Just what the Doctrine Ordered?

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‘*A life in reason was and is difficult. All of us....find it easier to follow dogma than to think.*’[[2]](#footnote-3)

**Abstract**

The prototypical normative intuition against direct physical interferences underlies the trespassory torts and is entrenched in current tort law doctrine. That such interferences are actionable without proof of damage distinguishes these torts from the compensation-dominated mainstream and requires explanation (found in: psychology; legal history; and Maine’s ‘interstices of procedure’) and justification (found in vindication and deterrence). Trespass doctrine instantiates Schauer’s ‘presumptive formalism’—a legal-systemic analogue of Kahneman’s ‘fast thinking’.

But—as the analysis of direct acts, intention, harm, standing and the available forms of redress demonstrates—trespass doctrine is both over and under inclusive. Consequently, it is sometimes manipulated by means of *intra*-systemic ‘slow thinking’*.* Furthermore, occasionally *extra*-systemic review from standpoints outside the citadel of doctrine seems appropriate. Choosing between these modes entails difficult issues of judgement.

Because the argument draws from several disciplines, the lengthy text can show only the tip of the several conceptual icebergs. Hence extensive references are provided, which (together with the additional, and optional, endnotes) give some indications of what lies beneath the waterlines.

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# Introduction

Battery and false imprisonment [fi] are as up-close-and-personal as tort law gets. They result from a gradual institutionalization of instincts and customs—norms that ‘lie deep in the background of our experience, implicit, largely transparent to our consciousness, bred in the bone’.[[3]](#footnote-4)[[4]](#endnote-2) For the most part, they work well. According broadly with folk morality, they mark wrongs and protect interests. And the systematizing work begun by eighteenth and nineteenth century ‘legal scientists’ (treatise writers and judges)[[5]](#footnote-5) has provided a body of settled ‘doctrine’ (taken-for-granted fundamentals) that makes for efficient predictability (a formal aspect[[6]](#footnote-6) of the Rule of Law) and broad folk moral assent.

In this conceptual heaven, we see Frederick Schauer’s ‘presumptive formalism’ in operation. Schauer holds that decision-makers should—as the default setting—‘defer [to necessarily exclusionary rules] even when they are convinced that their own judgment is best.’[[7]](#footnote-7) But doctrinal clarity is also doctrinal rigidity. Within the system, doctrine cannot be rejected. It can only be interpreted—although one person’s ‘interpretation’ is another person’s ‘manipulation’. As times change and ‘manifesto’[[8]](#footnote-8) claims for the recognition of as yet unprotected *interests* as *rights* emerge, this doctrinal rigidity produces some positions that, on critical reflection, might be regarded as under-inclusive lacunae or as over-generous to claimants.

Although they have attracted some autonomy-rhetoric by way of *ex post* rationalization and justification, trespass and fi are not driven by conceptions of a fundamental right to individual autonomy (self-rule). Instead they are founded on particular kinds of wrong and their doctrine systematizes a Tennysonian ‘wilderness of single instances’[[9]](#footnote-9)[[10]](#endnote-3) that evidences our intuitive condemnations of a particular kind of ‘bad act’[[11]](#footnote-10)[[12]](#endnote-4)—the aggressive shove that would outrage a victim and would fire up the mirror neurons[[13]](#footnote-11) of almost any spectator. My hypothesis is that a blow-like paradigm—the physical interference with body and property—is central to trespass’s consonance with folk morality.

In contrast with the general run of contemporary tort law that is dominated by compensatory damages, the now firmly entrenched trespass doctrine provides that:

A. the gist of liability is *a direct physical act that is intentional and unjustified*; and

B. these ‘bad acts’ are actionable *per se* (call this ‘aps’).

The exploration of aps requires us to examine tort law’s capacity to address and redress harms that do not count as ‘losses’ in the sense accepted in textbooks. Questions abound:

(1) How did aps evolve?

(2) How do the doctrinal concepts of direct acts and consequences, intention and standing (a) delimit the scope of aps and (b) account for its survival?

(3) Do the available means of judicial redress match the scope of liability?

Within a discrete legal system, doctrine is its own justification. But those stationed outside the citadel of doctrine will ask challenging questions:

(4) How aps can be justified?

(5) Has the doctrine generated instances of significant under- and/or over-inclusion?

None of these questions (1)-(5) sits comfortably within disciplinary boundaries—but jurisprudence is a mercifully ‘sociable science’.[[14]](#footnote-12)

# Instances

Given that that our ‘understanding of concepts generally…depends, among other things, on [our] understanding of their relation to concepts that can have instances’,[[15]](#footnote-13) it is useful to begin with some instances of arguable under- and over-inclusion—taken from the common law’s rich store of thought experiments. The concepts introduced are then explored in the subsequent sections.

## Mrs Wainwright and Direct Touching

On a visit to a relative in prison, Mrs Wainwright and her son were each strip-searched in ways that contravened the Prison Rules. The requirement to submit to search was entirely legal and undoubtedly justified by the worrying incidence of drug abuse by prisoners. Hence, all turned on the manner of the searches.

Mrs Wainwright *was not touched* but was required to strip completely naked (rather than half-by-half naked, as the Prison Rules prescribe) in a room of which the window-blinds were not drawn. Her son was treated with similar disrespect, but also *was touched* in an unseemly fashion. Neither suffered a consequential recognisable psychiatric condition that fitted the conventional conception of loss. In the House of Lords, her son succeeded in battery. She, being untouched, did not. Touching was treated as an absolutely necessary condition.[[16]](#footnote-14) aps availed her son but not her.[[17]](#footnote-15) Consequently her son was vindicated but she was not. Had her son not been touched, the prison officers’ errant conduct would have gone unpunished—indeed the officers might have felt vindicated. Other potentially errant prison officers were not deterred. Is this under-inclusion?

Mrs Wainwright had no need of *compensation*. But she wanted *vindication*—the *wrongfulness* of her treatment to be *marked* officially—and perhaps to *deter* such behaviour in the future. She might also have sought to indulge or *sublimate* vengeful feelings. The officers had interfered with her quasi-proprietorialinterest in deciding *for herself* which parts of her body to offer for visual inspection and to whom. They had acted with contumelious disregard of her personhood. They had caused her distress and indignity—or harm in some thicker-than-usual sense.

Importantly, her claim was not for *mere* distress, but for distress caused by the *invasion* of an *interest* rooted in *autonomy* or self-management. Her interest includes the bodily integrity that battery protects when it recognizes—as a *right*—one’s interest in deciding for oneself whether one’s in-growing toenail should be removed by that particular surgeon.[[18]](#footnote-16)[[19]](#endnote-5) It is her body and no-one else’s. Adapting Arthur Ripstein, ‘[She is] sovereign because nobody else gets to tell [her] what to do; [she became] their subject [when] they did’.[[20]](#footnote-17) Judicial recognition and prioritization of a *quasi-proprietorial interest in self-management* would have strengthened her tort claim for *vindication* and would have *deterred* those who might treat persons as *means* or as *commodities*.

Mrs Wainwright had to go to Strasbourg to secure redress. Adopting a thicker conception of *harm* than the common law recognises, ECtHR awarded her the significant token of €3,000 as *redress* for her ‘undoubted and more than transient *distress*’ that was caused by the failure to take ‘rigorous precautions to protect [her] *dignity*…from being assailed any further than necessary’.[[21]](#footnote-18)[[22]](#endnote-6) Her personhood and dignity are *hers and no one else’s.* Interference with her sovereignty over them could be considered *targeted*-*offence-as-harm*—as distinct from *mere offence.* However, tort law is resistant to the notion that Mrs Wainwright was *harmed*.

There is also a recognizable *public* interest in *deterring* such conduct as the defendants’ and in securing a right to vindication for any citizen affected by that conduct. aps can be crucial to C’s status as a *victim-with-standing* to seek the *vindication* of *public* norms by *private* lawsuit.[[23]](#footnote-19) [[24]](#endnote-7)

## Over-inclusion vignette

In contrast with *Wainwright*, consider this vignette. Prankster aimed a custard tart at Gamely. Prankster missed and the tart hit Pompous. Prankster *touched* Pompous *directly* but Pompous suffered neither injury nor loss—except of dignity. Prankster had no *intention-to-hit-Pompous*. Prankster’s hitting of Pompous is reckless or merely negligent and—as the books tell us that battery is an intentional tort—we might imagine that, despite aps, Pompous’s claim would fail. But the trespass doctrine can be manipulated. Prankster’s *intention-to-hit Gamely* can be ‘transferred’ to become an *intention-to-hit-Pompous*.[[25]](#footnote-20) That ‘intention’ could not be established—by inference—on any balance of probabilities. It simply was not any part of Prankster’s plan. By means of the manipulative transference device, the word ‘intention’ is retained but is attached to an *imputation* (of law) rather than an *inference* (of fact). The effect is to permit Pompous to benefit from aps.

We might think this over-inclusion. We might think Pompous’s interest just not valuable enough. Thus the vignette strongly suggests that the availability of aps (and of any deterrent effect of a finding of liability) should be subject to a *de minimis* condition. Furthermore, Prankster might reasonably argue that in *Rhodes* v. *OPA*, the Supreme Court held that *imputed* intention has no place in tort law. Lady Hale and Lord Toulson said,

‘Imputation of an intention by operation of a rule of law is a vestige of a previous age and has no proper role in the modern law of tort. It is unsound in principle.’[[26]](#footnote-21)

But a doctrinalist would kick that away. *Rhodes* is in a different doctrinal category—*Wilkinson* v *Downton*[[27]](#footnote-22)—and in a different chapter in the textbooks.

## Analogue or Binary?

The doctrinal equation (aps + transferred intention = liability) avoids or obscures[[28]](#footnote-23) the fundamental question, *viz*. should that kind of interest of that kind of claimant be protected from that kind of violation by that kind of defendant? Addressing that question would probably lead us to: (a) *attribute weights* to the various interests at stake—including Pompous’s dignity; and (b) conclude that (although other more severe indignities, such as those suffered by Mrs Wainwright, merit protection) [[29]](#footnote-24) Pompous’s claim should, on these facts, be rejected for the un-doctrinalreason that it is *de minimis*. Interestingly, the *de minimis* concept is recognized in the *Wilkinson* doctrine. As Lord Hoffman put it,

‘In institutions and workplaces all over the country, people constantly do and say things with the intention of causing distress and humiliation to others. This shows lack of consideration and appalling manners but I am not sure that the right way to deal with this is by litigation’. [[30]](#footnote-25)[[31]](#endnote-8)

*Attributing weight* is an *analogue*exercise, an exercise of judicial discretion that cannot be explained solely in *binary* terms. It is expensive in time and money—downsides that are exacerbated as more interests are deemed relevant. It reduces outcome-predictability. Imagine traffic wardens with complete discretion to issue parking tickets—no marked bays, no clock, no meters, no fixed time limits. However, the system lives with many analogue concepts, especially in the ubiquitous negligence tort. Furthermore, to the extent that judges are seen as mechanics applying rules rather than persons of integrity and experience making rule-guided judgements, more analogue judgement has the potential to undermine legitimacy. As presumptive formality signals, we cannot afford too much of the all-things-considered way of deciding things. But how much is too much?

## Quantifying the Unquantifiable

When your car is wrecked, damages are easily quantified by reference to its market value—unless it is the red Mini from *The Italian Job* or similarly unique. But what if you lose an arm? Your arm is neither replaceable nor fungible, although money might buy you an *enabling* prosthetic limb[[32]](#footnote-26) and a *consoling*world cruise. Your loss is real-but-difficult-to-quantify. Similarly, Mrs and Mr Rees had an interest in limiting the size of their family. That interest was violated when D conducted a negligent sterilisation operation on Mrs Rees and she became pregnant subsequently. The House of Lords awarded a conventional sum of £15,000.[[33]](#footnote-27) Although plucked from the air, that arbitrary quantification *signalled value* in a money-driven economy.[[34]](#footnote-28)

Arbitrary quasi-market quantification also features in the tariff the Court of Appeal devised in *Thompson* v *Commissioner of Police for the Metropolis* to address fi by the police. [[35]](#footnote-29) The victim might suffer neither injury nor loss of anything tangible. But the interest in self-determination of movement has been violated. [[36]](#footnote-30) The tariff *marks* violations officially and consoles victims. However, it is not clear that such payments are truly ‘compensatory’.[[37]](#footnote-31)[[38]](#endnote-9) Indeed, they have more to do with *vindication* and, perhaps, *deterrence*.

## Vindicatory Damages

Mr Lumba was imprisoned on invalid grounds. Because the public officials could (and probably would) have used other valid grounds, the invalid imprisonment had caused him no *loss*. Nevertheless, in the context of aps, he argued that: (i) his right—that he be imprisoned only on proper authority—demanded *vindication*; and (ii) the officials’ error demanded a deterrent gesture from the court. The Supreme Court majority’s view sits ill with *Rees* and *Thompson.* The majorityconsidered that *nominal damages* sufficed to *mark* the violation of Lumba’s right and the public officials’ failure to respect the rule of law. There was no need for additional ‘vindicatory damages’.[[39]](#footnote-32) That approach risks trivializing the state officials’ wrongs as merely technical.[[40]](#footnote-33)[[41]](#endnote-10) The Twitter-style message is ‘Public officials get off lightly’. Recognizing that concern, the minority favoured an arguably too tokenistic conventional sum of vindicatory damages of £500-£1,000.[[42]](#footnote-34)

## Directness and Omissions in False Imprisonment

fi is less blow-like than battery is. In *R v. Governor of Her Majesty's Prison Brockhill ex parte Evans (No 2)*,[[43]](#footnote-35) it is difficult to find a positive direct act in the prison governor’s innocent miscalculation of C’s release date. Nevertheless the governor was personally liable for the excess detention. However, *Prison Officers’ Association* v. *Iqbal* demonstrates that the concept of a ‘direct act of imprisonment’ is *interpretive*. We can see three different views. Lord Neuberger MR adopted a blow-like model that runs counter to *Evans*. He thought the prison officers’ strike action constituted only an *indirect cause* of Iqbal’s confinement to his cell and deprivation of free association.[[44]](#footnote-36) Smith LJ’s view was that Iqbal’s confinement might have been *directly caused* by the absent prison officers in the period before the Governor arrived at the prison and issued what Smith LJ thought a chain-of-causation-breaking order that cells be kept locked.[[45]](#footnote-37) Sullivan LJ dissented, regarding the whole period of confinement as *sufficiently direct* and the governor as having been ‘deliberately left by the Appellant with no practical choice…but to respond to the strike as she did.’[[46]](#footnote-38)

*Iqbal* also illustrates the general reluctance to hold defendants liable for their omissions.[[47]](#footnote-39) Whilst one cannot batter by omission, one can easily imprison by omission. Although *Evans* points to acceptance that an omission can give rise to liability in fi, the majority decision in *Iqbal* points the other way. However, Sullivan LJ’s dissent is coherent. He classified the officers’ refusal as ‘an *act* of defiance’ and ‘deliberate’. Locking-and-going away and refusing-to-unlock each seem similarly culpable. The officers did not *merely* *allow* Iqbal’s in-cell confinement. It was not a ‘fortuitous consequence of the strike’ (or a mere *side effect*) but its ‘intended result’.[[48]](#footnote-40) It was a *targeted omission*.

## Negligent False Imprisonment

The final instance points to significant under-inclusion. It involves Mr Reilly (who was 61 and suffered from angina) and Mrs Reilly (who was 68). They were imprisoned for 80 minutes in a malfunctioning (because poorly maintained) hospital lift. They claimed in negligence but Mann LJ held that they sustained ‘no recognizable psychiatric injury’ and experienced ‘only normal emotion in the face of a most unpleasant experience’. Damage being of the essence in the tortious category of negligence, their claim failed.[[49]](#footnote-41)

Subject to a *de minimis* discretion, the Reillys’ interests in freedom of movement seem well worth vindicating. But, for doctrinal reasons, aps would not have availed them had they claimed in fi. D had *no intention to imprison* the claimants—it had *no plan*[[50]](#footnote-42) to do so—and, even on the broad view in *Evans*, their imprisonment was probably *indirect*.

However, the Reilly’s could be vindicated if the concept of harm that counts as damage in negligence were to be thickened. Of this, there are some hopeful signs. In 1698 Holt CJ said, in a malicious prosecution case, ‘To take away a man’s liberty is damage, of which the law will take notice’[[51]](#footnote-43)—or, we might say, ‘take into account’. More recently there have been suggestions that the fact of imprisonment might count as sufficient harm in negligence. In *W*. v. *Home Office*, C was improperly interviewed and his papers were confused with another’s. C’s detention was planned but that plan was negligently made. C made no fi claim and the negligence claim failed for want of a duty of care. Nevertheless, Lord Woolf MR suggested that the fact of imprisonment might be ‘damage’ sufficient to support a claim in negligence.[[52]](#footnote-44) Furthermore, in *McLoughlin* v. *Grovers*, Hale LJ (as she then was) said, ‘Loss of liberty is just as much an interference in bodily integrity as is loss of a limb’.[[53]](#footnote-45) What we think of as aps could be, in fi, just ‘loss’ that is difficult to quantify.

## Left to Parliament

It is also noteworthy that there have been some limited statutory interventions to address lacunae. Protection from Harassment Act 1997 and Modern Slavery Act 2015 along with equality legislation provide examples. Although particular forms of violation of interests in equal concern and respect are addressed, common law creativity in areas falling just outside the legislation can be inhibited.[[54]](#footnote-46)

# Unpacking Vindication

In several of the instances just reviewed, a case for *marking wrongs* and *vindicating rights* emerges quite clearly. There is also some good authority for tort law’s vindicatory function. For example, Lord Scott has contended that,

‘The….main function [of the civil law of tort] is to identify and protect the rights that every person is entitled to assert against, and require to be respected by, others.’ [[55]](#footnote-47)

Nevertheless, tort law comprehends compensation and deterrence more readily than it comprehends *vindication*—a complex concept that is too easily marginalized as ‘anomalous’, ‘something for human rights claims’ and not tort law’s ‘proper business’ as tort law’s doctrine defines it.[[56]](#footnote-48) But our instances suggest that we should be ‘taking vindication seriously’ and that we should unpack its functions—its various kinds of effects in the world. Here’s a beginning list.

1. *Marking (correlative) wrongs and rights* by an official certificate that C had a right and that D committed a wrong when violating it.
2. *Naming and shaming D*.

Both A and B can make C feel good and might deter other potential defendants, as can damages awarded primarily as compensation.

1. *Securing explanation.* Sometimes claimants just want to know what happened and why. This occurred in a pure form in *Ashley* v *Chief Constable of Sussex.*[[57]](#footnote-49) Ashley had been shot dead by a policeman and the Chief Constable had offered every kind of compensation available. But the deceased’s relatives wanted an explanation of how the death occurred and so—relying on apsto distinguish their claim from the offered compensation—claimed in battery. The House of Lords allowed that claim to proceed. Lord Rodger assumed that Cs’ motive was ‘a desire for explanation by way of a judicial finding’.[[58]](#footnote-50) Lord Scott thought the Ashleys were,

‘determined….to obtain a *public admission or finding* that the deceased Mr Ashley was unlawfully killed….They want a finding of liability on their assault and battery claim in order to obtain a *public vindication* of the deceased's right not to have been subjected to a deadly assault, a right that was infringed by PC Sherwood.’[[59]](#footnote-51)

1. *Consolation.* An award of vindicatory damages as in *Rees* or *Thompson* can provide some comfort—‘at least I got a good holiday out of the episode’.[[60]](#footnote-52)
2. *Sublimation.* Much as we might imagine that we have risen above primitive urges, it is all too clear that the urge for revenge can be powerful and that, when a group feels affronted, insulted or threatened vigilante activity will occur unless the law provides some credible alternative route.[[61]](#footnote-53)[[62]](#endnote-11)

# Doctrinal Evolution

We turn now to question (1)—how did aps evolve? We find a complex story of the intuitions that underlie the blow-like paradigm’s wrongfulness and their entrenchment as established legal doctrine. Fascinating though the historical details are, my approach to them is fairly summary, to allow more space for a fuller explanation of the significance of what can loosely be called ‘intuitions’—ethical principles, including the obligation of ‘non-injury’, that are ‘seemingly plausible’ or ‘readily understandable’ and have a ‘sense of non-inferential credibility’.[[63]](#footnote-54)

## Doctrine

Although it is difficult to conceive of the advocates, judges and treatise writers operating over several centuries as a *group entity*, we happily regard the emerged consensus of rules as an *entity* that we can call ‘doctrine’. Moreover—anthropomorphically—we attribute purpose to it.[[64]](#footnote-55)

A good pedigree is not enough to secure a doctrine’s survival. Doctrine must have some obvious features that accord with folk morality sufficiently to give a sense that, on the whole, tort law protects the interests that ought to be protected. In the kinds of matters with which trespass and fi deal, we need most of the doctrine most of the time to be accepted unquestioningly—guiding conduct unambiguously, enabling citizens to plan, avoiding an exponential increase in litigation. It seems improbable that such broadly accepted standards evolved exclusively within law. Neither do they simply reflect habits that have over time acquired normative force of customs that the law came to recognize. Rather, as Gerald Postema contends, behavioural *regularities* and the notions of how people *ought* to behave interact and intertwine in the very establishment of the custom—and are impossible to disentangle.[[65]](#footnote-56) But there will be awkwardness that doctrine does not resolve and we will expect tort law to adjust as the balance of interests in our world shifts. Without some such reasonability, doctrine will degenerate into *dogma*—a thing in itself and beyond any re-appraisal or re-imagining.

## Intuitions

Daniel Kahneman draws a useful distinction between System 1 ‘fast thinking’ and System 2 ‘slow thinking’.[[66]](#footnote-57) System 1 comprises both: (a) innate—or prototypical—norms, hard-wired from the hunter-gather period, or earlier, of human evolution;[[67]](#footnote-58)[[68]](#endnote-12) and (b) culturally-acquired norms.[[69]](#footnote-59)[[70]](#endnote-13) Although it is difficult to distinguish (a) from (b) empirically,[[71]](#footnote-60) these human and tribal norms together determine the auto (point-and-shoot settings) of our normative cameras.[[72]](#footnote-61) The instant snapper ‘thinks fast’ about catching the moment and does not ‘think slowly’ about the settings of film speed, focal length, aperture and shutter speed to which a professional photographer will give careful attention when setting the camera manually to override the does-most-things-pretty-well auto settings (perhaps in order to blur the background but not the subject of a special portrait). System 2 then is ‘effortful reflection’ that might overcome, confirm or justify (rationalize *ex post*) System 1 norms. We can regard ‘effortful reflection’ simply as mental activity that makes a heavy call on working memory.[[73]](#footnote-62) It is not necessarily deductive or even abductive *inference*. After prolonged thought, the actual decision-making can still be the experience of having a *hunch*.[[74]](#footnote-63) And nowadays, System 2 effortful reflection can be observed by neuroscientific experiments.[[75]](#footnote-64)

I make four assumptions.

1. Humans have an innate moral capacity—a ‘deep normative grammar of morality’[[76]](#footnote-65)—much as we have a linguistic capacity.
2. Humans are not normative blank slates. Some norms are innate.[[77]](#footnote-66) The empirical evidence on which I have relied for this comes principally from child psychology[[78]](#footnote-67) and trolleyology as utilized by psychologists.[[79]](#footnote-68)[[80]](#endnote-14)
3. A norm against striking others—a blow-like paradigm—is System 1 innate
4. That norm would inevitably affect the behaviour standards expected by and of all who were involved in the *diverse local justice* that, in the years before and after the Conquest, preceded the evolution of Royal justice.[[81]](#footnote-69) D strikes C and is liable. D2 strikes C2 in self-defence or defence of another and is excused because acting out of an imminent necessity created by C2’s threatened bad act.[[82]](#footnote-70) But the doctrine of necessity has only relatively recently expanded beyond more-or-less-intuitive *emergency* (preventing virtually certain damage to person or property) into the more complex and challenging territory of non-urgent decisions on behalf of those lacking capacity.[[83]](#footnote-71) These wider notions of justification were not articulated clearly in the UK until Lord Goff’s judgments in the 1980s.[[84]](#footnote-72)

### System 1: Innate

System 1 standards can be *prototypical*, hard-wired during our evolution in a pre-industrial world, maintaining social cohesion and defending the tribe from danger and stranger. In defence of kin or kith, you might kill a murderous intruder, whereas close-up-and-personal violence within the tribe is taboo. Similarly, a hunter-gatherer needs no philosophy of libertarian individualism and no System 2 effortful reflection to conclude that imprisonment is a bad thing—preventing hunting and gathering.

Trolleyology has uncovered some of this prototypicality. You might—after System 2 effortful reflection—switch the points to save five others tied to the trolley track, even though that would kill one person on the spur track. However, would you—to the same end but with your bare hands—push a fat man off a bridge into the oncoming trolley’s path and to certain death? [[85]](#footnote-73)

### System 1: Culturally Acquired

Alternatively, some System 1 standards are *culturally* ingrained. For example, in a stratified society (think *Downton Abbey*, first series), a gentleman was *expected* (predictively and normatively) to raise his hat to a lady and did so automatically. Servants were *expected* to manifest deference—to doff caps, bow, curtsy, etc.—and, for the most part, did so automatically. Although deference was a habit, it was not merely a prediction of likely behaviour. It was a *learned-automatic norm*, deeply internalised by aristocrats and servants alike.[[86]](#footnote-74) When the internalisation is deep enough, there is little practical difference between the innate and the culturally acquired. Indeed, distinguishing them is an empirical challenge.

### Moral Codes

It seems that moral rules do not depend for their force on belief in reasons for them and that ‘hunches’, emotions and the like cannot simply be dismissed.[[87]](#footnote-75) Moral norms and codes need some System 1 traction. The utilitarian needs some conception of the good that members of the tribe cannot reasonably reject.[[88]](#footnote-76)[[89]](#endnote-15) A rule that permitted killing other members of the tribe for the killers’ pleasure would be rejected. Immanuel Kant’s categorical imperative—never to treat others merely as means[[90]](#footnote-77)—must meet the broad expectations of members of the tribe, even if his absolute rule against lying does not.[[91]](#footnote-78) But a lot turns on who count as ‘legal persons’ or ‘members of the tribe’—slaves? indigenous people?[[92]](#footnote-79) women? female babies? embryos? outcasts from the tribe? gorillas?.[[93]](#footnote-80)[[94]](#endnote-16) Though clearly System 1, that matter is probably culturally-determined rather than hard-wired.[[95]](#endnote-17)

Within the tribe there will be patterns of responsibility to act, to look after children or respected elders, to fend off intruders, etc. Where the tribe has come to regard the kind of *relationship* involved—whether through established status, such as parent-child or doctor-patient, or a genuinely voluntary assumption of responsibility[[96]](#footnote-81)[[97]](#endnote-18)—as *close enough* to demand action, System 1 norms can be breached by omission.

### Property Construction

Later, I argue that territorial and quasi-proprietorial notions are significant System 1 factors in our story and that the rights protected by aps can be usefully characterized as *quasi-proprietorial*—our rights as *autonomous*[[98]](#footnote-82) individuals to *exclude* othersfromwhat is *ours.* Many accounts follow Hobbes, Locke, Hume and Bentham in taking property norms to be primary features of ‘law as a purely *cultural construct* to repress our natural aggressions’ and not as ‘*human nature’s* institutional analogue’.[[99]](#footnote-83) Certainly, some conceptions of exclusive entitlement to real property are culturally-specific: barony; tenant for life; the modern assured shorthold; *etc*.

Jeffrey Stake argues that property has a prototypical foundation. ‘Property is more than a social invention; it is a set of feelings built into our brains to solve survival problems confronting our ancestors’.[[100]](#footnote-84)[[101]](#endnote-19) He draws on evidence from a wide range of species. Even butterflies seem to respect the ‘rights’ of the butterfly that lands first on a particular flower, just as humans might respect the ‘rights’ of the person who first brought a particular parcel of land under cultivation. By contrast, in some societies, hunting is conducted for the benefit of the group and the meat secured must be shared.[[102]](#footnote-85) Whether or not Stake is completely right, it is clear that ‘no system of property rights can survive unless property ownership is infused [somehow] with moral significance.’ As Smith and Merrill suggest, Bentham was probably wrong to hold that the idea of property is entirely constructed.[[103]](#footnote-86)

### The Legal-Systemic Aspect

Despite our sophisticated institutionalized view of justice through law, we rely heavily on System 1. It would tend to social in-cohesion and to inefficiency were citizens, lawyers and judges to debate every normative issue *de novo*. In Frederick Schauer’s words,

‘rule-based decision-making is premised in part on the belief that none of us, ordinary or not, have the mental capacity incessantly to consider all of the things that an “all things” considered decision-making model requires of us’.[[104]](#footnote-87)[[105]](#endnote-20)

Moreover, the planning of human affairs requires a normative environment—including shared conceptions of wrongs—that is reasonably predictable. We need categories of convenient clarity—perhaps what Stanley de Smith once called, ‘the austerity of tabulated legalism’.[[106]](#footnote-88) Decisions, within tort law, to question established *doctrine* can be decisions to consider disruptive changes in the bases on which citizens and businesses plan. Hence, in our general affairs, a setting that selects automatically from the available innate norms and learned-automatic norms is the right *default*. Rules that run counter to innate or learned-automatic norms incur high information and enforcement costs.[[107]](#footnote-89) In short, there is a strong systemic and social case for Schauer’s ‘presumptive formalism’, which we might reasonably regard as a ‘systemic System 1’. Call this ‘legal-systemic mode 1’ [lsm1].

Nevertheless, a rule’s form matters. To be bound to exclude under 18s from voting is different from being bound to hold only those who take reasonable care liable in negligence. The former is ‘binary’ (like an on/offswitch). The latter is ‘analogue’ (like the volume and bass and treble controls). When the dominant concepts are analogue, responsible rule-following entails effortful reflection. Call this ‘legal-systemic mode 2’ [lsm2].

Inevitably, lawyers determined to win today’s case and judges moved by the equity of a claim will sometimes manipulate the doctrine by ingeniously effortful reflection *within* the conceptual framework of doctrine that ‘legal science’ has articulated and crystalized. Call this ‘legal-systemic mode 3’ [lsm3]. Such manipulation can be provoked by binary character of the doctrinal concepts in battery and fi. Because value judgements can be concealed by the doctrine, there is a case for the more analogue approach of a *de minimis* rule, making the exercise of judgement more overt and less legalistic. That would weaken ‘presumptive formality’, but rather less than notions of duty of care, proximity and reasonable foreseeability weaken it in negligence.

In that they maintain or retain—but, in lsm 3, perhaps do not respect—the doctrine, lsm 1-3 share a doctrinalist view. They operate within the citadel.

### Extra-legal Review

We do not *choose* our particular prototypical or learned-automatic normative reactions. They simply come upon us. But we have and hold them and cannot shirk responsibility for them. Sometimes, as Henry Sidgwick put it, ‘the primitive spontaneous processes of the mind are mixed with error, which is only to be removed gradually by comprehensive reflection upon the results of these processes’.[[108]](#footnote-90)

A considered life cannot give an overriding priority to prototypical norms. Human evolution lags way behind socio-economic change. Regina Rini argues that neurological data suggesting innateness are ‘an aid to reflective self-understanding’ but not the arbiter of moral decision, which demands careful normative reflection using appropriately developed but traditional philosophical methods. Similarly, Barbara Fried argues that, although ‘widely shared moral intuitions are entitled to some presumption of moral correctness…[a]t some point, the presumption of rightness has to be defended in light of articulated norms’. Those whose ‘articulated norms’ are tough-mindedly consequentialist will say that the emotional tail should not be allowed to wag the rational dog—‘just do the math and push the fat man.’ But the common law has tended to reflect intuitions rather than rational consequentialism—and understandably so.

Some will (and sometimes others perhaps should) adopt standpoints *external to the citadel of doctrine* and confront the utility and disutility of legal forms, doctrines and dogma—or the tension between intra-legal consistency and extra-legal (moral and political philosophical) evaluations. When to step outside the citadel and to countenance that the doctrinal *givens* might be *re-imagined*[[109]](#footnote-91)[[110]](#endnote-21)is one of law’s *wicked* problems—a critically demanding responsibility for system-loyal common law judges and for legislators.[[111]](#footnote-92) Moreover, lacunae and anomalies are not easily seen through doctrine-bound spectacles. Furthermore, although System 1 standards are defeasible by System 2 effortful reflection, in that very reflection dominant cultural values will tend to weight some interests (say, in property) more heavily than others (say, a homeless family’s needs).

Hence what we can call ‘extra-legal review’ [elr] is more radical than lsm2 or lsm3. It might take the form of Llewellynesque ‘grand style’ Supreme Court judgements[[112]](#footnote-93)[[113]](#endnote-22) or radical reviews by a law commission or a Royal commission.[[114]](#footnote-94) Despite the virtues of lsm1, there is a case for a watching brief. The wicked question—‘when to engage elr?’—presents an obstinately endemic dilemma. lsm1 tells us to avoid lsm3 and elr. But elr tells us to get on top of lsm1 and to view lsm3 with suspicion. Understanding might be the only therapy. Certainly, no litmus test can be devised but the time might be ripe when—in the manner of the *Sorites* Paradox—the lacunae, anomalies and ‘contradictory perceptions’ pile high enough.[[115]](#footnote-95)

### The Interstices of Procedure[[116]](#footnote-96)

Although court records often obscure them,[[117]](#footnote-97) it is reasonable to assume that some prototypical norms—including the blow-like paradigm that we now call battery—were well-established as wrongs in the local courts that were the primary dispute-resolution forums before and after the Conquest. Joshua Greene’s prototypical trio of signals for System 1 condemnation—intention, action and direct personal contact—found their way into Royal justice not by centralizing initiative but because litigants sought the advantages of Royal procedures and enforcement.

To secure a writ from the Chancery and initiate proceedings, C had to show that the matter had Royal interest—and ‘The King was not so much interested in remedying private wrongs as he was in establishing a monopoly on the legitimate use of force’.[[118]](#footnote-98) The available *praecipe* writ would ‘command’ D to come and explain why he or she had done the wrong that C alleged, but it would only be issued for wrongs (called ‘trespasses’) that were committed ‘with force of arms and against the king’s peace’. This *vi et armis contra pacem nostram* formula applied most readily to D’s deliberate bodily movements—blow-like, physical contact with C. Because the trespass writ’s *form* addressed the King’s peace rather than any *interest* of C’s, C did not have to allege *harm*. This formal *procedural* oddity—and not the greater blameworthiness of intentional conduct—provided the conceptual opening for trespass’s *substantive* aps. *Jurisdiction*—and not *substance*—was the driver.

Over time, a more comprehensive system of justice was expected from the Royal ‘fountain of justice’[[119]](#footnote-99) and there were, of course, many other ‘wrongs’ for which litigants might seek Royal justice. At first, legal fictions were used to extend access. Toby Milsom cites a case in 1317 in which an issued writ improbably alleged that wine had been adulterated with salt by the use of ‘swords and bows and arrows’.[[120]](#footnote-100) We see much ‘special pleading and evasion, stretching and strait-jacketing, besides the invention of technical terms, or technical senses for common terms’—lsm3 in operation.[[121]](#footnote-101)

Although the formal record would show only that D had pleaded ‘not guilty’ (which plea a jury would accept if it thought D’s conduct somehow justifiable), less flagrant fictions probably became commonplace. But, by 1370, a different form of writ had emerged, alleging wrongs that had caused *harm* but were not *contra pacem*. The specific circumstances of the *harm* of which C complained and which constituted the ‘wrong’ appeared on the face of this writ, which became known as ‘the action on the case’—Maitland’s ‘fertile mother of actions’,[[122]](#footnote-102) from which negligence, several other torts and modern contract law developed. Note the stunning contrast *in form* between: the narrowly specific concepts—deliberate and blow-like physical contact—that justified *contra pacem* claims for batteries and assaults; and the open texture of the action on the case.

### Legal Science Divides and Rules

These two forms of writ co-existed and overlapped but, by the eighteenth century, that overlap seemed unsystematic to those who, in the spirit of the times, wanted to present the law as a coherent *science*.[[123]](#footnote-103) In 1725, Raymond LCJ asserted the need to ‘keep up the boundaries of actions’ in order to avoid ‘the utmost confusion’.[[124]](#footnote-104) Later, in their efforts to systematize Tennyson’s ‘codeless myriad of precedent’,[[125]](#footnote-105) textbook writers would shoehorn precedents into conceptual schemes that inevitably reflected the then dominant morality. ‘The “form” expressed “substantive” values and policies’.[[126]](#footnote-106) History was read backwards and *ex post* rationalizations were presented as *ex ante* purposes.[[127]](#footnote-107)

To separate trespass from case, a bright line had to be drawn and—resonating with the *vi et armis contra pacem nostram* formula—blow-like *directness* provided it. Trespass was confined to D’s *direct* interferences. All other actions were to be brought in case.[[128]](#footnote-108) In 1773, *Scott* v. *Shepherd* marked out the limit to which directness could be stretched.[[129]](#footnote-109) D had thrown a lighted firework onto a gingerbread stall in a market. In rapid succession and intuitively, Willis and then Ryal had thrown the firework from off the gingerbread stalls on which it had landed. Ryal’s reflex throwing caused the firework to hit and injure C. Whilst D had no plan to affect C, the jury rejected D’s ‘not guilty’ plea. They probably thought D’s conduct reckless or negligent. But—as befits an era of *categorization*—D raised, on appeal, a paradigmatically formalistic argument, *viz.* that any harm caused to C was *indirect* and that battery was therefore the *wrong form* of action.[[130]](#footnote-110)[[131]](#endnote-23)

The jury’s decision survived. Rather than accept that a remedy for the eventual-but-unplanned-harm D had caused was justified in all the circumstances—as if C had pleaded ‘on the case’—the court chose to *manipulate* (lsm3) the concept of directness. By treating Willis’s and Ryal’s conduct as *mechanical extensions* of D’s act—‘more or less nearly automatic, in order to arrive at the decision’[[132]](#footnote-111)—the appeal court had probably *stretched* blow-like directness to its limit. The effect was to *entrench* *directness* in the doctrine as battery’s distinguishing feature—a *necessary* condition.[[133]](#footnote-112)

The very *form* of the action on the case required C to allege—as a circumstance of the case—*damage consequent* upon D’s conduct. This gives us the rule that damage is of the essence in the negligence tort that, in turn, exacerbates the *under-inclusion* risk that merely *negligent* interferences with autonomy-based interests will go unvindicated and undeterred unless they cause *loss*.

When there is no damage and C relies on aps for vindication and/or deterrence, an action lies in battery if, and only if, C can meet the doctrinally-entrenched, crudely binary, *necessary* conditions of *intentional* *direct contact*. Though its relative clarity might commend it and other torts might be expanded to meet some of the needs, this canonical restriction risks under-sizing the common law’s protection of the expanding conceptions of *individual autonomy*—instrumental (*our* objectives), representative (*our* choices) and symbolic (*our* status)[[134]](#footnote-113)—that have gathered momentum since the eighteenth century. Mrs Wainwright’ case is well in point. Furthermore, the availability of aps also risks over-sizing C’s right and under-sizing the protection of D’s interests—*over-inclusion* and *under-inclusion*.

### Targeted omissions[[135]](#footnote-114)

We think of acts and omissions as opposites—as doing and not doing, as moving muscles and not moving muscles. I mowed my lawn yesterday. My neighbour did not. I did not yesterday consider giving a proportion of my savings to fund the battle against aids, but I read this morning that Bill Gates had done exactly that. We cannot cope with the sheer bulk of all the things we have not done or with the burden of guilt over some of them. Hence, we have what psychologists call an 'omissions bias',[[136]](#footnote-115) which we can often find *ex post* reasons to justify when challenged. We value our freedom to choose our actions; the busybody is unwelcome; and the stranger masquerading as a ‘victim’ might be ready to rob the attracted rescuer. But elr might ask whether we are now entitled to put our ‘thumbs on the moral scales’ to reject so comprehensively the notion of a duty to act in the interests of unfamiliars.[[137]](#footnote-116) [[138]](#endnote-24)

To batter is to act—to touch C directly. We easily assume the opposite—that not touching is no battery.[[139]](#footnote-117)[[140]](#endnote-25) The concept of ‘battery by omission’ does not come upon us automatically. Inaction is ‘inherently abstract’. We need some effortful reflection to identify instances. You find that your car has rolled onto C's foot and, opportunistically, you plan to—and do—leave it there.[[141]](#footnote-118) Prankster notices a banana skin in a gangway and leaves it there, hoping that Pompous will slip on it and lose some more of his dignity. Note however that these are not ‘pure’ omission cases, but examples of 'targeted omissions'. Prankster might as well have placed the banana skin in the gangway himself.[[142]](#footnote-119)[[143]](#endnote-26)

What then might inculpate a *targeted* omission? We need not be stuck with the doctrinal norms that fit most easily with our innate or learned-automatic omissions bias. If C’s autonomy-based interest in receiving positive assistance was *identified* more clearly, it would not necessarily *trump* D’s interests in freedom from such obligation. The interests could be *weighed* and D might, or might not, be able to *justify* inaction.[[144]](#footnote-120) Being negatively instrumental, a targeted omission’s moral wrongfulness cannot lie in its instrumentality. It must lie in the balance of quite other factors—sometimes difficult to quantify and sometimes incommensurable.[[145]](#footnote-121) Just as for positive acts, the possible factors include: the relationship between D and C; D's *plans* and knowledge of the circumstances (D’s ‘state of mind’); D's and C’s circumstances; the effects on C; the social worth of D’s conduct; relative avoidance costs; and the effects on wider community welfare interests.

Arguably, tort law doctrine is too comprehensively resistant to liability for omissions and could accommodate the pure/targeted distinction relatively easily, especially if a *de minimis* notion were also to develop. Although imprisonment by omission might be easier to imagine than battery by omission, we should recall the differing judicial views in *Iqbal* and *Evans*. Moreover, targeting entails intention, the component of the doctrine—redolent with notions of free will and free choice—to which we now turn.

# Intention

Post-Renaissance individualistic liberty—‘the liberty each man hath to use his own power, as he will himself, for the preservation of his own nature’[[146]](#footnote-122)[[147]](#endnote-27)—has influenced folk morality, emphasizing intentional choice as a convenient justification for agential responsibility. In System 1 terms, we tend to condemn *intended* interferences more readily and severely than *careless* interferences. Whether innate or culturally-determined, this nigh-on universal reaction has the potential to *explain* and *justify* the current doctrine that it is only *intentional acts* that merit vindication or deterrence through aps, at least for trespasses to the person. Irrespective of loss, intentional acts (touching or imprisonment) seem to raise a presumption of responsibility, rebuttable by such justificatory notions as self-defence and lawful arrest. In battery, the least touching of the body’s *surface* suffices to raise the presumption—‘every person's body is inviolate’.[[148]](#footnote-123) In fi, judges invoke the particular value of *victims*’ *interests* in liberty—Bracton’s ‘priceless thing, not to be entrusted to the discretion of the unlearned and inexperienced’ or, in Lord Atkin’s view, to the Executive.[[149]](#footnote-124) Given the close relationship between intention and aps, we must explore how it is conceived and how it functions. It is argued here, following John Finnis and Michael Bratman, that *intentional* acts are *planned* acts.[[150]](#footnote-125)

## Motive-as-Trigger

Motive is the psychological trigger for our planning. If D *acts out of jealousy*, jealousy is D’s *motive* but not D’s *intention.* Jealousy *prompted* D to make a *plan* of action, but, neither as means nor end, is jealousy *part* *of the plan*. Nevertheless, motive in this usage can be a factor to be weighed in deciding whether or how severely to vindicate, deter or compensate. Many of us intuit that harassment out of racial hatred is more culpable than harassment out of misplaced juvenile humour. That intuition *precedes* any System 2 reflective evaluation through consequentialist calculation or philosophical argument balancing freedom of speech with equal concern and respect.

## Intention as Planned Means and Ends

*Motive*-*as-trigger* must be distinguished from *motive-as-planned-objective* (whether that objective be ultimate or instrumental). The latter conception accords with *intention* as that term is used here. If D touches C *in order to* attract C’s attention, D’s *plan* encompasses both the *end* (securing C’s attention) and the *means* (touching C). Both means and ends are *intended* because both are *planned*. Thus D has an *intention* to *φ* when D: has a plan to *φ*; whether as means or ends; and commits to its implementation. ‘What one intends is what one *chooses*, whether as end or as means’.[[151]](#footnote-126)[[152]](#endnote-28)[[153]](#endnote-29)

Intention is *necessarily transitive*. One cannot *act intentionally* without intending some *object* or *objects*. Glanville Williams held the frequent judicial talk of an ‘intentional act’ to be ‘crooked reasoning’ and ‘a violation of an elementary cannon of legal language’. Intention ‘must be taken in relation to a particular consequence of circumstance’[[154]](#footnote-127) The questions become: what object?; how is it defined?; how, in practice, is it distinguished from side effects?;[[155]](#footnote-128) and how (absent D’s confession)[[156]](#footnote-129) might a court (inevitably externally and retrospectively)[[157]](#footnote-130) determine what intention(s) to *ascribe* to D? In the following vignette, Finnis identifies: multiple intentions (none of which is merely collateral); and chains of planned-and-chosen-means leading to planned-and-chosen-ends.

‘One’s chosen means are indeed one’s proximate ends, some more and some less proximate. (“Why are you carrying that gun and wire?” “In order to lay a man trap.” “Why do that?” “In order to punish, deter and disable poachers.” “Why do that?” “To have game for hunting.” “Why hunt?” “For the opportunity to show my skill and meet friends and associates.”)’.[[158]](#footnote-131)

The carrier (i) is *carrying intentionally*;[[159]](#footnote-132) (ii) currently *intends the traps as means* to his ends; and (iii) has the *intended ends* of hunting and socializing. But he sees his ‘entire project of activities as a whole not just as time-sliced bits and pieces.’[[160]](#footnote-133)

The practical context is important. Direct evidence of D’s state of mind is often unavailable. D rarely confesses to intending. Thus the ‘fact’ of D’s intention is often and necessarily a judicial *construction*. The tools, materials and influences involved in deciding whether D should be *regarded as having intended* to *φ* include: available direct evidence about D’s physical movements and their context; and judicial experience, views of human nature and intuitions about just outcomes.

## Acts and Consequences

In battery, the violation of C’s recognized interest must be causally connected to D’s intentional act.[[161]](#footnote-134) Except perhaps in cases of so-called transferred intention, *Fowler* v*. Lanning* has laid to rest any possibility of stricter liability in battery. Diplock J held that it was insufficient to allege ‘laconically that…“D shot the claimant".’[[162]](#footnote-135) C must plead either intention or negligence. Later, in *Letang* v. *Cooper*,Lord Denning and Diplock LJ agreed *obiter*[[163]](#footnote-136)that: aps does not apply when D is merely negligent; and that, absent damage, the vindication of C’s rights requires proof of intention. Echoing eighteenth century categorizing formalism, Lord Denning went still further and purported to rule out any possibility that trespass to the person can be committed negligently.[[164]](#footnote-137)[[165]](#endnote-30)

By contrast, in trespass to land, the property instinct and the notion that efficacious property rights are vital to the maintenance of social and economic order continue to hold sway. Rights in land can be vindicated when invaded *unintentionally*[[166]](#footnote-138)—even when there is no damage or positive act.[[167]](#footnote-139) Despite Lord Kerr’s recent comment that,

‘[i]t is entirely right and principled that the law should accord a greater level of importance to the protection of the lives and physical well-being of individuals than it does to their property’,[[168]](#footnote-140)

in this respect, C’s interests in bodily security and freedom of movement[[169]](#footnote-141) are less adequately protected than real property rights are.

## The Minimal Conception of Intention

Oliver Wendell Holmes famously declared, ‘When a man commits an assault and battery with a pistol, his only act is to contract the muscles of his arm and forefinger in a certain way’.[[170]](#footnote-142)[[171]](#endnote-31) Call this the *minimal conception* of the intended act. If we look only at the first two sentences of his oft-cited dictum in *Wilson* v. *Pringle*, Croom-Johnson LJ might also be thought to have adopted this conception.

‘It is the act and not the injury which must be intentional. An intention to injure is not essential to an action for trespass to the person. It is the mere trespass by itself which is the offence’.[[172]](#footnote-143)

If intentional trigger-squeezing sufficed, D would be liable for *consequences* in respect of which D had no intention and was not negligent. D’s liability would be *strict*. Vindication and deterrence would be maximized. D’s freedom of action would be greatly constrained. Nevertheless, Holmes had quite the opposite purpose. Concentrating on liability for *damage* and not on aps, he first separated the *act* from its *consequences* and then insisted that D be liable to *compensate* only those *consequences* in respect of which D is deemed *negligent* or which D is taken to have *intended*. His reasoning foreshadowed the fault-based, *anti-strict liability* approach of *Wagon Mound (No. 1)*.[[173]](#footnote-144)

## The Commonsensical Conception of Intention

JL Austin thought this minimal conception ‘about as true as that saying something must, in the last analysis, come down to making movements of the tongue.’[[174]](#footnote-145) Michael Moore calls this conception’s identification of each link in a causal chain a ‘micro approach’ or ‘event-individuation’. Moore explains that, when ascribing causal and moral/legal responsibility, we focus instead on ‘the macro-sized events of ordinary thought’—the, admittedly vague, *commonsensical* or conventionalist ‘closeness’ of the various causal links.[[175]](#footnote-146) Thus, we do not divide ‘shaking hands’ into a series of movements. We decide to ‘shake hands’ but perform the component actions automatically. Similarly, we automatically and unmathematically conceive of ‘instants’ as ‘intervals’ of some three seconds—roughly the time to it takes to shake hands.[[176]](#footnote-147) This commonsensical or folk moral conception accords with System 1 intuitions. Functionally, it limits claimant-vindication and defendant-deterrence but facilitates some defendant freedom of action and defendant-vindication.

In *Prison Officers’ Association* v. *Iqbal,* Smith LJ described the required act in battery commonsensically—as ‘*the act of striking the claimant*’.[[177]](#footnote-148) She did not separate *fist-moving* from *hitting C*. And, in *Wilson*,Croom-Johnson LJ did not separate D’s deliberate physical act (jumping) from its most immediate consequence (*touching C*). Commonsensically, as his third sentence reveals, he regarded *touching C* as ‘the act and not the injury which must be intentional’.

## Transferred Intention

It is difficult to separate act from consequence when the case is close to the paradigm bare-fisted blow.[[178]](#footnote-149) Commonsensically, the touching is both act and consequence. But gaps open when D’s plans go awry. Shakar Eldar points out that,

‘When a defendant causes harm to a different object than the one he had in mind, either because of accidentally missing the target or as a result of mistaken identification, intuitions can easily go both ways.’[[179]](#footnote-150)

In *Livingstone* v. *Ministry of Defence*[[180]](#footnote-151)—a case similar to *Scott* v. *Shepherd*,[[181]](#footnote-152) in that C was not D’s chosen target—Hutton J separated the *deliberate act* of ‘firing at X’ from the *consequence* that ‘C was shot’. D planned to shoot X but had no plan to shoot C. Realizing that to *deem* shooting C ‘intentional’ would stretch the concept of intention beyond its breaking point, Hutton J put scare quotes around the word.[[182]](#footnote-153) Having dismissed C’s negligence claim, he needed some form of ‘intention’ in order to allow the battery claim to proceed and to open the route to compensation, vindication and deterrence. He therefore, treated D’s intentiontowards target X *as if* it was *aimed* at victim C.

It is odd that C, having—in *Livingstone*, but not in the broadly similar *Bici—failed* to establish *negligence*, can be thought to have a chance of success in battery, ostensibly an *intentional* tort.[[183]](#footnote-154) The result is functionally justifiable when: D’s alarming act with bad consequences merits deterrence;[[184]](#footnote-155) and/or C, its victim, merits compensation and/or vindication. But the (lsm3-style) transference device—described in *Bici* as ‘transferred malice’—consigns such functional reasoning to the judgment’s ‘unspoken silences’.[[185]](#footnote-156)

The case for aps by transferred intention is tenuous. As the over-inclusion vignette illustrates,[[186]](#footnote-157) current doctrine cannot easily accommodate questions of whether: C’s interest is *sufficiently* valuableto warrant protection; or D’s conduct *sufficiently* blameworthy to warrant sanction; a *sufficient* public interestin marking or deterring such conduct. All point to the need for some *de minimis* control.[[187]](#footnote-158) Presently such matters are managed only at the remedial stage, restricting C to nominal or even contemptuous damages.

## Justification and the Hostility Detour

Even on the commonsensical conception of the required act, absent a *de minimis* concept, battery with aps might seem over-inclusive—too easily vindicating C at D’s expense. For that reason, Croom-Johnson LJ seized, in *Wilson,* upon *hostility* as a liability-limitation device. D had admitted intentionally touching C in horse-play, but C was not entitled to summary judgment because D had not admitted hostility in touching C. D was therefore entitled to defend at a full trial. Croom-Johnson LJ thought the additional hostility could somehow be found in the facts even when there was no ‘ill-will or malevolence’. He argued that the facts of *Collins* v. *Wilcock* exemplified hostility—the touching in that case being ‘contrary to [C's] legal right not to be physically restrained’.[[188]](#footnote-159)

*Wilson* was a damages claim—the intentional striking injured C. But apswas of the essence in *Collins*. Wilcock, a police officer, held Collins’s arm to *restrain* her—but not to *arrest* her. Collins retaliated and was convicted of assaulting a police officer who was acting in the course of duty. On appeal, Goff LJ held that Wilcock’s act, being outwith her constabulary duty, ‘constituted a battery’ because it went ‘beyond the generally acceptable conduct of touching a person to engage his or her attention’.[[189]](#footnote-160) He did not consider hostility a requirement. Later, in *Re F.*, he made it plain that *Wilson* had been wrong to do so[[190]](#footnote-161) and insisted that battery’s scope should be limited by want of *justification* rather than hostility or want of implied consent.[[191]](#footnote-162)

Lord Goff’s view that, unless it falls within one of several justificatory exceptions, intentional touching is battery and an unlawful interference with a *quasi-proprietary* interest—‘every person's body is inviolate’—is now part of the doctrine.[[192]](#footnote-163) However, his list of exceptions is extensive. There are ‘specific cases’ of justification, ‘such as chastisement of children, lawful arrest, self-defence, the prevention of crime, and so on’. Consonant with our seemingly innate distinguishing of helpers from hinderers,[[193]](#footnote-164) help that is needed in C’s interests is justifiable when consent is impossible.[[194]](#footnote-165) Importantly, there is also an intuitive ‘general exception embracing all physical contact which is generally acceptable in the ordinary conduct of everyday life’ that excludes from battery’s scope ‘jostling in a street or some other crowded place, social contact at parties, and such like’.[[195]](#footnote-166)

Lord Goff’s approach imposes on battery a pattern of binary presumptive quasi-proprietorial protection that is rebutted when the analogue justificatory exceptions apply. So long as justification is not a matter the absence of which claimants must assert and establish but a defence properly so-called,[[196]](#footnote-167) Lord Goff’s approach favours claimant-vindication and defendant-deterrence. Furthermore—because several of the exceptions are open-textured—it entrusts judges with the management of over- and under-inclusion risks. By contrast, the under- and over-inclusion risks resulting from the more mechanistic binary requirements of touching and directness remain entrenched and less malleable in judicial hands.

# Imprisonment

Like battering, imprisoning is plausibly a prototypical wrong. It is anti-collaborative and we have seen that even very young infants approve of helpers and disapprove of hinderers. A hunter-gatherer would intuit that it is wrong to trap members of one’s tribe. It prevents them from hunting or gathering and trapping a person seems akin to the treatment of animals—un-persons—killed for food.[[197]](#footnote-168) Furthermore, because imprisonment affects C’s body and will often involve force, it was readily accommodated by the *vi et armis* formula that enabled victims to move Royal justice.[[198]](#footnote-169) Like battery, fi became a sub-species of trespass-as-*tort* (as distinct from the earlier trespass-as-*wrong*) and is often categorized nowadays as an *intentional* tort.

But, unlike battery, fi is also often described currently as a tort of *strict liability*. Lord Hope said in *Evans*,[[199]](#footnote-170) that ‘[t]he authorities are at one in treating [fi] as a tort of strict liability.’[[200]](#footnote-171) Nevertheless, it seems that *planned* (or intentional) *striking* or *imprisoning* is a *necessary* condition of liability in *both* torts. Otherwise we would have no problem in establishing liability in negligence for unplanned imprisonment that causes no loss.

Following Lord Goff’s lead in *Re F.*, we can say that battery and fi have similar forms. In both torts proof ofD’s *planned* conduct raises an lsm1-resonant *presumption* of liability to C that is *rebuttable* by justification or by justificatory defences. Although the condition that D must have planned C’s imprisonment was not made explicit, this form is visible in *Mohammed and others* v *Secretary of State for Defence*.

‘As to English law, detaining someone is prima facie the tort of false imprisonment. It is a longstanding and fundamental principle of the common law that any interference with personal liberty by imprisonment is unlawful and gives rise to a claim in tort unless the person responsible for the imprisonment can show that it is justified: see Lord Dyson in *Lumba's* case…at [65].’[[201]](#footnote-172)

Because our focus is on aps, the gist of liability is not ‘harm-based’, in the conventional senses of harm as physical, psychological or economic damage.[[202]](#footnote-173) The strictness of liability increases as: (i) the range of possible justifications is narrowed; and/or (ii) those justifications are more restrictively construed. Strictness is a matter of degree—analogue, not binary.[[203]](#footnote-174)

Nevertheless, the invocation of strictness in fi may be more than rhetorical. The conception of the *conduct* required of D seems less limited by *directness* in fi than it is in battery. Similarly, the bar for *justification* in fi is set quite high, exemplifying ‘a rigorous application of the principle that the liberty of the subject can be interfered with only upon grounds which a court will uphold as lawful’.[[204]](#footnote-175) These differences suggest that liability in fi is—although not *absolutely* strict[[205]](#footnote-176)—*stricter* than in battery, making vindication and deterrence more readily available. However, because fi does not currently stretch to *negligent* conduct, it is—despite the rhetoric—less strict, vindicatory or deterrent than trespass to land.

These elements of strictness reflect the view that ‘the right to be free from arbitrary imprisonment by the state is of fundamental constitutional importance’[[206]](#footnote-177). Given that only the state is equipped to imprison on an industrial scale, it is hardly surprising that claims—albeit in *private law*—against *public* bodies and officials predominate.

## Public Defendants

It is argued later that violation of citizens’ essentially *private* interests—captured by thick and/or quasi-proprietorial conceptions of *harm*—can justify *private law standing* to secure *vindication*. Nevertheless, especially in respect of the *deterrent* function, C also acts on the *public’s behalf*—a justifiable approach since it is unreasonable to rely on any organ of the state to police another when individual liberties are at stake. Furthermore, given the state’s awesome power, there is no categorical reason to cap the *substantive* or *procedural* standards of conduct required of its officers at those applying citizen-to-citizen—whether it is vindication, deterrence or compensation that drives. The strength of the case for marking serious breaches of the rule of law by public officials is: primarily public; independent of individual officials' intentions; and independent of any loss to C, who, in a sense, acts for the public. But the formal position—in respect of the torts’ *structure* rather than of the many specific statutory and other authorizations applicable only to public defendants—remains one of Diceyan equality. Public defendants are denied any peculiar privilege and no peculiar responsibilities are imposed on them, a position that Lord Kerr was reluctant to accept when dissenting in *Michael*.

‘Whereas it is arguable that a *private* individual’s freedom has an *intrinsic* value in its contribution to an *autonomous* life, the value of the *state*’s freedom is *instrumental* and lies in the contribution that it makes to the fulfilment of its *proper functions*.’[[207]](#footnote-178)

Fortunately for vindication and deterrence, aps can be invoked to rebut arguments that Cs must be *aware* of their confinement, whether or not D is a public official. Thus, in *Murray v. Ministry of Defence*,Lord Griffiths insisted that a mere 30 minutes’ *un-apprehended* confinement that caused no loss was actionable. He invoked ‘the liberty of the individual’ to which ‘[t]he law attaches supreme importance’.[[208]](#footnote-179) Unconstrained by any notion that C must have suffered *loss*, he said that *harm*—in some thicker than usual sense—could occur even when C is unaware of the imprisonment.[[209]](#footnote-180)[[210]](#endnote-32) As John Murphy puts it, ‘so long as dignity is seen as being bound up with [one’s] very personhood, it is perfectly possible for [one’s] dignity to be injured whether or not [one is] conscious of it’.[[211]](#footnote-181)

In *Lumba*,[[212]](#footnote-182) D ran a counterfactual *no-loss-caused-therefore-no-liability* argument. Had D’s error not occurred, C would have been lawfully detained using other powers and, on the balance of probabilities, the *public* law transgression did not *cause* any *private* law *harm*. Having served his sentence, C had been kept in prison under a concealed, arbitrary and unlawful policy that was intended to facilitate subsequent deportation. Whilst all agreed that this offended—essentially *public*—rule of law principles,[[213]](#footnote-183) three dissenting justices (Lords Brown, Rodger and Phillips) accepted that, no *loss* to C having been caused, C was not a *victim* of fi.[[214]](#footnote-184)

However, the strength of the case for *public deterrence* by means of *private vindication* was recognized by the other six Supreme Court Justices. They rejected D’s *causation* argument. As Lord Kerr put it, ‘The fact that a person *could have been* lawfully detained says nothing on the question whether he *was* lawfully detained.’[[215]](#footnote-185) The detention was arbitrary and, as Armatya Sen says, ‘an *arbitrary* arrest is *more* than the capture and detention of someone’.[[216]](#footnote-186)[[217]](#endnote-33)

## Act or Fact in fi?

In fi as with battery, a *direct act* in the post-*Scott* sense was not rigidly required in medieval times. Sir John Baker recounts that, ‘the common-law action [of fi]…lay not only against the person who first laid hands on the prisoner but also against the servant who turned the key and the gaoler who kept the key’.[[218]](#footnote-187) That approach facilitates vindication, deterrence and the upholding of high standards for public officials’ conduct. But, in modern tort law, symmetry with battery (rather than with trespass to land) has encouraged the view that fi requires a *direct* and *intentional act* of imprisoning.[[219]](#footnote-188)

Nevertheless, both *directness* and *act* are sometimes construed more flexibly than in battery.[[220]](#footnote-189) This makes fi more inclusive and increases its vindicatory and deterrent potential—especially usefully when D is a public body or official. Thus Lord Bridge said in *R* v. *Deputy Governor of Parkhurst Prison, Ex p Hague* that, ‘[fi] has two ingredients: the fact [rather than act] of imprisonment and the absence of lawful authority to justify it’.[[221]](#footnote-190)[[222]](#endnote-34) In *D.* v*. Home Office*, Brooke LJ was not hidebound by directness. D1, who had issued *invalid* instructions to D2 to imprison C, was held liable to C.[[223]](#footnote-191) Although D2, who followed D1’s instruction, had committed a *direct act* of imprisoning C, D2 was not liable—having a *de facto* defence of superior orders.[[224]](#footnote-192)

Recall that in *Evans*, the *personal* liability of the prison governor (who had without negligence calculated C’s proper release date on a legal basis that had subsequently been changed) required no search for a *direct act*. The governor’s *plan* for C’s continuing detention sufficed. Given the governor’s moral innocence, it seems reasonable to describe such liability as *strict* and to think that the high value of C’s constitutionally valuable interest in *liberty*—and the want of statutory or other justification—*outweighed* the want of negligence.[[225]](#footnote-193) But that strictness is tempered by the requirement that C must be D’s *target*. The position in battery is similar, save when intention is transferred.[[226]](#footnote-194) And if D is *reckless*? In *Iqbal*,Smith LJ thought ‘a reckless disregard of the consequences’ to C would satisfy the requirement of *intention*—even when D has no ‘positive wish’ to imprison C.[[227]](#footnote-195) Elias J took a similar view in *Bici*, a battery case, emphasizing that D must have been indifferent to a subjectively apprehended risk of *harm* *to C*.[[228]](#footnote-196)

In the UK, a resolutely *geographical* conception of imprisonment limits these flexibilities for vindication and deterrence. *Bird* v. *Jones*[[229]](#footnote-197) is the standard authority. By contrast, the vindication and deterrence of ‘invisible handcuff’ cases invite the *psychological* conception adopted in a Newfoundland case.[[230]](#footnote-198) [[231]](#endnote-35) Interestingly, *Bird* itself includes several mentions of overbearing *will.*[[232]](#footnote-199) Furthermore, Denman LCJ said (albeit dissenting) that he ‘had no idea…any particular boundary [was] necessary to constitute imprisonment’ and railed against an over-rigid distinction from the action on the case—‘[If I sue in case, shall I] be told...I have misconceived my remedy?’[[233]](#footnote-200) We can just glimpse an open-textured, non-geographical test by which judges might weigh public and private interests and evaluate the respective parties’ behaviour.[[234]](#footnote-201)

## Negligent Imprisonment

The route to vindication and deterrence is less accessible when D does not plan C’s imprisonment but causes it *negligently*. But if C’s liberty is valued so highly that, as in *Evans*, a morally innocent D can be so strictly liable in fi, how is it that a blameworthy-because-negligent D can escape liability? Negligence suffices in trespass to land despite any absence of damage.[[235]](#footnote-202) Property is held ‘so sacred’ that merely treading upon C’s soil is actionable unless licensed[[236]](#footnote-203) and C is free, without being called to account, to set the terms on which D can enter.[[237]](#footnote-204) Without any intention to walk on the land of another, D violates C’s *proprietorial* interest.

The ‘strict liability’ in *Evans*[[238]](#footnote-205) puts D to justification whenever C can show that D *intentionally imprisoned* C. To incur liability, D must have had a *plan* that entails C’s (or, perhaps in a case of mistaken identity, X’s) imprisonment. In Lord Atkin’s terms, D must be ‘a person *directing imprisonment*’[[239]](#footnote-206) and claims of justification will be scrutinized zealously[[240]](#footnote-207) and by objective standards.[[241]](#footnote-208) But, if D did not *direct* or *plan* C’s imprisonment but *caused* it merely negligently, the route to tortious vindication and deterrence is hazardous.[[242]](#footnote-209) Imagine that a contemporary Mrs Sayers suffers no physical or psychiatric injury or economic loss but seeks vindication for her inconvenient incarceration in a public toilet that had a carelessly-caused defect in its lock.[[243]](#footnote-210) Despite the *fact* that she was imprisoned, her claim in fi will fail because D neither *planned* her imprisonment nor committed any *positive* and *direct* act.[[244]](#footnote-211)

Even the *intentional locking* of the village hall is not *imprisoning* when D does not target C but merely *carelessly fails to check* the anterooms for other occupants and *accidentally* imprisons C. Whilst C’s interest is clearly invaded, C cannot be *vindicated* and potential Ds will not be *deterred* unless C suffers *damage* of a kind that will sustain a claim in the negligence tort. Recall the Reillys’ unsuccessful claim for their 80 minutes in the hospital lift.[[245]](#footnote-212)[[246]](#endnote-36) They might have wanted *vindication* more than *compensation*. D’s careless conduct might be reprehensible enough to justify *deterrence*. But without a sufficiently broad conception of what counts as *damage* in negligence, courts can address vindication and deterrence only when D’s *plans* to imprison C have made the fi + aps combination available.

A vindicatory recognition—after elr—of *imprisonment* as justiciable *harm* would not entail imposing aps throughout the negligence tort. It would sit comfortably with the conventional award instituted in *Rees*[[247]](#footnote-213) and the tariff set out in *Thompson*.[[248]](#footnote-214) Without disrupting tort law’s current classifications unduly, it would facilitate better review of relevant interests and of the contending, duly-prioritized reasons. Alternatively—again after elr and at the risk of weakening presumptive formality—intention-to-imprison and directness might be demoted from their present status as *necessary* conditions in fi to become simply relevant factors to be weighed with others. Nonetheless, individual *liberty*—despite the rhetoric of its ‘supreme importance’—is currently protected *less strictly* than *property* possession and those attendant ‘comforts of society’[[249]](#footnote-215) that the economically advantaged have long thought essential to social and economic stability.

# Standing Room Only

Tort law is categorized as *private* law. But, without damage, what licenses the individual private claimant to claim? Whilst one might think this a contest between consequentialism and deontology—and aps a victory for the latter—we can make useful progress by asking ‘what kinds of consequences do (and should) count?’[[250]](#footnote-216)[[251]](#endnote-37)

When D causes C loss or damage, we see no illogicality in C, a *private citizen*, having standing in *private law*. But, absent damage, what justifies C’s *standing*? This modern question betokens a lurking sense that non-compensatory functions for private law are remote from the risk-allocation that is the stuff of the negligence tort—that they are irregular and more properly the subject of *public* and *criminal law*. However, as Holmes reminded us, ‘The law did not begin with a theory. It has never worked one out’[[252]](#footnote-217) and David Friedman contends that ‘outside of the accidents of a particular legal system at a particular time, there is no natural category of tort or crime and thus no essential distinction’.[[253]](#footnote-218) Instead, over the greater part of the previous millennium, a discrete body of tort law has slowly emerged from a world in which it was unremarkable that a thief might have to pay both court and victim. As late as 1863, Sir James Stephen wrote that all laws, being commands, are ‘in one sense criminal’.[[254]](#footnote-219) But to modern minds—accustomed to institutionalized policing, public prosecution services and jurisdictional divisions—this conflation of public and private seems anomalous.[[255]](#footnote-220)

Nevertheless, the overlap persists. Modern categories are more permeable than the structures of curricula, treatises and jurisdictions suggest. We have schemes for the compensation of victims of crime. Victims’ impact statements in criminal trials are encouraged. Failed attempts at criminal harms are punished less severely than successful ones. Declarations and ‘findings of violation’ are made by non-criminal courts. Tort claimants are sometimes awarded punitive/exemplary damages. In some US jurisdictions, as much as 75 per cent of such damages is payable to the state rather than to the victim.[[256]](#footnote-221) Furthermore, the interests at stake in tort cases go beyond those of the individual parties. There are indeterminate numbers of *potential* claimants and defendants whose conduct will be regulated by the standards set by civil courts in deciding particular disputes. In that way *public* *interests* are at stake in *private law* litigation—and *vice versa*.[[257]](#footnote-222)

In search of a clearer justification for aps-based private law standing—the privilege of private individuals themselves to move the law—we first contrast the consequentialists’ *harm principle* with *public offence*. Then we consider the intertwined concepts of *targeted offence* and *quasi-proprietorial* interests.

## Consequentialism

Consequentialist justifications of private law standing rely on the *harm principle*—D must have caused C harm. The *locus classicus* is John Stuart Mill’s *On Liberty.*

‘Whenever…there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law’.[[258]](#footnote-223)

*Caused harm* *of some kind* is a *necessary* condition for moral disapproval—*a fortiori* for any kind of legal intervention. Mill’s principle is quintessentially liberal-individualistic. On Mill’s principle, as Lord Plant says,

‘Institutions and policies are not to be justified in terms of some dominant conception of the good or some specific conception of human flourishing…Rather the central thing is autonomy and the set of rules which provide the framework within which autonomous choice can be pursued’.[[259]](#footnote-224)

Mill’s scheme can readily accommodate aps when damage can be *presumed*.[[260]](#footnote-225) But the narrower the conception of *damage*,[[261]](#footnote-226) the broader is freedom of choice for agents and—correlatively—the more their actual and potential victims are at risk of irredressible interferences. Furthermore, Mill’s primary purpose was not to define *damage* but to protect autonomous individuals’ freedom of action, thought and speech—as long-term benefits to society and as interests of *inherent worth*—from the autonomy-corroding ‘tyranny of the majority’.[[262]](#footnote-227) Hence, the commonplace stretch from *damage* to the potentially broader *harm* is easy.

## Public Offence

By contrast, Joel Feinberg found Mill’s harm principle too restrictive and, in a criminal context, argued that,

‘It is always a good reason in support of a proposed criminal prohibition that it is probably necessary to prevent serious offense to persons other than the actor and would probably be an effective means to that end if enacted’.[[263]](#footnote-228)

Whilst this formulation purports to justify sanctions just because a *public* rather than *individual* interest is offended, the case for *individual* *standing* in such matters seems weak. If legitimately exigible at all, control over *public offence* is primarily a matter for *public authorities*, as when a French local authority banned dwarf-throwing. Monsieur Wackenheim—a dwarf who, finding no dignity in unemployment, had agreed to be thrown for his own financial reward and others’ amusement—objected. But, the Conseil d’État, the European Commission on Human Rights and the UN Human Rights Committee, accepted that the local authority’s view of offence to the *public interest* legitimately overrode Wackenheim’s *autonomous* *choice*.[[264]](#footnote-229) Such legal intervention might also be viewed as *altruistic paternalism* that transforms an *autonomy-based* interest into an *inalienable* interest of which none other can divest the holder, but which the holder cannot sell at any price.[[265]](#footnote-230) Whether or not otherwise justifiable, this denies the interest-holder’s autonomy. Indeed, because he wanted to sell rather than protect it, Wackenheim would, in these circumstances, see his inalienable interest not as a benefit or right but as a burden or Hohfeldian *no-right.* Mill would condemn the local authority’s action as an encroachment on ‘the most unquestionably legitimate liberty of the individual’ and as evidence of ‘the most universal of all human propensities...to extend the bounds of what may be called moral police’.[[266]](#footnote-231)

## Targeted Offence and Quasi-Proprietorial Interests

Feinberg also offers a more restricted alternative justification for offence-based responsibility. *Harm* can include ‘[t]he thwarting, setting back, or defeating of an interest’. By *interests* he means ‘those things in which one has a stake’—or, we might say, aspects of one’s autonomy, personhood,[[267]](#footnote-232) or even sovereignty.[[268]](#footnote-233)[[269]](#endnote-38) Although Feinberg wrote in the context of *criminal* law, these are interests that *private individuals* can hold and which might therefore support standing in *private law*. He argues that *interests* are, ‘indistinguishable components of a person’s well-being: he flourishes or languishes as they flourish or languish.’[[270]](#footnote-234)

Feinberg draws an analogy with trespass to land, which protects a *proprietorial interest* in *exclusive* possession. He argues that the holders of such interests are *harmed* by violations even when no *damage* is caused to their property. Rules thatfocus on consequential *loss* cannot capture the value of that kind of interest. *Harm*, as Feinberg conceives it, is not necessarily *loss* but can extend beyond the ‘tangible and material kind’. ‘[F]ew wrongs…are not to some extent harms’.[[271]](#footnote-235)

Here two strands intertwine. First, we can thicken our conception of harm by thickening our conception of relevant consequences to include the *intangible* and the *non-fungible*. You disturb a burglar, who takes nothing, but you *feel* that your home—and your privacy and peace of mind—have been violated.[[272]](#footnote-236) Or, in assault, you *fear* a battery that does not occur. Whilst you suffer no *loss*, such interferences with your autonomy plausibly constitute *harm* because they have *adverse* *consequences* for you, their victim. Call this harm’s *thick conception*, for which claimants will seek compensation, consolation, vindicatory redress, explanation or apology.[[273]](#footnote-237)

Secondly, even *without such consequences*, we can say that there is *harm* just because the invasion offends the *self-rule* that is at the heart of *autonomy*. Without *your* freely-chosen prior authorization, picnickers on *your* land trespass even when they cause no damage and you are away on holiday.[[274]](#footnote-238)[[275]](#endnote-39) So too when you are the victim of unwanted and undignified touching, or are imprisoned whilst asleep. You acquire standing just because D violated *your* quasi-proprietorial interest. Call this harm’s *quasi-proprietorial* *conception*.

Individuals will claim standing and rely on aps so that violations of their interests can be vindicated—*marked* *officially* as such. The *public interest* in the deterrence of conduct that would undermine a free society requires that its *citizens’* autonomy-based interests be officially recognized, always taken seriously and only unprotected for good reasons. And, if *harm* is not limited to *loss*, thick and quasi-proprietorial conceptions of *harm* can justify redress through aps.

Arguably, allautonomy-basedinterests are tautologically *quasi-proprietorial.*[[276]](#footnote-239) How else can they be y*ours*—and *not mine*—to enjoy and dispose? How else are you an autonomous person? But our autonomy-based interests are not confined to the *tangible*—our bodies, our property. Just as the monarch has the *royal* peace and prerogatives, we each have *our* interests—in *our* peace of mind, privacy and self-determination—that we are free to use, waste or abuse irrespective of our best interests, but on which defendants sometimes ‘trespass’.

Blackstone wrote of ‘the private or civil rights belonging to individuals considered as individuals’. His assertion that ‘every man’s person [is] sacred, and no other [has] the right to meddle with it, in any slightest manner’ is echoed by Lord Goff’s invocation in *Re F.* of a ‘fundamental principle, now long-established, that every person's body is inviolate’.[[277]](#footnote-240) And, if body, why not mind? Where does the one end and the other begin?

To conceptualize actual and potential Cs’ interests as *quasi-proprietorial* is: to formulate a *presumption* that they should be protected; and to *exceptionalize* any conflicting public interests or interests of actual and potential Ds.[[278]](#footnote-241) However, the scope of this presumption is limited. Much as folk morality about property seems grounded in up-close possession, the blow-like paradigm of battery is also up-close—‘[t]he sphere of autonomy starts with the space closest to the person’.[[279]](#footnote-242) We might more intuitively condemn D for tying C to a chair than for applying the ‘invisible handcuffs’ of psychological domination.

Crucially, the quasi-proprietorial presumption is not a *trump* that will *always* outrank cards from another suit. Not every *interest* can be recognized as an overridingly peremptory *right*, although, intuitively, we accept that reasonable self-defence can override bodily security’s quasi-proprietoriality. More reflectively we might accept that constitutional interests in press freedom and free speech might well outrank C’s interest in freedom from targeted offence. The quasi-proprietorial presumption will sometimes be no more than an *ex ante* priority demanding that an autonomy-based interest be taken seriously in a competition with other interests that—in an all-things-considered argument—will sometimes outweigh it. To recognize an *interest* as a *legal right* is to ascribe it some peremptory quality—but does that not guarantee that it is a trump in the strict sense in which the Two of Trumps outranks even the Aces of other suits. When interests recognized as rights conflict, those thought *quasi-proprietorial* will have the edge—but are not invincible.

## Weighting Interests

In all these cases, the key to the legal wrongfulness is the *unjustified* violation of an *interest* that C claims and the law *recognizes* and *protects*. The decision to recognize-and-protect generates and defines *legal* rights and correlative duties.[[280]](#footnote-243)[[281]](#endnote-40) Nevertheless, the choice between the consequentialist thick conception of harm and the more deontological quasi-proprietorial notions—autonomy, personhood, dignity, sovereignty—has some rhetorical and analytical significance. In balancing competing interests, the quasi-proprietorial styles seem to weigh more heavily and to be regarded as reasons of a ‘higher order’—‘second-order *exclusionary* reason[s] [that] can override or render superfluous the balancing of first-order reasons for action’.[[282]](#footnote-244) A Private must obey a Colonel even when the Colonel's—second-order and *exclusionary*—command is misguided. Margaret Radin writes that ‘the personhood perspective provides a moral basis for protecting some rights more stringently than others in the context of the legal system’[[283]](#footnote-245). Similarly, designating C's interest as *quasi-proprietorial* ascribes to it a *status* that *presumptively* *excludes* prudential reasons of *utility* or *welfare*—and exemplifies Schauer’s *presumptive formalism.*[[284]](#footnote-246)

Within the trespass paradigm—which carries the prototypical and culturally-ingrained notions of *property* in one’s body and direct physical contact—we readily see this higher, presumptively peremptory status as a given, although not beyond challenge and occasional defeat. It might or might not be in C's best interests to be vaccinated but, absent a public health crisis, C’s body is C's property to do with as C wishes. However, when C’s interests lie outwith that paradigm—as Mrs Wainwright’s did—there is no System 1 attribution of priority. System 2 effortful reasoning is required to overcome the ingrained notion that it is damage—or thinly-conceived harm—that justifies standing and liability.

# Setting Matters Right—Functional Redress[[285]](#footnote-247)

The challenge here is to align the court’s award with whichever function—vindication, deterrence, or compensation—best explains the wrongfulness of D’s conduct in the context of the particular case.[[286]](#footnote-248) But under the negligence tort’s hegemony, compensatory damages have become the lsm1 ‘default setting’. Although Winfield thought them one of tort law’s essential characteristics,[[287]](#footnote-249) unliquidated damages are not the only form of redress that courts can give.

The use of tariffs and conventional awards to overcome the inconvenient absence of a relevant commodity market was discussed earlier in the section on ‘instances’. We should note here that, without a market basis, *compensation* intermingles with *vindication* and *deterrence*. Bruce Chapman has mounted a radical argument against all monetary damages for *non-pecuniary losses* because such damages can only increase C’s *welfare* in respects *unconnected* with D’s wrongdoing (a world cruise funded from damages for loss of a limb). However, he concedes that D’s wrongdoingmight be appropriately *marked* by *nominal* damages. Although ‘non-actual’ or ‘non-real’, they need not be ‘small’ or ‘trifling’ but could ‘[i]n theory at least…be quite large.’[[288]](#footnote-250) Consoling and marking officially the wrongfulness of violations and the value of private law claimants’ autonomy seem perfectly valid reasons for some sort of award to C—and money does talk.

Damages also function to protect a *public* interest in *deterring* such conduct, which, by more powerful stigmatization, punitive or exemplary damages do more effectively.[[289]](#footnote-251) Nevertheless, there is also a risk that commodification and monetization of C’s interests will demean the very values that they purport to protect. Michael Sandel argues that, ‘Paying kids to read books might get them to read more, but also teach them to regard reading as a chore rather than the source of intrinsic satisfaction’.[[290]](#footnote-252) And, if consenting dwarfs are paid the going rate to be thrown or air hostesses trained to smile, are they not commodified and their very personhood demeaned?[[291]](#footnote-253)

Whether compensation for thick or thin harm or aps to vindicate a quasi-proprietorial interest, all *damages* awards implement *liability rules*, since it is not C but the court that sets the price for an entitlement transfer that has already occurred.[[292]](#footnote-254) But an *injunction* functions primarily as a *targeted deterrent*—it is D specifically who is deterred from interfering with C’s interests—and secondarily as *vindication* and moregeneralized *deterrence.*

It is important to see these non-compensatory functions as *sui generis* and not mere by-products of *compensation*. Indeed, Kiley Hamlin goes so far as to argue that *retribution* is an element of our ‘innate moral core’.[[293]](#footnote-255) She contends,

‘There must be a way to punish those who cheat the system and to deter potential free-riders, or else the cooperative system would collapse. In other words, moral evaluations need “teeth.”’

Certainly, a legal system that too often neglects to *mark* prototypical wrongs adequately will fail to *vindicate* or *deter* and will tempt vigilantes to step in.

In a society that sets a high value on money, damages can, as Margaret Radin maintains, ‘symbolize public respect for rights and public recognition of the transgressor’s fault by requiring something important to be given up on one side and received on the other, even if no equivalence of value is possible.’[[294]](#footnote-256) However, when the status of the court is so high that *symbolic* terms will mark the wrongdoing adequately, a *declaration* or even a required formal *apology* can: vindicate C; console C; secure an official explanation;[[295]](#footnote-257) name-and-shame D; and deter potential Ds. In the morally-charged Strasbourg atmosphere, ECtHR frequently considers a *finding of* *violation* sufficient just satisfaction and either makes no monetary award[[296]](#footnote-258)[[297]](#endnote-41) or adds a token €3,000. But sometimes only serious money speaks loud enough to be heard.

Given that all damages awards are, to some extent, secondarily vindicatory and deterrent, the Supreme Court’s rejection of vindicatory damages in *Lumba* seems arcane. The majority’s view that—C having *lost* nothing—*nominal damages* suffice to *mark* the state’s failure to respect the rule of law[[298]](#footnote-259) risks trivializing state’s wrong as merely technical.[[299]](#footnote-260)

Unless the *function* and *nature* of orders are aligned—a proposition that, in his determination to reject the notion of vindicatory damages, Lord Collins expressly rejected[[300]](#footnote-261)—vindication and deterrence will be under-valued. The minority recognized this concern and favoured an arguably too tokenistic conventional sum of vindicatory damages of £500-£1,000.[[301]](#footnote-262) Lady Hale said,

‘The claimant has…been done wrong. Let us assume that the circumstances are not such as to attract punitive or exemplary damages. Is our law not capable of finding some way of vindicating the claimant's rights and the importance of the principles involved? A way which does not purport to compensate him for harm or to punish D for wrongdoing but simply to mark the law's recognition that a wrong has been done?’[[302]](#footnote-263)

The declaration—or, to borrow from ECtHR, a ‘finding of violation’—is the logical default where there is no damage. It marks the wrong officially. But in modern society, money is the dominant currency for the expression of value[[303]](#footnote-264) and nominal damages rather than declarations are the default for aps cases.

# How Things Stand Presently

The present position can be summarised as follows.

1. The doctrine has two components.
   * 1. A presumption (direct touching/imprisoning + intention) that, as Mrs Wainwright’s case shows, can be treated formalistically as a litmus test—‘governed by the rigidity of a rule's formulation’. [[304]](#footnote-265) Nevertheless, the questions, ‘What counts as touching?’, ‘Was the interference sufficiently “direct”? and ‘Can that intention be transferred’ are far from ‘absolute’ or mechanically factive. They import—perhaps covertly (lsm3)—some analogue standard-setting discretion.
     2. The possibilities of (lsm2) justification provide what Schauer would call ‘escape routes’.[[305]](#footnote-266) They are overtly analogue, open-textured and attributive.
2. The concept of justification provides a means to control the over-inclusion problem, but an explicit (and necessarily analogue) *de minimis* principle has not yet been articulated.
3. Provided the burden of proof of justification or *de minimis* remains with D, claimant-vindication and defendant-deterrence are well-served by the binary presumption.
4. However, the under-inclusiveness of presumption 1.i) weakens claimant-vindication and defendant-deterrence. This presents a significant problem, *viz.* how to strengthen claimant-vindication and defendant-deterrence without moving to a super-analogue all-things-considered-approach that would undermine lsm1 presumptive formality unduly.
5. The forms of redress are presently too much influenced by the compensatory model of damages. More direct attention to vindication and deterrence would change this.

# Conclusions

This article tells a story of the survival and adaptation in law of some simple norms of folk morality. In recent years, the pace of socio-economic change and the development of richer and more pervasive conceptions of individual autonomy have exposed some under-inclusion (notably in negligent imprisonment, omissions and cases like Mrs Wainwright’s) and over-inclusion (where, for want of a *de minimis* control or a more explicit balancing of interests, aps applies automatically).

Concentrating as they do on D’s behaviour, some of the rules in trespass and fi tend to marginalize consideration of the range of claimants’, defendants’ and public interests nowadays at stake. In particular, the hybrid private-public vindication function and the public deterrent function are—despite aps—starved of air. Marc Galanter and David Luban contend that ‘the standard legal taxonomy [that I have called ‘doctrine’] stands in need of drastic revision.’[[306]](#footnote-267) Although they wrote about the particular private-public crossover that is exemplary/punitive damages, their argument applies more widely.

Whether explicitly or by silent default, tort law is necessarily engaged with vindication and deterrence and the public aspect. A ‘no tort’ position (as in Mrs Wainwright’s case) is as normatively significant as is a radical expansion (as in *Rees*). Both require justification and periodic elr re-examination with an open-minded approach that attends to compensation, deterrence and vindication.

Statute and tort law’s progressively less grudging incorporation of human rights thinking have, to an extent, addressed under-inclusion. But, in the kinds of cases reviewed here, tort law could easily be displaced.[[307]](#footnote-268)[[308]](#endnote-42) Already, claims that the police failed by omission to protect C’s bodily integrity might best be founded on Article 3 and would gain little from the addition of a tort claim. It would be unfortunate indeed were doctrinal categorization to result in the marginalization of tort law’s valuable case-by-case learning. However, the marginalization risk is clearly evidenced by the refusal of the majority of the Supreme Court in *Michael* to allow an Article 2 claim to proceed to trial but to strike out the claim that the police owe a tortious duty to take positive steps to protect a fatally-stabbed victim who had been clearly identified as at high risk.[[309]](#footnote-269) Perhaps their hope is that Article 2 is better suited than tort law to keeping the floodgates just ajar. But, whether we start from declared right or duty derived from accumulated tort decisions, it is surely for judges to weigh the facts, interpret the law and decide the case before them.[[310]](#footnote-270)

The given doctrinal categories correspond well to the ‘bad acts’ that folk morality intuitively condemns without particular regard to their consequences. Their ‘presumptive formalism’ gives us the predictability and economy of lsm1. The predominantly binary nature of the doctrine’s presumption-creating component concepts (the concepts of directness, action and intention):

1. limits the scope for incremental re-balancing of the interests of—actual and potential—claimants and defendants (and the public interest in the fairness of such rules) by doctrinal re-interpretation;
2. can provoke lsm3 manipulation; and
3. arguably, inhibits the development of analogue justificatory concepts.

I have argued for the accommodation of the analogue *de minimis* concept. But, if we have sufficient reason to stand outside the citadel of doctrine—when to do so is itself a wickedly difficult judgement call—we might see a case for more radical change. elr must countenance ‘re-imagining’ the ‘given’ categories of the present doctrine and giving new weight to the functions of vindication and deterrence.

Tort law is a ‘loose and baggy monster’,[[311]](#footnote-271) lacking a grand design or grand designer. Hence, I have made no claims about what tort law’s *purpose* is, or should be. Neither have I claimed that other common law areas follow an identical pattern of development. Nevertheless, understanding—which this paper might have aided—is both an absolute and instrumental good and it might be that the analysis offered here provides a useful Weberian ‘ideal type’—a model, template or comparator in the exploration of the fascinatingly dynamic common law.

# Endnotes

1. My thanks go to Carol Harlow and to my colleagues at LSBU—Mike Rodney, Andy Unger, Kim Silver, Tracey Aquino and Cherry James—for their extraordinarily patient help. As to the remaining flaws, *mea culpa*. [↑](#footnote-ref-2)
2. Martha Nussbaum, Obituary of Hilary Putnam, http://www.huffingtonpost.com/martha-c-nussbaum/hilary-putnam-1926-2016\_b\_9457774.html [↑](#footnote-ref-3)
3. Gerald Postema, ‘Custom, Normative Practice, and the Law’ (2012) 62 *Duke Law Journal* 707-738, 720. See also endnote A. [↑](#footnote-ref-4)
4. In her ‘Property and the Rule of Law’ (2014) 20 *Legal Theory* 79-105, 84, Lisa Austin argues that we should view the common law ‘as primarily a social practice of reasoning’. She holds that: ‘doctrine is always closely tethered to the practice of reasoning’; ‘community practices…[provide] evidence of implicit norms and…a way to confirm the reasonableness of the law that was meant to address social life’; and that law and social order are mutually constitutive. Her claim’s comprehensiveness perhaps exaggerates both: the extent of correspondence between community attitudes and the common law; and the coherence of community values in complex societies. On the latter, see Max Weaver, ‘Herbert, Hercules and the “Plural Society”’ (1978) 41 *Modern Law Review* 660-680. [↑](#endnote-ref-2)
5. Geoffrey Samuel, ‘Is legal knowledge cumulative?’ (2012) 32(3) *Legal Studies* 448-479, 451-460; Harold Berman, ‘The Origins of Western Legal Science’ (1977) 90 *Harvard Law Review* 894-943. [↑](#footnote-ref-5)
6. There is little justice in certain injustice. Lady Hale knows for certain that she cannot join the Garrick Club under its present rules. [↑](#footnote-ref-6)
7. Frederick Schauer, ‘Formalism’(1988) 97 *Yale Law Journal* 509-548, 546. [↑](#footnote-ref-7)
8. See Joel Feinberg, ‘The Nature and Value of Rights’ in Joel Feinberg & Hyman Gross (eds.), *Philosophy of Law* (1980) 270-280, 275; originally in (1970) 4 *Journal of* *Value Inquiry* 243-257. [↑](#footnote-ref-8)
9. Alfred, Lord Tennyson, in ‘Aylmer’s Fields’ in his *Enoch Arden* (London: Moxon, 1891). See endnote B. [↑](#footnote-ref-9)
10. The full passage reads: ‘Mastering the lawless science of our law, / That codeless myriad of precedent, / That wilderness of single instances, / Thro' which a few, by wit or fortune led’. [↑](#endnote-ref-3)
11. See: Kiley Hamlin *et al.* ‘Social evaluation by preverbal infants’ (2007) 450 *Nature* 557–559, video at: https://www.youtube.com/watch?v=anCaGBsBOxM (visited 6 July 2016). More examples at endnote C. [↑](#footnote-ref-10)
12. Gavin Nobes *et al*., ’The influence of negligence, intention and outcome on children’s moral judgments’ (2009) 104 *Journal of Experimental Child Psychology* 382-397; Kiley Hamlin, ‘Moral Judgment and Action in Preverbal Infants and Toddlers: Evidence for an Innate Moral Core’ (2013) 22(3) *Current Directions in Psychological Science* 186–193; Hamlin & Wynn, ‘Young infants prefer prosocial to antisocial others. (2011) 26(1) *Cognitive Development* 30-39; Fiery Cushman *et al*., ‘The development of intent-based moral judgment’ (2013) 127 *Cognition*6–21 and Mark Spranca *et al*., ‘Omission and Commission in Judgment and Choice’ (1991) 27 *Journal of Experimental Social Psychology* 76-105. [↑](#endnote-ref-4)
13. The work on mirror neurons by Giacomo Rizzolatti, Vittorio Gallese and V S Ramachandran is conveniently reviewed at http://greatergood.berkeley.edu/article/item/do\_mirror\_neurons\_give\_empathy (visited 26 June 2016). However, if we see Muttley omit to save Vulnerable when Muttley could have easily done so, we do not feel Vulnerable’s pain in the same way. Instead, and perhaps more reflectively, we compare Muttley’s conduct with our expectations of ourselves and others [↑](#footnote-ref-11)
14. Gerald Postema ‘Jurisprudence, the Sociable Science’ (2015) 101 *Virginia Law Review* 869-901. *Cf.* Dan Priel’s comment that ‘in jurisprudence the philosophical argument cannot be kept apart from empirical work’, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2642461, *Osgoode Hall* *Research Paper* No. 34 Volume 11, Issue 7, 2015*,* 27. [↑](#footnote-ref-12)
15. Joseph Raz, *The Practice of Value*—*the 2001 Tanner Lectures*, http://tannerlectures.utah.edu/\_documents/a-to-z/r/Raz\_02.pdf, at 121. [↑](#footnote-ref-13)
16. Schauer, note 4 above, 548, holds that formalism—which screens out other considerations—is only properly condemned ‘when it is taken to be absolute rather than presumptive, when it contains no escape routes no matter how extreme the circumstances.’ [↑](#footnote-ref-14)
17. *Wainwright* v. *Home Office* [2003] UKHL 53. [↑](#footnote-ref-15)
18. Without physical contact, or its threat, trespass affords no assistance but the autonomy interest is now recognized in negligence, see *Montgomery* v *Lanarkshire Health Board* [2015] UKSC 11 [82]. See also *Mohr* v. *Williams* 104 N.W. 12 (Minn. 1905) and endnote D. [↑](#footnote-ref-16)
19. However, the non-disclosure must cause *harm* of some sort: see *Rees* v. *Darlington Memorial Hospital NHS Trust* [2003] UKHL 52. *Cf. R. (McDonald)* v. *Royal Borough of Kensington and Chelsea* [2011] UKSC 33 and *McDonald* v. *UK* (2015) 60 *EHRR* 1. Although C’s judicial review failed, ECtHR found a breach of Article 8, because, D having withdrawn night time care, C (who required mobility assistance) ‘was faced with the possibility of living in a manner (required to use incontinence pads at night even though she had bladder control) which “conflicted with [her] strongly held ideas of self and personal identity”’ [47]. [↑](#endnote-ref-5)
20. Arthur Ripstein, *Beyond the Harm Principle*, (2006) 34(3) *Philosophy & Public Affairs* 216-246, 20 in http://ssrn.com/abstract=1138439. [↑](#footnote-ref-17)
21. *Wainwright* v. *United Kingdom* (2007) 44 EHRR 40 [48], [55], [58]. See endnote E. [↑](#footnote-ref-18)
22. Speaking extra-judicially, Lord Neuberger described ‘the introduction of the Convention into UK law’ as ‘a breath of fresh air for the judiciary, the legal profession and legal academics…[that] has…made us more questioning about our accepted ideas and assumptions.’([31] in ‘The Role of Judges in Human Rights Jurisprudence: a Comparison of the Australian and UK experience’, his speech at a conference at the Supreme Court of Victoria, Melbourne on 8 August 2014, available at http://supremecourt.uk/docs/speech-140808.pdf). [↑](#endnote-ref-6)
23. Marc Galanter & David Luban, ‘Poetic justice: Punitive Justice and Legal Pluralism’ (1992-1993) 42 *American University Law Review* 1393-1463, 1426. See endnote F. [↑](#footnote-ref-19)
24. Insightfully, Dan Priel sees vindication and explanation as a *public* function—calling the police to account. But he attaches little weight to victims’ *private* needs for explanation or to notions of sublimation of revenge (Dan Priel, ‘A Public Role for the Intentional Torts’ (2011) 22(2) *King’s Law Journal* 183-208). Victims can be interested in accountability. However, the public and private interests are neither dichotomous nor mutually exclusive. We might rely on the criminal law and regulatory agencies for vindication, but these can be sadly dilatory or driven by extraneous considerations of institutional or political reputation: see the scandals involving TV presenter Jimmy Savile.

    (http://en.wikipedia.org/wiki/Jimmy\_Savile\_sexual\_abuse\_scandal) and the Rochdale grooming cases (http://www.thesundaytimes.co.uk/sto/news/uk\_news/Crime/article1224517.ece) [↑](#endnote-ref-7)
25. *Bici* v. *Ministry of Defence* [2004] EWHC 786 [71] (Elias J). [↑](#footnote-ref-20)
26. [2015] UKSC 32 (hereinafter ‘*Rhodes*’) [81]. Perhaps the doctrine of transferred intention will be abolished on the ground that it is inconsistent with *Rhodes*. The matter was not addressed in *Rhodes*. [↑](#footnote-ref-21)
27. [1897] 2 QB 57. [↑](#footnote-ref-22)
28. I guess I’m still an American Realist at heart. [↑](#footnote-ref-23)
29. On the many conceptions of dignity, see Michael Rosen, *Dignity, its History and Meaning* (Cambridge MS, Harvard University Press, 2012). [↑](#footnote-ref-24)
30. *Wainwright* v. *Home Office* [2003] UKHL 53 [45]-[46] (hereinafter ‘*Wainwright*’): In the Court of Appeal [2001] EWCA Civ 2081, [71], Buxton LJ spoke of ‘strong policy reasons why the tort of trespass to the person should be limited to its proper sphere’ but specified neither the policy nor the sphere. On the related topic of harassment, see endnote G. [↑](#footnote-ref-25)
31. The statutory harassment tort does not require proof of loss. Its victims can be awarded damages or an injunction for ‘(among other things) any anxiety’: Section 3(1) Protection from Harassment Act 1997). A context-specific *de minimis* notion of ‘gravity’ has developed (Gage LJ, *Conn* v. *City of Sunderland,* [2007] EWCA Civ. 1492 [12]; *Allen* v. *Southwark* [2008] EWCA Civ. 1478; *Ferguson* v. *British Gas Trading Ltd* [2009] EWCA Civ. 46, [1] and [4]). This is sometimes described as a ‘threshold of seriousness’; see Section 1A(3)(c) and *Trimingham* v *Associated Newspapers Ltd* [2012] EWHC 1296 [87]-[88]. Baroness Hale said in *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34 [66] that courts must ‘draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour’*.* See also Lord Phillips MR in *Thomas* v *News Group Newspaper Ltd* [2001] EWCA Civ 1233 [30].

    Ms. Ferguson carried a *public* banner. However, in *Trimingham,* the public interest in freedom of the press availed the defendant newspaper and overrode any sense that C was a secondary target and genuinely offended. Whereas in *Thomas*, the possibility that the harassment was racist overrode press freedom. [↑](#endnote-ref-8)
32. In *The Sunday Times* 10 July 2016, 5, the father of Jacob Stratton, whose medical negligence claim for brain damage was settled at £15 million, is reported as saying, 'This settlement is *not compensation* for Jacob. It is *enablement* to allow him to live as well as he can.' *Cf*. Bruce Chapman, ‘Wrongdoing, Welfare, and Damages’ in Owen (ed.) *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, Clarendon, 1995) 409-426. [↑](#footnote-ref-26)
33. *Rees* v. *Darlington Memorial Hospital NHS Trust* [2003] UKHL 52 (hereinafter ‘*Rees*’). [↑](#footnote-ref-27)
34. Margaret Radin maintains that money awards ‘symbolize public respect for rights and public recognition of the transgressor’s fault by requiring something important to be given up on one side and received on the other, even if no equivalence of value is possible.’ See her ‘Compensation and Commensurability’ (1993) 43 *Duke Law Journal* 56-86, 62. *Cf.* Michael Sandel, *What Money Can’t Buy* (London: Allen Lane, 2012) 9. [↑](#footnote-ref-28)
35. [1997] 2 All ER 762. [↑](#footnote-ref-29)
36. There are (un-free) markets in freedom: buying release or passage to another country. [↑](#footnote-ref-30)
37. In *Rees*, note 24, Lord Bingham regarded the conventional award as ‘recompense’ for ‘real loss suffered’ but ‘not compensatory’ [8]. Lord Millett founded it on ‘the denial of an important aspect of [the parents’] autonomy’ [123]. See also, endnote H. [↑](#footnote-ref-31)
38. In *Kennedy* v *Kerr* [1942] 1 All ER 412, 413, Asquith J noted that damage is ‘presumed’ when the slanders are ‘so intrinsically outrageous that they ought to be actionable, even if no pecuniary loss results’. He also noted that damage is presumed when a slander is ‘so obviously damaging to the financial position of the victim that pecuniary loss is almost certain’. These two categories are very different: ‘outrage’ points to the invasion of the ‘right’, whereas ‘obvious damage’ points to ‘loss’. [↑](#endnote-ref-9)
39. *R (Lumba)* v. *Secretary of State for the Home Department* [2011] UKSC 12 (hereinafter ‘*Lumba*’) *per* Lord Dyson [34]. [↑](#footnote-ref-32)
40. *Cf.* Lord Brown in *Lumba* [343]. The case involved nine justices and exemplifies the problem that multiple judgments can make the discernment of a majority *ratio* difficult. See Alan Paterson, *Final Judgement* (Oxford: Hart, 2013) 141-145 and 199. See also, endnote I. [↑](#footnote-ref-33)
41. See also *Chester* v. *Afshar* [2004] UKHL 41 where compensation for the physical consequences of a non-negligent surgical procedure were awarded because of the surgeon’s failure to warn a patient (who would probably have had the operation at some time) of the procedure’s inevitable risk. The damages awarded bore no relation to the nature of D’s negligence but are powerfully deterrent. See: Alan Paterson, *Final Judgement* (Oxford: Hart, 2013) 119, 188-189; Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) 164-166; and Tamsyn Clark & Donal Nolan, ‘A Critique of *Chester* v. *Afshar*’ (2014) 34(4) *Oxford Journal of Legal Studies* 659-692, in which the authors are sympathetic to notion that non-disclosure entails an affront to autonomy, but favour a statutory scheme. Parliament seems unlikely to provide one. [↑](#endnote-ref-10)
42. *Ibid. per* Lord Hope [180], Lord Walker [195] and Lady Hale [217]. [↑](#footnote-ref-34)
43. [2001] 2 AC 19; [2000] UKHL 48 (hereinafter ‘*Evans*’). [↑](#footnote-ref-35)
44. *Prison Officers Association v. Iqbal* [2009] EWCA Civ 1312 (hereinafter ‘*Iqbal*’)[35]. [↑](#footnote-ref-36)
45. *Ibid.* [79]. [↑](#footnote-ref-37)
46. *Ibid.* [102] [↑](#footnote-ref-38)
47. Lord Neuberger, *ibid* [22], noted that the officers owed no *contractual* duty to C. He therefore regarded their conduct as a *pure* omission—inexigible at the motion of a prisoner. An argument reminiscent of ‘no contract, *therefore* no duty’ that *Donoghue* v. *Stevenson* [1932] AC 562 rejected [↑](#footnote-ref-39)
48. *Ibid.* [93]-[94] [96] and [100]. [↑](#footnote-ref-40)
49. *Reilly* v. *Merseyside Regional Health Authority* [1994] EWCA Civ. 30, 23 *Butterworths Medical Law Reports* 26, 30. See also Rachael Mulheron, ‘Rewriting the Requirement for a 'Recognized Psychiatric Injury' in Negligence Claims’ (2012) 32 *Oxford Journal of Legal Studies* 77-112. [↑](#footnote-ref-41)
50. On planning theories of intention, see: John Finnis, ‘Intention in Tort Law’ in Owen ed. *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, Clarendon, 1995), 229-247: and Michael Bratman, ‘Intention, Practical Rationality, and Self-Governance’ (2009) 119 *Ethics* 411-433. [↑](#footnote-ref-42)
51. *Savil* v. *Roberts* (1698) 88 *English Reports* 1267. [↑](#footnote-ref-43)
52. In *W*. v. *Home Office* [1997] *Immigration Appeal Reports* 302. [↑](#footnote-ref-44)
53. [2001] EWCA Civ. 1743 [57]. [↑](#footnote-ref-45)
54. See Lady Hale in *Taiwo* v. *Olaigbe* and *Onu* v. *Akwiwu* [2016] UKSC 31 [34], ‘[Claims may] fail…not because [the claimants] do not deserve a remedy for all the grievous harms they have suffered [but] because the present {statutory] law, although it can redress some of those harms, cannot redress them all.’ [↑](#footnote-ref-46)
55. In *Ashley* v *Chief Constable of Sussex* [2008] UKHL 25 [18]. See also his observation, as Scott J, in *Thomas* v. *National Union of Miners*, that ‘[t]he law has long recognized that unreasonable interference with the rights of others is actionable in tort’ [1986] Ch 20, 64. See generally, Jason Varuhas ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34(2) *Oxford Journal of Legal Studies* 253-293. [↑](#footnote-ref-47)
56. aps might look anomalous but, in trespass to land and to the person it is firmly entrenched. *Cf*. trespass to goods, in which relevant authority is scarce: see *Everitt* v. *Martin* [1953] NZLR 298. [↑](#footnote-ref-48)
57. Note 44 above. [↑](#footnote-ref-49)
58. *Ibid*. [65]. [↑](#footnote-ref-50)
59. *Ibid*. [23] emphases added. [↑](#footnote-ref-51)
60. On *solatium* in civil law, see F H Lawson, *Negligence in Civil Law* (Oxford: Clarendon, 1955) 67. *Solatium* consoles A for the harm suffered by B. Under Section 1A Fatal Accidents Act 1976 a conventional sum is provided for bereavement. [↑](#footnote-ref-52)
61. The use of the term ‘sublimation’ in fourteenth century alchemy suggests the *vaporization* of the hurt. But the urge for vengeance is often persistent. See further, endnote J. [↑](#footnote-ref-53)
62. Whilst writing this during early July 2016, the news of killings in Dallas filled the media. For an example of the escalation of revenge, see http://www.dailykos.com/story/2016/7/7/1546262/-Ex-Congressman-calls-for-revenge-against-President-Obama-and-Black-Lives-Matter-for-Dallas-shooting (visited 9 July 2016). The rise of violence prompted by ‘disrespect’ rather than physical harm cannot be ignored. See Dale Miller, ‘Disrespect and the Experience of Injustice’ (2001) 52 *Annual Review of Psychology* 527-553: ‘[A] considerable amount of research supports the claim that disrespectful treatment is a common determinant of both anger and aggression. Furthermore, research shows that a common characteristic of those who exhibit especially high levels of anger and aggression is a low threshold for inferring disrespect from the actions of others.’ (citations omitted) [↑](#endnote-ref-11)
63. See Robert Audi, ‘Intuitions, intuitionism, and moral judgement’ in his *Reasons, Rights and Values* (Cambridge: Cambridge University press, 2015) 129-159, 130-131. Audi invokes W D Ross, *The Right and the Good* (Oxford: Oxford University Press, 1930. [↑](#footnote-ref-54)
64. *Cf.* Lawrence Solan, ‘Private Language, Public Laws’ (2004-05) 93 *Georgetown Law Journal* 427-486, 437-444. The un-anthropomorphic or realist approach is exemplified by Lord Toulson’s judgement in *Willers* v. *Joyce* [2016] UKSC 43 [42], ‘The case law on the tort of malicious prosecution…shows how the courts have fashioned the tort to do justice in various situations in which a person has suffered injury in consequence of the malicious use of legal process without any reasonable basis. Drawing on that experience, the court has to decide whether the tort should now apply to the malicious and groundless prosecution of a civil claim causing damage of the kinds alleged in the present case. This requires consideration of the justice and practical consequences whichever way the question is decided. In considering those consequences, it is appropriate to have in mind the essential ingredients of the tort…’ [↑](#footnote-ref-55)
65. Gerald Postema, ‘Custom, Normative Practice, and the Law’ (2012) 62 *Duke Law Journal* 706-737, 717-719. The ambiguity of ‘expectation’—which can be predictive or normative—casts some light here. On habituation or habit beyond mere regularity, see Helen Ngo, ‘Racist Habits: a Phenomenological Analysis of Racism and the Habitual Body’ (2016) *Philosophy and Social Criticism* 1-26. At 18, she invokes Maurice Merlau-Ponty’s view that ‘habits are *held* rather than simply possessed; they are both active and continually *activated*.’ *Cf.* ‘Habit, my friend, is practice long pursued, that at last becomes the man himself.’ (Evenus, cited by Aristotle, (J. A. K. Thomson (trs.), *The Ethics of Aristotle: the Nichomachean Ethics Translated* (Harmondsworth: Penguin, 1953) 217.) [↑](#footnote-ref-56)
66. Daniel Kahneman, *Thinking, Fast and Slow* (London: Penguin, 2012). [↑](#footnote-ref-57)
67. See: Peter Singer, ‘Ethics and Intuitions’ (2005) 9 *Journal of Ethics* 331-352; Joshua Greene, *Moral Tribes: Emotion, Reason and the Gap between Us and Them* (London: Atlantic Books, 2014). Further sources in endnote K. [↑](#footnote-ref-58)
68. Chapter 1; Jeanette Kennett. 2013. ‘Folk Psychology, the Reactive Attitudes and Responsibility’. Podcast. http://podcasts.ox.ac.uk/folk-psychology-reactive-attitudes-and-responsibility (2013, visited 7 July 2016); and John Gardner, ‘Nearly Natural Law’ (2007) 52 *American Journal of Jurisprudence*1-23, in which he writes (at 22-23), ‘[E]ven as we resist the idea that morality is a kind of law, we should endorse the idea that morality is entirely natural. It binds us by our nature as human beings, while law binds us, to the extent that it does, only by the grace of morality.’ [↑](#endnote-ref-12)
69. See: Andrew Whiten *et al*., ‘Culture Evolves’ (2011) 366 *Philosophical Transactions of the Royal Society B* 938–948; Kenny Smith *et al*., ‘Cultural transmission and the evolution of Human Behaviour’, (2008) 363 *Philosophical Transactions of the Royal Society B*, 3469-3476, 3474); *Cf*. Henry Smith’s comment that, ‘In order to broadcast messages to duty holders who are far-flung, the law has to employ a basic everyday morality that is easy to communicate precisely because it is basic and every day.’ See also, endnote L. [↑](#footnote-ref-59)
70. See also Henry E. Smith, ‘Property, Equity and the Rule of Law’, in Lisa Austin and Dennis Klimchuk (eds.), Private Law and the Rule of Law (Oxford: Oxford University Press, 2014) 224-246, available at http://www.law.harvard.edu/programs/about/privatelaw/related-content/2013-working-paper-series/smith\_property-equity-and-the-rule-of-law\_6-14-13.pdf 2013, 9). (2013).

    See also, in the same collection at 17-40, Gerald Postema, ‘Fidelity in Law’s Commonwealth’, available at SSRN: http://ssrn.com/abstract=2294665 or http://dx.doi.org/10.2139/ssrn.2294665. [↑](#endnote-ref-13)
71. It seems likely that the instinctive disapproval of blow-like interferences is prototypical. But a collaboration-for-survival norm (*e.g. pacta sunt servanda*) might be more softly wired. See note 8 above. [↑](#footnote-ref-60)
72. Greene, note 55 above, uses this camera metaphor extensively. For a meta-review of the territory, see Cristina Bicchieri & and Ryan Muldoon, "Social Norms", *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/spr2014/entries/social-norms/, (visited 14 July 2016). [↑](#footnote-ref-61)
73. Jennifer Nagel, ‘Intuition, Reflection, and the Command of Knowledge’ (2014) Supp. Vol. 88 *Proc. Aristotelian Soc*. 219-241. [↑](#footnote-ref-62)
74. See: Joseph Hutcheson, ‘The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision’ (1929) 14 *Cornell Law Quarterly* 274-88; Joshua Shepherd, ‘Deciding as Intentional Action: Control over Decisions’ (2015) 93(2) *Australasian Journal of Philosophy* 335-351. Reasons can motivate but can also justify *ex post*. [↑](#footnote-ref-63)
75. See Matthew Glasser *et al*, ‘A multi-modal parcellation of human cerebral cortex’ (2016) *Nature* doi:10.1038/nature18933. [↑](#footnote-ref-64)
76. Rainer Forst (trs Jeffrey Flynn), *The Right to Justification* (New York: University of Columbia Press, 2012) 3. ‘Deep structure’ is strongly linked with Noam Chomsky’s transformational grammar. The expression was used in his first publication, *Syntactic Structures* (The Hague and Paris: Mouton, 1957). [↑](#footnote-ref-65)
77. In a ‘Review of Patricia Churchland, *Braintrust: What Neuroscience Tells Us about Morality*’(2013) 123 *Ethics* 354-356, 355, John Mikhail has recently rehearsed David Hume’s argument for assumption B. ‘[B]ecause individuals are prepared to recognize an infinite number and variety of moral duties, the precepts from which these duties arise cannot be derived from experience alone. Instead, one must seek their origin in more general principles, a type of instinctive knowledge that constitutes part of the "original fabric" of the human mind.’ [↑](#footnote-ref-66)
78. See note 7 above. [↑](#footnote-ref-67)
79. Trolleyology began with Philippa Foot, *‘The Problem of Abortion and the Doctrine of Double Effect’* (1967) 5 *Oxford Review* 5-15. Although Barbara Fried has asked, ‘What does matter? The case for killing the Trolley Problem (or letting it die)’ (2012) 62 *Philosophical Quarterly* 505-529, the vast and now quite subtle literature includes: Jonathan Crowe, ‘Natural Law and Normative Inclinations’ (2015) 28 *Ratio Juris* 52-67; and David Edmonds, *Would you kill the fat man?* (Princeton: Princeton University Press, 2013). For further sources in endnote M. [↑](#footnote-ref-68)
80. On trolleyology etc. see also:

    Joshua Greene, ‘From neural ‘is’ to moral ‘ought’: what are the moral implications of neuroscientific moral psychology?’ (2003) 4 *Nature Reviews* 847-850;

    Joshua Greene, note 55 above, locs. 1825-4070;

    Mark Kelman, ‘Moral Realism and the Heuristics Debate’ (2013) 5 *Journal of Legal Analysis* 339-397;

    Mark Kelman & Tamar Kreps, ‘Playing with Trolleys (I): Intuitions about Aggregation’ Stanford Public Law Working Paper #2138475 (2012) available at https://papers.ssrn.com/sol3/Data\_Integrity\_Notice.cfm?abid=2138475 (visited 26 July 2016); and

    Kelman & Kreps, ‘Playing with Trolleys (II): Which Losses do We Impose on Some to Benefit Others?’ (23 May 2014), available at https://www.gsb.stanford.edu/sites/gsb/files/working-papers/kreps\_kelman\_ssrn\_0.pdf (visited 12 July 2016)

    John Mikhail, ‘Universal Moral Grammar’ (2007) 11 *Trends in Cognitive Sciences* 144-152;

    Stephen Pinker, *The Stuff of Thought: Language as a Window into Human Nature* (New York: Penguin, 2008) 229-234. Peter Singer, ‘Ethics and Intuitions’ (2005) 9 *Journal of Ethics* 331-352. [↑](#endnote-ref-14)
81. The Conqueror wanted military and financial control and sought no control over the resolution of local private disputes. See SFC Milsom, *A Natural History of the Common Law* (New York; Columbia University Press, 2003), Introduction (locs. 131-138). As the Royal courts became engaged, procedure rather than substance dominated. ‘[L]egal thinking was not in terms of substantive rules which a legislative mind might view, as it were from above. There was no legislative mind, no view from above, no substantive law to be viewed, not even much of a system.’

    A sixteenth century Prosser or Winfield could have produced only ‘a book arranged by kinds of action, under each of which would be set out cases showing what pleas had and had not been found acceptable…Most of classical tort law still remained in hiding’ (*id*., 12-13). Later phases brought substantive rules into view, systematizing what juries had formerly done behind the screen that D’s general denial created. Then ‘inchoate…[l]ay perceptions of right and wrong were articulated into rules of law’ (*id*. 16, 18). [↑](#footnote-ref-69)
82. See *Janson* v. *Brown* (1807)170 E.R. 869; *Cope* v. *Sharpe (No2)* [1912] 1 KB 496*, Creswell* v*. Sirl* [1948] 1 KB 241. [↑](#footnote-ref-70)
83. See Lord Goff *In Re F. (Mental Patient: Sterilisation)* [1990] 2 AC 1, 74-76 (hereinafter ‘*Re F.*’). [↑](#footnote-ref-71)
84. *Collins* v. *Wilcock* [1984] 1 W.L.R. 1172 and *Re F.,* note 68 above, 72. Milsom notes that justification was raised explicitly only by special pleas and was ‘not central to the law of torts’ (Milsom, note 66 above, 14). [↑](#footnote-ref-72)
85. Typically some 80 per cent of experiment subjects will react this way: see (*e.g*.) footnote 32 in Kelman & Kreps (2012), note 65. See also Regina Rini, ‘Making Psychology Normatively Significant’ (2013) 17 *Journal of Ethics* 257–274, 271. [↑](#footnote-ref-73)
86. You learn to tie your shoe laces. The motor skill becomes automatic, but is there not also the trace of a feeling that one ought to tie them that way? See note 53 above. [↑](#footnote-ref-74)
87. Martha Nussbaum, *Political Emotions* (Cambridge MAS: Belknap, 2013) 6, holds that ‘emotions…are not just impulses, but contain appraisals that have an evaluative content’. [↑](#footnote-ref-75)
88. See Thomas Scanlon, *What we Owe to Each Other* (Cambridge MS: Harvard University Press,1998). Theories that seek to maximise self-determination of the good are less vulnerable to this criticism. I am free to do (or not do) anything I choose except interfere with others’ equivalent freedom. But if I do not pay my taxes? See further, endnote N. [↑](#footnote-ref-76)
89. Joseph Raz, note 10, 399 fn. 9, criticizes a passage in Thomas Scanlon, *What we Owe to Each Other* (Cambridge MS: Harvard University Press, 1998) 198. Scanlon writes, ‘[W]e rarely, if ever, “see” that an action is wrong without having some idea *why* it is wrong. There may be cases in which some action “just seems wrong,” even though one cannot say what the objection to it is. But these reactions have the status of “hunches” or suspicions which need to be made good: there is pressure to come up with an explanation or else withdraw the judgment if we cannot explain what our objection is.’ Scanlon goes on to note that ‘People in different cultures regard different things as funny and have different views about what constitutes a beautiful face.’ However, as Raz points out, Scanlon promptly kicks his own point into the long grass by saying, ‘But even if there are, in this sense, standards of humor and beauty, these standards do not play the same role in individual judgments that moral standards generally do.’ [↑](#endnote-ref-15)
90. Immanuel Kant, Mary Gregor (ed.), *Groundwork of the Metaphysics of Morals* (Cambridge: Cambridge University Press, 1998, original 1785) 38, AK 4:429. [↑](#footnote-ref-77)
91. Immanuel Kant,Mary Gregor (ed) *The Metaphysics of Morals (*Cambridge UK: Cambridge University Press, 1996, original 1797) 182, 6:429. [↑](#footnote-ref-78)
92. Interview with Megan Davis, ‘Does constitutional recognition help or hinder the road to Aboriginal self-determination?’ https://radio.abc.net.au/programitem/pe83b2Pyq3?play=true (11 August 2016). [↑](#footnote-ref-79)
93. Christine Korsgaard, *Fellow Creatures: Kantian Ethics and Our Duties to Animals—the 2004 Tanner Lectures*, http://tannerlectures.utah.edu/\_documents/a-to-z/k/korsgaard\_ See also her 2014 Uehiro Lectures http://philosophy.fas.harvard.edu/news/christine-korsgaard-delivers-2014-uehiro-lectures. On gorillas’ rights, see endnote O. See also, Judith Butler, *Undoing Gender* (Abingdon: Routledge, 2004) 24, ‘lives are supported and maintained differentially…there are radically different ways in which human physical vulnerability is distributed across the globe. Certain lives will be highly protected…other lives will not find such fast and furious support and will note even qualify as “grievable.”’. More generally, see endnote P. [↑](#footnote-ref-80)
94. On 2 December 2013, the Nonhuman Rights Project in New York filed a *habeas corpus* suit on behalf of Tommy a chimpanzee. The unachieved objective was not to free Tommy but to secure his transfer to more spacious quarters. The justification offered was that chimps, as ‘cognitively complex, autonomous beings’, have some rights as ‘persons’. See http://www.nonhumanrightsproject.org/2013/12/02/lawsuit-filed-today-on-behalf-of-chimpanzee-seeking-legal-personhood/, visited 26 July 2016. [↑](#endnote-ref-16)
95. Martha Nussbaum, *Political Emotions* (Cambridge MAS: Belknap, 2013) 112, ‘All societies have to grapple with the history or current reality of group subordination, whether in the form of slavery, religious animosity, caste, or the exclusion of women. All, therefore, need to cultivate emotions that conduce to equal respect and toleration, while inhibiting those that militate against these norms. All societies, then, have reason to study and manage emotions such as disgust, shame, and fear.’ [↑](#endnote-ref-17)
96. In *Michael* v. *Chief Constable of South Wales Police* [2015] UKSC 2, [100] Lord Toulson noted that courts sometimes ‘use the expression “assumption of responsibility” when in truth the responsibility has been *imposed by the court rather than assumed by D*. It should not be expanded artificially.’ ([100] emphasis added). It is far from clear what ‘artificially’ might mean in this context. See further on *Michael*, endnote Q. [↑](#footnote-ref-81)
97. Although it might well run counter to folk-moral expectations that a police force should protect individuals exposed to high risk of severe harm, the majority in *Michael* held that the police owed no duty of care to a woman who had made an emergency call to say that she was under patent threat of imminent murder by an identified assailant. Acceptance of the call was not thought to be an ‘assumption of responsibility’: see Lord Toulson [138], [69] and [100].

    The language of ‘omissions’ was also invoked, notably at [97] emphases added: ‘The *fundamental reason*, as Lord Goff explained [in *Smith v Littlewoods Organisation Ltd* [1987] AC 241, 270,], is that the common law does not generally impose liability for *pure omissions*. It is one thing to require a person who embarks on *action* which may harm others to exercise care. It is another matter to hold a person liable in damages for *failing to prevent harm* caused by someone else.’ *Cf.* the powerful dissents of Lord Kerr [164]-[167] and Lady Hale [189]-[199]. [↑](#endnote-ref-18)
98. Literally ‘self-law’, from the Greek: *auto* (self); and -*nomy* (arrangement, management), derived from *nomos* (law). See T. F. Hoad (ed.), *The Concise Oxford Dictionary of Word Origins* (Oxford: Oxford University Press, 1986). [↑](#footnote-ref-82)
99. Morris Hoffman, ‘The Neuroeconomic Path of the Law’ (2004) 359 *Phil. Trans. R. Soc. B* 1667-1676, 1667, emphases added. [↑](#footnote-ref-83)
100. Jeffrey Stake, ‘The property instinct’ (2004) 359*Phil. Trans. R. Soc. B*, 1763–1774, 1772. See further endnote R. [↑](#footnote-ref-84)
101. Carol Rose, ‘Possession as the Origin of Property’(1985) 52 *University of Chicago Law Review* 73-88, 88 concludes that, ‘The common law gives preference to those who convince the world that they have caught the fish and hold it fast. This may be a reward to useful labor, but it is more precisely the articulation of a specific vocabulary within a structure of symbols approved and understood by a commercial people.’ [↑](#endnote-ref-19)
102. See: David Damas, ‘Central Eskimo Systems of Food Sharing’ (1972) 11 *Ethnology* 220–240; John C. Mitani & David P. Watts, *‘Why do chimpanzees hunt and share meat?’* (2001) 61 *Animal Behaviour* 915–924; Francesco Parisi, ‘The Fall and Rise of Functional Property’ *Law and Economics Working Paper 05-38*, George Mason University School of Law, http://ssrn.com/abstract\_id=850565, 3-5. [↑](#footnote-ref-85)
103. Henry Smith with Thomas Merrill, ‘The Morality of Property’ (2007) 48 *William & Mary Law Review* 1849, 1850-1851. [↑](#footnote-ref-86)
104. Frederick Schauer, *Playing by the Rules* (1993), cited in Alan Wertheimer*,* ‘(Why) should we require consent to participation in research?’ (2014) 1(2) *Journal of Law & Biosciences* 137–182, 178, note 93. See also endnote S. [↑](#footnote-ref-87)
105. However, we do not have to accept that *all* judicial reasoning is, or should be, *rule-based* (see Adam Rigoni, ‘Common-Law Reasoning and Analogy’ (2014) 20 *Legal Theory* 133-156.) *Cf.* Lon Fuller, ‘Fiat in Case Law’ (1946) 59 *Harvard Law Review* 376, 376: judge-made law is in part a ‘fiat intended to fill the space left blank by defaulting reason.’ [↑](#endnote-ref-20)
106. Stanley de Smith, *The New Commonwealth and its Constitutions* ((London: Stevens, 1964) 194. [↑](#footnote-ref-88)
107. See Henry Smith, note 56 and Austin, note A. [↑](#footnote-ref-89)
108. Henry Sidgwick, ‘Professor Calderwood on Intuitionism in Morals’ (1876)1(4) *Mind* 563–66, 564. [↑](#footnote-ref-90)
109. ‘The Settle Bed’ in Seamus Heaney, *Seeing Things* (London: Faber, 1991). Text at note T. [↑](#footnote-ref-91)
110. ‘[W]hatever is given / Can always be reimagined, however four-square. / Plank-thick, hull-stupid and out of its time / It happens to be. You are free as the lookout, / That far-seeing joker posted high over the fog, / Who declared by the time that he had got himself down / The actual ship had been stolen away from beneath him.’ This literary allusion is borrowed from Philip Allott’s ‘The Idealist’s Dilemma’, his address to the International Law Association on 23 May 2014. [↑](#endnote-ref-21)
111. In their ‘Dilemmas in a General Theory of Planning’ (1973) 4 *Policy Sciences* 155-169. 160-167, Horst Rittel and Melvin Webber argue that ‘wicked problems’: lack definitive formulations and stopping rules; are not matters of truth/falsity; are unique; and their solutions are one shot solutions. [↑](#footnote-ref-92)
112. See Karl Llewellyn, *Jurisprudence* (Chicago: Chicago University Press, 1962) 179-182. Llewellyn calls the Grand Style ‘the Manner of Reason’ and opposes it to the doctrine-driven Formal Style. He extravagantly suggests that ‘every current decision is to be tested against life wisdom’ (*ibid.* 217). Lord Denning’s judgements in *Lewis* v *Averay* [1972] 1QB198and *Central London Properties Trust Ltd* v. *High Trees House Ltd.*[1947] KB 130 provide well-known examples of re-casting entrenched doctrine. See further, endnote U. [↑](#footnote-ref-93)
113. U See Lord Toulson in *Patel* v. *Mirza* [2016] UKSC 42 [120], ‘[I]t would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.’

     Lord Sumption in *Versloot Dredging BV and another* v. *HDI Gerling Industrie Versicherung AG and others* [2016] UKSC 45 [10] ‘Courts are rarely in a position to assess empirically the wider behavioural consequences of legal rules. The formation of legal policy in this as in other areas depends mainly on the vindication of collective moral values and on judicial instincts about the motivation of rational beings…’ [↑](#endnote-ref-22)
114. The terms of Section 3(1) Law Commissions Act 1965 are broad enough to cover this. The duties of the Commissions include: ‘to take and keep under review *all the law* with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies….and generally the simplification and *modernisation* of the law’ (emphases added). [↑](#footnote-ref-94)
115. In ‘On the Open Texture of Law’ (2013) 87 *Grazer Philosophische Studien* 195-213 (http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1926855), Schauer comments that, ‘[t]he question of defeasibility is not a question about what is in a rule, but is rather a question about how what is in a rule, or about how what a rule says, is to be treated, and this is not, and can never be, something that can be determined by the rule itself.’ That treatment is a matter of legal culture and, in particular, ‘the power and abilities of judges’. The quoted phrase is from Linda Alcoff, *Visible Identities* (Oxford: Oxford University Press, 2006) 184. [↑](#footnote-ref-95)
116. Sir Henry Maine famously said that substance was ‘secreted in the interstices of procedure’: Sir Henry Maine, *Dissertations on Early Law and Customs* (London: Murray, 1883) 389. [↑](#footnote-ref-96)
117. A recurring theme in SFC Milsom’s work. See his *Historical Foundations of the Common Law (*London: Butterworths, 1981, 2nd edition) and *A Natural History of the Common Law* note 66 above. [↑](#footnote-ref-97)
118. John Witt, ‘Contingency, Immanence, and Inevitability in the Law of Accidents’ (2007) 1(2) *Journal of Tort Law* Article 1, 128. [↑](#footnote-ref-98)
119. In 1066, ‘[t]he Conqueror took over a going concern’, in which the resolution of inter-personal disputes was largely a matter for local justice (Milsom, note 94, 11-23). But, by 1765, Blackstone could write ‘that all jurisdictions of courts are either mediately or immediately derived from the crown’: see William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769*, Vol 1, 257. [↑](#footnote-ref-99)
120. Milsom note 91, 289; *Rattlesdene* v *Grunestone* (1317) YB 10 Ed II. [↑](#footnote-ref-100)
121. JL Austin, *‘A Plea for Excuses’* (1956-57) *Proc. Aristolean Soc.* 1-30, 14 [↑](#footnote-ref-101)
122. Frederic Maitland, *The Forms of Action at Common Law*. (Cambridge: Cambridge University Press,1965, original 1909) 48. [↑](#footnote-ref-102)
123. Samuel, note 2 above; Berman, note 2 above. [↑](#footnote-ref-103)
124. *Reynolds* v. *Clarke* (1725) 1 Strange 634, 635, 93 English Reports 747, 748. [↑](#footnote-ref-104)
125. Alfred, Lord Tennyson, *Aylmer’s Fields* in his *Enoch Arden* (London: Moxon,1891). [↑](#footnote-ref-105)
126. Berman, note 2 above, 942. See also Samuel, note 2 above*,* 455-456. Witt, note 95 above, 7, comments ironically, ‘The law professor’s work is to identify the general patterns and the salient facts, to jettison the accidental and irrelevant’. [↑](#footnote-ref-106)
127. Although it took a surprisingly long time for the quintessentially liberal notion of intention to become an explicit feature of the battery paradigm. [↑](#footnote-ref-107)
128. Milsom, note 94, 306-313. [↑](#footnote-ref-108)
129. (1772) 2 Wm Bl 892, 96 English Reports 525. Dissenting, Blackstone J held that the intermediaries broke the causal chain. [↑](#footnote-ref-109)
130. Milsom, note 91, 312-313. On directness, see endnote V. [↑](#footnote-ref-110)
131. On directness: *Leichtman* v. *WLW Jacor Communications* [92 Ohio App. 3d 232, 634 N.E.2d 697, 1994 Ohio App.](http://www.bloomberglaw.com/document/X4SJ0H?jcsearch=92%2520Ohio%2520App.%25203d%2520232#jcite&ORIGINATION_CODE=00344) (blowing smoke into C’s face was battery), discussed by See Hershovitz, note 86, 100-102. Some US authorities suggest that poisoning, though not blow-like, is battery: *e.g*. *Mink* v. *University of Chicago* 460 F Supp 713 (1978) 718 (injection would be battery, as would ‘causing [C] to physically ingest a pill.’) *Cf*. *Herr* v. *Booten* 398 Pa. Superior Ct. 166 (1990) 580 A.2d 1115, which suggests that the essence of battery is intent to interfere with C’s autonomy: ‘We are unwilling to view the supplying of an alcoholic beverage to a person as an act intending to cause "offensive or harmful bodily contact.” ’ (*id.* at 170). [↑](#endnote-ref-23)
132. Oliver Wendell Holmes, *The Common Law* (London: Macmillan, 1968, original 1881) 74. [↑](#footnote-ref-111)
133. Milsom, note 94, 397, argues that there are not two distinct and mutually exclusive classes of fact situation and that this attempt to draw a ‘distinction of forms’ between trespass and case was ‘unworkable’. But, after *Williams* v. *Holland* (1833) 10 Bing 112, 131 English Reports 848, direct injuries could be claimed in case—if there was damage. [↑](#footnote-ref-112)
134. See Thomas M. Scanlon, *What we Owe to Each Other* (Cambridge MS: Harvard University Press, 1998 251-256. [↑](#footnote-ref-113)
135. Spranca, Mark, et al., ‘Omission and commission in judgment and choice’ (1991) 27 *Journal of Experimental Social Psychology* 76-105. [↑](#footnote-ref-114)
136. Whether innately hard-wired or (post-birth) learned soft-wired, exceptional altruists (donors of kidneys to complete strangers) apparently exhibit exceptional brain soft-wiring (Abigail Marsh *et al*., ‘Neural and cognitive characteristics of extraordinary altruists’ (2014) *Proc. Nat. Ac. Sciences*, DOI10.1073/pnas.1408440111. [↑](#footnote-ref-115)
137. One might think the parental obligation to feed one’s child prototypical but, sadly, in some cultures, it is sometimes overridden if the child is female. See: Jonathan Bennett, *Morality and Consequences—the 1980 Tanner Lectures* (1981), in Sterling M. McMurrin (ed.), *The Tanner Lectures on Human Values, Volume II*, (Cambridge: Cambridge University Press, 2011)45-116, 78, 72-95 and at http://tannerlectures.utah.edu/\_documents/a-to-z/b/bennett81.pdf; and endnote W. [↑](#footnote-ref-116)
138. Further on positive and negative duties: Ronald Dworkin, *Justice for Hedgehogs* (Cambridge MS: Belknap Press, 2011) 277-283; and Rini, note 70 above, 267, 269. [↑](#endnote-ref-24)
139. SFC Milsom, ‘Not Doing is No Trespass’*,* (1959) 12 *Cambridge Law Journal* 105-117. See further, endnote X. [↑](#footnote-ref-117)
140. *Cf.* *Coventry and others* v. *Lawrence and another (No 2)* [2014] UKSC 46 at [18]: a claim in nuisance against a non-occupier landlord must be based on ‘“active” or “direct” participation’ in the nuisance. Mere knowledge is not enough. This suggests that, however *participation* is manifested, it must be part of the landlord’s *plan*, which, as is argued below, suggests *intention* rather than negligence or strict liability. [↑](#endnote-ref-25)
141. *Cf.* *Fagan* v. *Metropolitan Police Commissioner* [1969] 1 QB 439, having driven a car onto C’s foot accidentally, D—opportunistically and immediately—*planned* to *do nothing* to remove the car. [↑](#footnote-ref-118)
142. Greene, note 55 above, uses ‘allowing’ locs. 3838, 3782-3867. For criticism of the similar term ‘letting’, see Bennett, note 113 above, 53-53. See further, endnote Y. [↑](#footnote-ref-119)
143. Whilst Bennett, note 113, regards turning off the respirator as a ‘positive letting’ that is also a ‘killing’ (at 70), Lord Goff and other members of the House of Lords took a different view in *Airedale NHS Trust* v. *Bland* [1993] AC 789. However, at 898, Lord Mustill described the distinction between acts and omissions as ‘morally and intellectually dubious’. See also Mark Spranca *et a*l., ‘Omission and commission in judgment and choice’ (1991) 27 *Journal of Experimental Social Psychology* 76-105. [↑](#endnote-ref-26)
144. See (*e.g.*) *McDonald* v. *UK*, note 13 above, [47], [53]-[58], but note [48]. [↑](#footnote-ref-120)
145. Bennett, note 113 above, 77. [↑](#footnote-ref-121)
146. Thomas Hobbes, *Leviathan* XIV, 1651. For Adam Smith, see endnote Z. [↑](#footnote-ref-122)
147. In 1759 in *The Theory of Moral Sentiments* (Uplifting Publications 2009, 77) Adam Smith wrote, ‘Whatever praise or blame can be due to any action, must belong either, first, to the intention or affection of the heart, from which it proceeds or, secondly, to the external action or movement of the body, which this affection gives occasion to; or, lastly, to the good or bad consequences, which actually, and in fact, proceed from it.’ [↑](#endnote-ref-27)
148. *Re F.* (note68 *supra*) at 72; Blackstone, note 96 above, Book III, 2 and Book III, 120. [↑](#footnote-ref-123)
149. Bracton, *On the Laws and Customs of England*,

     http://bracton.law.harvard.edu/Unframed/English/v2/300.htm Vol 2, at 300 (13th century). In *Eshugbayi Eleko v. Officer administering the Government of Nigeria* [1931] AC 662 at 670, Lord Atkin said, ‘It is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive’. [↑](#footnote-ref-124)
150. Finnis, note 39, 229-247; Bratman, note 39. [↑](#footnote-ref-125)
151. On choice and deciding, see endnote AA. On *Bradford Corporation* v*. Pickles* [1895] AC 587, in which ‘motive’ is thought to make no difference to liability, see endnote BB. [↑](#footnote-ref-126)
152. On choice and deciding, see Joshua Shepherd, note 60, 349, ‘[A]n exercise of direct control over decisions is an extension of the skilled mental activity of deliberation, necessarily involves attention, and is initiated in response to attention-mediated indication that terminating deliberation by forming some intention is appropriate’. But, even if it follows effortful reflection, the decision is not necessarily a deductively reasoned conclusion: see note 60.

     To regard *choice* as critical makes the major assumption that actors have a significant degree of free will. In her ‘Do we have free will?’ *New Scientist*, 18 November 2006, 42-45, Patricia Churchland argues that free will and responsibility are best understood as ‘self-control’ (*cf.* autonomy), which has ‘many degrees, shades, and styles.’ ‘Deciding’ to kick a stone entails some conception of free (not pre-determined) will capable of supporting the attribution of causal, moral and legal responsibility.

     However, neuroscientists report data that might be thought threatening evidence of determinism. For example, Chun Siong Soon, *et al*., ‘Predicting free choices for abstract intentions’ (2013) 110(15) *Proc. Nat. Ac. Sciences USA*, 6217–6222, 6220 ‘investigated the formation of spontaneous abstract intentions [not merely simple movement decisions or matters of general awareness, but choosing whether to add or subtract numbers] and showed that the brain may...start preparing for a voluntary action up to a few seconds before the decision enters into conscious awareness’. If the brain has already decided, where is the mind? This particular line of inquiry began with the work of Benjamin Libet, *et al*, ‘Time of conscious intention to act in relation to onset of cerebral activity (readiness-potential)—the unconscious initiation of a freely voluntary act’ (1983) 106(3) *Brain* 623–642. It has been developed by John-Dylan Haynes, Gabriel Krelman and others. For a review that espouses the ‘hard determinism’ that threatens even compatibilist conceptions of free will, but purports to save free will on consequentialist grounds, see Joshua Greene & Jonathan Cohen, ‘For the law, neuroscience changes nothing and everything’ (2004) 359 *Philosophical Transactions of the Royal Society*, *London B* 1775–1785. See also, Julian Baggini, *Freedom Regained: the Possibility of Free Will* (London: Granta, 2015). [↑](#endnote-ref-28)
153. In *Bradford Corporation* v*. Pickles* [1895] AC 587, D’s plan was to: (i) extract the subterranean water; (ii) *in order to* affect adversely C’s waterworks; (iii) *in order to* pressurize C to buy D’s land. Whether called motive, purpose or intention, (iii) was *part of the plan*. That plan included the *consequences*—(ii) and (iii)—that C’s *interests* were *invaded.* However, D’s ‘absolute’ right, as *property owner*, to actthat way on *his* land (without invading C’s close) overrode C’s interest—and there were no other potentially unlawful means. Lord Halsbury thought *acts as such* could be classified as lawful or unlawful: *id*. at 593. *Cf*. *Hollywood Silver Fox Farm Ltd* v. *Emmett* [1936] 2 KB 468; and Milsom note 94 above, Blackstone, note 96, Book III, 120 (malice alone is not enough; there must also be consequent ‘inconvenience’). *Cf.* Adam MacLeod, ‘Bridging the Gaps in Property Theory’ (2014) 77 *Modern Law Review* 1009-1029, 1019, 1023-1025). Macleod cites *Keeble* v *Hickeringill* (1707) East 574, 103 E.R. 1127, (1707) 11 Modern 130, 88 English Reports 945 and *Rideout* v. *Knox* 19 NE 390 (Mass 1889), in which a bad motive inculpated D. [↑](#endnote-ref-29)
154. Glanville Williams, *The Mental Element in Crime* (Jerusalem: Magnes Press, 1965) 37. [↑](#footnote-ref-127)
155. On side-effects, see: Bennett, note 113 above at 95-116; Edmonds, note 65 above; Greene, note 55 above, loc. 3908-4012. [↑](#footnote-ref-128)
156. *Bird* v. *Holbrook* 4 Bing. 628, 632, 130 English Reports 911 (an action on the case): ‘[D] testified that…he wanted to catch the tulip thieves [including C], by injuring them.’ (noted by Finnis, note 39,233). [↑](#footnote-ref-129)
157. Securing an injunction restraining *future* intentional behaviour requires evidence of intentional *past* behaviour or *present* threats. [↑](#footnote-ref-130)
158. Finnis, note 38, 232. Similarly, G. Elizabeth Anscombe, *Intention* (Cambridge MS: Harvard University Press, 2nd edn, 2000) §26 and §36 page 70. [↑](#footnote-ref-131)
159. See Anscombe, note 128 above, 11-15. The carrier cannot claim that his action was involuntary. [↑](#footnote-ref-132)
160. Duncan Sheehan, ‘Mistake, Failure of Consideration and the Planning Theory of Intention’ (2015) 28(1) *Canadian Journal of Law & Jurisprudence* 155-181, 169, see also 157-159. For a convenient literature review, see Kieran Setiya, ‘Intention’, *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), Edward N. Zalta (ed.)

     URL = <http://plato.stanford.edu/archives/spr2014/entries/intention/>. [↑](#footnote-ref-133)
161. Or possibly omission. Although it is difficult to batter by omission, it is not impossible. See *Fagan* (note 115 above). See also, on fi, text at notes 32-37. [↑](#footnote-ref-134)
162. *Fowler* v. *Lanning* [1959] 1 QB 426, 431. See Percy Winfield, ‘The Myth of Strict Liability’, (1926) 42 *Law Quarterly Review* 37-51. [↑](#footnote-ref-135)
163. Damage had occurred and interpretation of Section 2(1) Law Reform (Limitation of Actions, etc.) Act, 1954 was the fundamental issue. [↑](#footnote-ref-136)
164. *Letang v. Cooper* [1965] 1 QB 232 (Court of Appeal) 239. *Cf.* *Wilson* v. *Pringle* [1987] QB 237 (Court of Appeal) [hereinafter ‘*Wilson*’] at 249. See further, endnote CC. [↑](#footnote-ref-137)
165. *Wilson* v. *Pringle* [1987] QB 237, 249, ‘It has long been the law that claims arising out of an unintentional trespass must be made in negligence’ (*per* Croom-Johnson LJ, who had, as counsel some 20 years previously, represented D in *Letang* in which, arguably, that rule was first articulated). But this step has been resisted in Australia: see *Williams* v. *Milotin* (1957) 97 CLR 465 and *Parsons* v. *Partridge* (1992) 111 ALR 257. *Cf.* *Carter* v *Walker* [2010] VSCA 340 [215] (10) (road traffic might be a ‘special category’). [↑](#endnote-ref-30)
166. *Network Rail Infrastructure Limited* v. *Conarken Group Limited* [2010] EWHC 1852 (TCC) [64]-[67], but probably not if D is an automaton or having an epileptic fit: *Public Transport Commission of New South Wales* v *Perry* (1977) 137 CLR 107. But some US states require negligence or intention in trespass to land: see (*e.g*.) See *e.g*. *Randall* v. *Shelton*, 293 S.W.2d 559 (Ky. 1956); *Wood* v. *United Air Lines* 32 Misc.2d 955 (N.Y. Misc. 1961). [↑](#footnote-ref-138)
167. *Bush* v. *Smith* (1953) 162 Estates Gazette 430; *Gregory* v. *Piper* (1829) 109 English Reports 220. In Scotland, aps does not apply in trespass to land, see James Bailey ‘Trespass in Scots Law: Re-examining the Recovery of Damages’ paper at Society of Legal Scholars Conference, 2016. [↑](#footnote-ref-139)
168. *Michael*, note 78 above [172]. [↑](#footnote-ref-140)
169. It is argued below that these interests can usefully be considered quasi-proprietorial. *Cf*. Gregory Keating, ‘Personal Inviolability and “Private Law”’ (2007) 1(2) *Journal of Tort Law* Article 4. [↑](#footnote-ref-141)
170. Holmes, note 108, 73-74. *Cf.* JL Austin’s approach, endnote DD. [↑](#footnote-ref-142)
171. See also JL Austin, *How to do Things with Words*, 2nd edition (Cambridge MS: Harvard University Press, 1975) 107-108. ‘That we can import an indefinitely long stretch of what might also be called the “consequences” of our act into the act itself is, or should be, a fundamental commonplace of the theory of our language about all “action” in general. Thus if asked “What did he do?”, we may reply either “He shot the donkey” or “He fired a gun” or “He pulled the trigger” or “He moved his trigger finger”, and all may be correct.’ [↑](#endnote-ref-31)
172. *Wilson,* note 134 above*,* 249. [↑](#footnote-ref-143)
173. *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co. Ltd.* [1961] AC 388. [↑](#footnote-ref-144)
174. JL Austin, *How to do Things with Words*, 2nd edition (Cambridge MS: Harvard University Press, 1975), 4. See also: Pinker note 65 above, 67; *A* v*. Bottrill* [2002] UKPC 44; [2003] 1 AC 449. (Privy Council) [38]. [↑](#footnote-ref-145)
175. Michael Moore, ‘Four Friendly Critics: a Response’ (2012) 18 *Legal Theory* 491-542, 497-501. [↑](#footnote-ref-146)
176. Pinker, note 65 above, 188-189, and 64-72, Moore, note 143 above, 494-498. [↑](#footnote-ref-147)
177. [2019] EWCA Civ 1312 [71]-[72] emphasis added. Re ‘deliberate’, see Peter Cane, *The Anatomy of Tort Law* (Oxford: Hart Publishing, 1997), 32. [↑](#footnote-ref-148)
178. Whilst consequential bruising and bleeding are distinguishable from touching, they also readily evidence damage. See Pinker note 65 above, 66-69. [↑](#footnote-ref-149)
179. Shachar Eldar, ‘Examining Intent through the Lens of Complicity’ (2015) 28 *Canadian Journal of Law & Jurisprudence* 29-50, 50. [↑](#footnote-ref-150)
180. [1984] NILR 356. [↑](#footnote-ref-151)
181. Note 106 above. [↑](#footnote-ref-152)
182. *Livingstone*, note 148 above*,* 361. See also *Bici,* note 17 above*,* [71]. *Cf.* the rejection of imputation in *Rhodes*, note 18 above[81]. But in *Livingstone* and *Bici* there was no need to *impute* any original intention to hit the target. That could be *inferrred*. [↑](#footnote-ref-153)
183. When D’s conduct falls below the objective standard for negligence (in which C must show damage), intention is hardly exculpatory. But in some jurisdictions a claim might be blocked for reasons of formalistic categorization: see *New South Wales* v. *Lepore* (2003) 212 CLR 511 [270] ‘the intentional infliction of harm cannot be pleaded as negligence’ (*per* Gunmow and Hayne JJ); and *Cousins v. Wilson* [1994] 1 NZLR 463. 468. *Cf*. Lord Denning’s categorizing approach in *Letang*,note 134 above. [↑](#footnote-ref-154)
184. *Cf.* Austin, note 139 above, 11, fn. 4. Which of these ‘excuses’ D? Shooting C’s donkey *mistaking* it for one’s own? Shooting C’s donkey *accidentally* whilst aiming at one’s own? [↑](#footnote-ref-155)
185. Alvin Gouldner, *The New Criminology* (London: Routledge & Keagan Paul, 1973) ix. See *Bici*, note 150 above, [68]. The transference device is particularly unconvincing where D would have been been justified in shooting X in self-defence (or planned to fire only to warn X), but missed and offended nearby C, who was not threatening D. There would be no fictionally-complete assault or battery to transfer. [↑](#footnote-ref-156)
186. See text and notes 17-22 above. [↑](#footnote-ref-157)
187. Mulheron, note 38 above*,* 84, relies on this concept as an important ring-fence around an expanded ‘scope of recoverable mental injury’ for negligence, which is not actionable *per se*. Although misfeasance in public office requires intention, it also requires ‘material damage’: *Cf*. *Hussain* v. *West Mercia Constabulary* [2008] EWCA Civ. 1205 [16]. Maurice Kay LJ said [20], ‘Whilst it is entirely appropriate to deny actionability where the non-physical consequences are trivial…it is important not to set the bar too high.’ He focused on a compensable ‘*grievous non-physical* reaction’ (emphasis added) and perhaps on *deterrence* rather than C’s *vindication*. See also Mark Aronson, ‘Misfeasance in Public Office’ http://www.lawcom.gov.uk/wp-content/uploads/2016/01/apb\_tort.pdf (viewed 6 September 2016). [↑](#footnote-ref-158)
188. *Wilson*, note 134 above, 253. [↑](#footnote-ref-159)
189. *Collins* v. *Wilcock* [1984] 1 WLR 1172, 1180E. [↑](#footnote-ref-160)
190. *Re F*, note 68 above. *Re F* concerns the justification of involuntary sterilisation as being in the best interests of the subject. The best interest test entails trust in judicial integrity. In *re B (a minor)* (wardship: sterilisation) [1988] AC 199, 202 Lord Hailsham was at pains to deny any question of eugenics, responding to the chairman of Mencap’s accusation that the courts below had authorised the subject to be ‘spayed like a bitch’ (see *The Times*, 22 August 2016, Obituary, Lord Rix). *Cf.* the blatant eugenics—to ‘prevent our being swamped with incompetence’—of Holmes’s judgement in *Buck* v. *Bell*, (1927) 274 U.S. 200, 207, ‘It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.’ [↑](#footnote-ref-161)
191. On Lord Goff’s principle, surgeons who operate with patients’ consents are not tortfeasors with good defences. Their *acts* being justified by virtue of the consent, they commit no tort at all. See McCowan J in *Freeman* v. *Home Office (No 2)* [1984] 2 QB 524, 539. *Cf.* Croom-Johnson LJ’s reliance on a notion of implied consent to the risk of injuries (*Wilson*, 253). In *Freeman* v. *Home Office (No. 2)* [1984] 2 QB 524 CA, 557, Lord Donaldson MR thought that the *volenti* defence, ‘does not negative the cause of action itself.’ See Eric Descheemaeker, ‘Tort Law Defences: a Defence of Conventionalism’ (2014) 77(3) *Modern Law Review* 493-512. *Cf.* *Blake* v. *Galloway* [2004] EWCA Civ. 814 [24] *per* Dyson LJ: C’s consent to the ‘understandings and conventions of the game’ of horseplay exculpated D. [↑](#footnote-ref-162)
192. *Re F*, note 68 above, at 72. [↑](#footnote-ref-163)
193. See Hamlin *et al.* ‘Social evaluation by preverbal infants’ (2007) 450 *Nature* 557–559. In email correspondence with the author in August 2016, Kiley Hamlin suggested, albeit tentatively, ‘the more general idea that one should not force/coerce someone to do something they do not want to do, should not restrict others' rights, etc.—with false imprisonment being the worst offence on this continuum. Hindering may be another version of this more general idea—thou shalt not block others' goals.’ [↑](#footnote-ref-164)
194. In *Malette* v. *Shulman* 72 O.R. (2d) 417, the Ontario Court of Appeal held that it is battery to give an unconscious patient who has previously indicated ‘no blood transfusions’ a life-saving blood transfusion. See also *F.* v. *F.* [2013] EWHC 2783 [Fam] in which a 15 year old girl’s refusal to consent to the battery that mmr vaccination entailed was overridden. Refusal was treated as evidence of lack of capacity. *Cf.* *Gillick v. West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 *(*15 year old was held competent to consent to contraceptive treatment). Could the child in *F* v. *F* have claimed an injunction to prevent the (elective) battery? *Cf*. Wertheimer, note 84 above*.*  [↑](#footnote-ref-165)
195. [1990] 2 AC 1, 72-74. [↑](#footnote-ref-166)
196. See note 159. A strict reading of Lord Hope’s comment at 32 in *Evans*—‘the essence’ of fi is ‘imprisonment…without lawful justification’—might suggest the opposite, but that would clash with current general understanding. [↑](#footnote-ref-167)
197. See note 161 above. [↑](#footnote-ref-168)
198. Writs for trespass *vi et armis* can be found as early as (1348) YB 22 Edw III, Lib. Ass., pl 56, in Sir John Baker & SFC Milsom, *Sources of English Legal History* (2010) at 353-354. See also Maitland, note 99 above, 89. *Habeas corpus*, a prerogative writ, eventually provided another way to challenge imprisonment. [↑](#footnote-ref-169)
199. [2001] 2 AC 19; [2000] UKHL 48. (House of Lords) [hereinafter ‘*Evans*’]*.* [↑](#footnote-ref-170)
200. [2001] 2 AC 19, 35: see also Lords Slynn and Browne-Wilkinson, 26-27. [↑](#footnote-ref-171)
201. [2015] EWCA Civ 843 [301]. [↑](#footnote-ref-172)
202. See Gregory Keating, *‘Strict Liability Wrongs’* in John Oberdiek (ed.), *The Philosophical Foundations of the Law of Torts* (Oxford: Oxford University Press, 2014) 292-311. [↑](#footnote-ref-173)
203. See note 132 above. [↑](#footnote-ref-174)
204. Lord Hope, *Evans*, note 167 above, 35. [↑](#footnote-ref-175)
205. As when D is liable just because causally connected, irrespective of any intention targeted at C or any want of care for C. [↑](#footnote-ref-176)
206. Lady Hale, *Lumba* [217]. See also *Attorney General of Trinidad and Tobago* v. *Ramanoop* [2006] 1 AC 328 [19]. [↑](#footnote-ref-177)
207. *Michael,* note 78 above, [177] emphases added. [↑](#footnote-ref-178)
208. [1988] 1 WLR 692, 703, endorsed by Lord Dyson in *Lumba* [64]. [↑](#footnote-ref-179)
209. See Joel Feinberg, *Harm to Others* (New York: Oxford University Press, Vol I, 1984) 79-95. *Cf.* Cane’s remark that the harm principle is ‘at most, a necessary and not a sufficient condition of legal liability’ (Peter Cane, ‘Taking Law Seriously: the Starting Points of the Hart/Devlin Debate’ (2006) 10 *Journal of Ethics* 21-51, 42). Cane objects that Feinberg ‘effectively collapses the distinction between wrongfulness and harmfulness’—depriving the harm principle of all ‘analytical purchase’ (*id*., at 43 and 30-38), but it is argued here that the non-trivial invasion of a recognized interest is a good—necessary but not sufficient—reason to support a *claim* for legal protection. See also Barbara Fried’s views, endnote EE. [↑](#footnote-ref-180)
210. Barbara Fried considers Judith Jarvis Thomson’s vignette—playing Russian roulette, squeezing the trigger but neither shooting nor waking a sleeping C—from ‘Imposing Risks’inThomson’s *Rights, Restitution, and Risk: Essays in Moral Theory* (Cambridge MS: Harvard University Press, 1986) 163. Fried comments,‘Surely most people would think that the central wrong…is not the contempt the would-be killer thereby expresses for your worth as a person, or the transitory anxiety he causes you, but the fact that he actually could have killed you’ (Barbara Fried, ‘The Limits of a Nonconsequentialist Approach to Torts’ (2012) 18(3) *Legal Theory* 231-262, 247). But why must we choose *between* respect and risk? The respect argument should not be ruled out *categorically* but required to meet a threshold of seriousness. [↑](#endnote-ref-32)
211. John Murphy, ‘The nature and domain of aggravated damages’ (2010) 69(2) *Cambridge Law Journal* 353-377, 363. [↑](#footnote-ref-181)
212. Note 29 above. [↑](#footnote-ref-182)
213. Lord Phillips, *Lumba* [221]. [↑](#footnote-ref-183)
214. See *Lumba*, *per* Lord Brown at [342] and [357] and Lord Phillips at [333]. In essentially *public* law terms, the minority denied that ‘a flawed decision-making *process*’ made C’s continued detention ‘unlawful.’ *Cf.* Shiffrin’s arguments, note 225 above, 367, that one can be harmed even though not made ‘worse off than [one] otherwise would have been’. [↑](#footnote-ref-184)
215. *Lumba* [239]. By a 3:2 majority, the Supreme Court reached a similar conclusion in *Kambadzi* v. *Secretary of State for the Home Department* [2011] UKSC 23. Failure ‘without good reason’ to review C’s detention regularly as required by the policy rendered C’s continued detention unlawful. ‘In principle it must follow that tortious remedies will be available, including the remedy of damages’ (*per* Lord Hope at [52]). [↑](#footnote-ref-185)
216. Armatya Sen, *The Idea of Justice* (London: Allen Lane 2009) 22-3, emphases added. See also: *James, Wells and Lee* v. *UK* (2013) 56 EHRR 12 [201]-[222] (indefiniteness indicates arbitrariness of imprisonment); *Huckle* v. *Money* (1763) 95 English Reports 768 at 769 (the arrest was ‘arbitrary’ because the warrant did not name the detainee). On fi as a right of a constitutional nature, see endnote FF [↑](#footnote-ref-186)
217. *Cf*. *Walker* v. *Commissioner of the Police of the Metropolis* [2014] EWCA Civ. 897: C’s brief detention in a doorway by a police officer, before C’s unlawful violence and subsequent arrest, was tortious false ‘imprisonment’, but marked only by £5 nominal damages. At first instance the claim was thought too technical and trivial to constitute ‘imprisonment’ in fi. But, for the Court of Appeal, the constitutional-type requirement that all detentions by *state officers* be clearly authorized *ex ante* outweighed *de minimis* arguments. [↑](#endnote-ref-33)
218. Sir John Baker, *The Oxford History of the Laws of England, Volume VI* (Oxford, Oxford University Press, 2003) 87-88, citing *Whele’s case* (1483) Hil. 22 Edw. IV, fol 45, pl 9. [↑](#footnote-ref-187)
219. *E.g.* Lord Dyson, *Lumba*, [65]. See: *Grinham* v. *Willey* (1859) 157 English Reports 934, 935 (Pollock CB); Donal Nolan, ‘New Forms of Damage in Negligence’ (2007) 70*Modern Law Review* 59-88, 68; and *Davidson* v. *Chief Constable of North Wales* [1994] 2 All ER 597. [↑](#footnote-ref-188)
220. Similarly, liability in trespass to goods extends not just to those who wield the cutting tools but to all who combine to secure ‘acts [cutting C’s fishing nets] which in the event prove to be tortious’ (Beatson LJ in *Fish & Fish Ltd* v. *Sea Shepherd UK* [2013] EWCA Civ. 544 at [66]). On appeal, [2015] UKSC 10 [26], the Supreme Court held the appellant organization’s role merely of ‘minimal importance’ in the ‘joint design’. Nevertheless, a concept of *conditional intention* was expressly recognized [27]. See further, Sheehan, note 130 above, 162-167. [↑](#footnote-ref-189)
221. [1992] 1 AC 58,162 C-D [bracketed interpolation added]. Broad though these words are, Hague’s incarceration was undoubtedly *intended*. See further, endnote GG. [↑](#footnote-ref-190)
222. Lord Bridge’s words in *Hague*, note 187, are almost verbatim from Blackstone, note 96, Book 3, Chapter 8, 127. Note the absence of any mention of intention or directness. Similarly, in *Evans* at 32, Lord Hope found ‘the essence of the tort’ in ‘imprisonment…without lawful justification’. In *Austin v. Metropolitan Police Commissioner* [2009] UKHL 5, demonstrators *‘*kettled’ by police were deemed ‘imprisoned’ but not ‘deprived of their liberty’ within Article 5 of the Convention, thus sidestepping the Article 5 §1 (a)-(f) exceptions. See also: *Austin v. United Kingdom* (2012) 55 EHRR 14 for a similar view of Article 5. [↑](#endnote-ref-34)
223. [2005] EWCA Civ. 38 [54]. [↑](#footnote-ref-191)
224. See, Joseph Raz, *Practical Reason and Norms* (London: Hutchinson, 1975) 35-48. D3 (the employing organization) will be vicariously liable for D1’s tort and/or liable ‘personally’. [↑](#footnote-ref-192)
225. The strictness might be better justified as a form of enterprise liability for the inevitable risk inherent in the organization’s activity (not the individual’s action), in which case the government agency, and not its individual employee, would be the appropriate D. [↑](#footnote-ref-193)
226. Liability in trespass to land is arguably stricter in the UK, requiring no targeted C: see text at notes 199 and 200. [↑](#footnote-ref-194)
227. *Iqbal* at [73]–[74]. In *Bici*, note 150 above*,* [67], Elias J said that D’s *subjective* appreciation of, and indifference to, potential harm to C would be sufficient in principle. In *Rhodes*,note 150 above[82]-[87] and [113], the Supreme Court held recklessness insufficient for liability under the *Wilkinson* v *Downton* principle. [↑](#footnote-ref-195)
228. *Bici* at[67]. See also Cane, note 145 above, 33-34. [↑](#footnote-ref-196)
229. (1845) 115 English Reports 668. [↑](#footnote-ref-197)
230. *Chaytor* v. *London, New York and Paris Association of Fashion Ltd* (1961) 30 DLR (2d) 527 (Newfoundland Supreme Court, Dunfield J at 536-537. For other comparators, see endnote HH. [↑](#footnote-ref-198)
231. *Cf.* *Yemshaw* v. *Hounslow LBC* [2011] UKSC 3 at [19] and *Hussain* v. *London Borough of Waltham Forest* [2015] EWCA Civ 14 at [32] (‘violence’ in Section 177(1) Housing Act 1996 need not be physical if it is ‘of such a nature and seriousness as to be liable to cause psychological harm.’); *Page* v. *Smith* [1996] AC 155 at 186 (Lord Lloyd thought the physical/psychiatric distinction might ‘soon be altogether outmoded’). In an invisible handcuffs case, *Godwin* v. *Uzoigwe* ([1993] *Family Law* 65; *The Times*, 18 June 1992) £20,000 substantial damages were awarded. However, intimidation, false imprisonment and breach of contract were conflated as one ‘intimidatory situation’.

     Estimates of up to 13,000 ‘enslaved’ persons in the UK emerged in November 2014: see

     http://www.bbc.co.uk/news/uk-30255084 (visited 3 December 2014). The 2016 figure is thought to be some 13,000: see http://www.unseenuk.org/about/the-problem (visited 31 July 2016). A Home Office consultation in 2014 has led to a Government proposal to ‘explicitly criminalise patterns of coercive and controlling behaviour where they are perpetrated against an intimate partner or family member’: see

     https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/389002/StrengtheningLawDomesticAbuseResponses.pdf, visited 4 January 2015). The many victims of enslavement who are not intimate partners or family members will benefit from the new offence of knowingly holding another person in slavery or servitude in Modern Slavery Act 2015, Section 1. However, criminal prosecutions are not controlled by or on behalf of victims in the way that tort claims can be. [↑](#endnote-ref-35)
232. ‘[R]estraint within some limits defined by a will or power exterior to our own’(*per* Coleridge J in *Bird*, note 194 *above* at 669). [↑](#footnote-ref-199)
233. *Ibid*. 673. [↑](#footnote-ref-200)
234. *Cf.* *Austin* v. *Metropolitan Police Commissioner* [2009] UKHL 5 (endnote GG)*.* If Iqbal (note 33 above) had sued the Governor, *Austin* would have supported defences of: necessity (fi); and no material deprivation of liberty (Article 5). [↑](#footnote-ref-201)
235. *Basely* v. *Clarkson* (1680) 83 English Reports 565 (carelessly crossing unmarked boundary); *cf. Smith* v. *Stone* (1647) 82 English Reports 533 (a third party carried D forcibly). See also *Conway* v *George* *Wimpey* *& Co Ltd* [1951] 2 KB 266, 273-274. [↑](#footnote-ref-202)
236. Camden LCJ, *Entick v. Carrington* (1765) 95 English Reports 807, 817. Intrespass to goods, knowledge of title can aggravate trespass, but is not a ‘constituent part’: *Leitch* v. *Leydon* [1931] AC 90, 107 *per* Lord Blanesburgh. [↑](#footnote-ref-203)
237. Avihay Dorfman, *The Normativity of the Private Ownership Form*, (2012) 75*Modern Law Review* 981-1009, 1007, justifies the over-inclusive tendency of the proprietary form on the generalizable ground that it requires duty-holders to respect rights-holders’ autonomy. See also Smith & Merrill, note 83 *above* at 1890-1893. [↑](#footnote-ref-204)
238. *Per* Lord Hope in *Evans* at 35. Lords Slynn, Browne-Wilkinson and Steyn agreed. Holding the morally innocent Governor (an individual employee) *personally* liable seems difficult to justify, albeit as the means to the end of vicarious liability. A better articulated conception of organizational responsibility is required. [↑](#footnote-ref-205)
239. *Liversidge* v. *Anderson* [1942] AC 206, 245, dissenting, emphasis added. See Christopher Wadlow, ‘A riddle whose answer is “Tort”’ (2013) 76*Modern Law Review*649-680, 658-661. [↑](#footnote-ref-206)
240. Brooke LJ in *D v Home Office*, note 188above, [114]. [↑](#footnote-ref-207)
241. *Evans* at 42. ‘it is no defence for [D] to say that he believed he could justify it [or] that he acted in good faith.’ [↑](#footnote-ref-208)
242. Article 5 §1 damages are available for ‘feelings of distress and frustration resulting from continued detention’, provided the deprivation of liberty is ‘arbitrary’: see *R. (on the application of Faulkner)* v*. Secretary of State for Justice* [2013] UKSC 23*.* [↑](#footnote-ref-209)
243. *Sayers* v. *Harlow Urban District Council* [1958] 2 All ER 342. [↑](#footnote-ref-210)
244. See Nolan, note 185 *above* at 62-70 and 68. In *Weldon* v. *Home Office* [1990] 3 WLR 465 at 470, Gibson LJ expressly left open the question whether negligence would suffice. [↑](#footnote-ref-211)
245. The Reillys might suffer pure economic loss. See endnote II. [↑](#footnote-ref-212)
246. Presumably, had the Reillys suffered pure economic loss because their imprisonment had caused them to miss some deadline and thus to incur a financial penalty, they would have been denied recovery because the economic loss was not the consequence of physical damage to person or property: see *Cattle* v. *Stockton Waterworks* *Co*. (1875) 10 LR QB 453. The ‘*Hedley Byrne* exception’ allowing recovery for loss caused by C’s reasonable reliance on D’s words uttered in a relationship equivalent to contract would not apply. See *Hedley Byrne* v. *Heller Partners* [1964] AC 465. [↑](#endnote-ref-36)
247. *Rees*, note 24, approved in *Montgomery* note 13 [108]. [↑](#footnote-ref-213)
248. Note 26 above. See also note 30 above. [↑](#footnote-ref-214)
249. *Entick,* note 200 above*,* 817. [↑](#footnote-ref-215)
250. On tort theories, see endnote 213. [↑](#footnote-ref-216)
251. Tort theory is often unclear in two respects. Firstly, is it explaining and/or justifying tort law as it is? Or is it a manifesto for tort law’s reform? Secondly, there are the tensions between the deontological and the consequentialist views. The former pay little attention to issues of probability and proportionality (see Seth Lazar, ‘Deontology, Uncertainty, and Options to Act Suboptimally’ and ‘Moral Sunk Costs’, drafts posted on *Academia.edu*, visited 12 July 2016). The consequentialist view depends ultimately on some test of what consequences are bad. Civil recourse theory also requires that there be some definition and, presumably, justification of duties and rights. See John Goldberg and Benjamin Zipursky, ‘Tort Law and Responsibility’ in Oberdiek (ed.) note 170, 18, ‘Tort law is best understood as law that defines duties not to injure others and leaves those who have breached such duties vulnerable to their victims’ demands for responsive action.’ This leaves us waiting for the other shoe to drop. [↑](#endnote-ref-37)
252. Holmes, note 108 above, 63. [↑](#footnote-ref-217)
253. David Friedman, ‘Beyond the Tort/Crime Distinction’ (1996) 76 *Boston University Law Review* 103-112, 108-109 and, at 109 fn 30, ‘The transfer of economic resources was, ‘[i]n the case of a writ of trespass,…both to the victim and to the crown; in the case of an indictment of trespass, it was usually to the crown alone, although occasionally to the victim as well.’ [↑](#footnote-ref-218)
254. James F. Stephen, *A General View of the Criminal Law of England* (London: Macmillan, 1863) 1-2. [↑](#footnote-ref-219)
255. Interestingly, philosophers seem to attend little to the distinction between punishing wrongdoers and compensating their victims. John Stuart Mill offered no conclusive test justifying legal as opposed to moral intervention. He was concerned not with compensation but with moral reprobation, retribution and punishment. He was silent on the distinction between *tort* and *crime* (*cf.* Cane, note 177 above, 38-46). Similarly, Immanuel Kant thought unspecified, but probably criminal, coercion justifiable if, and only if, A’s freely-chosen act had infringed B’s freedom (Kant, note 75 above, 24-26). [↑](#footnote-ref-220)
256. Dan Priel, ‘Tort Law for Cynics’, (2014) 77(5) *Modern Law Review* 703-731, 713. See Scott Hershovitz, *Tort as a Substitute for Revenge*, in Oberdiek (ed.), note 170 above, 86-102, for a distinction between vindictiveness and vindication. [↑](#footnote-ref-221)
257. Priel, note 16; Carol Harlow, ‘A punitive role for tort law?’ in Carol Harlow *et al* (eds.) *Administrative law in a changing state: essays in honour of Mark Aronson* (Oxford: Hart, 2008) 247-271. [↑](#footnote-ref-222)
258. John S. Mill, *On Liberty* (London: Penguin Classics, 2006, original 1859) 93. [↑](#footnote-ref-223)
259. Raymond, Lord Plant, ‘The Common Good’ in Jane Garnett *et al* (eds.), *Redefining Christian Britain—post 1945 Perspectives* (London: SCM Press, 2007) 257. [↑](#footnote-ref-224)
260. See Asquith J in *Kerr* v. *Kennedy* [1942] 1 KB 409, 411. [↑](#footnote-ref-225)
261. Mill uses damage and does not use ‘harm’. *Cf*. Lord Lloyd’s approach in *Page* v *Smith* [1996] A.C. 155, 187-189. [↑](#footnote-ref-226)
262. Mill, note 220 above, 72-73, 51. ‘Inherent worth’ is interestingly deontological. [↑](#footnote-ref-227)
263. Feinberg, note 177 above, 26: a ‘good reason’ is not necessarily *conclusive* or *sufficient* or *exclusionary* of other contributory reasons. It might simply be so far ‘undefeated’ (Joseph Raz, *Between Authority and Interpretation* (Oxford: Oxford University Press, 2009) 6 and 216-7; see also Cane, note 217 above at 30-38. *Cf.* Seana Shiffrin, *Harm and its Moral Significance* (2012)18 *Legal Theory* 357-398, 395-396. Shiffrin tentatively concludes that only offence that interferes with ‘actions and judgments for which it is an essential component of autonomy rights that individuals enjoy the freedom to make their own decisions about them’ should count as *harm*. [↑](#footnote-ref-228)
264. Rosen, note 21, 69, argues that, despite Wackenheim’s protestations, dwarf-tossing’s indignity *harms* the community of dwarfs. *Cf. Laskey, Jaggard and Brown* v. *UK* (1997) 24 EHRR 39; and *R* v. *Coney* (1881-82) LR 8 QBD 534, 549. [↑](#footnote-ref-229)
265. See Guido Calabresi and Douglas Melamed, ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’ (1972) 6 *Harvard Law Review* 1089-1128, 1111-1115. Under Section 1(5) Modern Slavery Act 2015, consent ‘does not preclude a determination that the person is being held in slavery or servitude, or required to perform forced or compulsory labour’. [↑](#footnote-ref-230)
266. Mill 1859 at 96 and 94-105. The ‘moral policewoman’, Mary Whitehouse, was permitted to bring a private prosecution for the now abolished offence of blasphemy: *Whitehouse* v. *Lemon* [1979] AC 617 and *Gay News Ltd*. v. *UK* (1982) 5 EHRR 123. Section 6(1) Prosecution of Offences Act 1985 preserves private prosecutions, subject to the DPP’s control. Prosecutors must have a ‘special interest’: *Gouriet* v. *Union of Post Office Workers* [1978] AC 435 at 482. Can attempts to ban burkinis be justified by: public offence; defence of (sacred) secularism; or paternalistic concern that the wearers are oppressed? [↑](#footnote-ref-231)
267. Article 6, *Universal Declaration of Human Rights*, provides, ‘Everyone has the right to recognition everywhere as a person before the law.’ However, this begs the question of what personhood entails. [↑](#footnote-ref-232)
268. Ripstein, note 14 above, 5, fn. 3, criticizes Feinberg. Ripstein argues that the true principle is not *harm* (however thickly conceived)but *sovereignty*—a version of *autonomy* that ‘rests on a simple but powerful idea: the only legitimate restrictions on conduct are those that secure the mutual independence of free persons from each other’ (*ibid.* 17). See further, endnote KK. [↑](#footnote-ref-233)
269. My elaborately harmless nap in your bed—Ripstein’s example of the harmless trespass—demotes your choice to a wish which I override, as it were, despotically. Ripstein touches on the issue of private law standing, commenting that, ‘The trespass against your person is primary, and any consequent injury secondary to it.’ (*ibid.* at 25 and 30). *Cf.* Shiffrin’s contention, note 225 *supra* at 386, that a violation of autonomy *should count as harm* ‘because another's will is being imposed upon one in an arena in which one's will is supposed to be supreme.’ See also Ripstein’s ‘Tort Law in a Liberal State’ (2007) 1(2) *Journal of Tort Law*, Article 3, 1-43. *Cf*. Barbara Fried, ‘The Limits of a Nonconsequentialist Approach to Torts’ (2012) 18(3) *Legal Theory* 231-262. [↑](#endnote-ref-38)
270. Feinberg, note 177 above, 34. [↑](#footnote-ref-234)
271. *Ibid*. 35; *cf.* Cane, note 83 above, 42-43. Shiffrin, note 225 above, 367, is right that Feinberg’s approach here is not a comprehensive theory of harm. The *protection* of an interest constitutes the right, so that invasions of that right are necessarily incursions into the protected interest. Whereas Feinberg seems to see the right as logically prior when he says, ‘One person wrongs another when his indefensible (unjustifiable and inexcusable) conduct violates another’s right, and in all but certain very special cases will also invade the other’s interests and so be harmful.’ Nevertheless, his emphasis on interests usefully points the way to a thicker conception of harm. [↑](#footnote-ref-235)
272. Feinberg 1984, 33-34. *Cf.* Margaret J. Radin, ‘Property and Personhood’ (1982) 34 *Stanford Law Review* 957-1015, 992, ‘The home is affirmatively part of oneself—property for personhood—and not just the agreed-on locale for protection from outside interference.’ In *R (Walford)* v. *Worcestershire County Council* [2014] EWHC 234 (Admin) at [51] Supperstone J said, ‘Home is a place to which a person has a degree of attachment both physical and emotional. The test as to whether a person occupies premises as their home is both qualitative and quantitative.’ [↑](#footnote-ref-236)
273. See Hershovitz, note 218 above. [↑](#footnote-ref-237)
274. See *Star Energy Weald Basin Limited* v *Bocardo SA* [2010] UKSC 35. On the evolution of the absolute conception of rights in land, see Francesco Parisi, note 82 above. On the etymology of harm, see endnote LL. [↑](#footnote-ref-238)
275. Etymologically: ‘harm’ is associated with ‘hurt’ and ‘insult’; and ‘damage’ with ‘loss’. Some dictionaries give ‘harm’ less substantively consequentialist secondary meanings: ‘mischief’ (Merriam-Webster, Longman and Shorter Oxford or ‘wrong’ (Longman and Shorter Oxford) or ‘moral evil’ (Collins) or ‘moral injury’ (Random House Kernerman Webster's); ‘hurt’, ‘sorrow’, ‘an affliction’ (Shorter Oxford). See also *(e.g*.) James Woodward, *‘*The Non-Identity Problem’ (1986) 96*Ethics* 804-831, 818, argues that, irrespective of C’s well-being, C is ‘harmed…whenever [D’s] action…violates some right possessed by or obligation owed to that person’. Certainly C may regret D’s conduct when aware of it. Similarly, Roger Brownsword, ‘Cloning, zoning and the harm principle’ in Sheila A. McLean (ed.), *First Do No Harm: Law, Ethics and Healthcare* (Aldershot: Ashgate, 2006) 527-542, contends that there is harm ‘where the autonomy of rights-holders is compromised’. See Ripstein, endnote KK above, 14-15. However, Ripstein regards this usage of ‘harm’ as ‘just an umbrella term for any violation of any legal interest’ (*ibid*. 30-31). He makes an over-rigid distinction between harm-based and trespass-based torts. Furthermore, by construing ‘private law’ as *excluding* ‘public law’, he allows no space for the strictness of enterprise liability that is very appropriate to a world of risk-generating *activities* rather than particular Ds’ *acts* towards particular Cs. See Keating, note 138. [↑](#endnote-ref-39)
276. What matters for present purposes is that property rights entitle us—without any further justification—to the benefit of both: prophylactically *exclusionary* ‘property’ rules; and *compensatory* ‘liability’ rules against interferers. The analogy will serve, although it is moot whether property rights are extensions—perhaps through our labours—of our ownership of ourselves, or founded on the facilitation of collaboration. See Rose, endnote R. [↑](#footnote-ref-239)
277. *Re F.* note68above, 72; Blackstone, note 96 above, Book III, 2; Blackstone 1765, Book III, 120. [↑](#footnote-ref-240)
278. Raz, note 189 above, 35-48; Smith, note 56, 3-4, 7-8. Henry Smith comments at 9 that efficient communication of norms applies with particular force to proprietorial and quasi-proprietorial law: Feinberg argues that‘legal wrongs [are] invasions that violate established priority rankings’ (Feinberg note 177, 35). To categorize an interest as proprietorial is to promote it in the ranking of reasons that will contribute to a decision. Thus, an interest can progress: from manifesto claim; to recognized right; to quasi-proprietorial right (Feinberg, note 5, 275). [↑](#footnote-ref-241)
279. Smith & Merrill, note 32 above, 1867; Stake, note 81 above, 1764-1766. [↑](#footnote-ref-242)
280. Feinberg suggested that ‘“human dignity” may simply be the recognizable capacity to assert claims’ (Feinberg, note 238 above*,* 275). Similarly, Rosen argues that claims do not *identify* but *presuppose* rights (Rosen, note 226 above, 57). On correlativity in tort law, see: Cane, note 193 above. See also, Grégoire Webber, endnote MM. [↑](#footnote-ref-243)
281. See Grégoire Webber, 'On the Loss of Rights' in G. Huscroft, *et al.* (eds) *Proportionality and the Rule of Law: Rights, Reasoning, Justification* (New York: Cambridge University Press 2014), ‘[t]he word ‘interest’ captures the controlling idea in the account of rights under the received approach: all that is advantageous for, beneficial to, or the concern of an individual’. He also comments that the received approach of defeasible rights has the ‘most curious and unfortunate feature [that] *we come to know what rights truly, justifiably require only through their violation*’.(https://www.lse.ac.uk/collections/law/wps/WPS2014-13\_Webber.pdfat 21, original emphasis, visited 28 July 2016). [↑](#endnote-ref-40)
282. Raz, note 238 above, 46. Christopher Essert, ‘Legal Obligation and Reasons*’* (2013) 19 *Legal Theory* 63-88,70-71 contrasts the weighing of contributory reasons with its *verdictive* conclusion. ‘That the action is wrong precisely is just the verdict on the reasons pro and contra’. [↑](#footnote-ref-244)
283. Radin, note 233 above, 959. [↑](#footnote-ref-245)
284. See note 4 above. [↑](#footnote-ref-246)
285. More broadly than compensation, ‘redress’ functions to set matters right. See Hershovitz, note 86 above. [↑](#footnote-ref-247)
286. See Hanoch Dagan, ‘Remedies, Rights, and Properties’ (2011) 4(1) *Journal of Tort Law* Article 3.   
     There are genres of value, each having defining standards: see Raz, note 10 above,133. [↑](#footnote-ref-248)
287. Percy Winfield, *The Province of the Law of Tort* (Cambridge: Cambridge University Press, 1931) 32. [↑](#footnote-ref-249)
288. Chapman, note 23 above, 412, 418, 419 and footnote 23. [↑](#footnote-ref-250)
289. In *Kerr*, note 222 above, 411, Asquith J saw that damages can function as a deterrent fine when D’s conduct is ‘so intrinsically outrageous that [it] ought to be actionable, even if no pecuniary loss results’. Exemplary/punitive damages are not free-standing but parasitic on compensatory damages: Law Commission, *Aggravated, Exemplary* *and Restitutionary Damages* (1997) 1.116. Regrettably, no change was proposed: see 1.44 (20). More broadly, see John Goldberg, ‘Two Conceptions of Tort Damages’ (2006) 55 *DePaul Law Review* 435-468. [↑](#footnote-ref-251)
290. Michael Sandel, What Money Can’t Buy at 9 (2012). [↑](#footnote-ref-252)
291. Rosen, note 226 above; Arlie Hochschild, *The Managed Heart* (Berkeley: University of California Press, 1983); Pinker note 65 above, 119-121. [↑](#footnote-ref-253)
292. Calabresi and Melamed, note 227 above, 1092, 1106-1110. [↑](#footnote-ref-254)
293. See Hamlin, note 7 above, citing evidence that infants as young as five months, who have never seen an act of punishment, approve of some retributive behaviours. In her view, retribution follows two other innate elements: moral goodness and moral understanding. [↑](#footnote-ref-255)
294. Radin, note 25 above, 69 and 73, citing Louis Jaffe, ‘Damages for Personal Injury: The Impact of Insurance’ (1953) 18 *Law and Contemporary Problems* 219, 224. [↑](#footnote-ref-256)
295. On the suitability of a declaration, see Clarke MR in *Ashley* v. *Chief Constable of Sussex* [2006] EWCA Civ. 1085 (Court of Appeal) [96], noted in the Lords [2008] UKHL 25 by Lords Neuberger at [105] and Rodger at [46]. In *McDonnell* v. *UK* (2014) 19563/11 at [90] and [97] €10,000 was awarded in respect of non-pecuniary damage for breach of Article 2 (distress on account of the 18 years ‘excessive investigative delay’ in commencing an inquest into her son’s death in the case). [↑](#footnote-ref-257)
296. *E.g*. *Vinter and others* v. *UK* 66069/09, 130/10 and 3896/10 (2013) [2013] ECHR 645 at [136], but note Judge Ziemele’s reservations at [6]. For other examples, see endnote NN. [↑](#footnote-ref-258)
297. See also *McHugh* v. *UK* 51987/08 (2015) and *Hammerton* v. *United Kingdom* 6287/10 (2016) in which ECtHR awarded €8,400 because ‘the acknowledgment by the domestic courts of the violation of the applicant’s rights under Article 6 by reason of his lack of representation at the contempt-of-court committal hearing [is not] capable, on its own, of affording adequate reparation for the actual and likewise acknowledged prejudice in terms of lengthened imprisonment which, in the circumstances, that violation must be taken to have caused. Accordingly…the applicant can still claim to be a “victim” insofar as he did not receive any redress in the form of financial compensation.’ [↑](#endnote-ref-41)
298. *Lumba* *per* Lord Dyson [34]. [↑](#footnote-ref-259)
299. See Lord Brown, *ibid*. [343]. [↑](#footnote-ref-260)
300. *Id*. [236]. [↑](#footnote-ref-261)
301. *Ibid. per* Lord Hope [180], Lord Walker [195] and Lady Hale [217]. The case involved nine justices and exemplifies the problem that multiple judgments can make the discernment of a majority *ratio* difficult. See Paterson, note 30 above, 141-145, 199. See: James Edelman, ‘“Vindicatory” damages’, Paper presented at TC Beirne School of Law conference ‘Private law in the 21st century’, Brisbane, 15 December 2015; Varuhas, note 44. [↑](#footnote-ref-262)
302. *Lumba* [212]-[213]. [↑](#footnote-ref-263)
303. See note 24 above. [↑](#footnote-ref-264)
304. See Schauer, note 4 above, esp. 548. [↑](#footnote-ref-265)
305. *Ibid*. 548. [↑](#footnote-ref-266)
306. Galanter & Luban, note 16 above, 1394. [↑](#footnote-ref-267)
307. For an example, see *Commissioner of Police for the Metropolis* v. *DSD, NBV* *and Alio Koraou* [2015] EWCA Civ 646 and endnote OO. Lord Neuberger is reported in *The Times Brief* for 2 September 2016 as having said, ‘Judges…had been originally so excited about the new toy of human rights that they left the old one, the common law, in the cupboard.’ [↑](#footnote-ref-268)
308. See*Commissioner of Police for the Metropolis* v. *DSD, NBV* *and Alio Koraou* [2015] EWCA Civ 646. The Convention dignifies victims’ *interests* as *rights* irrespective of the modality of any interference. Article 3, on which the claim in *DSD* for non-fatal abuse is based, articulates an absolute right to be free from ‘torture or to inhuman or degrading treatment or punishment’. This includes such treatment resulting in death. Article 2 (the right to life), on which the surviving claim in *Michael* are based, is qualified but in a relatively specific fashion (death sentences, self-defence or defence of another, lawful arrest, quelling a riot or insurrection). [↑](#endnote-ref-42)
309. Note 78 above. The majority took liability for omissions to be exceptional and emphasized that the police owed duties to the public at large rather than to particular individuals. *Cf.* Lord Reed’s aspiration in *A* v *BBC Scotland* (a case endorsing A’s anonymity in order to protect A from an established risk of serious violence) [2014] UKSC 25, [57] that ‘the Convention and our domestic law…[might] walk in step’. Nevertheless, Lord Reed was in the majority in *Michael,* as was Lord Neuberger. [↑](#footnote-ref-269)
310. See Sections 6(1), 6(6) and 7(1) Human Rights Act 1998. The victim of a public authority’s failure to protect a Convention right can bring a civil claim. In her dissent in *Michael*, Lady Hale clearly thought (see [196]) that, although tort law and ‘issues under the Human Rights Act 1998’ were ‘not identical’, any differences in policy terms were immaterial in protecting a life that was manifestly at high risk. At [192] she said, ‘a court hearing [an HRA-based] claim would have to examine the same factual issues which it would have to examine in a negligence claim’. [↑](#footnote-ref-270)
311. Jeremy Kendall and Martin Knapp, ‘A loose and baggy monster: boundaries, definitions and typologies’ in Rodney Hedley *et al* (eds.) *Introduction to the Voluntary Sector* (London: Taylor & Francis ,1994) 66-95. [↑](#footnote-ref-271)