* at 174.

can see yourself in both roles. We've all been in a hurry and driven less carefully than we know we should. This is one of the problems of that goes by the name moral luck, but I don't want to get distracted by it.⁷⁵ I want to make sure we keep the first-person perspective in view.

So let me ask again: How would you feel if you were Kresin? I would be angry, and I would want to hold Jijon responsible for what he'd done. Because let's be clear: the accident was not just bad luck. When you take control of two tons of steel, you owe it to the people who might be behind you to take care not to crush them with it. This case doesn't fit Murphy's messages, but Jijon's conduct sent a closely related one: "I don't have to watch out for you."⁷⁶ A plaintiff in a negligence action protests just that sort of message. She says, in effect, "yes, you do have to watch out for me."

When Kresin filed suit, and the jury found Jijon negligent,⁷⁷ it vindicated her protest. The judgment established that Jijon owed Kresin a duty to take ordinary care and that he breached that duty. This time, the judgment was not backed by punitive damages, and that makes sense. When a wrong is willful or wanton, we should not hesitate to condemn the person who did it. But our temptation to condemn Jijon must be tempered by our recognition that we could be him. He did not mean for this to happen and that counts. But it does not count for everything. The jury awarded Kresin just over \$16.5 million dollars in compensatory damages. That sum included nearly \$400,000 for medical expenses, just over \$1.1 million in caretaking expenses, an even \$6 million for pain and suffering, \$7 million for her disability, and \$2 million for her disfigurement.

How should we understand these damages? A standard story says that compensatory damages aim to make the plaintiff whole.⁷⁸ I think that's a terrible way to talk, and I want to offer a different suggestion about what compensatory damages like these do. Once again, we can get help from Hieronymi:

[A]ny wrongdoing leaves in its wake some amount of damage or cost, be it physical, financial, emotional, relational, or social. This is damage which the offender usually cannot repair ("you can't take it back," as children learn), and which the offended will,

⁷⁵ If you want to get distracted by it, see generally John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007); WALDRON, *supra* note 8.

⁷⁶ The claim here is not that Jijon intended to send this message; he certainly did not. But people's intentions are not the sole determinants of what attitudes their actions express. See Anderson & Pildes, *supra* note 7, at 1513. When you backup without looking behind you, you manifest a lack of care, whether or not you intend to do so.

⁷⁷ The jury also found Sears liable, both for Jijon's negligence and its own. See *infra* Part V.

⁷⁸ See, e.g., Henry Kalven, Jr., *The Jury, The Law, and The Personal Damage Award*, 19 OHIO ST. L.J. 158, 160 (1958) (suggesting that "the function of tort damages [is] to make the plaintiff whole").

in any case, incur. The persistence of the damage threatens any attempt to leave the past in the past, insofar as the damage testifies to the deed.⁷⁹

Jijon hurt Kresin, badly. But the injuries Kresin suffered were not just medical problems. They were markers of the way she was mistreated. And they were markers that she would have to confront every day, for the rest of her life. When compensatory damages can repair an injury, the money makes the marker disappear. That helps to put the past in the past. But with rare exception, that only works for financial injuries—medical expenses, lost wages, and the like.

Most injuries cannot be repaired by money. But compensatory damages can still make a difference, as they shift the meaning of the marker. To be sure, the injuries that remain will always testify to the deed. But compensatory damages mark those injuries as the defendant's responsibility. The damage award said to Jijon: *This is what you did. This is your fault—the disability, the disfigurement, the pain and suffering.* The damages did not make Kresin whole, not even close. But they did make clear that her injuries were Jijon's responsibility. And they ensured that Kresin would be paid for her injuries, so that they would not stand as markers of mistreatment her community did not care to do anything about.⁸⁰ If we did not offer that to Kresin—if we left in place injuries that might be repaired or sat silent about those that could not—then she would indeed have reason to doubt her social standing. Maybe she could be treated that way, she might think, because she was, and nobody cared to do anything about it. The compensatory damages stopped that train of thought cold. They made clear that Kresin could not be treated that way.

Of course, compensatory damages don't just say something; they do something. The damages helped Kresin with her bills, and they gave her resources to adapt, as best she could, to the limitations that she faced. And this is another terribly important fact about tort law. Indeed, one of the best things that can be said on behalf of tort is that it affords people some measure of security in their persons and possessions.⁸¹ But tort offers that security only to

⁷⁹ Hieronymi, *supra* note 28, at 550.

⁸⁰ As an anonymous commenter for this journal noted, injuries are only markers of mistreatment to people that know their source. Likewise, damages only shift the meaning of the markers for people that know that they have been paid. This limits the expressive significance of tort damages, but it does not vitiate it, since the plaintiff, defendant, and their close associates—*i. e.*, the people most likely to about the injury and the damages—are among the most important audiences for tort judgments. I will make this point again when we turn to settlement. *See infra* Part V.

⁸¹ John Gardner makes the point forcefully in his forthcoming book. JOHN GARDNER, *FROM PERSONAL LIFE TO PRIVATE LAW* (forthcoming).

those (un)lucky enough to be injured by torts. And that suggests that security against injury is not the primary good that tort aims to provide. Anyone who suffered injuries like Kresin's would almost surely need serious assistance, whether the injuries resulted from a tort or not. So if we care about their security, we should maintain institutions that support them, however the injuries came about. But tort does not do that. Tort responds to the fact that the defendant wronged the plaintiff, and one of the ways that it responds is by assigning responsibility for the plaintiff's injuries through an award of compensatory damages.

There is another happy benefit to this. By making defendants pay for the injuries,⁸² we deter future wrongdoing. And this is yet another terribly important fact about tort law. The deterrence matters in itself, since it is surely better to avoid injuries than suffer them. And as I said earlier, the willingness to award damages that deter reinforces the message that tort liability aims to send—that the plaintiff may not be treated the way that she was. But it would be a mistake to think that deterrence is in the driver's seat. And since I suggested up front that tort is primarily, and not just incidentally, an expressive institution, I want to take a detour to explain why.

If the main point of tort damages was deterrence, then the law would look an awful lot different than it does. The basic principle of deterrence is that damages should be set “equal to the harm the defendant has caused.”⁸³ But that principle only holds when it is certain that all negligent defendants will be held liable.⁸⁴ If the negligent sometimes escape liability, then damages should be ratcheted up, so that each potential defendant expects to face damages equal to the harm caused, notwithstanding the fact that they will sometimes avoid paying anything. For example, if only one out of four wrongdoers will be held liable, then optimal deterrence requires that we charge the ones we catch quadruple the harm they caused.⁸⁵

But tort does not do that. Of course, plaintiffs can receive punitive damages, which are extracompensatory. But the conditions for awarding them do not track

82 A caveat: as you might suspect, Jijon did not ultimately satisfy the judgment against him; his employer did. I address this complication *infra* Part V.

83 A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 878 (1998). Strictly speaking, this is only true when the defendant faces strict liability. For negligence, matters are more complicated. But we won't undermine the point in this paragraph by assuming, with Polinsky and Shavell, that “optimal damages under the negligence rule equal harm.” *Id.* at 886.

84 *Id.* at 887.

85 *Id.* at 889.

the criteria for optimal deterrence.⁸⁶ Punitive damages are available only when the defendant's conduct was willful or wanton, but simple negligence can escape detection too. The problem also runs in the opposite direction: some willful or wanton misconduct is almost certain to be detected. The theory of optimal deterrence suggests that there is no need for extracompensatory damages in those cases, but punitive damages are quite commonly awarded anyway. And there are other departures from the theory of optimal deterrence.⁸⁷ The magnitude of punitive damages in tort is commonly set to reflect the reprehensibility of the defendant's conduct, which makes sense if you take the word "punitive" at face value. But reprehensibility has little bearing, if any, on the way you would set damages if your goal was optimal deterrence.⁸⁸ The bottom line is that if deterrence were really in the driver's seat, we'd have to radically reconceive the role of punitive damages. Instead of seeing them as a tool for punishment, we'd see them as a way of compensating for the deficiencies of compensatory damages. In other words, we would not see them as *punitive* damages.⁸⁹

There is another problem here, even more pressing for our purposes. To put an optimal deterrence theory into practice, you need a way to measure the harm that a defendant does. Some aspects of this problem are easy. To figure out Kresin's past medical expenses, you simply add up the bills. Other aspects are harder. To figure out her future medical expenses, you've got to project her needs and the cost of care, which is far from a simple task. But even that pales in comparison to the challenge of putting a price on her pain and suffering, disability, and disfigurement. There are no markets to pull prices from, and the tools that economists offer us for generating prices in the absence of markets are not well-suited to solve this problem.⁹⁰

86 *Id.* at 898 ("Courts ... do not pay systematic attention to the probability of escaping liability, even though this probability is the central element in determining the appropriate damages multiplier for the purpose of achieving proper deterrence.").

87 More, even, than I am cataloguing here. For a more complete account, see *id.* at 896–900.

88 *Id.* at 904–05.

89 *Id.* at 890–91 (acknowledging that the adjective "punitive" will sometimes be misleading as applied to extracompensatory damages awarded on an optimal deterrence theory).

90 They make more sense elsewhere. For example, the concern raised in the next paragraph—that injuries that result from wrongs are experienced differently those that are not—is not relevant when the question on the table is how to factor injuries into a cost-benefit analysis that will inform the decision whether to restrict a certain form of pollution. If the answer is no—the pollution should not be restricted—then the injuries that pollution causes will not result from wrongs, since no one will hold a right to be free from it.

It makes no sense, for example, to ask how much Kresin would have charged Jijon for the privilege of crushing her had he asked in advance.⁹¹ There was almost certainly no such price. But the deeper problem is that this question assumes a voluntary transaction, and the character of a transaction affects the way people experience it.⁹² And we would not do any better by asking what Kresin would pay to be free from the injuries now that she has them. The answer would depend almost entirely on her wealth. Faced with these difficulties, some suggest that we investigate how Kresin herself implicitly priced the prospect of pain and suffering when she had the opportunity to spend money to avoid risk. But this is no better. Again, the answer will depend on Kresin's wealth, but more important, injuries that are realized by risks one chooses to take are different from injuries that are realized by risks imposed by others. Had Kresin been injured in a car accident that might have been avoided had she spent the money for antilock brakes, she could have reminded herself about the choices that she made—maybe she spent less on a car so that she would be better able to support her children. And even if her choice was ill-considered, it would have been hers. In this case, Jijon made the decision to back up without looking in the mirror, his choice redounded to no one's benefit, and the costs fell entirely on Kresin.

These sorts of challenges make it difficult to take optimal deterrence theory seriously, either as an interpretation of our current practice or as a recommendation for reform. But then we must ask: why award these damages if there is no

91 Sometimes, economists suggest that instead of asking how much the plaintiff would have accepted in return for a certain injury, we should instead ask how to compensate her for the risk of injury that the defendant exposed her to. See, e. g., Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 818–21 (1995). But with the limited exception of loss of chance claims—which are not recognized in many jurisdictions—tort takes the compensable injury to be the injury, and not the risk of suffering it. Thus, this suggestion subtly changes the subject of the plaintiff's claim.

92 To put the point sharply: when a person is raped, her pain and suffering is not properly valued by the price she would have charged in a prostitution market. Most of the time, there is no such price. But even when there is, much of the victim's pain and suffering will surely stem from the fact that she did not consent to sexual contact. Now, this is something of a special case, but I suspect that, as a general matter, the experience of pain depends on its source. And there is social science evidence to support that proposition. See Kurt Gray & Daniel M. Wegner, *The Sting of Intentional Pain*, 19 PSYCHOLOGICAL SCIENCE 1260, 1261 (2008) (providing experimental evidence that “the meaning of a harm—whether it was intended—influences the amount of pain that it causes”). But if you need more evidence, you are welcome to babysit my children, who every day demonstrate that injuries caused by one's siblings are more difficult to endure than similar injuries otherwise acquired.

sensible way to put a price on the harm involved? The answer lies in the fact that money is not just a medium of exchange; it is also a medium for sending messages. Think back on the progression of the awards that we've seen: \$1,000 in *Alcorn*; \$10,000 in *Angus*; \$100,000 in *Steenberg Homes*. These numbers were not picked because there was any reason to think that they provided just the right amount of deterrence. They were picked because of the messages that they sent. A six-figure damage award says something, just as surely as a six-figure salary does.

In *Alcorn* and *Steenberg Homes*, the damages were punitive, so the messages were targeted toward the reprehensibility of the wrongs. In Kresin's case, we are dealing with compensatory damages, so the subject of the message was not the reprehensibility of the wrong, but rather the seriousness of the injuries inflicted. But the damages were nevertheless expressive. If you add up the figures for Kresin's pain and suffering, disability, and disfigurement, you get \$15 million, and I doubt that figure is an accident. What should we make of it? Well, we can be sure that the money did not make Kresin whole. Did it optimally deter? I doubt it, but the truth is that I don't know how far off it was, or even in which direction it missed.⁹³ But I do know what \$15 million said about Kresin's injuries. It said that they were devastating; indeed, it said that Kresin was hurt just about as badly as anyone could be.

And she was. On top of all of her physical injuries, Kresin's dignity—in the capacity sense—was crushed beneath that van. But I wouldn't have been surprised to see a court cut down the damages anyway. Remember that the trial court in *Alcorn* cut the jury's award of vindictive damages from \$2,000 to \$1,000. Why? There's no record, but we can be sure that the court did not discover that \$1,000 would achieve optimal deterrence. My guess is that the court thought, "That's enough." Four figures sends a message, but even doubling the damages does not say much more. The same logic might have applied here; ten million dollars would have sent more or less the same message as fifteen. So why weren't the damages reduced? Well, I'll tell you one last story

⁹³ If you are inclined to think that \$15 million could not possibly count as too little compensation for Kresin, then you will want to recall Richard Posner's observation that "[d]amages for pain and suffering, even when apparently generous, may well undercompensate victims crippled by accidents. Since the loss of vision or limbs reduces the amount of pleasure that can be purchased with a dollar, a very large amount of money will frequently be necessary to place the victim in the same position of relative satisfaction that he occupied before the accident." RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 196 (7th ed. 2007). Of course, the idea that we could return Kresin to the position of relative satisfaction that she occupied before her injury is more than a bit crazy. But if you take it seriously, then she might well have been undercompensated.

about *Kresin*, just in case you aren't yet convinced that the plaintiff's social standing is at stake in a tort suit.

When the defendants appealed, they contested the non-economic portion of the damages. Over and over, they argued that an award of \$15 million was excessive for *someone of Kresin's age*. They pointed out that the award would set a record for Illinois plaintiffs over age 70.⁹⁴ And they implored the court to consider the implications the award would have for younger plaintiffs that suffered similarly significant setbacks.⁹⁵ These arguments backfired, almost comically. Here's what *Kresin* had to say in response:

By one stroke, defendants turned a woman who had been able to care for, feed, entertain and enjoy her family into a burden upon those same family members. Now, having done all of this, defendants have the audacity to appeal to this Court for the stated purpose of establishing a "precedent" in this and future cases which will say that it is acceptable to destroy a human life in this fashion, as long as the life that is destroyed is someone aged 70 or older! Apparently, Sears believes that those individuals really are no longer useful members of society, no longer have the right to expect and enjoy good health or serve a useful function in that society, and that an award of "substantial damages" should be reserved for those who Sears describes in its Brief as "younger plaintiffs."

This argument is not only insulting, but it is patently erroneous. A "productive life" does not end at age 70. For example, members of this Court have served productive terms not only into their 70s but, in at least one instance (Mr. Justice Burke), have served as active, thoughtful, and well-respected appellate jurists until they were forced to retire by statute just prior to reaching their 100th birthday!⁹⁶

Mr. Justice Burke did not decide the case, but our judiciary is a gerontocracy, and the judges that did hear the appeal were not moved by the defendants' thoughts on damages for the over-70 set. They refused to consider what *Kresin's* award might imply about younger plaintiffs, and they concluded that the \$15 million was not "shocking to a judicial conscience with present-day awareness of the quality of life that a healthy 73-year-old woman can have."⁹⁷

If you think that the point of tort damages is to make the plaintiff whole, or force the defendant to internalize the cost of his actions, then the defendants' arguments were on the mark. *Kresin's* age had to matter, since it would restrict

⁹⁴ Brief of Defendants-Appellants at 31, *Kresin v. Sears, Roebuck & Co.*, 736 N.E.2d 171 (Ill. App. Ct. 2000) (No. 1-99-3183), 1999 WL 33755787.

⁹⁵ *Id.* at 30 ("If \$15 million is appropriate for non-economic damages for a 73-year-old, what amount would be appropriate for a 15-year-old rendered a quadriplegic, or for a 30-year-old sustaining severe brain damage?").

⁹⁶ Corrected Brief and Argument of Plaintiff-Appellee at 5–6, *Kresin v. Sears, Roebuck & Co.*, 736 N.E.2d 171 (Ill. App. Ct. 2000) (No. 1–99-3183), 2000 WL 34334486.

⁹⁷ *Kresin*, 736 N.E. 2d at 178.

the duration of her pain and suffering. But Kresin's attorneys appreciated that there is an expressive dimension to compensatory damages, and they put it front and center for the court. If the court reduced the damages on account of Kresin's age, they would have to say that she was not worth as much as a younger plaintiff would be. And if you follow through on the logic of deterrence, that would imply that people need not take as much care for her safety. These were not messages the court was willing to endorse. Presented with the choice, they happily affirmed that Kresin mattered just as much as anyone else.

5 Mucking with the message

Well, I said that was the last story about *Kresin*, but a few more details will help us tackle our next topic. As you might have guessed, I simplified the story a bit. Though I mentioned Sears at the outset, I focused on Jijon. But Kresin also sued Sears, which she sought to hold liable for Jijon's negligence, as well as its own. As a result of *respondeat superior*, Sears was clearly on the hook for what Jijon did; he was taking the van for a test drive, a task that was squarely within the scope of his employment. Kresin also argued that Sears had been negligent. She alleged that Sears had failed to adequately train and supervise Jijon. Among other things, Sears had prepared a safety manual that emphasized the need to be careful when backing out of a service bay, but it had not bothered to distribute it. More important—at least to my thinking—Kresin alleged that Sears was negligent in designing the store, such that pedestrians had to enter and exit through a door directly adjacent to a service bay.⁹⁸ Ultimately, the jury decided that Sears was 60% responsible for Kresin's injuries, that Jijon was 35% responsible, and that Kresin herself was 5% responsible.⁹⁹

The first time I saw those numbers, they struck me as odd. After all, Jijon is the one who backed up without looking behind him. But then I found a picture of the Sears Auto Center where the accident happened, and it does look like an accident waiting to happen.¹⁰⁰ Indeed, the picture shows that, after the accident,

98 See *Sears Roebuck & Co. v. Charwill Associates L.P.*, 2001 WL 36176047 (Ill. Cir. Ct. 16 February 2001).

99 I don't want to spend too much time on these numbers, but it is worth noting that this is an aspect of tort law than can only be given an expressive interpretation. These numbers tell us nothing more than that the jury judged Sears mostly responsible, Jijon partly responsible, and Kresin just a bit responsible.

100 3700 E Main St., St. Charles, IL 60174, GOOGLE STREET VIEW, <https://goo.gl/maps/g7gLYUHkqH12> (last visited 24 September 2017).

a barrier was added to prevent pedestrians from crossing directly in front of the service bay door where Kresin was hit.¹⁰¹ So there was a simple precaution that Sears could have taken that would have prevented the injury, and the risk was rather obvious.¹⁰² Of course, it is also possible that the jury assigned most of the responsibility to Sears because it wanted Sears to pay most of the judgment. But if that is what the jury did, then it was doubly confused. Sears was vicariously liable for Jijon's negligence, so it was going to be responsible for any portion of the damages not apportioned to Kresin. And even if Sears was held mostly responsible, there was no guarantee that it would have to pay anything at all, since an insurer might have satisfied the judgment. As it happens, Sears believed that it was insured, but the policy, which was secured by its landlord pursuant to their lease agreement, had an automobile exclusion.¹⁰³ In the end, Sears withdrew its last appeal and settled with Kresin, paying her even more than the jury had awarded—\$17.25 million—presumably because post-judgment interest had accrued.¹⁰⁴

So far as I can tell, Jijon did not pay a dime of the judgment, and there was never any prospect that he would. He almost certainly did not have enough money for Sears to seek indemnification from him. As for Sears, it did pay the judgment, but if not for the landlord's mistake in taking out a policy with an automobile exclusion, part of what Sears paid would have been picked up by an insurer. And that is typical. The question for us is whether the fact that it is typical for tort judgments to be satisfied by someone other than the tortfeasor—whether through insurance arrangements or the various forms of vicarious liability—undermines their expressive significance.

I do not think that it does. We might draw a contrast here with criminal punishment, which carries a message of condemnation. We do not allow people to insure against the possibility of criminal punishment. If you are sentenced to

101 At least, I assume the barrier was added after the accident. There is no mention of it in the Court's description of the facts, or in either party's briefs, and its presence would seem to have precluded the accident happening in the manner described.

102 This is not just hindsight bias. The manager of the store testified that he had discussed the risk with his employees and encouraged them to exercise common sense. *See Kresin*, 736 N.E. 2d, at 173–74.

103 *Sears, Roebuck & Co. v. Acceptance Ins. Co.*, 793 N.E.2d 736, 739 (Ill. App. Ct. 2003). That violated the terms of the lease, and the landlord ending up paying Sears \$2 million in damages for not taking out an adequate policy. *See Sears, Roebuck & Co. v. Charwil Associates L.P.*, 864 N.E.2d 869 (Ill. App. Ct. 2007).

104 *See Sears, Roebuck & Co. v. Charwil Associates L.P.*, 864 N.E.2d 869, 872 (Ill. App. Ct. 2007). Sears obtained \$2 million dollars in damages from its landlord for failing to take out an adequate insurance policy, as required by the their lease. *See id.* at 873–76.

a term in prison, you will serve it yourself; you cannot supply another prisoner to take your place. This makes sense, in part because confinement is a physical manifestation of the condemnation. The very fact of your confinement suggests that you are not fit to live with the rest of us, and that message would be undermined if we permitted you to shift the burden to someone else.¹⁰⁵ And even when criminal punishment falls short of confinement, labeling a person a criminal lowers her status. That would not work if someone else could be designated to bear the label instead.

But this story does not carry over to tort. Hardly anyone knows the word “tortfeasor,” and it does not signal outcast in the way that “criminal” or “felon” does. This is not surprising, since, as I said at the start, tort liability does not communicate condemnation.¹⁰⁶ Tort has different expressive aims. Tort liability establishes that the defendant wronged the plaintiff. Compensatory damages reinforce that message by assigning the consequences of the wrong to the defendant. The point is to vindicate the social standing of the plaintiff, and one of the signal virtues of tort is that it can do that without making the defendant suffer.

Allowing defendants to draw on other people’s financial resources to satisfy judgments against them does not muck up the message that the defendant wronged the plaintiff. The judgment is entered against the defendant, who has responsibility to see to it that it is satisfied. Moreover, it would be a mistake to think that insurance allows defendants to evade responsibility. In fact, just the opposite is true. Responsible people recognize that they may wrong others and prepare in advance to compensate them for their injuries. Allowing them to do so does not undermine the message that they are responsible for their wrongdoing. Quite the opposite. It helps them to them to take responsibility for it.

What about settlement? *Kresin* is peculiar, in that the settlement came after a trial and jury verdict. Most cases settle long before that and the details of the settlement are often kept confidential. This limits the role that tort can play in vindicating the victim’s social standing. And if I am right to think the expressive function of tort law important, this is yet one more reason to worry about the frequency of settlement in civil litigation.¹⁰⁷ But confidential settlements can nevertheless serve an expressive function. There are, after all, many audiences for a tort suit, and the plaintiff and defendant are among the most important.

¹⁰⁵ On the expressive significance of imprisonment, see Kahan, *supra* note 24.

¹⁰⁶ Except when punitive damages are in play, and in many jurisdictions, you cannot insure against liability for punitive damages.

¹⁰⁷ For further reasons to worry, see generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

When Toya Brown settled her battery claim against the Burlington Coat Factory and its security guard, she knew she had forced them to pay for what they had done. And they knew it too. That matters, even if the message was not spread as wide as it would have been had the case proceeded to trial and judgment.

Still, we should regret that Brown settled for less than a full, public vindication of her rights. And we should regret that most plaintiffs make the same decision she did. There are lots of reasons for that. Tort litigation is expensive and slow. We do not have adequate institutions for helping people while their claims are pending. If we did, we might see less settlement. But as it stands, many plaintiffs are forced to give up their opportunity to publicly vindicate their rights, so that they can obtain the resources they need to deal with their injuries in a timely fashion. And that is far from the only problem with tort law. Judges and juries make mistakes, and many plaintiffs are not in a position to risk one, when the certainty of a settlement is on offer. Moreover, public trials can be a public spectacle, which puts some plaintiffs to the choice of compromising their dignity in one way, so that they can vindicate it in another. Faced with that choice, many potential plaintiffs—especially in cases involving sensitive subjects, like sexual assault—choose to avoid tort altogether or seek to settle their claims privately.

We should mitigate these problems where we can. But there are limits to what we can do consistent with tort's other virtues. As I said before, tort aims to respect the dignity of the defendant, not just the dignity of the plaintiff. That requires neutral arbiters, who must be informed of the facts, which inevitably demands something like discovery and trial. We could make it quicker and more considerate, and we should. But there will still be people who decide, quite sensibly, that it is not worth standing on their rights, or that they should settle for less than a full, public vindication of them. And we should be clear: we are letting those people down. Their dignity is diminished, in part, by our insistence on respect for the defendant's dignity. But though that is regrettable, we might do worse to insist that all plaintiffs present their claims in court, as that would diminish their dignity in a different way. The holder of a right ought to be able to decide how far—and in what forum—she will press it.¹⁰⁸ Otherwise, there is an important sense in which it is not *her* right.

There is lots more to say about settlement, but I will pass it by. For our purposes, we need simply note the old saw: settlement takes place in the shadow of the law. If courts do not stand prepared to recognize your rights,

108 See WALDRON, *supra* note 43, at 51 (“[L]aw will recognize potential plaintiffs and defer to their dignity in allowing *them* to make the decision whether some norm-violator is to be taken to task or not”).

then you stand little chance of settling your claim. A settlement speaks primarily to the plaintiff and defendant, and maybe only to them, if it is kept confidential. But the very possibility of settlement depends on the expectation that courts would speak up for the rights of tort victims if called upon to do so. And that means that the messages that courts send matter, even to people who settle their disputes long before they reach the courthouse steps.

6 Excuses

So tort serves an expressive function in negligence suits, situated in the world of insurance and settlement. But still, some may doubt the story I've told about tort law, because I have not yet addressed the very first worry that I flagged. I've said that tort liability sends a simple message: the defendant wronged the plaintiff. But some will think that false, and they'll point to the doctrines I mentioned at the start—the objective standard of care and strict liability. We can make fast work of this worry, as it rests on a simple confusion. Let's start with the objective standard of care. As every student of tort law knows, a defendant in a negligence action cannot avoid liability by arguing that she did her best to prevent the plaintiff's injury. She will be liable if she failed to exercise ordinary care, which is the care that a reasonable person would take in the circumstances. If her best did not come up to that standard, then tough luck for her. She faces the consequences anyway.

Now, some think this implies that a defendant can be held liable even if she did not wrong the plaintiff. But remember, when I say that the defendant wronged the plaintiff, I mean simply that the defendant breached one of the plaintiff's rights. So the objective standard of care only bars the judgment that the defendant wronged the plaintiff if we suppose that the plaintiff's entitlement is limited by the capabilities of the defendant, as it would be if the plaintiff had a right to the defendant's best efforts and nothing more. But that is clearly not tort's view. Tort affords us a right to reasonable care, whether or not the defendant is capable of providing it.

What trips people up here is the fact that tort sometimes sees a wrong even though the defendant did nothing wrong. But though that sounds funny to say, we need to remember that we use the word "wrong" in different ways. When we talk about whether a person did something wrong, we're typically interested in a bottom-line assessment of her conduct. We want to know, for example, whether what she did is blameworthy, such that we ought to think worse of her for having done it. When blame is the target of our inquiry, we take account of

excuses, since excuses deflect blame where it would otherwise be warranted. And the fact that a defendant did her best can, in some circumstances, serve as an excuse, and thus deflect blame. But that's all an excuse does. It does not undermine the judgment that the defendant committed a wrong, if all we mean by that is that she breached the plaintiff's right. Indeed, the search for an excuse presupposes a wrong, since only wrongs need be excused.¹⁰⁹

The objective standard of care is a manifestation of tort law's indifference to excuses.¹¹⁰ The plaintiff has a right not to be injured by the defendant's failure to take ordinary care. The defendant may well have a good excuse for that failure, but tort law will not hear it. Why not? Because tort is concerned with the plaintiff's rights, not with the character manifested in the defendant's conduct, at least not until punitive damages are at issue. As I have said several times, criminal liability communicates condemnation. Tort liability does not. But that does not mean that torts are not wrongs. All it means is that torts addresses a different problem than criminal law does. Rather than aim to condemn those who ought to be condemned, tort law aims to vindicate those who ought to be vindicated.

I'll return to the relationship between torts and crimes later, but first let's see what sense we can make of strict liability. In many jurisdictions, the seller of a product that has a manufacturing defect (*i. e.*, a product that deviates in some way from the manufacturer's own specifications) will be held liable to a plaintiff who is injured by that defect, regardless of the steps the seller took to avoid it. Such a seller might protest that she did everything reasonable, practicable, or even possible to avoid the defect. And she might be right, but the court will not care. She is liable simply on account of the fact that she sold a defective product that injured the plaintiff, no matter how much care she took to avoid it.

Here again, we see tort's hostility to excuses. When the seller says that it took all the care that it was reasonable to take, it explains why it was justified in taking the care that it did. If we were dealing with negligence, there would be no tort, since in negligence, the plaintiff's right just is to have the defendant take reasonable care. But here, the plaintiff holds a right not to be injured by a defective product, full stop. And the question whether that right was breached does not depend on how much care the seller took. The fact that the seller was justified in the care that it took excuses its breach of the plaintiff's right, and

109 The view of justification and excuse on offer here is more or less John Gardner's. See GARDNER, *supra* note 5, chs. 4–6.

110 For a thorough exploration of the role of excuses in tort, see generally John C.P. Goldberg, *Inexcusable Wrongs*, 103 CAL. L. REV. 467 (2015).

that bears on the seller's blameworthiness.¹¹¹ But as I've said too many times already, tort does not concern itself with blame, at least not until punitive damages are in play. Of course, we might question whether tort ought to accord the plaintiff a right to be free from injury, regardless of how much care the defendant took to avoid it. But, as things stand now, tort does recognize that right, and a defendant that breaches it wrongs the plaintiff.

The bottom line is that neither strict liability nor the objective standard of care prevents tort liability from communicating that the defendant wronged the plaintiff. A plaintiff can hold a right to competent care (whether or not the defendant can provide it), or a right not to be injured (whether or not the defendant took reasonable care to avoid it). But before we move on, I want to address a different worry that these doctrines raise. Way back when we considered *Alcorn*, we saw that tort helped Mitchell counter the message that Alcorn's spit sent—that he was up high and Mitchell down low. We saw something similar with *Steenberg Homes*. There, the tort judgment countered the message the trespass sent—no, the court said, Steenberg could not use the Jacques' land for its purposes. And even in *Kresin*, we saw that the judgment was a retort to the message might be read into Jijon's conduct—yes, the jury said, Jijon had to watch out for Kresin. In all three cases, the tort judgment responded to and rebutted a message implicit in the misconduct.

But some torts don't send messages of that sort. Take, for example, the surgeon who slips with her scalpel, notwithstanding the fact that she's attentive to the patient's well-being. Tort law does not care that she was trying to be careful. The surgeon is liable simply because she failed to conform to the standard of care set by the medical profession. And that is true even though no one would see her slip as an insult to the plaintiff, or even as an indication that she did not take the plaintiff's well-being seriously. In this sort of case, there is no need for tort to respond to a message implicit in the moral injury. Indeed, we might doubt that there is a moral injury here at all, at least in Murphy's sense. The slip is not a wrong for what it says about the plaintiff; it is a wrong for all the reasons we think patients are entitled to demand competent care.

In cases like these, there is less expressive work for tort to do, and I suspect that partly explains many people's sense that administrative compensation

¹¹¹ Why is the seller merely excused and not justified? Because the seller does not have a justification for inflicting the injury. Indeed, the seller has no reason whatsoever to inflict the injury. She is excused because she has fully discharged the reasons she has to try to avoid it. But the lack of reasons to take further steps to avoid an injury does not imply that there are reasons to inflict it, as there are when full-fledged justifications, like self-defense, are in play.

schemes or insurance are an adequate way of responding to accidents of this sort. But there still is some expressive work that tort can do in response to accidents like the surgeon's slip. If we let the surgeon walk away and leave the patient to fend for herself, we make clear that the patient is not, in fact, entitled to competent care. If we think that she does have a right to competent care—and not just the surgeon's best effort—then we must treat the failure to provide it as a wrong, regardless of what that wrong, on this occasion, expressed. The way that we respond to a slip of the scalpel says something about the plaintiff's social standing, even if the slip itself did not. We can debate whether tort should recognize a right to competent care. I think that it should, but I don't want to make that case here. All I want to say is that once we decide what rights to recognize, we have to treat breaches of those rights as wrongs; otherwise we call into question whether people really possess them.¹¹²

7 Corrective justice corrected

I've told you a simple story about tort law. Tort announces in advance what rights people have, and then it backs the announcements up treating breaches of those rights as wrongs. A tort judgment says *this defendant wronged that plaintiff*, and when damages are attached, they help make clear that the judgment means what it says. Compensatory damages repair what injuries they can, but they also assign responsibility for the plaintiff's injuries to the defendant, which helps to shift the social significance of the injuries that remain. Punitive damages mark the seriousness of the wrong, and because they are set with an eye on the defendant's wealth, they help ensure that we treat each other's rights as constraints, rather than as suggestions which might be ignored for a price. Tort law says that we have a right to be free from Alcorn's spit. It says that we have a right to keep Steenberg Homes off our land. And it says that Jijon must watch out for our safety.

¹¹² To put the point a bit differently: there is expressive significance in what tort labels as a wrong *and* in the way it which it responds to wrongs. One reason to label Alcorn's spit as a wrong is so that tort has an occasion to rebut the message implicit in it. If there are grounds for seeing the surgeon's spit as a wrong, in contrast, they won't lie in the need to rebut any message that it sends. I'm not bothered by this discrepancy, because I do not think that we should expect to explain all of tort law by reference to its expressive significance. (In general, I think we should be skeptical of totalizing explanations of tort law.) I do, however, think it important to note that tort remedies can have expressive significance, even when they are responses to wrongs that do not convey moral messages. I appreciate Larry Sager pressing me on this point.

All this is obvious, or it should be. As I said at the start, the messages that tort law sends are out in the open, plain for all to see, right there on the face of the judgments. And, of course, they have to be, if they are to do their job. But many tort scholars think there must be more to the story. Some think that lurking behind all the talk of rights and wrongs is an economic project. The point of tort law, they say, is promote an efficient allocation of resources, and they find support in the Hand Formula, or in the simple fact that making people pay for the damage they cause deters the damage in the first place. But the evidence to the contrary is overwhelming. It starts with the fact that damages are not calculated in the way that the economic hypothesis suggests they should be, and it builds from there to the point that many people who think the economic project worthwhile propose that we jettison large swaths of tort, or radically reform its rules. And they might be right—perhaps we should do that—but the need for such drastic measures is an indication that the economic interpretation of tort law does not fit the institution. And before we cut tort law loose, or remake it in the image of efficiency, we should figure out just what it does, so that we know what we’d surrender if we cashed it in.

For many people, the answer is corrective justice. And they are right, but most of what they say is wrong. There are many principles of corrective justice in the literature, but they all owe something to the picture presented by Aristotle, who imagined two parties in a position of equality, represented by a line divided into equal segments. When one person wrongs another, that equality is disturbed; the wrongdoer’s segment of the line is lengthened, and the victim’s segment shortened. According to Aristotle, corrective justice requires that we restore the equality, taking from the party with the lengthened segment just what is necessary to restore the shortened one.¹¹³ Some tort scholars think that this picture provides a helpful guide to tort law. Ernest Weinrib, for example, suggests that a tort “remedy consists in simultaneously removing the defendant’s excess and making good the plaintiff’s deficiency.”¹¹⁴ But that can’t be right, for the simple reason that some tort defendants do not gain anything as a result of their wrongdoing. Jijon, for example, did not benefit from crushing Kresin.¹¹⁵

113 ARISTOTLE, *NICHOMACHEAN ETHICS*, bk. V (Joe Sachs ed., Focus Pub. 2002).

114 ERNEST WEINRIB, *CORRECTIVE JUSTICE* 17 (2012).

115 Of course, Weinrib sees the problem. He suggests that even though Jijon did not enjoy a material gain as a result of his wrongdoing, he enjoyed a normative gain, which can be used to offset Kresin’s loss. See Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 *DUKE L. J.* 277, 286 (1994) (“[C]orrective justice is concerned with the correlativity of normative, not material, gain and loss.”). The idea is that immediately upon injuring Kresin, Jijon incurred a duty to compensate her, so that he had more than he ought to have had right up until the moment he discharged that duty. See *id.* at 283 (“A party may realize ... a normative gain but no

And even if he had, handing over his “excess” would not have made good Kresin’s “deficiency.”¹¹⁶

Some corrective justice theorists restrict their attention to the short segment of the line, suggesting that the wrongdoer must restore it, even if that leaves his segment shorter than it was before. For example, Jules Coleman argues that “the duty of wrongdoers in corrective justice is to repair the wrongful losses for which they are responsible.”¹¹⁷ And that sounds nice, but Jijon was in no better position to repair Kresin’s “losses” than he was to make good her “deficiency.” This problem is not completely lost on corrective justice theorists. Arthur Ripstein, for example, notes that, in many cases, “nothing could make it as though the injury had never happened.”¹¹⁸ But he still thinks that we can rejigger the lines: “insofar as they enable a plaintiff to adapt to his or her situation,” he says, “money damages are an appropriate way of transferring the loss so that it becomes the injurer’s problem to decide how to deal with what is properly his or her loss.”¹¹⁹ But transfer is no more realistic than repair. We can make Jijon help Kresin with her problems. But we cannot make her problems his, and we should not pretend otherwise.

Do me a favor. Go back and reread the description of Kresin’s injuries, slowly and carefully. Linger for a moment over each one: the blindness, the paralysis, the incontinence—all of them. All too often, we skim past these parts of opinions. But it is important to read them closely, because the more time you spend with them, the harder you will find it say things like “the duty of wrongdoers in corrective justice is to repair the wrongful losses for which they

material gain: if I negligently injure another, I am liable for my wrongdoing, but my resources have not been increased by the wrong.”). As I have argued elsewhere, this picture is hopelessly circular. Weinrib has corrective justice conjure just the gain it needs to offset the victim’s loss. See Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107, 113–115 (2011).

116 Weinrib is aware of this problem too, but he nevertheless maintains that tort law can “remove the inconsistency with the plaintiff’s rights by having the defendant restore what is rightfully the plaintiff’s.” WEINRIB, *supra* note 114, at 94. He says that when a court cannot award the very thing that was taken, destroyed, or denied, it can award a monetary equivalent instead, thus preserving “continuity of right and remedy.” *Id.* But there is no monetary equivalent for what Kresin lost. See Hershovitz, *supra* note 115, at 110–12; Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993).

117 COLEMAN, *supra* note 3, at 324.

118 ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 58 (2001). For more on Ripstein’s view of remedies, see my review of his book *Private Wrongs*. Scott Hershovitz, *The Search for a Grand Unified Theory of Tort Law*, 130 HARV. L. REV. 942, 963–68 (2017) (reviewing ARTHUR RIPSTEIN, PRIVATE WRONGS (2016)).

119 RIPSTEIN, *supra* note 118.

are responsible,”¹²⁰ or “[t]ort liability makes injurers internalize the harm that they cause.”¹²¹ Most tort scholars know that there is a problem with the way that we talk about tort law (or, at least, I hope they do). And when they are careful, they qualify their claims. Here’s Weinrib, with a standard line on tort: “[T]ort law places the defendant under the obligation to restore the plaintiff, insofar as possible, to the position the plaintiff would have been in had the wrong not been committed.”¹²² This is better than the unqualified version of the claim. But *insofar as possible* is not a way of acknowledging the problem; it is a way of avoiding it, because the phrase that follows has next to nothing to do with what tort law does for a plaintiff like Kresin. And it has precisely nothing to do with what tort law does for plaintiffs like Mitchell, or the Jacques.

One thing I admire about honor cultures is that they understood that corrective justice is not, finally, about repair. *An eye for an eye* is a formula for corrective justice, even though it does not repair the victim’s injury. How could that be? One last time, we can turn to Hieronymi for help. A while back, we saw Hieronymi’s list of ways that we might mark a wrong, so as to counter the message implicit in the moral injury: “apology, atonement, retribution, punishment, restitution, condemnation.”¹²³ Hieronymi did not include revenge on that list, but she later added that “taking revenge might be one way to ‘correct’ the historical moral significance of the event, marking it as a wrong.”¹²⁴ I think that’s right, and I don’t see any reason for the scare quotes. In fact, I think that Hieronymi here tells us just what it is that corrective justice corrects: the message that wrongdoing sends about the victim’s social standing, and not the victim’s injuries. Of course, demanding that a wrongdoer repair his victim’s injuries might be one way of correcting the message that his wrongdoing sends, and when it is, repair will be a way of doing corrective justice. But repair is not the only way of doing corrective justice. And despite what many tort theorists say, it is not tort’s way of doing corrective justice, at least not in most cases, and not as to most injuries. Tort does justice, when it does, by saying, clearly and loudly, *this defendant wronged that plaintiff*.

The expressive story about tort law is, finally, a corrective justice story, just not in the way that we have become accustomed to thinking about corrective justice. And though this is too large a topic to tackle here, I want raise the

120 COLEMAN, *supra* note 3, at 324.

121 ROBERT D. COOTER & ARIEL PORAT, GETTING INCENTIVES RIGHT: IMPROVING TORTS, CONTRACTS, AND RESTITUTION 149 (2014).

122 Weinrib, *supra* note 115, at 295.

123 Hieronymi, *supra* note 28, at 546.

124 *Id.* at 548.

possibility that our confusion about corrective justice stems from a more basic confusion about the nature of justice. Many people think that justice—in all its forms—governs what John Gardner describes as questions of allocation, *i. e.*, questions about who gets how much of what.¹²⁵ Without doubt, distributive justice addresses those sorts of questions. But some think that retributive and corrective justice do too, each in their own special way. For example, Gardner says that retributive justice regulates the allocation of punishment—who gets punished and on what grounds. And corrective justice, he says, “regulate[s] the allocation of goods back from one person to another,”¹²⁶ when they shift as the result of wrongdoing.

The corrective part of this picture is yet another non-starter. Jijon did not acquire anything from Kresin that we could allocate back. But the real problem lies in the thought that justice governs allocation. Justice is not, finally, about who has what. To tweak a phrase from Rawls, the subject of justice is the basic structure of our social relations. Inequalities become injustices only at the point that they bear on that structure—at the point that they suggest, for example, that some people matter more than others. So while distributive justice is about allocation, the allocations matter derivatively, not directly. And corrective justice is not a form of justice because it governs the allocation of goods that shift as the result of wrongdoing. It is a form of justice because the way that we respond to wrongdoing is partly constitutive of the basic structure of our social relations. The distinctive demand of corrective justice is that we treat wrongs as wrongs, so that victims enjoy the social standing that wrongdoers threaten to deny them.

Where does retributive justice fit in this picture? Corrective justice requires that we vindicate the social standing of victims. But it does not require that we condemn the people who wrong them. The question whether we should falls within the domain of retributive justice. I do not want to offer anything approaching a full theory of retributive justice here. But to fill out the picture, let me tentatively suggest that the distinctive demand of retributive justice is that we diminish the social standing of those who deserve it. Punishment, on this picture, diminishes the wrongdoer’s social status by marking him as someone with diminished moral status. Indeed, the very act of punishment implies that the wrongdoer is—in virtue of his wrongdoing—subject to harsh treatment that others have a right to be free from. And the seriousness of the punishment signals just how far he is thought to have fallen.

¹²⁵ See Gardner, *supra* note 8, at 8 (“Norms of justice ... answer questions about who is to get how much of what *and why* (i. e. on what grounds).”) (citation omitted).

¹²⁶ *Id.* at 14.

If this is right, then we can shed some light on the relationship between torts and crimes. A standard way of carving legal institutions assigns tort the aim of corrective justice, and criminal law the aim of retributive justice. This is much too neat. To the extent that punitive damages communicate condemnation, they are a way of doing retributive justice. So tort is not purely corrective. And criminal law is not purely retributive. Punishing a defendant for a wrong that had a victim affirms that the victim was, in fact, wronged. Indeed, I am inclined to think that, in some cases, we have to seek retributive justice in order to do corrective justice.¹²⁷ When we fail to punish a rapist, for example, we send a message about the victim and how seriously we take the offense against her. This, I take it, is why we find it natural to say that criminal punishment delivers justice for the victims of a crime. The primary point of criminal proceedings may be to dispense retributive justice, but corrective justice often comes along for the ride.

8 Tort reform reform

One of the curious things about contemporary tort scholarship is that tort law is not terribly good at the things we are most often told it is supposed to do. It nearly never restores a plaintiff to her rightful position, and there are endless reasons to doubt that it promotes an efficient allocation of resources. But there is something that tort is good at. It treats wrongs as wrongs, and in doing so, it vindicates the social standing of the victims who invoke it. And this is not just something the institution is good at. It is also something worth doing, at least whenever the wrongs involved are worth taking seriously.

Are the wrongs worth taking seriously? Without doubt, a great many of them are. We ought to make clear that people have a right to be free from assault, battery, defamation, and the intentional infliction emotional distress so severe that no reasonable person could be expected to endure it. Of course, nearly no one thinks that we should abandon these torts. But others are controversial. And the controversial torts—negligence, medical malpractice, and products liability—make up the majority of litigation. I do not want to wade into the controversy here. But seeing tort's expressive function in action sharpens what is at stake. Maybe an alternative to tort would provide quicker, more consistent compensation for accident victims, and at a lower cost too. If it did, that would count in its favor. But those gains would come at a cost. There would be no forum for Kresin

¹²⁷ If this is right, then it helps to explain why we make punitive damages available through tort.

to say to Jijon, “you must watch out for me,” and no opportunity for her to call on her community to vindicate that claim. And while the quickly compensated Kresin might know that her community cared for her well-being, she would also know that it did not care enough to recognize in her a right to have others take ordinary care not to injure her in the first place.

Of course, we might decide that those gains are worth that cost. But we should be clear about what the cost is. If we think that Kresin has a right to have Jijon take ordinary care not to injure her, then we fail her when we fail to recognize that right. The American experiment with no-fault insurance has never gone that far. The jurisdictions that adopted no-fault schemes left in place tort liability for significant bodily injuries.¹²⁸ In effect, no-fault tells drivers that they must take ordinary care to avoid significant bodily injuries, but that they need not worry about the minor harms that they carelessly cause other motorists. That strikes me as a sensible line to draw. We do not need to get bent out of shape about fender benders. But I would think it a serious moral failing if we could not or would not say that Jijon wronged Kresin when he backed over her without looking behind him.

Tort is not the only way to treat a wrong as a wrong. We can do it through revenge, or informal social sanction, and sometimes the latter option, at least, will be superior to tort. But when someone suggests that we cast a tort claim aside, we should ask what we will put in its place, or whether we are ready to give up on the idea that we have a right that our community should be expected to enforce when called upon to do so. Because when we give up on tort law, that is what we give up, unless and until we develop an alternative way that our community can treat the wrong as a wrong.

But though there are good reasons to maintain an institution like tort, there are also reasons to worry about the way it is presently constituted. We have seen some already: tort litigation is expensive and slow, and that limits its ability to vindicate the rights of victims. We need faster, friendlier procedures. And we need new torts too. The old ones cover lots of wrongful conduct, but there are new wrongs worth recognizing, and old ones that tort never managed to name properly. Here, you might think of the involuntary disclosure of intimate photographs. This kind of conduct might fit an old tort—public disclosure of private facts. But even so, there are also reasons to name the tort colloquially, so that we are clear about what conduct it covers. Nearby, there are also reasons to recognize tort claims for rape, or sexual assault more generally. These wrongs have little in common with Alcorn’s spit—they are far graver violations—and yet tort types them all battery. There is some

128 JAMES M. ANDERSON, ET AL., *THE U.S. EXPERIENCE WITH NO-FAULT AUTOMOBILE INSURANCE: A RETROSPECTIVE 11–12* (2010).

upside in that; simpler elements make the claim simpler to prove, and I would not suggest that we bar rape victims from bringing battery claims. But there are surely reasons to allow victims to complain about rape, so that their right not to be raped is vindicated, and not just their right to be free from harmful or offensive contact.

This is the smallest of steps toward a tort reform agenda that flows directly from tort's expressive function. But we can already see that, in many ways, it runs counter to the tort reform we have received. Many recent changes to tort law serve mainly to muck up the messages that tort aims to send. In jurisdictions that have abandoned the collateral source rule, for example, damages no longer reliably convey the seriousness of the injuries inflicted. That is a problem, because tort assigns responsibility for injuries by demanding that the defendant pay for them. And damages caps do even more damage. When they constrain compensatory damages, they prevent juries from accurately portraying serious injuries; when they limit punitive damages, they prevent juries from accurately portraying serious wrongs. I don't doubt that juries are, on occasion, overgenerous. But when we need to rein them in, robust appellate review is a better tool than a cap on damages. Caps cut off our ability to communicate in the most compelling cases—those where the victim is seriously injured or seriously wronged.

But though we have reason to worry that tort reform is doing damage, we should also remember that there is nothing sacrosanct about the way that tort responds to wrongs. Many philosophers think that there is. They think that corrective justice requires repair, so they object to caps on damages on the ground that they prevent the jury from requiring the defendant to restore the plaintiff to her rightful position. But repair is just one way of doing corrective justice. We would not make a moral mistake if we responded to victims' injuries through social welfare institutions, so long as we found some other way to respond to the fact that they were wronged. This gives us space to think creatively. Tort is a better practice than revenge. Maybe there is something better still. But until we find it, we should remember that tort has an important job to do. It treats wrongs as wrongs, and in doing so, it vindicates the social standing of victims.

Acknowledgement: Thanks to Lynn Baker, Mitch Berman, Guido Calabresi, Sherman Clark, Jules Coleman, Hanoch Dagan, Chris Essert, Jim Fleming, Rich Friedman, Mark Geistfeld, John Goldberg, Don Herzog, Keith Hylton, Greg Keating, Gabe Mendlow, Bill Miller, Andrew Podrygula, Ariel Porat, Richard Primus, Carol Rose, Jed Rubinfeld, Larry Sager, Zoe Sinel, Scott Shapiro, Seana Shiffrin, Henry Smith, Ernie Weinrib, Sean Williams, John Witt, Kathy Zeiler, and Ben Zipursky for helpful comments and conversations. Thanks also to an anonymous reviewer for this journal, as well as audiences at BU, Harvard, Michigan, Tel Aviv, Texas, Western, Wharton, and Yale.