

Rethinking Injury and Proximate Cause

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TABLE OF CONTENTS

| | | |
|------|---|------|
| I. | INTRODUCTION | 1315 |
| II. | PERRY ON HARM..... | 1316 |
| III. | HARM VERSUS INJURY..... | 1321 |
| | A. <i>Injury, Harms, Rights Violations, and Lost Expectancies</i> | 1321 |
| | B. <i>Harm and Damages</i> | 1330 |
| IV. | HARMS, WRONGINGS, AND A RATIONALE FOR PROXIMATE CAUSE | 1332 |
| V. | CONCLUSION | 1343 |

I. INTRODUCTION

Injury and proximate cause form two components of a plaintiff's prima facie negligence case.¹ Although equals in this sense, they have received starkly different treatment at the hands of judges and scholars. Proximate cause has long attracted attention, yet has also managed to defy repeated efforts at characterization and explanation.² Injury, by

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1. See RESTATEMENT (SECOND) OF TORTS § 281 (1965) (defining the elements of negligence, albeit using the term “legal cause” in place of proximate cause).

2. See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 45, at 311–12 (1941) (noting the degree of attention, and confusion, surrounding proximate cause doctrine).

contrast, seems to have been largely ignored.³

One of the many virtues of Professor Perry's paper⁴ is that it prompts reconsideration of this disparate treatment from both ends. By offering a subtle and rich account of the related concept of "harm," Perry permits us to see that the concept of "injury" is normative, contestable, and therefore laden with interesting questions. Likewise, his analysis provides a springboard from which to launch an inquiry into proximate cause. In this Commentary, I will undertake both of these projects, first, by reviewing and elaborating Professor Perry's thoughtful analysis of harm, then by analyzing the distinction between the concepts of harm and injury, and finally by sketching an account of proximate cause that can help explain why it has a legitimate role to play in negligence law.

II. PERRY ON HARM

Professor Perry proceeds primarily by working against contrary analyses offered by Joel Feinberg and Seana Shiffrin.⁵ My comments will not attempt to retrace his critique of their work—it is clearly laid out in his paper. Instead, I will try to reconstruct Perry's positive claims about harm.

His most basic claim is that a person can be said to suffer a harm *only if some relevant interest of hers has been adversely affected*.⁶ Built into this proposition are at least five discrete claims, each of which has further implications. To summarize, and without introducing various qualifications to be developed below, Perry maintains that:

- (1) Harm is a normative concept rather than a purely descriptive concept.
- (2) Individual instances of harm are, as a normative matter, treated as discrete effects, even when accompanied by offsetting benefits.

3. Despite noting the existence of the injury element in torts such as negligence, two of the leading torts treatises omit any separate treatment of the injury requirement. See DAN B. DOBBS, *THE LAW OF TORTS* xv–xxxiii (2000) (demonstrating the absence of a separate listing for the injury requirement); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* xxv–xxx (W. Page Keeton ed., 5th ed. 1984) (same). The thinking seems to be that there is little to be gained from analyzing what renders a broken leg or shattered psyche an injury.

4. Stephen Perry, *Harm, Counterfactuals, and Compensation*, 40 *SAN DIEGO L. REV.* 1283 (2003).

5. See JOEL FEINBERG, *Wrongful Life and the Counterfactual Element in Harming*, in *FREEDOM AND FULFILLMENT: PHILOSOPHICAL ESSAYS* 3 (1992); Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 *LEGAL THEORY* 117 (1999).

6. Perry, *supra* note 4, at 1303, 1309.

- (3) Harm generally can be described independently of how it comes about.
- (4) Whether one has suffered an adverse effect on one's interests is and ought to be assessed historically, rather than counterfactually.
- (5) Determinations of the appropriate measure of compensation for harm may appropriately rely on a different criterion than the historical criterion used to determine if harm has occurred.

Let me briefly elaborate each of these claims.

It is tempting to think of ascriptions of harm as descriptions of facts. Indeed, core instances of harm, such as broken limbs, seem to be particularly brutish in their factualness. Yet the inference from brutishness to factualness is misleading. Broken limbs are treated as obvious harms not because harm is a matter of unadorned fact, but because, on almost any plausible normative account of human well-being, dramatic loss of physical integrity will count as a significant setback.⁷ The fact of the matter as to whether *X*'s limb is broken matters to the assessment of whether harm has occurred. But the assessment is not only factual.

So Perry's first claim is that harm is a normative concept rather than simply a factual one. More specifically, he cashes out the normativity of harm in terms of a substantive distinction among human interests.⁸ It is only if a person suffers a setback to the right sort of interest that she may claim to be harmed. It follows that an adverse effect on a person's interests is a necessary but not a sufficient condition for the existence of harm. This is because, if the interest affected is not the right sort of interest, then the adverse effect on it does not count as harm.⁹

Although he is not concerned in this paper to provide a description of what counts as the right sort of interest, Perry posits that there is a set of

7. One can imagine a conception of life in which instances of dramatic loss of physical integrity do not count as harms but instead as benefits. For example, it is sometimes said that there is an overall benefit in becoming partly disabled (e.g., by losing one's hearing) because it is only by doing so that one can gain access to previously unavailable goods of community, spirituality, self-knowledge, etc. This just highlights the fact that the question of what sort of effect should count as a harm will depend on contestable judgments of political, moral, and legal theory.

8. Perry, *supra* note 4, at 1295.

9. Perry also points out that de minimis interferences to core interests might not suffice to count as harms. *Id.* at 1303.

“core” interests that, when adversely affected, generate harms. That core, he supposes, includes an individual’s interests in bodily integrity, pain avoidance, and emotional tranquility. By contrast, his prime exemplar of a category of noncore (secondary) interests is the category of “recursive” (or meta-) interests: interests in core interests. The interest in avoiding a *heightened probability* of lost bodily integrity—as opposed to lost bodily integrity itself—is an example of a recursive interest. Perry believes that it is perfectly intelligible to describe recursive interests as being adversely affected. Indeed, he posits that individuals may sometimes have a right against others that they avoid acting so as to interfere with these sorts of secondary interests.¹⁰ Still, such interferences do not, in his analytic taxonomy, count as harms.¹¹

Perry next maintains that, *for purposes of determining whether a harm has occurred*, the law ordinarily conceptualizes harms discretely.¹² Thus, if a person suffers a setback to a relevant interest, but also obtains a comparable or greater gain to that interest, or some other interest, the gain is not treated as *annulling* the harm. For example, suppose rescuer *D* intentionally breaks unconscious *P*’s arm in order to pull her from the wreckage of an accident and thereby save her life. By saving *P*, *D* has conferred a benefit to *P* that can be supposed to outweigh the adverse effect on *P*’s bodily integrity. Still, according to Perry, the law usually does not, and conceptually we should not, treat the benefit of being saved as somehow undoing the fact that *P* suffered the harm of a broken arm. Of course, one might conclude that the benefit conferred on *P* should affect our assessment of whether *D* was *justified* in harming *P*. Alternatively, *D* might be entitled to an offset against any damages he has to pay by virtue of having caused a harm to *P*. But none of this denies that *P* experienced a harm.

Perry’s third claim is that the issue of *whether* a person has suffered harm is, except in one special set of cases, analytically distinguishable

10. *Id.* at 1305–08. In an analysis somewhat similar to Perry’s, Professor Zipursky and I have distinguished between “intermediate” and “ultimate” harms, as well as “unripened” and “target” harms, and argue that only ultimate or target harms confer on the victim the ability to satisfy the “injury” element of the negligence tort. John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1650 (2002). I leave for another day whether clear analysis is best promoted by distinguishing (as we do) among two types of “harm,” only one of which constitutes injury, as opposed to, or in addition to, distinguishing between setbacks that amount to harms and setbacks that do not (as Perry does).

11. In addition to recursive interests, Perry identifies other sorts of interests, such as purely aesthetic interests, that might count as secondary. For example, the erection of a hideous structure that blocks homeowner *H*’s previously unfettered view of a dazzling landscape, but otherwise does not interfere with *H*’s property rights, is surely a setback to *H*, but might not constitute a harm to *H*. Perry, *supra* note 4, at 1306–08.

12. *Id.* at 1304–05.

from the issues of *how* that harm came about and *who* brought it about.¹³ To impose some ugly terminology on his position, we might say that he regards harm as generally capable of being described monadically, as opposed to dyadically or relationally. Perry takes the failure to perceive the monadic nature of (most) instances of harm as one of the central mistakes of Feinberg's analysis. By focusing his efforts on parsing the dyad of "*A* harms *B*," Feinberg conflates the idea of *causing harm* with the distinct idea of *suffering harm*.¹⁴ If hiker *H* trips on a tree root in a virgin forest and breaks his leg, it is entirely appropriate, according to Perry, to say that *H* suffered a harm, even if there is no one (else) who can be said to have harmed *H*.

There is, however, an exceptional set of cases in which the setback cannot be captured without reference to a person doing the harming. Perry gives the example of an act of rape. Perhaps the central harm of rape—the setback to the victim's interest in autonomy—cannot, he says, be captured simply by reference to the condition of the victim's person or state of mind. Such a characterization necessarily requires reference to the fact that the victim was subjected to nonconsensual sex by another.¹⁵

Perry's fourth claim, and the central focus of this paper, is that there are two different criteria or tests for assessing whether a person has experienced a setback to a relevant interest.¹⁶ Both tests are *comparative*—both seek to identify setbacks by evaluating the condition of the relevant interests in two different states of affairs. They differ because they draw comparisons between different states of affairs.

The first test, favored by Feinberg, is the *counterfactual test*. It considers the condition of the relevant interest subsequent to an event and compares that subsequent condition to a *hypothetical* condition, namely, the condition that the interest would have been in had the event never occurred. In algebraic form, the counterfactual test can be represented as $C_{(HY)} - C_{(PE)}$: the difference in the condition of the relevant interest(s) in the hypothetical state and the post-event state. The second test, favored by Perry, is the *historical worsening test*. It also examines the condition of the relevant interest subsequent to an event. However, unlike the

13. *Id.* at 1294–95.

14. *Id.* Perry also rightly criticizes Feinberg for further conflating issues of causation and issues of responsibility in his account of what it means to say "*A* harms *B*."

15. *Id.* at 1295.

16. *Id.* at 1286.

counterfactual test, the historical worsening test compares that subsequent condition to an antecedent condition, namely, the condition that the interest was in just prior to the occurrence of the event. Algebraically, the historical worsening test can be represented as $C_{(A)} - C_{(PE)}$: the difference in the condition of the relevant interest(s) in the antecedent state and the post-event state.

Although Perry does not stress this point, I think it is important for purposes of analysis to emphasize that the two tests, though different in substance, overlap considerably, especially in the tort context. Imagine an instance in which *P* is sitting on a bench waiting for a bus. *D* drives his car over the curb and into *P*, causing *P* to suffer a broken leg. Under either test, *P* has suffered a harm. So far as we can know, *B*'s leg probably *would have been* intact had *A* not acted as he did. Likewise, *B*'s leg *was in* the condition of not being broken prior to *A*'s colliding with *B*.

Despite this overlap, Perry insists that the counterfactual test is not the correct test for harm. In support of this claim, he relies primarily on a famous tort problem in which two fires, one set by *X*, another set by *Y*, merge to cause the destruction of *Z*'s property.¹⁷ It is assumed that each fire was substantial enough that it would of itself have destroyed the property. Given these facts and assumptions, Perry maintains that the counterfactual test is committed to the counterintuitive proposition that *Z* suffered no harm at the hands of *X* or *Y*. This is because it cannot be said with respect to either *X*'s acts or *Y*'s acts that *Z*'s property would have been in its prefire condition had not *X* or *Y* acted as he did. By contrast, the historical worsening test reaches the intuitive result, because before either *X* or *Y* acted, *Z*'s property was intact, whereas after each acted, it was incinerated.

Perry's fifth and—for purposes of my exposition—final claim specifies that the adoption of the historical worsening test for harm does not entail the propriety of using that test as the measure of compensation owed by a wrongdoer who causes harm to the victim.¹⁸ Conversely, the counterfactual test, which he deemed inappropriately employed as a criterion for determining whether harm has occurred, might at least sometimes be an appropriate benchmark for setting the value of compensatory damages. Here, Perry proceeds cautiously, largely content to make the negative (nontailment) point. He does suggest, however, that, as a matter of positive law, it is standard for courts in tort cases to instruct juries to compensate tort victims in accordance with the counterfactual test by awarding them the sum of money that will put

17. *Id.* at 1286–87; see *Kingston v. Chi. & N.W. Ry. Co.*, 211 N.W. 913, 914–15 (Wis. 1927).

18. Perry, *supra* note 4, at 1309–10.

them in the same position in which they would have been had they not been wronged.¹⁹

III. HARM VERSUS INJURY

There is a great deal more in this rich paper than I have outlined here, but I take the foregoing five claims to form the spine of Perry's argument. I now turn to evaluation. In this Part, I will attempt to clarify and build on his analysis by revisiting the distinction between harm and injury.

A. Injury, Harms, Rights Violations, and Lost Expectancies

I will begin my analysis by considering together the third and fourth claims that I have attributed to Professor Perry, starting with the former. It maintains that harm generally is capable of being described without reference to how the harm was brought about, but that certain special kinds of harm are not capable of being so described. An example of a case that would seem to fall in the special category will help articulate the exception and the rule.²⁰

Suppose *L* owns a large parcel of land in a rural area whose surface is covered with more than a foot of snow. One day, *L* is approached by *D*, who wishes to drive his heavy construction equipment across *L*'s property in order to reach a construction site. *L* refuses permission out of plain orneriness: he stands on his property rights. Now suppose two alternative scenarios. In the first, *L* wakes up the next morning, goes for

19. *Id.* Perry quotes Lord Blackburn's opinion in *Livingstone v. Rawyards Coal Co.* for the proposition that courts typically instruct juries in tort cases to employ the counterfactual test to measure damages. *Id.* at 1310. According to Blackburn, the jury is to award "that sum of money which will put the party who has been injured . . . in the same position as he would have been in if he had not sustained the wrong." *Livingstone v. Rawyards Coal Co.*, 5 App. Cas. 25, 39 (P.C. 1880) (appeal taken from Scot.).

Although "would have been" is the signature language of the counterfactual test, a certain amount of care is needed here because there is a sense in which the historical worsening test also employs counterfactual analysis. For example, one could state it as follows: Victims have suffered harm only if, but for the harm, they would still be in the condition that they were in had the tort not occurred. Indeed, courts often use counterfactual language to convey the idea of historical worsening in the context of instructing jurors on what it is that their damage award is meant to compensate. See Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1578–79 (1997) (discussing typical judicial formulations).

20. The following example is drawn from *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997).

a walk with snowshoes, and discovers tracks in the snow on a remote corner of his property indicating that *D* went ahead and crossed it with the heavy equipment. In scenario two, *L* goes for a walk and finds that a large herd of wild animals has crossed his property. Assume in both scenarios that there is no effect on the land except that the snow on the surface of this remote corner of the property has been tamped down. Thus, we can assume that *L* has suffered no setback in terms of his use and enjoyment of his property or the economic value of the property. For either scenario, has *L* suffered a harm, in Perry's view?

I take it that his position would be that, if *L* has suffered any harm, it is only in the first scenario, in which *D* brought his equipment across the property. This is because the invasion of *L*'s right to exclude others from his land will only qualify as harm if it is one of those special cases in which the adverse effect must be specified in conjunction with a description of how it came about. *L* suffered an invasion of his rights only because *another person* purposely intruded. By contrast, in the case in which the wild beasts caused the same consequence, *L* cannot claim to have suffered a rights violation. At best, he has a claim to an adverse effect on something that would seem to qualify as one of Perry's secondary interests: interference with *L*'s aesthetic sensibilities.

Perry could invoke his category of special cases to describe the first scenario as one in which *L* was harmed. In doing so, his categories would track at least some judicial usage.²¹ However, I think the contrast between the two scenarios helps to show that *L*'s misfortune in the first scenario is somewhat awkwardly captured by the idea of *L*'s having suffered a harm, especially given Perry's "historical worsening" conception of harm (discussed in more detail below). This is not to deny that there is a temporal aspect to *L*'s treatment at the hands of *D*. Prior to the time of *D*'s acts, *L*'s right to exclude had not been interfered with, whereas after that time it had been. But the purely intangible nature of the interference—the fact that *L* suffered a setback only in the form of *D*'s refusal to recognize *L*'s intangible right to exclude other persons from his property—suggests not so much that *L* suffered a special kind of harm, but that *L*'s experience is better captured without reference to harm. The negative effect on *L*, one might say, did not consist of a change in *L*'s actual condition, nor the condition of *L*'s land, and absent such a change in condition, we are dealing with a different category of negative effect.²²

21. This is one way in which the *Jacque* court expressed its holding. *Id.* at 160 (describing this sort of trespass as generating a harm).

22. This point can perhaps be made clearer by considering a hoary example from tort law. Suppose that *B*, neighbor of *A*, throws a rock that travels across *A*'s yard and lands on a public street on the far side of the yard, never having made contact with

It is crucial to emphasize that a decision to follow the conceptual path just charted by concluding that *L* was not harmed at the hands of *D* by no means entails that *L* lacks a tort cause of action against *D*. Indeed, this is precisely the significance of the distinction between the concept of harm and the broader concept of injury. Tort causes of action such as negligence typically require the plaintiff to prove the occurrence of an injury as part of her prima facie case.²³ But injury is a relatively capacious normative concept that includes not only harms, but also other adverse effects, such as rights violations. For example, courts have long permitted actions for *harmless* trespasses to property, which are signified by the award of nominal damages.²⁴

Thus, a court entertaining a trespass action by *L* against *D* might readily conclude that *D*'s conduct was tortious *notwithstanding* the absence of harm. Employing legalese, it might alternatively conclude that the violation of *L*'s rights creates, as a matter of law, an inference of harm.²⁵ With these options available, it may be that Perry would do better, in terms of the consistency of his analysis of the concept of harm, were he to eschew the idea that there is a special class of harms that require a different sort of description than the general run of harms, and instead treat these cases as instances of wrongs that cause a class of injury distinct from any harms that they might also cause.

The suggestion that rights violations can and perhaps should be described independently of harms also ties in with Perry's fourth and main claim, to which I now turn. This claim asserts that, for purposes of defining harm, the idea of "adverse effect" to relevant interests is and

anything (other than the air) in *A*'s yard. Suppose also that neither *A* nor anyone else other than *B* was present at the time: *B* informs *A* about what happened after the fact. *B* has committed a trespass on *A*'s land notwithstanding the absence of any disturbance in the condition of the land. See DOBBS, *supra* note 3, § 54, at 108 ("It is trespass to . . . fire a bullet across [another's land] . . . or even to extend an arm into the airspace.").

23. See *supra* note 1 and accompanying text.

24. DOBBS, *supra* note 3, § 50, at 95, § 56, at 113. The award of nominal damages might suggest that tort law treats misconduct causing harmless rights violations as less grave than misconduct causing harm. This is not so. The *Jacque* court, for example, determined that purposeful harmless trespasses at least sometimes warrant the imposition of substantial punitive damages. 563 N.W.2d at 159–62. In distinguishing harms from rights violations, I do not claim (nor does Perry) that harmful misconduct is categorically more culpable or serious than harmless rights violations. Nor do I mean to deny that the foregoing hypothetical is unusual in that rights violations typically are accompanied by harms.

25. This usage is also employed by the court in *Jacque*. 563 N.W.2d at 160 ("The law infers some damage from every direct entry upon the land of another.").

ought to be cashed out in terms of the historical worsening test, rather than the counterfactual test.

As indicated above, Perry's central argument for the impropriety of the counterfactual test as the criterion for determining whether harm has occurred rests on the example of the joining fires case. His claim is that application of the counterfactual test to that case results in the counterintuitive finding of no harm.²⁶ I suspect, however, that a defender of the counterfactual test for harm could avoid this problem by asserting that the plaintiff who loses his house because of the two independently sufficient fires has suffered harm by virtue of the two fires, treated as a unit or single event. After all, if *both of them* had not occurred, the plaintiff's house would have been intact. Therefore, under the counterfactual test, the plaintiff suffered a harm.²⁷

I will not dwell on whether this move will suffice to rebut Perry's criticism. Instead, I want to further explore the implications of adopting the historical worsening test. In particular, I want to suggest that, just as its application to rights violations might suggest that rights violations are best conceptualized as nonharmful injuries, its application to another class of cases may suggest the existence of another category of adverse effects that generate injury and liability yet fall outside the category of harms. The easiest way to identify this category is to turn our attention, momentarily, from tort to contract.

Contract law poses an apparent challenge for Perry's endorsement of the historical worsening test as the exclusive test for determining whether harm has occurred. Indeed, this challenge seems to explain in part why Feinberg rejected the historical worsening test.²⁸ Here we encounter what Fuller and Perdue famously termed the "expectation interest."²⁹

Some breaches of contract generate consequences that quite readily fit the historical worsening test's criterion for adverse effect. These are breaches that affect what Fuller and Perdue called the "reliance

26. Perry, *supra* note 4, at 1286–87.

27. Perry's critique of the counterfactual test may suffer from the same conflation that tripped up Feinberg in that it seems to fuse the question of whether, on a counterfactual analysis, either or both of the two fire-igniters can be deemed to have *caused* the plaintiff's harm (under the but-for test, they cannot, since neither's conduct was a necessary condition for the harm to occur) with the question of whether, on a counterfactual analysis, the plaintiff can be deemed to have *suffered* a harm (seemingly, he can).

28. See Perry, *supra* note 4, at 1287 (describing Feinberg's argument that the historical worsening test must be rejected because it cannot account for the intuition that someone who is prevented from entering and winning a beauty contest suffers a harm).

29. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936) [hereinafter Fuller & Purdue I]; L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373 (1937) [hereinafter Fuller & Purdue II].

interest.”³⁰ They leave the nonbreaching party with fewer assets than before the time the contract was entered into, perhaps because that party incurred expenses to prepare for and undertake performance prior to the breach.³¹

But what of breaches that prevent the nonbreaching party from attaining a condition of being better off without leaving her materially worse off—cases in which the only harm to the nonbreaching party is to her expectation interest? Can these be accommodated within the historical worsening conception? Suppose, for example, *A* enters into a valid contract with *B* to sell widgets to *B* for a set payment. *A*, however, breaches and does not deliver the widgets, for which *B* never pays. Has *B* suffered a historical worsening by virtue of the breach? Perry’s comments about Feinberg’s beauty pageant example—which suggest that a detained contestant who misses the pageant because of the detention could claim to have suffered harm in the form of interference with her opportunity to win the pageant—indicate that he may be inclined to conclude that *B* has suffered a harm under the historical worsening test.³² *A*’s breach made *B* worse off than he had been because it denied him an opportunity that he once had, namely, the opportunity to have and use the widgets, presumably to increase his welfare.

As with defining rights violations as a “special kind” of harm, there is nothing necessarily incoherent about treating lost expectancies as historical worsenings.³³ Still, the description seems awkward for two reasons. First, there is at least a superficial tension between treating loss of opportunity as harm and yet maintaining, as Perry does, a distinction between core and noncore interests. Indeed, it seems that something like this tension is what drove Fuller and Perdue to conclude that expectancies were ‘second class’ interests, interferences that generated no claims to having been treated unjustly. In their view, the interest in

30. See generally Fuller & Perdue I, *supra* note 29; Fuller & Perdue II, *supra* note 29.

31. Again, Perry wants to distinguish sharply between harm and compensation for harm. As explained below, so long as the plaintiff experiences a historical worsening of a relevant interest, he is perfectly entitled to claim that certain heads of damages (e.g., future income) are appropriately set by reference to the counterfactual test.

32. Perry, *supra* note 4, at 1292–93.

33. Of course, this analysis presumes that the relevant antecedent condition is the condition the nonbreaching party was in just after contract formation, but prior to breach. An argument will be needed as to why that is the right baseline, as opposed to the condition of the nonbreaching party just prior to contract formation, at which point in time the nonbreaching party did not have the option that he “loses” by virtue of the breach.

having one's contractual expectations satisfied is *not* a core interest. They therefore saw no reason grounded in justice for contract law to protect the expectation interest: absent a harm, there is nothing to correct.³⁴ Instead, interferences with expectancies should be remedied only to serve pragmatic or utilitarian ends.³⁵

While Perry need not be committed to these conclusions,³⁶ Fuller and Perdue's perception that expectancies do not seem to be interests on the same order of, say, the interest in bodily integrity, does suggest the need for an explanation as to why he is willing to treat these disparate interests as members of the same category. By necessary implication from his definition of harm, if Perry is going to treat lost opportunities as harms, then he is treating them as core, rather than secondary, interests. It is incumbent on him, therefore, to say more about why they deserve "first class" status.

Even if Perry can provide this explanation, and can appropriately treat interferences with expectancies as historical worsenings—namely the destruction of previously enjoyed opportunities—one can imagine special instances of contract breaches that cause the nonbreaching party a loss, yet do not seem to involve historical losses of opportunities. Thus, if Perry remains committed to historical worsening as the exclusive criterion for harm, he is probably obligated to treat at least these cases as involving nonharmful breaches. For example, assume that *C* is a lonely and out-of-work actor who was planning to spend Saturday at home watching golf on television, not because he particularly wants to, but because there is nothing better for him to do. Fortunately, however, *A* calls *C* on Friday night and offers to pay *C* if he will serve as a clown at a children's birthday party. *C* readily agrees because he would rather be clowning than watching TV anyway. In fact, although he did not say as much to *A*, he was prepared to clown for free; getting paid was a bonus for him. *C*, incurring no preparation expenses, performs appropriately. *A* refuses to pay. Has *A*'s breach caused *C* to suffer a harm under the historical worsening test? If so, how is that harm defined? Of what opportunities has *C* been deprived?³⁷ Here, Perry seems committed to

34. Fuller & Perdue I, *supra* note 29, at 56–57.

35. *Id.* at 60.

36. Indeed, as discussed briefly below, Fuller and Perdue's argument seems to rest on a basic confusion over the difference between harms and injuries. They reasoned that, because breaches interfering only with expectancies do not generate harms (i.e., Perry's historical worsenings), the nonbreaching party has no claim in "corrective justice" to a remedy. But it does not follow that, just because the nonbreaching party suffered no harm, he suffered no injury: Loss of expectancy, in other words, might be an injury without being a harm. As such, a person who suffers such a loss can claim that, as a matter of justice, he ought to be compensated for that loss by the person responsible for it.

37. One answer might be that *C* has been deprived of the option of performing *and*

describing this breach of contract as being actionable without proof of harm (or to asserting that the law should employ the fiction that *C* was deprived of an opportunity, even though he was not). That is, he seems obliged to say that this breach caused *C* no historical worsening, but was actionable nonetheless, which in turn would indicate that contract law does not always require a harm as a predicate to an action for breach.

So far, my argument has pointed toward the conclusion that, given Perry's historical conception of harm, at least some actions for breach of contract seem to not be grounded in harm to the nonbreaching party. Rather, the loss to these plaintiffs appears capable of identification only through the counterfactual test. It might seem, then, that it is open to him to draw a distinction on this basis between contract, on the one hand, and tort, on the other. Contract, in this view, is distinct from tort in part because it treats pure loss of expectancy as actionable interference.

Perry does not draw this set of inferences and, in my judgment, he is wise not to do so. For there are tort actions based on disappointed expectancies that are not attended by lost opportunities. Consider, first, the misrepresentation torts, such as fraud and negligent misrepresentation. The *Restatement (Second) of Torts* gives the following illustration, which I will embellish, to clarify the scope of liability for fraud. *A*, a seller of land, falsely represents to *B* that a certain parcel of land contains valuable timber. *A* tells *B* that the land is available for \$5000. He also falsely asserts that the land is worth a good deal more than that because of the timber and that the reason he is willing to take only \$5000 is because he is desperate for cash and cannot wait to sell the land on the open market. *B* actually and justifiably relies on *A*'s misrepresentations and purchases the land. It turns out that there is no usable timber. It also turns out that, even without the timber, the land has a market value of \$5000. *B* still has an action for fraud—in the eyes of the law he has suffered an injury, notwithstanding that he is no worse off than prior to having been defrauded. For this injury, *B* is entitled to compensation equal to the difference between the actual value of the land (\$5000) and

getting paid. I wonder, however, if this is just a way of applying the counterfactual test using the language of the historical worsening test. *C* is restored to the position he "was" in, but the position he was in is defined as the position of being able to attain the condition in which he would have been had the contract been performed. As suggested above, one can express the historical worsening in the language of the counterfactual test without mangling English syntax. See *supra* note 19. This is not to say that they are the same test, only that verbal formulations can easily disguise one in the appearance of the other.

the value of the land had there been usable timber on it.³⁸

Another tort that seems to render conduct actionable even in the absence of historical worsenings is the tort of interference with contract, or, more to the point, interference with noncontractual expectancy. Suppose *X* learns that *Y* is about to invest in Company 1. In justified reliance on *X*'s intentional and material misrepresentation that Company 2 is a better investment because it has recently been awarded an important patent, *Y* foregoes investing in Company 1. However, just before *Y* invests in Company 2, she learns of the misrepresentation. In the meantime, the stock of Company 1, in which *Y* would have invested but for *X*'s fraud, has taken off. Even if *Y* suffered no out-of-pocket losses, *Y* may be able to recover from *X* for tortious interference with a noncontractual expectancy: *X*'s conduct would amount to actionable interference by "wrongful means."³⁹

The examples of tortious interference and fraud suggest that historical worsenings are not required to generate tort liability, at least with respect to torts generating losses of economic prospects. Here again, it may be to Perry's advantage to continue to insist on historical worsening as the test for harm, yet also acknowledge that, in these sorts of cases, tort compensates a non-harm injury, namely the injury of lost expectancies. Were he to do so, he would be left with a relatively neat tripartite division of injuries that, depending on the satisfaction of other elements, may generate tort liability: harms, rights violations, and lost expectancies.

To sum up Perry's position and my response, I take him to offer, if only tentatively, the following line of reasoning:

- (1) Person *P* suffers a *harm* if a core interest of hers undergoes an historical worsening (subject, perhaps, to a *de minimis* exception).
- (2) Rights violations (understood as special harms) and lost expectancies (understood as lost opportunities) are appropriately described as historical worsenings of core interests.
- (3) Therefore, rights violations and lost expectancies constitute instances of harm.

Although nothing in the foregoing discussion suggests that these claims are logically inconsistent or incoherent, it does, I think, offer reasons to reconsider step (2) above—the decision to classify rights violations and lost expectancies as harms. It bears repeating that, even if Perry were to

38. RESTATEMENT (SECOND) OF TORTS § 549 cmt. i, illus. 4 (1977). I realize that this last point involves the use of the counterfactual test to measure damages, rather than determine harm. Its use, however, helps bring into focus the difficulty of identifying what adverse effect *B* suffered other than lost expectancy.

39. DOBBS, *supra* note 3, § 446, at 1258–59, 1262 (discussing the contours of tortious interference with economic opportunities and the idea of "wrongful means").

rethink this step and to conclude that neither rights violations nor lost expectancies constitute harms, he can still readily account for the fact that such setbacks sometimes support causes of action in tort and contract. Essentially, he would be saying that harms constitute only one of three types of setbacks that can ground such actions. To use vocabulary introduced earlier, he might say that *injury* to the plaintiff is a necessary condition for the establishment of liability in contract and tort, but that the category of injury contains at least three distinct forms of interference with a person's interests: (1) *harms* (historical worsenings of core interests), (2) *rights violations*, and (3) *lost expectancies* (losses measured counterfactually).

Still, there will be cases that elude this typology and, I believe, confound Perry's desire to define harms exclusively by reference to historical worsenings. Suppose *A* and *B*, husband and wife, are contemplating having a child. Their doctor informs them that, because of their blood types, they run a significant risk that their child will be born deformed. He also gives them a bottle of pills and informs them that, if either of them takes one of the pills within a few hours before sexual intercourse, the risk of birth defect will be virtually eliminated. For no good reason, *A* and *B* forego the medication and conceive a child, *C*, who is later born with only one arm.

It strikes me as quite intuitive to say that *C* has suffered a harm as a result of *A*'s and *B*'s negligent misconduct.⁴⁰ Yet the adverse effect on *C*'s interest in bodily integrity is not readily captured by the historical

40. Even if these facts would not generate a negligence claim, that claim would not, I think, fail because *C* lacks a valid claim of injury. Rather, depending on the jurisdiction, he may face obstacles because of restrictive duty rules or intra-family immunities.

One might argue that the *A-B-C* example presents an instance of nonfeasance, which might alter the characterization of *C*'s fate, because, at least on certain views of causation, nonfeasance by definition cannot "cause" any consequence, whether harmful or otherwise. In this view, *A* and *B* could not have caused harm to *C*, but instead, at most failed to confer a benefit on him.

If necessary, the hypothetical can readily be changed to avoid any implication of nonfeasance. For example, suppose that the doctor informs *A* and *B* that if both of them were to drink alcoholic beverages in the twenty-four hour period prior to conception, they would run a very high risk of having a child with a serious physical deformity. Suppose that *A* and *B* nonetheless, and for no good reason, drink considerable amounts of alcohol just prior to conceiving *C* and that their drinking can be shown to have been a cause of *C*'s birth defect. Here, I think, we would have an instance of misfeasance causing harm to *C*, notwithstanding the absence of any historical worsening experienced by *C*.

worsening test.⁴¹ *C* was never in a condition of having two arms and hence is no worse off now, at birth, than he was at any time from just after conception forward. Perhaps one can say that *C* lost an opportunity to be born with two arms, but it seems forced to attribute that opportunity to someone that does not yet exist. Here, then, we seem to have an instance in which we are dealing with a harm, yet the counterfactual test more readily captures the nature of the worsening. *C* is worse off because he is not fully intact, as he would have been had *A* and *B* acted with due regard for his physical well-being.⁴²

My point in raising this example is not to suggest that Perry is wrong to link harm to historical worsening as a generalization, nor to undermine the tripartite typology of adverse effects on interests that I have developed herein. Rather, it is to note that analytic typologies have their limits. Experience, in all its variety, confounds the aspiration to complete coherence in this area of the law as much as any other.

B. Harm and Damages

On my reconstruction, Perry's fifth claim is that, notwithstanding the inappropriateness of using the counterfactual test as a criterion for determining whether someone has suffered a harm, it might still be an appropriate measure of the damages a wrongdoer ought to pay to compensate for that harm.⁴³ Damage payments, he notes, cannot literally annul the harm—they do not erase the experience of historical worsenings. Instead, they constitute a payment in light of those worsenings. And because payment cannot be a literal restoration of the status quo ante, there is no particular reason to latch onto historical worsening as the appropriate measure of damages. Conversely, the counterfactual test may at least sometimes be deemed the appropriate measure for damages.

I think Perry is right that the use of the historical worsening test to determine whether harm has occurred does not entail in any strong sense the adoption of a particular measure of damages. However, I also note that the impossibility of turning back the clock does not provide an

41. To avoid misunderstanding, I am not positing that *C* is bringing a “wrongful life” claim. The harm asserted here is not that *C* would have been better off had he never been born. Rather, it is that he would have been better off born with two arms.

42. Perry perhaps could argue that, notwithstanding the apparent adverse effect on *C*'s bodily integrity, this is another instance of a rights violation unaccompanied by harm. *A* and *B*, on this view, committed the equivalent of a “harmless” trespass to land by negligently causing *C* to be born with one arm. Again, however, this seems an unnecessarily odd locution, as contrasted to saying, simply, that *C* suffered a harm because he would have been intact had *A* and *B* been more careful.

43. Perry, *supra* note 4, at 1309–10.

affirmative reason to prefer one measure over another. Regardless of whether the judge instructs the jury to set damages at an amount equal to the difference between plaintiff's pre-tort and post-tort condition, or between a hypothetical condition and his post-tort condition, the jury is usually being asked to assign a value to something that cannot be valued with anything approaching precision. Impossibility gives us no reason to prefer one or the other.

Interestingly, the converse may not hold true. For cases in which it is nearly possible to restore the status quo ante, historical worsening might set the appropriate measure of damages. For example, suppose surgeon *S*'s carelessness causes patient *P* to develop a *symptomless* postoperative infection that is nonetheless detected and must be treated to avoid harm to *P* in the future. Otherwise the surgery is successful. *S* prescribes a very expensive antibiotic for *P* that *P* takes with no side effects. Assume that there is no additional pain, psychic harm, or inconvenience to *P*, and hence that the only setback *P* experiences is the cost of the medicine. In these circumstances, a payment from *S* to *P* equal to the value of the money *P* spent on the medication would, for all intents and purposes, restore the status quo ante. *P* would be made whole. Moreover, make-whole would seem an appropriate measure of compensation. *P*'s out-of-pocket loss is a plausible measure of what we would want *S* to pay to *P*.⁴⁴

As we shift from a scenario of out-of-pocket losses to losses that do not admit of being annulled, or nearly annulled—for example, physical harm, pain and suffering, and emotional distress—the intuitive appeal of historical worsening as a measure of damages wanes. For these sorts of losses, the law can no longer meaningfully engage in the project of making good the plaintiff's losses, or returning the plaintiff to her pre-tort position. Rather, as Perry suggests, it can only offer compensation that is appropriate in light of the plaintiff's losses, where propriety may be determined by a host of factors, including historical, counterfactual, and equitable considerations.

Black-letter law on damages appears to track the distinction I have drawn between cases involving out-of-pocket losses and those involving other forms of loss. Generally, tort damage rules attempt to put an injured person "in a position substantially equivalent in a pecuniary way

44. It is a plausible measure, but not the only one. For example, one might argue that make-whole compensation should be supplemented by an additional sum in recognition of the wrong done to *P*, a sum that is owed independently of any harm suffered.

to that which he would have occupied had no tort been committed.”⁴⁵ But this is just to say that tort damages aim to *compensate* the plaintiff for what has happened to him. The abstract concept of compensation, in turn, gives rise to different measures depending on the nature of the harm to the plaintiff. A person complaining of economic and property losses can often be placed in a position “substantially equivalent” to the one he formerly occupied.⁴⁶ It makes sense to speak of this sort of plaintiff as being made whole by a damage award. For one complaining of injuries to body and mind, money damages are “not the equivalent.”⁴⁷ Here the law cannot coherently aspire to the idea of making whole. In these instances, *fair* compensation, not full compensation, is what tort law aims to deliver.⁴⁸

IV. HARMS, WRONGINGS, AND A RATIONALE FOR PROXIMATE CAUSE

In this Part, I will use Professor Perry’s second claim—that, in identifying instances of harm, neither law nor morality tends to treat benefits as annulling harms—as a launching pad for an examination of the concept of proximate cause. Just to be clear, I do not mean to saddle Perry with a set of claims about proximate cause. He has not chosen on this occasion to discuss that concept. Still, his analysis permits exploration of it. Moreover, concern over proximate cause’s intelligibility was one of the central impeti for this conference. Thus, it seems appropriate to open a brief inquiry into the animating principles of proximate cause.

We can begin the inquiry, as I have just suggested, with Perry’s observation about the tendency to treat benefits as offsetting rather than annulling harms.⁴⁹ Certainly he seems correct that ordinary discourse observes the anti-annulment idea. Imagine a doctor who appropriately administers a medicine to her patient that cures a life-threatening infection, yet also produces severe and recurring headaches. It is common

45. RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1979).

46. *Id.*

47. *Id.*

48. *Id.* § 912 cmt. b. It would be an interesting exercise to identify the type of cases in which judges first employed the language of “making whole.” One might expect to find them first using it in cases of property damage, where the metaphor has some purchase, then only later invoking it as a generic description of the measure of damages for all tort cases. The latter would be a regrettable development, in that the metaphor of making whole has come to dominate and distort our conceptions of tort law. See John C.P. Goldberg, *Rights and Wrongs*, 97 MICH. L. REV. 1828, 1851–53 (1999) (reviewing ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* (1999)), and noting the undesirable tendency of corrective justice theorists to use the make-whole measure as the centerpiece of their analyses of tort).

49. Perry, *supra* note 4, at 1304–05, 1311–13.

to refer to the latter as “harmful side effects”: harms notwithstanding the overall benefits conferred.

The principle that benefits do not annul harms seems also to hold in reverse. Suppose, for example, *Y* has a rare food allergy and *X* innocently causes *Y* unknowingly to ingest food containing the relevant allergen. As a result, *Y* experiences euphoria for a day, but then suffers a miserable illness requiring a month’s stay in a hospital and resulting permanent injuries. Here it seems appropriate to say that *Y* enjoyed a benefit by virtue of the food poisoning, even though *Y* is worse off overall because of the severity of the ensuing harm.⁵⁰

To note that benefits and harms do not annul one another is, again, not to claim that they ought not, in some circumstances, *offset* one another. Indeed, as this conference attests, there are many complexities facing any account as to when offsets are, or ought to be, permitted and when they will affect judgments as to wrongdoing and justification, as well as judgments as to the appropriate level of compensatory damages. The issue of offset is posed, for example, by the familiar hypothetical of the careless cab driver who crashes and causes his passenger a broken leg, in turn causing the passenger to miss a doomed airplane flight. For most, the strong intuition here is that the driver should *not* be granted an offset against the broken leg equal to the value of the substantial benefit he conferred by causing the passenger to avoid death in the plane crash. What can explain this intuition?

One way to sharpen our understanding of the taxi case, at least in the context of assessing legal responsibility, is to think in terms of the intersection of two bodies of law: tort and restitution. Indeed, such an approach is invited by Perry’s anti-annulment argument. In the taxi example, this would first entail seeking to isolate the harm suffered by the passenger and asking whether it provides the basis for an action in negligence, which presumably it does. Having carved out the passenger’s claim for the harm, we next ask whether a cab driver who does not injure his passenger but simply fails to deliver him to the airport on time, thereby preventing him from boarding a doomed plane, can bring an action for restitution—unjust enrichment—against the passenger. Surely

50. If the poisoning were to result from *X*’s intentional or negligent act, then we might be more inclined to resist the idea that *Y* received any benefit from the poisoning. However, that intuition is likely to rest on a judgment that *X*, as a wrongdoer, should not be *credited* for bringing about a benefit to *Y*, rather than a judgment that *Y* received no benefit.

not. Under these circumstances, at least, the fortuitous conferral of an unrequested benefit will not support a claim in restitution.⁵¹ To put it another way, to the extent the passenger was “enriched,” it seems not at all *unjust* that he, rather than the taxi driver, retains the benefit.

Perry also alludes to another way of capturing the intuition behind the taxi example, which some conferees dubbed the “symmetry” principle. Here, the notion is that, just as a wrongdoer should not be held responsible for fortuitously caused *harms*, so too, he should not be able to claim credit for fortuitously caused benefits.⁵² Consider another familiar example: the driver who first speeds without incident, then resumes careful driving at a normal speed, after which he collides with another car at an intersection, injuring the other car’s driver. Even if the victim of the crash could prove that the driver had been speeding at some time prior to the accident, his negligence claim will founder because the careless conduct—the speeding—does not stand in the right relation to the collision; its only significance was to bring the driver to the intersection at a different time than he would have otherwise been there.⁵³ The symmetry principle would suggest that, just as the victim who fortuitously suffers harm at the hands of the careless driver cannot recover, so too, the taxi driver cannot claim credit for the benefit gratuitously conferred.

Of course the symmetry principle will only support the common intuition about the right result in the taxi example if fortuitousness does affect, or ought to affect, our attributions of responsibility for harms. And here, finally, we arrive at the issue of proximate cause: whether and why tort law would limit responsibility to exclude certain instances of fortuitously-caused harms. If this conference is any indication, Perry’s invocation of the symmetry principle faces an uphill battle, given that its organizers profess great puzzlement over the idea that fortuity ought to limit responsibility in tort law as well as morality generally.

With respect to tort law, the puzzle, I gather, arises out of the

51. The case for denying the driver’s restitution claim strikes me as overdetermined. First, it is not clear that there is a meaningful sense in which the driver voluntarily conferred a benefit on the victim, seeing as he was unaware, and had no reason to believe, that his actions would in any way benefit the victim. Second, even if his conduct were to constitute the voluntary conferral of a benefit, it was gratuitous, and gratuitous conferrals do not generate a claim for restitution absent mistake, coercion, emergency, or some other basis for a reasonable expectation of compensation on the part of the driver. Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1284 (1989) (describing the “negative rule” to the general principle of disgorging unjust enrichment). Third, even if there were some basis for thinking the driver was entitled to expect compensation, such compensation surely is not required as a matter of justice or equity, given the facts of the case.

52. Perry, *supra* note 4, at 1312–13.

53. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 29 cmt. h, illus. 8 (Tentative Draft No. 2, 2002).

following chain of reasoning. In a tort suit brought against an intentional or careless wrongdoer, we, by definition, confront an actor deserving of some form of sanction.⁵⁴ The actor, after all, is a wrongdoer. Moreover, although we generally adhere in criminal law to some notion of the punishment fitting the crime, in tort law we permit disproportionate sanctions. So, for example, the careless driver, whose carelessness consists merely of taking his eyes off the road for an instant, may be required to pay hundreds of thousands of dollars in compensatory damages.⁵⁵ It cannot be the case, then, that tort law's refusal to hold wrongdoers responsible for fortuitously-caused harms is driven by a principle of proportionality in sanctions.⁵⁶ And, because there is no other obvious candidate for a principle within the family of principles having to do with attributions of responsibility that can explain the salience of fortuitousness, it follows that limits based on that quality are unmotivated: they pose a puzzle, at least for justice-driven accounts of tort law.

The puzzle dissipates, however, if one takes a certain view of what tort law aims to do. In this view, tort law, like criminal law, *is* concerned to offer a legal response to wrongdoing. It is not understood, for example, as a scheme designed efficiently to deter socially undesirable risk-taking. However, it differs fundamentally from criminal law because it is not concerned to sanction and deter wrongs per se or on behalf of the public. Rather, it is designed to empower victims of wrongs to seek redress from their wrongdoers. As such, tort actions require plaintiffs to show more than that somebody committed a wrong so as to cause them harm. In

54. In this discussion, I will leave aside claims grounded in strict liability. I should note, however, that the following explanation of proximate cause as instantiating a requirement of "wronging" does not thereby render it incapable of explaining why proximate cause limitations apply to instances of strict liability. This is because the concept of "wronging" or "mistreatment," as I employ it, is not limited to morally blameworthy conduct, but instead may include objective (nonblameworthy) fault, as well as conduct that, though lawful, generates unfair or disparate risks of injuries to others.

55. See Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387, 387 (David G. Owen ed., 1995) (offering this example).

56. But see Michael L. Wells, *Proximate Cause and the American Law Institute: The False Choice Between the "Direct-Consequences" Test and the "Risk Standard,"* 37 U. RICH. L. REV. 389, 391 (2003) (asserting that proximate cause doctrine exists "to save the defendant from the unfairness of paying huge damages for a small departure from due care"). However desirable such a limit might be as a matter of moral or political theory, it is clear that proximate cause doctrine as it currently exists fails to deliver such a limit, given that, so long as a harm is foreseeable or within the scope of the risk, the defendant sued by the innocent plaintiff is left on the hook for its entire amount.

addition, they must show that they suffered harm or other injury *by virtue of having been wronged*. In tort, unlike in crime, a wrong is not enough. There must also be a wronging.⁵⁷ In Cardozo's words, "Affront . . . is . . . the keynote of the wrong."⁵⁸

Doctrinally, the requirement of wronging is captured within several tort concepts. For example, it is sometimes instantiated in the requirement that the plaintiff establish an appropriate nexus between the duty and breach elements of the negligence tort.⁵⁹ As Cardozo famously explained in *Palsgraf*, even a plaintiff to whom a defendant owes a duty of care has no cause of action if she establishes only that some other duty—owed to others or to society generally—was breached.⁶⁰ Thus, Mrs. Palsgraf was owed a duty of care by the railroad and was harmed by the careless actions of two railroad conductors who jostled another passenger. Yet she herself was not wronged. Because the jostling occurred well away from where she was standing, it was not reasonably foreseeable to persons in the position of the conductors that their wrongful conduct would have *any* effect on a person in the position of Mrs. Palsgraf. Therefore, the conduct in question—although perhaps antisocial, as well as wrongful to persons standing near the conductors—could not have amounted to a wronging of her; it did not constitute a harm flowing from a breach of any of the duties that were owed to her.

Cardozo himself appears to have believed that *Palsgraf's* duty-breach nexus analysis provides an adequate instantiation—or at least the only doctrinally supported instantiation—of the principle that a tort plaintiff cannot prevail without establishing that she has been wronged. That is why he was content to conclude that, had Mrs. Palsgraf been able to establish a breach of duty to her, her claim would not have foundered on the issue of proximate cause.⁶¹ Subsequent courts, however, have

57. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928).

The argument for the plaintiff is built upon the shifting meanings of such words as "wrong" and "wrongful," and shares their instability. What the plaintiff must show is "a wrong" to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct "wrongful" because unsocial, but not "a wrong" to any one.

Id.

58. *Id.* at 101. It bears repeating that I am employing "mistreatment" and "wronging" in a sense capacious enough to capture unintentional misconduct. See *supra* note 54.

59. See John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 709–12 (2001) (discussing the nexus requirement).

60. *Palsgraf*, 162 N.E. at 101.

61. *Id.* In a recent article, Dean Hurd and Professor Moore mistakenly interpret Cardozo's refusal to treat proximate cause as a doctrine instantiating the requirement of wronging as manifesting his acceptance of a purely risk-based conception of negligence, under which causation of harm is rendered irrelevant to the definition of the wrong of negligence. Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, THEORETICAL

rejected this aspect of his reasoning by altering the meaning of the proximate cause element of the negligence tort. Indeed, this is perhaps the central upshot of the switch from tests that focused on the *directness* of the causal sequence between carelessness and harm to modern formulations, which require the plaintiff to prove either that she suffered a harm of a type that was reasonably foreseeable to the defendant at the time of acting, or that the harm consists of the realization of at least one of the risks that rendered the defendant's conduct careless.⁶²

To help see how, *pace* Cardozo, proximate cause can also instantiate the requirement of wrongdoing, consider two variations on yet another careless driving example. First, imagine a person who, while driving his car on a street in a moderately busy part of town, carelessly throws a half-filled paper coffee cup out of the driver's side front window. The coffee proceeds to splatter on the windshield of a car coming in the opposite direction, temporarily blocking the vision of the driver of that car, who swerves, strikes, and seriously injures a pedestrian standing on the far sidewalk.

Now imagine the same careless act—the throwing of the half-filled coffee cup by the driver—except that, instead of hitting another car's windshield, the cup lands harmlessly in the road. However, a pedestrian walking along the far curb sees the tossing of the coffee, stops in his tracks, and raises his arms in indignation over the driver's act of littering. Only because the pedestrian happens to stop at that precise point and gesticulate, he makes contact with a tree limb, which in turn disturbs a hidden nest of bees, many of which sting him, causing him to suffer disfiguring welts and considerable pain.⁶³

INQUIRIES L. 333, 348–54 (2002). Here they conflate “small ‘n’ negligence” (the fault element of the tort of negligence) with “big ‘N’ negligence” (the four-element tort). While Cardozo did sometimes cast the notion of fault in terms of a notion of undue risk, he was quite adamant in *Palsgraf* and elsewhere that fault be distinguished from negligence in its entirety. Thus, for Cardozo, a complete claim of negligence would require a showing not only that the defendant acted unreasonably by unduly risking the well-being of another, but that this unreasonable conduct amounted to a breach of a duty owed to a person such as the plaintiff to take care not to cause a certain kind of injury to the plaintiff. To borrow Ripstein and Zipursky's helpful terminology, Cardozo understood the negligence tort as instantiating duties of noninjury, rather than duties of noninjuriousness. See Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 214, 218–21 (Gerald J. Postema ed., 2001) (distinguishing between these types of duties).

62. DOBBS, *supra* note 3, §§ 183–85, at 451–60 (describing different tests for proximate cause).

63. I assume that the pedestrian was not physically endangered by the airborne

A court, I think, ought to permit a jury verdict for the plaintiff in the first case, yet rule for the driver as a matter of law in the second case. Moreover, I think that the difference between the two cases turns in this instance on proximate cause, not duty or the duty-breach nexus. Physical injury to nearby pedestrians was a foreseeable consequence of tossing a half-filled coffee cup out of a moving car on moderately busy street, hence the driver in both instances owed pedestrians a duty to take reasonable care not to cause physical injury to them. Moreover, in both cases, the driver breached that duty by tossing the cup out of the car for no good reason. And, in each case, the careless conduct functioned as a but-for cause of injury to the plaintiff. Thus, if the first plaintiff is entitled to prevail, while the bee-sting plaintiff should lose, it is not because the latter is unable to prove that the driver carelessly caused her an injury that he was duty-bound to guard against, but rather because the injury came about too fortuitously.⁶⁴ The littering driver committed a wrong, and that wrong harmed the bee-sting victim. But the driver still did not *wrong the victim* because he could not reasonably foresee that his act of littering would produce bee stings, and with it injuries. To make the same point in the language of “scope of the risk,” the risk of a pedestrian’s being injured by a bee sting was not one of the risks that inclines us to label throwing litter out of a moving car to be a careless activity.

Regardless of whether the test for proximate cause is cashed out in terms of foreseeability or the risk rule,⁶⁵ when applied in cases like the bee-sting hypothetical, what the doctrine achieves is very similar to what Cardozo achieved by invoking duty-breach analysis in *Palsgraf*. The bee-sting plaintiff loses, just as Mrs. Palsgraf lost, because he

coffee and that he likewise did not fear or otherwise apprehend that he was about to be splashed by the coffee. I also assume that nothing in the situation would have alerted the reasonable person to the presence of bees, such that the pedestrian may be found comparatively responsible.

64. Modern courts and commentators have tended to invert Cardozo’s analysis by treating proximate cause, *rather than* the duty-breach nexus, as a sufficient instantiation of the principle of not holding persons responsible for wrongful conduct that does not wrong the plaintiff. This explains, in part, why they are content to eschew duty analysis. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) 191 (Tentative Draft No. 2, 2002) (explaining the draft’s rejection of *Palsgraf*). It also helps explain why *Palsgraf* is routinely, yet mistakenly, treated as a proximate cause case. See Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 11–12 (1998). My sense is that the two concepts ought to be treated as complementary rather than as substitutes. The duty-breach nexus requirement better explains the result in decisions like *Palsgraf*, whereas the notion of proximate cause better explains cases such as the bee-sting hypothetical.

65. This account of proximate cause might even justify the use of tests that focus on the physical and temporal distance between wrongful conduct and harm. At least in some instances, the more remote the harm, the less ground it provides for a sense of indignation at having been mistreated.

cannot plausibly assert that he was mistreated by the defendant. To use the language of older cases, one only has a claim to have been wronged by another if the harm one suffers at the hands of the other has come about through an “ordinary and natural” sequence of events.⁶⁶ Essentially, tort law is available to plaintiffs who may justifiably complain to the defendant: “How could you treat me that way?”⁶⁷ In instances in which a defendant’s careless conduct only fortuitously generates a harm—even a type of harm that the defendant was duty-bound to guard against—negligence law takes the view that the fact of fortuity defeats the ability of the plaintiff to make that sort of complaint. Confronted by the bee-sting plaintiff, our imagined littering driver can point to the weird sequence of events and say: “I did not carelessly harm you; I merely littered in your presence.” Thus, it is not quite right to say that negligence law aims to compensate those who suffer losses flowing from wrongs. The plaintiff must also have been wronged, such that she might *justifiably maintain a sense of victimization or indignation with respect to her treatment at the hands of the defendant.*

Articulating the rationale for proximate cause in terms of a requirement of mistreatment or wrongdoing has several advantages. First, and perhaps most importantly, it offers a better justification for the existence of the doctrine than conventional accounts. To the extent they purport to explain proximate cause doctrine, these treat it as a fairness- or efficiency-driven cap on “excessive” liability. Yet, as indicated above, proximate cause doctrine does not prevent the imposition of huge sanctions on tortfeasors: that is what makes the doctrine puzzling to the organizers of this conference. Nor does efficiency help explain the contours of proximate cause doctrine, given that there is no reason in the abstract to suppose that society wants only those who are hurt ‘in the right way’ to sue and thereby deter negligent conduct.⁶⁸ As a result,

66. *Ryan v. N.Y. Cent. R.R. Co.*, 35 N.Y. 209, 212 (1866). By “ordinary and natural” I do not mean “as in nature” or “without human intervention.” Rather, I mean that events have unfolded in such a way that an ordinary person, if told of them, would not find their recounting especially strange or surprising. Also, I do not intend by this invocation of *Ryan*’s conceptualization of the test for proximate cause to endorse the particular holding of the decision—that the negligent igniter of a fire in a rail yard can only be held responsible for fire damage to the first structure ignited by the fire. Indeed, this holding seems quite inconsistent with that test.

67. My emphasis on the centrality to tort law of the idea of *doing unto others* clearly owes a debt to Professor Weinrib’s work, which emphasizes the interrelation of “doer” and “sufferer” in tort law. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 81 (1995).

68. See generally John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 *GEO.*

many feel driven toward the skeptical conclusion that proximate cause is incapable of being captured: it is just a label behind which judges engage in ad hoc decisionmaking. The foregoing sketch, however, suggests an answer to the skeptic in the form of a coherent account of proximate cause that can, to a considerable extent, explain current doctrine.

Understanding proximate cause in terms of a notion of wronging or mistreatment not only captures at a general level why tort law might care about the fortuitousness of outcomes, and why modern courts focus on foreseeability or scope of the risk. It can also explain some of the specific contours of proximate cause doctrine. For example, it can explain why “proximate cause” limitations vary in scope depending on whether the defendant’s wrong was intentional or merely negligent. Suppose that *A* shoots at *B* intending to kill her, but misses. The shot proceeds to ricochet off an object and then blows apart a nearby bees’ nest. *B* is stung, causing an allergic reaction and serious injury. It is quite possible that, if *B* can prove that *A* acted for the purpose of killing *B*, *A* will be held liable for committing a battery against *B*. This even though, had *A* only been careless—imagine he was cleaning his gun in his very expansive backyard when, through carelessness, the gun accidentally fired—his conduct might not be deemed a proximate cause of *B*’s injury.⁶⁹ What is the difference that explains why fortuitousness does not defeat liability in the battery action, but does in the negligence action? *B* would be utterly justified in feeling mistreated by *A*’s intentional attempt to kill her regardless of the fortuitous manner in which her injury came about, yet would not be justified in harboring that feeling had *A* been only careless toward her so as fortuitously to produce an injury.

The foregoing analysis is also consistent with tort law’s embrace of the thin skull rule. I have argued that fortuity is relevant to the determination of whether a victim can claim to have been wronged. It does not follow that, once a wronging has been established, fortuities as to the magnitude of the loss flowing from the wrong should be counted in favor of the tortfeasor. At least as between an innocent victim and a tortfeasor, the legal rule permitting the jury to place the burden of bad luck on the wrongdoer rather than the victim is intelligible.⁷⁰ So, one can embrace the foregoing account of the centrality of wronging to tort without

L.J. 513, 555–57 (2003) (criticizing economic analyses of tort doctrines of causation and proximate cause).

69. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 33 (Tentative Draft No. 3, 2003) (specifying that the scope of liability for intentional wrongs is broader than that for careless wrongs).

70. The rule is intelligible, although perhaps in need of more justification than it is usually given. See John C.P. Goldberg, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2040–41 (1997) (noting problems in certain arguments advanced on behalf of the thin skull rule).

having to eschew the well-established doctrine of the thin skull rule. Alternatively, those who are appalled by what they take to be the evident injustice of the thin skull rule can reject it while still endorsing my claim that proximate cause matters to tort law because tort is concerned not with wrongs per se, but with wrongings.⁷¹

Another advantage of conceptualizing proximate cause cases (as well as certain duty cases) in terms of the idea of wronging is that this reconstruction is quite consonant with, and indeed helps make sense of, the historic linkage of the original common law tort action—the writ of trespass—to a concern with breaches of the peace.⁷² Modern commentators have tended to read into this concern a utilitarian ambition on the part of tort law: it is there because tort law is all about the delivery of the aggregate good of social order. Yet, the idea of “keeping the peace” is equally capable of a deontic interpretation. Tort law, in this view, aims to isolate, to the extent law’s categories are capable of doing so, those instances of wrongful harming that will leave the victim with a justified sense of having been injured through mistreatment by another and with that, a corresponding belief that he is entitled to retaliate against that other to vindicate his rights, rather than simply bemoan his bad luck. In this way, tort law aims to keep the peace by enabling victims who have been unfairly or otherwise wrongly treated to seek legal or

71. The requirement of having been wronged is not applicable to all tort actions. Legislatures have occasionally relaxed the wronging requirement, as by enacting survival and wrongful death actions that permit certain beneficiaries to sue those who have wronged their decedent. It is possible, moreover, that the common law also recognizes limited exceptions to the wronging requirement. This may be the case, for example, with respect to certain applications of “transferred intent.” Here, a lot will depend on whether the tortfeasor’s intentional misconduct toward one person also constitutes intentional or careless misconduct toward the person who ends up getting hurt. To the extent it does—as, for example, when *D* shoots in the general direction of *A* and *B*, or shoots at *A* knowing that *B* is standing nearby—then *D* has clearly mistreated *B*. The existence of a wronging or mistreatment is a closer question when, for example, *D* shoots at *A* without believing, or having any reason to believe, that *B* is anywhere nearby, yet hits *B*. Courts that would permit recovery in such a case may be, in effect, imposing strict liability for injury caused by dangerous activities such as that of intentionally firing a gun at another person. Alternatively, they may be “waiving” the mistreatment requirement given *B*’s innocence and *D*’s culpable act.

72. In its standard formulation, the trespass writ required the plaintiff at least to plead that the defendant had acted “against [the] peace.” J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 545 (4th ed. 2002) (providing an example of such a writ). While this aspect of the writ carried primarily jurisdictional significance—it explained why the suit belonged in royal rather than local court—it also conveyed what it is that the royal courts aimed to accomplish by entertaining such claims.

civil recourse for having been wronged.

Interestingly, Professor Sherwin offers in her conference paper a picture of tort law largely consistent with the notion of empowering individuals to avenge mistreatment. To her mind, however, this is cause for regret over the very existence of tort law: the fact that its coherence resides in an idea of a victim seeking vengeance against a wrongdoer provides a reason to disparage the entire enterprise.⁷³ Sherwin's disposition toward tort rests, however, on the undefended supposition that, at least as a first-best matter, no department of law ought to recognize or validate victims' vengeful dispositions toward their victimizers. Yet the foregoing account suggests, to the contrary, that tort law serves a *desirable* civilizing function precisely by identifying instances in which an injured person would be justified in harboring feelings of mistreatment and a concomitant desire for vengeance, but then demanding that the victim eschew self-help and instead channel those feelings and that desire into a legal action seeking damages as vindication for having been mistreated. In this view, tort can claim to be a salutary branch of the law precisely because it provides *civil* redress or recourse.⁷⁴

In addition, Professor Sherwin ought to take some comfort in that the law does not simply empower plaintiffs to sue whenever they subjectively believe or feel that they have been mistreated. Law must enshrine and set social norms.⁷⁵ So, for example, negligence doctrine as it pertains to emotional distress injuries must be fashioned in part out of a concern not to foster excessive sensitivity, lest it promote, by means of affording a remedy for certain instances of wrongfully caused emotional distress, a norm of being thin-skinned.⁷⁶ Likewise, tort law must take care not to issue an overly broad invitation to the victims of harm at the hands of others to feel indignation. Thus, tort law draws a line at foreseeability, or at harm-within-the-risk, as a way of specifying an objective normative standard as to when a victim may justifiably claim to have been wronged by another.

The preceding sketches an account of the rationale for a proximate cause limitation on responsibility for harms (and, if the symmetry principle holds, an equivalent limitation on credit for benefits conferred).

73. Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1411–13 (2003).

74. See Goldberg & Zipursky, *supra* note 10, at 1641–46 (arguing that tort's value inheres in part in serving to channel vengeance into legal fora). For a general exposition of a theory of civil recourse, as contrasted to theories of corrective justice, see Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003).

75. See Goldberg & Zipursky, *supra* note 10, at 1679–84.

76. *Id.*

It does not purport to identify the correct test for proximate cause, although it has implications for that analysis. Nor does it purport to account for every decision that denies responsibility or liability on proximate cause grounds.⁷⁷ Still, it does seem to offer a plausible explanation of some of the main contours of proximate cause doctrine within a broader conception of tort as a law of civil redress or recourse.

V. CONCLUSION

In this Commentary, I have tried to distill the basic claims contained in Professor Perry's cogent analysis of harm. Working off those claims, I have also sought to demonstrate some of the underappreciated complexities that attend the idea of injury and to articulate a coherent conception of proximate cause within a civil recourse theory of tort law. The concept of injury, it turns out, is more subtle than many of us have recognized. By the same token, the concept of proximate cause is less mysterious than is often supposed.

77. For example, to the extent the doctrine of superseding cause is viewed as a proximate cause doctrine, I am unsure whether it is best viewed as instantiating the requirement of a wronging.

