without permission, but that the defendant did not intend to cause harm in doing so. The trial court then instructed the jury that if the defendant did not intend to cause the plaintiff harm, liability cannot be imposed. The jury then found for the defendant. The plaintiff appealed, arguing that this instruction was incorrect, because a defendant can be held liable for battery if he touches the plaintiff without permission, even without intending to cause harm. The appellate court will then apply the correct rule governing liability for battery to determine whether the trial court's instruction was or was not correct.[5] This ruling will be embodied in a written opinion explaining the basis for the appellate court's decision and stating whether the court's instruction was or was not correct in light of the substantive rules of battery.

III. The Nature of Tort Law

Fields of law normally do not come labeled with a self-designated character or set of goals. As a field that is predominately common law—law made by courts adjudicating individual disputes over a period of centuries—the law of torts has grown and evolved, state-by-state, without any central, self-conscious authority to make it responsive to a clear set of express principles or agreed-upon goals. Although much of modern tort law scholarship has been concerned with analysis of and debate about the nature and proper functions of tort law, they remain contested. Some scholars argue that tort law is, and should be, rights-based. On this view, tort law is about redressing, or providing recourse for, wrongs. It is about the relationship between a wrongdoer and a victim. Others see tort law's function as more instrumental: to prevent wrongs, or to compensate those who suffer loss. For many instrumentalists, tort law is, or should be, concerned among other things with the effect that imposing liability will have on others beside the plaintiff and defendant. It is about the effect on others of imposing, or not imposing, liability in a particular set of cases. And still others see tort law as a mixed system that performs a combination of these and other functions.

The courts almost never expressly address these theories about the nature of tort law. Rather, in attempting to understand and describe tort law, scholars interpret or infer from judicial decisions what theory lies behind or best fits them. And some scholars advocate adoption of a particular theory, whether or not they believe that tort law reflects it.

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[5] For an appellate opinion addressing this issue, *see Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891).

A. Corrective Justice

One important rights-based understanding of the function of tort liability is corrective justice. When one party wrongs another, correction of the wrong may help to restore the moral balance between them. In tort law, when bodily injury has occurred, the injurer cannot literally rectify the injury. Liability is therefore imposed for monetary compensation, though it is admittedly often a poor substitute for prior good health. In cases involving only economic loss, the correction can be more nearly adequate and complete. The case of the intentional wrongdoer is most obviously an occasion for corrective justice. But in many cases of negligence and even sometimes when there has been neither intention to cause harm nor negligence, corrective justice may be the principle that underlies the imposition of liability.

The way in which correction actually occurs, however, may affect the strength of the appeal of corrective justice as a justification for imposing tort liability. The core of the notion of corrective justice envisions an individual injurer who directly compensates an individual victim, with the injurer's own money. Here the correction of the wrong by the injurer is direct and close. In contrast, as the connection between injurer and victim becomes less direct, corrective justice seems more attenuated and indirect. For example, if the injurer is protected by liability insurance, she does not pay her victim directly. Instead, she has paid premiums for this insurance that may or may not bear a close relation to the degree of risk that her activities pose. Similarly, if the injurer is a corporation, then ultimately the shareholders, employees, or customers of the corporation may bear the cost of compensating the victim. In these situations an injustice still is corrected, and the injurer is the one who has undertaken to assure correction in the first instance. But because the injurer does not necessarily end up actually shouldering the burden of correction, these situations are at some remove from a conception of corrective justice as the face-to-face correction of a moral imbalance between individuals. For this reason, there is a difference of opinion among the commentators as to the importance of corrective justice in modern tort law settings, where defendants typically are either large corporations or individuals who are covered by liability insurance.

B. Civil Recourse

Although corrective justice focuses on what and why the defendant is obligated to pay the plaintiff, another group of rights-oriented scholars have focused on what the plaintiff is entitled to receive. In a series of articles and books over the past two decades, these scholars have developed in considerable detail the argument

that tort liability is better understood not as ensuring that injustice is corrected, but as providing victims with the opportunity to seek recourse for civil wrongs.[6] Under this view, the state has an obligation to provide a means by which private wrongs can be redressed. Further, the payment of damages for tortiously-caused harm should not be seen as being, or even aspiring to be, fully compensatory or fully correcting a wrong. Instead, the imposition of liability is a complex social practice that vindicates victims' need for recognition that they have been wronged, in a manner that is proportional to the seriousness of the wrong and the seriousness of their injury. What both the corrective justice and civil recourse views of the function of tort law have in common, despite their differences, is that they both understand tort law as being mainly concerned with the moral or civil rights arising out of the relationship between the plaintiff and the defendant, rather than with affecting the behavior of future actors or with achieving the other sorts of instrumental goals that are described below.

C. Deterrence

The imposition of tort liability not only corrects wrongs or provides civil recourse for wrongs that have already occurred; whether intentionally or as a side effect, it also helps to prevent future tortious actions, by threatening potential wrongdoers with liability if they cause actionable harm. That is, tort law is not only backward looking, but may also be forward looking. In this sense, it can be understood as being not only about the relationship between injurer and victim, but also about reducing the undesirable consequences of risky activity. Not all risky activity is worth deterring, however, or we would be required to take endless safety precautions at unlimited cost. Rather, the function of tort liability in this respect is to promote *optimal* deterrence—that is, to deter *excessively* risky activity so that only those losses worth avoiding are avoided.

Rights-oriented scholars tend to object to this instrumental view of tort liability on the ground that it does not accurately describe the normative structure of tort law, which involves rights and correlative duties, not policy-making at large. In addition, promoting future safety through the imposition of liability would use litigants as a means to an end, rather than treating resolution of their dispute as an end in itself. This is a fundamental difference of opinion that runs through much academic writing and thinking about tort liability, although it rarely finds expression in judicial opinions.

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[6] The originators and leading proponents of this theory are John C.P. Goldberg and Benjamin C. Zipursky. *See, e.g.*, their book, RECOGNIZING WRONGS (2017).

But the difference between the two points of view is arguably complicated by the fact that resolving a tort suit after an injury has occurred is obviously far less desirable than avoiding the injury in the first place. Imposing liability in a current case may make it unnecessary for future potential victims ever to bring a tort suit, because the threat of liability has prevented someone from injuring them. To the extent that we think that these potential victims have a right to be protected against some future injury, then then deterrence might seem to play a legitimate role in the protection of rights, and therefore may be more than a simple instrumental concern.

Two other points about the view that a function of tort law is to promote safety also are worth emphasizing. First, it follows from the principle of optimal deterrence that deterring certain losses is not worth what it would take to deter them. That is, imposing liability for harm caused by an activity that poses some risk but that is not excessively risky would require foregoing some of the benefit of that activity. Virtually every activity poses some risk, and therefore sometimes results in loss—safely driven automobiles sometimes collide, knives sometimes cut fingers, and so forth. Up to a point tort law threatens liability for risky activity, but beyond that point it does not, and the law tolerates the losses that result. Put harshly, some losses—and this includes some personal injuries—are not worth avoiding. Otherwise we would not require proof of negligence in a whole series of cases, but would instead always impose liability regardless of negligence. From the optimal deterrence standpoint, the negligence requirement implies that some losses are worth avoiding (those caused by negligence) but that some (those caused without negligence) are not, because the risks posed by an activity may or may not outweigh its benefits.

Second, nothing in the principle of optimal deterrence dictates what values should be taken into account in determining which losses are and which losses are not worth deterring. Some supporters of the principle of optimal deterrence promote it as an economic concept that compares the monetary costs of risking losses with the monetary costs of preventing losses. And some opponents of the principle object to it for precisely that reason, since it seems to them to ignore important human values. But the economic approach to optimal deterrence is merely one among a number of possible conceptions. One might reasonably take the position that the economic conception of deterrence is unacceptable and that the pain and suffering that results from bodily injury should not be reduced to a monetary value in comparing it to what must be done to reduce the risk that injury will occur. But that is not the same as saying that no effort should be made to compare the social benefits gained by

reducing the risk of injury with the social costs, economic and otherwise, that must be incurred in order to reduce this risk. Making such a qualitative rather than an economic or quantitative comparison may be difficult, but being willing to make it is consistent with accepting the principle of optimal deterrence, even while rejecting an economic conception of that principle.

D. Loss Distribution

Defendants who are held liable in tort actions often do not shoulder the burden of compensation themselves. Sometimes defendants are covered by liability insurance and the insurer literally pays the plaintiff on behalf of the policyholder/defendant. On other occasions even an uninsured defendant may be able to include its prospective liabilities in the price of the products it sells; or the defendant may have shareholders whose investments decline in value as a result of the payment of a liability by the company whose shares they own. In each of these situations the cost of the loss suffered by the plaintiff is not simply transferred to the defendant, but is distributed through the defendant to a larger number of individuals. Promoting the broad distribution of losses is therefore often considered one of the functions of tort liability.

Whether loss distribution in itself is a good thing, and even if it is, whether imposing tort liability is a good way to achieve loss distribution, are both disputed questions. Suppose you suffer a $500 loss, and the law pays you for that loss by charging $1 to each of 500 people. Unless the sum of the value that each of these individuals attaches to the $1 they pay is less than the value you attach to the $500 you have lost, economically speaking nothing in total has been gained by the transfer. The total "pie" is the same size as before, even though different people now have the slices. There is still a total loss of $500. On the other hand, when people purchase insurance they are confirming the notion that losing a small sum for certain (the premium they pay) is a lesser loss than the low probability of suffering a larger loss later. This is much like saying that 500 losses of $1 suffered by 500 people do in fact entail less loss than a single loss of $500 suffered by one person. Some people would argue that the imposition of tort liability has long reflected the similar intuition that, other things being equal, having a large number of people bear a small loss is better than having a single person bear a large one. Thus there has been an inclination to develop rules of law that permit the imposition of tort liability on individuals and businesses that can distribute their liabilities through the purchase of insurance or by raising the price of their products or services.

This rationale has some explanatory and normative power, but it also has a weakness. The loss distribution rationale for the

imposition of tort liability contains no stopping point. Like the compensation justification for imposing liability discussed next, loss distribution cannot explain why tort liability often is *not* imposed on parties who might, in fact, be good loss distributors. Moreover, imposing tort liability through a lawsuit is a cumbersome and expensive mechanism for achieving loss distribution. Simpler and more broadly applicable insurance systems (e.g., health insurance, disability insurance, social security) can broadly distribute losses at lesser cost if that is desired. Nonetheless, despite the objections that can be leveled at loss distribution as a rationale for the imposition of tort liability, there can be no denying that loss distribution has been and is likely to continue to be one of the effects of the imposition of tort liability.

E. Compensation

It is sometimes said that a function of tort law is to promote the compensation of those who have suffered injury. For most analysts of tort law, this is only true in a very limited sense. There is no doubt that anytime tort liability is imposed, a plaintiff is awarded compensation. There is also no doubt that, other things being equal, most of us feel enough natural sympathy for the victims of injury (especially physical, as opposed to solely economic, injury) to view the event giving rise to the injury as an appropriate occasion for considering whether (and how) society might assist the victim of the injury. And it is probably true that up to a point we are all better off—because we value other people's well-being, and because we feel more secure ourselves and are therefore willing to take socially productive risks that we would not otherwise take—knowing that if we suffer certain kinds of injury, then compensation for that injury may be forthcoming. If by a "function" of tort law we mean a beneficial effect of the imposition of tort liability, then it is accurate enough to say that providing compensation to victims is a function of tort law.

But if by the term "function" we mean a principle reflected by or a goal of tort law, the notion that providing compensation is a function of tort law is debatable. The desirability of providing compensation to a particular class of injury victims rarely explains the lines that are drawn to distinguish those who are and those who are not entitled to prevail in a tort claim. Rather, time after time, some other factor or factors explain the occasion for the imposition of tort liability, or tort law's refusal to impose liability. As Oliver Wendell Holmes put it with characteristically ruthless clarity over a century ago,

> The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by

> the fact that a human being is the instrument of misfortune. * * * The undertaking to redistribute losses simply on the ground that they resulted from the defendant's act would not only be open to [other] objections, but * * * to the still graver one of offending the sense of justice.[7]

Since the time Holmes wrote, the scope of liability in tort has expanded substantially, but the principle he expressed still stands. Liability is not imposed in order to provide compensation to victims. Rather, victims are provided compensation in order to serve the other goals of tort law, such as corrective justice and deterrence. If it were otherwise, then the basis of liability would be the suffering of loss, not the commission of a tort by another. Since in order to justify the imposition of liability, we require something in addition to the bare fact that the plaintiff suffered a loss caused by another party, describing "compensation" as one of the functions of tort liability cannot tell us why or when tort liability will or will not be imposed. At best, the desirability of providing compensation will be a factor that, when linked with others, makes it more likely that there will be tort liability for a particular category of conduct. And even on that view, providing compensation *under certain circumstances* rather than in general is what is really going on when tort liability is imposed. For that reason, these "other circumstances"—whatever they turn out to be—are likely to reflect more clearly the actual principles, functions, or goals of tort liability, than the goal of compensating victims. Compensation is a good thing when the prerequisites to the imposition of liability are satisfied, but victims go uncompensated when these prerequisites are not satisfied.

F. Redress of Social Grievances

Even in situations in which the foregoing rationales for the imposition of tort liability will not be served or are shown to be inapt, people sometimes have the sense that tort liability should be imposed anyway. For example, they may want the law to express concern and respect for suffering, or to be available as a substitute for vengeance. Of course, one view is that such people are wrong and that tort liability should never be imposed if it would not effectively serve one of the functions described above. But another view is that, even apart from these functions, the right to sue in tort promotes the redress of social grievances, especially against large, impersonal institutions. In this sense tort law is a populist mechanism that permits ordinary people to put authority on trial. Surely the lawsuits brought in the past involving the Dalkon Shield, asbestos-related lung disease, and breast-implants, and cigarettes exhibit some of this quality. Future suits may do so as well. Standing alone, this justification for the

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[7] Oliver Wendell Holmes, Jr., THE COMMON LAW 76–78 (M. Howe ed. 1963).

imposition of tort liability may not be strong; but when allied with one or more of the other functions of tort liability, the possibility that imposing liability on an impersonal institution will help to redress social grievances may well help to explain why some close cases are decided the way they are.

G. A Mixed System?

A last possibility is that tort law does not reflect only a single principle, perform only a single function, or serve only a single goal, but a set of different principles, functions, or goals whose importance is likely to vary with the situation. Tort law might thus be a "mixed" system. In some cases concern for corrective justice or civil recourse might dominate, but in others deterrence or concern for loss distribution might be the key. Or in many instances the imposition of liability might be justified on both rights-based and instrumental grounds, because it simultaneously rights a wrong and deters future wrongdoing, for example. It may even be that, for a doctrine to persist and be stable, it must serve more than one function or satisfy both rights-based and instrumental concerns. For those who seek perfect coherence in a body of law, this may be an unsatisfying state of affairs. But tort law is a human institution; there is not necessarily any reason to suppose or even to demand that it be perfectly coherent.