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Chapter 3

Rules, Duties, Rights and Rights of Action

We maintain that the *ubi jus* maxim captures an idea central to tort law. But what does it really mean to say: “Where there’s a right there’s a remedy”? American lawyers and law professors pride themselves on being down to earth. And *ubi jus* is the sort of lofty notion that seems to cry out for deflation. According to a standard deflationary or ‘no-nonsense’ view, what it means for a person to have a legal right is that she has a legal remedy. On this view, *ubi jus* is circular.

This chapter explains why the circularity objection and the no-nonsense view are uncompelling. More affirmatively, it offers an account of legal rules, legal duties, and legal rights that illuminates the structure of tort law. Building on the work of H.L.A. Hart, we begin with some conceptual claims about what it means to be under a legal duty and to have a legal right. We then fuse these conceptual claims with interpretive claims about the type of rules one actually finds in American law. Specifically, we maintain that tort law contains an array of rules, including the rules that define the various torts, that generate *relational duties*—obligations owed by some persons to refrain from acting upon (or to act for the protection of) other persons in certain ways—and correlative *rights* against being so acted upon (or to certain protective actions). It is the existence of these rules, and these rights and duties, that renders the *ubi jus* maxim substantive. To invoke the maxim is to assert as follows: where there are legal rules that impose duties not to mistreat others (or to protect others) and that recognize correlative rights not to be mistreated (or to be protected), a person who has been treated in a manner proscribed by the rules is entitled to a legal remedy for the violation of her right.

Notwithstanding the overall affirmative cast of this chapter, the no-nonsense view and the circularity objection will figure prominently in what follows. A challenge for any account that, like ours, claims to be revealing an apparently obvious truth about
its subject is to explain why, if the truth is obvious, so many have missed it. Thinking about the circularity objection will lead us to confront a dominant approach to duties and rights that has led too many law professors to dismiss or downplay ubi jus, notwithstanding its apparently fundamental status. As is the case for several other facets of our account, our principal foil is Oliver Wendell Holmes, Jr.

1. Holmes on Rights and Duties

The beginning of confusion about legal rights and duties in American jurisprudence is Holmes’ celebrated essay, The Path of the Law. Written as an address to law students, the essay famously contains some cautionary advice about how to understand references within law to notions of right and duty.

... The primary rights and duties with which jurisprudence busies itself ... are nothing but prophecies. ... [A]s I shall try to show, a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right.

... Take again a notion which as popularly understood is the widest conception which the law contains; — the notion of legal duty, to which already I have referred. We fill the word with all the content which we draw from morals. But what does it mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money. ...¹

It is easy to see why Holmes’ account caught on. In these passages he seems simply to be speaking the plain, unvarnished truth. Moreover, there is an appealing practicality to the warnings he conveyed to his student audience. Clients do not retain lawyers to be lectured on their moral duties. They do so because they desire information about the likely consequences of different courses of action.

¹ Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 458, 461 (1897). We will assume that Holmes was asserting claims about the nature of legal duties, rather than merely suggesting to his audience that it would be a good corrective to their overly moralistic legal education for them to go through the exercise of supposing that legal duties boil down to predictions about legal sanctions.
At the cost of spoiling Holmes’s elegant prose, we will pry out of it several propositions. We can begin by distinguishing two categories of claims:

1. analytic claims: that is, claims about what makes it true that a person has a legal duty to refrain from doing something (\(S\)), and

2. interpretive claims: that is, claims about what lawyers are typically aiming to communicate when they say that a person has a legal duty to refrain from doing \(S\).

Each of these two categories can be further divided into affirmative and negative variants. For analytic claims, the two variants are:

1a. (affirmative analytic claim) What makes it true that a person has a legal duty to refrain from doing \(S\) is that, if the person does \(S\), then the person is subject to liability.

1b. (negative analytic claim) Whatever makes it true that a person has a legal duty to refrain from doing \(S\), it is not that doing \(S\) is morally wrong.

For interpretive claims, the two variants are:

2a. (affirmative interpretive claim) What a lawyer means when she advises a client that the client is under a legal duty to refrain from doing \(S\) is that the client will be subject to liability for doing \(S\).

2b. (negative interpretive claim) Whatever a lawyer means when she advises a client that the client is under a duty to refrain from doing \(S\), the lawyer does not mean that the client has a moral duty to refrain from doing \(S\).

Needless to say, these four propositions have received a great deal of attention. (1b) and (2b) have been the focus of debates over positivism and the separation of law and morality; (2a) stands at the heart of American Legal Realism. Our interest, however, is principally in proposition (1a) and its extension to the idea of a legal right. According to Holmes, what it means for a person to have a legal duty to refrain from doing  

\[S\]  

\[\text{something}\]

We use the word “something” rather than the word “actions” because the rules of tort law proscribe not just certain actions or activities, but certain ways of interacting with others. (The rule contained in the tort of battery, for example, proscribes certain ways of touching others.) Also, although the formulations that follow focus on ‘negative’ duties to refrain from doing things to others, they apply equally to ‘affirmative’ duties to do things for others.
doing something is for it to be the case that acting in that manner will subject the person to legal sanction, i.e., criminal punishment or civil liability. Importantly, on Holmes’ view, rights are correlative to duties. (This is why the first paragraph quoted above ends with the phrase: “and so of a legal right.”) Given the correlativeity of rights and duties, to say that Yvonne has a legal right that Xander not defraud her is equivalent to saying that Xander has a legal duty not to defraud Yvonne. And because, according to Holmes, Xander’s having a legal duty means nothing more than that Xander faces liability if he defrauds Yvonne, it follows that Yvonne’s right that Xander not defraud her is constituted by Xander facing liability if he defrauds Yvonne. Thus, analytically, what makes it true that Yvonne has a legal right against Xander’s defrauding her is that, if Xander defrauds Yvonne, Yvonne will have a legal remedy against Xander.\(^3\) It follows, on the Holmesian view, that “Where there’s a right, there’s a remedy” really is vacuous—an analytic truth.

The connection between (1a) and (1b) is significant for at least two reasons. The most obvious reason is that (1a) offers a way of giving legal words meaning without relying upon moral ideas. It thus undermines the thought that legal duties and rights are connected analytically to moral duties and rights. But the larger aim of Holmes’ project generally, and of The Path of the Law in particular, is to show that there is something fallacious about the inference from moral duty to legal duty, and from moral right to legal right. To the students whom he addressed, Holmes sought to make clear that they cannot and should not make judgments about legal liability merely on the basis of moral intuitions or judgments. “Where there’s a right, there’s a remedy” would be non-circular if the word “right” referred to moral rights and the word “remedy” referred to legal liability. Once we see, however, that the word right refers to “legal right,” then (Holmes claimed) we must concede that the maxim is circular.

Leading tort scholars within the law and economics movement, including Guido Calabresi, Richard Posner, and Steven Shavell, all adopt frameworks descended from

\(^3\) Here we are assuming that liability to Yvonne is the only legal ‘sanction’ that Xander might face (i.e., that there will be no criminal punishment or regulatory sanction).
Holmes’, and their frameworks all lead to the same place, jurisprudentially. Consider Calabresi. Legal rules, he and Melamed famously argued, almost all fall within one of three kinds: property rules, inalienability rules, and liability rules. Under a property rule, no one may act upon or remove the entitlement of another without her consent. Under an inalienability rule, even consent is ineffective to remove an entitlement. Under a liability rule, an actor may unilaterally choose to interfere with another’s entitlement, but then will be subject to liability for having done so. Tort law, Calabresi insists, is overwhelmingly a scheme of liability rules. To be under a rule of tort law stating that one must not do $A$ to another is to be under a rule according to which one will be liable if one does $A$ to the other. Here, too, the *ubi jus* maxim is rendered circular.

2. **Hart’s Alternative**

As we embark on our critique of Holmes’s analysis of legal duties and rights, we want to be clear that the position we will offer is entirely consistent with his insistence on separating legal duties and rights from moral duties and rights. More succinctly, this chapter’s analysis of duties and rights is perfectly compatible with legal positivism, though one need not be a positivist to adopt it. Indeed, the principal foundation of our anti-Holmesian analysis is the work of self-described positivist H.L.A. Hart. Hart, of course, famously criticized the predictive theory of law and Holmes’ analysis of legal duties. More importantly, Hart offered a framework that establishes the cogency of treating legal duties as a species of obligation comparable to, yet distinct from, moral obligations.

Hart’s critique of Holmes has several components. We will focus on two: the argument against predictiveness, and the argument from the obliged/obligated distinction.

In an effort to account for the ordinary parlance of duty—what it means for a speaker to assert that $X$ is under an obligation to refrain from doing $S$—Holmes

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proposed to treat such statements as predictions that liability will follow if \( X \) does \( S \). Hart’s most concise response to this claim observes that people obviously can and often do mean something distinct from predicting the onset of disagreeable consequences when they assert that they (or someone else) are under a legal obligation, because it is not incoherent to assert both that someone is subject to an obligation and that she is under no risk of sanction:

If it were true that the statement that a person had an obligation [to someone] meant that he was likely to suffer in the event of disobedience, it would be a contradiction to say that he had an obligation, e.g. to report for military service but that, owing to the fact that he had escaped from the jurisdiction, or had successfully bribed the police or the court, there was not the slightest chance of his being caught or made to suffer. In fact, there is no contradiction in saying this, and such statements are often made and understood.\(^5\)

Additionally, Hart pointed out that assertions about obligations obviously can carry some content other than predictive content. In particular, Hart observed that Holmes’s “predictive” analysis is particularly unable to account for judicial speech about obligations.

Perhaps the most memorable negative argument in *The Concept of Law* against the Holmesian conception of obligation is in some ways the most subtle. Holmes maintained that having a legal duty (or obligation) to do \( S \) is roughly analogous to being told by a threatening gunman that one must do \( S \). Such a person would be obligated to do \( S \) on pain of a sanction that the more powerful party is in a position to inflict. In law, it just so happens that the more powerful party is the state.

Hart responded that Holmes’s picture runs roughshod over an important distinction between being “obliged” and being “obligated.” The addressee in the gunman example might accurately describe himself as “obliged to do \( S \)” But if the threat were the only reason provided to him to do \( S \), then it would not be correct to describe the addressee as under an obligation to do \( S \): “There is a difference . . . between the assertion that someone was obliged to do something and the assertion.

that he had an obligation to do it.” The former is a psychological statement referring to the beliefs and motives with which the action is done. “But the statement that someone had an obligation to do something is of a very different type ....” It connotes that there are or may be mandatory reasons applicable to the person under the obligation in light of which he ought to do S. Holmes’s account of duties runs roughshod over this distinction.

We now turn to the affirmative side of Hart’s critique. A large subset of laws, on Hart’s view, consists of what he calls “duty-imposing rules.” The force of these rules is to enjoin, direct, or demand conduct of a certain form. “Car lights are to be used after dusk, or when it is raining” is such a rule, directing persons who drive cars to turn on their headlights under certain circumstances. “The fork and knife should be put on the plate when one is finished eating” is a duty-imposing rule too, albeit a rule of etiquette. Some forms of rule—legal and moral, for example—impose obligations, while other forms of rule—rules of etiquette, for example—do not.

Hart argued that three features separate domains in which socially recognized rules are understood as imposing obligations from those in which they are not. First, “[r]ules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.” Second, and partly explaining the social pressure, in the domain of obligations, the rules “are believed to be necessary to the maintenance of social life or some highly prized feature of it.” Third,

it is generally recognized that the conduct required by these rules may, while benefiting others, conflict with what the person who owes the duty may wish to do. Hence obligations and duties are thought of as characteristically involving sacrifice or renunciation, and the standing possibility of conflict between obligation or duty and interest is, in all societies, among the truisms of both the lawyer and the moralist.\(^8\)

\(^6\) Id. at 82. Hart arguably rested his argument too heavily on a claim about the ordinary-usage meanings of the terms “obliged” and “obligated.” However, even he was wrong in his claims about usage, his larger point stands. The distinction between acting in order to avoid a threatened harm and acting in fulfillment of an obligation is perfectly familiar.

\(^7\) Id. at 83.

\(^8\) Id. at 87.
Hart, of course, believed that legal systems are among those whose primary rules do impose obligations. His recognition that the primary rules of law have these three features is coupled with his analysis of obligations as particular to rules enjoying these features. The result is that he is able to offer an interesting explanation of what it means to say that the law imposes obligations, beyond saying that it has rules that enjoin conduct.

A person has a legal duty to refrain from doing $S$, according to Hart, as long as there exists a valid legal rule applicable to him that enjoin him not to do $S$. To assert that a person has a legal duty to refrain from doing $S$ is not to predict that he will be sanctioned if he does $S$. It is to assert that there exists a relevant legal rule that proscribes doing $S$. It is often a consequence of such a rule that the legal system will also empower someone to impose a sanction or liability for the failure to live up to it, but asserting that there is a primary rule directing an actor to refrain from doing $S$ is not predicting what will or might happen if the actor does $S$. We will refer to what Hart described as primary, duty-imposing rules as “legal conduct rules” or “legal directives.”

A citizen’s capacity to recognize legal obligations is, in part, a capacity to grasp that there is a legal rule that speaks to a kind of situation, and that directs her to act (or not act) in a certain way in that situation. In The Path of the Law, Holmes advised that the good lawyer focuses on the legal sanctions that may follow if certain conduct is undertaken. Hart, by contrast, emphasizes a lawyer’s or layperson’s capacity to glean information about the content of the legal system’s directives concerning what a person is permitted or not permitted to do.9 Critically, however, Hart’s account is every bit as positivistic as Holmes’. For Hart, it is a matter of fact—of positive law—whether there is or is not a legal rule enjoining certain conduct.

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9 This contrast is somewhat overstated. Holmes, unlike his Legal Realist followers, maintained that lawyers could and should make their predictions about judicial sanctions on the basis of their readings of standard legal sources such as cases and statutes, as opposed to psychological or sociological facts about the relevant parties or the judge(s) who might decide the matter at hand.
We recognize, of course, that many Holmesians are skeptical of the distinction drawn above. Indeed, if readers will pardon the anachronism, it is fair to say that Holmes himself was attracted to the view that nearly all legal norms of conduct were in some sense mere liability rules (or, as he called them, “taxes”) and that, therefore, a richer, Hartian conception of legal duty was illusory:

Take again a notion which as popularly understood is the widest conception which the law contains--the notion of legal duty, to which already I have referred. ... But what does it mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money. But from his point of view, what is the difference between being fined and being taxed a certain sum for doing a certain thing? .... You see how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law.10

Hart’s famous discussion of the internal aspect of rules and the internal point of view provides powerful (though hardly uncontestable) answers to these questions, to which we shall eventually return for critical scrutiny. For the moment, however, a shorter response will suffice. Hart was willing to concede, at least for the purposes of argument, that there is a possible bad-man perspective on law generally and on the particular laws of the legal system. He insisted, however, that there is another possible perspective, which might be called the “generally law-abiding citizen perspective.” Oversimplifying, Hart used the phrase “the external point of view” to refer to the bad-man perspective and the phrase “the internal point of view” to refer to the law-abiding citizen perspective.

What the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society. These are the officials, lawyers, or private persons who use them, in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment, viz., in all the familiar transactions of life according to rules. For them the violation of a rule is not

10 Holmes, supra note 1, at 461-62.
merely a basis for the prediction that a hostile reaction will follow but a reason for hostility.¹¹

Hart argued that there are many persons in a legal community at any given time who occupy the internal point of view. Relatively, he argued that legal rules have an *internal aspect*—they must be such that there is a way of seeing them as the generally law-abiding citizen does. Although it is a matter of controversy whether Hart believed that some or most ordinary members of society *must* occupy the internal point of view if there is to be an actual, functioning legal system, it is clear that he did not think all members of society needed to do so. Conversely, however, it appears that Hart did believe that legal officials—in particular, judges—must see the law from the internal point of view.¹²

On the basis of the assumption that it is possible for persons to occupy an internal point of view with respect to legal norms—*i.e.*, to understand the law as enjoining them to comply with certain standards of conduct—we will proceed with the idea that legal duties need not be understood in Holmesian terms. We further assume that a jurisprudential thinker committed to distinguishing legal duties from moral duties need not adopt a Holmesian analysis of legal duties. Rather, it is possible to see legal duties as existing whenever there are conduct-enjoining rules that have the status of valid laws within a legal system. As did Hart, we will assume that a great many of these conduct-enjoining rules qualify as valid not because of the moral justifiability of their substance, but because they came to be law through a process that the legal system treats as valid. For example, the validity of a statutory provision requiring that each automobile owner in a state carry $50,000 in liability insurance turns on whether the state legislature properly enacted the statute, not on whether it is a morally justifiable rule. On this account, the existence of a legal duty consists in the existence of a valid duty-imposing legal rule.

¹¹ Hart, *supra* note 5, at 90.
¹² Scott Shapiro has argued persuasively that this claim was one of the centerpieces of Hart’s theory of law. *Scott J. Shapiro, Legality* 79-117 (2013).
3. Relational Directives, Dyadic Duties and The Conduct-Rule Theory of Rights

Having generated an option for understanding legal duties as distinct from moral duties without understanding them as liability rules, we now turn to the task of generating an account of legal rights that will pave the way for a substantive, noncircular rendering of the *ubi jus maxim*.

The crucial move here is to distinguish two kinds of legal directives: those that are “simple” and those that are “relational.” Simple legal directives require persons to perform certain acts or enjoin persons from committing certain acts. Laws requiring persons to purchase liability insurance for their cars or to register for the military draft, and laws enjoining people from polluting, flag-burning, or conspiring to sell narcotics all contain simple legal directives. A simple directive that proscribes (rather than requiring) conduct has the following form: *Each member of the class of persons C must refrain from doing S.*

Relational legal directives, by contrast, enjoin persons to treat or to refrain from treating other persons in a particular way. Directives specifying that a parent is required to care for his children, or that enjoin a physician from incompetently treating her patient, or that prohibit eavesdropping on another, are all relational legal directives. Respectively, they require a parent to attend to *his child*, a physician to avoid injuring any of *her patients* through incompetent care; and each person to refrain from eavesdropping *on any other person*. Though they thus differ in scope—both in terms of the class of persons to whom they are addressed, and the class of persons whom they protect—relational directives that proscribe conduct all share the following form: *Each member of the class of persons C must refrain from doing S to each member of the class of persons P.*

The distinction between simple and relational legal directives generates a distinction between two kinds of legal duties. To say that a person has a “simple legal duty” to refrain from doing *S* is to say that the person is subject to a simple legal directive enjoining *S*. To say that a person has a “dyadic legal duty” to refrain from doing *S* is to say that there is a relational directive under which doing *S* to another
person or other persons is identified as legally required or prohibited. Insofar as there are legal rules against polluting, flag burning, and conspiring to sell narcotics, violations of these rules are breaches of simple legal duties. Insofar as there are legal rules against child neglect, medical malpractice, and eavesdropping, violations of these rules are breaches of dyadic legal duties.

It may be illuminating to compare the distinction between simple and relational directives to the distinction between intransitive and transitive verbs. To use a transitive verb correctly, one must specify or imply a direct object that is being acted upon (e.g., “X injured Y.”) To use an intransitive verb correctly does not require the identification of such an object (e.g., “X bellowed.”). In a similar manner, relational directives identify how an actor must conduct herself in relation to other persons, whereas simple directives identify how an actor must conduct herself, full stop.13

Importantly, the distinction between simple and relational directives, and simple and dyadic duties, is not a distinction between directives and duties that are personal, particular, or specific (on the one hand) and those that are impersonal, abstract, or general (on the other). Relational directives—such as the directive not to defraud any other person—can be quite broad. Likewise, although relational directives and dyadic duties are at the heart of tort law, the simple/relational dichotomy does not map neatly onto the distinction between tort law and other bodies of law, such as criminal or regulatory law. Tort law’s substantive directives are all relational—they always enjoin certain actors from doing certain things to certain others, or to do certain things for certain others. It is not true, however, that criminal law’s directives are all simple. Some are (“Do not possess narcotics”) but others are not (“Do not murder another.”). At this juncture, we are making a claim about the analytic structure of different directives and different duties. We are not yet advancing an interpretive claim about tort law, though we will advance such a claim below.

13 On a more purely philosophical (as opposed to linguistic) level, the pioneering work at the inception of analytic philosophy of Gottlieb Frege and Bertrand Russell turned on part on their willingness to look at polyadic predicates, not simply monadic predicates.
With the idea of relational legal directives and dyadic legal duties in front of us, we can fairly quickly proceed to the recognition of a special kind of legal right. By identifying a class of duty-bearers whose duties consist of obligations to refrain from acting upon certain other persons, relational directives at the same time identify a class of right-bearers. Yvonne has a legal right against Xander’s doing S to her (for example, carelessly injuring her) if and only if Xander has a dyadic legal duty to refrain from doing S to her. Because relational legal directives are the source of dyadic legal duties, it follows that Yvonne has a legal right to have Xander refrain from doing S to her if and only if there is a relational legal directive requiring Xander to refrain from doing S to her.\textsuperscript{14}

The point can of course be enlarged from the case of dyadic duties owed by one particular person to another particular person. Yvonne has a right not to have anyone do S to her if and only if there is a relational legal directive enjoining the class of all persons not to do S to her. And all persons have a right not to have anyone do S to them if and only if there is a relational legal norm enjoining the class of all persons not to do S to any other person.

We have provided the foregoing analytical apparatus in part to allow for the flexibility that any theory of legal rights and duties will need. It is not simply that some rights are rights to be free of certain kinds of mistreatment. It is also that many rights are rights as against a significant subset of persons, while other rights are as against everyone, and other rights still are as against only one (or one kind of) person. A legal right to have one’s confidences kept exists as against one’s lawyer, one’s doctor, or one’s clergy-person, but perhaps not as against a reporter or a stranger. A legal right not to be punched in the nose exists as against everyone.

For present purposes, we will concede that it is not always easy to decide whether a particular legal directive is simple or relational, that it is not always clear who the rights-holders are under such directives, and that it is not even clear what criteria are

\textsuperscript{14} The same analysis applies with respect to affirmative relational directives. For example, a legal directive that requires all hotel owners to take reasonable steps to provide first aid to guests who are injured on their premises generates a duty for hotel owners and operators that corresponds to a right enjoyed by guests.
to be used to ascertain the existence and content of such a directive. We will further concede that there are at least some legal rights—e.g., the right to vote—that are best conceived at least partly as legal powers, which in turn suggests that some legal rights do not correspond to duty-imposing directives. None of these concessions undermines the plausibility of our basic claims that: (i) there is an analytically cogent distinction to be drawn between simple and relational directives; and (ii) there is a cogent notion of legal rights and legal duties that can be derived from the notion of a relational directive.

Consider, for example, an archetypical set of legal rights, namely, the rights guaranteed by the federal Constitution’s Bill of Rights. It counts in favor of the intelligibility of our account that many of these rights fit the model we have just offered. The Eighth Amendment, for example, states that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” 15

Given that only governments set bail or inflict punishment (and bracketing the question of whether the government in question is the federal or a state government), one may fairly paraphrase the Amendment as follows: “a government shall not require excessive bail of anyone, or impose excessive fines or inflict cruel and unusual punishment on anyone.” So put, this is plainly a relational legal directive. The Eighth Amendment instructs government actors—i.e., imposes a legal duty on them—not to set excessive bail for anyone, and not to impose excessive fines or inflict cruel and unusual punishments on anyone. At the same time, it confers on each person who falls within the Amendment’s scope a right not to be subjected to these mistreatments. The commonplace notion of a person “asserting her Eighth Amendment rights” conveys effortlessly the connection we are describing between a certain kind of a legal rule, a certain kind of legal duty, and a certain kind of legal right.

Of course legal rights are hardly confined to the Bill of Rights, but are found throughout the law, protecting individuals in others ways and imposing duties on various actors, public and private. Many of these rights, too, fit our model. Consider

15 U.S. Const. amend. VIII.
Vermont’s Fair Credit Reporting statute. The statute provides consumers with a right to obtain their credit scores from credit reporting agencies as follows:

(a) A credit reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer all information available to users at the time of the request pertaining to the consumer, including:

1. any credit score or predictor relating to the consumer, in a form and manner that complies with such comments or guidelines as may be issued by the Federal Trade Commission;
2. the names of users requesting information pertaining to the consumer during the prior 12-month period and the date of each request; and
3. a clear and concise explanation of the information.16

This provision contains a relational legal directive that confers rights upon consumers and duties upon credit-reporting agencies. We mention it not because it is remarkable, but because it is completely unremarkable. State and federal law is shot through with relational directives, relational legal duties, and corresponding legal rights.

The Hartian framework we have provided solves the challenge we set for ourselves of identifying a way separating legal rights and duties from moral rights and duties without requiring the adoption of a Bad Man, liability-rule view. Hart argued that there are valid legal rules that enjoy their status or validity in virtue of facts that obtain at least somewhat independently of whether they are morally justifiable. Such rules, he maintained, are valid because properly enacted, adopted, or recognized. Because their content is essentially injunctive and because they exist within a system that at least some members—as a matter of sociological fact—cogently understand to impose obligations of conduct, it is proper to speak of them as “duty-imposing” legal rules. Moreover, the courses of conduct they purport to require are plausibly described as “legal duties.”

Imagine, for example, that a credit-reporting agency has just begun doing business in Vermont. It receives a letter from a Vermont consumer requesting his credit score.

16 9 V.S.A. § 2480b(a).
If the letter were forwarded to an in-house lawyer, and if she were knowledgeable about the situation, she might well communicate to the relevant company officials that the company is under a legal duty to provide the consumer with the requested report. What she would mean by saying this is that a valid Vermont law exists that is applicable to the company. *The lawyer is neither telling the company what it ought to do, morally, nor offering a prediction as to its risk of facing a legal sanction. Instead, she is identifying that the company is subject to a valid legal rule that requires certain actions of it.*

To get to our claim about rights requires just one more step. Returning to our imagined in-house lawyer, one could just as easily envision her advising the credit-reporting agency as follows: “Under Vermont law, a consumer has a legal right to the release of her credit scores. Indeed, Section 2480b of volume 9 of the state statutes indicates that we are required to send her a copy of her credit report within 30 days of her request.” Obviously, the lawyer is once again looking at the same duty-imposing rule. But because the rule contains a *relational* rather than a simple legal directive, it is no less natural for the lawyer to describe the legal situation facing the agency in terms of the consumer’s right than in terms of the company’s duty. Relational legal directives are simultaneously duty-imposing and rights-conferring.

The general point is that for a certain kind of legal right to exist in a given legal system is for a particular kind of legal rule to be valid in that system. Of course, there can be difficult interpretive questions of how to identify which legal rules are valid and what they mean. But interpretive difficulties of this sort were not Holmes’ principal concern in *The Path of the Law*, nor Hart’s in *The Concept of Law*, and they are not our principal concern in this chapter. The issue is whether there is a way to make sense of the statement that someone has a legal right against someone else without saying that someone else faces liability to them, and without saying that the right in question is a moral right. We now see that there is a way to answer “yes” to this question. A person has a legal right that another not treat her in a certain way if there is a valid legal rule in the system that enjoins the other not to treat her that way.
We shall call the foregoing account of legal rights the “conduct-rule theory of legal rights.” It captures the idea that certain legal rights exist by virtue of the existence of valid legal directives within a legal system that require some set of persons (including the set of all persons) to treat some set of persons (including the set of all persons) in certain ways, or that enjoin some set of persons from treating some set of persons in certain ways. These relational legal directives or norms are conduct rules.

While we have not shied away from giving our account a fancy label, our aspirations for it are quite modest. We certainly do not mean to suggest that this was Hart’s account of legal rights: the truth is otherwise. Nor do we mean to suggest that it is wholly original: Neil MacCormick arguably offered a similar view. And we do not mean to suggest our account either as an alternative to interest-based rights theories (like Bentham’s or Raz’s), choice theories (like Hart’s or Feinberg’s), or trump theories (like Dworkin’s), or as an instance of any one of them. And, as mentioned above, we do not suggest that our account is able to accommodate all of the senses of the concept of right that Hohfeld famously teased apart.

What we do mean to suggest is that our account of legal rights will assist us in explaining what is meant by the maxim “where there’s a right there’s a remedy.” Admittedly, an account of a concept that has plausibility in explaining only one maxim would hardly be a serious account, but—as the remainder of the book will show—that is not true of the conduct-rule theory of legal rights; it has the capacity to capture the concept of a legal right throughout private law.

4. Rights, Rights of Action, and Remedies

We are almost in position to understand how it is that the *ubi jus* maxim is substantive, not circular. To get there, however, requires the introduction of one additional concept: *right of action*.

Though familiar in legal discourse, the phrase “right of action” is hard to pin down. It is sometimes understood to refer merely to a right to file a claim. But this
rendition is too thin. Pretty much anyone can file a claim: court clerks rarely refuse to accept complaints, even complaints that will be dismissed promptly on jurisdictional or other grounds. A right of action is a more robust legal power. In the elegant language of an old New York decision, it is “the right to prosecute an action with effect.”¹⁷ In other words, it is a power to file a claim and to obtain judicially ordered relief—a remedy—upon proof of the claim.

Needless to say, the power to pursue and obtain a remedy is subject to various conditions, and requires for its exercise the acts of others.¹⁸ The claimant must indeed file a claim, and usually must put forward evidence in support of it. In addition, legal actors such as judges and jurors, while bound to apply and follow procedural and substantive rules, often enjoy substantial discretion in determining the validity of a claim. Other legal rules specify the menu of remedies available to a successful claimant. These qualifications notwithstanding, where there is proof of valid claim (and no applicable affirmative defenses), it is not within the discretion of a judge or jury to deny the claimant a remedy to which she is legally entitled.

Armed with the idea of a right of action, it is now possible to see how the conduct-rule theory of legal rights generates a non-circular interpretation of the ubi jus maxim. Plaintiffs invoke the maxim when they believe they can establish that a right of theirs has been violated and are seeking a remedy—typically damages—for the rights-violation through a court proceeding. The phrase “where there is a right there is a remedy” means that a person is entitled to be provided with a remedy by a court for having suffered a certain kinds of rights-violation. More precisely, the maxim posits a linkage between legal rights (and corresponding duties) generated by relational legal directives and rights of action. Ubi jus thus can be restated as follows:

For every dyadic legal duty generated by a relational legal directive, a person is entitled to obtain a remedy from the other upon proof that the other has violated the relational directive as to her.

¹⁷ Patterson v. Patterson, 59 N.Y. 574, 578-79 (N.Y. 1875) (emphasis added).
¹⁸ This is hardly an uncommon feature of legal powers. The legal power to marry requires the participation of various actors beyond the power-holder, including an official charged with issuing marriage licenses, and a person authorized to conduct marriage ceremonies.
That this formulation is not circular can be seen by returning to our example of the Vermont credit reporting statute. Readers can know—and did know, after reading our discussion of it—that Vermont consumers have a right to obtain from credit reporting agencies their credit scores and the names of others who have requested it. Crucially, readers gained this knowledge in the absence of any information about the legal consequences that follow from a violation of that right. Of course one would expect that a legislature that goes to the trouble of enacting a law conferring this right would make provision for its enforcement. And one might complain that a law that without any such provision would be toothless. But a law that fails to provide for the adequate enforcement of a right it confers is readily distinguishable from a law that confers no right at all.

In any event, even if one were to equate a toothless law with a law that confers no legal right—that is, to insist that the right to credit information provided by the Vermont statute cannot count as a legal right unless there is a meaningful enforcement provision—it does not follow that ubi jus is circular. After all, there are mechanisms of enforcement other than private rights of action. Indeed, Vermont’s statutory scheme expressly confers powers on state officials to impose civil penalties on actors who violate the statute. ¹⁹ Suppose this were the statute’s exclusive enforcement mechanism. If it were, the proper description of the legal right conferred by the statute would be a right without a remedy. There would be no remedy for this legal right because a violation of the right would give rise only to an official enforcement action, not a victim-initiated court proceeding through which the victim would seek a remedy for the rights-violation from the actor who perpetrated it.

As it turns out, the actual Vermont statute authorizes both public enforcement and private rights of action. Thus, Section 2840f(b) reads as follows: “A consumer aggrieved by a violation of this subchapter … may bring an action in superior court for the consumer’s damages, injunctive relief, punitive damages in the case of willful

¹⁹ 9 V.S.A. § 2461(a) (providing for civil penalties for statutory violations).
violation, and reasonable costs and attorney’s fees.” Obviously this section refers to something more than a right to file a claim. It confers a legal power to obtain a remedy upon proof of claim in a court proceeding. The Vermont statute, in other words, conjoins a legal right against mistreatment with a remedy for violations of that right. In doing so, it instantiates the *ubi jus* maxim.

Another example will help elucidate our rendering of *ubi jus*. It concerns an old United States Supreme Court decision that we mentioned in Chapter 1. In *Texas & Pacific Railway v. Rigsby*, the plaintiff, a switchman employed by the defendant railroad company, was descending a ladder on the side of the defendant’s railroad car. Because the ladder had a loose or missing handhold, he fell and was injured.

At the time of the accident, the railroad was subject to directives set out in two federal statutes known as the Federal Safety Appliance Acts, one enacted in 1893, the other in 1910. Section 2 of the 1910 Act required railroads to equip their cars with secure handholds. Under Section 4 of the same Act, a railroad operating with noncompliant cars was subject to a penalty of $100 per violation, payable to the U.S. Treasury.

Although Rigsby filed suit in state court, his suit was removed to federal court at the railroad’s request. Pointing to the railroad’s violation of Section 2 of the 1910 Act, Rigsby claimed an entitlement to damages for the injuries he suffered as a result of that violation. His claim prevailed in the lower federal courts, and the Supreme Court affirmed. In the process, the Court rejected the railroad’s argument that the suit was unauthorized because the Safety Appliance Acts—unlike the Vermont credit statute—nowhere explicitly stated that persons harmed as a result of violations of the Acts’ directives were authorized to obtain damages or other relief. (As noted, the Acts stated only that violations would result in a fine payable to the federal government.) The Court instead reasoned that the Acts were best interpreted to have *implicitly*...

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20 *Id.* § 2480f(b).
22 A separate federal statute in effect at this time allowed federally chartered companies such as the Texas and Pacific Railway to have claims against them heard in federal court.
conferred a right of action on persons such as Rigsby. Invoking *ubi jus* in support of its interpretation, and quoting an English decision, the Court reasoned that when a statute “‘enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for recompense of a wrong done to him contrary to the said law.”’23

*Rigsby* and the Vermont credit reporting statute each points toward the substantive, non-circular rendering of *ubi jus* that we aim to provide. The Vermont statute shows how a legislature can link a legal right (a right to obtain credit information from a credit reporting company) to a certain kind of legal power (a right of action to obtain a remedy through a court proceeding). *Rigsby* does the same thing, but in a context in which judicial interpretation was required in order to establish the relevant linkage. *Rigsby* is in this respect particularly illuminating because the Court’s judgment that workers such as Rigsby were entitled to a remedy under the Safety Appliance Acts turned in large part on its determination that the Acts were best read to contain a relational directive generating a right in workers such as Rigsby to be free of injuries caused by unsound equipment. In other words, the presence of a relational directive within the 1910 Act—and, with that directive, a legal right against certain forms of mistreatment enjoyed by railroad workers as against their employers—was taken by the Court as strongly indicative of the workers having also been granted a right of action by the Acts even though the Acts were silent on that precise question.24 Note that there is nothing circular about this chain of reasoning. The Court was not engaged in the bootstrapping exercise of asserting that Rigsby had a right to sound safety equipment because it (the Court) was prepared to

23 *Id.* at 40 (quoting *Anonymous*, 87 E.R. 791, 791 (1703) (Holt, Ch. J.)). As reported in the English Reports, the relevant portion of Holt’s opinion reads: “for where-ever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have the satisfaction for the injury done him contrary to law by the same statute ….”

24 One might object to our characterization of the Acts as identifying forms of “mistreatment” on the ground that liability under the Acts was strict, such that a railroad could be held liable for worker injuries caused by defective equipment even if it exercised due care to ensure the equipment was not defective. As we explain in Chapter __, the notion of mistreatment at work in tort law is entirely compatible with certain kinds of strict liability, including the kind at work in the Safety Appliance Acts.
hold the defendant liable to Rigsby for his injuries. Quite the opposite, it was asserting that Rigsby was entitled to a remedy because the 1910 Act conferred on him a right to be free of certain kinds of mistreatment by his employer. The bearer of a certain kind of legal right is one who, by virtue of being a bearer of that right, also enjoys a related legal power. This is *ubi jus* in its substantive, non-circular rendition.

As was the case in the previous section, our claims here are modest, at least in certain respects. We do not purport to have established on the basis of these two examples that U.S. law consistently adheres to the *ubi jus* principle. Likewise, the extent to which the maxim admits of qualifications or exceptions is a separate question. So too is the question of whether its converse holds—that is, whether, in the absence of the requisite kind of legal right, one cannot have a right of action.

Finally, we have put to one side the question of how *ubi jus* operates and should operate within our federal system of government, and whether it holds or should hold for federal courts in the same way that it does for state courts. Although we have invoked a Supreme Court decision (*Rigsby*) to illuminate our account, knowledgeable readers will recognize that there is something ironic about our having done so, just as there was something ironic about our focus on federal law in Chapter 1. This is because, since the late 1970s, the Supreme Court—based on a substantially different understanding of the jurisdiction conferred on federal courts by Article III of the Constitution than is expressed in *Rigsby*—has concluded that federal courts should not find implied rights of action in federal statutes, even statutes containing relational directives that generate relational duties not to mistreat others and correlative rights against mistreatment.25

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25 See, e.g., Touche Ross & Co. v. Redington, 442 U.S. 560 (1979). Although on a somewhat different timeline, a similar transition has played out on the question of whether the federal courts should be guided by *ubi jus* in their interpretation of the rights-conferring provisions of the U.S. Constitution.

In the *Bivens* case, the Court displayed an openness to finding implied rights of action in the guarantees of the Bill of Rights. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Federal agents raided Bivens' residence and arrested him. Both the search, which was conducted without a warrant, and the arrest, which
Our own view is that there are important differences between the jurisdictions of the federal and state courts, and that these differences may well warrant the federal courts in taking a different approach to implied rights of action than state courts, even if not the precise approach favored by a majority of the current Justices. However, the important point to emphasize here is that our claims about relational legal directives, relational legal duties, legal rights against mistreatment, rights of action, and remedies stand quite apart from the position one takes on whether and how federal courts should locate implied rights of action in the federal Constitution and federal statutes. Our goal from the outset of this chapter has been to articulate a substantive, noncircular rendering of *ubi jus* that can shed light on how tort law connects rights and remedies. We have used examples of statutory rights of action—express and implied—to help make that argument. But the argument stands independently of those examples.

Bivens brought suit in federal court seeking monetary damages from the agents. He claimed to be entitled to pursue his action in federal court (rather than a state court) because his claim was grounded in federal law—i.e., a right conferred on him by the federal Constitution. Lower federal courts dismissed the suit, reasoning that, while the Fourth Amendment identifies a right that individuals enjoy against the federal government, it neither explicitly nor implicitly confers a *right of action* on persons who suffer a violation of that right.

The Supreme Court reversed, holding that a person whose Fourth Amendment right is violated by federal officials is “entitled to redress his injury through a particular remedial mechanism normally available in the federal courts”—namely, a suit for damages. *Id.* at 397. In other words, according to the Court, once it was recognized that the Fourth Amendment conferred on Bivens a right against mistreatment by federal officials, it should also be recognized that it generates a power to bring a claim against them for those violations that, if proven, would entitle him to a remedy from them.

*Bivens* thus stands as a constitutional analogue to *Rigby*. And it has met a roughly similar fate in subsequent decisions. *Bivens* is still good law—it has never been overruled or repudiated. Nonetheless, the Court has limited it in various ways, in the process making clear that it no longer has a taste for finding rights of action implicit in the guarantees of the Bill of Rights. *See, e.g.*, Minneci v. Pollard 132 S. Ct. 617 (2012).
5. *The Common Law*

Even a Holmesian with patience enough to have come this far might balk at the examples we have relied upon to vindicate a substantive rendering of *ubi jus*. Holmesian thinking, one might suppose, begat ‘realism’ (*i.e.*, skepticism) about the cogency of maxims such as *ubi jus* in large part because Holmes was first and foremost a student of the common law. Yet the relational legal directives or “conduct rules” that we have thus far invoked—whether constitutional or statutory—are embedded in authoritative texts enacted by lawmakers. Thus (our patient Holmesian might claim) whatever life has been breathed into the *ubi jus* maxim by reference to legal directives will be of no help when it comes to making sense of the law of torts, which is largely judge-made.

The first problem with this objection is that it seems to suppose that legal rules can exist only by virtue of having been codified. Hart long ago showed that this view is incoherent for any number of reasons, not the least of which is that there will inevitably be appeals to uncodified law to distinguish valid from invalid legislative or constitutional enactments; that is, the notion of a valid legal rule in the statutory or constitutional context presupposes the notion of an unwritten rule.

A more subtle concern brings us back to the circularity objection, but now in a more qualified form. The worry is not that all law necessarily boils down to liability rules, but rather that tort law, because it is a branch of the common law, boils down to liability rules. This is the view that we earlier associated with Calabresi. Even though it could have been otherwise, the objection runs, the rules of tort law are best understood as liability rules, not conduct rules.

Although the liability-rule conception dominates law-and-economics scholarship in torts, it has been subjected to broad criticism. Indeed, even Calabresi in some of his recent writing his disavowed the idea that tort law consists of pure liability rules. Our own criticisms of the pure liability rule conception have unfortunately filled too many pages in the past decades. Here we will aim for concision. At the outset, we
emphasize that—again following Hart—the arguments below are meant to be descriptive and analytical, not prescriptive or preachy.

We begin with a piece of black-letter negligence law that cuts against the supposition of a sharp divide between written constitutions and statutes (understood to be capable of containing genuine directives) and common law (understood to be a scheme of liability rules).

The tort of negligence, which applies to car accidents, slips-and-falls, and the provision of professional services, is a mainstay of modern tort litigation. To prevail on a claim of negligence, a plaintiff typically must prove that the defendant injured her through conduct that was careless. In turn, carelessness is usually assessed by reference to the common-law standard of “ordinary prudence.” A negligence plaintiff must establish not only that the defendant injured her, but that the defendant did so by means of failing to act as a person of ordinary prudence would have acted under the circumstances.

The question of whether a defendant has or has not acted with ordinary prudence is usually for juries. Yet almost every U.S. jurisdiction also recognizes the doctrine of “negligence per se.” According to this doctrine, if a negligence plaintiff proves that the defendant injured her by means of conduct that violated a statutory standard of safe conduct, there is no need for the plaintiff to establish that the defendant failed to act with ordinary prudence. The statutory violation is deemed to be carelessness in and of itself.26

For example, suppose a pedestrian lawfully standing on a city sidewalk is struck and injured by a person riding his bike on the sidewalk. Suppose further there is an applicable statute requiring cyclists to walk their bicycles when on sidewalks. Under the doctrine of negligence per se, if the pedestrian sues the cyclist, the pedestrian can establish carelessness simply by proving the statutory violation. A jury hearing the case would be required to deem the cyclist careless, even if, in their judgment the

26 Even the few U.S. jurisdictions that do not recognize the doctrine of negligence per se treat violations of an applicable statutory standard as evidence of carelessness.
cyclist had exercised ordinary prudence (for example, by riding slowly in uncrowded conditions while using a loud whistle to warn of his presence).

Importantly, not every statutory violation will have this significance for a negligence claim. This is because the courts have set certain threshold requirements for the application of the negligence per se doctrine. Suppose, for example, a different pedestrian is struck by a car that is being driven carefully. (Sometimes accidents happen even when everyone is being careful.) It turns out, however, that the careful driver had failed to renew his expired driver’s license, in violation of a state statute. Courts typically do not treat the violation of licensure statutes as establishing that the driver acted carelessly toward the pedestrian because licensing statutes are usually best understood as administrative rather than substantive. In other words, it is only statutes that contain relational directives, and hence that generate duties to take care against injuring, and rights against being injured, that provide the basis for the application of the negligence per se doctrine.

Finally, to take a third example, suppose that a state statute requires homeowners whose properties contain in-ground swimming pools to install fences around their pools. Suppose further that a homeowner fails to install a fence around his pool, and that, because of the absence of the fence, a 30 year-old man who is in the process of robbing the home falls into the pool and drowns. If the robber’s estate were to bring a negligence action against the homeowner and were to argue that the homeowner’s statutory violation establishes the owner’s carelessness, a court might well reject the argument on the ground that the statute was not meant to protect criminal trespassers, but instead was meant to protect persons on the property by permission, as well as young children who trespass innocently. Unlike in the preceding car-pedestrian example, a court reasoning in this manner would be acknowledging the existence of a statutory rule of conduct, applicable to the homeowner, that generates relational duties and corresponding rights. Yet the court would also be concluding that the putative victim—the robber—was not among the class of persons on whom the statutory rule conferred a right.
As the reader perhaps will have already noticed, the inquiry called for under negligence per se closely resembles the implied-right-of-action inquiry conducted by the Supreme Court in the *Rigsby* case. (Indeed, some have argued that *Rigsby* is best understood as an application of the negligence per se doctrine.) In both instances, a court is trying to determine whether there is an applicable rule that generates a relational duty and corresponding right, such that the right-holder enjoys a right of action for violations of his right. While negligence per se operates on the borderline between statutes and common law, it strongly attests to the idea that negligence—a common law tort—is not simply a collection of liability rules, but instead connects rights to rights of action in the manner we have been describing. In short, the doctrine of negligence per se nicely highlights the fact that negligence law sets a conduct rule that generates a relational duty (roughly, the duty not to injure another through carelessness) and a correlative right (roughly, the right not to be injured by another’s carelessness), and confers a right of action on those whose rights have been violated.

The common law is easy to deride because it may seem like it involves nothing other than the words, concepts, and the social and institutional practices of those who use it. Even if so, this is hardly a good reason to think there is no substance to its rules. Words, concepts, and practices constitute so much in our lives that they cannot simply be shunted aside as inherently insubstantial. Rather, one must attend to them carefully to capture their meaning.

Our opening chapter emphasized that “tort” derives from a French word that means wrong. But the linkage between torts and wrongs goes far beyond etymology. Courts conceptualize and describe tortfeasors as “wrongdoers” not only in their description of various actors but also in the crafting of the law itself. Consider the following passage from a mid-Twentieth Century court, which rejects the argument that a defendant should be spared liability in a case in which the plaintiff could not identify how much of its losses were attributable to the actions of the defendant, as opposed to another, innocent source:
... when one of the two contributing factors is not the result of an actionable fault ... the single tortfeasor cannot be allowed to escape through the meshes of a logical net. *He is a wrongdoer; let him unravel the casuistries resulting from his wrong.*

This passage was not penned by some corrective justice theorist who snuck his way onto the bench but by Judge Learned Hand—he of the economist’s beloved “Hand Formula”—deciding a humdrum admiralty case on the Second Circuit.

Beyond judicial rhetoric and lawyerly nomenclature, the language of duties, rights, and wrongs is part of tort doctrine, through and through. “Duty” is of course the anchoring element of the tort of negligence, and the law requires the plaintiff to prove that the defendant breached a duty of care that he or she owed to the plaintiff. Negligence law also requires juries to decide whether the defendant acted as a reasonably prudent person would have acted under the circumstances, and it does so in the context of an understanding that we require people to live up to this standard of conduct. Trespass and nuisance law expressly invoke notions of right, referring to “the right to the exclusive possession” of one’s land and “the right to use and enjoy” one’s land. Privileges throughout tort law cut back on what otherwise would be duties by noting that sometimes defendants are entitled to conduct themselves in certain ways under certain conditions, even if normally such conduct would be a legal wrong. The privilege of self-defense in battery and the privilege of fair comment in libel law are typical examples.

Lawyers, too, understand torts as legal wrongs that they and their clients have legal duties to refrain from committing and from which they have legal rights to be free. There are no doubt some ‘bad-man,’ ‘bad-woman,’ and ‘bad-company’ clients, but there is no reason to suppose all clients are bad in the Holmesian sense. Here it is important to recall that the alternative to the ‘bad’ client is not the angelic client, but the client who wants to know what the relevant legal obligations actually are. Previously we imagined an in-house lawyer seeking to determine her company’s

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27 *Navigazione Libera Triestina Societa Anonima v. Newtown Creek Towing Co.*, 98 F.2d 694, 697 (2nd Cir. 1938) (Hand, L.) (emphasis added).
statutory duties. That same lawyer will, of course, want to know the company’s *common law* duties as well. For example, she will want to be able to tell her client what sorts of credit reports might count as defamatory, what sorts of representations to consumers or third parties would count as fraudulent, and so on. To be sure, clients might not expect their lawyers to invoke the language of “legal duty” or to inform them of such putative duties if there really is no conceivable prospect of legal accountability. And lawyers appreciate from the outset that their clients are bottom-line oriented. But that is a far cry from saying that they only give, and are expected only to give, predictions of sanctions. They are informing clients of the standards of conduct the law has set, whether through legislation, regulation, or judicial decision, and there is no reason to suppose they are always (or even typically) separating out these sources.

The pure liability-rule view of tort law is inadequate in more formal and visible ways than those discussed so far. We have an elaborate set of institutions and procedures in tort law that make little sense on a view that deems tort law to be a taxation scheme or a pricing mechanism. Defendants (or their insurers) do not simply pay a tax or activity fee after the fact. As corrective justice theorists such as Ernest Weinrib and Jules Coleman famously noted as part of their critiques of economic theories, defendants pay money *to the plaintiff*, and, as we have emphasized in prior work, *they do so on the plaintiff’s demand, if the claim is sufficiently established*. Coasean, Calabresian, and Posnerian liability-rule accounts work hard to patch together stories about why our system would make a special place for the victim as prosecutor of the case and recipient of the relevant activity ‘tax’. In doing so, they flagrantly violate the principle of Occam’s Razor. Courts hear tort cases because plaintiffs come to them seeking redress for wrongs done to them by tortfeasors. It is not that our system incentivizes complainants to come to court so that risky activities are properly priced, as Posner would have it. They are open to people who demand the state hold accountable someone who wronged them. Our point, for the moment, is not that the structure of tort suits *cannot possibly* be explained by exponents of the pure-liability rule
view. It is that they have a ridiculous amount of explaining to do. Certainly, exponents of the view that tort law is about wrongs, duties, and rights are not the ones who should be on the defensive.

Again we emphasize, as we have throughout this chapter, our arguments have been made on terms that should be amenable to someone as morally skeptical as Holmes and as committed to legal positivism as Hart. The duties, rights, and wrongs of tort law, on our account, are the duties, rights, and wrongs that are entrenched in the legal directives that make up this field of law, and they of course vary somewhat among common law jurisdictions. In nineteenth-century Ohio, for example, it was a tort to seduce another’s fiancée; today it is not. In nineteenth-century New York, it was not a tort to play a vicious practical joke on someone with the aim of traumatizing him (and so as to traumatize him); today it is. Disclosing intimate details of someone’s personal life to a law firm of 500 people is not a tort today in New York (since New York does not recognize public disclosure of private fact as a tort), but it very likely is a tort in Colorado and California, and indeed most American jurisdictions. We say these things not as moralists who are moralizing but as lawyers describing the law in these various jurisdictions.

American tort law in any given jurisdiction is not found in a code, but primarily in a body of accreted decisions that is expressly self-referential and linked to developed common law in other jurisdictions as well as treatises such as the Restatements. Notwithstanding the variations mentioned above, judges and lawyers in virtually all jurisdictions know that battering someone is a tort; negligently injuring someone is a tort; defrauding someone is a tort, and so on. To know these things is of course to know that persons are subject to liability for such conduct. But this is only part of the story. It is also to know that the law has rules about not hitting others, not injuring others through carelessness, not tricking others out of their money, and so on—that courts consider persons who violate these norms to be, in the words of Learned Hand, “tortfeasors” or “wrongdoers,” and will treat them accordingly.
There is no denying Holmes’ rhetorical flair, but his emphasis on the perspective of the bad man has imposed high costs on American thinkers in jurisprudence and in torts. His understandable disdain for the pedantic moralist unfortunately led him to pose a false dilemma between the pedant and the bad man. Missing from his analysis is the ordinary person, the lawyer who counsels this person, and the judge who understands, applies, and crafts the law imagining that her legal community expects her to take this perspective seriously. These actors see the law as containing legal duties, legal rights, and legal wrongs, and they see these in the law of torts, too. Put differently, they understand their legal system to say that people are not supposed to hit others, carelessly injure them, libel them, defraud them, and so on. Never mind whether, as a matter of justice, the legal system should say this—it does in fact say it. Like Holmes, they recognize that such standards may not be the measure of a man or woman’s moral worth. But what the law lacks in transcendental significance it makes up for in pragmatic relevance.

On this view, which is of course what we urge our readers to entertain, the law of torts in any given state is comprised in significant part of legal directives like those found in the Eighth Amendment or Vermont’s consumer reporting statute. True, these directives are for the most part not written down in one place and were not enacted at a point in time, but are instead implicit in a body of judicial decisions. They are nonetheless legal norms of conduct that impose relational legal duties on persons not to mistreat others in various ways and simultaneously confer legal rights on persons not to be mistreated in those ways.

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Our goal in this chapter has not been to produce the analytically correct account of rights, whether in tort law or more generally. Rather, it has been to ascertain whether there is a cogent way to understand rights that preserves the cogency and meaningfulness of the principle with which we began this book: the principle embedded in the *ubi jus* maxim. We have now shown, by example, that there is such a
theoretical perspective and that, indeed, our perspective so nicely aligns with the jurisprudential framework of H.L.A. Hart that it remains safe for those with positivistic proclivities regarding the importance of separating law and morality. When a plaintiff comes to court demanding that a defendant be held liable to her and asserts a tort claim as the basis for that demand, she is saying that the defendant \textit{legally wronged} her and that, therefore, she is entitled to a remedy.

While we are pleased to have provided an understanding of legal rules, rights, and duties, and of rights of action, that permits a robust rendition of \textit{ubi jus}, we also concede that there is a cost to be paid for having done so. The question now facing us is \textit{why}—since it is not true by definition—a person whose legal right has been violated is entitled to a remedy. In other words, even one who accepts that we have rendered \textit{ubi jus cogent} can still ask whether it articulates a defensible legal or moral principle. We turn to this question in Chapter 4.