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Which Interests Should Tort Protect?

JEAN THOMAS†

INTRODUCTION

This Article asks the question: what justifies the practice of tort law? It asks the question with a particular focus: which interests should tort protect? This Article argues that tort selects and protects a determinate set of interests, even if we do not take it to be doing so. The second claim advanced in the Article is that tort law is constitutive of political society in the sense that it expresses our sense of ourselves as persons within society, and our sense of what we owe one another. Given that tort law inevitably selects a particular set of interests for protection, and that this selection is politically significant in that it expresses what we take our rights and obligations towards each other to be, this Article argues that the interests tort selects for protection ought to, at least presumptively, reflect the set of interests that are enumerated in constitutions and bills of rights—the interests that best reflect the values that constitute our political morality. Given the fact of reasonable moral disagreement, constitutions and bills of rights offer the best approximation of the values to which

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we are fundamentally committed. To the extent that the set of interests that tort protects is different from the set of interests constitutionally enumerated in the form of individual rights, tort law's deviation from that set of interests must be explicitly justified—current theories of tort have not done so.

Tort law establishes the legal rights and obligations that individuals in a society have directly to one another. It is thus an institution that is, in some sense, both formative and constitutive of its society. Therefore, the content of the rights and obligations it establishes—that is to say, the interests it protects—as well as the manner in which it selects them, ought to be of concern not only to lawyers and legal theorists, but also to everyone who belongs to a society, especially lawmakers, political theorists, and philosophers. And yet, despite a vast scholarship concerned with the nature and justification of tort law, the question of which interests it ought to protect has received remarkably little attention.

Why does this question matter? Some have argued that so-called 'public' interests, such as nondiscrimination and freedoms of expression and religion, can be interpretively folded into tort's existing protection of material harm to the person. One such argument is that a woman's interest in being free from sexual harassment, for example, can be judicially interpreted to be included in the interest in "emotional tranquility"—which tort does protect—through its cause of action making the intentional infliction of emotional distress a legal wrong. However, a woman who is being viciously harassed on the street in a sexually degrading manner may or may not find herself protected by the police. And if such a woman wants to legally complain about the sexual harassment by her tormentor, claiming that he violated her as a matter of one private individual to another, she cannot do so. She must instead accuse him of disturbing her emotional tranquility—and as any woman who has suffered such harassment knows, this does not fully capture the nature of the act. Moreover, since her


2. Id.

3. Id.
sexual equality is the subject of public political morality, insofar as it's included in constitutional commitments and human rights instruments, the fact that she cannot make a claim grounded in that interest against her harasser in her own name, as a matter of his obligations to her, as contained in tort law, this inability seems all the more puzzling and morally problematic.

The main argument for the political importance of the interests tort protects rests on two central propositions, which, so far, have not been well recognized. The first proposition is that regardless of what theory or principle of tort law we take to justify it—the standard ones are economic accounts and some variant of corrective justice theory—tort does, simply as a matter of fact, protect a determinate set of interests. We can, in other words, describe the interests protected by tort rights simply by looking at existing tort doctrine. By implication, that set of interests is selected and, thus, prioritized by the institution of tort over other possible interests that could be protected instead. The second proposition is that tort law has an expressive function: it is the institution that determines what our legal rights and obligations are to one another, independent of voluntary agreements or assumed legal roles and, as such, affects our expectations of ourselves and of others.

These two facts together—tort's inescapable prioritization of a determinate set of interests, together with its unavoidably expressive function—mean that tort law is always expressing values; it is, in other words, integral to the positive political morality of its society, whether we want it to be or not, and regardless of whether we think it can be narrowly understood to defray accident costs or used as a means of implementing corrective justice. This conclusion has normative implications for liberal political society: since it is always expressing values, the values it expresses ought to be justified against the background political morality of our constitutive moral commitments. The main argument of this Article, then, will be that the array of interests tort law currently protects is unjustified, and that it ought, presumptively, to protect the array of interests to which we have committed as a matter of public political morality.

The manner in which tort law has, for centuries, selected which rights and obligations will obtain among the individuals in society is that judges have decided, on a case-
by-case basis, which interests warrant legal protection, and to what degree. The decisions of earlier judges have largely bound those of later ones, so that the interests, selected for protection through tort rights and obligations, crystallized quite early and came to be seen as characterizing or constituting tort as a legal category. As a result, we have inherited a system of tort law that has selected and prioritized certain interests—namely, immunity from physical harm and from some psychological harms, property in a variety of forms, and some reputational interests—over others, such as various forms of equality, interests in expression, conscience, association, privacy, and a right to low-cost rescue. Tort's existing conceptualization of the person, and the interests to be protected on his or her behalf, is by and large a proprietary one. The second group

4. In the preface to his textbook Torts, Richard Epstein asserts that “[a]t its core,” tort protects individuals’ “right to use and dispose of their own labor and the further right to exclude others from the use of their property[,]” and is founded on the “bedrock proposition” that “each person owns his or her body and has the exclusive right to use his or her talents as he or she sees fit.” He calls this the “basic autonomy assumption” and argues that it grounds tort's “primary function[,]” namely “to protect innocent . . . individuals from external aggression to their person and property.” Richard A. Epstein, Torts, at xxx (1999).

5. It is, of course, recognized that tort protects a variety of interests that are neither strictly material nor strictly proprietary: the dignitary interests protected by intentional torts, the interests in reputation protected by torts of invasion of privacy in the United States and by breach of confidence in the United Kingdom are clear cases in which interests, besides real property and physical integrity, are protected by tort. Nonetheless, my claim is that there is a tendency within both main theories of tort, the loss based and the corrective justice-based, to take property, and a proprietary conception of the person, as part of the moral grounding of tort. It is this proprietary conceptual tendency, which, it seems to me, buttresses the existing law's emphasis on protecting property and physical integrity over a broader range of nonmaterial interests (such as constitutionally enumerated interests in religion, equality, association, antidiscrimination) that I find problematic. Loss-based theories of tort are generally concerned to explain rectification of material losses, and corrective theories following Ernest J. Weinrib's general moral formalism seem to me embedded in the Kantian interpretation of the juridical rights as 'external' to the person, and 'belonging' to him or her. See Ernest J. Weinrib, The Idea of Private Law 22-55 (1995). Lorraine E. Weinrib and Ernest J. Weinrib point to the connection between reputation—a nonproprietary interest in the material sense—and a proprietary conception of the juridical rights: "Kant seems to have considered reputation as the same kind of right as bodily integrity. [A] good reputation is an innate external belonging . . . that clings to the subject as a
of interests I just outlined—call these nonproprietary personal interests—has become prominent through processes of constitutionalization and the codification of human rights that have taken place, in large measure, after the judicial establishment of the 'tort interests.' I will argue that tort's prioritization of the proprietary is not obviously justified. The question I will then take up, therefore, is: what ought to determine the selection of interests that will be reflected in the rights and obligations of tort law?

This Article will proceed as follows. In Part I, I will lay out several of the main candidate proposals that seek to justify the set of interests tort currently protects. In Part II, I will argue that tort's inevitable selection and prioritization of a determinate set of interests for protection, together with its expressive function in political society, makes it incumbent upon those who would defend the existing institution of tort to justify the particular set of interests it protects against the background of public political morality. I will argue that tort ought, therefore, to be conceptualized in a way that leaves it open to input about which interests it ought to protect as rights. The core of my argument in this Part will be that, if we take a society's moral values to be articulated in public law rights, the prioritization by tort law of proprietary interests over the interests protected by these public law rights is presumptively unjustified, and that a balance ought to be struck between interests of these different types, even within what has so far been considered to be 'purely private' law. More specifically, the presumption of justification, the burden of proof, should be shifted from assuming the existing institution to be justified, to requiring that it justify itself to, and against, the background of the public moral commitments that have been made by society. Tort could justify the interests it currently protects only if it can meet this burden of justification, remaining open to input from the public political sphere about which interests it ought to protect. In

person.' Lorraine E. Weinrib & Ernest J. Weinrib, Constitutional Values and Private Law in Canada, in HUMAN RIGHTS IN PRIVATE LAW 48 & n.18 (Daniel Friedman et al. eds., 2001) (quoting IMMANUEL KANT, THE METAPHYSICS OF MORALS 111 (Mary Gregor trans., 1991)).

6. In the Anglo-American common law tradition, tort is part of the common law, which is made by judges. Tort rights—and the delineation of the interests they protect—have largely been established by judges on a case-by-case basis.
Part III, I will argue that the existing justifications for the set of interests tort protects are normatively insufficient to fully justify the institution of tort against the background requirements of public political morality in a nonideal political society such as ours.

Having established the normative need for this conceptual openness, I will, in Part IV, consider four objections to conceiving tort in the way I suggest. The first is the charge that if tort is conceived of as conceptually open, with respect to the interests that it protects, it will lose its distinctive apolitical form—its institutional autonomy from other areas of law. The second objection is that tort actions will become redundant once the rights and obligations that tort establishes among individuals are understood to protect the same panoply of interests that are articulated in public law. These interests will be protected elsewhere in the legal system. My response to this objection is to emphasize my view that of tort’s normatively valuable institutional distinctiveness that does not refer to the interests it protects, nor sees tort as embodying a unique form of justice, but focuses, rather, on tort’s expressive function; its capacity to promote a culture of respect for rights and, in particular, for the notion of rights-subjectivity. I thus argue that we do have reason to conceive of and retain tort law as a distinct category of causes of action. On my view, however, this category would not be held together by the interests it protects, but by its institutional structure of direct complaints and compensation among individuals. This structure, I will suggest, holds a distinctive expressive and instrumental value for political society. This Part will close with a brief exploration of the possible constraints that might be imposed on tort’s substance—on the interests it protects as rights—by this interpretation of its institutional value. Part V will conclude the argument.

7. For an example of the view of tort as apolitical and institutionally autonomous see Amnon Reichman, Property Rights, Public Policy and the Limits of the Legal Power to Discriminate, in HUMAN RIGHTS IN PRIVATE LAW, supra note 5, at 245, 247.
I. Which Interests Should Tort Protect?

In an intuitive response to this question, one might reasonably rely on a variety of factors: these could include intuitions about our moral obligations to other individuals (obligations, say, of noninterference, aid, and beneficence), as well as ideas about how private legal obligations ought to be subject to principles of justice, and if so, which ones. One might think about how political society ought to be structured so that there is some moral division of labor between different types of legal rules; and one might think about how private legal obligations could further some social purposes. One might also consider how decisions ought to be made about which moral obligations, which interpretation of justice, which political ordering, and which social goals one ought to take up in deciding which obligations to impose on people, and to allow them to sue one another to vindicate.

If, however, one looks to the body of theory that is specifically about tort law for guidance in answering the question—namely, tort theory—one finds that there is a very short menu of possibilities on offer. Theories of tort law generally divide into three broad types of answers to the question, namely, welfare economics, corrective justice, and those that view tort as an instrument for distributive justice and equality.

A. Welfare Economics—Loss-Based Views

One branch of tort theory—the economic approach—was initially developed by welfare economists, and has been taken up by scholars in the field of legal scholarship known as ‘law and economics.’ The economic approach offers a

8. The theory that dominates the field today arguably began with Ronald Coase's article on social cost and Guido Calabresi's first article on tort law. Guido Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 YALE L.J. 499 (1961); R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ., Oct. 1960, at 1; see also Roscoe Pound, The Economic Interpretation and the Law of Torts, 53 HARV. L. REV. 365 (1940) (defining the "economic interpretation" as a theory of how the rise and fall of various economically powerful interests can explain changes in tort law, while arguing that this analysis may in fact only account for a small part of the changes within the law of torts).
consequentialist answer to the question of which interests tort protects.

There is naturally diversity of opinion within this type of account, but I will group these types of views together and refer to them henceforth as ‘loss-based’ theories of tort since my interest in it is relatively simple. On this view, tort is the institution through which society allocates the losses incurred through accidents. The explanatory aspect of the theory says that all the thousands of judicial decisions that have developed and constituted the body of tort law over the past eight centuries or so point to the conclusion that the institution (if not judges themselves) has been guided by a norm to maximize wealth by minimizing the social costs associated with accidents.

The loss-based theories take the tort of negligence to be the institution’s paradigmatic rule and view the balancing undertaken between fault and strict liability to be the law’s


11. Coleman & Mendlow, supra note 10, at § 2. These costs include both the substantive costs borne by injured parties and transaction costs. See Hershovitz, supra note 10, at 75-78.

12. Landes and Posner claim that the economic theory works with the hypothesis that “the common law of torts is best explained as if the judges who created the law through decisions operating as precedents in later cases were trying to promote efficient resource allocation.” Landes & Posner, supra note 9, at 1.
way of shifting accident costs to the party who could have avoided the loss most cheaply. Because of tort’s bilateral structure of complaint and compensation, there are only two possible parties on whom the law will impose the losses associated with harms: either they will be allowed to “lie where they fall,” in other words to be left for the injured party to pay for, or it will be shifted to someone else, i.e., the party who caused it.

Although most decisions in the tort of negligence have, over the decades, continued to use the more normative language of reasonableness as a community standard of care required in taking action, and that of reasonable foreseeability of harm and of the class of victims of a given action’s risks, economists have picked up on one judge’s ‘formula’ for the appropriate balancing of the value of action with the cost of taking risks. The judge was Learned Hand, and his formula is a simple way of getting at the basic norm of negligence that economists adopt. The formula says that a defendant has breached his duty of care if $B < P \times L$, where $B$ is the burden of precautions (the cost that would have been required to prevent the loss), $P$ is the probability of the loss occurring (the risk materializing into injury), and $L$ is the magnitude of the loss. So the defendant acted wrongfully—breached his duty—if the amount it would have cost to prevent the accident, and the loss, would have been less than the amount of the loss that actually occurred, multiplied by the probability of it occurring.

So suppose, for example, that in a fit of frustration at my carpentry errors, I throw a hammer over my fence and hit you on the head, causing an injury that we quantify as costing you one day’s wages—$100. The probability of my hitting someone walking past with my hammer was, say, one in ten. The magnitude of the loss, $100, multiplied by its probability, one in ten, is $10. So, I will be liable in negligence if the burden of precaution for avoiding that loss would have cost less than $10. If it would have cost more, then I have done nothing wrong and the loss ought to lie

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13. Coleman & Mendlow, supra note 10. Many have criticized economists’ emphasis on negligence as unwarranted by the doctrine. See, e.g., Goldberg & Zipursky, supra note 10, at 955-57.


where it fell. Now, of course, to fully explain how these quantities are calculated would require a great deal of economics, but the basic idea will suffice to consider the principle.

The basic assumption behind this approach is that, before their interaction, parties have agreed on a principle that would govern the allocation of any resulting losses. The idea is that they would, if rational, have selected this rule, whereby they would not spend more on precautions than the cost of any resulting loss. Of course, ahead of time they would not know which of them would be the injurer and which the victim; the principle is one for reducing the costs of accidents across many people, rather than for any given injured person.  

Loss-based views explain what appears to be the central function of tort law, namely, to compensate victims of injury for the losses they suffer. The venerable jurist, Oliver Wendell Holmes, in his seminal treatise, The Common Law, claimed that tort law is directed against the doing of harm, rather than against the violation of rights and duties—its purpose was “to secure a man . . . against certain forms of harm.” Even if one thinks—as some corrective justice theorists do—that the quantification of losses is meant as a remedial approximation to make people whole after wrongs have been committed against them, rather than for losses imposed, it is hard to escape the intuitive conclusion, based on its structure, that at least part of what tort law ought to do involves the compensation for losses and harms suffered. The rhetoric, used widely in tort, of ‘making someone whole’ as the point of compensation clearly implies the existence of a loss that took away from their wholeness in the first place.

From a normative standpoint, too, the role of loss and harm in tort law is hard to discount. The only way to think of loss, setback, or harm to interests as secondary to tort’s purpose is to think of it as exclusively concerned with remedying violations of primary rights. This would mean that tort tells us, ahead of inflicting injuries, how we ought to treat people, so that the right to compensation is


understood as secondary. 18 Even on that account, though, the content of the primary rights can be understood as a set of protected interests. If A violates some right of Bs without causing a measurable, material loss—such as an unconsented-to-touching that causes no injury or emotional distress—that does not mean that there has been no setback to B's interests at all. B suffers a loss of a different kind: of being intruded upon, invaded, intentionally, by another person, and we can think of B as having experienced a harm or loss to those interests. 19

Loss-based theories fail to adequately explain certain important features of tort. This failure forms the substance of much complaint against loss-based theories by corrective justice theorists, so I will merely summarize their explanatory concerns here. Although clearly concerned with loss, tort does take wrongfulness into consideration, in, for example, the particular causes of action it has developed for intentional torts, and its allowance—unlike much of contract law—for punitive damages. 20 Loss-based theories also, importantly, fail to account for tort's constitutive structure of individual complaints and direct compensation. Why, after all, if the minimization of accident costs were the central point of tort law, would it not make more sense for victims to be able to sue a party who could have prevented a loss much more cheaply than the actual inflictor of injury could? 21 Why not allow some third party to sue least-cost avoiders where victims cannot?

18. See Coleman & Mendlow, supra note 10 (comparing the first-order duties not to injure with the second-order duties of repair).

19. It is in advertence to this type of setback that Weinrib's relational view seems highly compelling, since it can recognize the loss to freedom as a normative loss, and thus a wrong, without requiring proof of material injury. But it seems to me that our conception of rights as interests has, in general, evolved to the point where we can acknowledge that an invasion of a non-material interest is a setback to an interest, so that we do not need a purely formalist theory to say that such an interaction is wrongful. See Weinrib & Weinrib, supra note 5, at 43-72.


21. Coleman argues that this structure, in which “[t]ort suits bring victim-plaintiffs together with injurer-defendants” is not explained by economic analysis “at all.” Jules L. Coleman, The Structure of Tort Law, 97 YALE L.J. 1233, 1241 (1988); see also Hershovitz, supra note 10, at 90 (“[O]ne of the most curious facts about tort is that it allocates accident costs incident by incident
The institutional connection between the victim and the tortfeasor (tort- or wrong-doer) is as central to tort as the institutional importance of the doctrine of privity is to contract law. This idea seems too important to leave out. Further, from an economic point of view, the important costs are the ones that have not occurred yet, since they can be avoided. Risk, rather than harm, ought to be the institutional focus of this point of view; yet in tort—at least in the case of negligence, which economists take to be paradigmatic—harm in the form of damage or injury that has in fact occurred must be proved, and proved to have been caused by the tortfeasor, before a cause of action can be established.

B. Corrective Justice

According to corrective justice theories, tort law is concerned, at least to some degree, with enacting corrective justice. The basic idea here is that wrongdoers have a duty to compensate the parties injured by their wrongful conduct for their wrongfully imposed losses.\textsuperscript{22} I will henceforth be using ‘corrective justice’ as a term of art that describes a theory that unifies a family of tort theorists. Corrective justice, here, in other words, does not simply mean something like ‘justice, however imagined or construed, as between one individual and another, or justice as just any fair mechanism of rectifying wrongs.’

The most normative version of corrective justice theory, it seems to me, is that of Ernest Weinrib,\textsuperscript{23} for whom it combines the Aristotelian idea about the forms of justice\textsuperscript{24} through private lawsuits, even though other mechanisms seem better suited to minimize . . . the costs of avoiding accidents.”).

\textsuperscript{22} Jules L. Coleman, Risks and Wrongs 325 (1992) [hereinafter Coleman, Risks and Wrongs].


\textsuperscript{24} Aristotle’s Nicomachean Ethics (Robert C. Bartlett et al., trans., Chicago: Univ. of Chicago Press 2011).
with the Kantian articulation of private rights, or 'jural' rights, as protecting equal freedom. In Weinrib's view, private law (including tort, contract, and property) is characterized by a different form of justice from that of public law's distributive form. Distributive justice has a geometric form, so that the normative question concerns the criteria—merit, status, height, virtually anything selected by the demos—according to which goods ought to be distributed within a society. Distributive justice is concerned with the question of proportionality rather than quantity, and public law is a manifestation of this form of justice. Corrective justice, by contrast, is arithmetic; it is not concerned with the overall distribution of holdings, but with quantities in individual interactions. Where a given transaction is wrongful, any gain made by one party, at the expense of the other, must be 'corrected' by having exactly that quantity returned to its former owner. For Aristotle, this form of justice holds against a normatively correct background distribution, and thus the moral division of labor between the two forms is justified. Weinrib's development of the idea of this form of justice imbues the idea of the quantity that has been improperly transferred, and must be corrected, with a normative rather than a material content—namely, the Kantian idea of external freedom. It is this freedom, in Weinrib's view, that is improperly transferred in wrongful interactions, so that the material rectification we see in tort law's compensation system is merely a reflection of that improper usurpation of one person's external freedom by another. What is corrected through material compensation, in this view, then, is the wrong itself, rather than the loss occasioned by the wrong.

The idea of 'private' rights, in this account, refers to rights that can be justifiably enforced by judges because their content is before, or external to, procedurally correct democratic lawmaking. The argument that the coercive

25. See Weinrib, supra note 5, at 84-113.

26. Id. at 122.

27. Kantian right supplies the content of corrective justice's norms, in Weinrib's view. Kant's view of legality, Weinrib says, is "an idea of reason [that] provides the archetype for bringing the juridical organization of humanity ever nearer its greatest possible perfection." As such, he argues, it "obliges every
enforcement of 'external freedoms' is justified assumes that it is justified in the absence of any structure of public justice or political morality, and anyone could, in principle, enforce these kinds of rights coercively and be justified in doing so. This is a very minimal idea about what kinds of moral rights justify coercion, referring us, in our search for the appropriate range of interests tort should protect, to the content given by Kant to the rights of external freedom, namely, the proprietary rights. The morality of tort law, on this view, is 'immanent' in it—tort law does not do justice, for Weinrib, it embodies justice.

On this normative account, to the extent that tort law embodies corrective justice, it is a good thing to have around. This latter point is one on which less normatively inclined corrective justice theorists part ways with Weinrib, taking the position that corrective justice is the normative basis of tort law, and explains tort, but leaving open the question of whether corrective justice is itself a good thing.

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28. Many corrective justice theorists recognize a narrow public role of tort law, but still they take the proper role of tort to be to embody the normative theory they set out, and thus to be restricted to the propriety array of interests. See, e.g., Arthur Ripstein, Private Order and Public Justice: Kant and Rawls, 92 VA. L. REV. 1391 (2006); see also Peter Benson, The Idea of Public Basis of Justification for Contract, 33 OSGOODE HALL L.J. 273 (1995) (arguing that the institution of contract must be justified according to a public basis of justification).

29. Here I mean to emphasize Weinrib's view of the "successive" externalization of right, in which the role of the judge is the third normative stage, the more fundamental normative principles of asserting one's external personality and protecting what each person owns as his are prior to adjudication. See WEINRIB, supra note 5, at 101.

30. See id. at 128 ("right to one's bodily integrity"); see also id. at 128-29 (referring to the right to the "external objects of the will" and requiring rights in property).

31. See generally id. at 128-29 (Weinrib's first major thesis, that of the formal "immanent intelligibility," with which corrective justice supplies tort law); see also id. at 19.

32. In the introduction to the book, Weinrib argues that tort law's justification is noninstrumental, nonfunctional, but intrinsic, or 'immanent'—he analogizes it, on this front, to love. Id. at 5.

33. Coleman and Perry, for example, acknowledge that, as Perry puts it, "The moral force of corrective justice is . . . partly, but not entirely, dependent on the
The second important distinction within corrective justice theory concerns the role of loss, and, thus, of human well-being. For Weinrib, private law is an instantiation of Kantian right.\textsuperscript{34} In his view, loss and gain are not properly constitutive components of tort as dimensions of the good.\textsuperscript{35} Jules Coleman, by contrast, calls his version of corrective justice theory a 'mixed' one, precisely because he takes losses to have an independent normative significance within tort.\textsuperscript{36}

Coleman objects to Weinrib's so-called 'relational' view that tort corrects the normative relation between the parties to a wrongful interaction—returning that relation to one of equal moral status—partly on explanatory grounds: tort rules grant damages to injured parties in the quantity of their loss, rather than according to an estimation of the 'badness' of the tortfeasor's conduct.\textsuperscript{37} Also, so-called 'completed' harms, meaning harms that have resulted in injury, are necessary before a legal tort claim can be made.\textsuperscript{38} But, explanation aside, Weinrib and Coleman agree that corrective justice creates agent-relative reasons for action, reasons that give rise to duties of repair.\textsuperscript{39}


34. For an example see WEINRIB, supra note 5, at 19, where Weinrib lays out his argument. "The idea of private law lies in the synthesis of . . . three theses." These are, first, tort law's "immanent intelligibility,"—specifying Weinrib's formalist methodology; the second thesis claims that this immanent intelligibility is provided by Aristotle's conception of corrective justice; the third thesis "concerns the normativeness of corrective justice." The latter, he says, is a "justificatory structure that pertains to the immediate interaction of one free being with another. Its normative force derives from Kant's concept of right as the governing idea between free beings." Id. (emphasis added).

35. See, e.g., id. at 86. Kant's view, says Weinrib, is not of law in terms of protected interests, but as "a distinctive community of concepts within whose regulatory structure every free will can protect whatever interests it has." Kantian right distinguishes the right, which involves freedom, from the good, which concerns welfare, and makes the former primary over the latter. See id. at 130-33.

36. See COLEMAN, RISKS AND WRONGS, supra note 22, at 303-28.

37. Id.

38. Id. at 319-23.

39. See, e.g., id. at 311-13.
been created through a wrongful interaction, though in the absence of the loss's independent normative significance, it might give rise to agent-neutral reasons to repair it. In order to explain why only the wrongdoer ought to have a special reason to act to repair the loss, the loss must itself be capable of generating a reason for action for that actor (independent of being punished for the wrong), thus allowing for corrective justice's characteristic agent-relativity.

The disputes among corrective justice theorists are complex, and for my purposes I only need to know what the differing views have to say about which interests tort ought to protect. In Weinrib's view, 'interests' are the wrong way to think about tort rights, because tort rights are grounded only in right, rather than in well-being.\(^{40}\) Nonetheless, a range of interests are, in fact, inevitably protected by tort rights, no matter how one thinks those rights may be theoretically justified, so the question cannot simply be avoided by reference to 'the right.' In effect, then, Weinrib's view answers the interests question in terms of the content of the external freedoms specified by Kant in his discussion of private right.\(^{41}\)

In Coleman's view, though, because room is made for the normative significance of loss, and of well-being more generally, interests have an explicit role in corrective justice.\(^{42}\) On his mixed conception of it, corrective justice includes the principle of wrongfulness in the conduct of the actor and that of the wrongful loss inflicted on the injured party.\(^{43}\) Rights come into this picture to distinguish loss from wrongful loss. Even when accompanied by loss, not all conduct that is wrongful generates reasons for

\(^{40}\) For an illustration of this aspect of the view see Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283, 1308 (1989).

\(^{41}\) Id.


\(^{43}\) Benjamin Zipursky and John Goldberg also emphasize, in their wrongs-oriented 'civil recourse' conception of tort, that wrongs are "injury inclusive," thus adverting to the normative role of loss. See Zipursky & Goldberg, *supra* note 10, at 943.
compensation or repair. However, wrongful loss can sometimes generate a duty of repair (as in cases of necessity), even in the absence of wrongful conduct, because the injurer acted intentionally and violated another person’s right. The violation is constituted, here, by a setback to a ‘legitimate interest’ in which one has a right.

On Coleman’s account, rights seem to have a kind of proprietary relation to interests, thus allowing for the idea that infringing interests can be wrongful even when, as in the case of necessity, there seems to be no element of moral fault in the doer’s conduct. Wrongfulness can sometimes occur, in these cases, where the agent has not done anything culpable or blameworthy—this is because wrong is associated with the infringement, or violation, of a right. Coleman gives the example of Hal, a diabetic who, in need of insulin, takes some (not all) of Carla’s supply without her permission, so that he does not fall into a coma. Since Coleman contends that Hal has done nothing wrong, but nonetheless owes Carla compensation, the category of ‘wrongful loss’ is required, creating a connection between Carla’s loss and Hal’s action—the connection is the violation of Carla’s property right.

That proprietary tendency, though, is really only an implicit and conceptual matter and does not seem to reflect

44. See, e.g., COLEMAN, RISKS AND WRONGS, supra note 22, at 332 (discussing the ways in which wrongful loss can come apart from wrongfulness, where an interest is legitimate but in which there is no right).

45. Harm, for Coleman, occurs when a setback occurs to a legitimate interest. A wrongful loss occurs when a harm results from a wrong or a wrongdoing; and a wrong is a violation of a right. See COLEMAN, RISKS AND WRONGS, supra note 22, at 346, 472. The important category being created here, normatively, is that of wrongful loss. Coleman specifies, for example, that:

Some wrongs are infringements, that is, permissible or justifiable invasions of rights. The losses that result from infringements are wrongful in the sense required by corrective justice and are thus compensable in justice, though the injurer acts in a permissible or praiseworthy, not culpable, fashion. Losses therefore, can be wrongful in the absence of culpable agency and agents who create such losses can have a duty in corrective justice to repair them.

Id. at 334.

46. Id. at 335.

47. Id. at 331.

48. Id. at 292-96.
an assertion that only interests in property count as ‘legitimate’ for the purpose of the principle of corrective justice. In this sense, then, Coleman’s theory simply does not address the question of which interests tort ought to protect, except insofar as he acknowledges its concern for human well-being.\textsuperscript{49} To extrapolate from this aspect of his view, we might say that the interests that ought to be protected are those most closely connected to, or that best promote, human well-being. For Coleman, I believe that a fully welfarist specification of private rights would be an unsatisfactory conclusion. This is because Coleman’s own argument for the content, or substance, of rights (their ‘semantics,’ in his language), rather than their form or ‘syntax,’ involves reference to ‘community norms’ which appear, for him, to be specified by the liability and property rules which specify the very interests whose prioritization through legal protection we are concerned with justifying.\textsuperscript{50} Moreover, although he confirms some relation between legitimate interests and human well-being, the conceptual tendency toward a proprietary view of rights—the idea that rights are essentially something that prohibit intrusions—suggest that Coleman’s conception of corrective justice somehow combines a general moral concern for interests with a prioritization of negative rights.\textsuperscript{51}

There are, of course, other versions of the corrective justice theory, ones that are less formalistic and less monist, in that they accept tort might be doing other things besides enacting or dispensing corrective justice.\textsuperscript{52} These theorists dispute the correct version of the theory, but in the larger

\textsuperscript{49} Coleman, unlike Weinrib, assumes some version of an interest theory of rights, on the basis of which rights protect particularly important legitimate interests. \textit{id.} at 326.

\textsuperscript{50} \textit{See id.} at 339.

\textsuperscript{51} One reason I say this is that the examples Coleman gives to delineate rights involve property rights. Hal’s conduct, on his view, is not analyzed according to a competing right, but in terms of its justification simply by reference to the blanket principle of necessity. My more general point here is that there is a proprietary inclination in corrective justice theory in general, and that this seems to pervade even those theories that take rights to be interest-based.

domain of tort theory they agree that corrective justice is, to some degree, the normative basis of tort, and that it consists of rights and duties of reparation for the commission of wrongs.53

Rights-based accounts of tort are more commonly accepted in the United Kingdom and Commonwealth jurisdictions; whereas, in the United States, and increasingly elsewhere, the theory of what tort is, and of what it ought to be, is by and large dominated by economic accounts of law. The significance of corrective justice, within the taxonomy of theories of tort, then, is to some extent that it represents the main intellectual challenge to the dominant welfare-economics or utilitarian theories, keeping alive the idea that tort protects moral rights.54

C. Tort and Public Law Values: Distributive Justice and Equality

There is a considerable wealth of scholarship arguing that tort ought to pursue the social good where that good is construed in terms of egalitarianism, distributive justice, racial and gender equality, and so on. These theories are best thought of in one of two ways: either they can be taken as sophisticated consequentialist views, according to which tort laws ought to be, or are, shaped to promote specific

53. See generally Perry, supra note 42 (discussing the differing views on the corrective justice theory).

54. Civil recourse theory also preserves a view of tort that is nonconsequentialist, but which emphasizes wrongs—and legal wrongs in particular, rather than rights. See generally Goldberg & Zipursky, supra note 10. I do not include a discussion of Civil Recourse here as one of the candidate proposals for an array of interests that tort ought to protect, precisely because it is a highly structural account of tort, emphasizing what I am calling the direct complaint and compensation procedure. Goldberg and Zipursky, though, take the view that reparation is not distinctively characteristic of tort, and also that tort provides recourse for legal wrongs, rather than any particular interests or rights. The content of the interests it protects, in this view, then, is almost entirely open. John Gardner argues compellingly that, in fact, corrective justice and civil recourse are entirely compatible, and also that civil recourse on its own does not explain what distinguishes tort from other aspects of private law, and from equitable remedies in particular. See generally Torts and Other Wrongs, Oxford Legal Studies Research Paper No. 46/2011 (Aug. 4, 2011), available at http://dx.doi.org/10.2139/ssrn.1904834.
values (such as racial equality or income equalization), or certain other social goals or goods; or they tend to be theories that make interpretive arguments for the insertion of such values within existing tort doctrines. The problem

55. For an example of the argument that egalitarianism generally should play a role in negligence law see Tsachi Keren-Paz, \textit{Egalitarianism as Justification: Why and How Should Egalitarian Considerations Reshape the Standard of Care in Negligence Law?}, \textit{4 Theoretical Inquiries in L.} 275 (2003).

56. For examples see Michael L. Rustad, \textit{Torts as Public Wrongs}, \textit{38 Pepperdine L. Rev.} 433, 440 (2011) ("While the manifest function of tort law is civil recourse or compensation, its latent function is vindicating public wrongs.") and the early and still controversial work of Leon Green, Leon Green, \textit{Tort Law: Public Law in Disguise}, \textit{38 Tex. L. Rev.} 1 (1959).

with the first type of view is that, as in the case of more standard welfare economics, it fails to advert to protecting individuals in particular cases from suffering a disproportionate burden in aid of the social goal. The problem with the second type of view is that it simply accepts the categorization of tort interests according to the status quo: tort rights are conceived of in proprietary terms insofar as considerations of race and gender, for example, are inserted at a secondary level of interpretation—the question of measuring damages, or of shifting the standard of care, or such interests are interpretively inserted into the interest in freedom from emotional harm; on this latter view the tort of intentional infliction of emotional distress is, it seems to me, being asked to bear a load it simply cannot and need not support.

While I am obviously sympathetic to the reformist impulses of some of this work, it seems to me that it is, on one hand, too radical; claiming that tort ought, as part of its purpose, aim at eliminating income inequality, for example. The main problem with such views, in the context of my present argument, is that they assert a value-laden purpose for tort, such as the pursuit of distributive justice, without justifying the selection of the particular interest that purpose represents in the light of the array of

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58. See, e.g., Ken Cooper-Stephenson Corrective Justice, Substantive Equality, and Tort Law and Economic Analysis, Substantive Equality, and Tort Law, in Tort Theory 48-68 (Ken Cooper-Stephenson & Elaine Gibson, eds., 1993). Cooper-Stephenson’s arguments that tort’s corrective structure operates in, and ought to be developed to recognize, its ‘distributive context’ is an example of this kind of view, which I take to beg precisely the question I am interested in: Ought tort law take income equality or equality of holdings as an interest it protects? And if such equality is not present, ought it pursue that equality through individual litigation?
public commitments. These views might be thought of as not radical enough, on the other hand, insofar as they do not require a reconsideration of the interests tort law protects 'all the way down,' as it were; so that, as I indicate in the following section, tort would include proprietary interests but only among others, where none of the interests were given presumptive priority, but weighed in each case. Again, in this context, the question is why the status quo is itself justified.

II. REVERSING THE PRESUMPTION: UN-JUSTIFYING TORT'S STATUS QUO

Having set out the main existing proposals for the principles that ought to govern the selection of interests protected by tort rights, I will now turn to the question of whether the existing selection of interests protected by tort law can be justified on any of the principles outlined above.

A. The Burden of Justification: Tort Law's Protected Interests and Its Expressive Function

Tort selects and protects a determinate set of interests, even if we don't think of it as doing so. Even if we take tort to be protecting Kantian equal external freedom, or if we take it to be allocating risk, it will, simply as a matter of fact, protect some interests. Of course, the different justifications for it will likely justify different sets of interests. Regardless, my point is that no matter what we take to be the justification for tort, we can identify a particular set of interests it selects for protection as legal rights.

By "interests" I mean to suggest one of two possible ways of using the term, while setting aside a third use. The use I want to set aside is the one that simply refers to something like a stake or a benefit, viewed subjectively: so, to say "I have an interest in the outcome of the vote" or "she has an interest in making sure the party goes well" does not yet imply that others have any reason to take the interest in question to be normative. The first possible meaning of the term "interests" I have in mind here can be taken to simply
flesh out moral rights, to describe their content,\textsuperscript{59} or, second, they can be taken to be independently important as aspects of welfare.\textsuperscript{60} On either of these two latter meanings, the \textit{set} of interests protected by tort represents a selection and prioritization of those interests over others—that is my first claim.

Tort also has an expressive function within political society. This is not a normative claim—I do not claim that tort \textit{ought} to have this function. Whether we want it to or not, the set of interests that our political and legal institutions protect, and hence the set of rights that those institutions establish to constitute our direct legal relations with one another, says something about the kind of society we have, want, and are committed to. This set of rights and obligations affects the expectations we have of ourselves and one another, and expresses our view of what constitutes due regard for persons in our society. So, my second claim is that tort law is partly constitutive of political society, in the sense that it expresses our sense of ourselves as persons within society, and our sense of what we owe one another.

Taking these two features of tort law together—that it inevitably selects a particular set of interests for protection, and that this selection is politically significant in that it expresses what we take our rights and obligations towards each other to be—leads me to my first argument, namely that it is incumbent upon those who design and defend the institution of tort law to \textit{justify} the particular set of interests that it protects.

The next question, then, is: against what moral background must this justification be given? Tort theorists have for the most part addressed their justificatory projects to the general moral concern with tort's coercive function.\textsuperscript{61} I

\begin{footnotesize}
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\item 59. It seems to me that Joseph Raz has this first function in mind when he sets out the (now) famous definition that undergirds the modern interest theory of rights. "X has a right," Raz says, when some aspect of his well-being is of sufficient moral importance to warrant the imposition of a duty on another. \textit{JOSEPH RAZ, THE MORALITY OF FREEDOM} 166 (1986).
\item 60. This latter function might be understood as an interpretation of Raz's definition; in this view, it is unclear how "rights" would not collapse into a wholly consequentialist mode of reasoning about important interests. \textit{See id.}
\item 61. I say this because theorists of tort, as of many other areas of law, do not put their justificatory arguments in terms more specific than that the law ought to be explained and justified precisely because it is law. The assumption—a
\end{itemize}
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will argue that the justification for the interests tort selects for protection, and hence for prioritization over others, must be given against a background presumption of commitment to public political morality enumerated in constitutive documents.

The argument here will be, first, that given the public and constitutive character of bills of rights (both in constitutions and human rights instruments), the interests enumerated in them ought to be taken to have a presumptive standing in representing society's moral values; and that the prioritization by tort law of proprietary interests over these values is, thus, presumptively unjustified. Second, I will ask whether the first two proposals for the range of interests tort ought to protect—the economic and the corrective justice-based—can offer a justification for the selection of interests, represented by tort's status quo, that overcomes that presumption. Upon close investigation they are, I will argue, either silent on the normative question, or they defend the status quo on unjustified grounds. The third proposal is the only one that seems normatively plausible as a justification for a range of interests grounding tort rights, although in its detailed instantiations I find it misguided, and prefer, as I will argue, to adopt a focus on the interests tort ought to protect as rights.

B. Shifting the Burden of Proof-the Presumption Against the Status Quo

When it comes to normative projects of institutional design, such as the one I am pursuing here, two types of questions are always present. The first is a substantive question: which interests ought tort rights protect? If we have a persuasive answer to this question, then that might seem to be the end of the story. But when deciding questions about coercive legal institutions—such as tort law—we encounter the problem of justification in the face of disagreement. Now, disagreement takes a variety of forms; even in purely moral theory one encounters a range of plausible views. However, normative questions about the design of coercive institutions make the fact of perfectly valid one—is that justification is required because of law's coercive effect.
disagreement particularly relevant and inescapable. If one is to be subject to a coercive rule of the state, then one is entitled, from a moral and a liberal point of view, to ask that that rule be justified in a way that is acceptable on the basis of one’s individual political morality, or on that of a public political morality. But even in respect of public political morality, there can be substantial and reasonable disagreement about what the content of a rule ought to be. So, justification raises the second question I referred to, namely, the procedural one of who decides—or, more precisely, who has the power of final decision on the substantive question.

These two questions are related: if we have a decision procedure to which we attach enough normative weight, then we may think that a decision reached through that procedure will be acceptable, regardless of its substantive content. So, a justification to someone affected by a coercive rule might be that the rule was crafted by a legislature, in which that person has a properly elected representative. Conversely, if we have a sufficiently justified view about which interests tort law ought to protect, then, to focus on the question at hand, if those interests are in fact the ones selected for protection, it may not matter, or it may matter much less, how the decision was reached.

The existing array of interests protected by tort law is, I will argue, presumptively unjustified on both the procedural and the substantive fronts. The argument is as follows. We have two major sources from which to derive moral plausibility and justification, for the design of rules in generally liberal societies. The first is the set of moral commitments that a given society has made in constituting itself: constitutional commitments and participation in human rights instruments and treaties are the best examples of these public moral commitments. The second source is a broadly theoretical one, namely, the most widely accepted principles of liberal political theory. Both these sources suggest that the range of interests delineated by tort law’s status quo is presumptively unjustified. I want to emphasize the qualifier here: the argument is that public moral commitments and liberal theory suggest that there

62. I argue for this view of the “sources” of justification in Chapter 2 of PUBLIC RIGHTS, PRIVATE RELATIONS (forthcoming 2013).
ought to be a burden of justification on the existing set of interests tort protects.

1. The Substantive Question—Which Interests?

   a. The Force of Public Moral Commitments. Consider, first, the substantive question from the standpoint of public moral commitments. Tort law forms the background rules of society. Along with contract and property rules, it establishes the obligations and entitlements that constitute the direct legal relationship between individuals. Therefore, it has a significant impact on a variety of social, political, and cultural facets of a society. The interests it protects as rights will, at a minimum, be likely to contribute to the overall understanding people in a society have of what their legal status and role within that society is. It will inform people's sense both of what is expected of them and what they can expect of others. The interests that tort protects, then, ought to reflect, at least presumptively, the interests that a society has articulated as important, by committing to uphold them as individual rights.

   63. The idea of private law as the 'background rules' of a society is a fairly common one; default rules are sometimes discussed in this sense. Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989). Background rules are clearly rules in the background, as it were, in common law jurisdictions in which legislative policies are pursued not, by and large, by reforms to tort and contract law, but through statutory interventions, which are imposed with existing common law rules regarding property and contract in the background. This idea has become especially common in the growing discourse on the need to 'horizontalize' constitutional law. See, e.g., Oliver Gerstenberg, *Private Law in a Poly Contextual World*, 9 SOC. L. STUD. 419, 425; see also Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT'L L. 435, 435 & n.1 (2002) (arguing that when plaintiffs assert constitutional claims against the state they are "act[ing] in a manner authorized by background rules of property and contract," but noting that sometimes the "background rules of tort law" are invoked, which is analytically the same problem).

   64. For example, in contrast to tax law, which of course has effects on and among individuals, but does not set out to say how each of us ought to behave in our interactions with those we come into contact with or whom our actions affect.

   65. Michael Rustad points out the way in which sociologists of law, in particular Weber and Durkheim, engaged with the relationship between entrenched legal forms and dynamic social structures. In particular, as Rustad points out, Weber showed how "the 'professional ideology' of legalism . . .
enumeration of interests in bills of rights and other human rights instruments and treaties to which a society has agreed, therefore, would appear to have a presumptive status in constituting the content of tort rights. Deviations from that set of interests might turn out to be justified, but would have to be justified explicitly against that presumption.

To see why this public moral commitment creates a justificatory presumption in favor of those interests specified in constitutive public moral commitments, consider an interest enumerated in public law, but not protected by tort—the interest in freedom of association. Free association is expressed as a constitutional right in virtually all liberal societies, as well as a core 'first-generation' human right. It is understood as a negative right, and is, thus, much less controversial than a right to welfare, housing, or education. In that sense, then, the interest in free association, as articulated in constitutions, is one of the facets of human life in a given society that most societies have expressed a legal and moral commitment to respecting, at least through their legal institutions. Therefore, it is a moral problem, at least prima facie, that an institution as core to the network of legal obligations as tort would protect property and physical interests but not an interest in free association. That prioritization means that the institution of tort embodies a failure of society to conflicted with democracy.” Rustad, supra note 56, at 442; see also Judith N. Shklar, Legalism: Law, Moral, and Political Trials 60 (1986) (describing law as “the official, politically sanctioned norms of matured legal systems”).

66. This is a different claim than the one made by constitutional scholars that human or constitutional rights or principles ought to apply, legally, to private law. See generally Oliver Gerstenberg, What Constitutions Can Do (But Courts Sometimes Don't): Property, Speech, and the Influence of Constitutional Norms on Private Law, 17 Can. J. L. & Juris. 61, 62 (2004) (noting the influence of higher law on private law norms); Frank I. Michelman, The Bill of Rights, the Common Law, and the Freedom-Friendly State, 58 U. Miami L. Rev. 401, 412 (2003) (arguing that the common law should be “la[id] wide open to Bill of Rights” scrutiny); Frank I. Michelman, Whither the Constitution?, 21 Cardozo L. Rev. 1063, 1081 (2000) (warning that continuing to confine application of the Bill of Rights to government actors risks it becoming marginalized). Of course, many scholars also claim—and this seems to be the prevailing legal position in North America, that there is no such legal application of constitutional rights to private actors.
live up to at least one of the public moral commitments it has made.

One might reply, though, that the interest in free association is one that has *special* relevance to the public sphere, because it is through association that political societies form, grow, and thrive. Free association also has special relevance to religious and other minority groups, protecting them from the power of the overarching, coercive institution that is the state itself—such specialness might seem to be captured by the fact that free association is a constitutional right, and thus a legal obligation not applicable to private interactions. But there is a problem with that line of argument. First, I am not claiming that the *right* to freedom of association, as a legal/moral hybrid set out in the constitution, *ought* to be protected by tort law. I am asserting only that a commitment to respecting the *interest* in free association is one of the central public moral commitments of any constitutional society that enumerates it as a right, precisely because making it a constitutional right expresses a moral commitment that is partly constitutive of the society. If that *interest* in free association is not taken up in, or reflected by, the content of the rights and obligations tort establishes, then tort has, as a legal institution, failed to make good on that commitment.

Second, even if we think that one has to understand the commitment to an interest expressed through its enumeration within a bill of rights—*in the context* of the public nature of the right that protects it—that does not yet establish that the moral relevance of that context could not be reproduced in the 'private' sphere regulated by tort. In the case of free association, there is a moral parallel between political and minority normative associations, such as religions and their need for protection against the state, and certain associations that form in the private sphere whose purpose is to build up a vocal resistance to, and practical force against, certain dominant actors. Unions and other labor organizations, for example, operate to mitigate the power disparity between individual workers and employers—particularly large employers. Labor associations allow workers both to express their wishes and voices in the context of their employment and to have their interests protected. Their size and ability to acquire resources from union dues, for example, allow them to gain access to information unavailable to individuals, to coordinate and share that information, and to access legal
advice and representation that would, similarly, be out of reach of individual workers. Therefore, in moral terms, they operate analogously to political associations, which give individual citizens a voice in the political arena and some measure of political power against the state.

If one is tempted to object, at this point, that employers are neither coercive, nor entirely constituted by law, in the way that the state is, and that employers are socially useful in a particular way that we ought to respect; then one is, I want to suggest, implicitly misled by the existing institutional status quo, which treats the property and contract rules that constitute corporate actors as ‘natural,’ and in some sense preinstitutional. States, like employers, often pursue extremely worthy social goals. States can, for example, pass laws aimed at preventing vicious hate speech, and the bullying and harassment of minority groups, but those worthy efforts have to be justified against the societal moral commitment to an individual’s interest in free association. Similarly, employers serve a useful social function, creating jobs, wealth, products, investment, etc. But employers are constituted by the proprietary and contractual interests that tort protects, and there is, thus, no reason why the protection of those proprietary interests ought not to be required to be justified against respect for the individual interest in association that would protect labor unions in the public sphere. To protect the proprietary interest in the employment context, and not the associational interest, is simply to prioritize one set of interests over the other, without any justification for doing so, thus contravening a society’s moral commitment to the latter interest, particularly on behalf of weak or minority groups (such as employees within a large, multinational corporation) within the institution in question.

Is the premise of the justificatory weight of public moral commitments really a substantive basis on which to determine the interests tort ought to protect? Perhaps it is, rather, a procedural answer to the question, assuming that the inclusion of some interest in a bill of rights reflects its having been established as important by a decision procedure—like a super-majoritarian one that created a constitution—to which we attach significant normative weight. I will come back to this point below. But whether or not we take the constitutionality of certain interests to give them a presumptive normative status for all legal institutions (on the basis of the substantive moral pedigree
of public moral commitments, or on the basis of their normatively justified procedural pedigree) as a matter of substantive moral principle, I will argue that political philosophy does not have a definitive position that would justify the existing set of tort rules in a nonideal context. In fact, as I will explain in the following section, the opposite seems true: the major liberal philosophical positions would, it seems to me, also likely require that there be some presumption in favor of allowing the interests protected as basic liberties to inform the interests protected by tort law.

b. Tort law and Liberal Justice. A full argument for the substantive content of tort on the basis of any particular liberal theory of justice would require much more argument than I can make here, but I will sketch the outline of one such possible argument, simply to show that the presumption in favor of the proprietary interests is plausibly unjustified on the basis of liberal political theory.

We might be monists about the principles of justice, whatever exactly we take them to be (I will gesture at the application of the Rawlsian principles in this section only by way of suggestion). Thus assuming that they apply directly to individuals, tort would clearly have to justify itself against the background principles, of which the protection of the interests that comprise the basic liberties, at least, would have to be presumptively prioritized.

But to make the case more difficult, assume we take the principles of justice to apply only to the basic structure of


68. See Liam B. Murphy, Institutions and the Demands of Justice, 27 PHIL. & PUB. AFF. 251, 283 (1998).
society. In that case, the question would be whether tort is part of the basic structure of society. For that to be the case, the institution of tort would have to, first, "distribute fundamental rights and duties and determine the division of advantages from social cooperation." It seems straightforward to infer that tort law distributes fundamental rights and duties, since it establishes the very entitlements and obligations that we have, simply as individuals within a society, outside of contract or of specific legislative regulation. The claim that tort does, or should, divide the benefits and burdens of social cooperation is more problematic. On one hand, distributing wealth in the context of individual transactions seems inefficient and largely unjustified, since tort law proceeds on a case by case basis, driven by litigation in response to some loss or setback to an interest caused by someone else. Distributing wealth on this basis seems ad hoc, and, thus, unfair because it would be essentially arbitrary: those whose wealth would become subject to redistribution for general allocative social purposes, rather than directly for compensatory ones, would be selected on grounds that have nothing in particular to do with their wealth. On the other hand, though, tort is already concerned with determining the division of advantages and disadvantages arising from social cooperation. Tort law regulates the burdens that arise in the effects of—at least in the case of negligence law—socially productive activities. A factory, whose effluent harms people downstream, is an employer, a manufacturer, and a contributor to social wealth and well-being. It is thus presumptively socially productive and a manifestation of social cooperation. Another manifestation of this cooperation, though, is that there are people living around the factory somewhere who might be harmed by its pollution. They may work in the factory, they may be its managers, its cleaning staff, or they may produce or repair its machinery; they may simply be its neighbors. In any event, when they are harmed, that harm is a burden arising from social cooperation. Now, some benefits of that cooperation have already been assigned—employees, shareholders, consumers, for example, have all, presumably,

70. See Goldberg & Zipursky, supra note 10, at 923 (discussing the allocative function of tort).
benefited from the factory's activities—but the burdens associated with it fall on the particular people living downstream. Tort law's mandate is to decide whether that allocation of burden is fair, and whether it should instead fall on the factory itself. In at least that limited sense then, tort is certainly concerned with the distribution of burden and benefit associated with social cooperation.

I want to point out the above, but also note that this line of argument makes a problematic assumption that is also widespread among theorists of tort, who claim to argue for its justification along Rawlsian lines: it takes for granted that tort's purpose and function is defined by its status quo. That is, it assumes that tort's purpose is to protect personal freedom and security, as defined by the protection of the very interests tort already happens to protect, according to some principle. The interpretation I suggested above, following this assumption and implying that tort forms part of the basic structure of society, presumed that tort's status quo is constitutive and definitive of it. If we conceptualize it more broadly, as an institution that establishes the individual interpersonal rights and obligations within society, then its potential role as part of the basic structure becomes even more clear, because it will protect and promote certain values over others, and contribute to people's expectations of themselves and of others within political society.

71. This is the case wherever theorists arguing for some kind of division of responsibility between the public and private spheres, such as those who argue for a distinctive role for corrective justice that is distinct from distributive justice (this is true of Weinrib, Coleman, and Gardner, for example). It is especially true in the case of those who make an argument that Rawls' theories are compatible with a system of private law—something like the one we have. See, e.g., Peter Benson, Equality of Opportunity and Private Law, in HUMAN RIGHTS IN PRIVATE LAW, supra note 5, at 201; JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 138-62 (Erin Kelly ed., 2001) [hereinafter RAWLS, JUSTICE AS FAIRNESS]; Arthur Ripstein, Private Order and Public Justice: Kant and Rawls, 92 Va. L. Rev. 1391 (2006); Arthur Ripstein, The Division of Responsibility and the Law of Tort, 72 FORDHAM L. REV. 1811 (2004). The assumption in those cases is fleshed out by the argument that in a state of nature one would find a right to property whose proper instantiation requires there to be some public or public-like adjudicator. The key point there is that the property rights (meaning property in the Lockean sense referring to personal security as well as personal property) are the ones associated with private law, and private law is understood to have the purpose of protecting those rights.
But assume we accept some principle of moral division of labor, as Rawls does, and as do some theorists of the relation between public and private law. In that case, some interactions and transactions would be considered subject only to the ‘private’ or ‘individual’ moral principles whose purpose is to ensure fairness within individual transactions, rather than being aimed at preserving background justice. This conception would arguably generate something like a Nozickean view of “free and fair transactions” that are normatively justified, and are especially so if the other institutions of political society redistribute wealth so that holdings reflect some background pattern of equality. But it seems to me that it is a mistake to understand tort as constitutively distinct from political institutions in this way, for the following reasons.

Consider this argument as it pertains to contract law. One way of regulating the content of contracts is for legislatures to pass statues setting out a minimum wage, for example. But whether wage agreements, or the minimum wage itself, is fair, will depend on background circumstances—on, as Rawls says, “the nature of the labor market: excess market power must be prevented and fair bargaining power should obtain between employers and employees.” And Rawls himself is clear that:

72. JOHN RAWLS, POLITICAL LIBERALISM 268-69 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM].

73. Most theorists of tort who incline toward corrective justice as its normative foundation seem also inclined to view it as distinct from the basic structure. See, e.g., ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 9-10 (1999) (noting that if “what Rawls calls ‘the basic structure’ of society is just . . . once the [basic terms of interaction] are set, people are free to pursue their own advantage as they see fit”). For political theorists not already convinced of the justifiability of corrective justice, it can seem more puzzling. See, e.g., Jeremy Waldron, Moments of Carelessness and Massive Loss, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387, 389-93 (David G. Owen ed., 1995) (questioning “the justice of the relationship between tort liability and what individuals deserve”).

74. Nozick describes a system in which, as long as the fairness of each individual transaction is preserved, this will be sufficient to produce and sustain fairness, thus obviating the need for the distribution of resources by the state. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 6 (1974) (“[W]hat persons may and may not do to one another limits what they may do through the apparatus of a state.”).

75. RAWLS, POLITICAL LIBERALISM, supra note 72, at 267.
There are no feasible and practical rules that are sensible to impose on individuals, which can prevent the erosion of background justice. This is because the rules governing agreements and individual transactions cannot be too complex, or require too much information to be correctly applied; nor should they enjoin individuals to engage in bargaining with many widely scattered third parties, since this would impose excessive transaction costs.\(^76\)

It would, therefore, seem that the appropriate way for contract rules to properly conform to the basic structure is to allow other institutions to make adjustments necessary to create fair conditions for free contracting.

The mistaken view on this matter, it seems to me, is that the corrective principle neatly maps onto—is, in other words, coextensive with—the principle regulating individual transactions, and that a principle of justice, such as justice as fairness, similarly maps onto the affairs of the state, such as taxation and other forms of distribution. But this is to make two false assumptions.

First, it is to assume that ‘fairness’ in each individual interaction or transaction, considered on its own—even in the presence of an otherwise just basic structure—would necessarily or even justifiably have a content entirely independent of the principles of respect for individual rights and basic liberties set out in constitutional moral commitments, and in the moral principles of respect for free and equal personhood.\(^77\)

Consider, for a general illustration of the way public moral commitments might be required to inform even individual transactions, contract doctrine\(^78\): the basic principle of contract is freedom and enforceability of

\(^76\) Id.

\(^77\) It is clear that against a background of unjust initial distribution, there is a sense in which even fully ‘free’ transactions cannot be considered fair. But that is not my point here.

\(^78\) Rawls himself, in Ripstein's interpretation, viewed contract doctrine in particular as being outside the basic structure, though others argue that contract is within it, or, at least, that private law as a whole does not fall outside the basic structure on that basis. See Kordana & Tabachnick, supra note 67, at 1291-93; Ripstein, Division of Responsibility, supra note 67, at 1813. Because my method here is different from Rawls and his contemporary interpreters on this matter, pitched as it is at the nonideal, I can remain agnostic on the question.
contracts freely arrived at. Most of contract doctrine involves cases in which there is some question about whether the contract was fairly arrived at, or whether, considered independently of its procedural formation, the substance of the contract is one the law will enforce. It seems plausible that the basic principles of contractual freedom and contractual formation—requiring clear terms, informed agreement from both sides, fair consideration, etc.—could be subject to the moral principles, which, on the overall division of labor, are aimed only at regulating individual interactions rather than at preserving background justice.

Some principles of contract, though, such as that of unconscionability, can require that the law find some contracts to be unenforceable because of their substance. Contracts for slavery are extreme examples of this kind. Similarly, contractual doctrine allows that contracts be invalidated on the grounds of public policy. But in interpreting doctrines such as unconscionability and "contrary to public policy," courts must turn to fuzzy normative concepts such as the reasonable person and the prevalent morality of a community. But why would the moral principles that regulate society as a whole, to which that society has expressly committed itself, requiring respect for political and social equality, for example, not play at least a background or presumptively justificatory role in determining the content of particular legal standards of fairness throughout the system? Even, in other words,

79. For an example from the United States see U.C.C. § 2-302(1) (2001) ("Unconscionable Contract or Clause").

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

See also Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (C.A.D.C. 1965) (remanding the case after finding that a court could refuse to enforce a contract it found to be unconscionable at the time it was made).

with respect to what, exactly, constitutes a free and fair transaction at the individual level.

Second, the categorical assumption—that tort and contract law, for example, are subject to a discrete principle that regulates individual transactions rather than background justice—is unpersuasive. Part of the problem here, it seems to me, is that Rawls uses the example of fair property transactions as against a background of redistributive fairness to illustrate the idea of the moral division of labor. This misleadingly suggests that property transactions cannot in themselves be problematic for the background structure, and that direct regulation of those "individual transactions" is not necessary to maintain and promote background justice.81 That they can have such problematic effects cumulatively seems clear enough, and Rawls acknowledges the point, in respect of the property rules pertaining to inheritance.82 If we are to preserve background justice over generations,83 some limitations might justifiably be placed on the property rules that allow for the transfer of assets from one generation to the next.84 Presumably, racially restrictive bequests would fall into the same category but would have pernicious effects, even one at a time rather than by cumulating over time.

Even if we accept the division of labor between moral principles, the protection of the basic liberties, or the fair value of the political liberties, for example, could still require individual transactions to be regulated on their own terms. Leaving inheritance aside, racially restrictive covenants are examples of property rules that create obvious problems for a society committed to the respect for equal rights, including the right to racial equality. Racially restrictive covenants are cases in which a given piece of property is set out for a particular use or set of uses—a housing development, for example, or a campground—by its

81. Rawls, Political Liberalism, supra note 72, at 52-54.
82. Id. at 51-53.
83. Because, as he says, even fair transactions—viewed on their own terms—will likely lead to the accumulation of wealth in the hands of few, creating problems for the fair value of the political liberties. See Rawls, Justice as Fairness, supra note 71, at 138-62.
84. Rawls, Political Liberalism, supra note 72 at 263-64.
private owner, on terms that are racially exclusive. Now, if the property is sufficiently “private”—for the use of only a particular exclusively privately owned neighborhood, for example—then the restriction might not fall under the civil rights legislation that is designed to protect the public as such.

The categorical assumption further presumes that, as ‘private law,’ contract and tort are, ipso facto, morally separable from the regulation of the basic structure, for the purpose of the division of moral labor because they fall under the category of regulating private, individual transactions. But contract law and tort law are very different in this respect: contract allows for, and enables, social cooperation by allowing people to commit to enforceable agreements that they are themselves the authors of; tort, by contrast, establishes background, involuntary rights and obligations. It is thus an institution whose contents are not largely determined by those to whom it will apply. It is in this respect that tort performs the function that makes its inclusion in the basic structure important:

[E]veryone recognizes that the institutional form of society affects its members and determines in large part the kind of persons they want to be as well as the kind of persons they are. The social structure also limits people’s ambitions and hopes in different ways. . . . So an economic regime, say, is not only an institutional scheme for satisfying existing desires and aspirations but a way of fashioning desires and aspirations in the future. More generally, the basic structure shapes the way the social system produces and reproduces over time a certain form of culture shared by persons with certain conceptions of their good.85

We have, so far, been considering tort law in this section as though the interests it currently protects are the ones that constitute it by definition. But it is largely the institution that determines the limits of individual freedom and property rights in respect of other important interests. Given tort’s institutional role in fashioning social assumptions about which interests are to be prioritized, which interests are essentially constitutive of the person such that they justify the restriction of basic freedom and property rights within individual interactions, tort’s

85. Id. at 269 (emphasis added).
inclusion of proprietary interests and exclusion of nonmaterial personal interests, such as those manifested in the basic liberties, seems problematic. It sends a message to individuals about what kinds of interests constitute the private person that warrants respect from other private persons, and those interests are limited to the proprietary. This is an institutional message that perpetuates an older political culture, one in which property-holding and political suffrage were conceptually linked, and thus undermines the political conception of the person and of liberal political culture.

A final point, here, that suggests a lack of justification within liberal theory for tort's privileging of the physical and proprietary interests, and the proprietary conception of liberty as an individual right to be limited only by the security of others. In connection with his discussion of the basic liberties and their priority within his theory of justice as fairness, Rawls includes "the liberty and integrity of the person" subsequent to the freedoms of thought and conscience, and association and the political liberties that I have described here as personal, nonmaterial interests, but before the liberties associated with the rule of law. 86 Now, it might seem that the listing of individual liberty and security together in the enumeration of the basic liberties suggests precisely the kind of parallelism between the two ideas that Weinrib, 87 for example, argues that tort law embodies. It would certainly suggest that, insofar as tort limits each of liberty and security against the demands of the other, it is justified in doing so on the basis of these both being among the Rawlsian basic liberties. 88 But these are only two among several interests listed as basic, to be pursued as the first aim of justice. What would justify having an institution that protected the interests in personal liberty and security, but not the other interests that are similarly basic? Perhaps if those interests were sufficiently protected by other areas of society, so that any

86. RAWLS, JUSTICE AS FAIRNESS, supra note 71, at 44.

87. This is the significance of what Weinrib discusses at length as formal correlativity. See WEINRIB, supra note 5, at 114-44.

88. In JUSTICE AS FAIRNESS, Rawls is explicit that the basic liberties do not prioritize liberty in general, but are given by a list, in which he includes "the rights and liberties specified by the liberty and integrity (physical and psychological) of the person." RAWLS, JUSTICE AS FAIRNESS, supra note 71, at 44.
infringement of association, say, by the operation of tort rules against trespass, or inducing breach of contract, would be corrected by the inclusion of free association in civil rights legislation. But, as is evidenced by the case of free association itself in the context of workers’ rights to form unions, the interests enumerated as basic liberties are not universally protected by legislation. Civil liberty statutes are not themselves understood to protect prepolitical rights, but rights that are necessary to protect given certain patterns of historic injustice, such as slavery and racial discrimination. Though some interests that are protected as basic rights, such as free thought and free association, are not clearly prepolitical (whatever we think the content of those rights is, a matter I will return to later), nor are they obviously corrective for historical injustice. But tort establishes a set of basic rights applicable to all individuals in all positions—rather than, as in the case of civil rights legislation, only within certain social contexts and positions such as employment—and thus have a special force in playing the formative role Rawls describes with respect to the institutions of the basic structure, 89 fashioning the sense citizens have of what their status as persons requires of them and of others. There is at least a plausible inference to be drawn about the kind of individualism, the kind of personal action and freedom, which society most values, from the rights and duties it establishes as basic at the interpersonal level. What does it say about our political social culture that I am personally accountable to you if I walk onto your property, but not if I discriminate against you or fail to save you from certain death, although doing so would cost me nothing? My point here is that the institution that establishes our basic rights and duties to one another cannot prioritize certain interests over others without that prioritization having a political significance and social effect, and thus requiring explicit justification. We must, therefore, shift the burden of justification from those who would change the status quo onto those who would defend it.

If we take tort rules, rather than individual actions, to be appropriately subject to justice, then whatever the

89. See id. at 34-35 (discussing the role that the basic structure of society plays in forming its citizens’ expectations).
principles of justice one thinks apply to the basic structure—be they Rawlsian principles of justice as fairness or a more general principle of deliberative democracy and constitutional legitimacy—would also have to approve of the composition of the tort rules in order to find that tort was justified. A full instantiation of a Rawlsian or otherwise liberal argument for the justice-based requirements of tort law is outside the scope of this article. But remember that I am not arguing that the interests specified in public law must be included in tort, in order for the latter to be justified. Rather, I am arguing only for a reversal of the presumption, or burden of proof, that currently allows the range of interests protected by tort to go unscrutinized against the interests that constitute society’s most basic moral commitments, and, in liberal terms, that form the content of the most basic rights and liberties. Property rights and other rights that constitute employers, for example, are represented in a liberal view by economic rights and freedoms. For an institution to prioritize those interests, over the ones that ground the basic political rights and liberties, is unjustified on its face. My claim here is only that there is currently a presumption, in tort theory especially, in favor of the status quo, so that an interest in free association, for example, would have to be justified to the status quo of tort, in order to be put on par, by private law, with the proprietary interests already protected, and given our constitutive moral commitment to interests, such as association, that burden of proof is unjustified and ought to be reversed. If tort is going to refuse to protect interests publically enumerated as constitutively important, then the burden of that prioritization of the proprietary ought to fall on those who advocate for the status quo rather than against it.

This is especially true given that the question of how to interpret, justify, and, thereby, design the institution of tort takes on a different cast from the standpoint of ideal theory than from that of the nonideal theory. The Aristotelian justification of the division of labor between the forms of justice holds up only if both forms are enacted, promoted, and respected at the same time, as they can be assured to be in ideal theory. Similarly, one might think that it is the job of the public sphere—the taxation system, and the

90. See Kordana & Tabachnick, supra note 67, at 1290-92.
criminal, regulatory, constitutional and quasi-constitutional branches of law—to ensure that the basic rights and liberties, and the constitutional essentials, are established and upheld; and that, if the public sphere is doing its job in maintaining those rights and liberties and in maintaining appropriate equality, then the tort system, like that of contract and property, can operate freely on a basis of individual exchanges viewed entirely independently of the social conditions that create the need for legal protections for racial and religious minorities and women. Even if one could understand private law as institutionally separable in ideal theory, however, as matters currently stand in most 'liberal' societies, this background redistribution of holdings does not take place, the value of equality is not adequately respected, and there is thus no justification for holding tort to be immune from playing its part in protecting the basic liberties, at least up to the point where, at some mythical future time, a background of equality exists such that all individual transactions can be normatively independent and governed by their own proprietary norms. And thus my question is not about how tort law ought to be designed against a background of ideal theory fully realized in society. It is about how tort law ought to be designed so as to be most justifiable to the members of the real society in which we live. And in our actual society, our moral commitment to the interests represented in bills of rights generate presumptive requirements on all the institutions of society to do what they can to realize the conditions of respect for these interests.

2. The Procedural Question—Who Decides? There are several possible views about who ought to decide on the substantive question of which interests tort ought to protect. One possibility is that the range of interests ought to be determined by philosophers, or by legislators and policymakers appropriately guided by philosophy. If my argument above is sound, though, there is a presumption against the status quo with respect to which interests tort protects, and a requirement that that selection of interests be justified. One way of justifying it would, arguably, be the decision procedure by which it arose. My argument here is therefore a narrow one, rebutting that possible justification for the selection of interests currently protected by tort, namely, that the existing range of interests is justified on the basis of their pedigree.
In the common law context in which tort law operates, the ‘rules’ that constrain judicial lawmaking were made by other judges. The interests that are deemed important enough to justify restricting individual freedom and the social benefits associated with productive action are, in the tort context, products of the judicial imagination and the moral convictions of judges. Holmes and others celebrated this feature of the common law and emphasized its role in the development of tort. But as Thomas Grey argues in Accidental Torts, the development of tort into the form in which we now find it was a contingent matter of judicial decision:

To make every harm to an individual's interests a wrong “would interfere with other equally important enjoyments on the part of his neighbors” Hence the law privileged certain acts against liability even though the actor foresaw “that harm to another will follow from them.” Holmes’ point in using this terminology was to emphasize that the rights and duties established in tort decisions were not premises taken from pre-existing law, but conclusions shaped by the judges’ traditional common law power to strike the community's balance between freedom and security.

But from the wider political standpoint, the premise that what judges do can be morally problematic is uncontroversial: one need only consider the normative criticism of judicial lawmaking in the context of constitutional adjudication and judicial review, where it is largely accepted that there is at least a presumptive problem with judges making law through their own processes of moral reasoning, unencumbered by the constraints of democratic accountability. In the context of judicial review of legislation, judicial lawmaking is heavily

93. Id. at 1272-73 (internal citations omitted).
criticized on this basis, but, at least in that context, judges are working with a set of constitutionally enumerated rights, rather than simply deciding what interests are sufficiently morally important to warrant limiting the state's legal actions. In the constitutional context, then, judges are not given wholesale discretion to decide which human interests warrant protection as rights against the state.

If political philosophy is not going to somehow directly design the institution of tort, and judges—at least those in higher courts—are famously unaccountable to the general public, then, in the face of reasonable disagreement about which interests ought to generate basic personal rights against other persons, what decision procedure would justify the selection of interests for tort to protect as rights? At a minimum, it would seem clear that the decision procedure ought to have some public accountability and be reached through a process that can resolve or override disagreement in a normatively plausible way. Is tort justified on these criteria?

Some judges are, in some places, elected. Does that justify their decisions as democratically grounded? It may improve the normative pedigree of judicial decision making, but elected judges are bound by precedential rules just as unelected ones are. That leaves us, again, with the set of interests elected for protection by tort over several centuries of legal history. The common law is, at least in the Anglo-American tradition, subject to the principle of parliamentary sovereignty in the United Kingdom and Canada, or legislative supremacy in the United States. The democratically elected government can, according to this principle, revise or overturn rules developed by common law judges; does this justify the existing set of interests protected by tort law? Perhaps this gives the selection of interests a measure of justifiability, but it is a feeble one: it says only that if parliaments didn't like the interests courts selected, they could have changed them. But revising the interests tort protects would require a kind of systematic

95. Martin Shapiro, Toward a Theory of "Stare Decisis", 1 J. LEG. STUD. 125, 129 (1972) (noting that, regardless of being elected or unelected, "[l]egal discourse in the style of stare decisis . . . [is] an instance of communication with extremely high levels of redundancy" paying homage to the rules set in prior decisions).
overhaul of institutions that have predated virtually every legislature in memory. In fact, many jurisdictions around the world have made this kind of revision, but they have done so in a way that drastically underspecified how the interests are to be weighed against existing private law rights, and, most problematically, in a way that left virtually all the decision-making up to judges.96 This, perhaps for reasons of path-dependence, has resulted in significant judicial deference to the status quo of private law. It seems, then, that democratic accountability might be enough to justify the set of interests protected by tort, if the legislature were involved ab initio in the normative question of institutional design that is our present concern. But because of the kinds of potential problems of path-dependence and deference to historical authority, it is impossible to infer the democratic approval of the existing state of affairs in the tort system from the mere failure of legislatures to have so far revised the rules.

This might appear to leave us in a kind of no man's land: if we have no access to a set of interests approved by the public through a normatively creditable decision procedure, and political philosophers cannot in fact decide, then perhaps the matter is best left with judges. On some views, after all, political morality is precisely what constitutes the work of (at least the best) judges.97 This way of thinking, though, as applied to the context of justifying tort's status quo on the basis of its judicially determined provenance, fails to appreciate the fact that we do have a set of interests set out as morally important, and as the subject of public moral commitment, by a public decision procedure, and a super-majoritarian one at that. Famously, constitutions are possible only at particular kinds of

96. For a discussion of this problem in the tort law of Ireland, for example, after the inception of a 'direct' constitutional tort, see Colm O'Cinneide, Ireland: Irish Constitutional Law and Direct Horizontal Effect—A Successful Experiment?, in HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY 227, 228-30 (Dawn Oliver & Jorg Fedtke eds., 2007); BRYAN McMAHON & WILLIAM BINCHY, LAW OF TORTS (Butterworths, 3d ed., 2000). He argues, for example, that "the impact of the direct horizontal effect doctrine has often been muted and even nullified by the adoption of a cautious approach by the judiciary towards developing private law remedies to reflect rights norms, in particular where existing private law rules clearly apply to the matter at issue." O'Cinneide, supra note 96, at 215.

moments in political history, where there is a certain sufficient alignment of at least some views. They are revisable only by super-majorities, and they are taken to enumerate and protect the interests that are understood to be essential in some way for every citizen in society—that is why the interests they protect as rights are put above or outside of the ordinary political process and cannot be infringed, even by democratic majorities. So we are back to the best real-world option available as a source of institutional design for a system that establishes the basic rights and obligations of persons 'as such' in a society: the interests elevated to rights-status in publically enacted bills of rights. The answer to the procedural question points to the super-majoritarian, constitutive decision procedure by which the content of bills of rights is arrived at, so that, in the end, the substantive and the procedural question appear, in this case, to point in the same direction. If I am right about the plausibility of either one of these arguments, or if both are at least minimally plausible, then I am also right that tort could justifiably deviate, in the interests it protects, from those set out in bills of rights only if they can explicitly justify that deviation.

C. Meeting the Burden: Tort Theory and Possible Justifications of the Status Quo

As discussed above, the debate within tort theory about what normatively justifies tort law is dominated by two main types of accounts, namely, the loss-based and the one grounded in corrective justice. The civil recourse account of tort is different from the corrective justice accounts, but insofar as it relies on the idea that tort rectifies wrongs (albeit legal ones), it, too, stands in opposition to the economists. There are by now compelling arguments on all sides for the explanatory merits of each theory, as well as for the demerits of the other. Because my project here is primarily normative, it will be unnecessary for me to repeat in any detail the explanatory arguments put forward by these two families of theories against one another. I will

98. This is most clearly true in the case of jurisdictions that Waldron refers to as having 'strong' rather than 'weak' judicial review, meaning that constitutional courts can read down, strike out, or invalidate, democratically enacted legislation. See Waldron, supra note 94.
leave behind the explanatory weaknesses each type of theory identifies in the other and put forward my own chief argument against both types of theory, namely that, once outside the narrow realm of legal theory, the normative assumptions and claims of both are unjustified from a wider, political perspective.

Let us review the criteria we have so far established for evaluating possible justifications of tort rules and, in particular, of the narrow, proprietary range of interests they protect. First, we must assume disagreement because a range of plausible views about the appropriate content of tort rights is available. In the face of that disagreement, is there a principle that can justify the status quo? Second, from the substantive argument, I concluded that such a justification would have to respond directly to the presumption in favor of protecting the interests set out in bills of rights. Why, in other words, ought tort prioritize primarily the proprietary and physical interests of persons? Third, from the procedural argument, can the principle proposed to justify the status quo of tort's protected interests be justified by its procedural pedigree? Was it arrived at through, or accountable to, for example, a democratic or even a super-majoritarian decision procedure? I will first consider the norms generated through the broadly economic interpretive approach, and then move on to the principles to be found in some version of corrective justice theory.

Before proceeding, though, I need to make a brief methodological clarification. My question is which interests tort ought to protect—it is a wholly normative one. And in each branch of tort theory there is at least one major view that also takes its project to be normative. But most tort theorists claim to be doing something much more descriptive: they insist, for the most part, that their projects are at least primarily explanatory.99 The major existing

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99. In the context of economic analysis of accident law, Posner and Shavell make claims that are, at least to some degree, supposed to indicate that tort law would be better if it proceeded according to their frameworks of analysis. For the argument that Shavell's project is normative, see Hershovitz, supra note 10, at 75-76. In the context of corrective justice, Weinrib makes a normative claim for that principle as justifying tort law in a way that Coleman, for example, attempts to distance himself from. For some discussion of the nuances of claims of normativity among various tort theorists, see, e.g., Gardner, supra note 52.
proposals seek to explain the existing set of interests protected by tort rights. The major theories of tort, in other words, because they are chiefly explanatory, are not inclined toward reform.

Yet they claim that they are telling us what gives coherence to the category of tort, and what principled basis lies behind that coherence. Tort theories thus give principled explanations for the status quo of tort law; for the most part, they find that status quo to be at least coherent, and, in some cases, also to be fully morally justified. It is true, therefore, that each of them takes itself to be doing something more than simply explaining the status quo, because each one is, in effect, also generating a metric by which future tort rules (including reform proposals) ought to be judged, if the existing category of tort is to be preserved.100

This claim about a principled, and in some cases morally justified, coherent basis to the status quo makes the theories appropriate, at least as candidate proposals in answer to my normative question. At the end of this section I will describe a different, and much more diffuse set of views that are primarily aimed at the normative question, rather than the explanatory, and I will, in large part, argue that this reformist outlook gives the only plausibly justifiable answer to the normative question.

With that point of methodology straightened out, I can now inquire whether the major theories of tort hold justifications for the existing set of interests tort law protects that can stand up to the criteria of justification I have so far set out, namely, reasonable moral disagreement and the consequent presumptive priority of public moral commitments to enumerated valuable interests.

1. Law and Economics. There are two ways of thinking about the normative economic analysis of tort. On either account, I will argue, the existing selection of interests

100. On both sides of the loss/wrong distinction, theorists are making claims that are to some degree explicitly normative. On the corrective justice side, Weinrib’s claims are the most straightforwardly normative. On the law and economics side, as Coleman points out, Landes and Posner “clearly present their claims on behalf of economic efficiency as both positive and normative.” Coleman, supra note 21, at 1236, 1247.
protected by tort is normatively unjustified.\textsuperscript{[101]} The first type of economic account is the one that assumes that the relevant normative basis on which tort should select interests for protection, and design its rules, is the minimization of accident costs, the maximization of wealth, or the maximization of welfare through the efficient allocation of the social costs associated with productive risk-taking. This type of economic analysis of law assumes a normative goal—the efficient allocation of cost and risk—and takes up a consequentialist mode of reasoning that operates to promote that goal. This is the normative basis of much of the economic theorizing about, and teaching of, tort. What interests does it propose that tort should protect? To the extent that it assumes a norm like economic efficiency, we might say that it protects people’s interest in cost minimization; or, conversely, people’s interest in having social wealth maximized. More specifically, we might say that it protects an interest in the efficient allocation of risk or loss. In the ex ante hypothetical agreement that some economists suggest to be at the basis of the best tort rules, we must assume that the parties to that agreement have some of their own interests in mind, and that they would agree, rationally, to the most efficient allocation of risks to those interests. But even accepting this hypothetical agreement premise, in order to also endorse economists’ justification of tort’s existing protected interests, we also have to accept that, in their hypothetical agreement, the

\textsuperscript{[101]} Weinrib’s arguments against loss-based theories of tort are partly in this vein. He calls these theories ‘functionalist,’ since they take tort to be evaluable according to how well it functions in promoting certain ends which we take to be valuable. The most commonly asserted ends for tort include the compensation of injury, the deterrence of accidents, and the minimization of the social costs of accidents. Weinrib, among other anti-functionalists, to borrow this language, does not object to the idea that the goals of compensation, deterrence and efficiency may well be valuable, or also, presumably, that some body of law might be designed to promote them. His objection is that tort law does not exist in service of these or any other ends that are external to it. So Weinrib shares my concern that tort law is not necessarily or intrinsically connected to the ends suggested by loss-based theorists. Weinrib goes further, though, because he claims that tort law, as it has been developed as a legal institution, is in fact its own end, and thus requires no further justification: he claims that tort law is itself a justificatory enterprise. See WEINRIB, supra note 5.
parties were either constrained in the set of interests about which they were making an agreement (namely, those in person and property), or that they actually value those interests and the most efficient allocation of risk to them, above others, such as interests in antidiscrimination, various freedoms such as conscience, religion and thought, and possibly interests in welfare that would manifest a concern to establish obligations of minimal beneficence.

But there is nothing in the idea of a hypothetical ex ante agreement that points in favor of either of those last two bases, on which the parties would select the interests economists espouse as tort's underlying norm (either descriptively or normatively). So, instead, economists of this type must be assuming that the efficient allocation of risks, and certain types of costs, is a valid social goal.

What justifies the selection of efficiency as an appropriate norm with which to legally regulate our interpersonal interactions? Why not other norms? Efficiency may be valuable, and the costs associated with accidents ought, perhaps, to be minimized by lawmakers. But even assuming that to be true, it does not explain what role other norms ought to play in the setting out of interpersonal obligations, if any—or, if efficiency is to be the dominant norm governing interaction, why that should be the case. The social goal selected as normative by economic theorists of tort is not obviously the appropriate

102. Coleman points out that “Landes and Posner present no systematic defense of the normative claims of efficiency.” Coleman, supra note 21, at 1236. Hershovitz argues that we might well have a moral intuition that runs contrary the logic of the hand formula if “when the risk of harm is substantial, we judge others responsible for our injuries even if the costs of the precautions they might have taken exceeded our expected loss.” In other words, we might have the intuition that if some activity risks injuring me in a way that would not necessarily be quantified to a high monetary amount, and risk is relatively likely to occur, but, say, the cost of preventing it is for some technical reason extremely high, then the defendant still ought to take the care to avoid harming me in that way. See Hershovitz, supra note 10, at 83.

social goal to exclusively refer to in selecting the interests tort protects, from a liberal standpoint, and it is not, moreover, justified by a public decision procedure.

More sophisticated economists, though, might say that their method is simply responsive to the norms set out by lawmakers. So, for example, however unpalatable it might seem to treat the deterrence of sexual battery as an aim to be pursued through incentivization mechanisms, it is a sufficiently good thing that sexual battery be minimized that such an approach is warranted.

Perhaps, then, we might think that the pursuit of certain social goals is so important that it warrants the establishment of individual rights and obligations. In other words, what if we don't think that moral rights ought to determine the content of interpersonal obligations? What if we think tort law ought to pursue some social goal, like wealth maximization or, perhaps more compellingly, maximization of welfare? Taking such a consequentialist view, one could still retain some of tort's institutional features, such as its bilateralism, because tort can operationalize some type of rule-consequentialism, and can still be constituted by legal rights, even if it does not recognize that individuals have first-order moral ones.

If we assume that the norm selected for promotion is a plausible one (such as the minimization of loss, or its efficient allocation), the theory still fails to justify the selection of interests tort protects, because many types of losses (individual and social) might be candidates for minimization. But which ones are justifiably selected by tort for protection as rights? Loss, in other words, to what?

One candidate social goal that seems perhaps the most plausible from the standpoint of liberal theory is the promotion—and perhaps even the appropriately distributed promotion—of welfare. If we take welfare, here, to mean human wellbeing understood in a more intuitive way than through the lens of welfare economics, its protection by tort law seems plausible. Even if we interpret tort's purpose as justified in these terms, though, the problem is that the welfare-promoting principle leaves open the question of how human wellbeing is to be understood and defined. Are we to take it to be symbolized by wealth? On an interest-based account of rights, tort rights might look very plausible in
these terms, since interests are understood to be aspects of wellbeing. But which aspects of well-being—the question comes back—constitute the most important facets of it? Any consequentialist mode of moral or legal reasoning must operate with a goal, a good toward which we can reason or design rules. The definition of that goal, in this context, must be justified against reasonable disagreement: the selection of welfare as a candidate good is, therefore, under-determinate. And, in fact, if we do look to public moral commitments, and public political morality, to identify those aspects of human life that have been specified as those most closely connected to wellbeing—most important to protect—we seem to come back, unavoidably, to the interests enumerated in bills of rights and as basic liberties by liberals. Even if we do not interpret those interests as requiring that tort protect them as first order moral rights, in other words, if we look instead for a publicly justifiable set of interests to specify the content of welfare as a social goal, the importance of those interests seems to create a presumption against the justifiability of tort law’s existing limitation of protected interests to those in physical person and property.

Furthermore, and finally, I want to suggest that the consequentialist view is, for the design of tort law, morally problematic if it does not allow for the protection of individual moral rights within its institutional structure. The structure of the consequentialist approach is normatively problematic: individuals’ experiences and claims are treated, in this type of view, as instruments in the pursuit of social policy. This is problematic from a number of perspectives; one of which is that it treats individuals as means toward an end. Moreover, and more particularly, it disregards the basic liberal assumption that the pursuit of social goals must be, to some extent, constrained by individual rights.

Even if we accept, therefore, that the social goal tort law justifiably promotes is that of efficiency—wealth maximization through the minimization of costs—or some other welfare-based goal, we still need something else to justify the coercive force of the institution, particularly given the involuntary character of its obligations. This is simply because of the myriad arguments made in a variety

104. Raz defines interests in these terms. See RAZ, supra note 59, at 166.
of contexts against a utilitarian pursuit of social aims at the unequal expense of certain individuals.\textsuperscript{105} According to most theories of justice, and according to the moral commitments of most liberal societies, the coercive pursuit of social goals requires that individual rights be protected from the unfair effects and unfair distributional consequences of majoritarian action, in order for the state’s actions to be morally justified. This is the role constitutional rights play in the legitimation of action taken by the state in pursuit of its goals.

There is an analogous structure in the institutions of the private sphere that requires us to interpret them as protecting individual moral rights, at least at some level. To grant the economists’ position for a moment, if tort’s governing norm ought to be the social minimization of accident costs, then the cost outcome for society is what will determine whether the victim of someone else’s carelessness or bad behavior will have to bear the cost of his or her own losses. But why ought that person, that particular plaintiff, bear a greater burden than others who were not similarly injured? It seems like an instance of unequal outcomes that are unjustified because they are brought about by luck. Society may benefit from the minimization of accident costs through rules whose content is determined by efficiency considerations, but the individual plaintiff will likely bear more of the burden of that cost (her own loss) than what her share of the social benefit would be. Making tort law’s rules with an eye to promoting some social goal, without attending to the unfair effects on individuals, in other words, seems normatively unjustified, even if we do accept the importance of the social goal.

2. Corrective Justice. In this section, I will argue that corrective justice, like economic analysis, unjustifiably approves, either implicitly or explicitly, of the existing

\textsuperscript{105} See, e.g., Ronald Dworkin, Freedom’s Law: The Moral Reading of the American Constitution 7-8 (1996) (noting that because of the Bill of Rights in the United States, “government must treat all those subject to its dominion as having equal moral and political status” and must treat them all equally); Ronald Dworkin, Taking Rights Seriously, at vii (1977) (defining and defending a Dworkin’s own “liberal theory of law,” while distinguishing it from, and criticizing, utilitarianism and legal positivism).
selection of interests tort law protects.\textsuperscript{106} The fully normative corrective justice accounts identify certain normatively valuable institutional features of tort, and then extrapolate from that analysis to argue for a certain ideal content of the rules themselves. In the case of corrective justice, the normative attractiveness of tort's protection of individual rights, and its bilateral structure of complaint and compensation, is taken to embody a much more substantive normative principle of the protection of equal freedom or Kantian juridical rights of external freedom. The existing practice is viewed as, at least, approximately\textsuperscript{107} or partly embodying the appropriate balance of freedom, and since external freedom is protected through noninterference with person and property, the theory implies that there is no reason to include other interests in the protections tort offers individuals.

This fundamentally normative account of tort's proper content as protecting equal freedom and equal moral status, and instantiating the Kantian 'external freedoms,' is

\textsuperscript{106} This is true of accounts that take their explanatory argument to imply something normative about the content of tort rules. As Coleman points out, a strictly explanatory account, one with no ostensible normative implications, is possible: "the defensibility of corrective justice as a moral ideal is . . . independent of its role in explaining tort law." See Coleman, THE PRACTICE OF PRINCIPLE, supra note 23, at 5. It is also true of accounts of corrective justice that justify the institution of tort according to one version of that principle. See Alan Calnan, In Defense of the Liberal Justice Theory of Torts: A Reply to Professors Goldberg and Zipursky, 1 N.Y.U J.L. & LIBERTY 1023, 1037 (2005) (discussing the attempt to justify tort according to non-normative principles). Those who closely follow the Aristotelian principle of reparation, for example, or those who accept an argument like Weinrib's about the role of Kantian Right to tort, will limit the range of interests tort can justifiably protect by reference to proprietary rights, or to interests that can be construed as relevantly similar to proprietary ones. See Perry, supra note 42, at 456-60 (discussing Richard Epstein's argument along these lines); see also Richard A. Epstein, Causation and Corrective Justice, A Reply to Two Critics, 8 J. LEGAL STUD. 477, 499-500 (1979) (claiming that strict liability is entailed by the concept of property).

\textsuperscript{107} I acknowledge that there is a fairly significant diversity of views about what exactly corrective justice is, as well as to what extent tort law does or ought to embody it, and, further, about whether tort law can or does only perform corrective justice. But since my question is a normative one, my claim here is only about the view to the extent that it has normative implications, and so I do not regard that diversity within corrective justice theories as relevant for my purpose here.
Weinrib's version of corrective justice.\textsuperscript{108} Coleman's 'mixed' account of corrective justice defines rights (and thus limits the included losses) by reference to the setback to interests, which he circumscribes by reference to ones that are 'legitimate' and especially important.\textsuperscript{109} This suggests that the existing privileging of certain interests by judges within tort law could be fully justified—if 'legitimate' and important interests are construed as negative proprietary ones, or as the kind of interest somehow 'appropriate' to tort law, meaning something like 'conventional within'—although his account does not explain why this would be the case.

To view private law in terms of corrective justice is to treat as settled certain moral and political questions that are not settled, such as the moral status of property—whether, for example, property rights are 'natural' and prepolitical or conventional, and, in particular, the role that property rights ought to play in relation to other rights and values. One might think there is a moral truth of the matter in this question, but assuming we think that some type of property rights are in some way morally justified, and that other rights (such as human rights) are also morally justified, this leaves room for reasonable disagreement about the correct balance to be struck between these two types of rights in general.

It counts presumptively against the account offered by corrective justice that that view does not include certain interests that are the subject of public commitments. Consider, for example, a few interests for which it seems at least plausible that justice, however construed, might well require or at least permit that certain interests be enforced through the legal obligations imposed on interpersonal interactions.

One such interest is equality, even if only in the form of nondiscrimination, rather than in that of resource distribution. Theorists who take a corrective justice view of tort argue that it cannot coherently protect this interest, and thus that the creation of a new cause of action for

\textsuperscript{108} See discussion infra pp. 13-14 and accompanying footnotes.

\textsuperscript{109} See COLEMAN, RISKS AND WRONGS, supra note 22, at 369-71; Perry, supra note 33, at 926-31.
nondiscrimination would be unjustified.\footnote{110} But if this argument is made on the basis of an interpretation of the existing practice, it seems less convincing from the point of view of a larger political perspective. If the protection of individual equality, through the legal prohibition of discrimination, is sufficiently important, from the standpoint of political morality, then it would seem that there is at least a prima facie case for that protection at all levels of society and through a variety of institutions, including private law.\footnote{111} An argument against the protection of those interests that is based on the existing practice of the institution seems to privilege existing practice unjustifiably.

Another interest rejected for tort protection by corrective justice is a minimal obligation to aid or rescue.\footnote{112} Much is made, in the literature on corrective justice, of the common law distinction between malfeasance (doing something wrong) and nonfeasance (not doing anything), so that the line separating these two effectively becomes the way interests are selected for protection by tort law.\footnote{113} But there are a number of jurisdictions, particularly outside the common law world, in which, if it would be costless or near costless for Smith to rescue Jones from death or terrible harm, and Smith fails to do so, Jones (or Jones’s estate) can sue Smith under private law. In effect, then, lawmakers in those places have decided that the obligation of costless rescue is one that the society values sufficiently, for one reason or another, to impose it on its members. Now, this is not an argument that costless rescue \textit{ought}, as a matter of justice, to be imposed everywhere as an obligation on

\footnote{110}{For an argument to this effect, see Benson, \textit{supra} note 71, at 201-45.}

\footnote{111}{One way to construct antidiscrimination as a personal right (or a correlative wrong) is suggested by Sophia Moreau’s argument that antidiscrimination laws protect people’s “deliberative freedoms.” Sophia Moreau, \textit{What is Discrimination?}, 38 PHILO. & PUB. AFF. 111, 143 (2010). One could interpret this idea as an interest that society has reason to value.}

\footnote{112}{See Weinrib, \textit{supra} note 5, at xii and 10; see generally Ernest J. Weinrib, \textit{The Case for a Duty to Rescue}, 90 YALE L.J. 247 (1980) (advocating for a duty to rescue).}

\footnote{113}{See \textit{Restatement (Second) of Torts} § 314 ("The rule [that there is no affirmative duty to rescue] is applicable irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection.").}
individuals; rather, it is to show that there are interests and obligations that a society could reasonably choose to impose, and that are sometimes legislatively imposed, which are excluded from corrective justice.

Corrective justice theorists are, for the most part, quite clear that there is a certain openness about which interests ought to be protected as rights within the theory of corrective justice, or about which interests tort ought to protect in addition to performing corrective justice. This openness is unfortunately quite unhelpful for the purpose of answering the question at hand. On one hand, we have Weinrib’s view, which is the least open on this score. His is the most explicit about the way corrective justice fully specifies the content of the rights it protects, and he is clear that tort law is the embodiment of corrective justice, so that, whatever else a society chooses to do to protect interpersonal rights and obligations, it ought not call those that fall outside the purview of corrective justice “tort law.”114 Other theorists take it that tort could be inclusive of other interests and still also have the purpose and function of performing corrective justice.115 But even within corrective justice, there is some possible openness about which interests ought to be protected: Jules Coleman’s conception of corrective justice—the mixed conception—takes an interest-based theory of rights as part of the basis for the theory.116 His view—limited to this particular question—is that corrective justice protects rights conceived of as ‘legitimate’ interests, as noted above. So it is possible to espouse some version of the structure of corrective justice, in the form of the view that simply says that where someone has committed a wrong by violating someone’s right, that person is responsible for doing something for the wronged person in recognition of that wrong. This is to put the matter extremely broadly, but my point is only that it might be the case that one could give some kind of corrective justice account of tort that protected some set of interests specified in the way I have in mind.

114. For Weinrib’s discussion of the categorical distinction between corrective justice as tort’s immanent rationality and other social or political goals, see WEINRIB, supra note 5, at 210-213.
115. See Gardner, supra note 52.
116. COLEMAN, RISKS AND WRONGS, supra note 22, at 369-71.
3. Is Corrective Justice Especially Receptive to Constitutive Interests? In an article written with the constitutional scholar Lorraine Weinrib, Ernest Weinrib addresses directly a question very close to the one I am suggesting is incumbent on corrective justice theorists to answer, namely, how tort law conceived of as instantiating corrective justice can be justified in the face of the public moral commitments made in constitutional societies.\footnote{117} I will argue that the answer Weinrib and Weinrib give is an illuminating illustration of the limitations of a conception of tort grounded in the normative version of corrective justice to justify its particular existing selection of interests, against a background of publically enumerated rights.\footnote{118} Although they share many of the views I argued for in the previous section about the moral importance of the constitutionally enumerated interests,\footnote{119} I will show that even when taking on the justificatory challenge directly, the conception of tort as corrective justice in fact cannot meet the burden of justifying its existing selection of interests.

The argument Weinrib and Weinrib make is that tort conceived of in terms of corrective justice is fundamentally receptive to what they call ‘Charter values,’ and can thus include at least several of the interests enumerated in the Canadian bill of rights, known as the Charter of Rights and Freedoms.\footnote{120} The ‘receptivity’ of corrective justice to Charter values is, they claim, due to two major features of private law when viewed as manifesting corrective justice.

The first is that both private law, conceived of in this way, and constitutional rights, in the Canadian Charter scheme, are systems of individual rights whose violations must be proved to be proportional.\footnote{121} Private law can thus conceivably include a wider range of interests as rights. Whereas Charter rights must be balanced with the legitimate pursuits of the government, and with other rights, within a free and democratic society, Weinrib and

\footnote{117. Weinrib & Weinrib, supra note 5, at 46-47.}
\footnote{118. Id. at 43-72.}
\footnote{119. Id. at 49.}
\footnote{120. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.), reprinted in R.S.C, 1985, app. II, no. 44; see also id. at §§ 1-34.}
\footnote{121. Weinrib & Weinrib, supra note 5, at 50-58.}
Weinrib claim that private law can similarly balance the proportionality of the rights it protects according to the centrality or marginality of the infringement to the parties’ respective interests. An infringement of a more central aspect of an interest will take priority over an infringement of a more marginal one. This proportionality, they argue, allows the inclusion of new Charter rights within private law to be accomplished while maintaining the “fundamental moral impulse” of the latter. That fundamental impulse is to preserve what is called the “transactional equality” of the parties. The idea here is that liability must be determined by reference to the normative position of both parties, rather than only of the plaintiff—as it would be in the case of exclusively compensating the plaintiff—or of the defendant—as it would be in the case of exclusively promoting deterrence. They point to tort’s use of a fault standard rather than a strict liability one as an illustration of transactional fairness.

The analogy between private law as corrective justice and constitutional rights in which both are proportional systems of rights protection is one basis of the receptivity of corrective justice to Charter values; but it is a fairly general one. The more specific basis on which Weinrib and Weinrib claim that corrective justice can be receptive to public law values involves corrective justice’s Kantian basis. The development of private law in accordance with corrective justice, they argue, is an exercise in public reason. As such, it is receptive to Charter values in terms of content, rather than only in terms of structure. This view of private law as public reason involves three Kantian stages, or “moments.” The first is the conception of the person:

The person in private law is a self-determining agent characterised solely by the capacity for purposive action without

122. Id. at 58.
123. Id. at 58.
124. Id. at 52.
125. Id.
126. Id.
127. See id. at 53.
128. See id. at 47.
129. Id.
being obligated to act for any purpose in particular. This capacity for purposiveness is the basis for ascribing dignity to every self-determining agent and is presupposed in the law’s notions of imputability and entitlement. By virtue of one’s self-determining agency, a person has the normative status to assert one’s dignity in relation to others and therefore to be an end and not merely a means for them. Rights are the juridical embodiment of the dignity inherent in self-determining agency.130

The second stage is what they call “the ensemble of juridical categories that express [the] rights and duties” associated with dignity as self-determining agency and freedom, respectively “in the interaction of one person with another.”131 This stage follows from the first in that the conception of the person exclusively in terms of self-determining agency—“a capacity for purposiveness without regard to particular purposes”—requires that “the relationships of private law are defined in terms of non-interference with the rights of others.”132 Moreover, they argue that the rights of the person at private law are necessarily the ones that reflect purposive agency not merely as “an inward attribute” but externally as well, thus giving rise to “the right to the integrity of one’s body as the organ of purposive activity, the right to property in things appropriately connected to an external manifestation of the proprietor’s volition, and the right to contractual performance in accordance with the mutually consensual exercises of the parties’ purposiveness.”133

In other words, the conception of the person at the first stage gives rise, at the second stage, to at least the rights of person and property we find as the interests tort law currently selects to protect. The third stage is the requirement of public institutions to give content to, and enforce, the rights of the person at private law.134 It is at this stage that Weinrib and Weinrib argue that judges can interpolate Charter values into the content of private law.

130. Id. at 47.
131. Id.
132. Id. at 48.
133. Id.
134. Id.
This is because the court, as an “institution of public reason, view[s] the litigants as participants in a social relationship within a world of shared social meanings.” It is largely this part of their argument that I agree with: Weinrib and Weinrib argue that because the Constitution commits the legal order to the priority of human dignity and enumerates the constituents of dignity for political purposes, constitutional values are available for specifying the incidents of dignity included within private law. The Constitution, as society’s authoritative repository of legally supreme and publicly accessible values concerning human dignity, is a preeminent source on which public reason can draw as it gives concrete meaning to the categories that comprise private law.

This description of the importance of constitutional values makes the view seem entirely consonant with the one I have so far been arguing for. It makes it appear as though we can, in fact, conceive of tort in terms of corrective justice, and include constitutionally enumerated interests within tort’s protection, thus justifying it against the presumptions and requirements of pluralism and disagreement. In fact, based on this argument, it looks as though we ought to adopt a version of corrective justice precisely because of its apparent receptiveness to the interests being elevated to constitutional rights. In fact, however, this view is based on certain controversial assumptions.

The first and most general assumption in Weinrib and Weinrib’s argument for private law’s receptiveness to Charter values is that private law is a fundamentally moral enterprise. The argument is thus grounded in a nonpositivist basis. In other words, the argument is not,

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135. Id. at 48-49.
136. Id. at 48.
137. Id. at 49.
138. For an argument against this kind of "immanent critique," see generally Barbara Fried, The Limits of a Non-Consequentialist Approach to Torts, 18 Legal Theory 231, 236-37 (2012). For an example of a discussion of, and argument against, formalist nonpositivism, see generally G. Brencher IV, Formalism, Positivism, and Natural Law in Ernest Weinrib’s Tort Theory—Will the Real Ernest Weinrib Please Come Forward, 42 U. Toronto L.J. 318 (1992).
as I would have it, that private law ought to be conceptualized and designed in a way that reflects the public political and moral commitments of liberal society, but rather that the corrective justice-conceptualization happens to coincide with a rights-based view of the person and shares the Charter's commitment to dignity. For legal positivists, there is no special reason for thinking that the personhood described by judges in private law cases ought to have any particular normative status when it comes to the broader political perspective of institutional design. Furthermore, being a legal positivist, I might well think that in the absence of the kind of legal directive—even the very weak one—found in the Canadian constitutional context, there is no legal basis, of the kind of argument Weinrib and Weinrib give, for altering the prioritization of protected interests in tort law.

The second problematic assumption in Weinrib and Weinrib’s argument for corrective justice's receptivity to Charter values involves the conception of public reason on which they rely. They are explicit that the private law judge’s reasoning is public, insofar as it refers to normative considerations that are properly respectful of, and equal in their application to, both parties, and that both parties can reasonably accept; they claim that this reasoning is not based, at this third stage, on philosophical reflection. That may be the case, but the public reasoning they describe is, overall, almost entirely based on philosophical reflection. At the second Kantian stage, the rights required in respect of purposive personhood are properly derivable from "reflections on the implications of self-determining agency." This kind of 'reflection' is certainly philosophical, and, if it is indeed a form of public reasoning, it is, as far as I'm concerned, the wrong kind of public reason from which to design a fundamental institution in liberal culture, and this is true, it seems to me, although it is supposed to align with Rawlsian public reason: within a society actually ordered by justice as fairness, and thus well-ordered, it may be possible for judges to reason exclusively deontologically in this way, but in a non-ideal context this seems

139. Weinrib & Weinrib, supra note 5, at 49 ("The specific content of the rights is derived, not through philosophical speculation, but through reference to beliefs, values, and modes of reasoning that have public plausibility.").
140. Id. at 48.
insufficiently advertent to the interests expressed as basic to liberal justice through public moral commitments.

This concern about the type of reasoning advocated in Weinrib and Weinrib's view brings me to the third problem. The reasoning flows from a particular conception of the person. That conception is a morally non-neutral one, and it is also not the one described by the incidents of dignified personhood in liberal bills of rights. It represents, rather, the will-based, Kantian morality that Rawls eventually set aside for his own conception of justice in favor of political liberalism. This is a conception based on agency alone; it does not even include the sense of justice that Rawls' moral person does.\(^{141}\)

Weinrib and Weinrib claim that private law is receptive to Charter values partly because both private and constitutional law are fundamentally animated by the moral premise of human dignity.\(^{142}\) And, although they say that the interests enumerated in the bill of rights can be considered to be the legally recognized constituents of dignity, those constituents can only enter the analysis after the existing prioritization of physical integrity and property in tort rights has been established.\(^{143}\) The conceptual content of dignity is thus hijacked and held hostage by that conception of the person: the enumerated interests in the bill of rights is taken to flesh out, for the private law context, only that conception of dignity. The interests protected by tort's status quo are, in this view, given priority. The Charter values are introduced, revealingly, at the third Kantian stage—after the fundamental rights and duties of person, property and contract have been established as necessary to the embodiment of dignity for the purposive, self-reflective agent.\(^{144}\) If one wants to design a set of institutions according to one's comprehensive moral

\(^{141}\) The status of the conception of the person found in the immanent analysis of private law is problematic as well, it seems to me, for a view like that of Mayo Moran, who takes the private law in general to contribute to a conception of the person within society that includes the publically enumerated interests and the moral view she takes to be immanent in private law. Mayo Moran, The Mutually Constitutive Nature of Public and Private Law, in The Goals of Private Law (Andrew Robertson & Tang Hang Wu eds., 2009).

\(^{142}\) Weinrib & Weinrib, supra note 5, at 49.

\(^{143}\) See id.

\(^{144}\) See id. at 48.
view, delineating a particular conception of the person is a good place to start. This conception of the person is one with which, it seems to me, more libertarians than socialists would agree with. Now, private law ought not be a socialist enterprise, but it also ought not appeal particularly to those of a particular political persuasion unless that persuasion can be justified directly against the conception of the person thrown into relief by the widely agreed-upon bills of rights themselves.

Weinrib and Weinrib give three main examples of new causes of action that could be created in reflection of Charter values under a corrective justice conception of tort. These involve freedom of expression in the context of property rights, a new tort of discrimination, and public policy in the context of testamentary freedom. It is not actually clear, though, that the committed corrective justice theorist would accept some of the suggestions made by Weinrib and Weinrib. They argue, for example, that a new tort of discrimination would be plausible under their view of private law; but other corrective justice theorists have expressly argued that such a tort based on public law would be impermissible as a matter of corrective justice.

Also, their view allows for the unreflective prioritization of existing ‘private’ interests, such as, in their illustration, “testamentary freedom.” Weinrib and Weinrib are somewhat elliptical on the question of the relative priority of the interests in bills of rights and private ones. They sometimes use language that emphasizes that, even given the legal imperative to include Charter values in common law jurisprudence, private law still ought to be conceived of according to its own distinctive “general imperative that governs private law from within.” But sometimes they seem to espouse the idea that existing private law categories, and the interests they protect, are more fully open to Charter influence, arguing, for instance, that that means that “a new set of interests—those associated with

145. See id. at 41, 65-68.
146. See id.
147. Benson, supra note 71, at 202-05; Reichman, supra note 7, at 257, 275, 279.
148. Weinrib & Weinrib, supra note 5, at 68.
149. Id. at 52.
the values inherent in the constitutionally guaranteed rights—becomes eligible for legal protection.\textsuperscript{150} To the extent that the view takes the private law conceptualization of the person as limited to him or her as a purposive agent, it seems to me that the view is unjustifiably moralized in Kantian terms, and insufficiently reflective of, and receptive to, the interests given public moral emphasis in bills of rights.

III. Objections: Losing Tort's Distinctiveness?

Let me summarize the argument so far. As a central rights-establishing institution, tort must justify itself against the background of public moral commitments. Therefore, any defensible conception of tort law must include some respect for individual moral rights. This can be at a fairly minimal level, requiring the kinds of constraints on the pursuit of social goals in respect to individual rights that we find in constitutional regulation of the state, or it can occupy the entire space of tort's institutional design, if one takes the establishment and vindication of individual moral rights to be what tort ought to be doing. My own sympathies lie with the latter view, but the argument of this Article is to establish only that the presumption in respect to the interests tort ought to protect should shift to require that its status quo be justified as a deviation from public moral commitments to a set of personal rights. Whatever view one takes about the fundamental purpose of tort law, there is a question about which interests its rights ought to protect. In other words, tort can be taken to be a (moral) rights-protecting institution, without the content of those rights being specified by corrective justice theory. Assuming reasonable disagreement, the question of which interests ought to be protected in private interactions is one that ought to be justifiable against the background of the set of interests most widely made subject to public moral commitments.

Having considered the existing normative justifications for the interests tort law protects, and having found them inadequate on the basis of the criteria of disagreement and the consequent necessity of publicly approved or liberally justified reasoning, my more reformist outlook is that the

\textsuperscript{150} Id. at 53.
which interests should tort protect

selection of interests grounding tort rights is a question to be referred to, or at least informed by, the enumeration of the interests deemed to be valuable through a means of publically accountable and procedurally sound decisions. In particular, and as a starting point, I contend that the interests that are articulated as having paramount importance, and thus being worthy of legal protection in constitutional bills of rights and human rights instruments, ought to be taken as presumptively authoritative on the question of which interests are valuable enough to warrant their protection as individual rights. In this section, I will consider three important objections to the view I have sketched so far; in responding to them I also hope to clarify certain aspects of my account.

A. Constitutional Imperialism

The conception of tort I am advocating here could be accused of something that is sometimes called "constitutional imperialism." This means that values, principles, or structures appropriate to the public sphere have somehow infiltrated or inappropriately begun to dominate those in the private sphere. The objection assumes that there is a meaningful distinction between the public and private spheres, that such a distinction can be usefully identified, and that, further, tort law falls on the private side of the divide. All three of these assumptions are either problematic or flawed, in my view, but even assuming they are to some reasonable extent true, one can nonetheless defend a view like mine against the objection. My main line of defense is as follows: disagreement, and hence the necessary presumptive prioritization of constitutionally enumerated values, are pertinent to determining institutional arrangements, rules, and obligations for activities in the private sphere as much as in the public sphere.

The imperialist charge implies that something morally problematic is going on—an unjustified, disrespectful and harmful invasion of some kind. That could be the case for two reasons. First, the area being invaded—in this case tort

151. This is the phrase used by Mayo Moran in her defense of private law's distinctive contribution to the conception of the person in society. Moran, supra note 141, at 18.
law—could be equally, intrinsically, valuable in its own right. In order for this to be convincing, the intrinsic value in the private sphere would have to be such that it would displace the presumptive priority of the public moral commitments to basic rights and liberties. In Part II, I found the justifications of tort’s prioritization of the interests in physical integrity and property inadequate as possible positions of this type. So this possibility is defeated by the inadequate justification of tort’s status quo against that public background.

Is there something distinctive about the structure and integrity of private law? I find this somewhat implausible from a broad political standpoint. At its foundations, tort law is simply a set of rights and obligations—what is distinctive about that? But perhaps there is another reason to warrant the retention of the status quo in tort law, its restriction to the interests it currently protects, that does not refer to their intrinsic priority, for interpersonal relations, over the broader range specified by public enumeration. Perhaps there is a more instrumental reason to keep this narrow range of proprietary interests separate, conceptually and institutionally, in private and especially tort law, from the encroachment of public law, public values, or even public moral commitments. In other words, perhaps we can helpfully reframe the question in slightly more instrumental terms: ought there to be something, or could there be something, usefully distinctive about private law’s structure and integrity? It seems to me that we can distinguish the questions of structure and integrity. I will argue in the next section that we have moral grounds to protect the structure of tort law, but that that need not require nor justify protecting its integrity if doing so means allowing the interests it currently protects to retain their special status, resisting the justificatory pressure of the other interests I have been arguing for.

The ‘integrity’ of tort simply cannot be invoked as a justification for its current selection of interests. Judges have developed tort law as though those interests were intrinsically characteristic of tort as a legal category; that is, to a certain extent these are the interests assumed to be important enough to give content to individual rights and obligations in tort because that is how tort was understood—as a category of legal claims. But that categorical quality is a contingent matter of history, and things could have been otherwise.
As an illustration of this contingency, I turn to an early legal theorist, John Norton Pomeroy. Pomeroy’s *Introduction to Municipal Law* conceived of legal categories differently from Holmes. He divided substantive law into three categories—persons and personal rights, property, and contracts. My interest lies in his analysis of the first, and, in particular, the section he called “general rights.” He divided the law not along the lines of public and private, nor by reference to the type of remedy available, but according to the types of interests protected by the rights he describes. So civil suits for damages were included with constitutional restrictions on legislation, and these were distinguished from political rights, like the right to vote. Pomeroy, then, did not treat tort as an independent legal category, but rather thought of the important categorical demarcation as the one between different types of interests protected by different types of rights (private, constitutional, etc.). Grey explains the ways in which Pomeroy interpreted the law and its categories according to the type of individual interest protected, rather than by the division between public and private defendants:

[His] civil rights (like Blackstone’s ‘absolute rights’ of persons in Book 1 of his *Commentaries*) were roughly the standard natural rights of liberal theory: personal security, subdivided into rights to life, body and limb, and reputation; the right to personal liberty; the rights to acquire and enjoy private property; and finally the right of religious belief and worship.

But even leaving aside the idea that tort is somehow conceptually constituted by the interests it protects, there are a number of reasons we might want to keep the animating values of private law, and of tort law in particular, distinctively separate from those of

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153. This was distinguished from “peculiar rights” that deal with status, which corresponded to the Roman law of persons, and included the law of domestic relations, for example, and master and servant. See Grey, *supra* note 92, at 1253-54.

154. See *id.* at 1254.

155. See *id.*

156. See *id.*
constitutional and human rights law, and we ought to consider their strength.

One possibility would be the desirability of a zone of privacy, meaning a sphere in which the animating values are distinctively private in some way. The problem with this idea of privacy is that the question of which values ought to be protected is inescapable. One suggestion is that the private sphere is the zone of individual autonomy and freedom. People who talk about the normative 'integrity' of private law often think of private law as the domain of individual autonomy.\textsuperscript{157} But why ought this necessarily be the case? Why would the delineation of a sphere of personal autonomy require that that sphere be given content that prioritizes the proprietary over political and social interests? We can agree that freedom and autonomy are the animating values of private law without that telling us much about \textit{which interests} ought to be taken to constitute the kind of personal autonomy we value. Weinrib and Weinrib have suggested that individual autonomy ought to be first conceived of as self-determining agency requiring the set of private law rights categories we find in its status quo, and that the set of personal interests established as the basis of public moral commitments could flesh out the details of \textit{those} rights.\textsuperscript{158} But one can be committed to individual freedom, autonomy and dignity, even in the context of private interactions, and \textit{still} think that the set of interests encompassed by those general concepts ought, at least presumptively, to refer to the publically enumerated set of interests constituting the person according to the political morality of a given constitutional state. Property, contract, and physical integrity will no doubt form part of the set of interests we ultimately think tort ought to protect, but they have no intrinsic priority in defining the concepts of freedom, autonomy and dignity. One might quite reasonably take the position that a set of positive entitlements, and an emphasis on social equality, is the most realistic basis for promoting everyone's private

\textsuperscript{157} This is a broad description of the formalist, Kantian view to which Weinrib and some other corrective justice theorists subscribe. For an example of one who follows in Weinrib's footsteps, see Calnan, \textit{supra} note 106, at 1023.

\textsuperscript{158} See \textit{infra} pp. 58, 59 and accompanying footnotes (discussion of Weinrib and Weinrib's claims about tort law's "special receptivity" to constitutional interests).
autonomy. Or one might think that personal autonomy consists of a libertarian conception of personal interactions. Given that the publically enumerated set of constitutional interests seems to emphasize a conception of personal autonomy that prioritizes freedoms of thought, conscience, religion, and equality, what would justify a selection of interests for tort protection that prioritizes the proprietary over the nonproprietary?

Why would one assume that corrective justice, as performed by tort law, protects exactly (or nearly so) the set of interests entrenched by tort law as a matter of contingent history? One possible answer, I would suggest, is that they assume it for a reason one finds in legal scholarship more generally, namely, that tort or ‘private’ law’s distinct institutional role is to protect prepolitical rights, which are appropriately subject to adjudication in the common law style. The argument for that position would go something like this. People have certain rights, in a state of nature, that are something like those specified by Locke—rights of the personal ‘estate,’ or of person and property. The protection of those rights is insecure in the state of nature, and so the social contract is adopted to enhance their protection. In political society, then, one of the central (and necessary) functions of the state is to create a system for protecting those rights; in our society, that function is fulfilled by the institution of private law, and, in the case of the protection of involuntary obligations, of tort law. The rights against the state enumerated in constitutions, on this view, are essentially a beefed-up version of the private rights in response to the more significant threat posed by the government. It would therefore make no sense to take the interests specified by those rights as the basis for tort protections since it is already clear which interests tort protects—those covered by the prepolitical rights—and since those publically enumerated rights are more

159. For an example of such an argument, see Andrew S. Gold, A Moral Rights Theory of Private Law, 52 WM. & MARY L. REV. 1873, 1882 (2011).

160. This is an argument along the lines of Ripstein’s interesting series of articles on the mutual requirements of prepolitical rights and public institutions. See Ripstein, supra notes 28, 67; RIPSTEIN, supra note 73.


162. I am grateful to Jeremy Waldron for pressing me to address this account.
expansive precisely because of the difference between foxes and polecats, to use Locke's analogy for the differing threat of individuals and states.

That argument is flawed in a variety of ways. First, as I argued in the previous section, while there may be a difference between the threat posed to certain individual interests by the state and by some private individuals, other private actors, such as large employers, quasi- or fully monopolistic service providers, as well as highly powerful actors in other domains, do present exactly the kind of threat to those very same interests as the state. Second, and more pertinent to my argument here, the idea that prepolitical rights are somehow more determinate in their content than any other type of posited or legal right is simply false. One might agree with Locke that in the state of nature we have certain moral rights, and yet reasonably disagree with him about which rights those are, or what their relative weight ought to be. Or one might agree that rights of person and property are prepolitical but think that under the circumstances of scarcity, or the circumstances of justice, more broadly, the scope of those rights is morally different than it would be under the conditions Locke described. In fact, when we disagree about what rights we ought to have, if we take those rights to be moral rights, then we are disagreeing about prepolitical rights. In short, then, if one assumes that the specific content of 'prepolitical' rights is determinate, one is making the same mistake as the one made by economists when they make the assumption that efficiency is a sufficiently justified social goal to overcome the moral requirements arising from the reality of disagreement.

Third, when comparing the interests protected by the Lockean prepolitical rights with those protected by bills of rights, one finds that the latter group protects what seem like 'social' or contingent rights, such as various forms of equality, welfare, and due process. Surely, one might say, those rights can't be construed as prepolitical, because they are so contingent: they are at least partly the products of historical inequalities perpetuated by political societies; they cannot, therefore, be truly prepolitical in the requisite sense, unlike rights of person and property, which do seem

163. For an argument about the moral implications of this phenomenon, see PUBLIC RIGHTS, PRIVATE RELATIONS, supra note 62.
uncontingent in the necessary way. But it is not at all clear that moral rights in a ‘real’ state of nature would not protect any interests that were systematically threatened by the conditions under which people actually lived. If women, for example, were routinely treated unequally in a state of nature (as could easily be imagined), then the motivation for recognizing their rights to the ‘personal estate’ would also, at least arguably, extend to recognizing certain special protections for their interests that are uniquely threatened. One way of responding to that argument, in other words, is to recognize that the kinds of interpersonal conditions that motivate moral rights within the state might also motivate them outside of it.

Another response, and my final objection to the ‘prepolitical rights’ basis for the justification of tort’s status quo, is related, but would apply even if we assume agreement about the content of the prepolitical rights. Just as we could reasonably take prepolitical morality to protect interests that fall outside the traditional physical-person-and-property set within the state of nature, where certain important interests are systematically threatened by social conditions, we have even greater reason to make sure that all of the institutions of the state are responsive to the protection of those interests, just as they are to the prepolitical ones. The institution of tort would thus be subject to this requirement, just as any others would. And we can quite reasonably interpret the rights enumerated within bills of rights to be precisely the kind of interests most widely taken to be both crucially important and thus ‘prepolitical’ at least in that sense, and to be threatened by the very social conditions for which we are imagining the institution of tort.

Finally, we find another form of this kind of ‘prepolitical’ argument in the idea that tort is justified because it fulfills something like the “dispensation of private justice.” But this kind of argument is vulnerable to the same kinds of objections set out above, particularly in respect of the fact of disagreement. What, in other words, is private justice—who would determine the content of its rights and obligations? If it were not assumed to simply be

164. See Calnan, supra note 106, at 1027 (making an argument in which the moral requirements of the prepolitical are articulated as a “liberal theory” of torts).
the same thing as ‘prepolitical’ justice, how would it differ from privatized justice such as Sharia? Private justice could, in short, be pursued according to any system of morality that allowed for a sphere of interpersonal norms. But the system of justice that forms part of the basic structure of liberal society cannot be animated by a particular, comprehensive morality like that of Islam. Nor, in fact, ought it to be animated by the comprehensive morality of Kantian justice, if that morality is to be imposed within the political sphere without proceeding through the norms of a public decision procedure.

Another possible candidate reason for maintaining a firmer conceptual separation between public values and private law than the one I have been advocating is that the ‘private’ can be kept as a kind of ‘apolitical’ sphere. Protecting a ‘neutral,’ ‘value-free’ zone strikes me as simply implausible, and many others have argued extensively and eloquently on this point, so I will not belabor it further. But what about a special and distinctively private sphere—are there uniquely private values? The most often cited candidate here is something like personal neutrality—as distinct from the legal neutrality espoused by legal formalism)—on this view private law would delineate a sphere in which one can pursue one’s conception of the good, and not have the state’s values imposed on one’s


166. This idea underpins corrective justice theory to the extent that it takes tort law to be an embodiment of the prioritization of the right over the good, and to the extent that it embraces the idea that the substantive good is the domain of the political while only the right is the proper purview of the legal. The idea is that tort as a system of formal reasoning cannot, as Bruce Chapman puts it, “be used systematically to achieve any particular goal of public policy or distributive justice or, for that matter, any specific substantive good at all.” See Bruce Chapman, Tort Law Reasoning and the Achievement of the Good, in TORT THEORY 77 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993).

interactions. The problem is that there is no way of neutralizing the political and moral association of the set of interests selected for protection by tort law, and tort law is an institution of the state. If we select only the most minimal interests—as seems to have been the case so far—a comprehensive moral position has in fact been espoused. But since tort law is the law of the state, and, on a positivist view of the law, is thus an expression of political moral commitments, what justifies the state’s adoption of a Kantian moral outlook when it comes to the design of its basic institutions?

A related proposal, and one I find more plausible, that also embraces a certain kind of minimalism about the interests tort should protect, involves personal privacy. Freedom, in other words, not from the state’s value system but from state interference: we shouldn’t be expanding the grounds on which people can get into legal trouble—we ought to try to minimize people’s legal liabilities. But minimalism about legal liabilities is not the same as justificatory minimalism; justificatory minimalism does not require that we protect as few interests as possible. Rather it requires that we protect only those interests that are the most widely agreed upon in a given social setting, as demonstrated through a super-majoritarian or constitutive decision procedure. That way, at least, the values that will be made the basis of interpersonal rights and obligations will be very clear, and can be publically criticized.

B. Redundancy

The objection here is that we have other aspects of the law that protect the interests reformists like myself am so concerned about. There is, so this objection goes, already human rights and civil rights legislation that protect these interests, and so there is simply no need for tort to do so. On its face this is a rather weak argument: the law addresses many interests in a variety of ways—through criminal,

168. Id.


170. I am grateful to Sam Issacharoff, Debra Satz, and participants in the Stanford Political Theory Workshop for raising this set of objections helpfully.
administrative, and regulatory laws—and this does not mean that there is no normative role for each area. Consider, for example, the interest in physical integrity, which tort protects and which is already protected in criminal law, administrative law, and environmental regulation. Still, to the extent that this objection has traction, one could call it the problem of overprotection.

Another objection along these lines might be that the current tort system does protect this wider set of interests, but that its characteristic mode of protecting them is indirect: if these interests are set back by means of infringements of person or property, then tort law does address them. In this line of thinking, we might say that the person and property limitation is a kind of seriousness threshold that justifies coercive response. What is wrong with this indirect mode of protection? Call this the objection from indirect protection.

A final concern along these lines is as follows. If the rights and obligations among individuals are understood to protect the same panoply of interests as those articulated in public law, there will be no reason to conceive of tort as an independent legal category at all. If we are going to leave open the question of which interests tort ought to protect, then we have accepted that there are no protected interests that tort necessarily involves by some sort of conceptual or logical implication; the interests selected for protection are selected by lawmakers—judicial or legislative.

One line of response to this kind of criticism is that tort protects interests with a distinctive set of remedies not available under criminal or civil rights law. Civil rights law allows for much less in the way of punitive damages, usually, than does tort; similarly it does not generally allow for trial by juries, nor for specific tort mechanisms such as vicarious liability, which can be an essential tool for plaintiffs wronged by penniless defendants, and also for the larger purpose of deterring conduct, such as discrimination, that is socially as well as individually injurious.

But it seems to me that there are two much more important reasons why tort ought to be conceptualized as a distinctive legal category and a category of legal claims, and these reasons are responsive to all three of the problems of redundancy just outlined, insofar as they conceive of a particular kind of normative role for tort that does not refer to the distinctiveness of the interests it protects. These reasons refer to two aspects of tort’s existing structure that
I will claim are normatively valuable against the background of the principles of liberal justice and of public moral commitments to the set of constitutionally enumerated fundamental rights. These involve tort's institutional capacity to address questions of the definition and limitation of property rights on a case-by-case basis, and its institutional structure of direct complaint and compensation.

1. Integrating Proprietary and Nonproprietary Interests. First, conceiving of tort as justifiable along the lines I have suggested means that these interests found in constitutive public moral commitments would have to be understood not as secondary to, or somehow as side-constraints on proprietary rights, but rather that both types of interests would have to be conceptualized as partly and jointly constitutive of the personal rights which individuals have. In other words, freedoms such as conscience, association, expression, and religion, and dimensions of social equality such as race and gender would have to be taken not as secondary limitations on innate property rights, but as part of the normative consideration of what property is, what justifies its protection and what defines its scope and contours. If tort protects the interests set out in constitutional commitments as its own, in the way I have been suggesting, so that those interests are considered to be as much 'tort interests' as are physical integrity, reputation, and property, then a much more direct rights-balancing would have to take place within all tort litigation.

So if a person simply put up a sign on their house that indicated two doors, one for whites and one for blacks, then even if other areas of the law would have the police knocking on his door, my argument says that there is a special role for tort to allow those whose interest in racial equality was affected to bring a claim against the homeowner. I am not saying that the claimant in such a case ought to win, ought to be compensated or granted injunctive relief against the homeowner, but only that, as a matter of tort's expressive political role, they be given a claim to make in their own name, directly against the other person, for the setback they experience to that very important interest.

All these interests would then be conceived of as dimensions of the person, of personal freedom, integrity and
autonomy; the question of what is the fair outcome in a given case would then require an explicit analysis of the relative importance of these interests in a person’s life and in the context at issue. Now, that kind of analysis would, of course, itself require guidance from public values and public debates. But conceiving of tort in this way would at least generate the requirement that the public, and philosophers of both political philosophy and private law, have such a debate, and reform tort according to its outcomes.

2. Promoting Rights Subjectivity. But there is a second reason to retain the legal distinctiveness of tort as a category of claims, beyond the explicit recognition that proprietary and nonproprietary interests are, as protected personal interests, the same kind of thing. There is, in other words, something properly, justifiably distinctive about tort law that speaks against collapsing the protection of individual interests against other individuals into other branches of the law—criminal, administrative, and constitutional—and cutting the cord to tort altogether. There is something normatively distinctive about tort, such that we might, as a way of designing an institution to enact and enforce our involuntary interpersonal obligations, want to keep it—that something refers back to the rights-promoting benefits of tort’s direct complaint and compensation structure.

We have reason to conceive of and retain tort law as a distinct category of causes of action—a category held together not by the ‘integrity’ of the interests it protects, since these ought to remain open, conceptually, to input from public and constitutional deliberative sources, but by its institutional structure of direct complaint and compensation by individuals in their own names. This structure, rather than the substantive set of interests privileged by selection in tort’s status quo, has a distinctive value for political society. This, then, along with the fundamental commitment to pursuing social goals in accordance with respect for individual rights, and with a presumption in favor of conceiving of the person in terms of the publically enumerated interests, is the third way in which we ought to use our foundational political and legal commitments to moral rights to inform our institutional establishment of interpersonal rights and obligations. Even when we recognize that tort ought, at least presumptively, to include the interests enumerated as public law rights
within its ambit of protection, tort's distinctive role in the legal, political, and social commitment to these rights still lies in its institutional structure of direct complaint and compensation.

We have made a moral commitment, through our constitutional foundations, to the idea that individuals are, in a fundamental sense, rights-bearing subjects, meaning that they can and ought to be legally entitled to make legal claims vindicating their rights on their own behalf, rather than relying on some other party, such as the state, to do so. Therefore, the interests specified by publically enacted bills of rights by tort ought to be protected in a way that recognizes and promotes the rights-subjectivity of individuals, as well as the social commitment to that subjectivity. It is in this respect that tort is, I argue, institutionally well suited to the political commitment to individual moral rights. Tort law's properly distinctive institutional feature within political society is its expressive institutional capacity not only to further the vindication of rights, but to foster active rights-subjectivity as a social and political norm.

My argument has one major implication for reform of tort law. Property and proprietary interests would still be protected by tort—virtually all constitutions and human rights instruments protect property in some way—but they would be protected as one set of interests among others, and the relationship among those interests would be presumptively equal, so that the way in which interests, such as racial equality, freedom of association, or privacy, interact with people's interest in the free use of their property would be determined on a case-by-case basis. The presumption in favor of the proprietary interests that we currently find in tort would be abandoned: sometimes people's proprietary interests would outweigh other people's claims to its restriction, and sometimes tort would delineate the contours of property rights with direct reference to those other, nonproprietary ones.

What would this equality of interests achieve? One effect would be expressive, in that proprietary and nonproprietary interests would stand on an equal footing. Take the case of sex equality. Many reformists argue that what I am calling the nonproprietary interests, such as antidiscrimination, or sex equality (as manifested in a cause of sexual harassment) could give rise to tort actions under the rubric of the tort of intentional infliction of emotional
distress. Now, that would be good, if it allowed those interests to be protected in tort law in a way that they are currently not. But my argument implies that it would be better to create causes of tort actions that directly and specifically express those interests, so that an action would be brought for racial discrimination, for a particular kind of sexual harassment, or for the restriction of free association. The reason this follows from my argument is that it is an inadequate reflection of the importance of our public moral commitment to those interests to treat them as wrongful because they cause emotional distress. Emotional tranquility is not the same interest as racial equality, sexual equality, or the freedom to associate. The expressive dimension of tort, I want to claim, means that it is inadequate to say that a pornographic calendar in a workplace is legally problematic only as a matter of human rights law, or as a matter of employment law, or as a matter of the emotional tranquility of those offended by it.

Eliminating this distinctive tort right would, therefore, deny victims a qualitatively distinct and important avenue of legal redress. It is not clear why such redress should not be open to victims of harm to their interests, such as racial and gender equality, low-cost rescue, religion or expression. Torts of this kind, for example, would allow for victims to make normative claims against each other directly, and violators would be forced to pay damages.

This response also addresses the objection from tort's indirect protection, and refers to tort's expressive function in political society: there is an expressive value in protecting important interests directly. In response to the idea of person and property interests as a kind of harm threshold, I would suggest that it would be a somewhat peculiar conception of harm to see a minor infringement of a property boundary as more "serious" than a violation of one of the basic freedoms.

This way of conceptualizing tort's distinctiveness raises a further consideration: if tort's institutional structure of direct complaint and compensation constitute its institutional character, and make it independently worthwhile as a mechanism for implementing interpersonal involuntary obligations, does that structure impose any constraints on the contents of the rights we might like tort to protect? The answer to this question dovetails with the final objection to the presumption in favor of publically
enumerated interests, so I will address the two together in the following section.

C. Overbreadth

The third objection is that the range of interests protected in constitutionally enumerated rights is hopelessly broad—tort could never actively protect them all without imposing a massive burden on individual freedom. This is a real concern, it seems to me, but it is mitigated somewhat by the fact that constraints might be imposed on tort's substance—the interests it protects as rights—by the interpretation of its institutional value I set out in the previous section. In order to give a full account of the way this kind of constraint would operate in practice, in the weighing of interests in litigation, I would need much more space than I have in this Article, so I cannot fully elaborate this response here, but I will, in what follows, give a brief outline of my early reasoning.

In general it seems to me that the structure of tort claims precludes using tort to unfairly put one defendant on the hook for a rights violation that has in fact been committed by a more polycentric tortfeasor—such as the political community more generally. This would limit the extent to which tort could be used as a form of localized distributive justice, but it would not limit the types of rights that could be enforced through tort. The only restriction is that the rights violation must be shown to have been committed by the defendant. The scope of tort claims is thus limited through agent-relativity. This can be accomplished by a determination that the defendant owed the plaintiff a duty of care in respect of the relevant right. What goes into making this determination, in the context of the interpretation of tort I am proposing here, is beyond the scope of this paper. Suffice it to say that the kind of connection between individuals that ordinarily grounds a finding of a duty relationship in tort law would be discernible in respect of the kinds of risks to interests such as nondiscrimination, or religious freedom, just as it is in the context of risks of physical harm.
CONCLUSION

What does it mean for tort to be understood as protecting rights? In this view, tort tells people how they ought to behave in certain contexts. One implication of this is that it would be wrong for people (or judges) to deliberate about actions that might harm others through cost-benefit calculations. So, for instance, it would be unacceptable to purchase freedom to inflict losses, as one might do if we accept the economists' interpretation of what tort is doing, where the burden of precaution is greater than the loss, so that it is acceptable for you to simply calculate that it is cheaper for a defendant just to pay for the resulting injury. Put more abstractly, the implication of the rights element of the interpretation of tort is that the system cannot be boiled down to a welfare maximization function. We may protect interests as aspects of welfare, but we do so within the constraining function of rights' orientation toward individuals, and their moral agency and separateness.

Taking a view of tort that understands the content of the rights it protects to be morally important interests implies that these rights are not absolute; that tort will retain its balancing function, weighing interests on a case-by-case basis.171 I suggest that we look to public moral commitments to protecting enumerated interests that have been deemed to be valuable (such as the fundamental rights articulated in bills of rights). Designing the content of tort rights this way would privilege particular aspects of welfare, or the interpretation of what interests constitute or generate welfare. This privileging, though, is justified because the interests in question have been determined to be morally important by carefully designed, transparent and publically accountable decision procedures, as opposed to the moral intuitions of judges.

171. As suggested by Joseph Raz in his definition of rights. See Raz, supra note 59, at 166.