

# Relational Wrongs and Agency in Tort Theory

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**Abstract**—Some of those theorists who believe tort law consists of relational wrongs also believe, under the influence of Kant’s legal philosophy, that tort law is concerned for the agency of the two parties to a wrongful interaction. I argue that these theorists should discard their agency framework. It distorts our view of tort doctrine and does not really fit the law’s relational structure. We can reach a better understanding just by pursuing the idea that torts are relational wrongs. I try to diagnose and suggest cures for the intellectual tendencies that lead Kantian theorists away from this approach.

**Keywords:** civil recourse, corrective justice, fault, Kant, strict liability, tort theory.

## 1. Introduction

One key idea in tort theory today—emphasised by ‘corrective justice’ and ‘civil recourse’ theorists—is that tort law is relational. A court does not just consider an individual’s behaviour or condition, nor the arrangement of society as a whole, but rather the justice of an interaction or other relationship between two persons. Torts are not wrongs of any sort but relational wrongs: wrongs done by one person to another.

A second key idea is endorsed by those corrective justice theorists who favour Kant’s legal philosophy, such as Ernest Weinrib and Arthur Ripstein. They believe tort law ensures that neither of the parties to a wrongful interaction subordinates the other’s agency. This idea is thought to fit tort law’s relational structure and to clarify tort doctrine—including the notoriously obscure distinction between so-called ‘strict’ and ‘fault-based’ torts.

Do these two key ideas belong together? Here I do not doubt torts are relational wrongs, but question the Kantian claim that torts involve one agent subordinating another. I argue that the Kantian agency framework does not actually fit tort law’s relational structure, and distorts its doctrine. I suggest

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Kantian theorists are driven to invoke this framework partly because they do not fully acknowledge the significance of their own idea that torts are relational wrongs.

In critiquing the Kantian agency framework, I will try to make arguments that should strike Kantian theorists as important. Consequently, readers may find I do not articulate their own views about tort law, or how best to theorise it. Still, I assume a critique of the kind I will attempt, when applied to one of the most influential accounts of tort law today, is one worthwhile enterprise in legal theory.

Much of what I say is friendly to the work of the rival ‘civil recourse’ theorists John Goldberg and Benjamin Zipursky. They view torts as relational wrongs but are not tempted by the Kantian agency framework. In that broad respect, I endorse their approach. However, I would not endorse some of their more particular claims about tort’s relational wrongs, and they say much else about tort law that I cannot consider. Their account, like the Kantian theory, is sophisticated enough to warrant detailed consideration on its own.

Nor will I examine in detail the work of other leading theorists who have their own take on some of the issues—including the late John Gardner, whose rich account of tort I will certainly not appraise. I will note how some of Gardner’s views about relationality bear on those I discuss below. Moreover, my overall argument echoes Gardner’s own dissent—based on other grounds, and expressed in his characteristically nuanced manner—from the Kantian claim that ‘the basic interpersonal architecture of private law is *essentially* an architecture of freedom’.<sup>1</sup>

## 2. The Key Ideas

### A. Relational Wrongs

How might one come to think that tort law is relational, and that this is important? Ernest Weinrib famously did by engaging with more general philosophical musings about the various human virtues.<sup>2</sup> It seems that some virtues, such as *courage*, can be exhibited by an individual alone. Crusoe, before Friday arrived, behaved courageously. Whereas other virtues require the presence of multiple persons—including *justice*, which concerns how one person acts, or stands, with regard to others.<sup>3</sup> After Friday arrived, Crusoe’s share

<sup>1</sup> John Gardner, *From Personal Life to Private Law* (OUP 2018) 199 (original emphasis). Here Gardner also distances himself from other theorists who emphasise different conceptions of agency, especially Hanoch Dagan and Emmanuel Voyiakis.

<sup>2</sup> Ernest Weinrib, *The Idea of Private Law* (Harvard UP 1995) 58–61; Aristotle, *Nicomachean Ethics* (Martin Ostwald tr, Pearson 1962).

<sup>3</sup> ‘The mark of this special virtue of human agents, as Aristotle says, is that it is “toward another”, *pros heteron* or *pros allon*; it is, as St Thomas says, *ad alterum*, or as Kant says, *gegen einen Anderen*.’ Michael Thompson, ‘What Is It to Wrong Someone?’ in R Jay Wallace and others (eds), *Reason and Value* (OUP 2004) 337. With a

of the island's resources could be just, he could treat Friday unjustly, and so forth.

The interpersonal virtue of justice, moreover, can be observed in at least two configurations or forms.<sup>4</sup> One appears when, for example, a prize is shared out among members of a group according to a criterion each may possess in varying degrees—such as *need* or *merit*. Here justice is achieved if each person gets the right proportion of the prize, given the claims of all the others. The second form of justice appears in certain civil disputes that often end up in court—including disputes about torts or civil wrongs, such as woundings and cheatings. Here one person alleges another has wronged her, and justice is achieved if the wrong is remedied and things are thereby set straight as between those two themselves. The issue is the justice of their relationship.

Weinrib and others with similar views tend to illustrate tort law's focus on relationships with the well-known case of *Palsgraf v Long Island Railroad*.<sup>5</sup> To commit the tort of negligence, Chief Judge Cardozo held, a defendant must act carelessly *towards another person*, the claimant. The railroad escaped liability because, even if its guard acted carelessly in pushing a passenger onto a moving train, this was not careless with respect to Mrs Palsgraf, the unlucky victim of the outlandish causal sequence that ensued involving concealed fireworks and poorly mounted scales.<sup>6</sup>

The other wrongs of tort law likewise seem to be relational. For instance, the tort of deceit, John Goldberg observes, does not involve individually specifiable misconduct by a defendant or suffering by a claimant.<sup>7</sup> The relevant misconduct is essentially other-related—a false representation to the claimant; as is the relevant suffering—reliance on the defendant's false representation. So both parties can be said to participate in a relation of deception.

Having come to suppose tort law is relational, theorists must decide how to encapsulate the idea and present it to their readers. This can be done in various ways ranging from relatively concrete to very abstract. One relatively concrete approach can be gleaned from the civil recourse theory of Goldberg and Benjamin Zipursky. Zipursky's article introducing the theory claimed that torts

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hold on justice in the interpersonal sense, we may apply it to a single person reflexively—and so describe Crusoe as acting unjustly *towards himself*.

<sup>4</sup> Weinrib, *Idea* (n 2) 61–66; Aristotle (n 2) V.2–4.

<sup>5</sup> 162 NE 99 (NY 1928); Weinrib, *Idea* (n 2) 159–67; Benjamin Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vand L Rev 1; Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing 2007) 123–9. Bernard Rudden, 'Tortices' (1991–92) 6/7 Tulane Civil Law Forum 105, 106, fn 5 notes the British equivalent is *Bowhill v Young* [1943] AC 92: speeding through an Edinburgh intersection was obviously careless, but arguably not careless with respect to a fishwife alighting a bus 50 feet away and out of sight.

<sup>6</sup> Contrast Gardner's account of negligence (n 1) ch 1. He distinguishes 'strictly' relational duties, which are justified by (defeasibly) valuable special relationships, from 'loosely' relational duties, which are not. Since a typical negligence case of a careless interaction between strangers does not turn on any valuable special relationship, the relevant duties must be 'loose'. Gardner argues that they are justified by the (nonrelational) value of human life. This approach is in various respects orthogonal to that of the theorists discussed above, who seek to account for torts as disvaluable (ie wrongful) relations that need not be special.

<sup>7</sup> John Goldberg, 'Ten Half-Truths about Tort Law' (2008) 42 Val UL Rev 1221, 1250.

are ‘relational wrongs’, and suggested we can often capture the gist of such a wrong using a word or short phrase such as *wounding*, *cheating*, *slandering*, *evicting*, *failing to care for*, etc.<sup>8</sup> These formulations are relational because they employ a transitive verb that takes one person as the subject and another as the object. In later writing, Goldberg and Zipursky have tried to provide pithy summaries of the relational gist or substance of each particular culprit in tort law’s ‘gallery of wrongs’.<sup>9</sup>

Yet, civil recourse theorists are not averse to more abstract ways of presenting tort law’s relationality. Zipursky’s original article also claimed that a relational wrong is captured by the formula: ‘(LN-T) For all  $x$ , for all  $y$ ,  $x$  shall not  $Ty$ ’,<sup>10</sup> where  $LN$  is a legal norm,  $T$  is an action, and  $x$  and  $y$  are persons. The equivalent formula for a nonrelational wrong would be: ‘For all  $x$ ,  $x$  shall not  $T$ ’.

Corrective justice theorists of Kantian bent are not afraid of abstraction. Weinrib has called his own interpretive theoretical approach ‘formalism’, because he aims to identify the abstract form of reasoning that is internal to tort law and, indeed, private law as a whole.<sup>11</sup> In his words, Weinrib proceeds by

identifying the most abstract unifying conceptions implicit in the doctrinal and institutional arrangements of private law ... bring[ing] to the surface ideas that are latent in liability as a normative practice.

Within [this approach] the movement of thought is from the particulars of liability to its most abstract characterization, thus carrying to its extreme the tendency to abstract that marks legal thinking. Although the events that give rise to a legal relationship are particular, the law treats these events in terms of categories. The particularities of the events are legally relevant only inasmuch as they instantiate a category applicable to the legal relationship to which they give rise. [A formalist theory] abstracts further from these categories to the barest and most general ideas underlying the law’s construction of the parties’ relationship.<sup>12</sup>

The form of reasoning characteristic of tort law and private law as a whole, Weinrib tells us, is ‘correlative’ (or ‘bipolar’). He explains this notion in part by drawing our attention to the logical structure of a ‘correlative’ judgment.<sup>13</sup>

<sup>8</sup> Zipursky (n 5) 60. Of course, the very characterisation of torts as ‘wrongful’ strikes objections—for instance, they do not always involve subjective moral culpability—on which see John Goldberg and Benjamin Zipursky, ‘Torts as Wrongs’ (2010) 88 *Tex L Rev* 917.

<sup>9</sup> John Goldberg and Benjamin Zipursky, *Oxford Introductions to US Law: Torts* (OUP 2010) ch 3.

<sup>10</sup> Zipursky (n 5) 61 (original emphasis). For other strikingly abstract presentations, see Thompson, ‘Wrong’ (n 3); Michael Thompson, ‘Propositional Attitudes and Propositional Nexuses’ in Sebastian Rödl and Henning Tegtmeier (eds), *Sinnkritisches philosophieren* (deGruyter 2012).

<sup>11</sup> Weinrib, *Idea* (n 2) ch 2.

<sup>12</sup> Ernest Weinrib, *Corrective Justice* (OUP 2012) 13–14.

<sup>13</sup> Weinrib, *Idea* (n 2) 63–6, 72–83, ch 5, and especially 78, fn 48, citing Aristotle, *Rhetoric* II, 1397a23 (‘Another topic is derived from correlatives. If to have done rightly or justly may be predicated of one, then to have suffered similarly may be predicated of the other. Similarly with ordering and executing an order. As Diomedon the tax-contractor said about the taxes, “If selling them is not disgraceful for you, buying them is not disgraceful for us.”’) See too Martin Stone, ‘The Significance of Doing and Suffering’ in Gerald Postema (ed), *Philosophy and the Law of Torts* (CUP 2001) 134. Weinrib also makes his point by speaking for example of

In such a judgment, a predication about one person is thereby a predication about another. For instance, to say of  $x$  that he *loves* (romantically) is thereby to say of some other person  $y$  that he or she is loved. The judgments of tort law, according to Weinrib, embody the ‘sheer correlativity of doing and suffering’.<sup>14</sup> To say of one person, a defendant, that his action is inappropriate is thereby to say of another, a claimant, that she has undergone a corresponding suffering.

Another strikingly abstract approach appears in the work of Arthur Ripstein, who claims tort law is not just relational, but what we might call ‘purely’ relational. Ripstein analogises the spatial judgment ‘to the left of’. It is relational because something is ‘to the left’ only in connection with something else to the right. Moreover, it is purely relational because it is not constructed by reaching two individual judgments and then linking them. You do not first consider the leftness of one object on its own, then the rightness of another, before concluding they stand in a relation of left-to-right. The spatial relation is basic.<sup>15</sup> Contrast an ‘impurely’ relational judgment, such as a comparison. In concluding that Everest is ‘taller than’ Kilimanjaro, you can think of the height of one mountain, then the other, before comparing them. While there is a relation, it is cobbled together by connecting two individual judgments.<sup>16</sup>

Why does it matter that tortious wrongs are relational? It means that a theory that employs relational concepts may straightforwardly ‘fit’ the law, whereas a theory that evinces concern for an individualistic value will face a certain challenge. Such a theory will have to resist the natural pull of its individualistic value, in order to explain why tort law should pursue that value only in the context of relationships between two persons.<sup>17</sup> The usual illustration is a crude utilitarian theory. Imagine a theorist claiming that tort law aims to maintain utility, conceived as a hedonic state an individual may enjoy. This should attract an obvious objection: if tort law cares about utility, why not maintain the utility of an individual considered alone,<sup>18</sup> for example by indemnifying her against suffering caused by nature or disease? If we care about utility, we should at least *prima facie* care about it in that individual context too.

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a correlation between the defendant’s ‘normative gain’ and the claimant’s ‘normative loss’, and of correlative rights and duties.

<sup>14</sup> Weinrib, *Idea* (n 2) 81–3.

<sup>15</sup> Arthur Ripstein, *Private Wrongs* (Harvard UP 2016) 36–7. I will not explore all the intricacies of the Kantian analogy between private law and (impenetrable solids in) space. See Arthur Ripstein, *Force and Freedom* (Harvard UP 2009) appendix.

<sup>16</sup> ‘The comparison refers to two things, but it is composed of nonrelational features of the particulars being so related.’ Ripstein, *Private Wrongs* (n 15) 37.

<sup>17</sup> eg Weinrib, *Idea* (n 2) chs 2, 5. We need not suppose the pull is ‘insatiable’. Goldberg (n 7) 1249. For Goldberg and Zipursky’s most recent treatment of this point, see John Goldberg and Benjamin Zipursky, *Recognizing Wrongs* (Harvard UP 2020) ch 7.

<sup>18</sup> For that matter, why not take on groups of people to maintain their overall utility?

It is important not to make too much of this challenge. A utilitarian theorist could respond by offering further reasons for tort law to focus on relationships between two parties. Those reasons would have to be considered on their merits, and may turn out to be persuasive. For example, our theorist might advance a two-level account such as rule-utilitarianism, or a ‘balance of reasons’ approach whereby the pursuit of utility is constrained by other goals.<sup>19</sup> Still, our theorist here shoulders an argumentative burden not borne by one who just appeals to relational concepts that more straightforwardly fit the law’s relational structure.<sup>20</sup> At least for the most ardent proponents of the relational view of tort—certainly, for its Kantian proponents—that is a good enough reason to prefer a relational theory, assuming one is available. I want to accept this point and see where it leads.

### B. *The Agency Framework*

Kantian theorists claim not only that torts are relational wrongs, but also that tort law ensures neither party to a wrongful interaction subordinates the other’s agency.<sup>21</sup> How might one come to combine these ideas?

Weinrib’s seminal discussion combining the two ideas begins by observing a puzzle about private law. A court resolving a dispute such as a tort case will ignore many qualities of the parties that would be important in other contexts—such as the fact that one is *needy* and the other rich, or one *meritworthy* and the other unworthy (in the sense of overall character).<sup>22</sup> Presumably, however, there must be some aspect or conception of the parties with which the law is concerned.<sup>23</sup> What could it be?

One aspect of any normally functioning person that seems worthy of legal attention is her *agency*. Indeed, one might suppose agency is important in tort law because it is a precondition for owing enforceable duties: to be liable, a defendant must generally have legal capacity and so be capable of acting agentially.<sup>24</sup> Of course, it is arguably implausible to think that tort law vindicates a full-blooded conception of agency or autonomy. Tort law does not, after all, ensure people realise their life plans. However, a more minimal, Kantian

<sup>19</sup> Gardner (n 1) ch 1, 213; Andrew Fell, ‘Corrective Justice, Coherence, and Kantian Right’ (2020) 70 UTLJ 40, 48–52; Craig Purshouse, ‘Utilitarianism as Tort Theory: Countering the Caricature’ (2018) 38 LS 24.

<sup>20</sup> Liam Murphy, ‘Purely Formal Wrongs’ in Paul Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (OUP 2020) 31 (‘Making good on this claim requires moral argument, of course’).

<sup>21</sup> Weinrib, *Idea* (n 2), *Corrective Justice* (n 12); Ripstein, *Private Wrongs* (n 15); Allan Beever, *A Theory of Tort Liability* (Hart Publishing 2016). Note, however, that Beever’s account differs in important respects. Accordingly, I will focus on Weinrib and Ripstein. Aspects of the Kantian view have also influenced other prominent tort scholars such as Robert Stevens, eg *Torts and Rights* (OUP 2007) and Jason Neyers, eg ‘Reconceptualising the Tort of Public Nuisance’ [2017] CLJ 87.

<sup>22</sup> Weinrib, *Idea* (n 2) 77–78; Aristotle (n 2) 1132a2–1132a6.

<sup>23</sup> Weinrib, *Idea* (n 2) 76, 80. Weinrib emphasises that he is looking for some respect in which the parties can be regarded as *equals*, and which pertains to their immediate interaction.

<sup>24</sup> Weinrib, *Corrective Justice* (n 12) 23–5. Weinrib also notes the connection between agency and the acquisition and transfer of private law rights such as property and contract rights.

conception of agency might fit the bill. On this conception, agency is just *purposive action*: an agent is someone who has a purpose or end she wants to achieve, and takes up means to achieve it.<sup>25</sup> For instance, you might decide to cross the road and so move your body in that direction; or to grow a vegetable garden and therefore till the soil, sow seeds and so on.

Because Kantian theorists are committed to a relational account of tort, they would never contend that the law is concerned for the agency of a single person considered alone. Instead, they claim, tort law ensures that neither of the two agents involved in an allegedly wrongful interaction subordinates the other's agency.<sup>26</sup> Or in other terminology Ripstein favours, tort law ensures no agent is 'in charge of' another; each is 'independent' of each other.<sup>27</sup>

According to Kantian theorists, tort law prevents subordination by requiring each agent not to interfere with the things or 'means' that are subject to another agent's purposes—in particular, her body and property.<sup>28</sup> Thus, the law tells me not to sneak up and push you over while you cross the road, and not to trample through your garden; if I do, I must remedy my disruption.

This Kantian agency framework supplies a high-level account of prominent torts such as trespass, nuisance and negligence. The torts are understood to address various ways one agent may inappropriately interfere with another's means. The various forms of trespass—to the person, to land and to goods—appear to address impacts upon another's body or property, as where I push you over, trample on your garden or steal your car. Nuisance addresses interferences with real property, as where the smoke from my factory or barbecuing poisons your trees or disrupts your sunbathing. The tort of negligence is thoroughly controversial, but paradigmatic cases involve careless injuries to person or property, as where I accidentally crash my car into you or your car.

I have sketched here only the barest outline of the Kantian account of tort. A fuller exposition would need to show, *inter alia*, how the account illuminates other tortious wrongs, such as interferences with psychological integrity, economic interests and so on. However, I will now turn to another pressing issue the account faces.

### C. A Perspective on 'Strict' and 'Fault-Based' Liability

At least since Holmes and Pollock founded the modern discipline, tort theorists have grappled with the problem that different torts seem to embody different approaches to liability: so-called 'strict' and 'fault-based'. It is difficult

<sup>25</sup> Immanuel Kant, 'The Metaphysics of Morals' (1797) in *Practical Philosophy* (Mary Gregor tr, CUP 1996) [6:211]–[6:213].

<sup>26</sup> See too *ibid* [6:230]–[6:231].

<sup>27</sup> Ripstein, *Private Wrongs* (n 15) 33–35.

<sup>28</sup> 'Your means are just those things about which you are entitled to decide the ends for which they will be used. ... The means that you have, in the first instance, are just your body—your ability to decide what to do and to manipulate objects in space—and your property, that is, the things outside of your body that you are entitled to use for pursuing purposes.' Ripstein, *Private Wrongs* (n 15) 9.

to overstate how much theorists disagree about this distinction, and about which torts fall on either side. Still, any ambitious theory must say something about it. Weinrib's earlier work concentrated on fault-based liability, and his limited treatment of strict liability has been justly criticised as too peremptory.<sup>29</sup> More recently, Kantian theorists have fully articulated a distinctive approach that seeks to rationalise both kinds of liability.<sup>30</sup> This approach focuses on the role of judicial 'reasonableness' assessments—which tend to be more prominent in the torts that are sometimes labelled 'fault-based' rather than 'strict'. While one might question whether this is the appropriate target for an account of the strict/fault-based distinction, I will here consider the Kantian account on its own terms.

Some torts, including the various forms of trespass, seem relatively 'strict' in part because no explicit judicial assessment of 'reasonableness' is needed to establish liability.<sup>31</sup> To establish trespass to land, a court need conclude only that the defendant entered someone else's land, say by walking across her garden, not that this was 'unreasonable'. (So it is irrelevant that the defendant reasonably believed the land unowned, or used it in an arguably reasonable way—say by crossing it quickly as the natural route to his destination.) Similarly, that a defendant employs the claimant's goods, say by driving her car, may suffice for trespass to chattels. Any unconsented-to touching of the body (or at least, any hostile, harmful or offensive touching) may amount to trespass to the person.<sup>32</sup> An explicit consideration of the reasonableness of the defendant's conduct is not part of the cause of action.<sup>33</sup>

By contrast, other torts which are often labelled 'fault-based' do require assessments of reasonableness. Most prominent is negligence.<sup>34</sup> In a typical case about an accidental car crash, the driver will be liable only if he failed to take reasonable care. Paradigmatic nuisance cases are akin to negligence in this respect: they often involve an assessment of reasonableness (or 'ordinariness').<sup>35</sup> In a case about a smoke emission from a factory or barbecue, the

<sup>29</sup> eg John Murphy, 'The Heterogeneity of Tort Law' (2019) 39 OJLS 455, 459. In *The Idea of Private Law*, Weinrib adopted essentially the analysis of negligence and nuisance discussed below. However, he did not address the trespassory torts, and sought to explain away other arguable instances of 'strict' liability (vicarious liability, abnormally dangerous activities, and incomplete privilege in necessity). Weinrib, *Idea* (n 2) 151–2, ch 7.

<sup>30</sup> See especially Ripstein, *Private Wrongs* (n 15) 43–52. To similar effect see Beever, *Theory* (n 21) 27, 51–5, 179–87. A structurally similar account appears in Peter Benson, 'Philosophy of Property Law' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) and Peter Benson, 'Misfeasance as an Organizing Normative Idea in Private Law' (2010) 60 UTLJ 731, though there are significant differences.

<sup>31</sup> Of course, others query whether trespass is 'strict', for instance because the defendant must violate a standard of conduct. See eg Goldberg and Zipursky, *Recognizing Wrongs* (n 17) 191.

<sup>32</sup> In England, it seems any touching will do, per Lord Goff's judgment in *Re F* [1989] 2 AC 1, though it has been suggested that 'hostility' is required, eg *Wilson v Pringle* [1987] 1 QB 237. The US Restatement requires 'harmful' or 'offensive' touching. Restatement (Second) of Torts (1965) §§ 13, 18.

<sup>33</sup> Although reasonableness assessments may become relevant, eg through the defence of implied consent—see section 4 below.

<sup>34</sup> Of course, some query whether negligence is 'fault-based', for instance because it does not track moral culpability. See eg Tony Honoré, 'Responsibility and Luck: The Moral Basis of Strict Liability' (1988) 104 LQR 530.



court will tend to ask whether the interference with the claimant's land is unreasonable (or 'extraordinary').

To explain the different approaches to liability across the various torts, Kantian theorists invoke their agency framework. In essence, they claim this framework generates a categorical distinction between two kinds of wrongful interaction, only one of which requires a 'reasonableness' assessment. In Ripstein's terminology: a reasonableness assessment is not needed where an agent 'uses' another's means, only where he 'damages' her means.<sup>36</sup>

On this view, no reasonableness assessment is required in the 'stricter' tort of trespass because here one person simply *uses* another's means. If I touch your body, take your goods or occupy your land, I put them to my purposes, treating them as means for the realisation of my ends. That is a straightforward usurpation by me of your agency. If tort law aims to uphold our equal agency—ensuring neither of us is in charge of the other—I must surely be liable.

The less 'strict' torts of negligence and nuisance, by contrast, are said to occur where one person *damages* another's means as a side effect of employing his own means to pursue his purposes. If I accidentally crash my car into yours, I am not simply using your car—I am, after all, employing mine to pursue my own ends. Likewise, if my factory pollutes your backyard so you cannot sunbathe, I am not simply using your land—I am also running my factory. Though my activity admittedly produces a damaging side effect upon you. From an agency perspective, this kind of case is not easy to resolve. At stake is the ability of each of us to exercise our agency. You cannot hold me 'strictly' liable for absolutely any impact upon you, no matter how unforeseeable or trifling, because that would fully protect your agency without showing equivalent concern for mine. Conversely, I cannot escape liability for every impact I cause, no matter how grave, because that would give my agency unfettered scope while severely limiting yours. We need a legal solution that steers a middle course, according our agencies equal respect.<sup>37</sup> This, Kantian theorists claim, is achieved by an objective assessment of 'reasonableness'. By asking what level of care a reasonable person would have taken or what uses of land are reasonable, a court can determine which effects of an agent's activity should generate liability and which not, without privileging either party's agency. In Ripstein's words, the reasonableness assessment is a way of '*reconciling each person's entitlement to use his or her means to set and pursue his or her own purposes*'.<sup>38</sup>

<sup>35</sup> Though more generally there is much debate about how to categorise nuisance. JM Eekelaar, 'Nuisance and Strict Liability' (1973) 8 Irish Jurist 191, 191.

<sup>36</sup> Ripstein, *Private Wrongs* (n 15) 43.

<sup>37</sup> Allan Beever, *The Law of Private Nuisance* (Hart Publishing 2013) chs 3, 13, emphasises that nuisance reconciles uses of land or property rights, rather than conduct or action as such. Consequently, he prefers to label it 'strict'.

<sup>38</sup> Ripstein, *Private Wrongs* (n 15) 51 (original emphasis).

### 3. Doubts about Agency

Granting that torts are relational wrongs, I will now question the agency framework Kantian theorists overlay upon tort law. I will raise three related difficulties.

#### A. Relationality

The Kantian framework is avowedly relational. It explicitly addresses only those usurpations of agency produced by another agent. Nevertheless, further reflection reveals that the framework is problematically individualistic. Indeed, it turns out to face essentially the same objection as a utilitarian theory.<sup>39</sup>

The Kantian framework conceives of an ‘agent’ as a purposive being: someone who puts means to ends. Importantly, agency, in this sense, is undoubtedly a quality an individual can exhibit.<sup>40</sup> Crusoe, alone on his island, took up means to realise his purposes when he planted a garden, built a shelter and so on. In this respect, agency is akin to utility, conceived, say, as an individual hedonic state. It may, but need not, appear in a relational context involving *two* individuals.

Of course, because Kantian theorists are committed to a relational account of tort, they do not contend that tort law addresses the agency of an individual considered alone. Rather, they insist, the law prevents one purposive being subordinating another—or, in the other terminology Ripstein favours, the law prevents one agent being ‘in charge of’ another or violating her ‘independence’.

Yet, if we scrutinise exactly what it means for one agent to subordinate another on the Kantian account of tort, we find that this is cashed out entirely in terms of the conception of agency as purposiveness, ie taking up means to realise ends. In particular, we are told that one agent subordinates another when he either puts her means to his purposes or else affects her means as a side effect of putting his own means to his purposes—in which case, the law must reconcile each party’s equal entitlement to exercise their purposiveness. Indeed, the Kantian framework for understanding tortious relations contains no fundamental normative conception *other than* purposiveness.

Consequently, Kantian theorists can be challenged to explain why their framework—and the tort law it purports to capture—should in fact be limited to the relational context. If one cares about purposive action in the context of an interaction between two persons, I suggest, one should also at least *prima facie* care about the purposiveness of a single person alone. If one cares that a

<sup>39</sup> We might call the following argument a version of ‘Flikschuh’s dilemma’, after Katrin Flikschuh, ‘A Regime of Equal Private Freedom?’ in Sari Kisilevsky and Martin Stone (eds), *Freedom and Force* (Hart Publishing 2017) 58–63.

<sup>40</sup> cf Ripstein, ‘A Reply’ in Kisilevsky and Stone (n 39) 194 (describing ‘purposiveness’ as a ‘non-relational feature[]’). Purposiveness may for that matter be exhibited by a group. Thompson, ‘Wrong’ (n 3) 352–3.

person's purposiveness is disrupted by another person, one should care too if it is disrupted by, say, nature or disease. One should care if a Crusoe, alone on his island, cannot cultivate his garden or build a shelter because he is thwarted by hurricanes or by the ague.

I cannot emphasise enough that the Kantian framework is officially limited to the relational context—it explicitly considers only interactions between two agents. My point is that a concern for agency should nevertheless pull us away from that context. By way of analogy, imagine a utilitarian theorist who insists that tort law protects each person's utility from interferences by another person who can also enjoy that hedonic state. I suggest this theorist should also, at least *prima facie*, care about the utility of a single individual, for example in the face of potential deprivations by nature or disease.

It is important not to make too much of this challenge, since a Kantian theorist could respond by offering further reasons to focus on the relational context.<sup>41</sup> Those reasons would have to be considered on their merits, and may be persuasive. Crucially, however, the Kantian would here shoulder the very same kind of argumentative burden as the utilitarian. One might think it preferable—certainly, Kantian theorists should, given their objections to other individualistic theories—to escape this burden by advancing an account of tort that does not feel any individualistic value's potentially destabilising pull.

Recall that Ripstein draws a striking analogy to bring out the kind of relational structure he seeks in an account of tort law. He distinguishes an 'impure' relation, such as a comparison, from a 'pure' relation, such as left-right, claiming that an account of tort should be more like the latter. I am arguing that the normative framework Ripstein and other Kantians articulate in fact fails to respect this kind of distinction.<sup>42</sup> The Kantian framework is problematic because, although it is indeed relational, it is only *impurely* relational: while it insists on a connection between two persons, it reflects a concern for an individually specifiable value—agency. Consequently, that value exerts a destabilising pull.

Ripstein has recognised that the role of agency in the Kantian framework might seem to render it problematically individualistic. He has responded by claiming that the Kantian framework does not evince a concern for, or *care about*, agency, in the sense of acknowledging its value. Rather, the framework merely *presupposes* agency, since it applies only to agents and not, for example, to minerals, vegetables or lower animals.<sup>43</sup> However, this response is belied by

<sup>41</sup> See n 19 above. Ripstein, *Private Wrongs* (n 15) 32, 35–6 hints that 'a distinctive part of morality governs ways in which persons—beings who set and pursue purposes—may treat other beings that set and pursue purposes'.

<sup>42</sup> Duly modified to apply to normative judgments about what we value or care for.

<sup>43</sup> Ripstein, 'A Reply' (n 40) 194–5. Ripstein analogises certain familial relations (see too Ripstein, *Private Wrongs* (n 15) 37). For clarity, consider brotherhood. Ripstein says this relation 'presupposes' individually specifiable capacities—since 'only members of a species that are biologically capable of having offspring and siblings' can stand in the relation—but that an endorsement of the relation is not 'somehow a recognition or acknowledgment of the value' of those individualistic capacities. The analogy is problematic. As an initial matter, it is worth

scrutiny of the Kantian framework itself. As we have seen, it relies throughout on the idea of purposive action; indeed, it contains no *other* fundamental normative idea. If it does not care about agency, then it is morally vacuous. We would be left unable to say what it means for one person to subordinate another, let alone why this is wrongful.

Could Kantian theorists amend their account to overcome these difficulties?<sup>44</sup> Since merely discarding the individualistic conception of agency would render their account vacuous, Kantian theorists would also have to identify some other, purely relational conception of subordination or being ‘in charge’ that can illuminate the various tortious wrongs. However, once we are denied resort to the notion of one person’s purposiveness usurping another’s, it seems doubtful there is any meaningful conception that could cover all of the quite various situations addressed by torts such as trespass, negligence and nuisance, not to mention the dozens of other torts. In what sense am I ‘in charge of’ you, for example, if I merely walk across your land (perhaps ignorant you own it), if my careless driving produces a car crash, or if smoke drifts from my factory or barbecue across your neighbouring backyard? Any substantial elucidation of ‘in charge of’ will surely fail to catch all of these forms of wrongful interaction.<sup>45</sup> Of course, a Kantian theorist could point to all of the various wrongs in tort law and stipulate that they involve one person subordinating or taking charge of another. But then the Kantian framework is reduced to a sort of label, which contributes nothing to our understanding.

### B. Use and Damage

Next, I will question the Kantian classification of torts into two kinds: ‘use’, which includes trespass; and ‘damage’, including negligence and nuisance. Lawyers conventionally suppose that the various torts overlap in messy ways not fully settled or understood,<sup>46</sup> and so might be happily surprised to learn they can apply a relatively neat bifold classificatory scheme. Assuming, that is, that the proposed scheme carves the various torts at their joints and gives us an accurate view of the differences and similarities among them. The Kantian classification, however, does not do this.

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distinguishing the biological relation of brotherhood (which some might think has no normative significance in itself) from the moral relation (which might require no biological capacity). The problem is that neither of these relations need involve any individually specifiable capacity, only incipiently relational capacities. Biological brotherhood presupposes only the capacity to share a parent with another; moral brotherhood presupposes the capacity to relate to another with the right kind of love and affection. These are genuinely ‘pure’ relations that require no reference to any individualistic idea. Contrast the ‘in charge of’ relation, which is problematic because it relies upon the individualistic conception of agency.

<sup>44</sup> Thereby perhaps overcoming the account’s Kantian origins. See nn 25–26 above.

<sup>45</sup> See further section 5 below. For example, Ripstein at one point suggests that to be in the charge of another is to be their ‘slave, serf, or subordinate’. Ripstein, *Private Wrongs* (n 15) 33. But in their natural meanings those terms do not apply to the cases above.

<sup>46</sup> eg Percy Winfield and Arthur Goodhart, ‘Trespass and Negligence’ (1933) 49 LQR 359; FH Newark, ‘The Boundaries of Nuisance’ (1949) 65 LQR 480.

Broadly speaking, the Kantian categories of ‘use’ and ‘damage’ represent two distinct ways a defendant’s purpose may connect up with a claimant’s means. ‘Use’ occurs where the claimant’s means figure in some substantial way in the defendant’s purpose; ‘damage’ where the defendant’s purpose largely concerns his own means, but his activity nevertheless impacts the claimant. The details of this distinction could conceivably be filled out in various ways. (For instance, does ‘use’ require that the claimant’s means be essential to the defendant’s purpose, or only that it be highly likely he will affect them?) Yet, however exactly the details are filled out, the use/damage distinction will not align with the torts of trespass, on the one hand, and negligence and nuisance on the other.

Trespass can arguably be committed where there is no ‘use’, but at most ‘damage’, because the claimant’s means do not figure in *any* substantial way in the defendant’s purposes. In particular, a trespass to land may occur where the defendant’s intrusion onto the claimant’s land is unintentional,<sup>47</sup> and perhaps where it is not even careless.<sup>48</sup> McBride and Bagshaw instance a defendant who regularly bumps his car against his garage wall when he parks, thereby unexpectedly causing the wall gradually to shift over the property boundary so that it occupies his neighbour’s land.<sup>49</sup>

On the other hand, negligence and nuisance can occur where there is ‘use’ rather than ‘damage’ because the effect on the claimant’s means is central to the defendant’s purpose.<sup>50</sup> Consider deliberate professional negligence: a lawyer, architect or accountant might do substandard work on, say, a real estate case or project, in order to change the character or value of the claimant’s land. Or consider a deliberate ‘failure to protect’: the police or a security firm might owe a duty to protect the claimant or her property from threatened violence and deliberately fail to discharge the duty so that she suffers at the hands of a third party.<sup>51</sup> It is even clearer that nuisance may involve ‘use’. I might commit the tort by, say, deliberately blasting loud music across my neighbours’ land, perhaps because I do not like them or perhaps because I think they will benefit.

Since any of these particular counterexamples might be disputed, it may help to gesture at the source of the difficulty here (to which we shall return). Kantian theorists, preoccupied with agency, suppose that a classification of the torts should turn on the ways in which a defendant’s purpose may connect up with a claimant’s means. But the torts themselves are not defined in that manner; rather, they are defined by describing certain substantive wrongful

<sup>47</sup> Michael Jones, Anthony Dugdale and Mark Simpson (eds), *Clerk & Lindsell on Torts* (22nd edn, Sweet & Maxwell, 2017) [19-06], citing *Network Rail Infrastructure v Conarken Group* [2010] EWHC 1852, [67].

<sup>48</sup> Nicholas McBride and Roderick Bagshaw, *Tort Law* (4th edn, Pearson 2012) §§ 14.2–14.3.

<sup>49</sup> *ibid* 409, fn 19.

<sup>50</sup> See also *ibid* § 4.2.

<sup>51</sup> The defendant might owe a duty to the claimant, say, because it has created the danger or assumed a responsibility.

relations. Consider the official definitions one tends to find in the opening lines of treatise chapters. A trespass to land is an ‘intrusion by one person upon land in the possession of another’.<sup>52</sup> A nuisance is ‘a condition or activity which unduly interferes with the use or enjoyment of land’.<sup>53</sup> Many treatises do not even attempt to define negligence,<sup>54</sup> but roughly it is the wrong of inflicting a sufficiently serious injury by failing to take due care for another person. Given that the law itself defines the various torts, and thus the differences among them, by identifying certain substantive relational wrongs, this can at best be approximated by the Kantian scheme based on the quite different conceptual apparatus of agency, purposes and means.

### C. Reasonableness

Finally, I will question the Kantian view of judicial reasonableness assessments. On this view, a reasonableness assessment is needed only in a ‘damage’ case, where an agent’s employment of his own means to pursue his purposes causes an injurious side effect upon another. The assessment allows a court to resolve the parties’ clash while according their agency equal respect—it is a way of ‘reconciling each person’s entitlement to use his or her means to set and pursue his or her own purposes’.<sup>55</sup>

While I will take no stand on this issue, one might question whether reasonableness assessments are in fact special to the so-called ‘damage’ torts of negligence and nuisance, and absent from the ‘use’ tort of trespass. Arguably the legal reality is murkier. Battery is sometimes said to require a ‘hostile’, ‘harmful’ or ‘offensive’ touching rather than just any touching, which is akin to asking whether the touching is ‘unreasonable’.<sup>56</sup> All of the trespass actions—to the person, goods and land—can be defeated by implied licence or consent if the claimant’s actions would lead a reasonable person to think she consented.<sup>57</sup> On the other hand, in negligence the defendant’s carelessness sometimes speaks for itself (*res ipsa loquitur*)—as where a flour barrel falls out of a flour shop onto an urban pedestrian.<sup>58</sup> One could argue that, in such a case, no investigation of the reasonableness of the defendant’s conduct is needed. (Though of course, on perhaps the standard view, *res ipsa* is *prima facie* evidence of unreasonableness.) Finally, in nuisance, material damage to land (as opposed to mere personal discomfort) is actionable regardless of the context, so if my factory smoke kills your trees I cannot claim my emission is

<sup>52</sup> *Clerk & Lindsell* (n 47) [19-01].

<sup>53</sup> *ibid* [20-01].

<sup>54</sup> *eg ibid* [8-01].

<sup>55</sup> See n 38 above.

<sup>56</sup> See n 32 above. See further Scott Hershovitz, ‘The Search for a Grand Unified Theory of Tort Law’ (2017) 130 *Harv L Rev* 942, 949–52; Zoe Sinel, ‘Allan Beever’s One-Dimensional Tort Universe’ (2017) 27 *NZULR* 807, 819–23, 827–9.

<sup>57</sup> *Clerk & Lindsell* (n 47) [15.94], [17.139], [19.48].

<sup>58</sup> *Byrne v Boadle* (1863) 2 H&C 722; 159 ER 299.

reasonable in our neighbourhood.<sup>59</sup> But all of these potential complications can, in my view, be addressed by Kantian theorists, who can adopt defensible views of the legal doctrine consistent with their framework.<sup>60</sup>

Instead, I want to question whether the reasonableness assessments that do occur in negligence and nuisance law are genuinely illuminated by the Kantian agency framework. Those assessments are familiar and broadly uncontroversial. Negligence law asks whether an activity is unduly careless or dangerous, considering the likelihood and gravity of the harm it tends to cause, the cost of precautions, the custom of professionals who perform similar activities and other factors. Nuisance law asks if an activity is unduly noisome or annoying in light of factors such as its timing and intensity, and the character of the neighbourhood.<sup>61</sup>

Some tort lawyers will wonder why we need the Kantian story about reconciling agency, given that, practically speaking, the law's reasonableness standards seem to be fully adequate on their own and the agency story superfluous. Lawyers learn the reasonableness standards and use them to decide cases—assessing a bodily injury's gravity or a neighbourhood's character—without ever pondering the Kantian conception of agency, let alone how to accord two agents equal respect. Even from a purely theoretical standpoint, some scholars will worry that the agency story is too indeterminate to have genuine explanatory power.<sup>62</sup> Surely no amount of reflection upon the abstract idea of reconciling the activity of purposive beings using an objective standard could, in itself, reveal exactly what that standard should look like—or, more particularly, that the standard should address an activity's dangerousness or noisomeness, with attention to factors such as professional custom or a neighbourhood's character. One might suspect that only by drawing upon a familiarity with our existing practices of assessing reasonableness—of the kind that appear in negligence and nuisance law—could we conclude that *this* is how agency must be reconciled. If so, the Kantian account derives its determinate content from our existing practices, which are merely re-presented in the Kantian vocabulary.

While this line of criticism might lead some to dismiss the Kantian account of reasonableness, in my view Kantian theorists have a powerful reply. Indeed, they can accept all of the points I have just made whilst maintaining that their

<sup>59</sup> *St Helen's Smelting v Tipping* [1865] 11 HL Cas 642; 11 ER 1483.

<sup>60</sup> Beever's efforts are most extensive. See Beever, *Theory* (n 21) 44–49, 75–87, *Negligence* (n 5) 447–53, *Nuisance* (n 37) 25, 29–33; 'Engagement, Criticism, and the Academic Lawyer' (2017) 27 NZUL Rev 1111, 1116–17. But note again (see n 21) that his views differ in various respects from those of Weinrib and Ripstein, which are my focus.

<sup>61</sup> Kantian theorists offer their own particular characterisations of these assessments. For instance, Ripstein says negligence law asks whether the defendant's activity is characteristically damaging because it is especially risky relative to a background level of ordinary danger. Ripstein, *Private Wrongs* (n 15) 50, 102. I will not dispute these more particular characterisations, but question the abstract, overarching story about reconciling agency.

<sup>62</sup> Jody Kraus, 'Legal Determinacy and Moral Justification' (2007) 48 Wm & Mary L Rev 1773.

account is valuable. Even if their account is, in a sense, a superfluous and derivative re-presentation of the law's reasonableness assessments, it may remain valuable if it supplies an illuminating abstract characterisation of the law's more particular reasoning.<sup>63</sup> By way of analogy, Martin Stone asks us to consider the abstract idea of 'friendship':

Suppose I say that I didn't go to the movies but helped Arthur pack because he is my *friend*. I assume this sort of case is familiar, however obscure its philosophical analysis might be. It has to do with explaining (interpreting or rendering intelligible) an action of mine, and this is accomplished by mentioning my engagement with the value of friendship ... [T]he appeal to friendship in cases like the present one is something genuinely explanatory: it gets at what I am doing (which is also to say *why* I'm doing it) in the most direct way possible.<sup>64</sup>

The abstraction 'friendship' may illuminate Martin's conduct even though it never explicitly featured in his practical reasoning. He may have decided what to do without pondering friendship. The abstraction may also illuminate even though it is highly indeterminate. That Martin should help rather than see a movie in these particular circumstances presumably will not be revealed just by pondering an abstract conception of friendship (such as 'a bond of affection that is neither familial or romantic'). Arguably, only by drawing upon a familiarity with existing practices of friendship could one come to think *this* particular action is required.

Yet, as Stone observes, the abstraction 'friendship' illuminates because there is an inherent conceptual connection between it and Martin's particular action: they imply each other and fill each other out.<sup>65</sup> If we seek to describe Martin's particular action and capture its full significance, we cannot but invoke the abstraction 'friendship', even if that did not explicitly occur to Martin at the time. We cannot just describe Martin as, say, 'helping' Arthur, or even 'helping out of affection', because it is significant that he acts with a particular motivation—in a *friendly* manner—and not with a quite different motivation, such as patriotic duty or romantic infatuation. Moving now in the other direction, starting with the abstraction 'friendship', we can see that part of the meaning of this idea is supplied by Martin's particular action which instantiates it. 'Friendship' cannot be fully grasped without mentioning something like Martin's action—since part of what it means to be a friend is to help another in need despite conflicting hedonistic inclinations. Friendship

<sup>63</sup> cf Weinrib, *Corrective Justice* (n 12); Ripstein, *Private Wrongs* (n 15) xi.

<sup>64</sup> Martin Stone, 'Legal Positivism as an Idea about Morality' (2011) 61 UTLJ 313, 313–14 (original emphasis).

<sup>65</sup> As Stone puts it, there is an 'evident circularity' between them, *ibid* 314 ('[I]f one were to object to such circularity—"a grasp of the content of 'friendship' depends on the situational judgements it is supposed to explain!"—one would be making a mistake. For a great many values are practically unavailable apart from such circularity.').



would be a different sort of thing if it were compatible with quite different behaviour on Martin's part, such as paying someone else to do the packing.

This kind of inherent connection between a particular activity and a theoretical abstraction is part of what Kantian theorists demand when they insist on an 'internal' theory of private law—one which proceeds, in Weinrib's words, by 'identifying conceptions *implicit in the doctrinal and institutional arrangements of private law ... bring[ing] to the surface ideas that are latent*'.<sup>66</sup> Contrast, say, an economic analysis of private law that brings to bear some conception—such as Pareto efficiency or Nash equilibrium—that arguably has no inherent connection with the reasoning in the law itself.

However, I suggest no inherent conceptual connection in fact obtains between tort law's reasonableness assessments and the Kantian agency reconciliation story. Starting with the law's assessments of undue dangerousness or noisomeness, it would seem we can fully describe these without implicitly invoking agency or its reconciliation.<sup>67</sup> (Many of the factors relevant to the reasonableness assessments—such as professional custom or a neighbourhood's character—have no obvious link to agency at all.) Indeed, given the reasonableness assessments we know from the law, we could conceivably tell an abstract 'reconciliation' story quite different from the Kantian one. For example, perhaps each person is entitled to be *free from worry* about the liability-generating consequences of their interactions. Of course, we cannot make a defendant absolutely free from worry, absolving him of all liability, since that would privilege his peace of mind over the claimant's. Nor can we privilege the claimant by holding the defendant liable for all effects upon her. We must steer a middle course—which, we might suppose, is the function of the reasonableness assessments in negligence and nuisance law, which allow a court to determine which effects of a defendant's action should generate liability and which not, while respecting the parties' equal equanimity.

Moving now in the other direction, starting with the abstract idea of reconciling the agency of two purposive beings, we can see that in order to give determinate content to this idea we need not articulate anything like tort law's current reasonableness standards. We could conceivably adopt a quite different approach. Rather than assessing undue dangerousness or noisomeness, we might, for example, assign each agent a time slot or space, within which she is entitled to act however she likes and outside of which she is liable for all the effects of her action.<sup>68</sup>

<sup>66</sup> Weinrib, *Corrective Justice* (n 12) (my emphasis).

<sup>67</sup> I do not deny it is possible to draw connections between purposiveness and, say, dangerousness or risk, eg Weinrib, *Idea* (n 2) 151–2, only that this is inherently necessary.

<sup>68</sup> AJ Julius proposes more sophisticated reconciliation schemes: AJ Julius, 'Independent People' in Kisilevsky and Stone (n 39) ch 5; Ripstein responds *ibid* at 200–5. For the avoidance of doubt, I am not suggesting that the schemes I mention above are good ones, only that they are ways of reconciling persons' entitlements to use means to pursue purposes, which accord their purposiveness equal respect, thereby avoiding subordination.

Tort law's reasonableness assessments and the Kantian agency reconciliation story do not imply each other and fill each other out. They have no inherent connection. Thus, the Kantian account does not stand to judicial reasonableness assessments as the abstraction 'friendship' stands to a particular friendly action. The Kantian agency story is more like an economic analysis that imposes a conception of efficiency upon the law.

#### 4. *Wrongs without Agency*

I will now suggest that by discarding the Kantian agency framework and appealing just to the idea of a relational wrong, we can reach a more straightforward understanding of torts such as trespass, negligence and nuisance, the distinctions between them and the role of 'reasonableness' in each.

I will adopt the approach, hinted at in Goldberg and Zipursky's work, of trying to capture the gist, or a paradigm, of each tortious wrong using a word or short phrase such as *cheating* or *slandering*. For reasons I develop below, it will help to characterise each wrong concretely, bringing out the particular kind of substantive wrongful conduct it involves.<sup>69</sup> Yet the characterisation should also be simple, so as to call to mind the gist of the wrong without too much distracting detail. Certainly, I will avoid official definitions of the kind that appear in the opening lines of treatise chapters—such as the definition of nuisance as 'a condition or activity which unduly interferes with the use or enjoyment of land'.<sup>70</sup> Here vague, anodyne language is further dulled by familiarity, at least for torts scholars, reading like an opaque technical specification rather than a vivid reminder of the gist of the wrong.

Given the complexity of the common law of tort, my efforts to characterise each wrong in a concrete, simple manner will inevitably be contestable. There is no way around this. I must reiterate that I aim only to convey the gist, or a paradigm, of each wrong, not a complete and fully accurate description. An incomplete and even slightly inaccurate characterisation will serve my present theoretical purposes. Indeed, my overall argument does not turn on the particular characterisation of any given tort—readers who object to mine can substitute their own preferred characterisations.

What, then, is the gist of each of the three torts central to our discussion? A *nuisance*, in everyday language, is an annoyance, and at least paradigmatically the tort occurs where someone seriously annoys their neighbour. So we might roughly characterise the wrong as *unneighbourly annoyance*.<sup>71</sup> *Negligence*, in everyday language, means carelessness, and the tort, or at least a paradigm

<sup>69</sup> cf Bernard Williams' 'thick' ethical concepts. Bernard Williams, *Ethics and the Limits of Philosophy* (Fontana Press 1985).

<sup>70</sup> See n 53 above.

<sup>71</sup> Of course, this characterisation could be contested. Someone might object that a nuisance is not always committed by a 'neighbour' in the sense of someone living next door or even very close to the claimant, or that 'annoyance' is too weak to capture some nuisances such as encroachments.

case, occurs where someone carelessly or dangerously injures another in a serious way.<sup>72</sup> Negligence is a ‘realised’ or ‘injury-inclusive’ wrong: the defendant’s carelessness must be bound up with an injury to the claimant.<sup>73</sup> Hence we might with some trepidation characterise the wrong as *careless injury*.<sup>74</sup> Finally, *trespass* is certainly not easy to capture. The word’s popular meaning today—an unauthorised entry onto land—is narrower than the legal understanding, and the older, popular, now literary meaning—the Lord’s Prayer sense of a transgression<sup>75</sup>—is too broad. Furthermore, there are three species of the tort—to the person, chattels and land—and an uncertain number of sub-species—battery, false imprisonment, conversion and so on. Rehearsing these would produce a lengthy catalogue that would be more likely to distract us from, rather than reveal, the gist of trespass. Instead, it will help to focus on a few paradigmatic cases: touching another person in an unwanted way, taking their goods or entering onto their land. With these in mind we might say that a trespass is something like: an *occupation* of another’s body or property.<sup>76</sup>

We have now reached a straightforward understanding of our three torts as substantive relational wrongs. Indeed, one problem with this view is that it may seem *too* straightforward or basic. One might suppose we do not yet have a theoretical account of our three torts, only a sort of re-description. Clearly, we have nothing approaching the theoretical sophistication of the Kantian account. I will return to this issue in the next Part. For now, I merely want to suggest that, whatever its disadvantages, our simple approach has some immediate advantages over the Kantian account.

For one thing, our understanding of the three torts as substantive relational wrongs avoids the problem of ‘fit’ the Kantian account strikes because of its individualistic conception of agency. Our approach takes the law’s relational structure at face value, modelling it using only slightly more abstract characterisations of certain substantive relational wrongs, which do not imply a concern for any individualistic value. Hence our approach does not feel any such value’s destabilising pull.

<sup>72</sup> Again, there will inevitably be objections, for example that ‘injury’ cannot include failures to benefit (of the kind negligence law addresses) or that ‘careless’ is too weak to capture some behaviour that is utterly contemptuous of the claimant.

<sup>73</sup> Goldberg and Zipursky, ‘Torts as Wrongs’ (n 8) 941–5.

<sup>74</sup> Unfortunately, there is no obvious single English word to convey this. I do not mean to suggest an ‘impurely’ relational view of the wrong. In *Palsgraf* (n 5), Cardozo rejects such a view: he denies that negligence can be established by reaching an individually specifiable judgment about the railway guard (that he acted carelessly in some nonrelational sense), then another such judgment about Mrs Palsgraf (that her injured condition was individually lamentable), and linking them by a chain of factual causation. The carelessness and injury must be inseparable aspects of a single, purely relational wrong encompassing both parties.

<sup>75</sup> Which, SFC Milsom famously realised, may have been the original legal usage too. SFC Milsom, *Studies in the History of the Common Law* (Hambleton Press 1985) ch 1; Goldberg, ‘Half-Truths’ (n 7) 1227.

<sup>76</sup> Perhaps a stretch for assault, but causing another to apprehend imminent physical harm might be viewed as an effective occupation of their mind and thereby body. cf Beever, *Theory* (n 21) 68–70.

Nor does our wrongs-based approach impose a foreign classificatory scheme on the torts, such as the Kantian distinction between ‘use’ and ‘damage’. Again, our approach mirrors the law’s own, defining and distinguishing the various torts by specifying certain kinds of relational wrongdoing. This upholds the conventional lawyerly wisdom that the various torts do not fall into any neat categorical division, but rather overlap in messier ways. If a trespass is something like an *occupation*, negligence a *careless injury* and nuisance an *unneighbourly annoyance*, there will obviously be difficult questions about how to allocate particular cases among them. (I have arguably committed all three if, say, my car rolls from my driveway onto your flowerbed next door.)

Finally, and perhaps less obviously, our wrongs-based view yields a more straightforward understanding of judicial reasonableness assessments. By focusing on the substantive character of each relational wrong, we can see why reasonableness assessments are more common in negligence and nuisance than in trespass, and also what these assessments amount to.

The wrongs of negligence or *careless injury* and nuisance or *unneighbourly annoyance* are potentially quite expansive: they could conceivably cover a wide range of human conduct that varies greatly in character and seriousness. I might be said to ‘carelessly injure’ you, not only where I drive fair too fast and maim you, but also where I drive very slowly and somehow gently scrape your car’s bumper. I might commit an ‘unneighbourly annoyance’ by practising constantly with my rock band, or just by holding a single house party. A civil court cannot be interested in all of these cases. But it would be difficult to define, in advance, the narrower subset of activities—the core of the relevant wrong, as it were—that genuinely warrants legal intervention. Furthermore, these wrongs are highly context-dependent. Exactly how I might carelessly injure you depends on whether we stand to each other as road user to road user; as lawyer, architect or accountant to client; as police officer to vulnerable person; and so forth. My band practice might annoy my neighbour in a quiet suburb at night, but not during the day, and not at night in an industrial zone. It would be difficult to define the relevant wrong precisely in a way that works across all of these contexts, let alone across the much fuller range of variegated fact patterns that confront courts in negligence and nuisance cases.

Because the wrongs of careless injury and unneighbourly annoyance are potentially expansive and also context-dependent, a court deciding a case about them must assess, in a circumspect and contextual manner, whether the case falls within the core of the relevant wrong that genuinely warrants legal intervention. This, I suggest, is all the judicial assessment of ‘reasonableness’ amounts to. Notably, the content of a ‘reasonableness’ assessment differs for each substantive wrong and is derived from the character of that wrong. In a case of negligence, ie ‘careless injury’, the reasonableness assessment essentially amounts to a consideration of an activity’s carelessness and injuriousness, with reference to factors such as the gravity and likelihood of injury, the cost

of precautions and so on. In a case of nuisance, ie ‘unneighbourly annoyance’, the court essentially considers whether an activity is, in the relevant context, unduly annoying, with reference to factors such as its timing and intensity and the character of the neighbourhood.<sup>77</sup>

Contrast the wrong of trespass—an *occupation* of another’s body or property. This wrong is less expansive than negligence or nuisance, covering a narrower range of human conduct. By the same token, conduct falling under this characterisation is almost always seriously wrongful. It tends not to be heavily context-dependent: occupying another’s body or property without their consent tends to be objectionable regardless of the context. Consequently, once a court has established the relevant facts in a trespass case, it need not generally undertake a circumspect and contextual exercise of judgment to determine whether the case before it falls within the core of the relevant wrong that warrants judicial attention. In other words, there is generally no need to evaluate whether a given occupation of another’s body or property is ‘reasonable’.

At the same time, the general claims I have just made about these wrongs may be subject to exceptions or qualifications. The approach I am proposing can accept a murkier legal reality than Kantian theorists acknowledge. In some negligence cases, the defendant’s conduct may ‘speak for itself’—such as where a barrel falls from an urban building onto a pedestrian—so that no reasonableness assessment is needed. The requisite kind of careless injury has obviously occurred. In nuisance law, it may make sense to hold that material damage to property is always wrongful, irrespective of the neighbourhood,<sup>78</sup> and so to that extent there is no need for a reasonableness assessment. On the other hand, reasonableness assessments might sometimes enter trespass, as in the defence of implied licence, which arguably allows a court to consider the reasonableness of an occupation of another’s body or property in the context of the parties’ relationship.<sup>79</sup> We can also make sense of the view that battery should require a ‘harmful’, ‘offensive’ or ‘hostile’ touching, rather than just any touching. Even the relatively narrowly defined wrong of occupying another’s body or property may be in some respects overbroad, covering conduct that does not genuinely warrant legal intervention. Therefore, something like a reasonableness assessment is required in order to home in on the core subset of conduct that is especially wrongful.

<sup>77</sup> This approach, on which the ‘reasonableness’ standard for each tortious wrong is not specifiable independently of the substantive wrong to which it appended (‘reasonableness’ is, we might say, attributive rather than substantive), differs from a familiar way of understanding criminal wrongs, whereby one first specifies an *actus reus* (eg killing) and then asks what separately specifiable *mens rea* or ‘fault’ standard (intention, recklessness, etc) should accompany it.

<sup>78</sup> But see RA Buckley, *The Law of Nuisance* (2nd edn, Butterworths 1996) 9 (‘a plaintiff who lives in an exposed and mountainous region should not be entitled to complain merely because his neighbour fails to prevent the deposit by natural forces of damaging detritus from his higher land on to that of the plaintiff, if such deposits are characteristic of the particular environment’).

<sup>79</sup> ‘Necessity’ may be another doctrinal route by which a court effectively considers the reasonableness of the defendant’s activity in exceptional circumstances. See *Re F* (n 32).

In sum, reasonableness assessments are more common in negligence and nuisance because those wrongs are less precisely targeted than trespass, and so a court must decide whether a given case falls within the core of the relevant wrong—which is all the reasonableness assessment amounts to. Contrast how all this appears to Kantian theorists preoccupied with agency. For them, a trespass case seems easy to resolve, requiring no reasonableness assessment, because one agent ‘uses’ another’s means, putting them to his purposes. Negligence and nuisance cases seem less easy, and to require reasonableness assessments, because an agent puts his own means to his purposes, albeit with ‘damaging’ side effects upon another’s means. Finally, the judicial reasonableness assessment shows up to Kantian eyes as a rather recondite exercise, an attempt to reconcile the parties’ equal claims to the free exercise of their purposiveness.

### 5. *Why Invoke the Agency Framework?*

Why do Kantian theorists pass over a simple understanding of torts as substantive relational wrongs, and invoke their agency framework? Could their motivations be addressed so as to make the simple wrongs-based approach more attractive?

Two main intellectual tendencies seem to block the wrongs-based approach for Kantian theorists. The first we have already encountered: a sort of residual individualism in their thinking about tort. I claimed above that the Kantian agency framework is problematic because it is only ‘impurely’, rather than ‘purely’, relational: though it insists on a relation between two persons, it at the same time evinces a concern for an individualistic value, agency. It is worth noting how deeply this ‘impure’ way of thinking may run.

Recall Weinrib’s seminal discussion that leads him to supplement the idea of relationality with the Kantian agency framework.<sup>80</sup> He begins with a puzzle: a court resolving a private law dispute such as a tort case will ignore many of the parties’ qualities that would be important in other contexts—such as their *need*, or *merit* in the sense of overall character. Yet presumably, Weinrib reasons, there must be some aspect or conception of the parties with which the law *is* concerned. What could it be? (Here he turns to agency.)

A theorist who poses this puzzle adopts a starting point that may be telling.<sup>81</sup> By setting up the puzzle in this fashion, he indicates he may already be conceiving of tort law’s relationality in a way that is fundamentally ‘impure’ rather than ‘pure’. In emphasising that the court is *not* interested in qualities

<sup>80</sup> See n 23 above.

<sup>81</sup> I will not attempt exegesis of Aristotle. For discussion of his more general assumptions about relations, see Pamela Hood, *Aristotle on the Category of Relation* (UP America 2004). For Kant, see eg *Critique of Pure Reason* (Paul Guyer and Allen Wood tr, CUP 1998) B106 (‘Of Relation’); Ripstein, *Force and Freedom* (n 15); Charlton Payne and Lucas Thorpe (eds), *Kant and the Concept of Community* (CUP 2011).

such as need or merit, the theorist nevertheless evinces an interest in features of the parties that could, in principle, be exhibited by an individual.<sup>82</sup> So, even as he rejects these particular features as irrelevant in tort law—even as he rejects them *because* they seem insufficiently relational<sup>83</sup>—the theorist may already be on the look out for other features of the parties that are structurally akin to need or merit (or, for that matter, akin to *courage*, *height* or *utility*) in that they are essentially individualistic.<sup>84</sup> Such a theorist is intellectually primed to turn to the similarly individualistic idea of *agency*. Contrast a theorist who thinks in ‘purely’ relational terms—who focuses just on the character of a relationship in which the parties participate. For such a theorist, the puzzle about tort law will not arise in the same way. This theorist might instead wonder why tort law does not concern itself with certain sorts of relationships—say, relations of *friendship*, or *love*.<sup>85</sup> This theorist might naturally turn to the idea of a substantive relational wrong.

To be sure, if a tort theorist is looking for some individually specifiable quality of the parties, then agency, conceived as purposive action, may seem an attractive candidate. Agency in this sense is arguably manifested by any normally functioning person and so is at work in all tortious interactions. Relatedly, the ability to act purposively might seem to be a precondition for owing enforceable duties in tort, since a tort defendant must have legal capacity. Certainly, beings which do not act to achieve purposes (minerals, vegetables, lower animals) cannot be tortfeasors.

However, tort law’s capacity requirement might alternatively be understood in purely relational terms. Courts have said, for example, that a tort defendant must be ‘capable of *transacting* the ordinary affairs and fulfilling the duties and obligations incidental to *the various relations of life*’.<sup>86</sup> And even if individual purposiveness is a precondition for tort liability, this would not entail that tort law aims to uphold purposiveness. Instead, the law might aim to redress certain substantive wrongful relations.<sup>87</sup> By way of analogy, even if all battery defendants must be capable of physical movement, this does not mean the

<sup>82</sup> The search for an individualistic quality goes hand in hand with Weinrib’s quest for some respect in which the parties can be described as equal. See n 23 above.

<sup>83</sup> Weinrib, *Idea* (n 2) 77–78.

<sup>84</sup> Of course, we may *compare* two individuals’ need or merit, *ibid* 77. See too nn 16 and 42 above.

<sup>85</sup> Weinrib famously claims, in discussing the need for an ‘internal’ understanding of private law, that, ‘in this respect, private law is just like love’. Weinrib, *Idea* (n 2) 6. I am suggesting he might have pursued the analogy even further.

<sup>86</sup> *Banks v Goodfellow* (1870) LR 5 QB 549, 560 (Cockburn CJ), cited in *Buckley v Smith Transport* [1946] 4 DLR 721, 726–8 (my emphasis). More specifically, a negligence defendant, for example, must be capable of seeing the need to take care regarding the claimant if he is not to injure her, and of taking steps to avoid the injury. Weinrib presents this case law as requiring a capacity for self-determining agency. Weinrib, *Idea* (n 2) 183 n22. As noted above (n 24), Weinrib also connects agency to the acquisition and transfer of private law rights. Assessing this claim would require one to investigate the possibility of a purely relational understanding of the capacities exercised there.

<sup>87</sup> Here one can legitimately make Ripstein’s move, discussed at n 43 above, by relying on the normative idea of a substantive relational wrong that is not cashed out in terms of agency.

tort aims to uphold the value of physical movement—instead, it addresses occupations of another’s body.

A second, related intellectual tendency also leads Kantian theorists to pass over the wrongs-based approach. This is their demand for a certain kind of theoretical abstraction. Consider a rather startling charge sometimes laid against Weinrib—not just by rival theorists, but by Weinrib himself. The charge is that a theory which merely emphasises the relationality of tort law (and private law more generally) is problematically empty, telling us nothing about the law’s content. Partly to address this charge, and to fill out his account, Weinrib turns to agency.<sup>88</sup>

How, one might wonder, could a theorist of tort law find himself justly accused of saying nothing about the content of tort law? Weinrib finds himself in this position because his account of tort law’s relationality is so extraordinarily abstract. As we have seen, he self-consciously aims to ‘identify[] the most abstract unifying conceptions’ in the law, ‘carrying to its extreme the tendency to abstract that marks legal thinking’, reaching ‘the barest and most general ideas underlying . . . the parties’ relationship’.<sup>89</sup> The abstract form he discovers is the law’s ‘sheer correlativity’, which he elaborates in part by drawing our attention to the structure of a certain kind of logical judgment. Likewise, Ripstein presents tort law’s relationality in a strikingly abstract manner, appealing to the distinction between spatial judgments and other judgments such as comparisons.<sup>90</sup>

This extraordinarily abstract presentation of tort law’s relationality has advantages, but it also leads Kantian theorists to overlook a more down-to-earth view of torts as substantive relational wrongs. The abstraction effaces the substantive character of the law’s various wrongs: unneighbourly annoyances, occupations, careless injuries, slanders, cheatings and so on. Hence the worry about lack of content, and the appeal to agency to assuage that worry. Such a worry is less likely to trouble a theorist who conceives of tort law’s relationality more concretely—who thinks not of bare abstract forms, or ‘sheer correlativity’, but in terms of substantive wrongs. This theorist *begins with* more contentful ideas, such as unneighbourly annoyance, careless injury and so on. Recall my earlier insistence that we adopt concrete characterisations of torts such as trespass, negligence and nuisance.<sup>91</sup> This is necessary in part to forestall the theoretical urge to supplement the wrongs-based view with some *other* intellectual framework.

Of course, someone might still complain that the wrongs-based view I sketched above lacks content. Perhaps my characterisations of trespass,

<sup>88</sup> eg Ernest Weinrib, ‘Correlativity, Personality, and the Emerging Consensus on Corrective Justice’ (2001) 2 *Theoretical Inquiries in Law* 107, 119, 154–5.

<sup>89</sup> See n 12 above.

<sup>90</sup> It is notable, too, that these theorists seek to identify the relational form not just of tort law but private law as a whole.

<sup>91</sup> See n 69 above.



negligence and nuisance need more detail to be illuminating. But this would not in itself be a reason to reject the wrongs-based approach, only to carry out further work. One could respond by elaborating each of the wrongs in the desired level of detail—saying more about, for instance, the particular kinds of unneighbourly annoyance that nuisance law addresses, before doing something similar for each other wrong. Compare a philosopher’s musings about the various human virtues—courage, generosity, friendship, etc.<sup>92</sup> Charged that her characterisation of a given virtue lacks content, she could respond just by supplying more detail.

Now, some tort theorists will believe that the wrongs-based approach—no matter how much further detail is supplied—must, in the end, remain ‘completely underwhelming’.<sup>93</sup> To them, this approach will seem merely to *describe* the wrongs of tort law, rather than *explaining* or *justifying* those wrongs—saying why they are wrongful.<sup>94</sup> Yet, while this objection too might necessitate elaboration of the wrongs-based approach, it should not in itself deeply trouble Kantian theorists or those with similar methodological inclinations. These theorists seek an *interpretive* understanding of the law—something more than a mere description, though perhaps less than a full justification or even an ‘explanation’. They seek, in Weinrib’s words, to identify the conceptions implicit in tort law doctrine, bringing to the surface ideas that are latent in this normative practice.<sup>95</sup> And a satisfactory interpretation of tort law’s wrongs might just involve reaching a compelling characterisation of each wrong that brings out why it might be thought a bad thing. One could elaborate, say, the tort of nuisance with a view to bringing out why it is unfortunate to have a certain sort of unhealthy relationship with one’s neighbour, before doing something similar for each other tort. Again, compare a philosopher’s interpretive account of the virtues: she might simply try to bring out, say, the kind of relationship friendship is, in a way that casts it in an appealing light.<sup>96</sup>

Still, Kantian theorists will remain sceptical of the wrongs-based approach for another, related reason. In developing their interpretation of tort law, they seek not merely high theoretical abstraction, but *a certain kind of* abstraction. They seek, in Weinrib’s words, ‘unifying’ abstractions—abstractions that ‘pervade[] the entire’ phenomenon of tort law, and which at the same time differentiate tortious relationships from other normative phenomena.<sup>97</sup> While non-

<sup>92</sup> Aristotle (n 2).

<sup>93</sup> McBride’s description of one reading of civil recourse theory. Nicholas McBride, *The Humanity of Private Law, Part I: Explanation* (Hart Publishing 2019) 16.

<sup>94</sup> This is just one of McBride’s objections to civil recourse theory. It is worth noting that, while he also objects that civil recourse theorists equivocate between positive law and morality when they speak of ‘wrongs’, this issue does not arise in the same way for Kantian theorists, or those of similar methodological inclinations, who do not accept the positivist distinction.

<sup>95</sup> See n 12 above.

<sup>96</sup> Aristotle (n 2) VIII-IX. See too Stone, ‘Legal Positivism’ (n 64).

<sup>97</sup> Weinrib, *Idea* (n 2) 29, and more generally ch 2. Note also *ibid* 87 (‘According to Kant, the function of reason is to order concepts so as to give them the greatest possible unity combined with the widest possible application.’ Citing Kant, *Critique of Pure Reason* (n 81) A644/B672).

Kantian theorists do not press this extreme demand for unity, they do tend to seek a somewhat integrated account of tort law—rather than a mere list, or ‘hodgepodge’, of various wrongs.<sup>98</sup> They also want to say something about what differentiates torts from other, non-legal wrongs, such as mere breaches of etiquette.

The Kantian agency framework seems to meet this demand for theoretical unity or integration. It claims that all torts involve one agent inappropriately subordinating another’s agency, whereas non-legal wrongs, such as breaches of etiquette, do not.<sup>99</sup> Our wrongs-based view, by contrast, does not purport to identify any factor that is shared by all of tort law’s relational wrongs, let alone which differentiates them from other wrongs. So this view does not even come close to meeting the relevant theoretical demand.

Is there any antidote to the theoretical craving for a criterion (or set of criteria) that unifies all of the various tortious wrongs and distinguishes them from other wrongs?<sup>100</sup> One possibility would be to adopt Wittgenstein’s model of ‘family resemblances’ in theorising tort law.<sup>101</sup> Wittgenstein famously observes that ‘the various resemblances between members of a family—build, features, colour of eyes, gait, temperament, and so on and so forth—overlap and criss-cross’ in various ways.<sup>102</sup> There need be no common trait that appears in all members of a family and distinguishes them from non-members. Still, we can give an account of a family’s traits. We can do so by proceeding from member to member, seriatim and by analogy, pointing out what each member has in common with some of their kin, even if there is no trait they all share.

Similarly, we might approach tort law by considering each tort in turn, seeking to show that each has something in common with some of the others, even though no single feature pervades all. On this approach, we will be able to say something about what distinguishes torts from other non-legal wrongs, but we will likely have to say something slightly different for each tort and each non-legal wrong (though there will be recurring themes). The reasons why battery differs from not returning a phone call may differ from the

<sup>98</sup> See Goldberg and Zipursky, ‘Torts as Wrongs’ (n 8) 936.

<sup>99</sup> Of course, there remains the question of how to distinguish torts from other legal wrongs, such as breaches of contract or fiduciary duties. See John Gardner, *Torts and Other Wrongs* (OUP 2019) ch 1.

<sup>100</sup> cf Ludwig Wittgenstein, *The Blue and Brown Books* (2nd edn, Blackwell 1969) 17 (the ‘craving for generality’).

<sup>101</sup> Weinrib contrasts this approach with Kant’s. Ernest Weinrib, ‘Law as a Kantian Idea of Reason’ (1987) 87 *Colum L Rev* 472, 480-1. It is surprisingly rarely invoked by other tort theorists in the way I suggest above. John Stick mentions it as an alternative to Weinrib’s formalist methodology, but does not consider its implications for understanding torts. John Stick, ‘Formalism as the Method of Maximally Coherent Classification’ [1992] 77 *Iowa L Rev* 773, 779. The idea is discussed in relation to particular aspects of tort law reasoning by Bruce Chapman, ‘Tort Law Reasoning and the Achievement of the Good’ in Ken Cooper-Stephenson and Elaine Gibson (eds), *Tort Theory* (Captus 1993) 88, fn 40; Gideon Parmachovsky and Alex Stein, ‘Catalogs’ (2015) 115 *Colum L Rev* 165, 196-201.

<sup>102</sup> Ludwig Wittgenstein, *Philosophical Investigations* (GEM Anscombe, PMS Hacker and Joachim Schulte tr, 4th edn, Blackwell 2009) § 67. See too §§ 65–72, 75–80, 83–8. Or, to change the metaphor: ‘in spinning a thread we twist fibre on fibre. And the strength of the thread resides not in the fact that some one fibre runs through its whole length, but in the overlapping of many fibres’, § 67.

reasons nuisance differs from not returning a phone call, or why battery differs from chewing gum too loudly, and so on.

Some of Goldberg and Zipursky's work effectively illustrates this 'family resemblance' approach, albeit not under that name. Seeking to provide pithy summaries of each particular culprit in tort law's 'gallery of wrongs', they proceed seriatim, but also by analogy, showing what each wrong has in common with some of the others. They start with the bodily impacts addressed by trespass to the person, explaining why these might be thought worthy of the law's attention. Next, they analogise interferences with property—which may affect the victims in ways not entirely dissimilar from bodily injuries. They then discuss injuries to dignity and reputation, observing that these share some similarities with deprivations of property, and so on.<sup>103</sup>

Reflection on the family resemblance approach might even lead one to conclude that the specification of a determinate criterion that unifies and differentiates tort law would not vindicate—but rather invalidate—a theory of tort. In the case of a family, the resemblances among its members tend to be importantly *open-ended*: as new members are born and older ones pass away, the family traits change. Likewise, new torts can be born and old ones slain.<sup>104</sup> Infliction of emotional distress, invasion of privacy and harassment have appeared in the not-too-distant past; others will appear in the future. Most jurisdictions have ceased to recognise, say, seduction or alienation of affections as wrongs warranting civil intervention. Furthermore, it would seem that nobody can say definitely which torts will be recognised or abandoned in the future. Thus, one might conclude, any purported limitation of the directions in which the common law of tort might move, by specifying a determinate criterion that must be shared by any tortious wrong, would be untrue to the law's open-ended character.<sup>105</sup>

## 6. Conclusion

Critics of Kantian tort theory sometimes observe that most of the judges who developed our common law did not read Kant, let alone decide to implement his legal philosophy.<sup>106</sup> The Kantian response has been that 'any felt need to point this out betrays a misconception' of their project.<sup>107</sup> They do not claim Cardozo secretly consulted the *Rechtslehre* beneath the bench. They claim the

<sup>103</sup> Goldberg and Zipursky, 'Torts as Wrongs' (n 8) 937–41. Here Goldberg and Zipursky consider the 'interests' implicated by each tort, but they have recently suggested this is not essential. Goldberg and Zipursky, *Recognizing Wrongs* (n 17) 236–7.

<sup>104</sup> '[S]ome torts have grown fat, some have married, and a few have been slain by court or statute; but others are born and (after some debate around the cradle) are given their proper name.' Rudden (n 5) 108.

<sup>105</sup> Wittgenstein, *Investigations* (n 102) § 69 ('We don't know the boundaries because none have been drawn.'). See too §§ 68, 70–1, 76–7.

<sup>106</sup> McBride, *Humanity* (n 93) 27–8 adds that even philosophers did not understand it until 2009, when Ripstein published his book-length interpretation, *Force and Freedom*.

<sup>107</sup> Ripstein, *Private Wrongs* (n 15) xi.

Kantian agency framework is a high-level theoretical abstraction that illuminates the more particular, casuistic reasoning in tort cases.

This article has suggested a different reason for critics' 'felt need' to point out that judges do not read Kant. The critics rightly feel that the Kantian account is foreign to the common law of tort. By 'foreign', I do not mean to suggest mere anglophone parochialism, but a recognition that the Kantian framework, based on its conception of agency, is a quite different conceptual scheme whose imposition distorts our view of the law. I have claimed the framework is not a natural fit for tort law's relational structure, produces a skewed classification of the various torts and yields an unrecognisable picture of judicial reasonableness assessments.

A theoretical approach not at all foreign to the common law of tort is likely to attract more or less the opposite criticism: that it is 'underwhelming'. This charge has indeed been levelled at something like the view I have sketched of torts as substantive relational wrongs. While I have not responded to this criticism in a way that will satisfy everyone, I have tried to suggest a way of developing the wrongs-based approach that might in principle assuage the underlying concerns.