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Q: What is Tort? A: Categorical Hurt

Anita Bernstein

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Abstract: The capacious and hard-to-confine term Tort challenges observers to identify what it includes and does not include. Offered here to describe tort, the label "categorical hurt" makes reference to two foundational characteristics. "Hurt," the noun in this phrase, insists that tort plaintiffs bring to court their experience of suffering. Its adjective, used in this article to echo the word Immanuel Kant chose to modify a different noun, "imperative," means that tort courts hear claims of general rather than exclusively personal interest. To earn a tort remedy, the suffering reported by a hurt plaintiff must be of a kind that other people can experience and understand.

Keywords: hurt, categorical, civil recourse, injury, feeling, pain, Kant, Posner, common law, bill of attainder

1 Introduction

Tasked to reflect on the current state of tort theory, a writer necessarily must start by describing. Observations that ensue can change the object of their attention, I think, in the mode of what a scholar known for his work away from tort law once called a "legal-academic version of the Heisenberg effect."[1] Description thus becomes exciting as an end in itself. This Article interprets the invitation to be present at this Symposium as a chance to join colleagues in considering the generative *Q: What is tort?*

Among the answers gathered in the pages of this Symposium, mine is new. Not entirely new out of nowhere, however: "Categorical hurt" as a response to "Q: What is Tort?" builds on civil recourse theory, in my opinion the most important contribution to tort theory of the twenty-first century. Like civil recourse as

1 Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 Const. Comment. 101, 113 (1994).

***Corresponding author: Anita Bernstein**, Brooklyn Law School, Brooklyn, NY, 11201-3799, USA, E-mail: ab@brooklaw.edu

expounded by its creators, John C.P. Goldberg and Benjamin Zipursky, "categorical hurt" aspires foremost, but not exclusively, to the aforementioned task of description.[2] My contention about this term is that better than any rival word or short phrase, it covers the central characteristics of tort claims that courts are willing to hear. Terminology that the phrase omits—for example "fault," "wrong," "right," "obligation," "duty," or "welfare"—refer to characteristics found in some but not all tort claims, whereas all torts claims feature categorical hurt.

To start with the noun of the phrase, as I will do below by putting "hurt" at the center of Part 1, tort demands that the plaintiff attribute a detrimental experience of hers to conduct by the defendant. I'll defend "hurt" rather than "wrong" or "injury" as a descriptor of this detriment. Hurt is always personal in the sense of having been suffered by a party rather than theorized, anticipated, heard about, or observed by someone else.

Whereas "hurt" means an unwanted consequence that individuals have experienced and for which they pursue a cash remedy that they as parties will collect,[3] "categorical" extends attention beyond a plaintiff. The adjective, which adverts to aggregation, is famous for modifying the word "imperative" as a noun. An imperative is an obligatory course of action. Its great exponent Immanuel Kant described the categorical imperative as a command to individuals to evaluate their actions with reference to "a maxim that can also hold as a universal law."[4] Read at sufficiently remote generality, this understanding of categorical describes all of law; as Part 2 will elaborate, it fits particularly well with tort.

Unless it maps onto something "categorical" in the sense of generalization, the perception held by an individual of having experienced something bad following the acts or omissions of a defendant receives no remedy in tort. Plaintiffs must have suffered hurt but their hurt is not enough. Their suffering must be of wider interest, capable of being felt by other persons. Detriments that tort will remedy have a judicial history and a future of continuing recognition. Variations on a complaint having been deemed worthy of judicial time in the past, courts stand ready to

2 For expressions of interest in normative directions by the founding authors of civil recourse theory, see John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 Yale L. J. 524 (2006) (urging an understanding to tort rights that locates them in the United States Constitution); Benjamin C. Zipursky, *Palsgraf, Punitive Damages, and Preemption*, 125 Harv. L. Rev. 1757, 1779 (2012) (defending punitive damages as "empowering a private tort plaintiff to be punitive").

3 On cash damages as surpassing other tort remedies in importance, see infra Part 1.3.

4 Immanuel Kant, The Metaphysics of Morals 17 (Mary Gregor trans., 1996) (1797). *See also* Immanuel Kant, Groundwork of the Metaphysics of Morals 30 (James W. Ellington trans., 3d ed. 1993) ("Act only according to that maxim whereby you can, at the same time, will that it should become a universal law.").

provide redress to claimants who come to them with the same detriment. In this sense, every tort claim that can succeed complains of a categorical hurt.

"Categorical" and "hurt" as the twinned constituents of an answer to *What is tort?* come clearly into view when their absence becomes fatal in judicial decisions that make an issue of their absence (albeit without using the term of art that I offer here for the first time). Consider demurrer, a short-form way to say failure to state a claim. Demurrer supports summary disposition in favor of a defendant, conceding that the plaintiff could be telling the truth about what happened to him but insisting he must lose. Dismissal of a tort action for failure to state a claim can be understood as expressing a conclusion that the accusation in it fails to report "hurt," a detriment held by the plaintiff in particular, or alternatively complains about a hurt that doesn't qualify for "categorical," meaning of a sort that courts believe qualifies for a tort remedy. Tort case law on failure to state a claim aligns with the construct of categorical hurt.[5]

In addition to its congruence with decisional law, my answer to *What is tort?* fits nicely within contemporary tort scholarship. "Categorical" makes reference in a single word to two big schools of thought perceived as rivals, a binary that goes by many names in law reviews: Readers will recognize "law and economics" on one side and "Kantian" on the other,[6] though they may prefer other labels for the dichotomy.[7] For a writer who wants to include both camps in the same phrase, there is no better single adjective than this one. Law and economics aggregates persons into groups and looks for effects on populations more than individuals; it has little interest in "hurt" unmodified, and it expects impacts to land on many

5 Illustrative decisions have both denied and granted motions to dismiss for failure to state a claim. *See* Ross v. Creighton Univ., 957 F.2d 410, 412 (seventh Cir. 1992) (rejecting the plaintiff's proffered "tort of 'negligent admission,' which would allow recovery when an institution admits, and then does not adequately assist, a woefully unprepared student"); Wilson v. Univ. of Ala. Health Servs. Found., P.C., 266 So. 3d 674, 677 (Ala. 2017) (reversing a trial court's ruling that "the tort of outrage 'is limited to three situations'," calling it "an incorrect statement of the law"); Kreft v. Adolph Coors Co., 170 P.3d 854, 857 (Colo. App. 2007) (rejecting claims for negligence, unjust enrichment, and violation of a state consumer protection statute that a plaintiff tried to attribute to alcoholic-beverage advertisements). *See also* Justin W. Aimonetti & Christian Talley, *What's the Buzz About Standing?*, 88 Geo. Wash. L. Rev. Arguendo 175, 192 (2020) (exploring a divide in the courts about whether text messages that arrive as spam can be trespass to chattels).

6 *See* Richard L. Cupp Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood As Stepping Stones Toward Abolishing Animals' Property Status*, 60 SMU L. Rev. 3, 36 (2007); Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. Rev. 323, 353–54 (2012).

7 *See*, e.g., Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 Tex. L. Rev. 1801, 1801 (1997) (using "deterrence" and 'corrective justice" as labels for two "unfriendly camps"). On distinctions between "Kantian content" and corrective justice, see Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 Law & Phil. 37, 37 (1983).

persons rather than one. "Categorical" is equally friendly to the half of the binary that pays more attention to the individual: it is the English version of *kategorischer*, Kant's original adjective. "Hurt," for its part, in one short syllable salutes multiple objects of examination that occupy current writing about tort.[8]

2 The "Hurt" in Categorical Hurt

When paired with "categorical," the "hurt" constituent of the phrase brings in the individual. Tort plaintiffs report hurt to themselves even when they are nonhuman entities like corporations or bring their action derivatively, and even when the remedy they seek is not damages.[9] They complain about past events recognized as unambiguously unpleasant; they say under oath that they suffered. Ask people to describe experiences that they would not want to happen to them and that they think observers would accept as deserving of cash recompense, and your informants will recite the catalogue of what tort undertakes to remedy.[10]

How they describe their hurt is illuminating. Tort plaintiffs do not check off items on a list that they think apply to their injury in the mode of an equal employment opportunity claim.[11] Both contemporary pleading rules and the writs of yore have always expected every tort plaintiff to tell a story. The account must fit in a doctrinal scheme that predates the impact and shapes a complaint into a description that tort recognizes—that's the "categorical" half of my phrase—but it also must recount a unique personal experience of harm.

2.1 The Tort Complaint as a Cry of Pain

The first substantive filing in a tort action is the complaint, a denunciation that can come only from a hurt person. Attorneys who draft complaints write from the vantage point of their clients; serving as agents, they never purport to be disinterested. Every tort story starts with woe. It does not stop there, of course, but

8 Among them emotion, neuroscience, and critical theory.

9 *See* Andrew S. Gold, The Right of Redress 119–28 (2020).

10 I undertook a similar exercise when I looked for experiences that human beings do not want, focusing on legal consequences but not limiting the inquiry to tort. Anita Bernstein, The Common Law Inside the Female Body 33–35 (2019).

11 *See Filing with the EEOC*, U.S. Equal Emp. Opportunity Comm'n, https://publicportal.eeoc.gov/Portal/Forms/NewEditForm.aspx?templateId=160&userKey= (last visited Aug. 26, 2021) (providing a checklist of 13 contentions prefaced by "I believe I was discriminated against because (check at least one, or as many as apply …)").

nothing about a cause of action can proceed without *You hurt me*, said accusatorily by the plaintiff to the defendant in court.

Is this pain of theoretical interest? I think it is, and a leading light of the field appears to agree. When Richard Posner undertook to generalize about tort—and to say in particular what he loved about it—he used Seventh Circuit decisions that he'd written as his set of primary materials. Posner found multitudes of pain in tort:

> Who would have guessed that you must never hold a Mister Coffee carafe above your lap, because the bottom may fall out and cause a terrible scalding of your groin? That firemen enter a burning house on their hands and knees, so they can tell whether the floor is so hot that it may collapse under them? That (maybe) if you take a child's tablet of Motrin you may develop a very rare disease that will literally burn your insides to a crisp? That Federal Express does occasionally lose packages en route, with potentially disastrous results?[12]

A field of law contains, inter alia, terrible scalding of a person's groin; firefighters who, fearing collapse, touch surfaces they depend on to feel how hot they are; and human insides literally burned to a crisp. Ouch. The last rhetorical question of the paragraph sounds more disembodied, less personal; but when Posner attributes "disastrous results" to carelessness of a delivery service, it turns out he has physical pain in mind too.[13] Tort knows that the risk of hurt lurks everywhere. Posner muses on

> … how vulnerable obese people are to injury, how easy it is to fall off a stool and be hurt, while pulling the lever on a one-armed bandit in a riverboat casino, and that one must never dive into a lake or river, leave the sliding glass door to a hotel room balcony unlocked if the balcony has stairs to the ground, or let a stranger who says he wants a glass of water into your motel room.[14]

Lest readers think that these passages are unrepresentative of a law review article whose title contains a pair of abstract adjectives and the word "theories," Posner makes clear that his catalogue is about hurt by adding an explicit reference to literary fiction. Reporting on what interests him about tort, he mentions its improbable outcomes and flair for the freakish turn.[15] Torts stories told in

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12 Richard A. Posner, *Instrumental and Noninstrumental Theories of Tort Law*, 88 Ind. L.J. 469, 486–87 (2013) (citations omitted).

13 *See* Kuehn v. Childs. Hosp., L.A., 119 F.3d 1296, 1297–98 (seventh Cir. 1997) (describing a shipping lapse that caused bone marrow, harvested painfully from a toddler's hips, to become useless as a cancer treatment).

14 Posner, *supra* note 12, at 487.

15 It may warrant mentioning that Posner is the author of well-known tort decisions where plaintiffs sought damages for injuries that did not harm the body or mind of a human person. *See*, e.g., Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174 (seventh Cir. 1990) (alleging contamination of soil and water that required a costly cleanup); Greycas, Inc. v. Proud, 826 F.2d

decisional law occupy the same territory as fiction, says Posner. And then they go further:

> I am not being hyperbolic when I say I love tort law! Not just the doctrines, the historical resonance, the ubiquity of Holmes and Cardozo, the economics, but also the facts—their variety, their unexpectedness, their implausibility; for it was Aristotle who distinguished history from literature on the basis that literature was about what was probable, but history was about what had actually happened, and what had actually happened was often so improbable, so strange ("truth is stranger than fiction"), that if presented as fiction it would be considered a ridiculous straining aftereffect.[16]

The signature trait of fiction is conflict, which in literature does not mean mere disagreement but the risk of harm to a human being. Novels and short stories without the prospect of pain for a character would lie lifeless on the page.[17] Like literary works written by artists, tort regards hurt as a defining element. No pain, no claim.

Especially in the United States, where plaintiffs describe their experiences in pleadings written to anticipate attention from lay factfinders (even though they seldom will receive that attention),[18] the element of hurt that is present in all tort actions seeks to engage sympathy or empathy. Elsewhere I have argued that this emotional constituent of personal injury liability, amenable to the label of "fellow-feeling" that Adam Smith introduced to moral philosophy in the eighteenth century,[19] extends past the poignantly injured vulnerable individual who tugs at jurors' heartstrings and collects plussed-up damages. Legal-institutional actors feel the pain of businesses and professions too, and they withhold fellow-feeling from plaintiffs who leave them cold. To explore the phenomenon, in *Fellow-Feeling and Gender in the Law of Personal Injury* I contrasted the experiences of female and male cohorts of plaintiffs who sought two remedies that tort rarely provides, damages for fear of cancer and medical monitoring.[20] All such plaintiffs face

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1560 (seventh Cir. 1987) (considering misrepresentation and legal malpractice). No conflating of tort with personal injury going on here—if Posner were talking about personal injury law in particular, rather than tort law in general, he would have said so.

16 Posner, *supra* note 12, at 486.

17 *See* Sarah Lyall, *Stacey Abrams Contains Multitudes*, N.Y. Times (May 9, 2021), https://www.nytimes.com/2021/05/05/books/stacey-abrams-while-justice-sleeps.html (recalling what a novelist learned about fiction in college).

18 *See* Margo Schlanger, *What We Know, and What We Should Know About American Trial Trends*, 1 J. Disp. Resol. 35, 37 (2006) (identifying tort as among the fields where trials are "vanishing").

19 Anita Bernstein, *Fellow-Feeling and Gender in the Law of Personal Injury*, 18 J. L. & Pol'y 295, 328 (2009) (referencing Smith's *Theory of Moral Sentiments* and *Lectures on Jurisprudence*).

20 *Id.* at 353–67.

doctrinal barriers to recovery, among them the burden of production and statutes of limitation.[21] That men have fared better than their female counterparts in these respects cannot be explained by the legal merits of what each group pursued. Instead, I contended, decisionmakers felt fellow-feeling in response to some cries of pain and not others.

In the disparate outcomes that *Fellow-Feeling* used as evidence for its thesis about an under-examined phenomenon within tort, decisionmakers swayed by the presence or absence of fellow-feeling include but are not limited to tugged-heart jurors and plaintiffs' lawyers who made choices about which clients to represent and whom to reject or represent wanly.[22] Patterns examined there suggest that the emotional quality of actionable hurt likely also pervade tort in legal systems that eschew the civil jury and lack colorful, flamboyant American-looking personal injury lawyers: fellow-feeling tugs at judges too.[23] Fellow-feeling lowers the resistance of defendants expected to supply zealous advocacy in opposition to personal injury claims.[24] It is present in the manifested choices of business entities.[25] The cry of pain not only initiates a claim and makes liability possible; it also winds through tort adjudication at every stage.

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21 *Id.* at 313.

22 The personal injury litigator Sybil Shainwald, whom I have interviewed, helped to right the gendered fellow-feeling imbalance when she started to represent DES plaintiffs in the 1970s. Having experienced symptoms that might have spurred a physician to prescribe this drug when she was pregnant in 1950, Shainwald went on to press claims for DES daughters that brought them significantly higher damages and settlements than they had previously received. I speculate that Sybil Shainwald "could relate," as the expression goes, to an injury that appeared trivial or vague to her male peers because it comes with relatively low medical expenses, little or no lost wages, and unruly female emotion. Another successful DES litigator whom I've interviewed, Paul Rheingold, took up this work after learning that his daughter had been harmed by this drug. On the belief, found in and out of tort, that female = unruly, *see* Anita Bernstein, *Restatement (Third) of Torts: General Principles and the Prescription of Masculine Order*, 54 Vand. L. Rev. 1367 (2001).

23 Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 Tex. L. Rev. 855, 859 (2015) (concluding that judges follow their feelings, and quoting an "open embrace of emotion in judging" by United States Supreme Court Justice William Brennan).

24 Bernstein, *supra* note 10, at 377. On attorney zeal in short supply, see Anita Bernstein, *The Zeal Shortage*, 34 Hofstra L. Rev. 1165 (2006).

25 *See* Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 Tul. L. Rev. 1461, 1462 (2002) (attributing pernicious empathy to "corporate directors and managers").

2.2 Hurt as the Signature Characteristic of Standing and Causation

If tort courts cared only about defendants' conduct—for negligence claims, that would be breach of duty; for intentional torts, fulfillment of judge-made checklists of elements; for judge-made strict liability, having engaged in an abnormally dangerous activity—while lacking interest in the hurt this conduct produces, then they would drop their insistence on standing and actual cause. A government agency, or even a loose scheme set up to pay informants for tips, would be able to detect and describe injurious misconduct than a frail, emotionally impacted, and sometimes literally bleeding individual biased in her own favor. But judges have never come close to abandoning these two elements. They demand sworn testimony from a hurt person (or from a lawyer speaking on her behalf, if she cannot speak) about her injury as a condition of hearing the claim.

Consistent with plaintiff-hurt as central to tort redress, courts accept relatively few derivative claims.[26] Those that get heard comport with the construct of categorical hurt because claims that derive from impacts on another person are understood to include harm to the plaintiff, not only to the person who experienced the impact. Consortium, for example, characterizes injury to a plaintiff's family member as an injury to a plaintiff whose body was not touched by the complained-of conduct. Elements of this claim examine what happened to the plaintiff as an individual who suffered a different type of hurt than the impact on her relative.

Contemporary tort law also preserves the tort claims of persons who die at some point between an impact and the filing of a claim that memorializes a historical occasion of hurt. The old common law rule of *actio personalis moritur cum persona* had hewed more literally to the hurt criterion by insisting that the injured person have survived the impact long enough to complain about it,[27] but contemporary replacement of this doctrine with the survival action is also consistent with hurt as central to a tort claim. Though no longer felt by the injured person who experienced a harmful impact before she died, the hurt happened.

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26 Howard H. Kestin, *The Bystander's Cause of Action for Emotional Injury: Reflections on the Relational Eligibility Standard*, 26 Seton Hall L. Rev. 512, 522 (1996) (applying to negligent infliction of emotional distress the truism that because breach of duty is necessary for negligence liability, plaintiffs "must be seen as direct victims").

27 Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 576 n.2 (1974) (stating that "the rule was uniform that tort actions died with the parties, either wrongdoer or injured party"); McFarland v. Miller, 14 F.3d 912, 918 (3d Cir. 1994) (noting that the cause of action must have accrued during the lifetime of the plaintiff).

2.3 Tort Remedies as Succor for Hurt

Tort's dominant remedy strives to put plaintiff-hurt into a monetary judgment. This effort has provoked scholars to lament the poor fit between court-ordered transfers of money and the experience of being injured.[28] I have some expressed support for this view about inadequacy.[29] What's valuable about 'almost nothing available except cash damages' is how it helps to answer this Article's descriptive question, rather than anything normative.

The judicial command to pay money usefully clarifies the centrality of hurt to tort. "Compensatory" as an adjective modifying damages means focused on hurt: hurt is what compensatory damages compensate for. Punitive damages, though more removed from the impact that an individual plaintiff suffers, also derive from hurt. Courts relay this money to plaintiffs at least arguably in recognition of an interest personal to them;[30] the more familiar view that this remedy fulfills a public-law function of punishment also insists on hurt. Punitive damages go to plaintiffs who come to tort on the hurt ticket. No hurt, no punitives-eligible claim. Both compensatory and punitive damages share a commitment to standing, causation, and the complaint as narrative when both insist on a historical instance of hurt suffered by at least one individual.

The much less available tort remedy of injunction illuminates hurt, here also by showing a path not taken.[31] Injunctions look ahead to future harm. They contemplate hurt likely to occur in the future but not yet experienced. Damages ascendant/injunctions rarely enforces a design that ranks hurt that really happened high and potential hurt relatively low.

Another noncash tort remedy, medical monitoring, similarly demonstrates by its absence tort's preoccupation with hurt. Elsewhere I have examined reasons that

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28 *See*, e.g., W. Jonathan Cardi, *Damages as Reconciliation*, 42 Loy. L.A. L. Rev. 5, 12–16 (2008) (offering examples of alternative or supplements to cash damages as a tort remedy); Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. Kan. L. Rev. 39, 66 (1994) (expressing interest in "restoration beyond payment of compensation").

29 Anita Bernstein, *Tort as Yet Another Locus of Gender Injustice in the Distribution of Money*, *in* Research Handbook on Private Law Theory 303, 326 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020).

30 Zipursky, *supra* note 2, at 1779. I am inclined to agree.

31 *See* Cain v. Huff, II, Revocable Tr. Declaration, 149 N.E.3d 645, 655 (Ind. Ct. App. 2020) (observing, in a decision denying an injunction to stop a trespass, that this relief "should only be granted in the rare instances in which the law and the facts are clearly within the moving party's favor") (citation omitted); Bryan H. Druzin, *Planting Seeds of Order: How the State Can Create, Shape, and Use Customary Law*, 28 BYU J. Pub. L. 373, 408 (2014).

courts rarely order defendants to pay for this surveillance of plaintiffs' bodies following toxic exposure.[32] The criterion of plaintiff hurt adds another consideration. Although medical monitoring conveys value to plaintiffs and costs defendants money, it does not deliver compensation for an injury. Instead it *looks for* an injury that has not emerged. Like an injunction, it addresses the future. Hurt addresses the past.

2.4 "Hurt" Not "Injury" or "Wrong"

Now that I am claiming that one noun is better than two possible alternatives, the moment has come to say a little more about what I mean by hurt. The Oxford English Dictionary has a definition compatible with my purposes: "Bodily or material injury, esp[ecially] that caused by a blow or a stroke; a wound; a lesion; damage."[33] Injury is a close synonym for hurt as I use the word here.

True synonyms being rare creatures, however, "hurt" is different from "injury." As a noun to describe that which (a) plaintiffs complain about, (b) defendants wish to resist and deny and minimize, (c) judges assess, and (d) judgments undertake to remedy, "hurt" conveys the pain that "injury" muffles and makes remote. One syllable rather than two echoes the cadence of the O.E.D.'s "blow" and "stroke" and "wound." In contrast to the Latinate "injury," "hurt" is of Germanic and Old French descent, an earthier etymology.[34] To me the shorter word feels more like a gut punch.[35]

As for the other alternative to this noun, my answer to "What is tort?," indebted as it is to civil recourse theory, departs from the founders' expressed preference. John Goldberg and Ben Zipursky have committed to "wrong" or "wrongs" as the word they think best describes tort. They put "wrongs" and no other noun in the

32 *See* Bernstein, *supra* note 10, at 358–59.

33 *Hurt*, Oxford English Dictionary (2d ed. 1989).

34 "Latin-derived words are considered fancier, stuck up, and just plain harder to understand," says an etymology blog. "The Germanic words are viewed as powerful, strait [sic] forward and more exciting. Germanic words, unsurprisingly, are usually shorter and only one or two syllables long." Sandra, *Latinate vs. Germanic: Word Geek 101*, LiveJournal (Oct. 23, 2005), https://porch-talk.livejournal.com/44589.html.

35 Feeling is regularly present in tort, I contend, recognizing no exception in this generalization for actions where plaintiffs are too numerous to be known to their lawyers and one or both parties are corporations. All who make decisions in tort actions are human beings subject to variations on hurt that can include rage, anxiety, bias, humiliation, and despair. *See* Anita Bernstein, *The Communities That Make Standards of Care Possible*, 77 Chi.-Kent L. Rev. 735, 736 (2002).

title of their recent monograph on torts.[36] Their law review articles favor this term.[37]

Goldberg and Zipursky have reviewed criticisms of their word choice, implying they have heard "empty" applied to Wrongs more than they wish. The "concept of a wrong," they write, "is by no means empty but instead capacious and nuanced."[38] I agree that the concept is not empty. Any attempt to put a field of law into one word or a short phrase will necessarily lack detail. These two scholars know their particulars as well as their grand theory;[39] if any persons who study tort have earned the chance to generalize loftily about it, they have. I'd accept "capacious and nuanced" for "wrongs" too, and in my view Goldberg and Zipursky defend themselves ably against other complaints about their noun choice.[40]

As I read *Recognizing Wrongs*, however, Goldberg and Zipursky concede there that the term wrongs fails to fit a part of tort too significant to neglect: An answer to *What is tort?* ought to cover strict liability for abnormally dangerous activities.[41] Strict liability provides a good illustration of "categorical hurt" as a better answer than "wrong [entitled to civil recourse]" to the question that frames this Article. When courts impose strict liability for abnormally dangerous activities,[42] they have unambiguously declined to classify the defendant's action as wrong in the sense of manifesting fault. Nor need the activity in question have been proscribed by criminal or regulatory law. Whenever a plaintiff can attribute negligence or intentional wrongdoing to conduct, liability for that conduct is not strict.

"Categorical," which I note here by way of transition, accurately describes the "hurt" complained about in a strict liability action. Although a defendant need not

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36 John C.P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs (2020).

37 *See* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 Tex. L. Rev. 917 (2010); Goldberg, *supra* note 2 (identifying a right to a law that provides for the redress of wrongs); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 Vand. L. Rev. 1 (1998).

38 Goldberg & Zipursky, supra note 36, at 183.

39 *See*, e.g., John C.P. Goldberg, *What Clients Are Owed: Cautionary Observations on Lawyers and Loss of a Chance*, 52 Emory L.J. 1201 (2003) (addressing legal malpractice); Benjamin C. Zipursky, *Sleight of Hand*, 48 Wm. & Mary L. Rev. 1999 (2007) (addressing the breach element of negligence); John C.P. Goldberg & Robert H. Sitkoff, Torts and Estates: Remedying Wrongful Interference with Inheritance, 65 Stan. L. Rev. 335 (2013) (arguing against the interference-with-inheritance tort).

40 *See* Goldberg & Zipursky, *supra* note 36, at 181–83 (elaborating on the challenges of "moral luck" and unforeseeable plaintiffs).

41 *See* Gold, *supra* note 9, at 111–12.

42 Other applications of strict liability exist, but in my opinion, they pose no problem for the "wrongs" rubric. Vicarious liability lands on defendants who did not themselves lapse but this liability rests on wrongdoing by someone else. Statutory strict liability, for example the dog-bite laws that most U.S. states have codified, falls outside the judge-made understanding of tort to which I am hewing in this Article.

have done anything with "wrong" included to be eligible for tort liability, some modifier is needed: that defendants inflicted mere hurt on someone does not suffice to make them liable. Strict liability terms of art—including but not limited to "abnormally dangerous,"[43] the older "ultrahazardous,"[44] and the academic "nonreciprocal"[45]—all refer to groups and categories.

3 The "Categorical" in Categorical Hurt

3.1 Kategorischer

Offering direction to persons interested in the moral path ahead of them—and speaking to these persons at the point where the question *What ought I do*? can guide their conduct[46]—Immanuel Kant announced what he called the categorical imperative. This construct tells individuals to consider which course of action would make the most sense when understood as an obligation for all persons to follow. As with "hurt," a turn to etymology informs "categorical" and elicits virtues pertinent to the task of describing tort.

"Categorical" is an odd adjective in that it seems to mean both the whole of something, no exceptions—Kant used *allgemeines*, "universal" or "general," to echo the idea he announced with *kategorischer*—and simultaneously a subgroup or subset.[47] Writers have explained this apparent contradiction in the word with reference to Aristotle, whose text known as *Categories* set out to gather all things that can be either the subject or the predicate of a proposition.[48] This taxonomical

43 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 20(b) (Am. L. Inst.2010); Restatement (Second) of Torts §§ 519–520 (Am. L. Inst. 1977).

44 Restatement of Torts §§ 519–520 (Am. L. Inst. 1938).

45 George C. Fletcher, *Fairness and Utility in Tort Law*, 85 Harv. L. Rev. 537, 542 (1972).

46 *See* Tom Whyman, *Why, Despite Everything, You Should Have Kids* (*if You Want Them*), N.Y. Times (Apr. 13, 2021), https://www.nytimes.com/2021/04/13/opinion/baby-bust-covid-philosophy-natalism.html?action=click&module=Opinion&pgtype=Homepage (including this question, along with "What can I know?" and "What can I hope for?," as among Kant's three constituents of human reason).

47 "Isn't a "categorical" denial a limited denial restricted to a specific category?" asked a reader of a blog. "Why do people "categorically" deny something when they should be denying it "uncategorically"?" *A Categorical Harm*, Grammarphobia (June 30, 2009), https://www.grammarphobia.com/blog/2009/06/a-categorical-answer.html; *see also Why does* "*Categorical*" *Mean* "*Unconditional*," Reddit (Feb. 26, 2020, 10:08 AM), https://www.reddit.com/r/etymology/comments/f9xe32/why_does_categorical_mean_unconditional.

48 https://plato.stanford.edu/entries/aristotle-categories/.

work contains a first part that divides into four sections and a second part that divides into ten. *Categories* has been influential for many centuries; Kant reflected on it before crafting his own application of "categorical."[49]

Without venturing too perilously into its particulars and controversies, a reader can locate in *Categories* a resolution of the "categorical" duality or contradiction. A scheme of groupings imposes singular, or universal, order on a set of materials. Categorical in this understanding means arrayed, organized, and laid out in bounded clusters. Divisions put together that which ought to be treated as alike while separating that which ought to be treated differently. Because this endeavor is committed to classification as its normative path, it is "categorical" not only in the sense of an adjective for category but also absolute and universal.

Law in general, not just tort law to which I will turn in a moment, also relies on categories and classifications. Prohibition in the United States Constitution (and also in state constitutions) of bills of attainder expresses this commitment.[50] Embraced by Alexander Hamilton and James Madison in the Federalist Papers, the stance against bills of attainder objects to the imposition of law-based detriment on an individual absent the procedural safeguards that a trial contains.[51] Separation of powers assigns discrete sets of tasks to the legislature and the judiciary. Legislatures routinely take actions that impose detriment along with the public good. Consider among many other examples zoning, taxation, criteria for licenses, financial regulation, and reductions in established transfer payments.

Constitutionally speaking, these detriments are just fine because the pain they cause falls on groups rather than individuals. Whenever government targets an individual, however, this person is entitled to due process in court.[52] The imperative in the division of labor spelled out in the Bill of Attainder Clause is categorical, and so is the obligation of the legislature to confine its hurts to aggregations rather than individuals.

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49 *Id.*

50 U.S. Const. Art. I § 9, cl. 3.

51 *See* M. Jackson Nichols et al., *Bill of Attainder*: "*Old Wine in New Bottles*," 36 N.C. Cent. L. Rev. 278, 282–84 (2014).

52 "Life, liberty, or property deprivations must either be generalized across the population (as are legal prohibitions or taxes), or else applied in specific cases through a trial in accordance with due process."

Anthony Dick, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 Stan. L. Rev. 1177, 1180 (2011).

3.2 The Centrality Within Tort of Cohorts, or Persons in Categories

Like all of law, tort is replete with categories and classifications, yet whereas other fields of law take note of group memberships that individuals did not choose (for example being located in a particular geographical place), categories in tort are especially Kant-like in that they focus almost exclusively on conduct about which an actor can reflect before taking action. Tort's "reasonable person" construct rarely takes an interest in status or conditions separate from actions.[53] When tort pays attention to status independent of action, as in some of its exceptions to the objective standard of care, it focuses on how theses statuses constrain conduct.[54]

Turns that tort has taken showcase groups and cohorts that could otherwise have lain out of view. *Brown v. Kendall* told the tale of a man who swung a stick to break up a fight between two dogs,[55] but torts scholars have long read it to describe railroads as defendants.[56] An influential "subsidy thesis" identified advantage to business gained "at the expense of factory workers, farmers, and other less powerful classes" when nineteenth-century tort courts started to insist that negligence plaintiffs prove fault.[57] In the mid-twentieth century, the California Supreme Court changed tort doctrines in a direction that helped plaintiffs and harmed defendants;[58] the tort reform movement, gaining ground approximately when the California pro-plaintiff shift receded, persuaded most state legislatures and a large fraction of the public to favor insurers, product manufacturers, and providers of medical services.[59] As a constituent of politics, the categorical-in-the-sense-of-cohorts aspect of torts tells members of groups whether a change in the law causes them to win or lose.

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53 *Cf.* Anita Bernstein, *Common Law Fundamentals of the Right to Abortion*, 63 Buff. L. Rev. 1141, 1202 n.297 (2015) (gathering examples of tort statuses including invitee, landlord, possessor, trespasser, bailee, mortgagee, licensee, and fellow servant, all of them derived from individually chosen actions).

54 Bernstein, *supra* note 35, at 741–42.

55 60 Mass. 292 (1850).

56 *See* Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359, 367–68 (1951).

57 John S. Martin, *Water Law and Economic Power: A Reinterpretation of Morton Horwitz's Subsidy Thesis*, 77 Va. L. Rev. 397 (1991) (interpreting the work of Morton Horwitz).

58 Kevin M. Mulcahy, Comment, *Modeling the Garden: How New Jersey Built the Most Progressive State Supreme Court and What California Can Learn*, 40 Santa Clara L. Rev. 863, 882–84 (2000) (reviewing tort decisions).

59 *See generally* Anita Bernstein, The *2 × 2 Matrix of Tort Reform's Distributions*, 60 DePaul L. Rev. 273 (2011) (identifying a binary).

Tort's jurisprudential movements also aggregate. Aggregation makes law and economics interpretations of tort possible: incentives, general deterrence, and ex ante perspectives on rules cannot exist unless individuals are members of groups. Aggregations also occupy civil recourse theory in that they locate an institutional stake in the conduct amenable to remedy. Because a tort is categorical hurt, societies have good reason to provide redress. The same descriptive condition applies to tort seen through a Kantian or corrective justice lens: while the individual stands at the center of this jurisprudence, this person's tort obligations and entitlements cannot be hers alone.[60]

3.3 Tort as "Categorical" Among Legal Fields

Of all fields in the curriculum covered in courses that American law schools tend to characterize as foundational, and to teach students sooner rather than later, tort fits closely with "categorical" priorities and premises. Tort is especially *kategorischer* in that it is so strongly associated with the common law. Like the meaning of "categorical" as absolute and universal but also committed to subgroups and subsets, this assertion of mine may sound peculiar at first. Fields of law replete with codification probably look at least as well suited to the categorical label.

The legislature, after all, works with groups and categories. More than the judiciary that dominates tort, it is *comprised* of groups and categories. Codifications like the Uniform Commercial Code display classification more overtly than does tort—and the UCC, barely heard from in the torts course, is dominant in contracts. Foundational law school courses that fall under public law have a claim to "categorical" related to my remarks a few paragraphs ago about bills of attainder: Public law expects persons to obey general rules put into phrases.[61] Civil procedure posits a design for adjudication. Constitutional law does the same for government. Both spell out what they provide. Legislation, codified rules, and constitutional provisions tell large groups of persons what they must and may not do. They also give direction to the state. These characteristics certainly sound categorical. What, then, gives tort a special claim to the adjective at the center of this Article?

My answer: The population governed by law in codified forms plays the role of follower, while common law doctrines add a demand of extra effort on the governed. Tort rules rely on categories as much as public law does; they also are harder

60 *See* Kant, *supra* note 4 and accompanying text (quoting Kant).

61 *See supra* notes 49–51.

for governed persons to look up.[62] Kant as the leading user of categorical in this sense did not publish universal laws in a parallel to modern criminal codes: instead he stated principles as bases for action.

Whereas codes lay out their answer to *What ought I do?* by announcing prohibitions and specific requirements, the absence of codification in tort shifts part of this obligation to reason and intuition.[63] Tort steers and obliges individuals to ask themselves what the rule ought to be. Kant's understanding of duties in *The Metaphysics of Morals* resembles tort in that it expects readers to figure out the right path ahead. From that foundation, tort can demand more. Burdens on individuals that criminal law rejects become at least defensible, if not overtly correct, for tort to impose.[64]

Tort is strikingly more categorical in this Kantian sense than contract, the field of private law where parties create the obligations they want. A contract expresses particulars that are exceptions to rules of universal application. Contract law says I don't owe you money unless I have agreed to buy a good or service from you, and that you don't have to fulfill someone else's requirement to deliver supplies or outputs if you haven't promised to do so. Because it must manage unplanned confrontations about which the parties had agreed on nothing before harm occurred, tort needs categories to guide its outcomes.

A sense in which tort and "categorical" as contained in the categorical imperative align with each other is preoccupation with the infliction of hurt. Criminal law shares that preoccupation, of course: when the state codifies penalties, it has concluded that the conduct it proscribes threatens harm to others. As noted, however, the tort perspective on harm is closer to Kant's directive in that it tells the individual who contemplates action to make decisions for herself and judges her judgment in hindsight. Tort and the Kantian universal-maxim exercise do not necessarily generate the same answers about redress for a particular

62 Jeremy Bentham lambasted the common law for this opacity. *See* Bernstein, *supra* note 10, at 15, 23, 190–91 (reviewing Bentham's criticisms of Blackstone in particular and the common law in general).

63 *See generally* R. H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 U. Pa. J. Const. L. 401 (2007) (exploring the common law entwined with natural law in the American founding era).

64 *See* Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. Rev. 796, 822 (1983) (observing that "tort law has long been deeply committed to liability standards … the vagueness of which might be plainly unacceptable if the full criminal law norm of fair notice were embraced"); James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 Ind. L.J. 957, 1013 (2019) (gathering void-for-vagueness, lenity, and mistake-of-law as examples of defenses found more in criminal law than noncriminal adjudication).

imposition of harm or the failure to act to stop it.[65] They do, however, start with the same concern about detriment.

4 Conclusion: On Asking *What is Tort?* And Reading the Answer(s)

A recent remark from two tort eminences warns about the risk of futility in trying to ask and answer *What is Tort?* Professors Abraham and White say that the path is parlous because no consensus exists, or is likely to be negotiated, about "any comprehensive underlying purpose of tort law."[66] Mindful of this warning, I've taken a shot at answering the question that occupies this Symposium with more than an embrace of amorphous "pluralism,"[67] speaking in response to an imagined interlocutor who asks how tort functions. What questions does tort ask? What approach or perspective does it bring to claims made in court? Striving for brevity, I have come up with categorical hurt.

Publish your answer to *What is Tort?*, and if you are lucky enough to be read you'll be called wrong. Good. When writers criticize fellow writers, refine their earlier theorizing, and advocate for themselves, their efforts enlarge the possibilities of tort. Prompts and prods that this theorizing puts in motion are more than idly academic if "academic" means tending to leave material conditions and distributions undisturbed. Doctrines and legal rules evolve, and the real-world directions they take when they move will rest in part on what theorists write.[68]

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65 *See*, e.g., R. George Wright, *Treating Persons as Ends in Themselves: The Legal Implications of A Kantian Principle*, 36 U. Rich. L. Rev. 271, 309 (2002) (noting that "Kant actually says much that is arguably relevant to a moral or legal duty to rescue, but little that can directly and uncontroversially decide" the duty-to-rescue chestnut *Yania v. Bigan*).

66 Kenneth S. Abraham & G. Edward White, *Conceptualizing Tort Law: The Continuous (and Continuing) Struggle*, 80 Md. L. Rev. 293, 297 (2021).

67 For a careful effort to attain pluralism without lapsing into "incoherence or even collisions," see Benjamin Shmueli, *Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice*, 48 U. Mich. J.L. Reform 745, 749 (2015).

68 Take for example a recent criticism by one esteemed tort theorist of two others. Catherine M. Sharkey, *Modern Torts: Preventing Harm, Not Recognizing Wrongs*, 121 Harv. L. Rev. 1423, 1424 (2021) (reviewing John C.P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs (2020)). (stating that the majority and dissent in Air & Liquid Sys. Corp. v. DeVries, a 2019 decision by the Supreme Court, "were unanimous in using the lens of law-and-economics, incentive-driven tort theory," implicitly spurning the thesis of *Recognizing Wrongs*). Sharkey drew a sharp rejoinder from her targets. John C.P. Goldberg & Benjamin C. Zipursky, *Thoroughly Modern Tort Theory*, 134 Harv. L. Rev. F. 184 (2021). This high-prestige specimen of tort theorizing invites two people important to

The work of tort theory does not stop with innovating; it also includes safeguarding. In contrast to criminal law, which in principle imposes liability on individuals only if these persons acted with a guilty mind, and also differing from contract law, which assesses planned promises and undertakings, tort pushes itself into the lives of non-volunteers. Persons can fulfill the elements of costly tort claims while not thinking or saying anything. This reach means that each mistaken stance in tort puts large numbers of people in danger.[69] We tort theorists have stimulating ideas to bat around. We also have a duty of care.

American law, Brett Kavanaugh and Neil Gorsuch, to reflect on where they stand as tort judges. *See id*. at 195–99.

69 Add to the problem of impacts on non-volunteers the vagueness that tort condones, *see* Helmholz, *supra* note 63 and accompanying text; the lenient preponderance-of-the-evidence standard by which plaintiffs must prove the elements of their tort claims; and the willingness of tort courts to apply new holdings retrospectively. *See* Stephen J. Hammer, *Retroactivity and Restraint: An Anglo-American Comparison*, 41 Harv. J.L. & Pub. Pol'y 409, 428 (2018) (expressing guarded approval for this last stance: reliance interests are typically absent in tort cases "because few people plan to be involved in a tort").