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WHAT IS WRONG ABOUT WRONGDOING?

Anthony J. Sebok

I. THE TWO BLACKSTONES

At various times in their work, Goldberg and Zipursky invoke Blackstone, or a Blackstonian conception of private law, to support their argument that torts are best understood as wrongs. The view held by Goldberg and Zipursky, which I generally support, is complex, but this sentence near the end of their article *Torts as Wrongs* captures the Blackstonian essence of their theory: “[T]he idea of civil recourse . . . is a political commitment to the following effect: Individuals who are able to prove that someone has treated them in a manner that the legal system counts as a relational, injurious wrong shall have the authority to hold the wrongdoer accountable to him.”1 Later they say that “[i]t is no accident that seminal figures in our constitutional tradition, including Coke, Locke, and Blackstone, deemed individuals to enjoy a right of recourse against those who wronged them and deemed governments to be obligated to provide an avenue by which to exercise this right.”2 Goldberg and Zipursky’s invocation of Blackstone is not merely to draw support for their theory from a certain, historically grounded constitutional tradition; rather, as in their earlier work, Goldberg and Zipursky rely on Blackstone to support their interpretation of the analytic structure of tort law as a common law practice.3

Therefore, it seems from the foregoing that Blackstone would support legal institutions that would assist individuals to secure legal recourse. It is impossible and pointless to predict what Blackstone would have said about various contemporary debates over the provision of legal aid in civil cases; that is not the point of this Article. We do know that Blackstone did have strong views about the practices of assignment, maintenance, and champerty: he strongly opposed

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2. *Id.* at 982.
3. Their reliance on Blackstone is made clear and explicit early in *Torts as Wrongs*: “As its name indicates, tort law is about wrongs. The law of torts is a law of wrongs and recourse—what Blackstone called ‘private wrongs.’” *Id.* at 918.
them.  This somewhat obscure fact has been recalled and emphasized in recent public communications by the American Tort Reform Association and the U.S. Chamber of Commerce, who have reached back to Blackstone to reinforce their argument that any form of third-party investment in litigation should be viewed with skepticism, if not hostility, by lawyers and legislators.  

As explained by numerous courts, “Put simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty.” The modern trend among many courts is to abolish these causes of action because they have been supplanted by modern tort actions such as malicious prosecution and abuse of process, as well as by the code of professional responsibility for attorneys.  

For the purpose of this Article, the technical distinctions between assignment, maintenance, and champerty are unimportant.  

I will focus on the public wrong of maintenance, which Blackstone defined as “intermeddling in a suit that no way belongs to one.” Blackstone was unrestrained in what this meant: any act on the part of a stranger to a lawsuit that had the effect of aiding the suit. Blackstone quoted from ancient Roman law sources to suggest that the aid need not be monetary—it could be merely informational. It is, in his mind, a public wrong even to supply witnesses to a person in whose suit one had no interest. Nor did Blackstone make any distinctions between supporting an ongoing suit and instigating a suit. All were forms of intermeddling; and, all were prohibited except in cases where the object of the aid was “[a] kinsman, [a] servant, or [a] poor neighbor [for reasons of charity].” It was an “offence against public justice” to assist a stranger’s suit, and according to

4. See 4 WILLIAM BLACKSTONE, COMMENTARIES *134-36.
8. For a more detailed exploration of the differences and similarities between the historical treatment of assignment, maintenance, and champerty in American law, see Anthony J. Sebok, The Inauthentic Claim, 64 Vand. L. Rev. 61 (2011).
9. BLACKSTONE, supra note 4, at *134-35.
10. Id. at *135.
11. Id.
Blackstone, even the Romans made it a crime to “support another’s lawsuit, by money, witnesses, or patronage.”

It is important to recognize that Blackstone’s view reflected a more general hostility towards litigation that may have pervaded the early common law. According to Stephen Presser, “litigation was something of an evil,” and “[a] litigious society . . . was a fractured society.” This attitude changed when the “[s]hame of [l]itigation” (the traditional common law view) was replaced by the “[r]omance of [l]itigation.” The success of the civil rights movement in the 1950s and 1960s changed the centuries-old social prejudice against litigation. Even garden-variety personal injury litigation was now seen not as “a social evil but a form of political expression and, in particular, an avenue for plaintiffs (the ‘aggrieved’) to learn of and to ‘effectuate’ ‘legal rights.’” In 1964, the American Bar Association noted that the view that “litigation, per se, is bad has been replaced by the view that litigation is a socially useful way to resolve disputes, particularly the injury claims arising [from] our mechanized society.”

Because litigation was an evil to be avoided, the common law adopted multiple mechanisms to express its disapproval of those who would excite unnecessary litigation, including strict bans on maintenance and champerty. The Blackstonian account suggests a straight line of hostility extending from Rome until the late twentieth century, when U.S. courts developed the view that litigation was no longer a social evil and that anything, short of fraud, which promoted legitimate claiming was a good thing. The historical truth is more complex, and it offers almost no support for the idea that Blackstone’s views were accepted in the United States. The Romans were much more comfortable with third-party involvement in litigation than medieval England, which was very much influenced by the “Christian attitude that litigation was itself something to be discouraged.”

By the time the American colonies split from England, the laws of

12. *Id.* at 134-35.
15. *Id.* at 5-9.
maintenance, which Max Radin called “the last flaring up of feudalism,” were already on the decline on both sides of the Atlantic.20

Radin’s theory as to why medieval English common law had such a hostile attitude towards litigation, even nonfrivolous litigation, was twofold. First, litigiousness was “an indication of a quarrelsome and un-Christian spirit.”21 Second, since litigation was not absolutely necessary and was most likely motivated by a desire for profit, it would have been disfavored, because “in medieval eyes [it] was tainted with that speculation which was the essence of the abhorred sin of usury.”22

These explanations offer very little support to the Blackstonian position. Radin suspected that even in England, by the time Blackstone and Coke wrote, the role played by so-called Christian attitudes towards litigation had become part of the “psychological background” with which lawyers approached new and unfamiliar legal innovations, such as the assignment of choses in action and the rise of an entrepreneurial legal class.23 Radin did not deny that the professed hostility of some members of the legal profession to litigation and, more specifically, third-party investment in litigation was a genuine reaction to changes in the economic order of the day.24 It is easy, in fact, to see how neatly the economic principles behind maintenance fit with the emerging capitalist United States. Even in 1936, Radin could see the connection between the United States’ commitment to private property and free markets, and the phenomenon of third-party involvement in litigation:

A claim in litigation is often as such a valuable piece of property . . . . To acquire a share in such a claim is essentially a speculation and in the Middle Ages [was] tainted with the discredit which attached to every form of speculation.

. . . . Speculation in the United States never had the continuous history of slight moral obliquity which it retained in England . . . .25

20. Id. 56-65.
21. Id. at 58 (“Vexatiousness, accordingly, consisted not merely in using legal process unjustifiably, but also in using it excessively, even when it was justified, or in using it all except under the pressure of necessity. A man . . . had no business to intermeddle with the interest or wrongs of some one else.”).
22. Id. at 60-61. Radin pointed out that the term “champerty” was derived from the concept in property law of tenure by champart, which was a form of tenancy by which a landowner shared ownership with the tenant and received a portion of the harvest but took the risk that there may be no return at all (the tenant, in turn, had an obligation to work the land or risk forfeiture). Id. at 61. Radin argued that tenancy in champart was imported into the Statute of Westminster II, which was the one of the earliest legal prohibition of third-party support of litigation, in order to apply to a new context a familiar concept. Id. at 61-62.
23. Id. at 68.
24. Id. at 65 (The law prohibiting “[c]hamperty . . . had its source in the resistance to the slowly growing capitalism that followed the Renaissance.”).
25. Id. at 69-70.
The story of the rise of modern tort law and its deep relationship with the rise of capitalism and the market economy has been told many times. The connection between the right to property and liberalism is deep and goes back to Locke, if not further. Central to Goldberg and Zipursky’s account of torts as wrongs is their conception of torts as a mechanism for members of a liberal state to secure redress for the violation of certain rights they possess as citizens. Why, then, would Blackstone not clearly have embraced a market in lawsuits if, as was occurring throughout the larger economy, markets were developing in land and other valuable social interests? One partial answer might be that the Blackstonian conception of a private right to redress lacked some essential element of “propertyness.” There is some support for this view, although it does not come directly from Blackstone. As Goldberg has shown in great detail, American courts have been deeply ambivalent, if not hostile, to the idea that the “right to redress” itself must be treated as property under the Fourteenth Amendment.

There is a tension between Blackstone’s opposition to maintenance and his view of torts as wrongs, which the state is obliged to allow citizens to redress. On the one hand, it would seem that were Blackstone serious about the view that torts are private wrongs, he would be glad if they were redressed, regardless of who initiated the redress or why—that is, he would be indifferent to the profit motive of third parties. On the other hand, he clearly disapproved of third parties initiating redress except under the most limited of circumstances. His stated reason—that to do so would “stir up” discord—seems strangely sentimental, and it cannot survive the shift from a precapitalist, Christian society to a capitalist society in which markets and liberty are seen as the foundations of liberal society.

What is not obvious is whether the tension ripens into a contradiction, and if it does, whether that contradiction tells us anything interesting about Goldberg and Zipursky’s theory of torts as wrongs. I will argue in this Article that Blackstone’s views are contradictory but that the modern civil recourse theorist can easily repudiate Blackstone’s views on maintenance while preserving their genetic link to Blackstone’s private law theory. However, I will try to show,

in the course of making this second argument, that the theory of torts as wrongs needs to be sharpened. I will argue that the “mistreatment” of victims—an interpretation by Goldberg and Zipursky of how tort law understands the defendant’s conduct—refers not to any subjective experience of mistreatment by the victim, but to the victim’s belief, whether subjective or counterfactual, that a rule of the legal system has been mistreated and that her feeling of mistreatment is relevant only to the extent that she resents the wrongdoer’s lack of respect of the law.

II. THE IGNORANT VICTIM

I want to begin with an example that I hope will illustrate why Blackstone’s antimaintenance approach might be a plausible extension of his views on private law. This example is a highly stylized version of an actual case decided by a federal court in Nevada in 2009.31

State S has a consumer protection statute (Law L) that requires all commercial homebuilders to construct homes “without defects.” Homeowner bought his house from Builder and noticed within one year that the stucco was cracking. He was annoyed, but was not sure why it was cracking and did not do anything. He did not know about Law L. Six months after Homeowner noticed the stucco cracking he received the following offer from Inspector. Inspector offered to inspect Homeowner’s house for free to see if Homeowner could claim under Law L. If Inspector found something, he would tell Homeowner, and if Homeowner used that information for any legal action that resulted in a positive outcome for Homeowner, Inspector would receive payment for his inspection from the damages Homeowner would receive from Builder. If there was nothing wrong with Homeowner’s home, or if Homeowner chose not to take action under Law L, then Inspector would receive nothing for his labor. Inspector inspected the home, determined that the cracked stucco was a defect under Law L, and told Homeowner. Homeowner brought an action under Law L, received compensation from Builder, and Inspector received $1000 for his inspection work.

According to Blackstone, Inspector committed a public wrong. It is important to see that Inspector did not lie to Homeowner, and Inspector did not induce Homeowner to make a frivolous claim against Builder. Nor did Inspector engage in malicious prosecution (which is also known as the “Wrongful Use of Civil Proceedings”) or abuse of process.32 The claim the Inspector induced against Builder was a val-

32. See RESTATMENT (SECOND) OF TORTS ch. 30 (1977).

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful
id claim; that is, under Law L, Builder had *wronged* Homeowner, and *but for* Inspector's aid, Homeowner would not have been aware that he had been wronged by Builder. It should not matter that the wrong is based on a consumer fraud *statute*, nor should it matter that the statute makes Builder liable without fault. As Goldberg and Zipursky note, it is a virtue, not a flaw, of their theory that it can accommodate the "hodgepodge" of wrongs that comprise modern tort law, including torts that are wrongs without proof of wrongful intent or carelessness, such as trespass.\footnote{Goldberg & Zipursky, supra note 1, at 951.}

Furthermore, the fact that Inspector received some compensation for his aid to Homeowner is irrelevant. In this example, Inspector, in theory, received *quantum meruit*, although it is more common in cases of maintenance for third parties who aided victims of wrongdoing to receive a share of the victim's recovery. In the Nevada case upon which this example is based, the court held that a home inspector in Inspector's shoes had acted illegally because he had "expended" his time in exchange for some portion of the recovery of the homeowners who brought (in theory) *valid* consumer claims against one of Nevada's largest homebuilders.\footnote{Del Webb, 2009 U.S. Dist LEXIS 85616, at *15.}

Blackstone's reasons for holding Inspector's actions wrongful are not set out in great detail, but from a few sentences, we can glean at least one reason. The maintainer of lawsuits violates "public justice" because he "keeps alive strife and contention."\footnote{Blackstone, supra note 4, at *135.} "These pests of civil society," he says, "are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels."\footnote{Id.} Blackstone's reasons are not based on a fear that third-party assistance of litigation will increase frivolous or spurious litigation, as is the case with some modern critics of litigation finance.\footnote{See Paul H. Rubin, On the Efficiency of Increasing Litigation 3 (Third Party Fin. of Litig. Roundtable, Searle Ctr., Northwestern. Univ. Law Sch. Sept. 24–25, 2009), available at http://www.law.northwestern.edu/jep/symposia/JEP_CJ_2009_Rubin.pdf (discussing the}

\begin{itemize}
  \item civil proceedings if (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.
\end{itemize}

*Id.* § 674. Although Chapter 30 is entitled "Wrongful Use of Civil Proceedings" and restricts the tort of "malicious prosecution" to improper initiation of criminal proceedings, many courts refer to both wrongful use of either the criminal or the civil process as malicious prosecution, a convention adopted by this Article. See *id.* § 682 ("One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."); 1 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 6:10 (2011 ed.) (stating that malicious prosecution derived from the torts of champerty and maintenance).

\footnote{Goldberg & Zipursky, supra note 1, at 951.}
\footnote{Del Webb, 2009 U.S. Dist LEXIS 85616, at *15.}
\footnote{Blackstone, supra note 4, at *135.}
\footnote{Id.}
stated concern about the “repose” of the maintainer’s neighbor might be directed to the repose of Builder in my example, but it is not clear why Builder’s repose should count in Blackstone’s eyes. It is at least as plausible, if not more plausible, that Blackstone’s concern is for Homeowner, and Homeowner’s “repose.”

But what possible connection could there be between Homeowner’s “repose” and Homeowner’s claim against Builder? Before Inspector’s intervention, Homeowner was already suffering from the “setback” of a defect in his home. He knew of the defect. The only difference in Homeowner’s condition after Inspector’s intervention (other than the possible recovery of a remedy) was that Homeowner now knew that his setback was the result of a legal wronging, as opposed to a human act that was perhaps innocent, or if culpable, merely morally, not legally culpable. Blackstone’s position that Inspector’s act was wrongful is tantamount to saying that Builder ought not to be held liable to Inspector. Yet, other than some fear that the suit instigated by Inspector is frivolous or spurious, which by definition is not true in this example, it is not clear why Builder ought not to be “vulnerable” to a claim by Homeowner.

Just as the Blackstonian objection identified above is not based on collateral concerns about frivolous litigation, it also is not based on collateral concerns about the possibility that Inspector has taken advantage of Homeowner (which would be ironic, given that Builder offered to help Homeowner recover under a consumer protection law). Modern criticisms of maintenance, especially when it involves “litigation finance” of consumers who have small personal injury claims, can sensibly be understood to be about the price of maintenance, not the practice itself. Yet, there have been other modern examples where, on the basis of a Blackstonian conception of maintenance, self-interested support by third parties of litigation has been declared illegal. For example, in Toste Farm Corp. v. Hadbury, Inc., the defendant was a law firm that had negligently prepared legal docu-

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38. “Torts . . . are wrongings. For every tort, there is an inquiry into the nature of the tortfeasor’s actions . . . , the nature of the setback suffered by the victim, and the connection between the two.” Goldberg & Zipursky, supra note 1, at 944 (emphasis added).
39. In fact, in many jurisdictions that continue to accept the Blackstonian idea that maintenance is wrong, a defendant like Builder, who can prove that the suit against them is the consequence of a third party’s support of the plaintiff, can secure a dismissal of the suit against them.
40. See Echeverria v. Estate of Lindner, No.018666/2002, 2005 WL 1083704, (N.Y. App. Div. March 2, 2005), in which the court voided a nonrecourse funding agreement on the ground that the payment by the litigant to the third party was noncontingent and was therefore a loan controlled by New York’s usury statute. The trial judge’s conclusion in Echeverria—that the investment by the funder was a usurious loan—was rejected in a subsequent proceeding in Plaintiff Funding Corporation d/b/a LauCash v. Echeverria, No.10140/2005 (Sup. Ct. N.Y. Kings, 2005).
ments for a third party. The plaintiff was sued by the third party in a related matter. The plaintiff alleged that the defendant offered to finance the third party’s suit—including the legal fees of another law firm hired to prosecute the suit—in the hope that if the third party received a settlement from the suit “he would not pursue a malpractice claim against” the defendant. The Rhode Island Supreme Court held that the law firm had committed maintenance, and it did not base its holding on whether the suit the defendant had encouraged its former client to pursue was meritless. In Oliver v. Bynum, a North Carolina court held that common law maintenance prohibited the gratuitous act of helping a party secure funding to mount a lawsuit because the maintainer desired to ruin the career of the person who would be named in the lawsuit. Again, the court did not focus on the merits of the suit brought by the party aided by the maintainer (the implication was that the suit had merit). It focused only on the motive of the maintainer and the effects of his aid, which the court found was for the purpose of “stirring up strife and continuing litigation.” Why, in each of these cases, if the party aided by the maintainer truly suffered a wrong, should it matter why or how it came to pass that the wrong was redressed, as long as no deceit or duress was employed by the maintainer?

III. Wrongings and Resentment

One possible interpretation of Blackstone’s position, read through the more sophisticated terminology of Goldberg and Zipursky, is that Builder ought to be vulnerable to a suit by Homeowner if Builder has satisfied the criteria of a relational wrong, and one critical feature of a injurious act that is a wronging is that it is a mistreating of the victim by the tortfeasor. As Goldberg and Zipursky put it, “From the plaintiff’s perspective, it is not correct to say that there just happens to have been a conjunction of her loss and wrongful conduct by the defendant: In her eyes the defendant’s wrong is mistreating her.” Blackstone might be making a simple but understandable error. He might assume that, while Builder may have acted wrongfully (by not building the house without a defect), and Homeowner suffered a loss (the defect), there was no “conjunction” between the wrongful act and

41. 798 A.2d 901 (R.I. 2002).
42. Id. at 904.
43. Id. at 906. The plaintiff in the suit had alleged that the suit was meritless, but it must be noted that the client had found a law firm (not the defendant) willing to file the suit, and there was no suggestion that the second suit had violated its obligations under Rhode Island’s rules of professional responsibility. Id.
44. 592 S.E.2d 707, 711 (N.C. Ct. App. 2004).
45. Id.
46. Goldberg & Zipursky, supra note 1, at 943.
47. Id. (emphasis added).
the loss since Homeowner did not experience the conjunction of the wrongful act and the loss as a mistreatment. Blackstone’s point here is not that Inspector ought not to have “disturbed Homeowner’s repose” by making his life more complicated than it had been before (before Inspector showed up, Homeowner would not have had to worry about whether to sue Builder). The world was in repose before Inspector showed up. There had been no wronging of Homeowner, notwithstanding Homeowner’s loss in the world, because Homeowner had no awareness of having been mistreated, as opposed to merely having been treated by Builder’s act, which was conjoined in time and space with the fact of a loss (the defect).

Before I address the obvious objections to Blackstone’s argument, I would like to observe that there is a way in which Goldberg and Zipursky’s language invites the peculiar view that an attribute of a relational wrong is the experience of mistreatment of the victim by the tortfeasor. The idea that a tort is a mistreatment of the victim by the tortfeasor is a major, if underdeveloped, theme throughout their writings. The term “mistreatment” (or some variation of the term) appears frequently in *Torts as Wrongs.*

The verb “mistreat” is more than a transitive verb (x mistreats y); rather, it implies an expressive act. The difference between mistreating someone and treating them in a way that results in a setback in their lives is the meaning of the act in its doing. While in everyday language we might take “mistreatment” to be a result of the meaning invested in an act by its doer, that is almost certainly not what Goldberg and Zipursky mean. After all, one of the hallmarks of their theory, and its chief virtue, is that it refuses to cut off the diversity of torts in the common law or force them, in a Procrustean fashion, into a single moralized conception. They accept that certain acts, such as trespass, which do not convey a culpable state of mind (and hence express no desire to “treat” the victim at all), are nonetheless torts and can be actions which mistreat the victim.

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48. “In her eyes the defendant’s wrong is mistreating her . . . .” *Id.* at 943 (emphasis added). “Historically, in a case in which a tortfeasor’s carelessness toward the plaintiff combined with another’s intentional mistreatment of the plaintiff . . . .” *Id.* at 967 (emphasis added). “[T]ort law as a law of wrongs guides conduct and protects individuals against mistreatment by others.” *Id.* at 972 (emphasis added). “[T]ort law identifies and enjoins actions that constitute mistreatments of others” *Id.* at 973. “[W]hen a tort is committed—the victim of the mistreatment not only has suffered a setback in the eyes of the law . . . .” *Id.* (emphasis added). “[A] law of wrongs, it guides conduct by reference to . . . and enforces duties not mistreat others.” *Id.* at 975 (emphasis added). “[T]he idea of legal wrongs helps to explain in what sense tort law recognizes responsibilities not to mistreat others . . . .” *Id.* (emphasis added). “[Law of wrongs] confers upon each of us duties not to mistreat others in various ways and rights not to be so mistreated.” *Id.* at 981 (emphasis added). “[T]he idea that there is not a class or group of persons who are somehow entitled to mistreat another . . . .” *Id.* at 982 (emphasis added). And “[i]n tort [law], wrongs are violations of legal norms not to mistreat others.” *Id.* at 986 (emphasis added).

49. *Id.* at 977.
A tortfeasor’s action possesses the attribute of mistreatment because the victim experiences it as such. This is why, for example, victims are right, say Goldberg and Zipursky, to “resent” the doer of a legally wrongful act more if the act, as a matter of luck, causes the victim injury than if, as a result of moral luck, it causes the victim no setback at all:

To say that an actor could reasonably be resented to a greater degree is not to say that there was some respect in which the actor’s conduct ought to be deemed more wrongful; on the other hand, increased blameworthiness in the sense of increased grounds for resentment may indeed be an attribute of the actor’s actions. . . . 50

And so, Blackstone might conclude, where there is no experience of mistreatment and no resentment, the doer’s act lacks an attribute that makes it wrongful. It is not relational in the correct way. A relation may exist nonetheless from the perspective of moral theory (under some moral theories Builder may still owe Homeowner some kind of debt), but it is not relational in the way required by private law theory. The “repose” disturbed by Inspector, under this reading of *Torts as Wrongs*, is the repose of the relationship between Builder and Homeowner as citizens. While there could have been, under alternate contingent conditions, a wrong between them in the world (for example, had Homeowner on his own investigated and pursued his consumer claim), as it was, when Inspector entered the scene, there was no wrong as between Builder and Homeowner. Inspector, so to speak, created it.

The obvious response to this Blackstonian interpretation of what it means for a doer to mistreat a victim in the law of wrongs is that it misapprehends how the doer’s act ripens into a mistreatment of the victim. A victim of an act can be mistreated even if they are not aware of the true expressive content of the doer’s act at the time of the mistreating. The victim of a fraud may be pleased by the flattering lies of the fraudster, but the mistreating of the victim inheres in the fraudster’s conduct at the moment the misrepresentations are uttered. But, even that counterexample is not as simple as it looks. In moral theory, it may be the case that a lie is a mistreatment of the person to whom it is directed at the very moment it is uttered, but that is partly because it is an intentional misrepresentation, and the expressive content of the act is supplied by the speaker’s active intent to treat the recipient of the misrepresentation poorly. What about acts, such as those which tort law treats as wrongs (and which may not be wrongs in moral theory), such as Builder’s, where the attribute of mistreatment comes entirely from the conjunction of a setback in the interests of the victim conjoined with the fact that the law has

50. *Id.* at 944.
imposed on Builder a duty to repair, regardless of Builder’s expressive attitude towards Homeowner when Builder’s actions failed to conform to the law’s requirements?

Here Goldberg and Zipursky can point out that Homeowner’s lack of subjective experience of mistreatment is irrelevant, even to Homeowner. Homeowner does not want to live his life based on mistaken premises; his larger life plan must include, it is safe to assume, a general commitment to engaging the world as it really is. It is not hard to see that the mistreatment of victims in the sorts of cases described in my example is counterfactual: If Homeowner knew the truth about the world (that Law L had been violated by Builder), then Homeowner would feel resentful towards Builder. That is why the victim’s resentment matters in capturing what is relational in the legal wrong committed by Builder. It is not just what the victim feels when a tortfeasor acts in violation of a legal norm and causes the victim a setback, it is, as Goldberg and Zipursky put it in the quote above, what the victim would “reasonably” feel if all the facts were known to the victim.

I have no quarrel with this obvious response by Goldberg and Zipursky to Blackstone as to why it does not make sense to say, under the theory of torts as wrongs, that no wronging has occurred in the example I offer, and why, further, it is nonsense to say that it is Inspector’s act of introducing true facts of the world to Homeowner that “disturbs the repose” of the world (whatever that is supposed to mean) and not Builder’s original act of failing to conform his actions to Law L which created the legal wrong sought to be remedied by Homeowner after Inspector’s intervention. My concern is with something else—with the new fact that drives the counterfactual account of resentment.

The victim who learns about the true facts of the world and who reasonably would feel resentment towards a tortfeasor does not learn any new facts about the loss that they have suffered in the world. In my example, Homeowner always knew that he had a defect in his home. Any facts about that defect that Homeowner learned from Inspector unrelated to the existence of Law L and his right to recover under it he could have learned on his own without also learning that Builder had wronged Homeowner. Similarly, in *Tort and Moral Luck*, Goldberg and Zipursky note that victims who may have a right to redress are fully aware of the setbacks they suffer at the hands of those who may be vulnerable to a legal action before they know that they have been wronged.51 The driver who has been hit by another

driver “heedlessly drifting into [his] lane”\textsuperscript{52} or the patient who has suffered an adverse result at the hands of a “great doctor and a decent, well-meaning person” feels resentment at the moment of injury.\textsuperscript{53} They may even feel mistreated. But none of those subjective feelings count towards why they have been wronged from a torts perspective. The actions of the tortfeasors who struck the driver and who harmed the patient possessed the necessary attribute of mistreatment because they failed to conform to the standards of conduct imposed upon drivers and doctors by law, not because they produced in their victims a sense of generalized resentment.

Seen from this perspective, we can see that Homeowner in my example is not so different from almost all tort victims. Few, if any, victims of a tortfeasor’s wronging know sufficient facts and law to realize that their setback was the result of the violation of a legal norm when it occurred. They may form that belief over time—first as a suspicion that leads them to a lawyer (which may or may not be well grounded) and then, if the system works properly, as a belief reasonably grounded in fact and law as the procedures of litigation grind forward. If the proper ground for finding a relational wrong between victim and tortfeasor is the mistreatment of the former by the latter as a matter of tort law, then all victims’ feelings of mistreatment by tortfeasors, as experienced by the victims, are counterfactual.

IV. Mistreatment at Violation of Law

The conclusion drawn in the last section—that in all cases of “tort wrongs,” the victim’s initial feeling of resentment or mistreatment is counterfactual—is not a problem for Goldberg and Zipursky, but rather a virtue. It is important to recall that a separate problem they attempt to resolve is the “Moral-Legal Dilemma,” which is simply that, as an interpretive matter, tort law seems to be either overinclusive or rooted in a crude form of positivism.\textsuperscript{54} Either whole chunks of tort doctrine which do not seem to be rooted in modern moral theory (such as trespass, which is liability without fault based on a crude property fetishism) or the concept of “wrong” in tort is “vacuous,” since “a legal wrong [is] anything the law defines as a legal wrong.”\textsuperscript{55}

Goldberg and Zipursky’s solution is to note that the concept of wrong can be normatively rich without being coextensive with social morality; that is, they see tort law as “a domain of duty-imposing legal directives” whose source happens to be the sort of legal sources identified by Hart: “The fact that an act falls under an authoritative

\textsuperscript{52} Id. at 1155.
\textsuperscript{53} Id. at 1162.
\textsuperscript{54} Goldberg & Zipursky, supra note 1, at 947-48.
\textsuperscript{55} Id. at 948.
legal directive that characterizes it as a legal wrong does not entail that such an act, in the circumstances it actually occurred, warrants categorization as morally wrongful.56

In a sense, the word wrong used in law is like the sense that one uses the word wrong in a game like chess. It is wrong to move a rook diagonally, even if it is by no means immoral. Goldberg and Zipursky could complain that this is too crude and too positivist an understanding of their use of Hart. Hart understood that legal systems, as well as other practices, could impose duties based on principles as well as rules.57 Even were one to concede the point that chess does not resemble “a domain of duty-imposing directives” like law,58 since so many of the rules require no interpretation, one could imagine arguments in games like chess that are resolved only by reference to principles drawn from the authoritative directives that govern the game (for example, is it wrong to stare at one’s opponent in chess?).59 In either case (the simple rule violation or the violation of a principle embedded in the game), the word “wrong” is used the same way it is used by Goldberg and Zipursky in their theory of torts as wrongs. The reason the victim of a car accident resulting from careless driving can say that she has suffered a wrong (and is entitled to redress) is because the driver who harmed her violated a directive in law, not because it may be, as a contingent matter, morally wrong to drive without reasonable care.

This brings me finally to a feature of the concept of mistreatment used in Goldberg and Zipursky’s theory. The counterfactual account of mistreatment is dynamic. Except for those highly unusual victims who know the law and are confident of the facts, their feelings of resentment, if they have any, are based on some spurious nonlegal ground. If they grow confident of the facts and are told by a lawyer (or a court) that their injurer violated a legal norm, only then do they have a reason to feel resentment because they have suffered a wrong in tort. In other words, the new fact that the victims learn that allows them to feel mistreated qua tort law is that the defendant did not conform his conduct to a legal norm. That new fact is what warrants the sense of mistreatment which explains why the tortfeasor should be vulnerable to the victim in the various ways provided by our tort system. Goldberg and Zipursky say as much in this passage:

56. See id. at 950-51.
57. See ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 78 (1998).
58. Goldberg & Zipursky, supra note 1, at 951.
59. This example is drawn from Dworkin, although I do not think that Dworkin draws the proper conclusion from it. RONALD DWORdIN, TAKING RIGHTS SERIOUSLY 102 (1978); see also Anthony J. Sebok, Finding Wittgenstein at the Core of the Rule of Recognition, 52 SMU L. REV. 75 (1999).
[Assuming that the increased resentment felt by the victim is not itself to be converted into an attribution of greater blameworthiness to the author of the injurious act, tort law helps us to see a distinct but related point . . . . A heightened degree of blameworthiness does not necessarily entail an increased level of wrongfulness, but it may reflect an increase in the level of blame by others to which a third party (like the state) would regard the wrongdoer as properly vulnerable.]

This passage begins with the concession, noted above, that at the point of interaction between victim and tortfeasor, the victim’s subjective experience of resentment towards the defendant, while often present, need not be. This is true because the victims’ subjective experience of anything other than legal mistreatment is utterly irrelevant to the question of whether a tort-wrong occurred. The experience of mistreatment that is always present (or at least constructively present) is when the victim learns the facts necessary to establish a violation of law that harmed her. Any subjective resentment that the victim might feel based on her own metric of blameworthiness is mere noise; that is not why she is warranted to seek redress. The fact that “the state” treats the act that caused the setback as blameworthy is all that matters. That fact, conjoined with her injury, provides the proper motivation to the victim to resent the defendant and also allows us to explain why the defendant has wronged her as a matter of tort law.

I would, therefore, amend the following statement by Goldberg and Zipursky, which they make in the context of explaining why the victim of a completed tortious act is justified in blaming the tortfeasor, while someone who luckily escaped harm would lack any justification for blame in tort:

In all [cases like the driver and the patient], victims appropriately and reasonably feel mistreated and not just because they are part of a society with a legal system that dubs these acts as wrongs. All of the victims have been injured in a way that warrants their thinking that someone else is responsible for mistreating them and that their wrongdoer is an appropriate person from whom to demand redress or satisfaction.

Goldberg and Zipursky are right that wrongful action is not enough to comprise mistreatment in tort. There must be a completed harm, too (no “negligence in the air,” so to speak). But to the extent that this passage implies that there is some reason, independent of law, that underwrites the injured victim’s sense of resentment towards the defendant, this implication should be resisted, for it is undercut

60. Goldberg & Zipursky, supra note 1, at 944 (emphasis added).
by other parts of their argument. The victim’s “right” to resent the
defendant is not based on their own self-interest; they already knew
that their interest had been rendered a setback when the accident
first occurred, and as demonstrated above, that was not enough to
warrant a feeling of mistreatment in tort.

It would seem to me that the only reason that these victims have a
right to feel mistreated is because they are “part” of a legal system
that has stipulated that, under certain conditions, the norms of the
legal system have been violated. In the case of tort, there are two
conditions—the violation of a norm and the causation of an injury.
Once those conditions are satisfied, the victim is then authorized to
act on behalf of the legal system. When the victim acts to secure re-
dress, it is the wrong done to the legal system that provides as condi-
tion precedent for the wrong to the victim. This is a small and per-
haps subtle difference, but one which is worth emphasizing. Under
Goldberg and Zipursky’s theory of torts as wrongs, the concept of
wrong is presented as an intuitive, almost irreducible normative in-
terest on the part of victim. This is reflected in Torts as Wrongs when
they say “[t]ortious wrongdoing always involves an interference with
one of a set of individual interests . . . tort law does not vindicate pub-
lic or communal interests.”62 Yet, upon closer inspection, it turns out
that tort law is not grounded in “individual interests,” except to the
extent that the legal system chooses to use individuals to bear its
own interest—which is to have its norms enforced. I am not sure that
this is a weakness in the theory of torts as wrongs, but it does high-
light how much the content of “wronging” in torts is based not on the
interests individuals have, but on the interest of the legal system,
which may only contingently reflect a commitment to individual
rights, interests, or dignity.

From this perspective it is easy to see how Blackstone’s rejection
of maintenance is quite inconsistent with the theory of torts as
wrongs. It would seem that the legal system would have an interest
in violations of its norms being identified, regardless of who identi-
fied them or the motivation behind the identification (assuming, of
course, that the incentives did not induce third parties to engage in
fraud or harassment). Goldberg and Zipursky’s theory of torts as
wrongs seems not only indifferent to the concerns of Blackstone but
also to positively reject them. Can anything be said, therefore, for
Blackstone’s view? Does it illuminate a weakness in the version of
torts as wrongs endorsed by Goldberg and Zipursky and, implicitly,
by all those who support open and unfettered markets for third-party
investment in litigation? This is a difficult question, for it might
simply be the case that Blackstone was incapable of seeing beyond

his own preliberal prejudices—that is, he was in the grips of the sort of suspicion of litigation identified by Radin. On the other hand, it might be the case that Blackstone’s conception of the right to redress had a different understanding of wrongs than the conception at the heart of Goldberg and Zipursky’s theory. That would explain his otherwise inexplicable resistance to maintenance, and why he could not see that the involvement by strangers in the identification and redress of wrongs would be a natural extension of his embrace of the idea of torts as redress for private wrongs. What that conception of the right to redress might look like, and how it would differ from Goldberg and Zipursky’s, remains to be examined in another article.63

63. For one recent effort in this direction, see Nathan B. Oman, The Honor Of Private Law, 80 Fordham L. Rev. 31 (2011).