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IS IT WRONG TO DO RIGHT WHEN OTHERS DO WRONG?

A Critique of American Tort Law

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In recent years, American tort law has been the beneficiary of a growing effort by sophisticated legal theorists to advance a theory that both descriptively and normatively accounts for its doctrines on non-utilitarian grounds.[1] Yet despite the formidable challenges that this literature has posed for the economic analyses that have dominated tort law theorizing in recent decades, central tort doctrines persist in defying efforts to describe and defend them as vehicles for redressing rights violations. In saying this, I do not mean to refer to such obvious things as the fact that the Hand Formula[2] appears to allow rights violations in the name of utility or wealth maximization (although corrective justice theorists must admit that the fact that the Hand Formula dominates contemporary characterizations of negligence is a painful theoretical thorn in their sides[3]). Rather, I have in mind the more subtle but more significant fact that myriad tort doctrines reflect the fundamental thesis that persons have obligations to (re-)structure their conduct so as to mitigate the harms caused by others' foreseeable wrongdoing—obligations which, when violated, properly serve as a basis for declaring such persons negligent.

In a surprising number of cases, involving a surprising number of familiar tort doctrines, persons are required to compensate innocent victims of third-party wrongdoing or to shoulder losses they themselves have sustained

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1. *See, e.g.*, the rich set of essays recently compiled by David Owen upon which I shall draw extensively in this piece. PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David G. Owen ed., Clarendon Press, 1995) (hereinafter PHILOSOPHICAL FOUNDATIONS).

2. "[I]f the probability [of a foreseeable plaintiff's injury] be called *P;* the injury, *L;* and the burden [of precautions necessary to avert *L*], *B;* liability depends upon whether *B* is less than *L* multiplied by *P*: i.e., whether *B* [is less than] *PL*." United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

3. For a denial of the prominence of economic analysis in doctrinal explanation, *see* Richard W. Wright, *The Standards of Care in Negligence Law, in* PHILOSOPHICAL FOUNDATIONS, 249–75, 250. For a deontological account of tort law's use of the Hand Formula, *see* Heidi M. Hurd, *The Deontology of Negligence*, 76 B. U. L. REV. 249–72 (1996).

at the hands of wrongdoers, or even to compensate wrongdoers themselves for harms sustained while doing wrong. Thus car owners who leave their keys in their vehicles are held liable for harms caused to innocent pedestrians by car thieves making high-speed getaways.[4] Doctors who return children to abusing parents are held liable for the further harms intentionally perpetrated by the parents.[5] Victims of accidents are forced to bear some or all of their own losses when their negligence consists solely of a failure to "drive defensively"—that is, with an eye to others' likely negligence. Property owners are held liable to trespassers who are injured by conditions that could foreseeably harm only wrongdoers. Product manufacturers are held liable for harms caused by their consumers' negligent and even intentional misuses of their products. And victims are held liable for the harms done to their assailants in self-defense when those harms could have been avoided by their own retreat.

The thesis that persons should act so as to avert foreseeable wrongdoing by others should not be puzzling to utilitarians, who believe that the morality of acts and omissions is determined by the net balance of utility that they produce. If one can anticipate and prevent the consequences of another's wrongdoing at less cost than the wrongdoing, then, on a utilitarian theory, one clearly does wrong if one fails to take preventative measures. But rights theorists—at least those who cash out the value of rights in terms of the liberty they purchase—ought to be deeply concerned by the claim that the liberty to exercise one's rights is rightly circumscribed by others' wrongs. While such a claim does not imply a conflict of rights of any traditional sort,[6] it is perversely paradoxical. It implies that wrongdoers, by their wrongdoing, acquire rights that others should abandon actions that they (otherwise) have rights to do. While one does not have a right to do what others have rights that one not do, one acquires a right that others abandon their rights when one does what one has no right to do. In short, the perpetration of a wrong trumps the exercise of a right. Thus, while rights do not conflict, they shrink. Such a thesis surely offends intuitions that the justifiable uses of one's time, labor, and property ought not to be thought relative to the unjustifiable uses to which those resources might foreseeably be put by slubberdegullions and shirkers.

4. Many state and city governments have enacted "ignition key statutes" that have been successfully invoked by plaintiffs to prove negligence per se by owners whose vehicles have been used by thieves in injurious ways. *See, e.g.*, Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943); Ney v. Yellow Cab Co., 117 N.E.2d 74 (Ill. 1954).

5. *See, e.g.*, Landeros v. Flood, 551 P.2d 389 (Cal. 1976).

6. It does not, that is, suggest any of the following: that morality violates the "ought-implies-can principle" by obligating us to do what we literally cannot do; that morality is contradictory by simultaneously requiring and prohibiting certain actions; that morality is conflicted by issuing obligations that are logically consistent but that cannot be simultaneously satisfied; or that morality requires what I have called "moral combat," by requiring some persons to do what it requires others to thwart. For a detailed discussion of this latter sort of rights conflict and its relation to the former sorts, *see* HEIDI M. HURD, MORAL COMBAT (Cambridge University Press 1999).

It is the principal project of this article to explore whether a non-utilitarian justification can be given for tort law's willingness to impose liability on those whose sole wrongdoing is in acting on the assumption that others will act rightly. More specifically, the question that it raises is: To what extent can those who defend a corrective justice theory of tort law, and who define what constitutes a wrong deserving of correction as a deontological rights violation, make moral sense of obligations to refrain from actions that would be permissible were it not for others' rights violations?

In Section I, I shall map the theoretical and doctrinal contours of the puzzle. I shall begin by demonstrating both the intuitive plausibility of the thesis that others' wrongdoing bears on what we can morally do, and the *reductio ad absurdum* that defeats a general defense of that thesis. I shall then briefly describe a number of doctrines that reveal the breadth and depth of tort law's commitment to imposing liability on persons who fail to modify their otherwise legitimate activities in light of others' foreseeable wrongdoing.

In Section II, I shall explore circumstances in which it is plausible to maintain that there is an agent-relative, categorical duty to avert the harmful effects of others' wrongdoing. As shall become clear in this section, the myriad circumstances in which American tort law requires us to guard against others' wrongs far surpass those in which a viable deontological moral theory would impose such a duty. If corrective justice demands redress only in instances in which persons have violated deontological duties (and thereby infringed others' correlative rights), then corrective justice seemingly does not account for, nor can it permit, the imposition of liability on those who fail to avert others' wrongs in circumstances in which deontology permits such a failure.[7]

In Section III, I shall take up a final non-utilitarian explanation of tort law's more extensive requirements. As I suggest, while many instances in which tort law requires us to guard against wrongdoers are not instances in which we are deontologically obligated to do so, they may nevertheless be instances in which it is supererogatory of us to do so, or suberogatory of us to fail to do so. If our best aretaic theory makes it obligatory of us to cultivate virtues (and suppress vices) that, in turn, require us to do supererogatory deeds (and refrain from suberogatory deeds), then our best explanation of tort law may be that it is in fact in the business of coercing

7. Jules Coleman might issue a caution here. In his view, the content of the concept of corrective justice is given, in part, by the practices in which the concept of corrective justice functions—the principal one being tort law. Since tort doctrines broadly reflect the principle that persons do wrong not to anticipate and avert others' wrongs, Coleman might argue that this is good reason to believe that corrective justice is compatible with such a principle. *See* Jules L. Coleman, *The Practice of Corrective Justice*, *in* PHILOSOPHICAL FOUNDATIONS, at 53–72. One might think, however, that tort law's requirement that we suspend our activities in anticipation of others' wrongdoing significantly undercuts Coleman's initial premise that tort law is a practice of corrective justice. If so, it does not follow from the fact that tort law embodies such a commitment that such a commitment is compatible with corrective justice.

virtue and eliminating vice. As this is likely to be an unpalatable normative ideal to those who embrace a liberal theory of the state, such an explanation may fail to compete with the utilitarian theory that otherwise appears to be without a challenger in explaining tort law's rigorous requirements.

I. THE PUZZLE

Unsurprisingly, utilitarians are puzzled by the suggestion that there is something puzzling about requiring persons to take into account the likely wrongdoing of others when deciding on what to do. If the Utility Principle dictates that tort doctrines should be formulated so as to induce the cheapest cost avoider to take precautions, then it surely sanctions the imposition of liability on those who refuse to take cost-efficient precautions against others' wrongdoing. Such a conclusion is at home with other (troublesome) lessons of utilitarianism. As Kenneth Simons points out, inasmuch as utilitarianism requires us to weight the interests of others as highly as we weight our own when calculating what will maximize the satisfaction of interests, it sometimes requires a victim to rescue a tortious *injurer*.[8] Yet it is precisely these sorts of implications that have prompted critics to level the well-known complaint that utilitarianism demands too much of people.[9] Its uncompromising insistence that we aggregate interests before maximizing their satisfaction implies that people should transfer their time, talents, and wealth to those who could put such resources to higher or better uses. One's liberty is a function of, and hostage to, others' need for it.

In contrast, it is tempting to think that for all its rigor, a deontological moral theory guarantees us an inviolable sphere of liberty. By virtue of being both agent-relative and categorical, deontological obligations are uncompromising: They cannot be violated in the name of good consequences. But it is in their uncompromising nature that one finds a promise of liberty unavailable in consequentialist ethics: So long as one is not violating any agent-relative obligations, one may pursue one's own projects, even if by so doing one does not maximize good consequences.[10] One must keep one's own moral house in order but one need not tidy up others.'

8. Kenneth W. Simons, *Contributory Negligence: Conceptual and Normative Issues*, *in* PHILOSOPHICAL FOUNDATIONS, at 461–85, 476.

9. *See* DAVID O. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS 264–68, 2733–83 (Cambridge University Press 1989); RONALD DWORKIN, LAW'S EMPIRE 292–93 (Harvard University Press 1986); JOHN RAWLS, A THEORY OF JUSTICE (Harvard University Press 1971).

10. There are two ways in which this characterization may be misleadingly stark. First, many deontologists believe that we have imperfect duties. Thus, on a deontological theory, our liberty to pursue our own projects is constrained by the requirement that we meet all of our duties, imperfect ones included.

Second, as I shall argue in Section IV, even when we are at liberty to pursue our own projects, our actions may be morally tainted. As a matter of aretaic theory, permitted actions may be supererogatory (beyond the call of duty), suberogatory (an abuse of our rights), or quasi-supererogatory (heroic if done, an abuse of our rights if not). Thus, even when deontology is silent, there may be actions that we (aretaically) should and should not do.

There is a host of cases, however, that try the claim that one need only keep one's own moral house in order. Such cases suggest that the scope of one's rights is determined not only by others' rights but also by others' wrongs. It is surely blameworthy to step out in front of a speeding car; to place one's children in the care of a known child molester; to give one's car keys to a friend if one knows he will drive drunk; to run up debts when one knows that one's own creditors will fail to pay their bills, leaving one unable to pay one's own; and to entrust one's legal affairs to a lawyer who has been disbarred.

In each of these cases, one acts wrongly by assuming that others will act rightly. Such cases collectively demonstrate that it can be wrong to stand on our rights; that it can be negligent to expect that others will act non-negligently; that one is not entitled to assume the best in others; that one is not justified in merely keeping one's own moral house clean. Utilitarianism readily accounts for such conclusions, and if a deontological moral theory cannot, then so much the worse for deontology.

Yet while slippery slopes are rarely as slippery as they appear, one cannot posit a duty to avert others' wrongs without coming perilously close to demanding the same sacrifices that are exacted by utilitarianism. To say that one must take precautions against the foreseeable wrongdoing of others when one can easily do so is to say that it is negligent to go for a Sunday drive (for surely one can anticipate that, by so doing, one will unnecessarily place oneself in the path of a negligent driver). It is to suggest that it is culpable to take a stroll through Central Park at dusk (for one certainly knows that one is likely to be mugged). And it is to imply that the woman who wears a low-cut red dress to a bar can be blamed for her own rape (for she could clearly anticipate that it would attract a man who would wrongly take it to be an invitation to rape).

If our liberty is justifiably limited by others' foreseeable wrongdoing, then our liberty proportionately decreases as crime increases and the circumstances in which carelessness can affect others expand. The *reductio ad absurdum* is clear: On pain of being found wrongdoers ourselves, we must relinquish our streets and parks to the thugs who threaten them and withdraw to locked homes within suburban gated communities (until those, too, become so threatening as to require us to move further and further away).

It appears, then, that there is a continuum of cases that takes us from the patently obvious claim that one does wrong to step in front of a speeding car to the manifestly absurd claim that one does wrong to live in New York City. Ranging along that continuum are numerous cases in which tort law transfers the burden of preventing the effects of wrongdoing from wrongdoers to those with otherwise innocent projects. Indeed, it is striking how many of the doctrines that define the prima facie elements of and defenses to intentional, negligent, and strict liability torts compel findings of liability in instances in which the only wrongdoing with which persons can be

charged is the failure to alter their (otherwise) legitimate activities in anticipation of others' illegitimate ones. While we cannot survey here all of the many doctrines that do this work, it is important that we recall enough of them to appreciate just how profoundly indebted tort law is to the principle that it is wrong to assume that others will do right.

Consider, for example, the central doctrines and defenses in negligence law—the doctrines that define when persons owe others a duty of care, when persons breach that duty, when persons are causally responsible for harms that materialize as a result of their breach, and when persons may avail themselves of the defenses of contributory negligence and assumption of risk. First, embedded in the doctrines that define when we owe others a duty not to unreasonably harm them are requirements that we guard wrongdoers against the consequences of their own wrongdoing. For example, many courts now accord foreseeable trespassers the same duty of care as is owed to invited guests, forcing property owners to forego otherwise legitimate uses of their property or to make otherwise unwanted and unnecessary improvements in their property when, by so doing, they can avert foreseeable harms to intentional wrongdoers.[11]

Second, the doctrines that define when persons owe others duties positively to aid them (as opposed to duties not to harm them) also explicitly require persons to mitigate the effects of others' wrongs. Courts now require persons who have unique information concerning third-party wrongdoing (e.g., psychiatrists), or who are uniquely well-situated to take precautions against such third-party wrongdoing (e.g., landlords), to take affirmative steps to warn or make safe those who are threatened by it, on pain of liability for harms caused by foreseeable assailants.[12]

Third, it is a striking feature of American tort law that both of the tests traditionally employed to define when the standard of due care has been breached permit findings of negligence when persons have failed to take precautions against others' negligence. Of course, as we have already observed, the Hand Formula is patently utilitarian, and hence, it is unsurprising that its application makes it negligent for persons to fail to take cost-efficient precautions against any and all harms (including those caused by wrongdoers).[13] More surprising is the fact that one may well get

11. *See, e.g.*, Pridgen v. Boston Housing Authority, 308 N.E.2d 467 (ass. 1974) (eliminating the distinctions between invitees, licensees, and "trapped, imperiled and helpless trespasser[s]").

12. *See, e.g.*, Kline v. 1500 Massachusetts Avenue Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (holding that it was actionable negligence on the part of a landlord not to protect its tenants from third-party criminal assaults); Tarasoff v. Regents of University of California, 551 P.2d 334 (Cal. 1976) (recognizing a cause of action against a psychologist who failed to warn a woman of his patient's desire to kill her).

13. Consider the facts of United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947), in which Chief Judge Learned Hand articulated the Hand Formula. The principle reason that it was negligent of the barge owner not to employ a bargee by day to guard the barge was that the barge owner could anticipate that the tugboat captain responsible for pulling the barge through the New York harbor would be negligent in his oversight.

the same result from the Reasonable Person Test. While the Reasonable Person Test is often thought to yield different conclusions from the Hand Formula precisely because it licenses decision-makers to take into account rights and duties to which the Hand Formula is systematically blind, it also readily permits the conclusion that the Reasonable Person would not stand on her rights.[14] It thus licenses adjudicators to declare persons negligent when they refuse to modify their own activities in anticipation of others' misbehavior.[15]

Fourth, the standard test of in-fact causation, which holds that a person is an in-fact cause of any harm that would not have happened but for her actions, precludes the argument that those who act indifferently to others' wrongs do not (in-fact) cause those harms. It is, after all, often easy to say that but for the creation of an opportunity, no wrongdoing would have occurred.

Fifth, under each of the three principal tests of proximate causation employed by American tort law defendants may be found to have proximately caused harms to which intervening wrongdoers have contributed. Consider, first, the "harm within the risk test," which makes a defendant's negligent action a proximate cause of a plaintiff's harm if the plaintiff's harm was within the class of harms whose risk made it negligent of the defendant to act as he did. If third-party wrongdoing can be a risk that makes (otherwise) innocent activities negligent, then under this test, actors who fail to avert third-party wrongs can be held to be proximate causes of those wrongs.

The same can be true under what is called "the foreseeability test," which requires a court to find that a defendant's action was the proximate cause of a plaintiff's harm if the type of harm suffered by the plaintiff was a reasonably foreseeable result of the defendant's action. Inasmuch as it is often possible to foresee that an action will facilitate another's wrongdoing, actions that would otherwise cause harm to no one may be

14. James Gordley has argued that the reasonable person test reflects the Aristotelian concept of prudence—conceived of as a virtue of character rather than a case-by-case cost-benefit calculus. James Gordley, *Tort Law in the Aristotelian Tradition*, *in* PHILOSOPHICAL FOUNDATIONS, at 131–158, 145–151.

15. Consider only two of the many cases in which the classic tests of breach have been thought to generate the conclusion that defendants have been negligent for failing to anticipate and avert others' negligence. In Weirum. v. RKO General Inc., 539 P.2d 36 (Cal. 1975), the Court held that a radio station could be held liable for the death of a driver who was killed by two teenagers while they were racing to intercept the station's disk jockey after he announced that he had "bread to spread" to the first person who made it to his location. The court found that the station posed "an unreasonable risk of harm to [the plaintiff]" by hosting an event in which contestants would foreseeably engage in "competitive pursuits on public streets." In Bigbee v. Pacific Telephone and Telegraph Co., the Court held that a telephone company could be held liable for injuries sustained by a plaintiff who was hit by a drunk driver while in a telephone booth. The Court held that in light of the foreseeability of reckless drivers, the company could be found to have negligently placed its booth within fifteen feet of a major thoroughfare (where outdoor booths are commonly located).

deemed proximate causes of harms perpetrated by intervening wrongdoers.[16]

When unadulterated by exceptions, the third common-law test of proximate causation—the "direct cause test"—does not make defendants causally responsible for third-party *intentional* wrongdoing. This test requires courts to find a defendant's negligent action a proximate cause of a plaintiff's injury so long as there are no intervening causes between the defendant's action and the plaintiff's harm.[17] Inasmuch as a voluntary human action committed with knowing appreciation of its consequences constitutes one sort of intervening cause, this test promises to relieve one of liability for any harm caused by an intentional or knowing intervening wrongdoer.[18] It thus appears to allow one to navigate through life without having to take causal responsibility for the harms that result when murderers, rapists, thieves, and arsonists seize on opportunities for wrongdoing that one's legitimate activities create.

However, there remain two reasons why jurisdictions that apply the direct cause test still force persons to guard against others' wrongdoing, on pain of being found a proximate cause of that wrongdoing. First, like the previous tests, the direct cause test makes defendants a proximate cause of harms done to plaintiffs via the intervention of *negligent* third parties.[19] Second, in a number of states, courts and legislatures have created exceptions to the general rule that intentional wrongdoers always function as superseding causes.[20] As I mentioned earlier, traffic ordinances often prohibit motor vehicle owners from leaving their keys in their vehicles, just

16. *See, e.g.*, Watson v. Kentucky & Indiana Bridge & Ry. Co., 126 S.W. 146, 151 (Ky. 1910) (holding that a railroad proximately caused an arsonist's fire when it failed to prevent the arsonist from tossing a match onto a tanker gas spill). Courts uncomfortable with this result have simply declared that third-party wrongdoing is unforeseeable. "[I]f the intervening agency is something so unexpected or extraordinary as that [the defendant] could not *or ought not to have* anticipated it, he will not be liable and certainly he is not bound to anticipate the criminal acts of others by which damage is inflicted, and hence is not liable therefore." *Watson*, 126 S.W. at 146 (emphasis added). Of course, what this really means is that persons ought not to have to foresee third-party intentional wrongdoing, not that they cannot foresee it.

17. For the classic articulation of the direct cause test of proximacy, *see* H. L. A. HART & TONY HONORE, CAUSATION IN THE LAW 68–81 (2nd ed., Oxford University Press 1985).

18. "The general principle of the traditional doctrine is that *the free, deliberate and informed act or omission of a human being, intended to exploit the situation created by the defendant, negatives any causal connection*." *Id.* at 136 (italics in the original).

19. HART, *supra* note 18, at 138. Thus, while an arsonist will break the causal chain between a railroad's negligent gas spill and a resulting fire, a passerby who carelessly tosses a lighted cigarette into the spill will not. Similarly, when a pedestrian who is injured by a negligent driver is further injured by a negligent ambulance driver, the original driver is deemed a proximate cause of the entire set of injuries sustained by the pedestrian. *See, e.g.*, Atherton v. Devine, 602 P.2d 634 (Okla. 1979).

20. In so doing they reflect the position of the RESTATEMENT (SECOND) OF TORTS, which states that persons are proximate causes of third-party negligent and intentional wrongdoing when they have either created the opportunity for that wrongdoing or are otherwise deemed negligent just because of the risk that their activity will invite third-party wrongdoing. AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF TORTS §§ 448, 449 (Philadelphia, Pa. 1965).

because doing so makes a thief's job easy,[21] and courts commonly require "defensive driving," on pain of liability for harms caused in part by those one should defend against when driving. It thus appears that whenever third-party wrongdoing is foreseeable, or at least whenever its foreseeability is part of the reason a court considers the defendant to have breached the duty of due care to begin with, all three of our tests of proximate causation permit courts to impose liability for the results of others' wrongdoing.

Just as the doctrines that define the prima facie case for negligence require persons to assume the worst of others, so, too, do the doctrines that define the defenses to a suit for negligence. First, in jurisdictions that still apply the traditional assumption of risk defense, a defendant can transfer liability to an injured plaintiff who knowingly and voluntarily encountered the risks of the defendant's wrongdoing.[22] The application of this defense forces persons to avoid the known negligence of others on pain of being found to have assumed its risks.

Second, and conversely, in jurisdictions that absorb considerations of assumption of risk into general comparative negligence analyses,[23] a defendant cannot altogether bar a plaintiff's suit by demonstrating that the plaintiff begged to take the risks of the defendant's activity. Such jurisdictions force persons to anticipate and avert the harmful consequences of others' fully informed and voluntary risk-taking. If autonomous choices (however unwise) ought to be respected, it would appear that their consequences ought to rest on their makers rather than on those who could have thwarted them.

Third, while most jurisdictions now apportion damages in accordance with the comparative fault of the plaintiff and the defendant (when the plaintiff is also found to have been negligent in contributing to her injuries), a number of jurisdictions refuse to reduce a defendant's damages if he failed to rescue the negligent plaintiff from a perilous condition of helplessness or inattention when he had a clear opportunity to do so. The so-called "last clear chance doctrine" is the most pure doctrinal expression of the claim that persons do wrong not to alter their activities when they both can foresee that their activities will have interactive effects with others'

21. Some jurisdictions treat such enactments as statutory torts; others allow plaintiffs to use them to establish per se negligence; and still others invoke them to make car owners "per se proximate causes" of any harms caused by fleeing car thieves. As one court declared in a case in which the defendant violated such an ordinance: "Since it is a safety measure, its violation was negligence. This negligence created the hazard and thereby brought about the harm which the ordinance was intended to prevent. It was *therefore* a legal or 'proximate' cause of the harm." Ross v. Hartman, 139 F.2d 14, 15 (D.C. Cir. 1943) (emphasis added).

22. Consider, for example, the person who agrees to be transported to a hospital by someone he knows is an incompetent driver, or the water-skier who appreciates that his boat driver will frequently look backwards at him, and may well fail to pay attention to obstacles that lie ahead. In both of these cases, the traditional doctrine of assumption of risk could be applied to exonerate the drivers of negligently caused harms.

23. For a short critique of this doctrinal collapse, *see* Heidi M. Hurd, *Will State's High Court Reform the Tort Laws that Burden Society?* San Diego Union August 18, 1991 (Editorial).

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wrongdoing and can prevent those effects by altering their otherwise legitimate conduct.[24]

The doctrines of tort law that transfer burdens of precaution from wrongdoers to innocents are not, however, limited to negligence law. There are several doctrines that define the conditions of intentional tort liability that do similar work. First, for example, while it may seem idiomatically odd, a defendant is said to "intend" a harmful contact if he simply knows that it will occur as a result of his actions. The legal meaning assigned to the *mens rea* of intent opens the door for a plaintiff to maintain that inasmuch as a defendant knew that her otherwise-legitimate conduct would interact with a wrongdoer's conduct in harmful ways, the defendant intended the wrongdoer's harm, and so should be liable not only for compensatory damages, but for punitive damages.[25]

Second, implicit in the contemporary doctrine of self-defense (as a response to a suit for an intentional battery or killing) is a set of limitations that require persons to take precautions against harming the very wrongdoers who are forcing their use of self-defense. First, in many states, persons are required to retreat from wrongful aggressors when they can safely do so, even when doing so will require them to abandon their homes, businesses, cars, or property in ways that impose considerable costs to liberty. Second, in most jurisdictions the doctrine of self-defense embodies a proportionality restriction: One is justified in inflicting a harm proportionate to, but not greater than, the harm threatened, so long as that degree of harm is necessary to defend against the threat.[26] The implication is that in circumstances in which one cannot defend against a harm except by inflicting a greater one, one must grin and bear it.[27] And finally, most commentators agree that a defendant who positively seeks out an opportunity to use self-defense loses the defense when the opportunity presents itself.[28] These limitations on the self-defense doctrine all require persons to anticipate and

24. Thus, where a driver recognizes that an oncoming driver is distracted and unlikely to stop at a stop sign, he must take affirmative steps to avoid a collision in an intersection at which he otherwise has no obligation to stop or yield.

25. Thus, if a defendant knows (i.e., believes to a substantial certainty) that in setting a can of gasoline outside her barn an arsonist will use it to burn down her neighbor's house, she (legally) intends her neighbor's fire and so can be held liable for arson. There may, of course, remain proximate-cause problems, but, as we saw, our tests of proximate causation all permit assignments of causal responsibility for others' wrongs.

26. The retreat rule is really a special case of this more general proportionality rule, because one would not be adopting the least force necessary to avert injury to oneself if one stood one's ground and exchanged blows when means of retreat were available.

27. Thus, if a woman's petite size and limited strength precludes her from repelling a large man's groping by any means other than the use of deadly force, she must succumb to the molestation, on pain of being found liable for an intentional, unjustified killing.

28. For example, most maintain that if a person who has recently acquired a black belt in Karate spends all of his spare time in Central Park posing as a likely victim, he loses the defense of self-defense when he finally has an opportunity to put his skills to use in fending off an attacker. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW (2d ed., Matthew Bender 1995).

avoid harms to murderers, rapists, and muggers on pain of being liable to such wrongdoers. Under such rules we not only have to protect innocent persons from the wrongdoing of others, but we have to protect wrongdoers from harms that might occur to them in the course of our defending against their wrongdoing.

Third, it is a commonplace that the law allows the use of deadly force to protect persons but not property. This *per se* proportionality rule implies that if deadly force is the only means of preventing a wrongdoer from destroying a beloved heirloom, one must protect the wrongdoer by letting him destroy the heirloom. This rule further motivates prohibitions or significant limitations on the use of indirect mechanical means, such as spring guns, to protect one's home. In jurisdictions that altogether bar persons from using spring guns,[29] a contract killer can recover damages when a defendant's spring gun harms him during his attempt to kill the defendant's sleeping family! In jurisdictions that allow the use of spring guns only when persons would be justified in using deadly force directly (i.e., in self-defense),[30] persons must sacrifice their property to thieves and vandals when its loss could be prevented only by the (disproportionate) deadly force of a spring gun. Finally, in jurisdictions that prohibit the use of spring guns by defendants who use them with the intent to injure trespassers (rather than to deter trespassers), defendants must forego the use of spring guns altogether when they know (i.e., legally intend) that wrongdoers will defy warnings and be shot.[31] All of these limitations on self-defense and defense of property thus require innocent persons to take measures to guard their assailants from harms threatened by their assailant's own wrongdoing.

Finally, tort law's willingness to limit our rights by others' wrongs is nowhere better illustrated than by contemporary strict liability law for product design and warning defects. Under the modern approach, the adequacy of both a product's design and its accompanying warnings is measured not by the product's safety when put to its normal and intended use, but by its safety when misused and abused in foreseeable ways. Product manufacturers are thus explicitly required to anticipate and avert the wrongful ways in which customers might use their products, on pain of being found strictly liable for customers' injuries.[32] And in a number of jurisdictions, defendants sued under a product liability theory are flatly

29. Jurisdictions of this sort conform their tort law to the prohibitions against the use of deadly mechanical devices articulated by the MODEL PENAL CODE § 3.06(5).

30. RESTATEMENT (SECOND) OF TORTS § 85.

31. Oliver Wendell Holmes ironically sought to justify this result by explaining that a landowner who sets man-traps with the (conditional) intention that if they do not deter a trespass, then they should do injury to the trespasser, "has contemplated expressly what he *would have had a right to assume would not happen* [that is, the trespass]. . . ." Oliver Wendell Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 11 (1894).

32. Consider two choice illustrations. In LeBouef v. Goodyear Tire and Rubber Co., 623 F.2d 985, 989 (5th Cir. 1980), a drunk driver was killed when he drove his new Mercury Cougar at

denied the defense of contributory negligence, making it impossible for them to escape liability for harms that result from grossly unreasonable, and even intentionally wrongful, consumer conduct.[33]

The extensive examples that I have provided should be sufficient to persuade even the most skeptical readers that American tort law is deeply committed to the principle that persons must alter their actions in anticipation of others' wrongdoing. If the many instances in which the law applies this principle surpass the instances in which our best deontological morality imposes such an obligation, then we have good grounds for thinking that existing tort law cannot be morally justified by a corrective justice theory that matches rights of redress to deontological wrongs. If tort law *should* seek corrective justice (so defined), then it will take a far-reaching doctrinal revolution to guarantee that persons are not held liable for others' wrongs.

Let us then turn to the task of determining whether and under what circumstances a deontological morality requires us to curtail the exercise of our rights in anticipation of others' wrongs.

II. DEONTOLOGICAL DUTIES TO PROTECT AGAINST OTHERS' WRONGS

A. All and Nothing Arguments

1. The Argument for A General Duty to Avert Others' Wrongs

At one extreme, it might by tempting to postulate that we are each subject to an agent-relative, categorical obligation to anticipate and avoid others' wrongs. In keeping with what it means for an obligation to be both agent-relative and categorical, this obligation cannot be violated in the name of

over 100 miles per hour on tires that had been tested for safety only for speeds up to 85 miles per hour. While the owner's manual stated that "[c]ontinuous driving over 90 mph requires using high-speed-capability tires," the court found that it was "to be readily expected" that high-speed driving without such specialty tires would occur, and it ruled that Ford had a "duty either to provide an adequate warning of the specific danger of tread separation at such high speeds or to ameliorate the danger in some other way. In Jackson v. Coast Paint and Lacquer Co., 499 F.2d 809 (9th Cir. 1974), a paint manufacturer had supplied the following warnings with its paints: "Keep away from heat, sparks, and open flame. USE WITH ADEQUATE VENTILATION. Avoid prolonged contact with skin and breath of spray mist. Close container after each use. KEEP OUT OF REACH OF CHILDREN." The plaintiff was allowed to reach the jury on the argument that the warning was inadequate because it permitted him to assume that the danger of unventilated use was breathing the toxic fumes, not an explosion—which is how he was injured by his unventilated use of the product.

33. *See, e.g.,* Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976) (court refused to admit evidence that prior to being thrown from her unlocked car during a collision in an intersection, the decedent had run the red light and had failed to lock her door or use her seat belt). *See also* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 860 (6th ed. Little, Brown and Company 1995) ("[R]ecent cases frequently take the line that a plaintiff who makes a '*foreseeable misuse*' of a product is entitled to the same protection as those who do not, thereby removing from products liability defenses not only plaintiff's failure to discover latent defects in the defendant's product but also *active negligence or, arguably, wilful misuse of the product*."

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the good consequences that would result from pursuing our own (otherwise) justified activities without regard to others' possible wrongdoing.

Yet most deontologists are generally anxious to preserve arenas in which it is fully permissible to act so as to maximize good consequences. They generally view deontological maxims as means of trumping otherwise legitimate consequential calculations. On this view of deontology, the principal payoff of categorical maxims is their ability to define and patrol the borders of legitimate consequential justification.[34] If this is the best understanding of deontological maxims, we must be wary of defining deontological obligations so broadly that they will prohibit consequentially justified actions in a great many circumstances.

Deontologists who would claim that we are each subject to a general categorical obligation to anticipate and avert others' wrongdoing would thus invite several alternative charges. First, they could be properly accused of being closet consequentialists, claiming deontological status for case-by-case consequentialist conclusions. Second, they could be criticized for positing agent-relative, categorical obligations in circumstances in which the violation of those obligations would indeed appear justified when more good is done than harm. Finally, they could be charged with the same philosophical offense of which consequentialists appear guilty: namely, requiring too much of us by calling upon us to abandon our projects at any time when, by so doing, we might avert the results of others' wrongdoing. In the face of these objections, there appears little promise in the argument that our best deontological theory embodies a general requirement that persons prevent the harms threatened by others' interactive wrongdoing whenever they have the means to do so.

2. The Argument against Any Duty to Avert Others' Wrongs

At the other end of the spectrum, it appears equally unpromising to maintain that a deontological moral theory would never require us to act in anticipation of others' wrongs. Initially, it may be tempting to think that deontological rights (and the correlative duties they impose) logically entail substantive liberties. By traditional analysis, if I have a duty not to do act A, then others have a right that I not do act A. If others have a right that I not do act A, then one might plausibly think that, on pain of contradiction, they have a right to act on that right—that is, to act on the assumption that I will do what they have a right that I do, namely, refrain from doing act A. But, of course, this does not follow. That others have a right that I not do act A is fully consistent with their having a duty to prevent me from doing act A. That is, others may both have a right that I not do act A and an obligation to anticipate and avert the consequences of my violating their right by doing

34. Thus, as Tony Honore argues: "Tort law, like the rest of law, must satisfy several values, of which efficiency in pursuing worthwhile objectives is only one. Efficiency must be pursued within a morally defensible framework; so we must ask, and ask first, what aims it is morally desirable and defensible to pursue by imposing tort liability." Tony Honore, *The Morality of Tort Law—Questions and Answers, in* PHILOSOPHICAL FOUNDATIONS, at 73–95, 74.

act A. Thus we cannot derive the conclusion that one need not anticipate and guard against others' wrongs from the sheer fact that one has a right that others not do wrong. Deontologists are thus not conceptually committed to, nor can they conceptually vindicate, the thesis that it is immoral to cast upon persons a duty to avert the wrongs of others. Those hoping that logic alone would extract libertarianism from deontology will be sorely disappointed. Those worrying that a deontological theory might commit them to saying that a pedestrian does no wrong in stepping in front of a speeding car or that a doctor does no wrong in returning a battered child to her abusers need have no fear.

Our question, then, is whether deontologists can carve out a middle ground between the unsustainable claim that everyone must always avert foreseeable wrongdoing by others and the untenable claim that no one must ever do so. Does deontology have the philosophical wherewithal to identify principled moral distinctions that allow us to assert both that one cannot send one's children home with a drunken friend and that one can live in a crime-ridden neighborhood? In what follows, I shall work through a set of moral factors that help to map this sought-after middle ground between cases in which we have duties to anticipate and guard against others' wrongs and cases in which we do not. That all of these factors do work reveals that there is no elegantly simply solution to the problem—no single formula that will parse between cases in which persons are deontologically obligated to avert others' wrongs and cases in which they are not.

B. Principled Limitations on a Limited Duty to Protect against Others' Wrongs

1. Completed Wrongs, Unstoppable Wrongs, and Future Wrongs

Suppose that someone wrongly fills a swimming pool with water. It would seem that those who arrive on the scene must act on their knowledge that the pool is full rather than on their right that the pool be empty. Were a non-swimmer to jump into the pool, insisting that it *should* be empty while seeing clearly that it is not, we would judge him a wrongdoer, notwithstanding the fact that his wrongdoing is a product of another's previous wrong. Similarly, were someone to step knowingly in front of a negligently loosed arrow, insisting that he has an unfettered right to tread that path, or to set out across a desert with a canteen that he saw emptied by his enemy, we would say that he failed to appreciate how what he had a permission to do has been affected by what has already been (wrongly) done.

To say this is to say that when another's wrongdoing is complete, it changes the baseline against which others' actions are measured. It effects alterations in the world that, for those who follow, are morally equivalent to those effected by Mother Nature. Just as one must take reasonable measures

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to determine the existence of, and take precautions against, slippery roads, fallen trees, poison ivy, and blinding blizzards, so one must take similar measures to assess and take precautions against hazards created by others' already completed wrongdoing. Were we to think otherwise, we would invite a *reductio ad absurdum* that would imply that we could now act as if wrongs had never been perpetrated by previous generations. If, without the bureaucratic mistakes that contributed to the Great Depression, my family would have had considerable wealth, and if, without others' mismanagement, I would have inherited an even greater sum today, then I do no wrong today in writing checks in the millions, notwithstanding the fact that I have only hundreds.

If the hazards created by completed wrongdoing are morally equivalent to the hazards created by natural forces, then this goes some distance towards explaining a subset of tort doctrines that force us to avert the consequences of others' already-completed negligence. It explains, for example, why, under the last clear chance doctrine, one must take reasonable means to discover and avert harms to wrongdoers whose own wrongdoing has left them helpless.[35] If a drunk is passed out in the middle of an intersection, one does not get to run over him because he should not be there.[36] It further explains particularly compelling applications of the contributory negligence and the traditional assumption of risk doctrines. If one's house is ablaze from fires set by an arsonist, it is surely contributorily negligent to go on ironing just because it should not be so. And if an expert skater sees clearly that an ice rink was negligently made too hard, he surely assumes its risks when he steps out onto it.[37]

That we must take reasonable means to avert the consequences of others' completed wrongdoing challenges us to specify when wrongdoing is complete. In a number of the above cases it appears clear that at the time the plaintiffs confronted the hazards created by the defendants, the defendants were unavailable to eliminate them (e.g., the arsonist had fled, the drunk was unconscious). They had done the last actions necessary to create hazards and were unavailable to do further actions to reverse the perilous conditions they created. One might, then, conclude that we have limited duties to anticipate and avert harms caused by hazardous conditions created by wrongdoers who are no longer available to avert the harms themselves.

35. But *see infra* note 49 and accompanying text, making clear that we have no duty to protect *inattentive* plaintiffs from their carelessness.

36. *See* Kumkumian v. City of New York, 111 N.E.2d 865 (N.Y. 1953), in which subway train operators reset the brakes and restarted a train three times before looking under the train to discover the body of a man who had wrongfully been walking the tracks. Since the victim's negligence was complete at the time the victim was first struck, the City's employees thereafter owed him a duty not to hurt him further by their actions.

37. *See, e.g.,* Meistrich v. Casino Arena Attractions, Inc., 155 A.2d 90 (N.J. 1959). *See also* Murphy v. Steeplechase Amusement Co., 166 N.E. 173 (N.Y. 1929) (court invoked assumption of risk doctrine to bar a plaintiff's recovery after he boarded a Coney Island ride seeing clearly that its point—however negligently conceived—was to toss persons around).

Such a criterion, however, would appear unduly narrow. Available wrongdoers who could prevent their hazards (say, by refilling the canteen or emptying the pool), but who harbor intentions not to do so appear to create hazards that are, for all practical purposes, equally complete. Since they will not, in fact, act to eliminate the hazards that they created, the hazards appear to be permanently embedded in the fabric of the world in a way that forces others to negotiate around them. We thus might define completed wrongs as hazardous conditions wrongly created by persons who are no longer physically available to avert the harms threatened *or* who harbor existing unconditional intentions not to do so.[38]

But it is plausible to think that even this criterion is too narrow. Consider the case of the pedestrian who steps in front of a speeding car that cannot be stopped before hitting him. Suppose he argues that while he saw that the car was speeding and knew that it could not stop in time, he is entitled to recovery because if it had been going at the required speed, it would have been able to stop. Here the defendant-driver's negligence is not complete in the sense specified above. The defendant is physically available to take measures to avert the harm (i.e., to step on the brake) and he clearly intends to avert the harm (which is why he steps on the brake). Nevertheless, he simply cannot avert the harm: his negligence is irreversible. If persons have obligations not to step in front of speeding cars, and not to jump into swimming pools that cannot be drained before they drown, then we must think that completed wrongs include wrongly created conditions that cannot be reversed by the wrongdoers who created them, however much they may try and however well-intentioned they may become upon realizing the peril they have created.

We must be wary, however, not to extend our criteria of completed wrongs so as to invite the *reductio ad absurdum* that we encountered in Section I. We do not want to say, for example, that muggers and rapists who roam Central Park, or drunk drivers who threaten our roads, are themselves "completed wrongs," such that we wrongly fail to avert their harms by taking a walk through the park or a drive to the grocery store. That a rapist conditionally intends to rape if given the opportunity does not make the rape an already-existing wrong. And that the drunk driver suffers from a condition that makes harms to others more likely does not, as yet, make the drunk driver a force analogous to an avalanche or mudslide. The rapist has yet to form the last intention and to do the last act necessary for raping a particular victim. The drunk driver has yet to make the last misjudgment and do the last act necessary for actually creating a highway hazard. In

38. It is crucial to be clear that this criterion applies to wrongs by persons who have an intention not to avert them, rather than to the much broader category of persons who have no intentions one way or another about averting them. The latter category of wrongdoers may have the opportunity to form intentions to avert their wrongs, as well as the physical abilities to act on those intentions, and when this is true, their wrongdoing is in no sense complete. In such cases, we will require some other source of obligation to avoid the defendants' wrongdoing.

neither of these cases, then, would it be appropriate to claim that subsequent actors should act as if the wrongs in question were either irreversible by the wrongdoers or already occasioned.

This final lesson is important. In the majority of negligence cases in which tort law imposes a duty to avert the wrongs of others, those wrongs have not yet been completed, at least if our criterion of completed wrongs is best specified as I have done. If a farmer may not stack his flax on his own land where it might catch a spark from a negligently operated railroad, this cannot be because the railroad's future sparks already exist and are now uncontrollable by the railroad. If under the last clear chance doctrine drivers have to avert harms not just to helpless pedestrians who are in the street but to negligently inattentive pedestrians who are about to step out into the street, this is not because such pedestrians' future presence in the street is as inevitable as that of a rolling ball. And if it is wrong for a toy manufacturer to sell checkers sets to parents without warning that their pieces create choking hazards for young children, it must be for reasons other than that the future negligence of parents in giving the sets to their two-year-olds can be said to be history before it happens.

There may be instances in which persons must guard against rapists, drunk drivers, railroads that operate without spark arresters, inattentive pedestrians, and careless consumers, but our explanation of these obligations cannot rest on the claim that such wrongdoers have completed the creation of hazards that are now a given part of our world, akin to icy roads and rattlesnakes—hazards which we must naturally take reasonable measures to discover and avoid. We must thus look elsewhere for reasons to think that we have duties to anticipate and avert wrongdoing that is yet to happen.

2. Harms to Self, Harms to Wrongdoers, and Harms to Innocents

The many tort doctrines that require us to act in anticipation of others' wrongdoing appear indifferent to the identity of the party threatened by that wrongdoing. In some cases, we are required to protect ourselves from others' wrongs (as when we would be deemed contributorily negligent for not looking both right and left when crossing a one-way street); in others we are required to protect *innocents* from intervening third-party wrongdoing (as when dram shops are held liable for harms done by inebriated customers, or car owners who left keys in their vehicles are held liable for injuries caused by thieves in high-speed getaways); and in still others, we are required to protect *wrongdoers* themselves from the consequences of their own wrongs (as when we are held liable for failing to take the last chance to avoid injury to inattentive actors, or for failing to retreat from intentional aggressors, or for using force disproportionate to the force with which we were threatened by an aggressor, or for failing to protect consumers from their own product misuses). But it would seem that the duties that we owe to ourselves, to wrongdoers, and to innocents

are considerably different, and that these differences ought to be reflected in the law.[39]

Consider the following hypothetical. X knowingly steps in front of Y's speeding car under circumstances in which it would not be negligent to step into the street but for Y's speeding. When X is hit by Y, X sues for his physical injuries, and Y countersues for damage caused to his car. It would appear that X should be liable for his own injuries, on the grounds that he assumed the risk of Y's negligence, but X should not be liable for Y's injuries, on the grounds that Y was a wrongdoer in bringing about his own damage. Now suppose that when X knowingly steps out in front of Y's car, he has a blind man on his arm who knows nothing of Y's negligent driving. When the blind man sues X for being hit by Y, should X be held liable for his injuries? In the following subsections, we shall explore how the identity of the beneficiary of the duty to avert others' wrongs alters the scope of that duty.

Duties to self. To begin, recall the implications of positing a deontological obligation: One is categorically prohibited from violating that obligation even when one's violation would result in a net gain of good consequences. It would seem, however, that one may risk oneself to achieve benefits that one would not be entitled to achieve by risking innocent others. One may climb into the "death zone" of Himalayan peaks in which the risk of death is one in ten, but one may not achieve an equivalent thrill by driving in a manner that subjects others to a one-in-ten risk of death. One may justifiably play the version of Russian Roulette that has each player put the gun to his own temple, but one may not play the version that has each player put the gun to his neighbor's head. And if the only threats that one were to invite by leaving one's keys in one's car, or one's home unlocked, were threats to one's self and one's own property, then it would seem that one should be at liberty to calculate whether the costs of such threats are outweighed by the benefits of foregoing a "fortress-like" existence.[40] In short, it would seem that we should resist the claim that we owe ourselves a deontological duty to avert wrongs that we can anticipate will come our way from others, for it appears that we are justified in violating such a duty when we conclude that the benefits outweigh the costs.[41]

39. Some courts at least in part agree. "[B]etween one whose negligent act does harm to others and one whose negligent act does harm to himself . . . the same mechanistic standard ought not to be applied indifferently. . . ." Rossman v. La Grega, 270 N.E.2d 313, 317 (N.Y. 1971) (cited in Simons, *Contributory Negligence*, *in* PHILOSOPHICAL FOUNDATIONS, at 470 n.24).

40. As Ken Simons asks, why not permit a person "to rank his own interests however he likes, since he will suffer the harm? After all, by definition there can be nothing unduly 'self-serving' about his ranking of some of his own interests over other of his own interests." Simons, *Contributory Negligence*, at 471.

41. Notice that in the previous section, I discussed many cases of harms to self as cases of possible wrongdoing. As I suggested, if one were to jump in a full swimming pool or stay in a burning house just because one declared it one's right that the pool not be full and the house not be burning, one would do oneself wrong. However, unless suicide is wrong (which I doubt), one who jumped into a wrongly filled pool or stayed in a burning house *because he calculated that the benefits outweighed the costs* would not, on the above analysis, do wrong.

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Notice, however, that the existence of this moral permission (i.e., the absence of any moral duty to oneself and thus of any moral wrong when one risks oneself for good consequences) does not free us from a kind of legal liability. Under the traditional common-law doctrine of assumption of risk (and the modern comparative negligence approach that absorbs that doctrine), any losses we suffer are not recoverable from the wrongdoer whose wrong we failed to avoid. That such legal liability is not based on any breach of a deontological duty on our part generates a real puzzle. How can it be moral to force those who permissibly confront risks generated by others' impermissible actions to bear the costs of those risks when they materialize? A deontological moral theory appears to be without an answer. I shall argue in Section IV, however, that before we concede defeat to utilitarianism on this point, we would do well to consider an answer provided by aretaic theory: It is supererogatory (virtuous) not to assume certain risks, or suberogatory (vicious) to do so, and legal liability is an appropriate response to our failures to exemplify virtue and suppress vice.

Duties to wrongdoers. Now assume that the party injured is the wrongdoer himself, and the party sued is a person whose only wrong was a failure to avert the wrongdoer's actions. In analyzing the duties that we owe to wrongdoers, it is useful to distinguish between intentional wrongdoers and negligent wrongdoers. Let us begin with the duties, if any, that we owe to intentional wrongdoers. Consider the notorious case of the would-be thief who, while trying to gain access to the defendant's building, fell through a third-story skylight and sued the defendant for failing to place metal guard rails around the skylight. Such a case evokes the strongest intuitions that we do no moral wrong in failing to prevent a wrongdoer's wrong and that we should bear no liability for that wrong when it results in harm to the wrongdoer.

Recall, however, that tort law embodies numerous doctrines that require us to forgo our own protection so as to protect the wrongdoer who threatens us—most notably, the proportionality requirement for self-defense. On a consequentialist ethic, of course, it is better that one bear an unwanted kiss than that one take the life of a person who is big enough and mean enough to inflict it over any resistance short of deadly force. However, theorists who are not hostage to an aggregating ethic need not conclude that persons must bear non-deadly threats if they cannot prevent them with non-deadly force. They can instead maintain that morality embodies an agent-relative permission to inflict whatever harm is necessary to repel a culpable rights violation, regardless of the consequences to the aggressor or society.

Do we have reasons to think that our best deontological theory would grant such a permission rather than a permission to use only proportional force? Many consider the necessity rule defeated by its prima facie puzzling conclusion that one may kill to prevent an unwanted tap on the shoulder.

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But under such a rule, one cannot kill unless one has, in fact, no alternative means of defense. Just why should someone permit violations of his bodily integrity by a wrongdoer who is undeterred by requests, warnings, threats, evasion attempts, and physical struggling?

Deontologists cannot maintain that when one compares the consequences of a tap on the shoulder with the consequences of a killing, one clearly does the right thing only if one endures the shoulder tap. One cannot be said to have a right to anything that one is permitted to possess only so long as the benefits that it provides exceed the harms that its defense imposes on others. One thus does not have a right to one's bodily integrity if one must forfeit it to others when to do otherwise would cause the loss of something more valuable. In short, the proportionality rule, if indeed best explained as an attempt to maximize the preservation of more important interests over less important interests, is inconsistent with deontological claims that persons have rights to their bodily integrity, their property, and so forth.[42]

Deontologists might maintain, however, that the proportionality rule need not reflect any illicit utilitarian calculus. They might argue that it is logically implied by a particular sort of deontological view—the view that all rights are not of equal weight; rather, some rights are very important, while others are relatively trivial. On this view, while the most trivial right cannot be violated in the name of good consequences, it can be trumped by a more weighty right. Such a view would allow deontologists to argue that while a culpable aggressor has a right to bodily integrity which is forfeited when he aggresses against an innocent person, he also has a right to life that is not forfeited unless and until he threatens another's right to life (or other similarly weighty right). Having similar rights, a victim may use non-deadly force to protect against a non-deadly attack, but she may not resort to deadly force unless and until she is threatened with death (or the violation of a right as weighty as the right to life).

Now imagine, however, that a culpable aggressor makes it his plan to molest one hundred persons, all of whom are unable to defend against him except by use of deadly force (they are all, shall we suppose, sufficiently physically handicapped that the only means by which each can viably prevent an attack is by squeezing the trigger of a gun). Can any one of them use deadly force to repel the aggressor's non-deadly attacks? It might be tempting to argue that even on the above view of rights, according to which the aggressor's right to life individually trumps each innocent person's right

42. The proportionality rule becomes all the more counterintuitive when one recognizes that fully half of the population—women—lacks the ability to meet the other half of the population—men—with *proportionately effective* non-deadly force. While there are ways to compensate for this (special defense training, use of private security services, use of the police, retreat to shelters for abused women, etc.), these means both cast a disproportionate burden upon women and do nothing to change the bottom line: When all else fails and one must choose between using necessary deadly force or succumbing to a rights violation, a rule that requires one to succumb is a rule that denies that one has rights to begin with.

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to bodily integrity, his killing is justified because the sum of his victims' (individually lesser) rights trumps his right to life.

To say this, however, is to give up deontology for a version of rights consequentialism. It is to suppose that rights can and should be aggregated and maximized.[43] In the above case, since the cumulatively more important rights of the many can be protected by sacrificing the rights of one, a rights consequentialist will countenance the use of deadly force to repel (a large number of) non-deadly rights invasions. But deontologists are not rights consequentialists. One is obligated under the maxims of deontology not to violate rights; one is not obligated, nor is one permitted, to minimize rights violations by committing rights violations. Hence a deontologist is unable to argue that cumulative rights violations by an aggressor employing non-deadly force will eventually justify the use of deadly force against the aggressor when no other means of defense is available. Thus any deontologist who assigns greater weight to a culpable aggressor's rights than she assigns to the rights of innocent persons must tolerate the conclusion that an aggressor may prey on an endless number of innocent persons without facing justified resistance, so long as he targets persons who are stopped from defending themselves by the fact that their only effective means of defense would unjustifiably violate the more weighty rights of the aggressor. In short, so long as an aggressor is clearly going to deliver only unwanted touches and non-deadly blows to bed-ridden nursing home patients, he cannot be shot. And if an abusive husband has made both escape and all lesser means of defense impossible, an abused wife must endure his endless beatings so long as she knows that no one of them is likely to result in death or grievous bodily injury.

Since I find such conclusions unpalatable, I am inclined to think that our best deontological theory would not require us to forego the protection of our own rights so as to safeguard culpable wrongdoers. Such a conclusion is not without troubling implications. Does it imply that persons should be able to use deadly force to repel not only violations of their bodily integrity but also violations of their other rights—say, their rights to property or their rights against defamation? If the rights of wrongdoers are trumped by the rights of innocents, then it would appear that one may kill to defend against someone taking a paper handkerchief if no other means of defending against that theft are available. Yet deontology need not adopt a proportionality rule to withstand this *reductio*. Rather, our rights to defend our persons and property against aggressors can plausibly embody exceptions for *de minimis* violations: We may kill to prevent another from stealing our Picasso

43. John Attanasio has defended what he calls the "principle of aggregate autonomy," according to which one must "act to protect [others] against severe constrictions of life plans whenever such protection requires *de minimis* wealth-related interference with one's own life plans." John B. Attanasio, *Aggregate Autonomy, the Difference Principle, and the Calabresian Approach to Products Liability*, *in* PHILOSOPHICAL FOUNDATIONS, at 299–318, 300. If Attanasio's principle were applied to sacrifices beyond those of wealth, it could readily be used to give a rights-based justification (though not a deontological justification) of the proportionality rule.

but not to prevent him from stealing a petunia from our front garden. I do not propose to pursue here what counts as a *de minimis* violation beyond suggesting that, in light of the above discussion, our best test of such a violation may be as follows: A *de minimis* violation is a violation whose indefinite repetition fails to justify a person in using deadly force.

Consider, now, cases that raise the question of whether we are morally required to alter our actions so as to protect *negligent* wrongdoers, rather than intentional wrongdoers, from the consequences of their own foolishness. If a hardware store owner knows that the customers who buy Sterno from her store are drinking it rather than using it as a source of heat, does she breach a moral duty by selling it to them? If the manufacturer of an electric knife can foresee that a consumer might use the product to trim his toenails (and thereby his toes) does the manufacturer have a duty to engineer the product so as to prevent such misuse?

The best answer is derived from a clear understanding of the proper object of a deontological duty. Deontologists disagree about whether deontological maxims are aimed at motivations, deliberations, intentions, attempted actions, or completed actions. I have elsewhere argued that only the last view can be sustained—that is, that deontological wrongs consist of causally complex act types (killings of innocents, rapes, thefts, etc.); they do not consist of particular mental states concerning such act types (intentions to kill innocents, deliberations about killing innocents, negligence vis-à-vis innocents, etc.). The mental state with which a person does a wrong determines his culpability but it does not affect whether or not what he does is wrong. Thus one can culpably do wrong, non-culpably do wrong, culpably do right, and non-culpably do right, where what is right and wrong is specified by obligations and permissions concerning causally complex act types.[44]

If wrongdoing is distinct from culpability in the way I have described, then whether the store owner does wrong in selling Sterno to her customers is independent of whether she knows that they will drink it. We must be prepared to say that it would be wrong (albeit non-culpable) for her to sell Sterno to customers who, unbeknownst to her, substitute it for liquor. If the selling of Sterno to a customer who drinks it and dies constitutes a *killing* of that customer, then I take it that there is little difficulty in concluding that it is a wrong—albeit a non-culpable wrong—if the store owner had no notice of such a possible consequence at the time of the sale. But to sustain the thesis that the store owner killed the customer when she sold him the Sterno, one must contend that the customer's own actions did not render

44. *See* Heidi M. Hurd, *What in the World Is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157–216 (1994); Hurd, *The Deontology of Negligence*, *supra* note 4, at 262–65. Stephen Perry articulates a similar argument in defending the thesis that to risk others is not, by itself, to harm them. Stephen Perry, *Risk, Harm, and Responsibility*, *in* PHILOSOPHICAL FOUNDATIONS, at 321–46. *See also* Honore, *The Morality of Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS, at 80–81, 88–91 (arguing that wrongs must be analyzed separately from fault, even if fault is a necessary limit on the pursuit of corrective justice).

the store owner's actions non-proximate to the customer's death. Under tort law's direct cause test of proximate causation, which exempts intervening negligent acts from the category of intervening causes, it is certainly true that the customer is not a paradigmatic "free, voluntary intervening actor": He does not drink the Sterno *in order to* commit suicide. But he is clearly sufficiently autonomous to be his own keeper: He is not a child whose inabilities justify paternalistic intervention, as demonstrated by the fact that the state does not intervene to protect such persons from their own cognitive and volitional limitations in the way that it does with orphaned children. If we do not think persons good candidates for state paternalism, it is hard to say why private parties should bear the burden of exercising private paternalism on their behalf.

We are now in a position to hazard the following conclusions. A person, A, does wrong in failing to alter her actions so as to protect a negligent third party, B, from self-injury if, but only if, B's injury can be thought to be a killing or battery by A. A's actions constitute a killing or battery of B only if B's intervening actions reflect a lack of autonomy on B's part that justifies the kind of paternalism generally reserved for children. On pain of indefensible condescension, we are not justified in declaring everyone who stupidly risks himself sufficiently childish to merit the treatment of a child; indeed, as a general matter (but with notable exceptions for the insane, senile, and severely retarded), only children are sufficiently child-like to merit treatment as children. Therefore, in most cases in which persons could alter their conduct to protect negligent persons from self-injury they have no duty to do so.

A final caveat is in order, however. If a defendant misleads another into thinking that a product or activity is safe in ways that it is not, then there may well be grounds for saying that when death results, the defendant has indeed killed. Thus if a store owner sells industrial-strength Sterno to customers under the representation that it is the same regular-strength Sterno that she has been selling them for years,[45] their decision to drink the Sterno may well be insufficiently informed to cast responsibility for their deaths on them alone.[46] Thus, while defendants owe others no duty to alter their otherwise legitimate conduct so as to protect others from negligent self-injury, they have a duty not to act in ways that will positively mislead others about the degree to which certain products or courses of conduct will, and will not be, self-injuring.

These conclusions imply a number of doctrinal criticisms. First, it is inappropriate to impose liability on a defendant for contributing to a

45. For a criminal case on point, *see* Commonwealth v. Feinberg, 433 Pa. 558, 253 A.2d 636 (1969).

46. Similarly, consider the fact that Johnson and Johnson, the makers of Q-tips, explicitly warn (in small print) against inserting Q-tips in one's ears, while marketing them for the purpose of cleaning ears. Whether Johnson and Johnson should be held liable for ear injuries sustained from inserting Q-tips into ears depends on whether its warning about Q-tips is made reasonably unbelievable by its contradicting advertisements.

plaintiff's negligent self-injury, because negligent self-injury, absent fraud or misrepresentation, should be thought to sever the causal chain extending back to previous actions by others. In short, tort law's direct causation test of proximate causation should be revised to make plaintiffs' intervening negligent actions "intervening causes" that legally relieve previous actors from responsibility for plaintiffs' ensuing harms. And tort law's foreseeability and harm-within-the-risk tests of proximate causation should be thought woefully overinclusive in making defendants the proximate causes of plaintiffs' negligent self-injuries whenever those self-injuries can be reasonably anticipated or are among the principal risks attendant upon the defendant's conduct.

Second, where a plaintiff's negligence in risking himself is antecedent to a defendant's actions, jurisdictions that no longer recognize it should probably resurrect the traditional assumption of risk defense to bar the plaintiff's suit. For example, if the plaintiff agrees to ride on narrow back roads in the defendant's 1950 Chevy pickup when she knows that it has poor brakes and is difficult to steer, the above analysis gives us grounds for thinking that, on pain of unacceptable paternalism, her suit against the owner ought to be barred when, as a result of difficulty with the truck's ancient mechanics, the defendant crosses the middle line and collides with an oncoming truck.

Third, while the last clear chance doctrine might be justifiably adopted to protect helpless plaintiffs (whose negligence is already complete), it is not justifiably extended to protect inattentive plaintiffs (whose negligence is not yet complete) when their inattentiveness cannot be thought to reflect a general lack of autonomous self-governance on their part.[47]

Duties to innocents. We come, finally, to the question of whether we owe innocent third parties duties that we do not owe either to ourselves or to wrongdoers—duties that require us to abandon otherwise permissible courses of conduct when we can foresee that they will interact with others' wrongdoing in ways that risk harm to innocents. Must a car owner take her keys out of her car so as to prevent a car thief from stealing the car, speeding through town, and hitting an innocent pedestrian? Must a railroad that misses a passenger's stop take affirmative actions to keep her from having to walk back through an area in which she confronts significant risks of being raped and robbed? Must a bartender "cut off" a customer when it appears that another drink will make him a dangerous driver?

If what I said in the previous section is right, then the intervening wrongdoing of the car thief, the rapist, and the drunk driver would appear to sever the causal chains that extend back from the harms that they cause to the opportunities for wrongdoing created by the car owner, the railroad,

47. Thus, while courts might properly follow § 479 of the RESTATEMENT (SECOND) OF TORTS, which imposes a duty to take clear chances to avoid harm to helpless plaintiffs, they should ignore § 480, which extends that duty to inattentive plaintiffs.

and the bartender.[48] As such it is inappropriate to impose liability on previous actors *on the basis that those actors proximately caused the harms* ultimately brought about by intervening wrongdoers.

There is, however, an alternative basis upon which it might be appropriate to impose liability on those who fail to protect innocent persons from harms caused by intervening wrongdoers. While it is wrong to say that defendants have *(proximately) caused* the harms done to innocent third parties by intervening wrongdoers, it might be fully legitimate to say that such defendants have omitted to rescue such innocent persons under circumstances in which they owe them affirmative duties to do so.[49] Let us thus leave the grounds for causation-based liability and take up the question of whether we might have affirmative duties to rescue innocents from others' wrongdoing.

3. Affirmative Duties to Rescue

Duties born of causing peril. It might be proposed that when an intervening wrongdoer harms an innocent as a result of capitalizing on an opportunity for wrongdoing created by a defendant, the innocent should be compensated by the defendant on the basis that the defendant caused his peril and therefore had a duty to rescue him from it.[50] There is, I suppose, nothing *conceptually* amiss about suggesting that while the railroad does not cause the passenger's *rape* when it drops her past her stop and allows her to walk back through a notoriously dangerous area, it nevertheless causes her *peril*, and, therefore, it has an affirmative duty to rescue her from that peril on pain of liability. But it smacks of duplicity to say that her *rape* is solely (proximately) caused by her rapist, but her *peril* is proximately caused by the railroad, when her peril just is that she will be raped by a rapist who will break the causal chain extending back to the railroad. After all, if intervening wrongdoers alone (proximately) cause their wrongs, what sense does it make to say that others cause the peril presented by their wrongs when those independently caused wrongs just *are* the peril in question?

It thus seems to me that we must look elsewhere for a satisfactory account of why omission liability might appropriately be imposed on those who do not actively prevent harms caused to innocents by wrongdoers who capitalize on opportunities that are morally innocuous but for the prospect of such wrongdoers.

48. Indeed, it is just because the direct cause test of proximate causation yields this result that courts and legislatures have adopted ad hoc exceptions to it. *See supra* notes 21–22 and accompanying text. But these ad hoc exceptions are just that: ad hoc. If intervening wrongdoers are autonomous actors, the injuries and deaths that they cause cannot be thought to be batteries and killings by previous actors.

49. For a sophisticated defense of the thesis that these cases should be dealt with by omission liability rather than causation liability, *see* Michael S. Moore, *Causation and Responsibility, in* 16 SOC. PHIL. & POL'Y 31–43 (1999).

50. This is just the argument Moore makes for why omission liability is appropriate in cases in which one gives wrongdoers the opportunity or means to do harms to others. *Id.*

Duties born of special relationships. One of the great virtues of a deontological theory is that it has the philosophical wherewithal to explain and justify two deeply held convictions. The first is that we do not have a general duty to be Good Samaritans—to part with our talents and resources whenever others could put them to higher and better uses. The second is that while we do not generally owe others affirmative duties of care, we have special duties to aid those near and dear to us.[51] Unlike consequentialists, deontologists can plausibly argue both that we have agent-relative permissions to pursue activities that may not enhance social welfare and that we have agent-relative obligations to suspend such activities when those who those who stand in special relationships to us need our aid. Inasmuch as the duty doctrine of American tort law takes precisely this tack, requiring us to be our brother's keeper but not our neighbor's keeper, it would appear that such a doctrine cannot be justified without recourse to deontological moral theory.

It is plausible to think that certain relationships are defined by the existence of powerful agent-relative obligations that require parties to keep one another safe from harm, whatever its genesis. Start with the clearest case: the relationship between parents and children. Parents appear to be subject to categorical obligations to keep their children safe from the many sorts of harms that may threaten them—hunger, cold, disease, and accidents. If among the harms against which parents must protect their children are harms caused by the intentional or negligent wrongdoing of others, then parents are categorically enjoined to anticipate and avert such wrongdoing. They must drive defensively when their children are in the car, screen and supervise the caregivers they employ, rifle through the Halloween candy in search of razor blades, lock their doors and windows against intruders, and generally maintain a vigilant guard against those who are evil and accident-prone.

However, many will think that this initially intuitive conclusion concedes both too much and too little to the thesis that we must live our lives around others' wrongs. It concedes too much because it implies that those who live in the crime-ridden inner neighborhoods of American cities or the feisty but vulnerable *Kibbutzim* along the Gaza frontier do wrong by their children: Their moral obligations to their children include the obligation to move their families to safer locations where street gangs and terrorists will not threaten their children's security. It concedes too little because the

51. Both of these convictions are famously at odds with the fundamental tenets of a consequentialist theory such as utilitarianism. It would seem that if the greatest good can be achieved by requiring persons to sacrifice their lives, liberty, and wealth when doing so will maximize life, liberty, and wealth, then we ought to recognize a general Good Samaritan duty that calls upon each of us to aid others whenever the harm to us from doing so is less than the harm that will occur if we do not. Similarly, if each counts for one and only one, then it would seem that we cannot justify our fundamental sense that a mother should save her drowning child rather than two drowning strangers when she cannot save all three.

parent-child relationship appears to be in a class of its own; whatever we say about it is unlikely to be true of any other relationship.

Let us start with the first objection. Is it morally outrageous to suggest that parents who subject their children to the risks of gangs and terrorists do wrong by their children? Do parents who live in crime-ridden inner cities and vulnerable outposts have a moral obligation to abandon their homes, neighbors, and social ideals for safer places? One of the reasons that it may seem imperialistic to make such a claim is that one of the principal reasons that parents move to, and stay in, such neighborhoods is because they lack the resources to live elsewhere. If morality cannot demand what is practically impossible, it cannot condemn the poor for failing to live like the rich.

Yet we must be careful not to blur the distinction between wrongdoing and culpability. Parents who lack the resources to move their families surely are not culpable for continuing to live in crime-ridden or politically volatile areas. But if their children are harmed by the wrongdoing of others, we may indeed say that they (non-culpably) wronged their children, for they indeed violated the duty to keep their children safe.

Of course, to say this is to concede that as wrongdoing increases, there is a large class of persons (namely, parents) who do wrong to resist it rather than to flee from it. It is to say that if parents have a choice between leaving a crime-ridden neighborhood or contested territory and staying to reclaim it, they do wrong to stay unless they can collectively reclaim it overnight. The objection will surely be made that if such a lesson were taken to heart, whole cities and territories would most surely be lost, because the people who alone could and would be motivated to collectively reclaim them—families—would be enjoined from so doing. Yet if our duties to our children are genuinely deontological, so that they cannot be violated in the name of good consequences, then this is indeed one of the significant prices paid for parenthood. Parents do not have the luxury of being pioneers. They are not at liberty to risk their children for consequential gains. Because the collective-action problems posed by reclaiming inner-city neighborhoods that have already been claimed by gangs cannot be solved without long-term risk-taking by "urban pioneers," morality would seem to deny such an adventure to those who are responsible for the safety of children. The moral thing for parents to do is thus to defect from the cooperative strategies required for urban renewal and territorial settlement where these can ensure safety only after a significant period of danger, if at all.

While many may be sobered by the costs to liberty that such a conclusion exacts, others will no doubt think that such a conclusion does not take us very far in justifying the law's imposition of cumulatively onerous requirements to avert others' wrongdoing. They will claim that the parent-child relationship is so special that it cannot be used as a model to explain why, in other relationships, we should prevent harms threatened by others'

wrongs. It seems to me that this is right, and that it is so much the worse for a deontological account of existing tort law.

The question that tests how far we can generalize the appeal to Good Samaritan duties to generate a duty to protect others from foreseeable wrongdoing is this: Are there other relationships in which the duty to provide care cannot be violated in the name of good consequences? There are, it seems, a few, but hardly the vast number to which American tort law attaches affirmative duties to protect against third-party wrongdoing. It might be thought, for example, that spouses are obligated to give aid to one another even when they could save many others if they did not save each other. The same might be true of siblings and of children who face a choice between saving their parents and saving a greater number of strangers.[52]

But is it true that the duties to guard against third-party wrongdoing that are legally owed by landlords to tenants, common carriers to passengers, universities to students, stores to customers, and psychologists to potential victims of patients are duties that cannot morally be violated in order to achieve good consequences? It seems, on the contrary, that good consequences can justify landlords in leaving their apartment buildings unlocked, common carriers in expelling their passengers in dangerous neighborhoods, and psychologists in refusing to warn their patients' intended victims. If so, we have to admit that the circumstances in which tort law imposes liability for a failure to avert third-party wrongdoing considerably outstrip the circumstances in which a deontological morality imposes such an affirmative duty.[53]

We have now canvassed a series of arguments that demonstrate that in some circumstances, persons have agent-relative moral obligations to avert harms caused by others' wrongs. We have discovered, however, that those circumstances are not nearly as numerous as the circumstances in which tort law threatens us with liability if we do not act on our worst fears about others. A quick review suggests that a deontological morality that imposes duties to avert others' wrongdoing only under the circumstances described

52. Perhaps we might go so far as to say that it is true of friends. As E. M. Forster famously wrote: "I hate the idea of causes, and if I had to choose between betraying my country and betraying my friend, I hope I should have the guts to betray my country." E. M. FORSTER, TWO CHEERS FOR DEMOCRACY 68 (Harcourt Brace 1951).

53. It is tempting to maintain that in at least some of the above cases a deontologist could make sense of tort law's duties to prevent third-party wrongdoing by appealing to the fact that there is a contract or promise to do so. If a landlord has entered into a lease with a tenant in which the landlord has promised to keep the building secure from intruders, then one might maintain that, absent an exception to the contract contemplated by the tenant, the landlord is indeed categorically stopped from leaving the building unlocked, even if, by so doing, he will maximize good consequences.

However, even if contracts generate deontological duties, this does not take us very far in accounting for the duties imposed by tort law. Duties to protect people from the intentional wrongs of others have been imposed *in tort* on landlords, businesses, universities, and common carriers precisely because they are not imposed by contract. We thus cannot account for tort law's expansive obligations to protect innocent persons from others' wrongs by premising them on promises to do so.

in this section cannot explain why (absent promises to do so) home owners should have to make their homes safe for trespassers; businesses, schools, and common carriers should have to take security measures against criminal intruders; childless drivers should have to drive defensively; home owners (again, childless ones) should have to lock their doors and remove their keys from their cars; neighbors should have to take the last clear chance to rescue their negligently inattentive neighbors; product manufacturers should have to take precautions against obvious misuses of their products; and home owners should have to forgo the use of spring guns and other mechanical devices to protect their homes in their absence.

Can anything further account for the more onerous obligations imposed by tort law, short of conceding that tort law is best explained by a utilitarian morality? Can those who seek to vindicate tort law as an instrument of correcting deontological wrongs account for the residual intuition that when persons can easily do so, they ought to alter their conduct so as to make wrongdoing by others less easy or attractive? There is, it seems to me, one further explanation of the law (and the persistent moral intuitions that back it), but it is an explanation that is unlikely to give much comfort to those who believe that American law in general, and American tort law in particular, implements, or ought to implement, a liberal agenda by the state.

III. ARETAIC DUTIES TO PROTECT AGAINST OTHERS' WRONGS

Even if one concludes that persons, in most circumstances, are not morally *obligated* to alter their activities so as to minimize the wrongs of others, one might still think that they *ought* to do so. Tort law might thus be explained as enforcing such "non-obligatory oughts." Ordinary moral experience reflects the regular use of "non-obligatory oughts." In addition to actions (and omissions)[54] that are deontologically obligatory (such as not killing innocents and keeping one's promises), we commonly presuppose that there are (1) actions that are "supererogatory" (permitted actions that are praiseworthy if performed but not blameworthy if omitted, such as throwing oneself on a grenade to save one's buddies); (2) actions that are "suberogatory" (permitted actions that are blameworthy if performed but not praiseworthy if omitted, such as joining and demonstrating with the Ku Klux Klan or buying a Renoir in order to destroy it); and (3) actions that are inelegantly referred to in the literature as "quasi-supererogatory" (permitted actions that are praiseworthy if performed and blameworthy if omitted, such as donating a kidney to save one's sibling). Inasmuch as our judgments about those who heroically go beyond the call of duty, and those

54. For the sake of simplicity, I shall speak only of actions. But the same taxonomy that I am about to describe can be applied to omissions, allowing us to describe certain omissions as supererogatory, suberogatory, and quasi-supererogatory.

who abuse their rights, are *moral* judgments, they imply that persons, in some non-obligatory sense, *ought* to supererogate and *ought not* to suberogate. If we can ultimately make metaphysical sense of the sorts of non-obligatory oughts implicit in our characterizations of actions as super- and suberogatory, we can use such oughts to account for the persistent moral relevance of actions that are regulated by tort law but that are non-obligatory under a deontological morality. For example, we might give the following explanation of why our intuitions that persons should avert others' wrongdoing survive our discovery that there are only a few circumstances in which deontology imposes such an obligation: It is sometimes supererogatory to avert others' wrongdoing, sometimes suberogatory to fail to avert others' wrongdoing, and sometimes quasi-supererogatory to avert others' wrongdoing, such that to do so is praiseworthy and to fail to do so is blameworthy. One might maintain, for example, that while a property owner is permitted to use his land in any manner that does not harm others, it is supererogatory of him to forgo a legitimate use (i.e., stacking flax near where a railroad's negligently thrown sparks might ignite it) when such a use would likely interact with another's negligence in a manner that causes harm. And one might maintain that while one has a right to use deadly force to repel a trivial touching when no other means of defense are available, one acts in a suberogatory manner when one resorts to disproportional force rather than enduring an indignity. Finally, in the absence of any affirmative duty to protect consumers from using products foolishly, a manufacturer would seemingly be praiseworthy if it included inexpensive warnings against obvious errors ("Coffee is hot!"), and blameworthy if it stood on its rights and refused costless protections; that is, it would be quasi-supererogatory of it to prevent consumer wrongs.

As appealing as these claims are, they confront us with three significant challenges. First, we must be able to articulate a theory of supererogation, suberogation, and quasi-supererogation that makes sense of the non-obligatory oughts implicit in such moral categories. Second, if we seek to offer a theory of tort law that successfully competes both descriptively and normatively with the now-dominant utilitarian theory, we must be able to demonstrate descriptively that when tort law imposes legal duties to avert others' wrongs that surpass those imposed by our best deontological morality, it is as plausible to say that those doctrines enforce non-obligatory moral oughts as it is to say that they realize the Utility Principle. And finally, we must be prepared to argue that as between these two equally viable descriptions of tort law, a theory that recommends the imposition of tort liability if and only if it redresses either a rights violation or the violation of a non-obligatory ought is normatively superior to any theory that recommends the imposition of tort liability if and only if it maximizes incentives to take wealth-maximizing precautions.

With regard to the first challenge, I have elsewhere argued that the only satisfactory means of accounting for the non-obligatory oughts of superero-

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gation, suberogation, and quasi-supererogation is to conceive of such oughts as aretaic obligations—obligations to develop certain virtuous character traits (such as beneficence, courage, and modesty) that necessarily require that one sometimes go beyond the call of (deontological) duty and that one sometimes forgo the enforcement of (deontological) rights.[55] While this is not the place to reiterate the arguments for such a thesis, let me offer two observations in the hope that they motivate sufficient philosophical sympathy for it to enable us to move to the second challenge. First, it is only by postulating that there are aretaic duties to go beyond deontological duties that we can make sense of our common notion, for example, that a person can properly be blamed for not being a good friend where being a good friend requires actions that are not obligatory. And it is only by thinking that people can abuse rights that we can make sense of rights to begin with. After all, one does not need a right to protect one in doing what is otherwise morally optimal. Rather, rights are robust only if they protect one in abusing them; that is, only when they allow one to do things that are neither morally optimal nor morally neutral. Hence, to make sense of the common moral presuppositions of daily moral discourse, such as the notion that certain virtuous character traits (that themselves require supererogatory actions) are obligatory, or the notion that persons can abuse rights, one needs a category of *deontologically* non-obligatory actions that are *aretaically* obligatory.

If I am right that the best account of super- and suberogatory actions reduces them to *aretaic* duties, then it follows that if it is supererogatory to avert others' wrongdoing (or suberogatory to fail to do so) in circumstances in which deontology does not require us to do so, it must be by virtue of the fact that we are *aretaically* obligated to develop character traits that, as a general matter, motivate us to avert others' wrongdoing when opportunities and capacities permit. If the circumstances in which it would be supererogatory to avert others' wrongdoing (or suberogatory to fail to do so) are the same circumstances in which tort law requires us to do so (when deontological moral theory does not), then it is plausible to suggest that American tort law in fact enforces not only our deontological obligations but also our aretaic obligations. Such an explanation challenges the traditional utilitarian explanation by promising to make sense of tort law's wide-ranging duties to avert others' wrongdoing without appealing to the need to sacrifice individual interests to achieve maximal social welfare. It also leaves intact the conclusion derived in the previous sections of this article; namely, that deontological moral theory yields only limited obligations to avert others' wrongdoing, deontologically justifying people, in many instances, in adopting the view that they need only keep their own moral houses in order. Yet it also vindicates residual intuitions that while people in many instances have (deontological) rights to act in ways that are oblivious to others' wrongs, they really ought not to do so (as a matter of aretaic obligation).

55. *See* Heidi M. Hurd, *Duties Beyond the Call of Duty,* 6 ANN. REV. L. & ETHICS 1–36 (1998).

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I do not propose to devote lengthy analysis here to the question of whether the many instances in which tort law surpasses deontological morality in imposing duties to avert others' wrongs are instances in which it is in fact supererogatory to do so (or suberogatory to fail to do so). Instead, let us turn to the final challenge that confronts one who assigns to tort law the task of articulating and correcting violations of deontological and aretaic duties. Is such a theory normatively superior to a utilitarian account that assigns to tort law the task of optimizing incentives to take cost-efficient precautions so as to achieve the ratio of accident costs to safety costs that would be purchased in a costless market?

While there is no doubt much to compare in choosing between these competing normative visions, let me close by making clear just what is entailed by the suggestion that tort law pursue the normative agenda of enforcing both our deontological duties to avert others' wrongs and our aretaic duties to cultivate character traits that require us to go beyond our deontological duties in averting others' wrongs. (1) If many instances in which we can avert others' wrongs are instances in which it would be supererogatory to do so (as opposed to deontologically obligatory to do so), and (2) if what it means to say that it would be supererogatory to avert others' wrongs is that it would be virtuous to do so, and (3) if we are (aretaically) obligated to cultivate virtues that require us to supererogatorily avert others' wrongs, and (4) if tort law should enforce such aretaic obligations, then it follows that at least tort law, if not other areas of American law, must fulfill an ideal that looks a good deal more perfectionist than liberal. Let me explain.

It is a central tenet of political liberalism that the power of the state ought not to be used to make people virtuous. While the law may properly enforce many of our negative obligations (obligations not to kill, steal, rape, etc.), and while it may perhaps properly enforce some of our positive obligations (obligations to aid those near and dear to us, obligations to contribute resources to support just institutions, etc.), it cannot justifiably be used to coerce persons to pursue certain visions of the good over others. Inasmuch as liberals generally take a theory of the virtues to be part of a theory of the good rather than part of a theory of the right, and inasmuch as they are prepared to use state power only to enforce the right, not the good, they are averse to legal doctrines that can be justified only on the basis that they contribute to the cultivation of certain personal virtues.[56]

If the only explanation of existing tort law that viably competes with the dominant utilitarian explanation is one that attributes to tort law an agenda

56. Richard Wright argues that aretaic obligations to cultivate certain virtues, if conceived of in Kant's terms as obligations to "subject the maxim of one's actions to the condition of qualifying as universal law," simply "cannot be coerced by another." Wright, *Right, Justice and Tort Law, in* PHILOSOPHICAL FOUNDATIONS, at 164. Wright's Kantian conception of virtue is not mine, but Wright's point about that conception nevertheless serves as an important reminder that law may be too blunt an instrument to affect the cultivation of virtue, however it is conceived. I exploit just such an argument in a paper that reluctantly rejects a perfectionist theory of law in favor of a liberal theory. *See* Heidi M. Hurd, *Liberalism by Default* (unpublished manuscript available from author).

that includes cultivating certain personal virtues, then liberals will no doubt be dismayed at the possibility that such a significant area of the law is so anti-liberal. More worrisome yet, if the only normative justification for existing tort law that viably competes with the utilitarian justification is one that assigns to tort law the goal of coercing the cultivation of certain virtues, then liberals will probably prefer the utilitarian ideal (with its promise to protect liberal values by assigning them significant weight in the tabulation of preferences)[57] to the aretaic ideal. In short, the cost of advancing a non-utilitarian explanation of, and justification for, existing American tort law (with its extensive requirements that people forego legitimate activities so as to protect against others' wrongs), may be that one must abandon a liberal ideal of law-making. Since this is likely to be a more fundamental ideal than any particular vision that one has for a particular area of law, those who count themselves political liberals may be forced to abandon the field of tort law to utilitarians.[58]

CONCLUSION

In recent years, corrective justice theorists have successfully forced utilitarian theorists to share the spoils of American tort law. Their efforts to demonstrate that existing doctrine both can and should serve the ideal of correcting deontological injustices now pose an impressive challenge to the long-dominant assumption that tort law is best accounted for as a tool of wealth maximization.

Still, tort law remains maddeningly committed to principles that refuse easy explanation by a deontological morality. As I have sought to demonstrate here, one such principle—which manifests itself in myriad doctrinal applications—is the principle that persons do wrong when they fail to anticipate how their (otherwise) innocent activities may interact with others' wrongful ones. As I have argued, there are indeed circumstances in which a deontological morality categorically obligates us to assume the

57. This promise is, of course, a philosophically false one. Notwithstanding Richard Posner's spirited claims to the contrary, a utilitarian theory of liability cannot—necessarily cannot—protect rights. Liberals cash out the fundamental tenets of liberalism as claims of right *just because* they fear that the majority may not prefer them (and so will refuse to honor fundamental protections of liberty and equality). Liberals therefore cannot find adequate status for their most basic principles in a theory that insists on giving them only as much weight as the majority prefers. Thus Posner's claim that there is "a consilience" between a wealth maximizer's approach to tort law and that of an Aristotelian, a Kantian, an egalitarian, and a consent-based liberal reflects, at best, wishful thinking and, at worst, grave confusion about the implications of such non-utilitarian theories. *See* Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, *in* PHILOSOPHICAL FOUNDATIONS, at 99–111.

58. Of course there are those who would do away with tort law altogether, being neither utilitarians nor believers that corrective justice demands liability in the circumstances in which tort law imposes it. *See, e.g.*, Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774–814 (1967); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555–664 (1985); Jeremy Waldron, *Moments of Carelessness and Massive Loss*, *in* PHILOSOPHICAL FOUNDATIONS at 387–408.

worst of others and to act accordingly, but those circumstances are far fewer than the circumstances in which tort law holds us liable for the wrongs of others that we could have averted. I have suggested that tort law's further requirements may be thought to embody aretaic, rather than deontological, obligations: they may reflect instances in which we (aretaically) ought to supererogate by averting others' wrongs, or in which we (aretaically) ought not to suberogate by forgoing the enforcement of our rights. However, the suggestion that tort law is, and ought to be, in the business of cultivating virtue and suppressing vice will no doubt be as disturbing to many corrective justice theorists as is the utilitarians' suggestion that tort law is, and ought to be, in the business of maximizing wealth.

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