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Causation and Wrongdoing

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Another topic is derived from correlatives. If to have done rightly or justly may be predicated of one, then to have suffered similarly may be predicated of the other. Similarly with ordering and executing an order. As Diomedon the tax-contractor said about the taxes, “If selling them is not disgraceful for you, buying them is not disgraceful for us.” And if rightly or justly can be predicated of the sufferer, it can equally be predicated of the doer, and if of the doer, then also of the sufferer.

Aristotle, Rhetoric II, 1397a 23

INTRODUCTION

In her Remarks on Causation and Liability, Judith Jarvis Thomson recalls the case of Summers v. Tice, in which the plaintiff could not prove which of the two negligent hunters actually injured him, and poses the following hypothetical:

[D]uring the course of the trial, evidence suddenly becomes available which makes it as certain as empirical matters ever get to be, that the pellet lodged in plaintiff Summers’ eye came from the defendant Tice’s gun. Tort law being what it is, defendant Simonson is straightway dismissed from the case. And isn’t that the right outcome? Don’t we feel that Tice alone should be held liable...? We do not feel that Simonson should be dismissed with a blessing: he acted very badly indeed. So did Tice act badly. But Tice also caused the harm, and (other things being equal) fairness requires that he pay for it. But why? After all, both defendants acted equally negligently toward Summers in shooting as they did; and it was simple good luck for Simonson that, as things turned out, he did not cause the harm to Summers.

By removing the difficulty of identification that makes Summers a fascinating case for lawyers, Thomson returns us to the paradigmatic instance of liability for negligently caused harm. This is, indeed, what renders her “But why?” so striking: the fundamental character of her query is certified by the apparent clarity of what she has called into question. It
is trite that there is normally no liability for negligence without both the defendant's wrongdoing and the plaintiff's resultant injury. However, one can cause injury without having been antecedently negligent, and one's negligence can trail off (as it does for one of the defendants in Thomson's hypothetical) without materializing in injury. Why, then, the law's insistence on yoking the two together as prerequisites for liability? The contingency of the relationship between wrongdoing and causation seems at odds with the importance that negligence law attaches to their juncture.

Thomson's query fixes itself in the secure moral anchorage of the defendants' wrongdoing, and sallies forth from there to question the significance of causation. Each hunter was equally culpable in shooting in the plaintiff's direction. That the bullet of the one and not of the other struck the plaintiff is the merest happenstance which in itself redounds neither to their moral credit nor to their discredit. And yet this element of fortune makes one liable and the other not. Causation thus functions to differentiate fortuitously between morally equivalent wrongdoings.

A parallel question can be addressed from causation to wrongdoing. From the standpoint of the injured party, it matters little whether the harm was negligently caused. The inquiry into the culpability of the injurer diverts attention from the palpable loss that has been inflicted. The occurrence of injury, so it might be thought, makes the differentiation between its negligent and its innocent cause as much a fortuity as causation was in Thomson's hypothetical. Why should the plaintiff's claim for compensation vary with the moral quality of the injurious action?

This article pursues these perplexities. Its focus is on the place of causation within the general framework of negligence law, and, in particular, on the relationship between causation and wrongdoing. Do these categories work in tension or in harmony? Is either causation or wrongdoing rendered superfluous by the presence of the other (as Thomson's query suggests) or are they mutually complementary? Accordingly, my concern is not with the nature of causation itself and with the formulations that have been offered as definitions. Causation will be treated here as an element in an ecology of concepts rather than as a landmark that commands independent attention.

The outstanding treatment of causation from the standpoint of its position within the general framework of negligence law is Guido Cala-

Calabresi's classic article. Calabresi's purpose is to situate causation in the interplay of goals that can plausibly be ascribed to tort law. He therefore examines the various causal doctrines (but-for cause, proximate cause, increasing the probability of injury) in the light of the various functions (loss spreading, wealth distribution, collective deterrence, and market deterrence) that he considers applicable. Calabresi sees tort law as a mixture of these goals, which sometimes overlap and sometimes pull in different directions.

Calabresi's instrumentalism has two characteristics. First, it forswears unity of conception for diversity of function. The enumerated goals have independent tendencies that contend with one another and are not integrated into a wider whole. Causation does not represent a single unifying impulse but is rather the rubric under which differing policy goals are achieved or compromised. Second, since the retrospective quality of at least some aspects of causation cannot coincide with the future orientation of the goals, a disjunction exists between the explanation and what it explains. The "alien language . . . of causation," as Calabresi puts it in the end, must therefore be assigned functions of its own: to camouflage goals that cannot be publicly acknowledged, to allow for a flexible mix of goals, and to facilitate the introduction of new or inarticulable goals. Thus, the deficiency of his explanation is transformed into a hidden strength.

The present article sets out a non-instrumental understanding of the place of causation in negligence law. Here the central elements of negligence law are regarded not as indirectly furthering some independently identifiable combination of goals, but as categories that mark an immediate normative connection between what the defendant has done and what the plaintiff has suffered. The concept of causation, in this view, is simply what it purports to be, an expression of the transitivity of the defendant's injuring the plaintiff. To understand causation non-instrumentally is to grasp its role in the moral relationship between the litigants when this relationship is considered as such and not as an occasion for the promotion of external ends.

In the non-instrumentalist approach, causation is not something that the analysis must distort or explain away. Causation—rather than a list of external goals—remains the subject matter and focus of the explanation, which is therefore an explanation of it and not of something else.
to which it is alien. Moreover, since causation links doer and sufferer, it
must be understood in the context of the relationship of which it is a
part. Institutionally, this relationship is between plaintiff and defendant;
conceptually it is between causation and wrongdoing. In contrast to Cal-
abresi’s combination of goals that pull tort law in different directions, a
non-instrumentalist understanding integrates the elements of the rela-
tionship into one another by exhibiting their separate roles as aspects of a
larger whole that embraces them. Whereas the instrumentalist account
introduces from the outside a combination of independently desirable
goals, its non-instrumentalist counterpart sees the relationship between
the litigants and between the conceptual components of the claim as a set
of mutual interdependencies that are joined to each other from within.
Every factor conditions and is conditioned by the other, and none can be
properly appreciated apart from the unity that they form.

This article exhibits the conceptual interconnectedness of causation
and wrongdoing. In so doing, it refutes Calabresi’s instrumentalism ob-
liquely—not by showing the inadequacy of his particular explanations,7
but by offering an alternative that obviates the need to produce explana-
tions of that sort. My assumption here is that the very existence of such
an alternative undermines the cogency of instrumentalism—i.e., the in-
strumentalist reduction of tort law to an alien congeries of inconsistent
purposes is necessarily inferior to an explanation that vindicates tort law
as the expression of a single normative conception integrating the plain-
tiff’s injury and the defendant’s negligence.

This integration is challenged by any argument that severs causation
from wrongdoing and thus fragments the plaintiff-defendant relationship
into the mutual autonomy of plaintiff’s injury and defendant’s negli-
gence. In this article I examine four such arguments. The first two each
focus on one pole, that of wrongdoing and of causation, respectively, to
the exclusion of the other. The last two acknowledge that both causation
and wrongdoing are essential to tort law, but deny that they can or need
be integrated into a single conceptual and institutional complex. My in-
tention is not to offer a seriatim criticism of four different arguments, but
to show that they fail for the same reason and that their failure points to
what they all implicitly deny: the juridical unity of the relationship of
the wrongdoing defendant and the injured plaintiff. My concluding sec-
tion will, accordingly, make some general observations on the philosoph-
ical significance of juridical unity so conceived.

7. See Wright, Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis, 14
Thomson's hypothetical on the *Summers* case dramatically puts the question to this unity. By asking why the negligent Simonson should escape liability because of the fortuity of missing Summers, Thomson supposes that wrongdoing without causation might be sufficient and, thus, raises a doubt about the coherence of negligence law. Our first task is to consider her query.

**I. WHY CAUSATION MATTERS**

Let us start with Thomson's treatment of her own conundrum. Her view, in brief, is that causation matters because it particularizes the defendant in a way consistent with the value we attach to freedom of action. I first wish to outline to the best of my understanding her elliptical and difficult argument. I will then point out that this argument does not fully respond to the query to which it is addressed, since particularization on the basis of negligence, even in the absence of injury, satisfactorily vindicates the defendant's freedom of action. Finally, I will suggest that causation particularizes with respect to the plaintiff and that Thomson's error thus lies in its attending to the wrong party to the litigation.

Thomson's argument proceeds in three stages. First, she locates the key to her solution in the value we place on freedom of action, in which she includes freedom to plan for such ends as one chooses for oneself. Her question then becomes in effect: given that we value the freedom of action of both plaintiff and defendant, what is true of the defendant in particular that entitles the plaintiff, when injured, to call upon the defendant's assets? If anything and everything about the defendant sufficed for this entitlement, the plaintiff would be able to call upon anyone at random for compensation. This prospect, unless incorporated into a person's planning through voluntary agreement, would be disruptive of freedom of action. Therefore, the availability of the defendant must be marked by some feature other than the defendant's existence.

The second step is to assume that the plaintiff caused his own injury for his own purposes without a causal contribution from anyone else. Here the plaintiff's loss cannot properly be shifted to anyone. The loss is the planned consequence of the plaintiff's exercise of his freedom of action, and it makes no sense to disrupt the defendant's planning in order to accommodate the dissatisfaction of the plaintiff with the outcome of his own planning. The feature particular to the defendant which allows the shifting of the plaintiff’s burden to him must be something other than

the defendant's coexistence in a world in which the plaintiff has for his own purposes caused his own injury.

The third step is to claim that the particular liability-allowing feature that we seek in the defendant must be something that rules out the possibility that the plaintiff's injury was of the sort described in the second step. Therefore, Thomson argues, even if the plaintiff's injury is in fact caused by a third party or is due to natural causes, there is nothing true of the defendant that rules out the plaintiff's having inflicted the injury on himself. In such a case there may be something true about the world in general (i.e., the historical fact that the injury was caused by a third party) but nothing true about the defendant in particular that excludes the hypothesis of self-inflicted injury. So far as the defendant is concerned, he is merely one of the pool of people who did not causally contribute to the plaintiff's injury. To single him out from among that pool is to choose him at random and thus to disrupt unjustifiably the freedom of action postulated in the argument's first step.

The upshot is that causality matters because it supplies the particular feature about the defendant that singles him out from the generality of those available for the shifting of the plaintiff's loss. For it is certainly true that the defendant's causing the injury is a feature about the defendant that rules out the hypothesis that the injury was caused exclusively by the plaintiff. And so the causation requirement, in Thomson's account, vindicates freedom of action by signaling the presence of a feature that differentiates the person causing the injury from anyone in the world whom the plaintiff might choose at random.

Where does this intriguing argument leave us? Thomson concludes from it, in her variant on Summers, that Simonson's freedom of action protects him from liability once it is discovered that the injury was in fact caused by Tice and not by Simonson.9 This conclusion, however, is not warranted. If correct, the argument justifies holding Tice liable for having negligently caused the plaintiff's injury, but it does not justify dismissing the action against the negligent but noncausative Simonson. The argument goes only to the presence of a link between the plaintiff and Tice, not to the absence of a link between the plaintiff and Simonson. Some other feature of the situation may perform the same particularizing function with respect to Simonson that, on Thomson's account, causation does with respect to Tice.

Even if Simonson has not caused the injury, he has *ex hypothesi* been

as negligent toward the plaintiff as Tice. Perhaps the negligence rather than the causation can serve to mark out from the totality of existing people the particular persons against whom the plaintiff can claim. Two considerations can be adduced in support.

First, the attractiveness of having liability depend on causation is that causation establishes that the plaintiff has a relationship to the negligent behavior—indeed, locating such a relationship is the point of Thomson's quest for particularization. But if injury gives the plaintiff a nexus with a particular person, why is unreasonable exposure to the possibility of injury also not sufficient? Simonson's negligence is, after all, nothing more than the unreasonable creation of risk, and if the plaintiff came within the ambit of this risk he stands in a relationship with the risk creator that is distinguishable from the relationship he has with any person chosen at random.

Second, the evil to be avoided in Thomson's estimation is an unjustified interference with freedom of action. However, it is hard to make a case that a defendant should be free to act negligently, as Simonson in fact did. Thomson herself states, in explaining why for liability fault must be added to causality, that "freedom of action has its limits: one is not free to act wrongly." This observation is no less valid when causation is absent. If Simonson is not free to act negligently, why should freedom of action protect Simonson from liability?

One might reply that Thomson can concede all this and yet maintain that her account of why causation matters still stands: other things such as negligence may matter as well, but their mattering does not affect the explanation of why causation matters. This would leave us with two factors that matter, but (so it might be argued) there is no harm in that: after all, tort law itself, at least in its conceptual core, makes both negligence and causation prerequisite to liability.

However, this accommodation preserves Thomson's answer at the cost of taming her initial query. Recall the point of her hypothetical. When both defendants are negligent toward the plaintiff but only one actually causes injury, the defendants' equivalence as wrongdoers seems to be morally at least as salient as the fortuity of the injury's materialization. Why, she asked, is Tice liable and not Simonson? "After all, both defendants acted equally negligently toward Summers in shooting as they did; and it was simple good luck for Simonson that, as things turned out, he did not cause the harm to Summers." In other words, the moral

10. J.J. THOMSON, supra note 1, at 203.
11. See supra text accompanying note 3.
gravamen of the incident lies in the defendants’ equal negligence, which should outweigh the happenstance that only Tice’s bullet injured the plaintiff. Thomson’s query challenges the harmonious coexistence of negligence and causation as prerequisites of liability by postulating that the moral force of the former overwhelms the fortuitous significance of the latter. Indeed, the *Summers* hypothetical is merely a dramatic formulation of an apparently pervasive tension: why should I not be liable for my numerous acts of often serious negligence which do not cause harm, but have to pay for the isolated act of perhaps trivial negligence that does? Implicit in the query is a denial that negligence and causation need travel together. Since all causation in a negligence context is a matter of fortuity, causation as a prerequisite of liability seems to be eclipsed by its morally more potent companion.

Thomson’s argument, then, is that causation matters because it singles out from the aggregate of existing persons the particular person whose assets can be called upon to make good the plaintiff’s injury. The objection so far has been that this explanation does not exclude a competing particularization in which wrongful behavior, even apart from injury, distinguishes a morally relevant subgroup of persons from the more inclusive aggregate. This competitor has the advantage of making the ground of liability (the creation of unreasonable risk) determine the class of liable persons (the creators of the unreasonable risk) without depending on the fortuity of the risk’s materialization.

The difficulty with Thomson’s explanation is that it concentrates on the wrongdoer, the moral quality of whose act is unaffected by whether the potential for harm that it releases actually comes to pass. Accordingly, the tort requirement of causation makes no sense if we conceive of the law as passing judgment on this moral quality as such. Causation becomes pertinent only when we focus on the plaintiff’s receipt from the defendant of an amount of money representing the harm suffered. This compensatory transfer shows that tort law is not concerned solely with the defendant’s emission of a harmful possibility but with that possibility’s coming to rest on a particular plaintiff. Inasmuch as cause particularizes, it does so with reference to the plaintiff rather than the defendant.

Tort litigation operates through and upon the relationship of plaintiff and defendant. Causation is the element in this relationship that functions to particularize the former as the victim of the latter’s wrongdoing. The bilateral nature of tort litigation requires our asking not only “Why can this plaintiff recover from *this* defendant?” but also “Why can *this* plaintiff recover from this defendant?” Even if we grant that the two defendants in Thomson’s hypothetical are morally equivalent, it does not
follow that Summers is entitled to claim indifferently against either of them.

Although Summers' injury does not distinguish Tice from the equally culpable Simonson, it does distinguish Summers' relationship with Tice from his relationship with Simonson. Tice and Summers are linked as doer and sufferer of the same harm; no such connection exists between Simonson and Summers. When the defendants fired they created an unreasonable risk to Summers, so that at that moment Summers was identically related to both of them in terms of the potentiality of injury. That moment has, however, been superseded in a different way for each of the defendants. In hitting Summers, Tice's bullet joined them as the active and passive components of the same causal nexus. Simonson's bullet flew by, harmlessly dissipating the possibility of injury into the environment. The relationship of doer and sufferer that Simonson's negligence might have initiated can now never come into being, and its former potentiality has no continuing significance for Summers.

As far as Simonson is concerned, Summers is not a person whom he has injured but merely a person who has an injury. The most that could be said is that Summers has been injured and that Simonson is someone who might have injured him but in the end did not. Since Simonson had no role in the production of this injury (though he might have caused a similar injury had things turned out differently), only the fact of Summers' disability is relevant to Simonson, not the process of the disability's creation. Now it may be that obligations under appropriate arrangements of distributive justice are owed to those who have disabilities. However, since Summers is not the only one with a disability nor Simonson the only one who should contribute to disability relief, the disability as such gives Summers no right to assert against Simonson a claim that is particular to them both.

Causation construed as the particularization of the sufferer in relation to the actor has a further implication. Neither causation so conceived nor the tort law whose bilateral structure embodies this conception can be understood in terms of an instrumental functioning. If tort law were a means to an independently specifiable end, that end would be directed either at the defendant or at the plaintiff or at the relationship between them. However, one cannot ascribe to tort law a purpose directed to the defendant alone, because no such purpose could be consistent with the restriction of liability to actual injury caused. This, as we have seen, is why tort liability is not in Thomson's hypothetical coextensive with the defendant's moral culpability. Nor can tort law have a purpose, such as compensation, directed to the plaintiff's injury,
since tort law includes reference to the defendant's role in causing the injury. Nor can an instrumental purpose seize on the relationship as a whole: since the relationship's defining characteristic is the fortuitous linking of doer and suffer, no independent goal could be congruent with it. Causation is thus not intelligible in terms of any functioning beyond itself.

II. IS CAUSATION ALL THAT MATTERS?

Causation, then, has the function of particularizing the plaintiff in relation to the defendant. As long as our attention is confined to the moral quality of the actor's behavior, nothing except fortuity differentiates the negligent hunters in Thomson's variant on the *Summers* case. Causation becomes decisive to tort law once we add to the defendant's liability the question of the plaintiff's entitlement to recover. But how decisive? Thomson's hypothetical raises the possibility that causation might be irrelevant in the face of the moral quality of wrongdoing. Because of the need to particularize the plaintiff, however, tort litigation is not properly exhausted by the moral assessment of the defendant's action and must attend to the plaintiff's injury. Now the converse possibility arises. Given that the function of causation is secure, perhaps we can dispense with negligence and make causation the sufficient ground for tort liability. Our conclusion to Thomson's query is that causation matters; can one not now press on to claim that causation is all that matters?

Under a theory of strict liability, causation is in principle decisive to the defendant's liability even without antecedent wrongful behavior. The intuitive appeal of strict liability is undeniable, especially in a non-instrumental context. The explanation of the significance of causation in terms of the doing and suffering of a single harm highlights the immediacy of the relationship between the parties rather than any ulterior goal that tort law may be thought to serve. Implicit in this account of causation is a conception of justice as operative only between the parties. To the extent that liability for negligence is identified in current scholarship with the goal of wealth maximization, 12 strict liability has the attraction of giving full play to the causal mechanism that cuts off the instrumentalist inquiry.

Among contemporary legal writers, Richard Epstein has been the most prominent champion of strict liability as a requirement of justice as

between the parties.\textsuperscript{13} His specific formulation of causal paradigms and stages of pleading have drawn the objection—rightly in my opinion—that these reintroduce the very conceptions of wrongfulness that strict liability purports to exclude.\textsuperscript{14} Here, however, our concern will be with his more general considerations in favor of making causation in principle determinative of liability regardless of fault.

The following discussion is divided into four parts. The first introduces the difficulties facing strict liability by relating it to the problem of particularization that figured in the discussion of the Summers variant. The next two show the inadequacy of the two positive arguments with which Epstein has supported strict liability. The final part traces how the second of these arguments leads to a non-instrumental conception of negligence that complements the conception of causation already adumbrated.

\textbf{A. Particularizing the Defendant}

If causation is, as suggested above, the device that particularizes the plaintiff, what particularizes the defendant? Strict liability, unlike liability based on fault, assigns this role also to causation. Two considerations, however, cast doubt on causation’s suitability for this function.

First, not all causes count for tort law. A cause, as a physical happening that produces an effect, is not in itself legally or morally significant, and the selection of juridically relevant causes—even if we confine the inquiry to human behavior—cannot be achieved by reference to causation alone. Especially problematic for strict liability is human behavior that is not volitional and therefore not legally an act. Although such behavior can cause injury, it cannot according to fixed tort doctrine be the basis of liability.\textsuperscript{15} Causation alone is incapable of generating this uncontroversial exemption.

Second, even if we know what causes are relevant, causation as such is indifferent to how far back we trace them. The search for the defendant requires identifying the act that initiates a juridically significant relationship with the plaintiff. However, since any juridically relevant cause can itself be the effect of a similarly relevant previous cause, the causal


sequence can stretch back endlessly. Because any cause is as much a
cause as the one that precedes or follows, causation itself does not iden-
tify the sequence's particular starting point.

Two resolutions of the conundrum of causation's excessive general-
ity are available. The first, found in negligence law, supplements causa-
tion with some conception of morally significant human action and uses
this conception to link the effect of action to a particular defendant. The
second, found in the ancient causes of action and in Epstein's causal par-
adigms, postulates an internal division that arbitrarily admits the legal
significance of certain causal relationships while excluding others. Under
the old writ of trespass, for instance, the notion of directness served as
such an internal divider, cutting off the causal sequence at a certain point
for purposes of liability.

Neither of these strategems can be attractive to a rigorous propo-
nent of strict liability, the first because it is an outright surrender of the
position, the second because it is merely a pragmatic management of the
problem that implicitly acknowledges its force. Internal division places
the strict liability theorist in the awkward position of simultaneously
pressing and limiting the role of causation. On the one hand, causation is
presented as having an inherently moral significance that somehow tran-
scends its signaling of a merely mechanical connection between two
events.16 On the other hand, this moral significance, inexplicably ex-
hausted at a certain point, is not regarded as coextensive with causation
itself. The difficulty here is not that an internal marker is unable exhaus-
tively to specify results in advance—all legal categories are indeterminate
in this way—but that the compromise it embodies reflects the inadequacy
of the framework that necessitates it. An internal marker is merely the
problem pretending to be a solution. Not surprisingly, as the common
law evolved, the internal markers of the second approach were recog-
nized to be proxies for the first approach's conception of culpability, and
legal doctrine was adjusted under the fault principle to make this concep-
tion explicit.

The inability of causation to generate its own limits was the theme
of the classic criticism of strict liability in Holmes' *The Common Law:

[T]he rule that a man acts at his peril . . .

. . . .

. . . would make a defendant responsible for all damage, however
remote, of which his act could be called the cause. . . . The distinction
between a direct application of force, and causing damage indirectly,
or as a more remote consequence of one's act, although it may deter-

mine whether the form of action should be trespass or case, does not touch the theory of responsibility... If the strict liability is to be maintained at all, it must be maintained throughout...

...If principle requires us to charge a man in trespass when his act has brought force to bear on another through a comparatively short train of intervening causes, in spite of his having used all possible care, it requires the same liability, however numerous and unexpected the events between the act and the result...

...Any act would be sufficient, however remote, which set in motion or opened the door for a series of physical sequences ending in damage; such as riding the horse, in the case of the runaway, or even coming to a place where one is seized with a fit and strikes the plaintiff in an unconscious spasm. Nay, why need the defendant have acted at all, and why is it not enough that his existence has been at the expense of the plaintiff? The requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen.17

Epstein has argued recently that in this passage Holmes misapprehended the nature of causation: both the limitations built into the categories of strict liability and a concern for freedom of action preclude the regression through distant causes.18 This response misses Holmes’ point. Holmes’ claim is not that the strict liability categories of his day allowed liability for all damage however remote, but that they had no reason not to allow such liability. As Holmes expressly says, he is dealing with the underlying theory of responsibility rather than with causes of action. Holmes’ argument is conceptual, not pragmatic: it presses the implications of strict liability to an extreme in order to expose its absurdity. The need for artificial limitation confirms that strict liability is not theoretically viable. As for Epstein’s observation that Holmes’ uncompromising treatment of strict liability is incompatible with freedom of action, this incompatibility merely shows the unsoundness of strict liability. Epstein’s response would have us believe that the defect of Holmes’ refutation is that it is too decisive.

Causation thus presents a problem of particularization parallel to that posed by the Summers hypothetical. Whereas wrongdoing fails to single out a plaintiff, causation fails to single out a defendant. The solution of negligence law is to embrace the two parties by requiring both cause and fault. Holmes’ critique of strict liability shows why the loss

suffered by the plaintiff does not serve to identify the particular defendant. Holmes' fundamental challenge indicates that causation cannot be taken to be all that matters.

B. The Hypothetical of Self-injury

Epstein's positive case for strict liability takes two forms, which can be termed the argument from the hypothetical of self-injury and the argument from the concept of property. Although neither of these arguments is cogent, they nonetheless interestingly illustrate the difficulties faced by a non-instrumental account of strict liability. They therefore allow us to appreciate how the requirement of fault responds to their failure.

Epstein first raises the hypothetical of self-injury in his analysis of Vincent v. Lake Erie Transportation Co. The issue in that case was whether the defendant was liable for damage done to the plaintiff's dock by the defendant's ship banging against it in a storm after the ship's captain had deliberately kept it tied to the dock in order to protect it from the storm. Epstein's justification for imposing liability is as follows:

Had the Lake Erie Transportation Company owned both the dock and the ship, there could have been no lawsuit as a result of the incident. The Transportation Company, now the sole party involved, would, when faced with the storm, apply some form of cost-benefit analysis in order to decide whether to sacrifice its ship or its dock to the elements. Regardless of the choice made, it would bear the consequences and would have no recourse against anyone else. There is no reason why the company as a defendant in a lawsuit should be able to shift the loss in question because the dock belonged to someone else. The action in tort in effect enables the injured party to require the defendant to treat the loss he has inflicted on another as though it were his own. If the Transportation Company must bear all the costs in those cases in which it damages its own property, then it should bear those costs when it damages the property of another.

Epstein accordingly proposes to determine the liability regime through a thought experiment that unites the interests of the plaintiff and the defendant and holds the defendant liable for whatever costs would be sustained by the amalgamated individual. The argument moves from the actual separateness of plaintiff and defendant, to the identification of the two in a superindividual who suffers the costs that he inflicts, and then back again to the actuality of separate existences. In Epstein's view, this procedure yields a justification for holding the defendant liable for dam-

age done to the plaintiff whether negligently or not. The argument for
strict liability proceeds "on the assumption that the defendant must bear
the costs of those injuries that he inflicts upon others as though they were
injuries that he suffered himself."21

Two related questions arise with regard to this procedure, the first
concerning its normative status, and the second concerning its determi-
nate outcome. First, why should any attention be paid to the amalga-
mated individual at all? And second, even if the notional amalgamation
of the litigants is appropriate, does it yield the liability structure that
Epstein draws from it with such dispatch?

Epstein offers strict liability as the most straightforward way of ac-
complishing justice between the parties in a tort context. The appeal of
Epstein's notion of strict liability is that its exclusive focus on causation
makes it utterly inhospitable to instrumentalist interpretation. In attend-
ing to the doer and sufferer of a single harm, causation affirms the con-
ceptual irreducibility of the two-party relationship. From a non-
instrumentalist perspective, however, it is hard to see what is gained by
transforming the problem from a two-party issue to a computation of the
losses suffered by the single superperson into whom the two litigants
have been counterfactually combined. Non-instrumentalism claims the
rhetorical advantage of respecting the separateness of persons and the
rights that reflect that separateness.22 Dissolving the litigants' personali-
ties into an amalgamated individual seems to lead in the wrong direction.

Moreover, Epstein's procedure does not point as unambiguously to
strict liability as his argument supposes and requires. Even if the hypo-
ethetical remains oriented toward the fact of the loss and not toward the
reasonableness of the decision that resulted in the loss (which would
bring us closer to negligence), two other possible implications for the
liability regime can be drawn from it:

[A] The defendant should be liable for all harm that he causes
even if the harm is the consequence of what is not regarded by tort doc-
trine as an act. Tort law, as we have seen, attaches liability only to dam-
ages resulting from manifestations of the defendant's volition. However,
this restriction cuts into Epstein's premise that the defendant must bear
the costs of injuries to others as though they were injuries to himself.
Just as I would myself bear the costs of whatever injuries I sustained
while sleepwalking or in the course of an epileptic fit, so Epstein's argu-

21. Id. at 159.

ment should hold me liable for any such harms that I inflicted on you.\textsuperscript{23} One can thus draw out of the hypothetical of self-injury a broader liability rule even than strict liability.\textsuperscript{24}

[B] The losses should lie where they fall. Epstein concludes that because the defendant would have borne the loss if he were identical with the plaintiff, the defendant should therefore bear the loss when the litigants are restored to their separate existences. One can equally argue, however, that because the plaintiff would have no cause of action if he were identical with the defendant, so no cause of action should be available when their individual identities are restored. Epstein assumes that the relevant feature of his hypothetical is that the superperson suffers an irrecoverable loss that should remain the actor's loss in the two-party situation. But the significant feature may be the superperson's irrecoverable loss, that should remain irrecoverable when transposed into the actuality of litigation. This reading allows no liability for any losses.

Possibility [B] also demonstrates why Epstein's hypothetical is normatively unilluminating. The problem at hand is whether the plaintiff or the defendant should bear the loss. Epstein tries to get a handle on this problem by collapsing the two parties and making some feature of the counterfactual situation determinative. This procedure merely submerges the problem without resolving it. As long as the plaintiff and the defendant are amalgamated, it does not matter whose interests are favored because their interests are not separate. When the parties are restored to their discrete existences, however, the original tension reasserts itself, this time in the selection of the counterfactual feature that is significant in the transition back to the real world.

Epstein's hypothetical of self-injury presents a large menu of possible liability regimes, from strict liability to liability even for non-acts to no liability for any acts. It does not, however, make strict liability more plausible than any alternative. The function of the hypothetical is merely to present as a reason the conclusion that Epstein has read back into it.

\textbf{C. The Concept of Property}

Epstein has also maintained that "the idea of ownership necessarily entails a strict liability standard in all tort cases between strangers."\textsuperscript{25} Ownership and property are, for Epstein, omnibus terms that refer to the

\begin{itemize}
  \item \textsuperscript{23} Epstein accepts the common law position that denies liability where there is no act. Epstein, \textit{A Theory of Strict Liability}, supra note 13, at 166.
  \item \textsuperscript{24} For a fuller discussion of this point, see Weinrib, \textit{Toward a Moral Theory of Negligence Law}, 2 J.L. & PHIL. 37, 58-59 (1983).
  \item \textsuperscript{25} R. Epstein, \textit{Takings: Private Property and the Power of Eminent Domain} 239
entire range of one’s entitlements to external possessions and personal integrity. Epstein contends that strict liability is conceptually implied by the very notion of private property because liability rules and property rights are opposite sides of the same coin, with no radical separation between them.

... [I]f you deny the plaintiff the prima facie right to recover against a stranger without proof of negligence, then you have taken a limited property interest.... By definition, every liability rule is tied to a correlative property interest that the law protects; to alter the one is necessarily to change the other. The linkage is not empirical, it is analytical, a function of the way in which we do use, and must use, all legal language.

The inference Epstein draws here from the correlativity of property and liability is inadequate on its face. This correlativity obtains, whatever the liability regime. It cannot in itself support strict liability or establish the threshold from which the negligence requirement should be adjudged a “taking.” The conceptual connection to which Epstein points is too broad for the specific conclusion he draws.

More interesting, because of its implicit claim that ownership carries with it an absolute inviolability, is Epstein’s description of the damage as the taking of a limited property interest. On this view the boundary of what I own circumscribes the area of my moral space, the domain within which I am entitled to be free of the intrusions of others. Your damaging my Ming vase even without fault, for example, is a penetration of this space, for which I can rightly demand compensation. The idea of property makes the location of the action’s effects, not its innocence, decisive for liability. Any harm you do to what I own is inconsistent with its being my property.

This superficially attractive conclusion fails to appreciate the idea of property, which is the basis of Epstein’s argument. Property as an idea is not identical with the present attributes of all the items that at this moment happen to be called property. These items instantiate the idea of property but they are not themselves that idea. If the argument for a corresponding liability regime is to pivot on the idea of property, the present condition of the aggregate of all the items that are now the prop-

27. R. EPSTEIN, supra note 25, at 97-98 (emphasis in original).
28. Cf. R. NOZICK, ANARCHY, STATE, AND UTOPIA 57 (1974) ("A line (or hyper-plane) circumscribes an area in moral space around an individual.").
erty of someone cannot be decisive, because the attributes of these items are only contingently related to property as an idea. This observation applies to legal attributes, because otherwise the liability rule would be whatever the present positive law happens to recognize. It also applies to physical attributes, because these are only the attributes of particular things and not of an idea. When we call my Ming vase my property, we do not mean that its particular qualities define the idea of property as such, but that these qualities happen to be present in something that happens to embody that idea.

The difference between the physical attributes of an item of property and the idea of property embodied in an item is apparent as soon as my Ming vase is accidentally dropped. I notice immediately that my property in a physical sense has undergone a drastic change; what was previously a thing of beauty and value is now a worthless scattering of sherds. But nothing has affected property in its conceptual sense. What had been my vase has become my sherds, and the idea of property is embodied in the sherds as surely as it was in the vase. From the standpoint of property as a concept, the fate of the vase has both the popular and the philosophical significance of an accident.29

The conclusion that uncompensated damage to my vase is inconsistent with the idea of property confuses property's physical and conceptual aspects. Our focus in determining whether the idea of property entails strict liability must be on the idea and not on its specific embodiments. With respect to my Ming vase, all we have so far is the conjunction of my ownership and your damage. These are merely two separate facts about the vase which in themselves no more entail liability than do any other facts about the vase (its color, its shape, its hardness and so on). The conceptual entailment of property requires reference to the concept of property and not to the attributes of particular embodiments of property. The question is not whether you have intruded into my moral space but whether the intrusion is compatible with the idea of moral space that this particular chunk of it instantiates.30

29. See Aristotle, Metaphysics 1025a 14 (Hippocrates G. Apostle trans. 1966): "‘Accident' means that which belongs to something and can be truly said of it, but which belongs to it neither necessarily nor for the most part.”

30. Accordingly, we seek the liability regime which, in Kantian terms, would not contradict the conception of property. For contradiction in the conception, see I. Kant, CRITIQUE OF PRACTICAL REASON 27 (L. Beck trans. 1956); I. Kant, FOUNDATIONS OF THE METAPHYSIC OF MORALS 41-42 (L. Beck trans. 1959).
D. From Property to Negligence

The question can now fairly be asked: what is the liability regime correlative to the idea of property? I wish now to suggest that property as an idea excludes strict liability and requires a negligence regime. In other words, Epstein's claim is not merely unsupported but wrong.31

Let me first outline what is meant by the correlativity of liability and property. Whatever its specific contours with respect to any particular item, property marks out a sphere within which I am free to act as I wish. As Epstein himself puts it, property is "an external manifestation of the principle of personal autonomy"; it specifies "for each person a domain of action in which he is not accountable to the whims or demands of any other group of individuals." Property divides the world between mine and thine. The function of property, conceived (as Epstein conceives it) as the totality of one's autonomous sphere of holdings and personal integrity, is to demarcate the boundaries of the juridical entities that interact in the legal world. The function of liability, on the other hand, is to set out what is permissible in the interaction of these entities. The separate categories of property and tort distinguish the delineation of the interacting entities from the terms on which these entities interact. Property defines what the parties have as they enter the interaction; liability defines the intelligibility of the interaction itself and, consequently, the parties' entitlements when the interaction is complete. To inquire into the correlativity of property and liability is to ask: what interaction

31. The enterprise of conceptually connecting property and liability presupposes that property is more than the name given to the bundle of rights that the state protects or ought to protect for the sake of achieving certain consequences. Accordingly, the enterprise is incompatible with utilitarian and positivistic approaches to property. When property is regarded solely as a means of funneling a set of social relations to the consequences at which state power aims, the question of the conceptual connection between the idea of property and the regime of liability cannot arise. Because the invocation of property would be only a compendious way of triggering certain consequences, no conclusion would in principle be derived from property that would not more directly follow from attention to the consequences themselves. If property is to be conceptually linked to a liability rule, it must have some standing as an idea in its own right. For the classic expositions of this idea, see G.W.F. Hegel, Philosophy of Right, para. 41-70 (T.M. Knox trans. 1952); I. Kant, The Philosophy of Law 61-69 (W. Hastie trans. 1887). The discussion that follows is suggested by Hegel, supra, para. 34-40, 82-103, just as the discussion of the idea of property in the preceding section was suggested by Kant's notion of intelligible possession (recently discussed in Benson, External Freedom According to Kant, 87 Colum. L. Rev. 559, 566 (1987)). Accordingly, the issue in this section is: what non-instrumental liability regime is correlative to a non-instrumental conception of property? It is irrelevant that the conclusion I draw might not follow from a different (utilitarian) understanding of the function of property. I discuss the general superiority of non-instrumental to instrumental accounts of law in E. Weinrib, Legal Formalism (unpublished manuscript on file at the Chicago-Kent Law Review).


33. Id.
between owners is consonant with the idea of property and is thus expressive of their nature as owners?

Because ownership implies the possibility of owning specific things, tort law must, to be sure, work against the background of the specific holdings with which the parties entered the interaction. The interaction is the occasion not for a fresh distribution of holdings but for a correction that restores the wronged party to his antecedent resource level. This, however, goes only to the remedy, not to the definition of liability. The setting of liability for accidental damage cannot itself be a reflex of the parties' antecedent resources. Because a loss has occurred that must be absorbed by one or the other of them, it is impossible for both to retain unimpaired the specific holdings with which they entered the interaction. Nor, as we have seen, is the retention of specific holdings required by the idea of property, because this idea is not synonymous with its particular embodiments.

What the parties share as owners—whatever the difference in their holdings—is the fact that they are owners. Implicit in the notion of property is the equal standing of all property owners. This equality is not an equality of welfare or resources, because the idea of property does not imply anything about the amount or value of what we have or ought to have; amount or value is a specific attribute of specific property holdings, and, as we have seen, the concept of property is indifferent to such particularity. Rather, the equality is a formal and abstract one: all property holders are as property holders equal to each other. Although tautological, this conclusion nonetheless yields the important conceptual consequence that the liability regime correlative to the idea of property will regulate the relationship of doer and sufferer according to a correlatively abstract equality. Tort law is, accordingly, expressive of the nature of the parties as owners if it makes interaction conform to the abstract equality implicit in ownership.

Let us consider a claim about the permissibility of action that is inconsistent with the idea of property. Suppose you asserted the right to use a vase that was incontrovertibly mine for whatever purpose you wished. Since under this claim I could not exercise my freedom on this vase except subject to your license, I could not be said to have property in it at all. In no sense would this vase really be mine. Moreover, since the vase is only an instance of property and ex hypothesi has no specific characteristic that entitles you to appropriate it, the claim would not be confined to the vase but would extend to all property everywhere. Inasmuch as all property holders are equal, your claim to the free use of this vase could equally be made by everyone with respect to everything. In-
deed, I could equally assert it against you with respect to this very vase. Such a network of crosscutting claims would not be a regime of property for all but the impossibility of property for anyone. Your assertion of a right to use my vase at will is thus inconsistent with the notion of property.

The claim to such a right is precisely what is implied in every intentional wrong. The intentional tortfeasor makes something that belongs to another the object of his action. A justification of his action in terms of the idea of property would take the form of an assertion of a right to determine the use of what someone else owned. Property would be conceptually impossible if this right were recognized. Therefore, correlative to the idea of property is a tort system that denies the validity of this implicit justification by treating the intentional invasion of another's moral space as a wrong.

Suppose now that you put forward the more modest claim to use your own property so long as that use does not create an unreasonable risk to mine, but you also claim to be the judge of reasonableness. This is the claim implied in a defense based on substandard ability, as when a stupid person pleads that he ought not to be held liable for the injuries caused by his stupidity. The subjective standard does not render property impossible, as does intentional wrongdoing. Your attention is directed to the use of your property not mine, and you merely claim an immunity for the effects of your use. Nothing you do undermines my ownership as such. Although your activities may damage what I own or diminish its value, my property's worth and condition are, as we have seen, merely specific attributes of a particular instantiation of property and do not implicate the idea of property. Moreover, the entitlement you claim has some limit beyond which my own rights are paramount. Nevertheless, your claim is inconsistent with the idea of property because it violates the equality inherent in our being property owners. You allow me property but you demarcate the border between your holdings and mine; we are both abstractly and equally free as owners, but my freedom is confined to the residue that you determine. Whereas in intentional wrongdoing you do not recognize my status as owner at all, here you recognize it but inconsistently withhold the acknowledgment of our equality.

Strict liability is the mirror image of this subjective standard of liability, asserting the same inequality with the parties reversed. Under

strict liability I recognize your freedom to act, but I limit the effects of that freedom at the boundaries of what I own. I do not dispute your property-owning status, but my holdings set the line that confines your action and its effects. Like the subjective standard, strict liability is inconsistent with the idea of property because it is inconsistent with the equality between property owners that the idea presupposes.

The virtue of the negligence standard is that it regulates the relationship between the property holders on the basis of equality. The negligence standard requires an objective comparison of the risk of harm and the cost of prevention. Thus the defendant must implicitly acknowledge not only that the persons he might affect are property owners, but that their interests have the same claim to consideration as his own. They cannot insist—as is implied by strict liability—that their holdings are more valuable than his freedom. Furthermore, the objective standard precludes the actor’s subjective capacities from providing a preferential vantage point for the determination of what should be a relationship between equals. If the idea of property mandates anything, it mandates a negligence standard. Therefore, in presupposing something identifiably mine on which the action of another impinges, causation entails fault.

The negligence standard thus conceived is not instrumental to any ulterior goal of wealth or utility maximization. Since the negligence standard is correlative to the idea of property as an abstraction from the particularity of the parties’ antecedent holdings and welfare, the attractiveness of the particular distribution that results from its application can serve no justificatory function. Negligence is a reflection of the formal equality of the rights-holders, setting the terms on which they can interact as equals. Its balancing of the risk to which the defendant exposes the plaintiff against the defendant’s burden of precautions is not a strategy for maximizing either the joint welfare of the parties or the general social good. Rather it is the formula by which tort law conjoins the action of the defendant to the freedom of the plaintiff in accordance with their equal status as rights-holders.

Just as causation particularizes the plaintiff as the recipient of the effects of another’s action, so negligence particularizes the defendant as one who has failed to conform his behavior to the equal status of others. Through causation, the wrongdoing of a defendant must light on a particular plaintiff, joining them in the relationship of doer and sufferer. Through the principle of fault, the claim cannot be lodged against any doer, but only against the wrongful one. The juridically significant initia-

tion of the causal sequence lies in the failure to treat as one's equals those who might be affected by one's action.

III. THE SYMMETRY OF CAUSATION AND WRONGDOING

The two preceding sections have argued that causation and wrongdoing single out the plaintiff and defendant respectively in a non-instrumental way. The two central concepts of negligence litigation have thus been statically connected to the parties to the litigation. This section moves on to consider the dynamism that this involves: how are causation and wrongdoing related to each other and to the litigational form of plaintiff suing defendant?

That there is some relationship is evident from the fact that tort law does not particularize a plaintiff and a defendant at random. Because the wrongful injury must be related to the wrongful injurer, it is not enough that anyone who has been injured sue anyone who has been negligent, nor even that a negligently injured party sue anyone who has negligently injured. Thus if A negligently injures X and B negligently injures Y, X cannot recover from B nor Y from A even if both injuries are identically quantifiable. The claim that the plaintiff makes against the defendant presupposes that these particular persons have been linked to each other through the causation and the wrongfulness.

The litigants who are singled out through causation and wrongdoing are, therefore, related to each other as more than juxtaposed monads. In institutional terms, their relationship is expressed by the lawsuit between the parties, with its assumption that the transference of a single sum can simultaneously satisfy the plaintiff's entitlement against the defendant and discharge the defendant's debt to the plaintiff. If a parallel doctrinal relationship exists, particularization of the plaintiff through causation must allow for linkage to the defendant, and particularization of the defendant through wrongdoing must similarly allow for linkage with the plaintiff.

This nexus of particularized litigants can be understood as follows. Something is particularized when it stands out from the general class of which it is a part. The particular thus requires reference both to a particularizing feature and to a general background. Accordingly, causation particularizes by singling out this plaintiff from the class of persons whom the defendant has endangered. Through injury the general risk which the wrongdoing has unreasonably created lodges in a particular person. Similarly, wrongdoing serves to single out from among the numerous causal antecedents of the plaintiff's injury the particular cause
that is juridically significant. Causation particularizes the plaintiff against the background of the defendant’s wrongful risk creation, and wrongdoing particularizes the defendant against the background of the totality of the injury’s causes. In this way causation and wrongdoing each reciprocally particularize with respect to the generality of the other.

This understanding of the elements of the negligence action links the plaintiff and the defendant symmetrically. Everything true of the defendant as actor applies correlative to the plaintiff as sufferer. Causation means that harm inflicted by the defendant is inflicted upon the plaintiff, and in acting negligently the defendant treats and the plaintiff is treated unequally. Since both wrongfulness and causation apply to the same parties with respect to the same incident, the defendant’s wrongful injuring of the plaintiff can be equivalently expressed in the active and the passive voice.

Inasmuch as wrongdoing and injury are the termini of a single relationship of action and passion, they demarcate the temporal sequence that tort law treats as a unit. The legal relationship between plaintiff and defendant links two persons and two moments in time, reflecting the symmetry of actor and victim through the interval in which doing matures into suffering. This relationship is initiated by the defendant’s acting in a way that is inconsistent with the equality of those whom his action might affect, and it is consummated when the risk thereby created materializes in injury to the plaintiff. Causation represents the relationship’s physical aspect, the direction of energy from the defendant to its impingement upon the plaintiff. The negligence standard is the relationship’s moral aspect, with its insistence that the potential for harm inherent in activity not violate the equal status of those whom it might affect. A wrongful act that does not injure lacks impact upon a specific victim; an injury that is not the materialization of a wrong is a misfortune devoid of normative significance for its author. For tort law wrongfulness without causation is empty; causation without wrongfulness is blind.

The conception of a single relationship symmetrically embracing both parties animates the entire structure of tort law. The plaintiff’s right to be free of wrongful interferences with his person and property is correlative to the duty on the defendant to abstain from such interferences. The plaintiff’s suffering of a wrongful loss is the foundation of his claim against the person who has inflicted that loss. The transference from the defendant to the plaintiff of a sum quantifying the loss is the procedure for annulling the effects of a wrong done by the former to the latter. Whether the issue is the ground of the claim or the mechanics of processing it, each litigant’s position is the mirror image of the other’s.
The relationship between causation and wrongdoing thus dovetails with the relationship between plaintiff and defendant. The former relationship integrates at the doctrinal level what the latter integrates through the form of litigation. Just as the litigants are brought together through the claim that one makes against the other, so the doctrines that single out the litigants are brought together by symmetrically particularizing each other's general categories of cause and unreasonable risk.

Two criticisms have been made of this happy union of legal content and litigational form. The first is that the negligence law is not in fact adequate to the litigational form. This objection acknowledges that for tort law to be intelligible causation and wrongdoing must be symmetrically related, but it denies that in negligence law they are. Jules Coleman has developed this analysis in a number of important articles, arguing that, whereas causation and wrongfulness are both morally significant to the victim, causation has no normative significance for the tortfeasor. Accordingly, the symmetry of causation and wrongfulness that is presupposed in the litigational form of negligence law does not hold, and the moral impulses of this law can, in Coleman's view, be more adequately expressed through the different legal framework of a compensation scheme.

The second objection denies that the litigational form requires so symmetrical a conception of the relationship between causation and wrongdoing. The bilateral structure of negligence law is taken as given, but not the need for symmetry in the conjunction of causation and wrongdoing. The controversies about duty and proximate cause, where negligent defendants are sued for unforeseeable injuries, illustrate this objection. Proponents of liability think it sufficient that the parties are linked through causation as doer and sufferer without the injury being a materialization of the potential for harm that renders the defendant's action unreasonable. The defendant is to be held liable for having wrongfully injured the plaintiff even though the plaintiff cannot be said to have been wronged by the act that produced the injury.

Between them these two objections cover both components of the symmetry that they expressly deny. For the first, the unilateral significance of causation for the plaintiff prevents the content of negligence law


from being adequate to its litigational form. For the second, the unilateral significance of wrongdoing for the defendant makes the litigational form suitable even to an asymmetrical content. The structure these objections share is that the joint moral force of wrongdoing and causation is not correlatively applicable to both parties. In the first, the plaintiff has been wrongfully injured without the defendant's having wrongfully injured. In the second, the defendant wrongfully injures without the plaintiff's being wrongfully injured.

We shall consider the first objection in the following section, and the second in the section after that.

IV. DOES CAUSATION BREAK THE SYMMETRY?

Coleman's argument that causation breaks the symmetry of the plaintiff-defendant relationship is based on the postulate that the distribution of entitlements not be distorted by either wrongful gains or wrongful losses. Such gains and losses are to be annulled. This principle operates regardless of the justice of the antecedent distribution, so that the tortfeasor cannot properly invoke the Robin Hood argument that his action produced a more just overall distribution even if in fact it did. The point of Coleman's postulate is not to foster a fair distribution of holdings, however such fairness is understood, but to remedy unjust departures from the prevailing distribution, be it fair or unfair.

Coleman regards his postulate as composed of two distinct parts, with wrongful loss being the ground of the victim's entitlement to recover, and wrongful gain being the basis of the injurer's liability. Since the wrongful loss is analytically different from the wrongful gain, liability and recovery need not be simultaneously played out through the litigational form of tort law. Identifying the gains and losses to be rectified and determining the mode of rectification are separate issues, with tort damages being only one of the possible modes of rectification.

For Coleman, the simultaneous annulment of gain and loss through tort law is appropriate only when the victim's wrongful loss is identical with the perpetrator's wrongful gain. Intentional wrongs satisfy this condition. Your theft of my Ming vase, for example, distorts the antecedent distribution, enriching you and impoverishing me by the value of the vase, and tort law corrects this distortion by forcing you to reconvey to me the vase's value. The equivalence of wrongful gain and loss allows tort law to rectify both at the same time.

38. Coleman, Corrective Justice, supra note 36, at 423.
The presupposition of negligence law is that the congruence of gains and losses in intentional torts obtains here as well. This, Coleman argues, is a mistake. In negligently caused injuries, the plaintiff’s loss does not in itself match any gain by the defendant. The plaintiff’s wrongful loss results from the juncture of the defendant’s fault and his own injury, but the defendant’s gain is complete at the moment of wrongdoing. The tortfeasor’s foregoing of adequate safety precautions can be regarded as an improper saving and therefore as a wrongful gain, but since this gain is complete before the plaintiff’s injury occurs (if it ever does), the tortfeasor achieves no additional enrichment as the result of the plaintiff’s loss. Therefore, the very loss which is the basis of the plaintiff’s action does not correspond to any morally relevant feature of the defendant’s situation.  

The consequence of Coleman’s argument is that the progression from action to suffering stops at the defendant’s negligence for purposes of wrongful gain but must include the plaintiff’s injury for purposes of wrongful loss. Since causation is essential for the plaintiff’s wrongful loss but irrelevant to the defendant’s wrongful gain, the relationship between the litigants is not a symmetrical one. Therefore, no single sum can be transferred from defendant to plaintiff as the simultaneous rectification of wrongful loss and gain. The rectification of the plaintiff’s wrongful loss and the annulment of the defendant’s wrongful gain are two discrete functions that negligence law inadequately integrates. Coleman concludes that the victim of negligence has a claim to compensation for what he has wrongly lost, but that the injurer need not be the source of that compensation: negligence law can be replaced by a compensation scheme that will attend separately to these separate functions.

This ingenious argument squarely challenges the understanding of negligence law as the juridical reflection of a single relationship of plaintiff and defendant symmetrically particularized through causation and wrongdoing. Coleman regards the mode of annulment as an issue separate from the substantive postulate that wrongful gains and losses be annulled. He thereby denies the conceptual connection between the content of negligence law and its litigational form. Moreover, the principle of rectification is itself fissured into the grounds of the plaintiff’s recovery and the grounds of the defendant’s liability. The difference in the significance of causation for the two litigants of a negligence suit

40. Coleman, Corrective Justice, supra note 36, at 425.
41. Id. at 440.
42. Id. at 425.
43. Id. at 422.
means that the plaintiff’s wrongful loss is not identical with the defendant’s wrongful gain. At the general level, Coleman conceives of wrongful gain and wrongful loss as notionally independent of each other and of the mechanisms that can be used to annul them. More specifically, Coleman understands negligence as illustrating these disjunctions, and he therefore finds the symmetry of the negligence litigational form to be inadequate to its legal content.

Both Coleman’s general conception and his specific conclusion are problematic. Let us start with the former and first consider the advantage Coleman foregoes by conceiving of wrongful gain and wrongful loss separately from each other and from their unifying litigational form. The notion of wrongful loss is inherently relational because to describe the plaintiff’s loss as wrongful is to implicate the action of the person who wrongfully inflicted the injury. The victim has been wronged because, and only because, the injurer has wronged him. The litigational form of tort law captures the relational aspect of wrongfulness by requiring the victim to be compensated by the tortfeasor. The process of rectification thus mirrors the process of wrongful injury. Just as the connection of tortfeasor and victim is essential to the wrongfulness of the loss, so this connection is essential to the way that tort law annuls this wrongful loss.

Tort litigation, accordingly, effects a transfer of wealth from the defendant to the plaintiff that retraces the moral relationship created by the wrongful injury. The plaintiff cannot recover from just anyone who was negligent, but must sue the particular party who wrongfully inflicted this particular injury. The relational aspect of wrongdoing fuses the defendant’s doing and the plaintiff’s suffering of wrongful injury into a normatively significant unit. Because this relational aspect is confined to the litigants, the transfer of wealth through the litigational mode of annulment is insulated from the distributional considerations that implicate the relative holdings of a wider range of persons.

Two problems arise when wrongful gain and loss are severed from each other and from the mode of rectification. First, an annulment that does not reflect the relational aspect of the wrongfulness does not completely annul that wrongfulness. When wrongful injury is made good from a compensation fund, for instance, rather than from the wrongful injurer, the wrongfulness is a contingent fact about the loss that triggers the compensation payment without in any other way determining its character. Wrongfulness here goes to the history of the loss, identifying this loss as one of the subset of losses that is to be annulled. Since the relationship of wrongdoer and victim that gives the loss its moral quality
is not mirrored in the mode of rectification, such a payment annuls the victim's wrongful loss but not the wrongfulness of the loss. The mode of rectification treats the wrongful gains and the wrongful losses as unilateral surpluses and deficits without retracing the reciprocity of wrongful doing and suffering that links this wrongdoer to this victim. Wrongdoing is the criterion of the victim's access to the compensation fund, but the payment as such does not reflect the relational structure of wrongdoing. Thus, the mode of rectification fails fully to rectify: it restores the amount lost but does not annul the wrongful quality that defines the loss as one to be rectified.\textsuperscript{44}

Second, when gains are notionally separated from losses, distributional considerations cannot be categorically excluded. The point of Coleman's theory is that the annulment of wrongful gains and losses is intelligible as a requirement of justice even when these gains and losses produce (on any standard) a fairer distribution of wealth. However, the independence of wrongdoing from distributive justice presupposes that the relationship of wrongdoer and victim is a moral unit to which distributional issues are irrelevant. This independence is impossible once the function of wrongfulness is conceived as the marking out of certain kinds of gains and losses by reference to their history rather than as establishing a distinct normative connection between injurer and victim. \textit{Qua} gains and losses (albeit of a certain sort), they are not in principle any more immune to distributive concerns than other gains or losses. Provided that my wrongful gain results in a superior distribution, why should I be forced to disgorge it? Or, to put it another way, why should these gains be annulled rather than taxed along with other gains pursuant to some distributive principle?

Coleman's specific conclusion about negligence and its litigational form is equally problematic. In his view, the respective independence of wrongful gains and losses produces an asymmetry that vitiates tort law's treatment of negligently caused injuries. We must now turn back to examine this asymmetry. He argues that tort law is an adequate remedy of wrongful distortions in holdings only when the plaintiff's wrongful losses are correlative to the defendant's wrongful gains, since only then can the damages awarded against the defendant correspond to the wrongful loss suffered by the plaintiff. In negligence law, the symmetry of wrongful

\textsuperscript{44} The difficulty cannot be overcome by setting up a parallel fund to which wrongdoers would have to contribute. The victim's relationship is with a particular wrongdoer, not with the class of wrongdoers of which the particular wrongdoer is a member. Because of Coleman's distinction between the grounds of recovery and the grounds of liability, this parallel fund would still not mirror the conceptual connection between the doing and the suffering of a wrongful injury.
gain and loss is upset by the different significance of causation for the two litigants. The plaintiff's wrongful loss is the injury for which he sues. Because the defendant realizes no additional gain from this injury, however, his enrichment is complete when he carelessly foregoes the requisite safety measures. Negligence litigation is, therefore, incapable of embodying the principle that wrongful gains and losses are to be annulled.

The defect of this argument, however, is that the same reasoning that supports Coleman's conclusion that the injury is not a wrongful gain for the defendant also supports the conclusion that the injury is not a wrongful loss for the plaintiff. Coleman argues that for the wrongdoer the risk can be split from its materialization because the wrongdoer's gain is complete even without loss. What he does not realize is that a parallel argument applies to the plaintiff: since the wrongfulness consists in the defendant's exposing him to unreasonable risk, the wrongfulness affecting the plaintiff is complete at the moment of exposure. Just as the injury brings the defendant no accretion of gain, so it also imposes on the plaintiff no additional wrongfulness. The actual injury makes the plaintiff worse off than before, but it does not make him the victim of further wrongfulness any more than it makes the perpetrator the recipient of further gain. When the injury occurs, the same disjunction between risk and materialization that clears the defendant of wrongful gain precludes the plaintiff from alleging that the injury is a wrongful loss. The reasoning that limits the defendant's wrongful gain to the unreasonable creation of risk similarly limits the plaintiff's wrongful loss to the unreasonable exposure to that risk. The actual injury is as relevant or irrelevant to the one party as to the other.

Coleman correctly notices that the movement from intentional to negligent wrongs introduces a temporal gap between the wrong and the damage. This gap, however, exists for both litigants equally, and does not in itself affect the symmetry of their relationship. In intentionally taking my Ming vase, you realize your gain and I experience my loss simultaneously with your commission of the wrong. In contrast, when you expose my vase to destruction, the destruction is now severable from the wrongfulness of your behavior. But it is severable for both of us, and if our normative principle involves the annulment of wrongful gains and losses, the gap's significance is not different for me than for you. Because the defendant is particularized through the element of wrong and the plaintiff through the element of causation, the temporal gap will not play itself out in the same terms for both litigants. However, if we are to ask what wrongful gain or loss the actual injury contributes in and of itself, the answer remains the same for both litigants: if you can be said to
realize no additional wrongful gain, I can equally be said to suffer no additional wrongful loss.

The asymmetry which Coleman discerns consists in the defendant's wrongful gain being complete at an earlier stage than the plaintiff's wrongful loss. My reply has been that the argument that cuts the wrongful gain off at the defendant's negligence can also cut the plaintiff's wrongful loss off at the same point. In other words, one can symmetrically shorten the duration of the relationship in accordance with Coleman's conception of the defendant's wrongful gain. Can one also lengthen the span of the relationship to bring both sides of it into line with Coleman's conception of the plaintiff's wrongful loss?

Coleman's argument assumes that the wrongful loss consists in the actual injury suffered by the plaintiff, rather than in the plaintiff's exposure to the risk of injury. The justification for this assumption is presumably that once the risk materializes in injury or dissipates itself harmlessly, the risk as such has no continuing significance to the imperiled person. Since every risk is a risk of something, risk is always related to the injury that it portends. The injury is the actuality that defines the risk as a potential of a certain sort. The risk of injury and the injury itself are the same thing regarded at different stages of maturation. Until the injury occurs, one can sensibly focus on the risk, but once it does occur, the actual injury is what matters to the injured person and not the spent risk. Accordingly, if a risk is unreasonably created, its materialization into injury is a wrongful loss for the plaintiff.

Now let us move to the other side of the relationship. Coleman takes the defendant's gain to be the expenditure foregone through not eliminating the risk, with the wrongfulness consisting in the fact that the precautions against the risk were less costly than the gravity of the injury discounted by its likelihood.\(^4^5\) This conception of wrongful gain is adequate for the time of the defendant's wrongful act. However, since the judgment of wrongfulness involves a balancing of expenditure against risk, the gain can be superseded in the same way that the risk can be. Once the risk materializes into injury, the savings realized by not eliminating this risk have no greater significance than the risk does. The conception of gain must keep pace with the stage of the risk's maturation. Given the actuality of injury, the defendant's gain can no longer be the amount sufficient to eliminate the potential for injury but must now be the amount that would undo the injury itself. Therefore, the damage award, which is designed to restore the plaintiff to his position antecedent

\(^{45}\) Coleman, Corrective Justice, supra note 36, at 425.
to the occurrence of the tort, is the equivalent in the post-injury stage of the savings foregone by the defendant at the time of his negligent action. If the savings are the defendant’s wrongful gain at the time of the creation of the risk, the damages are the wrongful gain once the risk matures into injury.

Accordingly, the defendant’s wrongful gain and the plaintiff’s wrongful loss are correlative to each other however we regard them. If looking at the defendant we dismiss causation on the ground that the injury brings no additional wrongful enrichment, a parallel argument allows us to say that it imposes no additional wrongful loss on the plaintiff. If looking at the plaintiff we consider the wrongful loss to be the actual injury, we can similarly regard the cost of annulling this injury as the amount of the defendant’s wrongful gain. Each argument concerning one of the litigants has a counterpart concerning the other. This refutation of Coleman does not postulate either for wrongful gain or for wrongful loss any meanings independent of those that figure in Coleman’s own argument. My point here has not been to specify new conceptions of gain or loss, but to follow through on Coleman’s, and thereby to ensnare his contentions in their own conceptual webbing. Only by paying Coleman the compliment of taking his notions of wrongful gain and loss to their logical conclusion can we appreciate why his argument fails to shake the symmetry of wrongdoing and causation presupposed in negligence law.

V. DOES WRONGDOING BREAK THE SYMMETRY?

The preceding section presented and refuted Coleman’s challenge to the symmetry of the plaintiff-defendant relationship. That challenge concentrates on causation. Whereas wrongdoing and causation define the plaintiff’s wrongful loss, only wrongdoing is, in his view, relevant to the defendant’s wrongful gain. He thus construes causation as disrupting the symmetry of the litigants’ relationship by being significant to the plaintiff alone.

The purpose of the present section is to explore the converse question. If we construe causation and wrongdoing as relevant to the defendant, can causation alone be relevant to the plaintiff? Here the symmetry of the relationship between the litigants is disrupted by wrongdoing, which particularizes the defendant by reference to a general category that need not include the plaintiff. A negative answer will mean that the symmetry will have been confirmed against objection from each possible side.

This question is a traditional theme of the jurisprudence of duty and
proximate cause. Under these rubrics, a standard problem is whether the negligent defendant can be held liable for unforeseeable consequences or to unforeseeable plaintiffs. Implicit in these perplexities is the prospect that the defendant may be liable although his wrongdoing does not bear upon this plaintiff or this injury. Since wrongdoing is not defined in terms of the possibility actualized by the plaintiff’s injury, the inquiry into the defendant’s wrongdoing is divorced from the issue of the plaintiff’s recovery. For instance, in Lord Sumner’s famous formulation of one of the poles of this controversy, the reasonable foreseeability of injury is material when the question is whether the defendant was guilty of negligence, and this “goes to culpability, not to compensation.”

The distinction between culpability and compensation is a distinction between who is liable, on the one hand, and to whom and for what on the other, and it presupposes that these questions are independent. The opposite approach can be summarized in Warren Seavey’s contention that “[p]rima facie at least, the reasons for creating liability should limit it.” When the defendant’s liability thus depends on the reasonable foreseeability of the plaintiff’s injury, wrongdoing embraces both litigants.

Often the problem of unforeseeable consequences in negligence law is discussed in terms of the viability and determinacy of verbal formulations (“foreseeable,” “natural and probable,” etc.) on the one hand and policy considerations on the other. The remarks that follow, however, are outside this false dilemma. Our concern is not with specific formulations contained in or suggested for positive law, but with the conceptual presuppositions that underlie them. These formulations are an attempt to represent something, and it is this something that is relevant here rather than the determining power of the formulations themselves.

Nor must we inevitably see duty and proximate cause as pointing to instrumental considerations of policy that orient the litigation toward independently identifiable goals. At issue in duty and proximate cause is how wrongdoing and causation are connected. When causation is understood as the doing and suffering of a single harm and wrongdoing as the violation of the abstract equality that pertains between doer and sufferer, neither category has an instrumental significance. If they can be connected in a way that respects their non-instrumental character, the link itself will be devoid of instrumentalism.

The Palsgraf case is perhaps the most famous exposition of the

rival approaches to the bearing of the defendant’s negligence on the plaintiff’s legal position. The negligent act of the defendant’s employee in dislodging the package of fireworks produced the plaintiff’s injury, but since the package gave no notice of its contents, the effect of this negligence on the plaintiff could not reasonably have been anticipated. Although both causation and negligence were present, they did not have a symmetrical significance for the two litigants. Since the negligence could be defined only in terms of the package’s owner, the plaintiff was suing for harm done to her as a result of a wrong to someone else.

Cardozo’s majority opinion emphasizes the relational quality of negligence. In construing negligence as the commission of a wrong that signifies the violation of another’s right Cardozo makes the wrongfulness of negligence embrace both the actor and the sufferer. The wrongfulness of unreasonably imposing on another the possibility of injury is correlative to the right of the other to be free from this imposition, and so the compensation that plaintiff seeks from the defendant is a vindication of her right. The plaintiff’s entitlement to compensation from the defendant mirrors her status as the victim of the wrong he has done her. Without such status the plaintiff cannot win.

Corresponding to the relational quality of negligence is the relational quality of risk. Risk is not intelligible in abstraction from a set of perils and a set of persons imperiled. As a way of referring to the harmful potentialities inherent in a given act, risk extends from the defendant’s creation of these potentialities to their actualization in the plaintiff’s injury. A negligent act releases a set of possibilities that due care could have avoided. Cardozo insists that the plaintiff cannot recover unless the injury that occurs actualizes a possibility within this set. The bond between plaintiff and defendant is the fruition in the plaintiff of the potential for injury contained in the wrongfulness of the defendant’s action.

At the moment of the commission of the wrongful act, the risk is relational in a general way. Because it refers to the possibility of harm, the risk does not include all the specific attributes of circumstance and person that qualify any actual harm. Risk is, therefore, general with respect to the class of persons that it might affect, the injury that might result, and the mechanism by which the injury might come to pass. It does not matter whether the defendant foreseeably endangered Mrs. Palsgraf as a specific and identified person, because the reasonable foresight is relative to a class of persons of whom Mrs. Palsgraf may or may not be one. Indeed, even if the defendant had every reason to suppose that Mrs. Palsgraf would not be at the station at that time, he would
nonetheless be liable if she turned up in the class relative to which the defendant's action was negligent.

Only when the harm materializes does this generality narrow to a particular victim and a particular injury. Duty and proximate cause, in Cardozo's approach, are the headings we use to subsume the particularity of the actual injury under the generality of risk. Duty addresses the question of whether the plaintiff, as the person in fact affected, is to be regarded as within the class foreseeably affected by the defendant's negligence. Proximate cause performs a parallel function with respect to the injury and the process through which the harm comes into being.\(^49\) Under the rubrics of duty and proximate cause, the courts formulate a general description of the risk that relates the plaintiff's suffering to the defendant's wrongfulness. This is not a mechanical operation exhaustively specifiable by rules set down in advance.\(^50\) Rather, the court's task is to determine in a given case the plausible range between a featurelessly inclusive generality and an exclusively singular particularity, and this task requires sensitivity to the contours of the fact situation and to differences that can be signaled by seemingly small variations.\(^51\) In the context of a specific happening, the general and the particular are held up to the light that each sheds upon the other.\(^52\)

Thus, Cardozo's view integrates causation and wrongfulness in a way that gives full faith and credit to each. The requirements of duty and proximate cause serve to subsume the particular injury under a casuistically appropriate general conception of the risk. The negligence particularizes the defendant who unreasonably creates potential damage of the kind that the plaintiff suffers.

In contrast, Andrews' dissenting opinion in *Palsgraf* attends in turn to the defendant's negligence and to the plaintiff's injury without integrating these two elements. Causation links the litigants as doer and sufferer, but the wrongfulness of the defendant's action is independent of whether the plaintiff is within the range of its foreseeable effects. The

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51. E.g., Doughty v. Turner Mfg. Co., [1964] 1 Q.B. 518 (C.A. 1963) (no liability for burns suffered from eruption of molten liquid after asbestos cover negligently knocked into cauldron; *alter* if negligent act had caused the liquid to spill); Bradford v. Kanellos 40 D.L.R.3d 578 (Can. 1973) (no liability for injury suffered in restaurant during stampede caused by someone yelling "Fire!" on hearing the hissing of a fire extinguisher putting out a flash fire in the grill; *alter* if the yell was prompted by the fire rather than the hiss?).
52. For a judicial elaboration of this process, see Lord Diplock's opinion in Home Office v. Dorset Yacht, [1970] 2 All E.R. 294, 323 (H.L.).
plaintiff's injury therefore need not be the materialization of the unreasonable risk created by the defendant.

The tensions resulting from the independence of causation and wrongdoing are evident from Andrews' opinion. He first construes the causing of harm as both irrelevant and decisive. "Where there is the unreasonable act," he writes, "and some right that may be affected there is negligence whether damage does or does not result. That is immaterial."?5 If the wrongfulness of the act is a function of its unreasonableness, it does not become more wrongful by materializing in harm or less wrongful by failing to materialize in harm. As in Thomson's Summers hypothetical, causation is a fortuity that does not affect the moral quality of negligent action. However, when Andrews goes on to assert that negligence involves a relationship not merely between the wrongdoer and those whom he might reasonably expect to injure, but between him and those whom he does in fact injure,54 the previously immaterial factor of damage becomes determinative of the recipient and of the extent of compensation. As Andrews shifts his gaze from the defendant's negligence to the plaintiff's claim, the occurrence of harm is transformed from something insignificant to something paramount.

Moreover, Andrews' comprehensive view of duty is at odds with his narrow conception of proximate cause. As long as the focus is on culpability, the duty is expansively owed to the world at large, so that all those in fact injured may complain. When Andrews turns specifically to the injury, the limitation of proximity is suddenly introduced—and expressly justified by its arbitrariness.55 The breach of the obligation at large wrongs everyone who has been injured as a result, but only an artificially defined subset can receive compensation in tort. As in the case of the historical categories of strict liability, the causal sequence is arrested at an internal marker, but here the limitation bears the additional burden of operating in the shadow of an inconsistently broad conception of duty.

His failure to integrate causation and wrongdoing brings into question the appropriateness of the litigational form under which Andrews would award the plaintiff damages in tort. Andrews' approach allows causation and wrongdoing to particularize a plaintiff and a defendant respectively, but as independent operations. The difficulty lies in finding a basis for joining these two particularized parties in a single lawsuit.

54. Id.
55. Id. at 352, 162 N.E. at 103.
CAUSATION AND WRONGDOING

Why must the negligent party compensate someone for an injury whose prospect was not an ingredient of the wrongdoing?

Several answers, none of them satisfactory, are available. One might first suppose that causation links the defendant to the plaintiff. However, to assert that causation is sufficient to entitle the plaintiff to recover is to return us to the inadequacy of Epstein's strict liability. Causation supplies a physical nexus between injurer and victim, but in itself contains no moral basis for compelling the former to compensate the latter.

Second, one might argue that the defendant's wrongdoing constitutes a link with the plaintiff. Since Andrews regards due care as an obligation owed to the world at large, its breach does not in itself give the plaintiff any special status to complain. Once the negligence has been committed, the function of the plaintiff in Andrews' conception should be to vindicate wrong done to the public at large. This function has no necessary connection with the injury suffered by any particular individual.

Third, although neither causation nor wrongfulness, taken each without the other, justifies holding this particular wrongdoer liable to this particular victim, perhaps the combination of these elements gives them a potency that they separately lack. The assumption here is that causation and wrongdoing together form a whole that is greater than the sum of its individual parts. The difficulty with this answer is that there is no such whole in the absence of a conceptual integration. Since Mrs. Palsgraf's injury is outside the range of the consequences that makes the defendant's action wrongful, Andrews conceives of wrongfulness and causation as mutually extrinsic elements that are contingently juxtaposed in his holding of liability. Such independent elements cannot leech from each other a joint power that they do not have severally.56

Fourth, the defendant's liability to Mrs. Palsgraf has been supported on the ground that it is fairer for the negligent perpetrator than for the innocent victim to bear the costs of the injury.57 This defense, however, merely reproduces the problem in a different form. It invites us to allocate the costs of this injury according to a comparison of the parties' guilt or innocence. This moral ledger, however, involves factors that apply not only to the particular accident in issue but also to the entire extent of a person's life and activity.58 Why, then, should our interest in the par-

56. See A. BERNDTSON, POWER, FORM, AND MIND 108 (1981) (on what it is for the whole to be greater than the sum of its parts).
ties' comparative innocence play itself out within the restrictive framework of this incident? The scope appropriate to the enterprise of comparison is at odds with the occasion and the form of the litigation.  

The root of Andrews' problem is that he does not regard wrongdoing and causation as the interpenetrating aspects of a unified conception of tort. Having broken the symmetry of causation and wrongdoing by assigning to the latter a significance peculiar to the defendant, his view cannot then recapture the integrity of the plaintiff-defendant relationship. Unless (as in Cardozo's treatment) wrongdoing and causation are regarded as concepts that correlatively particularize the litigants, their combination in negligence law is unstable and incoherent.

CONCLUSION

This paper has been concerned with the relationships between causation and wrongdoing, between plaintiff and defendant, and between the content and the litigational form of negligence. My theme has been that these various aspects are intelligible without postulating independently identifiable goals that stand beyond them, and that they come together as the mutually supporting parts of a juridical whole.

This concluding section makes some theoretical observations about treating causation and wrongdoing in this way. The exposition has taken the principal doctrinal and institutional components of negligence law more or less as given and then worked back from them to the structure that they embody. However, the philosophical antecedents and presuppositions of this conception of the internal harmony of negligence law have so far not been made explicit. I wish now to bring some of these to the surface, especially since the dominant instrumentalism of contemporary legal scholarship has made them so unfamiliar.

A preoccupation of this paper has been the relationship among the components of negligence law. Relationship can be understood in two ways. In an extrinsic relationship the elements are conceived as originally standing outside one another as independent entities that are then contingently joined. Each element is fully comprehensible in isolation,

59. Closely related is the argument that the fact that defendant may often have been negligent without having had to pay compensation justifies liability on the odd occasion when harm turns out to be unforeseeable. HART & HONORE, supra note 57, at 268. Here, too, the consideration invoked goes beyond the incident in question. Whereas the consideration in the text implicitly invites a global comparison of innocence and guilt, this one assumes both that unknown negligence of other occasions is relevant and that it is always to be debited to the defendant rather than to the plaintiff.

60. See also Weinrib, The Insurance Justification and Private Law, 14 J. LEGAL STUD. 681 (1985); Weinrib, The Intelligibility of the Rule of Law, in THE RULE OF LAW: IDEAL OR IDEOLOGY 59 (A. Hutchinson & P. Monahan ed. 1987); E. Weinrib, Legal Formalism, supra note 31.
and their joinder does not represent an inner necessity of their own but the result of an outside pressure. In contrast, the parts of an intrinsic relationship are originally intertwined with one another, so that they are incomprehensible apart from the relationship that they constitute. My argument has been that the components of negligence law are intrinsically related.

The distinction between extrinsic and intrinsic relation tracks the contrast between instrumentalism and its opposite. If causation and wrongdoing are understood non-instrumentally, an intrinsic relationship between them will necessarily also be non-instrumental. If, however, they are extrinsically related, the combination of causation and wrongfulness will have to be understood instrumentally even if the concepts in isolation are not initially instrumental. Since on the extrinsic understanding the elements being joined do not conceptually belong together, their joinder must be for the sake of some purpose that lies beyond at least one of them. Because an instrument can be defined as something whose intelligibility lies outside it in the end to which it is a means, an extrinsic understanding of relation is necessarily an instrumental one.

Intrinsic and extrinsic conceptions of relationship yield different understandings of the role of positive law. Causation and wrongdoing are concepts in the juridical understanding of action. If they are intrinsically related, positive law can reflect in its doctrine the seamlessness of that relationship by judging action in its light. If, however, they are extrinsically related, positive law is the external force that brings (or chooses not to bring) them together. For intrinsic relation, positive law functions to make explicit in particular cases the connection implicit in the related concepts. For extrinsic relation, positive law brings into being a combination that otherwise would have no significance whatsoever. The former function is paradigmatically adjudicative, the latter function is, even if performed by judges, paradigmatically legislative.

When the relationship between causation and wrongdoing is conceived as intrinsic, the defendant can be truly said to have wrongfully injured the plaintiff and, equally, the plaintiff to have been injured by the defendant. In these formulations the injury is qualified in a distinctively moral way, and the relationship between the litigants has the same structure from the standpoint of each of them. Since the wrongfulness modifies the plaintiff’s injury and the injury is modified by the defendant’s wrongfulness, causation and wrongfulness pertain even to the parties that they do not respectively particularize. The progression from wrong to injury is considered a single normatively meaningful unit, and, similarly,
the litigational form embraces plaintiff and defendant in a single normatively meaningful relationship.

If, on the other hand, the relationship is conceived as extrinsic, causation and wrongdoing are kept discrete. Thus, in Thomson's hypothetical on *Summers*, the injury is regarded as a fortuity in comparison with the equal wrongfulness of the two shooters, and in Epstein's version of strict liability, the wrongfulness of the defendant's act is insignificant in the face of the plaintiff's injury. When brought together, wrongdoing and causation do not mark out a single normatively significant relationship. The defendant may be said to have committed a wrong and the plaintiff to have suffered an injury without it being true that the defendant wrongfully injured the plaintiff. Accordingly, in the views of Coleman and Andrews, wrongdoing and causation combine differently from the standpoint of the plaintiff than they do from the standpoint of the defendant, and the parties' wrongful doing and suffering cannot, therefore, be expressed correlative in the active and the passive voice.

An intrinsic conception of the relationship makes sense of tort law in a way that an extrinsic one does not. In tort law the plaintiff's injury and the defendant's wrongfulness come together in the damage award, which is both the end of the litigation and the prospect that determines its character. The defendant is compelled to transfer to the victorious plaintiff a sum that settles the accounts between them. Since the same amount is given as is received, the damage award does not distinguish between the value of the defendant's wrongfulness and the value of the plaintiff's injury. This is hardly surprising if the relationship between the wrongfulness and the causation is an intrinsic one. The unity of the sum, on this view, simply reflects the unity of the relationship. Accordingly, an intrinsic understanding of the relationship will be completely adequate to the nature of the damage award in tort law.

From an extrinsic perspective, in contrast, the damage award always has a measure of mystery: how can wrongfulness and causation as discrete considerations come together in a single sum? An instrumentalist approach, accordingly, interprets each concept as embodying a different goal, the combination of which in tort law makes no sense except as a dubious convention of legal discourse, institutional practice, or law school curriculum. Thus a standard strategem for criticizing tort law is to specify the goals that can be ascribed in isolation to the plaintiff's receipt and to the defendant's payment of money, and to point out that these separate purposes cannot be preserved in a single tort award. For instance, if the purpose of the plaintiff's receiving money is to compensate for injuries, why restrict compensation to wrongful injuries? Con-
versely, if the purpose of the defendant's payment is to deter or to penalize wrongdoing, why is the fine dependent on the fortuity of injury or payable by a liability insurer? The presence of each party with his respective purpose frustrates the purpose applicable to the other. The decomposition of the relationship between the litigants into the goals applicable to them separately means that tort law can be seen as a congeries of arbitrarily overlapping lotteries. Hence the argument for the abolition of tort law in favor of compensation or regulatory schemes that attend separately to the separate functions.  

Alternatively, the extrinsic approach can appraise tort law as viable to the extent that it usefully combines its separate functions. For instance, the plaintiff's entitlement to sue in tort can be regarded as an efficient mechanism for privately enforcing the public standard that was violated by the defendant's wrongful act. Although no inner connection ties the violation of a public standard to a private mechanism of enforcement, positive law brings them together out of administrative convenience. The damage award functions as a bribe that induces the injured party to vindicate the public standard.

This notion of the private enforcement of a public standard preserves tort law but not as a fully understandable phenomenon. Here causation particularizes the plaintiff not because the injury has infringed his rights, but because the injury makes salient the identity of the most convenient private prosecutor. Interpreting tort law in this way gives rise to at least two perplexities. First, why is causation indispensable for particularizing the enforcer? Some tortious behavior happens to imperil only one person, and yet that person cannot successfully sue in tort if the act dissipates itself without injurious consequences. Although a wrongful act has been committed and the identity of the private enforcer is salient in these circumstances even without injury, tort law unambiguously denies recovery. Second, why is the amount of the bounty received by the plaintiff equal to the valuation of his injury? The method of computing tort damages is at odds with the purpose ascribed to them. Tort law restores the plaintiff to the position he would have been in had the tort not occurred. It operates on a present situation by wiping out, so far as it can, the effects of a past event. In contrast, an inducement is

supposed to motivate someone to act in a certain way by holding out a
future prospect that improves upon a present situation. Accordingly, the
relevant point for the fixing of the inducement should be a comparison
with what the plaintiff would have had without the inducement, not a
comparison of what he would have had without the injury. No doubt,
saving explanations can be produced, perhaps in terms of an optimal
level of generalization that causes the explanatory structure to fit the
legal institutions only loosely. What is noteworthy is not that explana-
tions are possible—with enough epicycles even Ptolemaic astronomy is
possible—but that they are necessary.

When causation and wrongdoing are regarded as capable only of
extrinsic relation, tort law is to a greater or lesser extent unintelligible.
Once one postulates an initial plurality of elements, their combination in
tort law becomes a matter of puzzlement. Intrinsic relation, in contrast,
treats causation and wrongdoing as parts of a unity that tort law ex-
presses in the damages the defendant is obligated to pay and the plaintiff
is entitled to receive. By any standard of explanatory parsimony, an in-
trinsic understanding of the relationship of causation and wrongfulness is
superior to an extrinsic one.

One might object that this explanatory superiority is beside the
point because the purpose of legal theory is not to explain but to justify.
Legal arrangements, it might be said, are not natural phenomena; they
cry out for an exposition of their normative foundations. What this ob-
jection ignores, however, is that an account of law in terms of the intrin-
sic relationship of causation and wrongdoing is an essentially normative
one, because it refers to—and integrates—the most fundamental con-
cepts by which we comprehend the morality of interaction. In attending
to action in its most elementary form, i.e., from the standpoint of injury
to another, it explicates the normative dimension of action and passion
unmediated by (and thus independent of the value that one might assign
to) outside goals. Explanation in these terms is inherently justificatory.

This form of theorizing has a distinctive texture. It takes the inter-
action of plaintiff and defendant as the most primitive datum of analysis
and seeks to show how the contours of positive law can reflect the intelli-
gibility of this interaction. It therefore does not start with the specifica-
tion of any extrinsic purpose for the relationship of the interacting
parties, nor with the state as the promoter of such purpose. Its mode of
justification focuses on the equality of actors in their impingements each
upon the other and is indifferent to any conception of the good to which
the parties’ relationship or the law’s operation on that relationship can be
oriented. In other words, its non-instrumentalism presupposes the priority of the right.

The Kantian inspiration of this approach will be readily apparent. Kant conceived of persons as ends in themselves who cannot be used solely as means for the accomplishment of another's purposes. Adjudication could not, therefore, properly be the mechanism for promotion of any collective goal aside from the disclosure and vindication of the normativity immanent to the interaction of persons. In their relations with others, persons are subject to the concept of right, which is the totality of conditions under which the actions of one can be united with the freedom of others in accordance with a universal law. Kant's legal philosophy was thus an exploration of the intelligibility of doing and suffering as between free and equal moral persons.

The present treatment of causation and wrongdoing is Kantian in its form as well as in its content. Kant's purpose was to exhibit the systematic interrelationship of juridical concepts that must be expressed in law if law is to be adequate to the interaction of free and equal moral persons. To reason Kant ascribed the function of ordering concepts so that they make up an articulated whole that allows each to be understood through its relationship with others. Reason does not unite concepts by obliterating the differences between them. It recognizes their distinctness, but relates them intrinsically as a systematic whole rather than extrinsically as an aggregate of juxtaposed elements.

The connection of wrongdoing and causation thus raises in the context of negligence law the most venerable philosophic problem of all: the relation between the one and the many. Since a multiplicity of discrete elements is intellectually unsatisfying, philosophers have always wondered whether one could discern the outline of a comprehensive unity. Kant's integrative interpretation of doing and suffering under the concept of right itself has ancient roots, because it translated into the terms of his metaphysics of morals Aristotle's pathbreaking elucidation of corrective justice.

Aristotle was the first to notice that private law exhibited a rationality internal to the relationship of doer and sufferer, and he demonstrated that this rationality, which he termed corrective justice, was distinct from that governing considerations of distribution and assessments of virtue. At the heart of corrective justice was a special kind of equality

66. ARISTOTLE, NICOMACHEAN ETHICS bk. V, paras. 2-4. For a discussion of this text, see E.J. Weinrib, Aristotle's Forms of Justice, 1 Ratio Juris ___ (forthcoming 1988).
that abstracted from the particular characteristics of the interacting parties. Aristotle conceived of the private law wrong as violating this equality, and of the award of damages as restoring it. His was thus the first analysis in our philosophical tradition both of the distinctiveness of the plaintiff-defendant relationship and of the role of adjudication in vindicating the relationship’s moral dimension.

Corrective justice—or rather the term—has reappeared in contemporary tort theory, but with different ambitions. For Epstein, corrective justice is the slogan that provides respectability to his elaborate but fundamentally unreasoned intuition in favor of strict liability. In Coleman’s writing, corrective justice (which for him is the postulate that wrongful gains and losses be annulled) expresses a public purpose that has no necessary connection with the private law mode or with the correlativity of wrongful doing and suffering. Epstein thus ignores the equality, and Coleman the unity, of the Aristotelian version. Missing from both is the uncompromising integration of juridical content and litigational form that gave Aristotle’s original notion its power and durability.

The issue at stake in discussions of causation is a very large one: does private law have its own theoretical requirements, or is it receptive to whatever public purpose we wish to impose upon it? This issue has long been with us, even when academic writing was less consciously philosophical than it is now. One can recall, for instance, Seavey’s contention that Cardozo’s opinion in the Palsgraf case was “more consistent with the underlying theory of negligence,” and Prosser’s riposte that there is no such thing as a theory of negligence since tort law, like the Constitution, is what we make it.

Although Seavey referred to the underlying theory of negligence, he never elaborated such a theory. However, the unity that he celebrated in Cardozo’s Palsgraf opinion is the hallmark of all theoretical attempts from antiquity onward to understand the distinctively non-instrumental nature of private law. Great lawyer that he was, Seavey’s reference to theory was perhaps truer than he realized.

67. Seavey, supra note 47, at 34.
68. Prosser, supra note 57, at 15, 17.