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## Competition Wrongs

**ABSTRACT.** In both philosophical and legal circles, it is typically assumed that wrongs depend upon having one's rights violated. But within any market-based economy, market participants may be wronged by the conduct of other actors in the marketplace. Due to my illicit business tactics, you may lose profits, customers, employees, reputation, access to capital, or any number of other sources of value. This Article argues that such competition wrongs are an example of wrongs that arise without an underlying right, contrary to the typical philosophical and legal assumption. The Article thus draws upon various forms of business law to illustrate what is a conceptual point: that we can and do wrong one another in ways that do not involve violating our private entitlements but rather violating only public norms.

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**INTRODUCTION**

In any minimally developed economy, market participants will sometimes be wronged by the conduct of others. Due to my illicit business tactics, you may lose profits, customers, employees, reputation, access to capital, or other sources of value. My misconduct, in such a case, leaves you personally aggrieved.<sup>1</sup> How are we to understand the wrongs that occur in the course of competition? In what does the complaint of the injured competitor consist? I think that probing these questions may shed light on deep moral and legal issues about rights, wronging, harm, and accountability. Competition tests the relationship between these basic concepts.

The wrongs that occur in the course of competition are noteworthy. Most instances of lost profits or lost consumers are hardly grounds for complaint. On the contrary, such economic setbacks offer a prime example of unobjectionable harming. For this reason, they are frequently cited to illustrate the conceptual distance between wronging and harming. Here, for example, is how Arthur Ripstein puts it:

Examples of harms that are not wrongful are . . . familiar . . . . If you build a better mousetrap, I may lose customers; if you close your hotel, my neighboring restaurant may suffer; if you show up before me, there may be no seats left on the bus or milk left at the store . . . . If contests really are fair, and the undertakings voluntary, any harm that ensues is not an interference with sovereignty.<sup>2</sup>

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1. I use the noun and verb “wrong” in a sense different than the merely adjectival use. “A wrong” or “wronging” implies that someone was “wronged” – someone has standing to complain, resent, hold accountable, or demand compensation – which is more than merely saying that someone acted wrongly. Some conduct – ranging from tax evasion to illegal drug use to chopping down old-growth trees – might in some circumstances be *wrong* without constituting *a wrong* to anyone. In this sense, wrongs are the traditional subject matter of private law, whereas criminal law might, on many views at least, be thought to concern whether the defendant has acted wrongly.
  2. Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215, 228–29 (2006). The same point may also be made about benefits, rather than harms. See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 9–10 (2d ed. 2015) (“That my act procures me a benefit or causes harm all by itself proves nothing. If I open a restaurant near your hotel and prosper as I draw your guests away from the standard hotel fare you offer, this benefit I draw from you places me under no obligation to you. I should make restitution only if I benefit *unjustly* . . .”).

The point is that many economic harms – even those that may have grave repercussions for the livelihood of the sufferer<sup>3</sup> – are not wrongs. The competitor who drives others out of business with a better product or price is not answerable to those who fall by the wayside. This is an important insight that I have no intention to dispute.

That insight might, however, lead one to imagine that the harms that arise in competition contrast with those harms that do wrong others. Ronald Dworkin describes the contrast as follows:

We need to . . . distinguish[] between two kinds of harm you might suffer because other people, like you, are leading their own lives with their own responsibility for their own fates. The first is bare competition harm, and the second is deliberate harm. No one could even begin to lead a life if bare competition harm were forbidden. We live our lives mostly like swimmers in separate demarcated lanes. One swimmer gets the blue ribbon or the job or the lover or the house on the hill that another wants . . . [E]ach person may concentrate on swimming his own race without concern for the fact that if he wins, another person must therefore lose. That inevitable kind of harm to others is, as the old Roman lawyers put it, *damnum sine injuria*. It is part of our personal responsibility – it is what makes our separate responsibilities personal – that we accept the inevitability and permissibility of competition harm.<sup>4</sup>

Dworkin's thought is that competition harms can provide a useful contrast to illuminate the wrongs of deliberate (and negligent) harming.<sup>5</sup>

There is some element missing from bare competition harm that prevents it from amounting to a wrong. For Ripstein and Dworkin and other like-minded thinkers, that missing element is a right or entitlement. The mousetrap manufacturer has no right to his or her customers, so when a competitor comes along with a better design, the harm does not constitute a wrong. The restaurateur has no right to an advantageous business environment, so there is no wrong when the neighboring hotel closes. And the swimmer has no right to the blue ribbon, so when a faster swimmer takes the prize, no wronging transpires. In each case, no right has been violated, even if a harm has been suffered. The harm

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3. Ripstein, *supra* note 2, at 239 (“No matter how significant the impact on those who lose at fair contests, the loss does not amount to the despotism of the winner over the loser.”).

4. RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 287–88 (2011).

5. Compare Ripstein, who follows the passage quoted in the text above with the sentence: “Other harms do interfere with sovereignty, but it is that interference, not their harmfulness, that merits prohibition.” Ripstein, *supra* note 2, at 229.

arises simply in the course of—to use Dworkin’s evocative metaphor—everyone swimming in their own lanes.

The conclusion, for these thinkers, is that wrongs require a rights violation. Wrongs arise when a party’s sovereignty is compromised—when a party is denied independence in a sphere in which he or she is entitled to independence.<sup>6</sup> Wrongs arise, that is, when someone crosses over into another’s lane. Thus, from the fact that not all competitive harms constitute wrongs, one arrives at the conclusion that wrongs are constituted by transgressions into another’s sphere of control.

I reject this lesson that rights-oriented thinkers like Ripstein and Dworkin draw from the existence of nonwrongful competition harm. In particular, I believe that a rights violation is not, in fact, a necessary ingredient of a wrong.<sup>7</sup> We can and do wrong one another in ways that do not involve crossing into another’s lane. A closer examination of competition injuries reveals as much. Through such an examination, I will argue that sometimes a market actor wrongs a competitor by his or her illicit tactics even though no rights have been violated.<sup>8</sup>

This thesis can be broken down into two subtheses. First, I claim that, in the context of illicit competition, competitors suffer a distinctive wrong. When a party engages in, say, false advertising or monopolistic practices, this conduct will often constitute a violation of norms that protect the public at large. Nonetheless, I claim that the competitor is specially (though not always uniquely) positioned to complain about the violation. Her grievance is personal, not generalized. Call this the *standing claim*.

Second, I claim that some competition wrongs cannot be explained in terms of any independently specifiable right of the competitor. That is, there is no right of the competitor grounding the wrong. Call this the *independence claim*. Of course, it is always possible to say that parties have a “right” not to suffer a certain kind of wrong. But my question is whether the distinctive wrong to a competitor can be explained in terms of some entitlement—some sphere of control. Such an

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6. DWORKIN, *supra* note 4, at 295 (“Sometimes I suffer harm only because I am in the wrong place at the wrong time; I stand in the way of others achieving their aims. Competition harm is typically like that; I am harmed because my small grocery store is in the town chosen by a supermarket chain. But in other circumstances I would suffer because others have usurped a decision that dignity requires me to make for myself—the decision what use is to be made of my body or my life.”).

7. For a different but related discussion of how wrongs and rights may come apart, see Nicolas Cornell, *Wrongs, Rights, and Third Parties*, 43 PHIL. & PUB. AFF. 109 (2015).

8. Cf. Homer Blosser Reed, *The Morals of Monopoly and Competition*, 26 INT’L J. ETHICS 258, 275 (1916) (arguing that wrongs of monopolistic conduct should not be evaluated by looking “backward” for some right that was violated).

explanation, to be meaningful, would require that the entitlement play some explanatory or functional role apart from merely labeling what actions may count as wrongs.

To understand my full aims here, it is necessary to appreciate that the arguments of Ripstein and Dworkin above – to which I am responding – are manifestations of much broader normative disputes. Both moral theorizing and private-law theorizing tend to divide between consequentialist and nonconsequentialist approaches. Consequentialist approaches typically take harm (and benefit) to be the foundational normative idea, and they tend toward a collectivist balancing of overall harms and benefits.<sup>9</sup> Nonconsequentialist approaches, in contrast, typically reject harm as a starting point and reject collectivist balancing, preferring instead to start from individual rights and freedom. In contemporary theorizing about private law, this division largely manifests as the division between law and economics, on the one hand, and corrective justice, on the other hand.

Two related arguments often figure prominently in these debates. First, nonconsequentialists argue that consequentialist approaches cannot explain the way that both morality and private law connect individuals.<sup>10</sup> It is not merely the fact that some acts are wrongful that needs explaining but rather the fact that some acts *wrong* others. To be wronged is to have a grievance, to have the personal standing to hold another person accountable. That familiar interpersonal accountability cannot be explained merely by showing that an action is impermissible. Rather, the action must connect the parties in some noncontingent way.<sup>11</sup>

Second, nonconsequentialists argue that harm itself lacks the normative significance to explain why some acts are wrongs. There are wrongs without harm,

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9. It is, for instance, illuminating to contrast the above-quoted passages from Ripstein and Dworkin with RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 8 (9th ed. 2014) (“A social cost diminishes the wealth of society; a private cost rearranges that wealth. Competition is a rich source of ‘pecuniary’ as distinct from ‘technological’ externalities – that is, of wealth transfers from, as distinct from cost impositions on, unconsenting parties. Suppose A opens a gas station opposite B’s gas station and as a result siphons revenues from B. Since B’s loss is A’s gain, there is no diminution in overall wealth and hence no social cost, even though B is harmed by A’s competition and so incurs a private cost. It would be different if to eliminate B’s competition, A destroyed B’s gasoline pumps. That would reduce the total stock of goods in the economy.”).
  10. See, e.g., R. JAY WALLACE, *THE MORAL NEXUS* 76–95 (2019); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 46–48 (1995); Michael Thompson, *What Is It to Wrong Someone? A Puzzle About Justice*, in *REASON AND VALUE: THEMES FROM THE PHILOSOPHY OF JOSEPH RAZ* 333, 333–40 (R. Jay Wallace et al. eds., 2004).
  11. This argument is developed especially clearly in WEINRIB, *supra* note 10, at 40–42. See also JULES L. COLEMAN, *RISKS AND WRONGS* 303–28 (1992).

and harms that constitute no wrong.<sup>12</sup> We need some other foundational normative concept, and rights – individual claims or entitlements – fill the explanatory void. The idea that rights ground our accountability relations becomes the core axiom of corrective-justice theorizing. As then-Chief Judge Cardozo famously put it,

What the plaintiff must show is ‘a wrong’ to herself, i. e. [sic], a violation of her own right, and not merely a wrong to some one else, nor conduct ‘wrongful’ because unsocial, but not ‘a wrong’ to any one . . . . [T]he commission of a wrong imports the violation of a right . . . .<sup>13</sup>

As illustrated by Ripstein and Dworkin, competition is taken to illuminate both the divergence between wrongs and harm, as well as the connection between wrongs and rights.

I agree completely with the first argument: both morality and private law are deeply and essentially relational, not merely instrumental. In this sense, I stand firmly with the nonconsequentialists. Indeed, part of my aim is to suggest that this relational accountability – the distinctive standing of one who is aggrieved and wants to hold another accountable – is even more pervasive than is typically appreciated by theorists attuned to the relational character of law and morality.

But I am skeptical that interpersonal accountability must always be grounded in individual rights. It is true that harms do not always generate wrongs and that, in this sense, harm is not itself sufficient to explain the relation between wrongdoer and victim. But that does not mean that all wrongs are about individual rights and entitlements. To flesh out this thought, I examine some exemplary American competition cases. I contend that these cases display a commitment to the idea that the plaintiffs have been wronged (the standing claim) and yet that the explanations offered for these wrongs do not – and could not – trace back to ideas about rights and entitlements (the independence claim). If this is correct, it suggests that rights-based thinking can overstate our independence from one another. Even as we each have our own separate swimming lanes,

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12. See, e.g., Ripstein, *supra* note 2. Though I have focused on Ripstein’s claim that not all harm – in particular, harm in the course of competition – amounts to a wrong, he devotes more energy to the opposite claim, namely that there may be “harmless trespass.” *Id.* at 218–28; cf. WALLACE, *supra* note 10, at 9 (“Wrongful actions can have harmful effects on other persons without wronging them in particular, and those who are wronged by an action need not specifically be harmed by it, taking everything into account.”).

13. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100–01 (N.Y. 1928); cf. WALLACE, *supra* note 10, at 98 (“Claimholders . . . are in a privileged position by comparison with the other people who might be affected by the agent’s actions. If A flouts a duty that is owed to B, then it is B in particular who is wronged or has suffered a moral injury, and B would seem to have a specific grievance or complaint about what A has done that is not shared with other parties.”).

our mutual accountability extends beyond merely respecting those boundaries. As members of a community, we have a stake in how others act more generally such that we can be personally wronged by acts contrary to our public norms.

My arguments are thus addressed in the first instance to the dominant corrective-justice paradigm and to the contemporary theories of relational normativity. I will largely take for granted that law and life are fundamentally relational in a way that is at odds with purely consequentialist theorizing. Nevertheless, by pressing back on the strong individualism of the rights-based approach, my arguments may resonate with more collectivist thinking and may also offer a conception of corrective justice that is more palatable to consequentialist thinkers. On my view, public considerations have a bigger place to play in interpersonal accountability than rights-based approaches have recognized. An individual's personal grievance against another may spring from obligations owed to the community as a whole.

If this is correct, however, it also means that there is more ground to be covered by interpersonal accountability. And this may open the door to seeing swathes of the law that have been traditionally viewed in narrowly instrumentalist terms in more deeply moralized ways. Antitrust law and marketing law may be regarded not merely as creating rules for an efficient market but as realizing a meaningful form of accountability between parties. And, more broadly, we may come to see much public regulatory law—even, say, environmental law—as potentially giving rise to private moral grievances.

## **I. THE STANDING CLAIM**

In this Part, I defend the claim that market actors are sometimes wronged by the competitive practices of other market actors. I refer to this as the standing claim, because the point is that injured competitors have special standing to complain or hold wrongdoers accountable. The concept of a wrong is defined in terms of a set of interpersonal practices and relations. Some conduct—for example, illegal drug use or tax evasion—might be wrong without wronging anyone in particular. To say that a party is wronged is to say that the party is not a mere bystander but rather might assert a specific complaint in his or her own name. A wronged party might feel personal resentment—not mere general indignation—and demand remedial actions like apology or compensation. Such attitudes and actions are inapt when conduct is merely wrong without wronging anyone in particular: tax evasion or illegal drug use may ground feelings of indignation or even outrage but not personal resentment that would make appropriate apology, forgiveness, compensation, or the like. It is wrongs, not mere wrongful conduct, that ground such attitudes and responses. The standing claim is thus a moral claim about how parties relate to one another *ex post*.



To illustrate the standing of competitors, I turn to some cases. Market actors are often afforded legal standing to bring a complaint. As I describe, the complained-of conduct ranges from direct interference to much more detached misconduct. Of course, it is possible that the legal standing granted to competitors is either a mistake or a matter of policy rather than morality. I will return to these possibilities at the end of this Part. But I hope that examination of the legal cases will at least provide a *prima facie* case for the moral claim that misconduct can wrong the competitors it harms.

### A. *Interference*

Let me start with a run-of-the-mill case of dubious competition. Lehigh Corporation was a real-estate broker in Florida in the 1970s. Lehigh promoted the sale of property by providing prospective buyers with expense-paid accommodations and the opportunity to see Lehigh's properties and talk to salespeople. Leroy Azar was a former Lehigh employee who was familiar with Lehigh's business model. He adopted a practice of following Lehigh customers—whom he could spot on the street based on their big envelopes of sales literature—and persuading them to rescind their contracts with Lehigh and to purchase property from him instead.<sup>14</sup>

Morally speaking, Azar wronged Lehigh. Lehigh might reasonably resent his activities. He was, after all, taking its customers, and not in an honorable way. And tort law agreed that there was a wrong here. A Florida court concluded that Azar was tortiously interfering with advantageous business relations.<sup>15</sup> Tort law generally recognizes torts for interference with contractual relations and, in most jurisdictions, with prospective economic advantage. The basic idea is that a party who, like Azar, intentionally causes the transactions of others to collapse can be liable for doing so.<sup>16</sup> The legal standing is suggestive: there seems to be a distinct wrong suffered by individual parties like Lehigh.

One might grant this point but remain skeptical of the broader thesis that the wrong Lehigh suffered cannot be explained by a right held by Lehigh. It is not my aim to defend the independence claim yet. But notice, for now, that tortious interference does not obviously track legal entitlements.<sup>17</sup> In this particular

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14. *Azar v. Lehigh Corp.*, 364 So. 2d 860, 861 (Fla. Dist. Ct. App. 1978).

15. *Id.*

16. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 766 (AM. LAW INST. 1979).

17. For a good discussion of the interference torts and how they might be explained by a corrective-justice approach, see J.W. Neyers, *The Economic Torts as Corrective Justice*, 17 TORTS L.J. 162 (2009) (concluding that the most promising rights-based explanation for inducing

case, federal law entitled Lehigh's customers to rescind their purchases at any time within three days of signing, a right that Azar was deliberately exploiting.<sup>18</sup> The wrong of tortious interference can thus arise even where the victim had no legal right to her customer or her deal.<sup>19</sup> One might respond that Lehigh had a right not to its deal per se, but against Azar's causing its customers to abandon their deals. On this score, it is worth noting that Lehigh would have had no tort claim against Azar had he been acting as a concerned consumer advocate or organizing a lawful boycott.<sup>20</sup> It is therefore difficult to pinpoint the sphere of true entitlement that Azar invaded. For present purposes, however, the important point is that parties like Lehigh suffer wrongs at the hands of interfering competitors.

### B. Exclusivity

Azar induced third parties to back out of existing deals; other competitors might induce third parties not to enter into contracts in the first place. In the late 1960s and early 1970s, Kodak dominated the camera market, accounting for over sixty percent of camera sales.<sup>21</sup> It did not, however, make flash equipment.<sup>22</sup> Over the years, Sylvania and GE developed various flash technologies and approached Kodak about using them in its cameras. In each instance, Kodak entered into joint development agreements requiring that these technologies—to which Kodak had not contributed—not be disclosed to any other firms.<sup>23</sup> A smaller camera manufacturer, Berkey Photo, sued Kodak, alleging that these joint development agreements denied Berkey access to the best flash technologies and the opportunity to bring to market cameras that would compete with Kodak's.<sup>24</sup> The complaint, in short, was that Kodak was inducing suppliers not

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breach of contract is a property-rights approach, but that the most promising such explanations for unlawful interference with economic relations are an abuse-of-rights approach or an approach based on public right).

18. *Azar*, 364 So. 2d at 862.

19. There might be no legal entitlement at all. There can be tortious interference even where the initial contract is legally unenforceable. See, e.g., *Daugherty v. Kessler*, 286 A.2d 95, 97-98 (Md. 1972).

20. See, e.g., *Missouri v. Nat'l Org. for Women, Inc.*, 620 F.2d 1301, 1316-18 (8th Cir. 1980).

21. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 269 (2d Cir. 1979).

22. *Id.* at 299.

23. *Id.* at 299-301.

24. *Id.* at 301.

to deal with Berkey and other competitors.<sup>25</sup> The Second Circuit affirmed a judgment in Berkey's favor.<sup>26</sup>

Exclusive dealing is a cousin of tortious interference. Berkey's complaint was based in statutory antitrust law, not the common law of torts. But the continuity should be clear. Structurally, the cases similarly involve private plaintiffs seeking a private remedy. And there is substantive continuity as well. In both tortious interference and exclusive dealing arrangements, the wrongdoer influences a third party to modify its economic relationship with the wrongdoer's competitor, thereby denying that competitor prospective economic gains. They are wrongs of a similar form. Morally speaking, the conduct seems analogous.

Antitrust is not the only statutory basis for private redress for an agreement not to deal. State unfair-competition laws may offer similar standing. For example, relying upon California's unfair competition law, businesses recently succeeded in suing competitors for forcing employees to sign noncompete clauses, alleging that the competitors had impaired their ability to acquire talent.<sup>27</sup> Such statutory competition suits should be seen as continuous with traditional interference torts. They similarly involve an outsider undermining relations between two contracting parties, and they similarly offer the injured competitor a private avenue for redress.

### C. Marketing

Another way that market competitors sometimes wrong one another occurs when businesses engage in false or misleading advertising. Seemingly recognizing such injuries, the law affords private causes of action to businesses injured by competitors' statements that are misleading or likely to cause confusion.<sup>28</sup>

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25. Exclusive dealing as an antitrust violation was established in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), in which a dominant newspaper refused advertisements from any business that chose to also advertise with a new local radio station. The newspaper argued that it had a right to select its advertisers, to which the court responded, "We do not dispute that general right. 'But the word "right" is one of the most deceptive of pitfalls . . .'" *Id.* at 155 (quoting *Am. Bank & Trust Co. v. Fed. Reserve Bank*, 256 U.S. 350, 358 (1921)).

26. *Berkey Photo*, 603 F.2d at 304.

27. See *Diversant, LLC v. Artech Info. Sys., LLC*, Civ No. 18-12133, 2018 U.S. Dist. LEXIS 210749 (D.N.J. Dec. 14, 2018); *Dowell v. Biosense Webster, Inc.*, 102 Cal. Rptr. 3d 1 (Ct. App. 2009); *Application Grp., Inc. v. Hunter Grp., Inc.*, 72 Cal. Rptr. 2d 73 (Ct. App. 1998).

28. At the federal level, the Lanham Act allows such suits. See 15 U.S.C. § 1125(a) (2018). State unfair competition laws or unfair and deceptive acts and practice laws also often afford such standing. For a good discussion of false-advertising law and its potential connections with private law, see Gregory Klass, *False Advertising Law*, in *THE OXFORD HANDBOOK OF NEW PRIVATE LAW* (Andrew Gold et al. eds., forthcoming 2020).

These misleading statements need not be about the injured competitor or its products; a company that makes false statements about its own products may be liable to competitors whom the false statements harmed.

Consider the facts of *POM Wonderful, LLC v. Coca-Cola Co.*<sup>29</sup> POM Wonderful grows pomegranates and sells various pomegranate juices, including a pomegranate-blueberry juice. Under its Minute Maid brand, Coca-Cola marketed a competing juice blend with a label featuring the words “POMEGRANATE BLUEBERRY.”<sup>30</sup> Below that, in smaller, lower-case letters, the label read, “flavored blend of 5 juices,” and then, in even smaller type, “from concentrate with added ingredients and other natural flavors.”<sup>31</sup> In fact, the Minute Maid juice blend contained 99.4% apple and grape juices, 0.3% pomegranate juice, 0.2% blueberry juice, and 0.1% raspberry juice.<sup>32</sup>

POM brought suit, alleging that the Minute Maid label constituted false or misleading advertising. Pause for a moment to appreciate why POM would take itself to be aggrieved by Minute Maid’s marketing. Minute Maid had said nothing about POM.<sup>33</sup> But POM—which manufactures actual pomegranate juice—naturally regarded Minute Maid as illegitimately capturing some of POM’s would-be consumers. Morally speaking, this is a perfectly coherent complaint. As with interference and exclusivity, here too the injury stems from the competitor’s lost relations with a third party—in this case, consumers. It should be unsurprising that the law offers an avenue of redress.

In response, Coca-Cola argued that the case should be dismissed because the Minute Maid label was compliant with the Food and Drug Administration’s (FDA) labeling regulations.<sup>34</sup> The relevant regulation stated that, if a juice

29. 134 S. Ct. 2228 (2014).

30. *Id.* at 2233.

31. *Id.* at 2235.

32. *Id.*

33. Some false-advertising cases involve claims about or comparisons with a rival product and thus can appear akin to defamation actions. But many—like *POM Wonderful*—do not. They involve only misleading portrayals of a product’s benefit, like portraying a vibrating razor as raising hair upwards for an especially close shave, *Schick Mfg., Inc. v. Gillette Co.*, 372 F. Supp. 2d. 273 (D. Conn. 2005); or misleading promotional tactics, like having employees block vote for the helpfulness of positive Amazon customer reviews to raise those reviews’ salience, *Vitamins Online, Inc. v. Heartwise, Inc.*, No. 2:13-CV-982-DAK, 2016 U.S. Dist. LEXIS 16355, at \*4-5 (D. Utah Feb. 9, 2016). In such cases, the injury is simply lost market share. One court has even held that in a two-player market, any false advertisement will be presumed to harm the competitor. See *Merck Eprova AG v. Gnosis S.p.A.*, 760 F.3d 247, 260 (2d Cir. 2014).

34. *POM Wonderful*, 134 S. Ct. at 2235-36.

names only juices that are not predominant in the blend, then it must either declare the percentage content or “[i]ndicate that the named juice is present as a flavor or flavoring.”<sup>35</sup> Minute Maid had done precisely that, stating that its product was a “pomegranate blueberry *flavored* blend of 5 juices.”<sup>36</sup> The case made it all the way to the Supreme Court, which rejected Coca-Cola’s argument. FDA regulatory compliance was a different issue than liability to POM under the Lanham Act; the public health and safety regulations did not preempt the possibility of a private suit for misleading consumers.<sup>37</sup>

It is natural to think of marketing law as fundamentally aimed at protecting consumers from being misled. But even if such consumer protection determines the substantive norms, competitors are empowered to assert their own grievances at violations of those norms.<sup>38</sup> POM’s complaint was, essentially, “You misrepresented things to consumers, and *we* lost out.” That the suit turned on POM’s complaint, not that of consumers, is reflected in the fact that damages were based on POM’s losses, not on the magnitude of the injury to consumers or society at large.<sup>39</sup> It is also, interestingly, reflected in the available defenses, which may concern the standing of the particular plaintiff—a consideration that might seem irrelevant if the injury to consumers were the sole motivation for liability. For example, on remand, Coca-Cola was permitted to invoke a defense of “unclean hands,” arguing that POM’s own advertising had itself misled consumers about both the content of its juice blends and the health benefits of pomegranate juice.<sup>40</sup> In sum, like interference and exclusivity, marketing, too, can generate a grievance particular to the competitor.

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35. 21 C.F.R. § 102.33(d)(1) (2019).

36. See *POM Wonderful*, 134 S. Ct. at 2235 (emphasis added).

37. *Id.* at 2237–39.

38. See *id.* at 2234 (“Though in the end consumers also benefit from the Act’s proper enforcement, the cause of action is for competitors, not consumers.”).

39. The doctrine has explicitly evolved to excuse plaintiffs from any burden to show actual consumer confusion when the advertisement is deemed “literally false.” See *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 13–14 (7th Cir. 1992). There are even instances in which cases are allowed to proceed despite uncontradicted empirical evidence that consumers were not affected. See *IDT Telecom, Inc. v. CVT Prepaid Sols., Inc.*, No. 07-1076, 2009 U.S. Dist. LEXIS 120355, at \*27–28 (D.N.J. Dec. 28, 2009) (holding that statements in an advertisement were material as a matter of law despite a survey, prepared by the plaintiff, in which only 2 of 401 respondents described the advertisements as how they “generally decide” and only 3% of consumers surveyed even looked at the advertisements).

40. *POM Wonderful LLC v. Coca Cola Co.*, 166 F. Supp. 3d 1085, 1091 (C.D. Cal. 2016).

*D. Other Misconduct*

In marketing cases, a plaintiff alleges that a competitor gained an illicit advantage by misleading consumers. But a competitor might gain an illicit advantage in other ways as well, mistreating not consumers but employees, the environment, or the public at large. Consider the facts of one case, recently allowed to proceed and still pending.<sup>41</sup> Diva Limousine is a California livery cab company.<sup>42</sup> It brought suit against the ride-sharing service Uber, alleging that Uber secures unlawful cost savings by misclassifying its drivers as independent contractors instead of employees in violation of California labor law. Diva argued that, in doing so, Uber takes business and market share from competitors, like Diva, that comply with the law.<sup>43</sup> In denying Uber's motion to dismiss, the trial court explained that California's unfair competition law "allows competitor suits predicated on conduct that . . . significantly threaten[s] or harm[s] competition . . . . [W]orker misclassification may constitute an example of such conduct."<sup>44</sup>

Like the previous examples, Diva's complaint is intelligible. Diva finds itself losing revenue and market share because a competitor is apparently exploiting its workers. It is harmed by Uber's conduct, and it has standing to complain. Such a complaint need not imply that California labor law exists in order to protect companies like Diva. Its substantive norms are shaped to protect employees, and it is the employees' rights that are being violated. But business competitors have a particular stake in whether their rivals are gaining an edge by mistreating others – be they consumers, employees, or anyone else. It is thus no surprise that

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41. *Diva Limousine, Ltd. v. Uber Techs., Inc.*, 392 F. Supp. 3d 1074 (N.D. Cal. 2019).

42. *Id.* at 1080.

43. *Id.* at 1081. Diva's suit is styled as a class action on behalf of itself and other providers of pre-arranged ground-transportation services. Class actions do have a partly public-law structure, allowing lead plaintiffs and the attorneys themselves to recover extra compensation for their service as something akin to private attorneys general. For my purposes, however, it is irrelevant that Diva's case is a class action.

44. *Id.* at 1091. For a similar structure with a different political bent, see *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 378 (2d Cir. 2001), in which a business was held to state a valid claim against a competitor that hired undocumented immigrants, allowing it to underbid other firms.

competitors have sued each other for conduct ranging from unlicensed professional practice<sup>45</sup> to violating environmental regulations<sup>46</sup> to money laundering.<sup>47</sup> Of course, there are limits on competitors' standing,<sup>48</sup> but their ability to bring suit at all in such cases suggests a legal recognition of the relation that competitors bear to the misconduct of their rivals.

### *E. Competition Law as Private Law*

My aim, in walking through these cases, is to emphasize the structural and substantive similarities between them. If we accept that interference is a private wrong appropriately redressed by private law, then these competition cases seem to involve parties with a similar standing to assert a grievance. The harmed competitor is no mere bystander, nor merely in possession of a complaint shared by every other market participant. The legal standing tracks a natural sort of interpersonal standing. Another way to put this point is to say that competition law, in these contexts, is private law—instantiating a justice between the parties.<sup>49</sup> And it is, in this way, an instantiation of a moral relation.

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45. *Law Offices of Mathew Higbee v. Expungement Assistance Servs.*, 153 Cal. Rptr. 3d 865, 868 (Ct. App. 2013).

46. *Sw. Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805, 807 (N.D. Cal. 1989).

47. *Republic of Colom. v. Diageo N. Am. Inc.*, 531 F. Supp. 2d 365, 430-38 (E.D.N.Y. 2007).

48. In particular, standing is often denied on grounds that there is an absence of proximate cause or that the injury is not of the kind intended to be covered by the relevant statutory scheme. See, e.g., *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) (denying Racketeer Influenced and Corrupt Organizations (RICO) Act standing where a competitor allegedly engaged in tax fraud); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (denying standing because the plaintiff did not suffer an "antitrust injury"). These limitations are, undoubtedly, significant constraints on the kind of standing that I am describing. Indeed, while sometimes a matter of practicalities and proof, proximate cause is at other times explicitly described in terms of limiting standing to violations of a right. I think this is a mistake, though I cannot fully defend that claim here. For present purposes, I will note that proximate cause is, at best, applied inconsistently and does not always rule out recovery for bare competition harm. See, e.g., *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1545 (Fed. Cir. 1995) (allowing recovery for lost sales not attributable directly to the rights violation). Less problematic for my purposes, statutory standing requirements are often used simply to police the particular mechanism for suit—e.g. to dismiss a claim in antitrust that is more appropriately brought as a business tort. This is generally reasonable, especially where state tort law and unfair competition law remain to catch the residual cases. But the boundary policing can strike me as overly fixated on arbitrary demarcations. In emphasizing the continuity across competition wrongs, I do mean to question the reification of some doctrinal categories.

49. There are multiple ways of carving up the distinction between private law and public law. See Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267 (1986). Each may be illuminating in certain ways. My interest is whether



Many scholars might try to cut off the line that I have drawn from common-law torts to antitrust and marketing law. They might contend that the standing in these latter cases is not moral but artificial. We allow these private lawsuits, the thought goes, as a matter of effectuating public-policy objectives. These plaintiffs have no moral complaint; they are simply empowered to act as private attorneys general. As courts explicitly say, these legal schemes are not meant to protect competitors per se, but rather the public at large.<sup>50</sup> This has generally meant a consumer-welfare standard, though that approach has faced more criticism of late.<sup>51</sup> But, even among the critics of the consumer-welfare standard, it is some public concern—with equality or democracy or justice—that should shape the law.<sup>52</sup> Regardless, then, a competitor’s standing looks to be purely instrumental: the damages defendants must pay are imposed only to deter conduct that harms the public (consumers, workers, etc.), and competitors are allowed to recover those damages only to provide them an incentive to bring such suits on the public’s behalf. As a matter of classification, this is public law, not private law in any deep sense.<sup>53</sup> Corrective-justice theorists and relational-moral theo-

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parts of competition law instantiate what Ernest Weinrib calls “the idea of private law.” See WEINRIB, *supra* note 10.

50. See, e.g., *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (“It is axiomatic that the antitrust laws were passed for ‘the protection of *competition*, not *competitors*.” (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))); *Int’l Order of Job’s Daughters v. Lindeburg & Co.*, 633 F.2d 912, 918 (9th Cir. 1980) (“[O]ur reading of the Lanham Act and its legislative history reveals no congressional design to bestow . . . broad property rights . . . Its scope is much narrower: to protect consumers against deceptive designations of the origin of goods and, conversely, to enable producers to differentiate their products from those of others.”); *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 720 F. Supp. 194, 212 (D.D.C. 1989) (“While the [Lanham] Act is not directly available to consumers, it is nevertheless designed to protect consumers, by giving the cause of action to competitors who are prepared to vindicate the injury caused to consumers.”).
51. The consumer-welfare standard is generally traced to ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978). See, e.g., *id.* at 7 (“[T]he only legitimate goal of antitrust is the maximization of consumer welfare.”). For examples of the recent criticism, see TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018); Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. (forthcoming 2020); and Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710 (2017).
52. See, e.g., WU, *supra* note 51 (advocating for antitrust as a mechanism for addressing economic inequality); Harry First & Spencer Weber Waller, *Antitrust’s Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2544 (2013) (“[A]ntitrust is also public law designed to serve public ends. Today’s . . . antitrust enforcement [is] too far away from its democratic roots.”).
53. Some writers suggest that the realm of private law might even be understood by contrast with areas like antitrust. See, e.g., John C. P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette*, 88 IND. L.J. 569, 606



rists might thus try to escape the challenge presented by the above cases by cleaving them off into the admittedly instrumentalist domain of regulation. This is simply to endorse the dominant understanding of antitrust itself.

But I am questioning precisely this widely but unreflectively endorsed assumption that antitrust and marketing law are public law. Its foundation is unsound. From the idea that considerations of public protection determine the substantive legal norms, it need not follow that the injured competitor's standing to complain is simply a policy choice about efficient enforcement. Regardless of the substantive norms involved,<sup>54</sup> there are features of these competition cases that strongly suggest treating them as private law, making the domain of private law more expansive than typically conceived by high theory.

Competition wrongs are private – and best conceived as part of private law – in three important ways.<sup>55</sup> First, these cases are structured as a drama between plaintiff and defendant. One private party initiates a lawsuit with a complaint against another private party, who must then respond. The state serves as the neutral adjudicator of the dispute; it neither initiates nor controls the course of the legal action.<sup>56</sup> Second, remedies are calculated based on the injury suffered

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(2013) (“While there are areas of law that are perhaps best understood on [a model of cost-effective deterrence] – antitrust law might be one – we have argued that tort law is not.”); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 50–52 (1998) (contrasting substantive standing in torts with antitrust standing, understood in economic terms).

54. A competitor may, I will argue, have a personal complaint stemming from more generalized misconduct. That is, there may be private wrongs that derive from breach of public-oriented norms. But that argument requires the independence claim.
55. Cf. A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 BERKELEY TECH. L.J. 1247, 1251 (2005) (arguing that antitrust should not be regarded as regulatory); Klass, *supra* note 28 (manuscript at 5, 18) (identifying four characteristics of private law – horizontal duties (which he defines in terms of wronging), transfer remedies, private enforcement, and ties to the common law – and concluding that “[c]ompetitor suits under the Lanham Act look very much like other private lawsuits and might advance the same values”).
56. This aspect of tort suits is an important feature of rights-based conceptions of private law. See, e.g., Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 FLA. ST. U. L. REV. 163, 200 (2011) (“Instead of being a matter of either distributive justice or loss allocation, corrective justice is concerned with rights governing the ways in which people are permitted to use their means in setting and pursuing their purposes . . . . Within this structure, it is not merely unsurprising but inevitable that plaintiff alone is entitled to decide whether or not to stand on his or her rights in cases of wrongdoing. That is a general feature of a right as between private parties; the right holder determines whether to enforce it.”); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 741 (2003) (“A right of action is a privilege and a power, and the state is not committed to the normative desirability of its exercise, only to the right to have it.”).

by the plaintiff, not the harm suffered by the public. The law is, in this way, responding to a private injury. One might object, at this point, that these laws often come with treble damages, departing from a purely compensatory measure.<sup>57</sup> But treble damages are still damages fundamentally based on the injury suffered by the plaintiff, which need not correspond to the amount of harm to the public that particular anticompetitive conduct has caused. In reality, treble damages may be more truly compensatory than traditional common-law damages, which typically undercompensate victims significantly.<sup>58</sup> Furthermore, if the presence of treble damages meant that the law is not responding to a wrong to the plaintiff, we would have to say that civil-rights cases, too, are not truly addressing wrongs done to plaintiffs. As long as the damages are anchored to the injury to the plaintiff, the presence of enhancing elements – whether they be trebling or an award of attorney fees or punitive damages – should not produce the conclusion that the law is no longer fundamentally concerned with the wrong to the plaintiff. Third and finally, as I have tried to suggest, competition law is often continuous with paradigmatically private tort law, such as tortious interference. The underlying conduct is similar; the relationship between the parties is similar; the ultimate harm to the plaintiff is similar; our pretheoretical sense of injustice is similar. Of course, traditional economic torts have common-law origins, whereas modern competition law is largely statutory.<sup>59</sup> But, substantively, they involve the same relation between plaintiffs and defendants.

To see why it is potentially misleading to describe these plaintiffs as private attorneys general, consider the contrast with *qui tam* actions, where this description seems completely apt. In *qui tam* actions, private parties initiate a lawsuit on behalf of the sovereign and the damages are based on the injury to the sovereign, with the private plaintiff receiving a share of the recovery for his or her trouble.<sup>60</sup> The private party is acting as an attorney for the public. In American

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57. Cf. *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998) (contrasting antitrust with business torts and expressing an unwillingness to “transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases”).

58. See Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?* 54 OHIO ST. L.J. 115 (1993).

59. If this difference were important, it is not clear which way it would cut, given that competition statutes, at least in the United States, were drafted in deliberately minimalist ways to allow the law to develop in the fashion of common law. See BORK, *supra* note 51, at 409 (discussing the deliberately “open-textured” nature of antitrust laws); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law*, 60 TEX. L. REV. 661 (1982).

60. See the False Claims Act, 31 U.S.C. §§ 3729-3733 (2018), which prohibits fraudulently claiming payment from the U.S. government, *id.* § 3729(a)(1), and authorizes any person to sue,

qui tam actions, the government has the right to take over the case if it believes it can better represent the public.<sup>61</sup> Plaintiffs in competition cases are not private attorneys general in this sense.<sup>62</sup> They are not pointing to an injury to the sovereign but to an injury of their own, and they control the lawsuit, which is keyed to their standing to assert their grievance.

To my mind, it has been a convenient fiction that competition law can be cordoned off from the law of private wrongs. It allowed private-law theorists to avoid facing the difficulties of rights-based explanations for competition wrongs. And it allowed competition law to regard itself as unconcerned with interpersonal morality.<sup>63</sup> And yet, there on its face, the law grants competitors the standing — across a range of relatively continuous cases — to go to court, make a complaint, and seek compensatory damages for injuries they have sustained from their competitors' misconduct.

## II. THE INDEPENDENCE CLAIM

The second half of my thesis is that competition wrongs do not depend on any underlying right of the wronged party. That is, though parties may have special standing to complain about illicit competition, this is not because of some right that they hold. This is a negative argument, so the natural way to proceed is by cataloguing and rebutting possible rights-based explanations.

Before wading into the details, however, let me say something about the general form of the argument. A successful rights-based explanation should do at least two things, and hopefully a third as well. First, it should describe a right

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on behalf of the government, for violations of that prohibition, *id.* § 3730(b)(1). Should the suit be successful, damages are assessed at triple the injury suffered by the government, plus a statutory penalty, *id.* § 3729(a)(1), and the plaintiff is entitled to a portion of the proceeds depending on the extent to which he contributed to the recovery, *id.* § 3730(d).

61. The complaint must be served initially on the government, giving it at least sixty days to elect whether to intervene and take over the action, 31 U.S.C. § 3730(b)(2), in which case the action may be settled or dismissed by the government regardless of the initiating party's objections, *id.* § 3730(c)(2). The government is at all times the named plaintiff, and the action can be dismissed only with the consent of the government. *Id.* § 3730(b)(1). Even if the government elects not to take over the action, it retains rights to intervene later or to stay discovery. *Id.* § 3730(c)(3)-(4).
62. A much better comparison, discussed *infra* Part III, is the tort of public nuisance, which is generally regarded as a sort of anomalous form of private law. I am suggesting that it is not anomalous at all.
63. Although hardly the main aim of this paper, I hope that reconceptualizing competition law as not strictly and exclusively public law may provide new resources and avenues for critique of the dominant antitrust paradigm. Antitrust law, on this view, may be partly about ensuring that we can potentially hold one another accountable for our public conduct — that such accountability relations are part of being free and equal coparticipants in a market.

uniquely held by the wronged party. Second, this right should have some independently meaningful function, guiding or structuring our normative life in some way beyond simply identifying wrongs. Finally, the right should offer a plausible qualitative characterization of what has been lost when the wrong occurs. Consider an example. You wrong me if you break into my house. An explanation of this wrong might plausibly appeal to my property right in my house. The property right is uniquely mine, so it can explain why I am wronged and my neighbor is not. And the property right is independently meaningful. *Ex ante*, it delineates my house as a sphere in which I have control – I can exclude you, give you permission, and so forth. Moreover, the right potentially figures in explanations of the reasons that others have for acting; the fact that it is mine might be a reason why you should not light it on fire. Finally, the deprivation of my sovereignty over my house seems to offer a plausible description of the nature and magnitude of the wrong involved in breaking in.

My argument is that there is no rights-based explanation of competition harms that can succeed in these ways. The potential rights to which one might appeal either do not exist, or, if they do, they fail to satisfy these criteria, by being either too diffuse to explain the distinctive wrong to the competitor, and thus failing the first criterion, or too empty to offer any meaningful explanation, and thus failing one of the final two criteria.

#### A. *A Right to Ownership or Control*

Along the lines of breaking into a house, a first possible explanation for competition wrongs is that they involve the violation of a proprietary right of one's competitor. Tortious interference with contract is often understood in terms of a party's having a property interest in its contractual relations.<sup>64</sup> Marketing law can seem to protect commercial parties' rights to their reputation.<sup>65</sup> One might think that competition wrongs are thus straightforwardly related to the rights of market participants in that they are forms of theft or conversion.

Analogizing to property in this way is tempting because, as I have been emphasizing, rivals harmed by unfair competition do seem uniquely wronged: something of theirs appears to have been taken from them. In order to see how

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64. See, e.g., *Dunlap v. Cottman Transmission Sys., LLC*, 754 S.E.2d 313, 321 (Va. 2014) (“[Tortious] interference is directed at and injures a property right, i.e., the right to performance of a contract and to reap profits and benefits not only from the contract but also from expected future contracts or otherwise advantageous business relationships.”).

65. See, e.g., *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 781-82 (1992) (Stevens, J., concurring) (describing a dual purpose behind the Lanham Act).

far this approach might reach, consider a famous Supreme Court case: *International News Service v. Associated Press*.<sup>66</sup> The Associated Press (AP) was the dominant news-gathering organization in the United States.<sup>67</sup> The International News Service (INS) was a competing news organization about half the size of the AP, mostly composed of newspapers belonging to the Hearst media empire.<sup>68</sup> During World War I, the INS began taking AP stories from AP bulletins or early Eastern editions and selling them to INS newspapers that ran them, sometimes verbatim.<sup>69</sup> Historical records suggest that the INS resorted to this tactic because the British and French had cut INS personnel from the front lines and denied the INS access to European telegraph cables due to its publication of material strongly sympathetic with the German cause in the war.<sup>70</sup> Without other direct access to the news of the war, the INS simply took the AP's material.<sup>71</sup> The AP brought suit, alleging unfair competition.

The case illustrates the outer bounds of what a property-like right might conceivably explain. In quite moralized terms, the Supreme Court ruled in favor of the AP, suggesting that the INS was "appropriating to itself the harvest of those who have sown."<sup>72</sup> But a precise rationale was hard to pinpoint. The news is public information. I commit no wrong by telling you about what I learned from the *New York Times* this morning. The Court evaded this difficulty by cleverly declaring that the news should be regarded as "quasi property": although the news was not property with regard to the public, it might be regarded as property as between the organizations whose business it was to profit from it.<sup>73</sup>

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66. 248 U.S. 215 (1918).

67. *Id.* at 248-49 (Brandeis, J., dissenting). For further historical details about the case, see Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 90-94 (1992).

68. Epstein, *supra* note 67, at 91.

69. *Id.* at 91-92.

70. *Id.*

71. *Id.* at 94-95.

72. *Int'l News Serv.*, 248 U.S. at 239-40.

73. *Id.* at 236 ("[A]lthough we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. For, to both of them alike, news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi property, irrespective of the rights of either as against the public.").

That is, as between competitors, what had been sown by one would be regarded as property against the others, even though it was not actually subject to true ownership. This peculiar doctrine, which has come to be known as the tort of “hot-news misappropriation,” continues to rear its head occasionally in contexts from basketball statistics<sup>74</sup> to stock recommendations<sup>75</sup> to celebrity gossip.<sup>76</sup> It allows courts to hold liable a party that systematically exploits the hard work of its competitor. This property-based explanation is tempting because, if true, it would tether the wrong to something independently significant: a right that the AP had *ex ante*.

But the language of “quasi-property” is elusive. As Justices Holmes and Brandeis noted in dissenting opinions, it can be misleading to say that anyone holds a property right in the news.<sup>77</sup> The worry is that by trying to conjure an independently significant entitlement—a property right—the opinion gives too much. Even if there is a wrong here, it cannot be explained in this way without unacceptably granting powers of ownership that we are not prepared to grant. As a result, property-law scholars have typically tried to ground the misappropriation doctrine in some other way.<sup>78</sup>

I am agnostic as to whether *International News Service* was correctly decided.<sup>79</sup> For the present purposes, what is important is the natural limitation of a property-based explanation. To say that a party has a property-like right is strong medicine. It entails meaningful powers—the incidents of ownership—beyond the ability to assert a wrong. Perhaps it is plausible that, as between each other, the AP and INS could engage in practices paradigmatic of ownership, such

74. *NBA v. Motorola, Inc.*, 105 F.3d 841, 843 (2d Cir. 1997).

75. *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 878 (2d Cir. 2011).

76. *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102, 1103 (C.D. Cal. 2007).

77. See, e.g., *Int’l News Serv.*, 248 U.S. at 246 (Holmes, J., dissenting) (arguing that property is about exclusion, i.e. control, not about whether another reaps value); *id.* at 250 (Brandeis, J., dissenting) (“An essential element of individual property is the legal right to exclude others from enjoying it. . . . But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property.”).

78. See Epstein, *supra* note 68, at 94–102; Henry E. Smith, *Equitable Intellectual Property: What’s Wrong with Misappropriation?*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 42, 54–55, 57–58 (Shyamkrishna Balganesh ed., 2013); see also Shyamkrishna Balganesh, “Hot News”: *The Enduring Myth of Property in News*, 111 *COLUM. L. REV.* 419, 444 (2011) (suggesting that the misappropriation principle originated to combat the free-rider problem); Michael E. Kennelly, *Misappropriation and the Morality of Free-Riding*, 18 *STAN. TECH. L. REV.* 289, 290–91 (2015) (same).

79. For a defense of the property-based account of *International News Service*, see generally Chris ESSERT, *Property in the Market* (Nov. 2019) (unpublished manuscript) (on file with author).



as excluding the other from using a piece of news or, alternatively, granting permission to print it. Perhaps they could even plausibly buy and sell stories from one another. To the extent that we are willing to accept that such relations could exist between two parties, the quasi-property explanation may be correct.<sup>80</sup> But the news presses the boundaries of what we might conceivably subject to such ownership, even if only between two parties.

Such an explanation would seem to be a complete nonstarter for other competition wrongs. One does not have even quasi-property in one's consumers, advertisers, suppliers, workers, or market share.<sup>81</sup> And yet the loss of these things seems to be precisely the subject of paradigmatic competition wrongs. For example, Berkey's contention was that Kodak wronged it by excluding it from the flash technology of Kodak's suppliers. But it would strain all bounds of coherence to say that Berkey had a quasi-property right in a potential supply agreement with, say, GE. Berkey had no entitlement to exclude Kodak from dealing with GE or to grant Kodak permission to deal with GE in the way that the AP might arguably have had an entitlement to deny or grant INS permission to print a news story. Or consider POM's objection to Coca-Cola's marketing. Even if we could describe Coca-Cola as misappropriating POM's customers or the carefully cultivated reputation of pomegranate juice, it would be implausible to say that POM had even a quasi-property right to its customers or to the reputation of pomegranate juice. POM could hardly object if Coca-Cola had taken POM's customers or traded on the reputation of pomegranate juice by selling actual pomegranate juice. Nor could POM grant Coca-Cola permission to mislead in the way that it did.<sup>82</sup>

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80. For an illuminating discussion of how quasi-property rights might be used to explain tortious interference with contract, see Peter Benson, *The Basis for Excluding Liability for Economic Loss in Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 427, 455-457 (David G. Owen ed., 1995). Benson's explanation is plausible precisely because contracts are transferred to third parties by way of assignment, which suggests their property-like status.

81. One might say that many of the failures of early-twentieth-century American law stemmed from its being too willing to grant quasi-property rights over contracts and workers. See, e.g., KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* 79-91 (1991) (describing the persistence of property-like treatment of workers); Cass R. Sunstein, *Lochner's Legacy*, 87 *COLUM. L. REV.* 873, 874 (1987) (arguing that the *Lochner* era's mistake was not judicial activism but a conception of economic entitlements as naturally held). For an interesting discussion of the connection between modern antitrust and this property-like orientation to market activity, see Alan J. Meese, *Standard Oil as Lochner's Trojan Horse*, 85 *S. CAL. L. REV.* 783 (2012).

82. This should be contrasted with the possibility that POM might have waived its potential legal action. But waiving a potential complaint is not the same as granting permission. See Nicolas Cornell, *The Possibility of Preemptive Forgiving*, 126 *PHIL. REV.* 241 (2017).

In a way, the quasi-property explanation offers an illustration of the kind of right that could fill out a rights-based explanation for competition wrongs. It fulfills the criteria mentioned earlier: it would be a right particular to the victim, and it would tie the wrong to some antecedent relation between the parties that meaningfully structured their duties and powers with respect to each other in additional contexts other than the competition wrong itself. But, although it is the correct kind of explanation, it fails for another reason. Whether plausible in *INS v. AP* or not, such an explanation cannot generalize to most competition wrongs. When competitors like Kodak or POM are wronged, it is not explicable in terms of a quasi-property right. If we are to explain such wrongs, we must look elsewhere.

### *B. Two Ideas of Fair Play*

Some scholars have suggested that the wrong committed by *INS* is better understood as free riding than theft.<sup>83</sup> Free riding might seem a more promising path forward in explaining competition wrongs more generally. In particular, it might seem that competitors have either a right that competitors refrain from free riding or, relatedly, a right that competitors abide by the rules of the competition. These ideas are frequently and naturally connected: a norm against free riding may be invoked to explain the obligation to comply with rules of a shared activity. This idea gets referred to as the principle of fair play.

The principle of fair play is often traced to H.L.A. Hart, who argued that “when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission.”<sup>84</sup> John Rawls temporarily picked up on this idea, giving it the name “fair play” while dropping any reference to rights.<sup>85</sup> Since Rawls, an intermittently lively debate has persisted as to whether the principle of fair play can

83. See Balganesch, *supra* note 78, at 429 (“If hot news misappropriation is to survive as a viable doctrine, then rooting it in a theory of competitive unjust enrichment directed at solving a collective action problem seems unavoidable. . . . Hot news misappropriation did not and cannot create a property right in news.”); Kenneally, *supra* note 78.

84. H.L.A. Hart, *Are There Natural Rights?*, 64 *PHIL. REV.* 175, 185 (1955).

85. John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3 (Sidney Hook ed., 1964). Here is how Rawls actually described the principle:

The principle of fair play may be defined as follows. Suppose there is a mutually beneficial and just scheme of social cooperation, and that the advantages it yields can only be obtained if everyone, or nearly everyone, cooperates. Suppose further that cooperation requires a certain sacrifice from each person, or at least involves a



ground a duty to obey laws, such as tax laws, that serve as the basis for cooperative activities.<sup>86</sup>

The notion of fair play is evocative, but two different ideas should be distinguished. First, one idea of fair play—perhaps truer to the name but more detached from the existing literature—would be that, specifically in competitive contexts, competitors have a right that other competitors not gain an unfair advantage by disregarding the rules of that competition. The thought here is that each competitor has a right that other competitors abide by the rules because, if they do not, then the complying participants will be at a disadvantage. Participants have a right against illicit gains because those gains necessarily constitute an injury to them, given the zero-sum nature of competitive success. I will refer to this proposal as based on *a competitor's right to rule compliance*.

Alternatively, you might think that by benefitting from a cooperative enterprise—in particular, benefitting from others' compliance with the rules of the enterprise—you acquire a duty to comply with the rules of that enterprise. On this picture, it is not essential that the other participants are harmed by your noncompliance. They have a right to your reciprocal compliance in virtue of having conveyed a benefit upon you by their compliance. It is this idea that has received the most philosophical focus.<sup>87</sup> Hart aside, it is not typically framed in terms of rights. Still, we might think that it could offer a rights-based explanation of competition wrongs. I will refer to this proposal as based on *a contributor's right to fair contribution*.

In what follows, I will suggest that neither of these proposed rights can ground the competition wrongs that are my focus. I will start with the more specific idea that competitors have a right that fellow competitors abide by the rules of their competition, and then turn to the broader idea that participants in

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certain restriction of his liberty. Suppose finally that the benefits produced by cooperation are, up to a certain point, free: that is, the scheme of cooperation is unstable in the sense that if any one person knows that all (or nearly all) of the others will continue to do their part, he will still be able to share a gain from the scheme even if he does not do his part. Under these conditions a person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefit by not cooperating. The reason one must abstain from this attempt is that the existence of the benefit is the result of everyone's effort, and prior to some understanding as to how it is to be shared, if it can be shared at all, it belongs in fairness to no one.

*Id.* at 9-10.

86. See generally Richard Dagger & David Lefkowitz, *Political Obligation*, STAN. ENCYCLOPEDIA PHIL. § 4.3 (Fall 2014), <https://plato.stanford.edu/entries/political-obligation/#FaiPla> [<https://perma.cc/R9CD-H4Y9>] (summarizing the debate).

87. See *id.*

any cooperative scheme have a right to contribution from those who benefit from the scheme.

### C. *The Competitor's Right to Rule Compliance*

It is natural to think that competitors have a right that fellow competitors abide by the rules of the competition. If we are rivals in a race, I may have a right that you not jump the gun. By analogy, a business may appear to have a right that its competitors not engage in tactics that violate the rules of the market. In both cases, one party would be put at a comparative disadvantage or would have their legitimate expectations violated by the noncompliance of their competitor. This explanation analogizes the market to a game or a sporting contest. And many philosophical discussions of competition take sports or games as the starting point.<sup>88</sup> Dworkin, one will recall, starts with the metaphor of swimmers competing in their own separate lanes.<sup>89</sup>

Sometimes competitors do seem to have a right that rivals abide by the rules, especially in the context of games and sports. If we are playing a board game and you are not following the rules, I am entitled to draw attention to this failure and demand that you correct it. Assuming that you are indeed breaking the rules, you owe it to me to bring your play into compliance. One can see how such a right to compliance might be grounded by imagining a dialogue. I might draw your attention to the written rules and point out that, in agreeing to play the game together, *we agreed with each other to abide by these rules*. “Look, this is the rule of the game and you committed to playing this game with me.” There are two elements here: established rules and mutual commitment among competitors to be bound by those rules.<sup>90</sup> When both are present, then competitors may indeed have a right to each other's compliance.

I want to suggest, however, that competition wrongs are not typically captured by such rights. In particular, I believe that a competitor's right to rule compliance would be both under- and overinclusive as an explanation of competition wrongs as they occur in real life. In making this argument, I consciously aim to move away from the analogy to sports and games. Games are highly artificial. An all-too-tempting idea about business is that business constitutes its own

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88. See, e.g., John McMurtry, *How Competition Goes Wrong*, 8 J. APPLIED PHIL. 201 (1991) (taking ice hockey as a model of thinking about competition and its pathologies).

89. See *supra* text accompanying note 4.

90. For an intriguing recent suggestion that all rights are grounded in joint commitment, see MARGARET GILBERT, *RIGHTS AND DEMANDS: A FOUNDATIONAL INQUIRY* (2018).

game—a game that, like poker, admits of some conduct that would be impermissible in ordinary life.<sup>91</sup> But the market is not a game. Games are typically characterized by well-codified rules, mutually accepted by all competitors upon a demarcated entry, and artificial game-specific objectives.<sup>92</sup> The market, though socially constructed, is not artificially designed in this way. Rather, the market is built out of, and continuous with, ordinary life. While we may not always be in the market, neither is it something that one cleanly enters and exits like a poker game or a swim race. And we are not “players” with artificial ends; we are real people with true interests.<sup>93</sup> While competition wrongs in games may often be understood in terms of claiming a right to compliance with some established rule, that model fits the competition wrongs of real life much less well.

First, the wrongs that arise from illicit competition outside of games and sport are not limited to competitors who have entered into the same competition and thereby share some implied agreement or joint commitment. The idea that there is a right that competitors abide by the rules seems most plausible as a right of direct competitors—the board gamers who sit down at the table together or the swimmers who simultaneously approach the starting blocks. By opting into the activity together, the competitors mutually commit to be bound by the rules of that competition. Consider the Court’s logic in *International News Service*: among those who opt to gather news, a special set of rules implicitly applies.<sup>94</sup> The advantage of such an explanation is that it potentially explains why the right is limited to just those within a particular competition. The AP has a right against INS because they are engaged in the same activity, like board gamers at the table together or swimmers in the same race.

And yet competition wrongs spill out beyond direct competitors. A recent Supreme Court case illustrates this point.<sup>95</sup> Lexmark, which makes laser printers and toner cartridges, designed its printers so that they could use only cartridges that Lexmark itself had also made.<sup>96</sup> Although competitors therefore could not manufacture their own cartridges for use in Lexmark printers, they could resell refurbished, used Lexmark cartridges in competition with Lexmark’s own, new

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91. See Albert Z. Carr, *Is Business Bluffing Ethical?*, HARV. BUS. REV., Jan.-Feb. 1968, at 143, 145.

92. For the definitive discussion of games and their connection with artificial constraints, see BERNARD SUITS, *THE GRASSHOPPER: GAMES, LIFE AND UTOPIA* (1978).

93. For the idea that players’ ends in games are systematically different, see the discussion of “disposable ends” in C. Thi Nguyen, *Competition as Cooperation*, 44 J. PHIL. SPORT 123, 124-27 (2017).

94. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 236 (1918).

95. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

96. *Id.* at 120-21.

cartridges.<sup>97</sup> Such competitors are called “remanufacturers.”<sup>98</sup> Static Control was “the market leader [in] making and selling the components necessary to remanufacture Lexmark cartridges.”<sup>99</sup> In an effort to prevent remanufacturers from acquiring used cartridges, Lexmark gave customers a discount, or “prebate,” on new cartridges in exchange for agreeing, through a shrinkwrap license at the time of purchase, to return the used cartridge to Lexmark.<sup>100</sup> In addition, Lexmark redesigned the cartridge so that once it was empty it would cease working until an embedded microchip was replaced by Lexmark.<sup>101</sup> Static Control developed a microchip that remanufacturers could use in lieu of Lexmark’s chip to reactivate used cartridges.<sup>102</sup> Lexmark sued for copyright infringement, and Static Control counterclaimed for Lanham Act violations.<sup>103</sup> Static Control’s counterclaim was that Lexmark had engaged in a campaign to “purposefully mislead[] end-users’ to believe that they are legally bound . . . to return the Prebate-labeled cartridge to Lexmark after a single use.”<sup>104</sup> In short, it was the supplier of the remanufacturers, Static Control, that brought a complaint alleging that Lexmark was lying to consumers about remanufacturers.

The trial court initially denied Static Control standing, holding that its injury was “remot[e]” because it was a mere “byproduct of the supposed manipulation of consumers’ relationships with remanufacturers” and noting that there were “more direct plaintiffs in the form of remanufacturers of Lexmark’s cartridges.”<sup>105</sup> But the Supreme Court, which has been highly reluctant to open its door to plaintiffs,<sup>106</sup> concluded that Static Control did have standing to bring its suit even though it was not Lexmark’s direct competitor. As the Court put it, “competition is not required for proximate cause; and that is true even if the defendant’s aim was to harm its immediate competitors, and the plaintiff merely

97. *Id.* at 121.

98. *Id.*

99. *Id.* (alteration in original) (quoting *Static Control Components, Inc. v. Lexmark Int’l, Inc.*, 697 F.3d 387, 396 (6th Cir. 2012)).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 122; *see also* 15 U.S.C. § 1125(a) (2018) (creating a private cause of action).

104. *Id.* at 122-23 (quoting Joint Appendix ¶ 39, at 31, *Lexmark*, 572 U.S. 118 (No. 12-873), 2013 WL 4407060, at \*31).

105. *Static Control Components, Inc. v. Lexmark Int’l, Inc.*, Nos. 02-571, 04-84, 2006 U.S. Dist. LEXIS 73845, at \*39 (E.D. Ky. Sept. 28, 2006).

106. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Scott v. Harris*, 550 U.S. 372, 397 (2007).

suffered collateral damage.”<sup>107</sup> At least in the marketing context, potential plaintiffs are not limited to direct competitors.<sup>108</sup>

Morally speaking, this conclusion is unavoidable. If a business engages in misleading marketing tactics, others beyond the business’s direct competitors may be injured. One might protest that injuries to downstream parties like a supplier are merely indirect. But it is hard to maintain a meaningful distinction between direct competitors and other market actors. First, as the Court noted, “In a sense, of course, all commercial injuries from false advertising are derivative of those suffered by consumers who are deceived by the advertising.”<sup>109</sup> Thus, to say that any competitor is wronged by illegitimate marketing tactics, one must be willing to accept that some indirect injuries are wrongs. Moreover, to echo an earlier point, one cannot cleanly delineate who is, and is not, within a particular competition. For example, the *Lexmark* decision has recently been applied to prevent Uber from dismissing a false advertising lawsuit brought by various taxi companies.<sup>110</sup> Uber argued that it was just a technology company and therefore not a direct competitor to the taxi companies.<sup>111</sup> Surely such categorization is irrelevant. A market actor is wronged when another party engages in illegitimate tactics that undermine the actor’s business—whether technically a direct competitor or not.<sup>112</sup> So a competitor’s right to rule compliance will fail to capture the many competition wrongs that do not occur between direct competitors.

One might respond by expanding the relevant joint activity to include all market participants. But then it will look like the noncompliance of any market actor wrongs every other market actor—for instance, underhanded tactics of

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107. *Lexmark*, 572 U.S. at 138.

108. The *Lexmark* decision marks an interesting contrast with the Court’s antitrust jurisprudence, where standing has been limited to those directly injured and denied to parties downstream in the supply chain. See *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977). The somewhat arbitrary nature of this rule is exposed in *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019), which allowed customers of Apple’s app store standing to sue despite the fact that prices were set by app developers, making the customers functionally akin to indirect purchasers. Both opinions in the case are compelling and yet faltering because the case pits the pragmatic and theoretical foundations of the *Illinois Brick* rule against one another.

109. *Lexmark*, 572 U.S. at 133.

110. *Yellow Grp. LLC v. Uber Techs. Inc.*, No. 12 C 7967, 2014 U.S. Dist. LEXIS 94093, at \*9-10 (N.D. Ill. July 10, 2014).

111. *Id.* at \*8.

112. To see the continuity with traditional economic torts, consider *Diamond Resorts Int’l, Inc. v. Aaronson*, No. 6:17-cv-1394-Orl-37DCI, 2018 WL 735627, (M.D. Fla. Jan. 26, 2018), in which a timeshare developer sued a law firm for false advertising because the firm was soliciting timeshare members and offering them legal services to free them from their financial obligations under the timeshare agreements.

Lexmark would wrong an unrelated fast-food chain.<sup>113</sup> Retreating, one might insist that some appropriately broad category could exist – say, direct competitors and quasi-competitors (like Static Control). But the problem here is not merely a problem of line drawing, though there certainly is that difficulty. The deeper problem is that, for the explanation to work, the group must consist of actors reciprocally engaged in some collective activity, involving a shared commitment to the rules, such that each is entitled to hold the others to account. If Static Control has a right to compliance from Lexmark, then Lexmark has a right to compliance from Static Control. Such reciprocity follows from the idea of a shared commitment. But my claim is that, in many cases, the potential wrongs do not have this reciprocal character. There will be asymmetries, in which one party has a stake in the other's compliance and not vice versa. For example, though Static Control could complain against Lexmark's misleading marketing to customers, it is hard to see why Lexmark could complain if Static Control had engaged in misleading marketing to its customers (the remanufacturers). The difficulty is thus not merely that wrongs spill over onto noncompetitors, but rather that wrongs spill outside whatever nontotal grouping one posits. That's because wrongs track causal relations – whose conduct in fact affects whom – with all their organic complexity.

Even if one could satisfactorily define a group of quasi-competitors reciprocally owing compliance, a second, reverse problem exists as well: overinclusivity. If competition wrongs were generally grounded in a right that competitors abide by the rules, then competition wrongs would arise whether the rule breaker gains an advantage over the other party or not. But, at least in market contexts, it would be odd to think that I suffer a wrong when my competitor breaks the rule *in a way that is not to my detriment*. Notice the contrast with games here. I can potentially complain when my board game companion violates the rules, regardless of whether it is to her advantage. She is breaching the terms of our agreed-upon and shared activity. It strikes me as less plausible that a swimmer can complain if her rival wears a noncompliant suit that actually impairs performance, but perhaps she can.<sup>114</sup> A business, however, surely would not have grounds to complain if its competitor engages in ill-conceived misleading advertisements or price-fixing schemes that serve only to drive the competitor itself into the

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113. For further discussion of such a widespread right, see *infra* Section II.D.

114. David Owens offers an interesting discussion of whether a competitor might be wronged by the poor effort of a rival. See DAVID OWENS, *SHAPING THE NORMATIVE LANDSCAPE* 29-31 (2012). The idea that competitors are wronged even by counterproductive rule violations seems to have an intuitive grip when the noncompliance threatens the integrity of the activity. But I can only make this out insofar as there is a harm – it tarnishes what the winner accomplishes.

ground. The idea of undermining a shared activity—so plausible for the board gamers—hardly seems plausible here.

There are two possible responses. On the one hand, one might insist that competitors are indeed wronged, albeit harmlessly, by even the ineffective non-compliance of their rivals. These are cases of harmless trespass. This response strikes me as the appropriate response for one who thinks that there is a right at play here.<sup>115</sup> But, as just noted, it strikes me as implausible in the market context. On the other hand, one might retreat to the idea that competitors have a right not to be disadvantaged by the noncompliance of a rival. But that seems to name an injury rather than something one can claim. It backs off the idea that my competitors owe it to me to abide by the rules where what is owed names some conduct to which I am entitled *ex ante*. I fear that a right like this is really only a placeholder, serving no independent function. It thus fails the second of the three criteria, and possibly the third as well. It does not describe to anyone what counts as within their sphere of control. If what we want from a right is a demarcation of what counts as my space—my swimming lane, to use Dworkin’s metaphor—then something outcome-dependent will not serve this purpose.

#### *D. The Contributor’s Right to Fair Contribution*

One might, at this point, consider abandoning the idea that a right to fair play is specific to competitors and to rules governing competitive activity. Instead of thinking about fair play in terms of not illicitly placing rivals at a competitive disadvantage, one might instead think of it in terms of not taking benefits to which others have contributed without contributing oneself. This conception of fair play hews closer to concerns with free riding. In the political-obligation literature, the duty of fair play typically refers to this notion of not benefitting without contributing.<sup>116</sup> Competition wrongs might then seem to consist in gaining benefits from a competition—such as a market for one’s goods—that one has not properly earned through compliance with the rules or practices that sustain the competition.

In at least some contexts, there does seem to be a duty to contribute to a scheme of cooperation from which one accepts benefits. Whether this duty can

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115. For a strong view that one has a complaint against even harmless conduct, see Rahul Kumar, *Who Can Be Wronged?*, 31 PHIL. & PUB. AFF. 99, 103 (2003).

116. See Dagger & Lefkowitz, *supra* note 86, § 4.3.



generalize enough to ground political obligation across the board is quite controversial.<sup>117</sup> But, for present purposes, I will assume that there is a broad duty to contribute to cooperative schemes from which one derives a benefit, including the laws of the market.<sup>118</sup> I want to argue that, even assuming a general duty not to benefit without contributing, competition wrongs are not explained by a right that others comply with this duty.

First, consider whether there is a private right to fair contribution. If there is, then it is a right held by a lot of people. Virtually everyone contributes, in one way or another, to making our market economy possible and thereby making possible the gains of market actors. Even if we were to limit our focus to those who refrain from committing violations of competition law itself, which seems insufficiently narrow, that is still a terribly large class of actors. It would be odd to say that each of these actors has a right to the compliance of all others.

We typically think of a right as something that one can claim.<sup>119</sup> Can those who contribute to a cooperative scheme make a claim on those who have benefited? Perhaps collectively they can.<sup>120</sup> But it is strained to say contributors have individual claims. I pay my taxes and you should pay yours, but I do not think that I have a personal claim that you pay your taxes. Ben & Jerry's does not commit antitrust violations and Microsoft should not either, but I do not know that Ben & Jerry's therefore has a right that Microsoft abide by antitrust law. If there are such rights, they are weak and diffuse.

Such ostensible rights – broadly and probably collectively held – seem unsuited to explain the wrongs that arise in the course of competition. They are too generalized and too detached from particular injuries. They thus fail the first criterion offered for a successful rights-based explanation. What is sought is a

117. For powerful criticisms, see ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 90-95 (1974); JOHN A. SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 101-42 (1979); and M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 *YALE L.J.* 950, 953-59 (1973).

118. There is an initial worry here. Any account of fair play may seem to rely on the idea – which I criticized above – that there are determinate rules of the marketplace. Can one free ride when the convention in question is not well established? Can I contribute to a system of rules that is, at best, inchoate? Again, I think that it is a mistake to think of there being some determinate set of “rules of the market” that are wholly apart from the rules of morality more generally.

119. See Joel Feinberg, *The Nature and Value of Rights*, 4 *J. VALUE INQUIRY* 243, 249 (1970).

120. I am inclined to think that some of the dispute about the duty of fair play turns on this question of whether there is a correlative right in the contributors. In Nozick's famous example of the neighborhood entertainment system, *see supra* note 117, at 93-94, my intuition is that the beneficiary ought to do her part, at least insofar as she has not explicitly disavowed the benefit. I think that the force of Nozick's argument lies, however, in the fact that the others do not have a right to demand that she contribute. She ought to, but they cannot claim it from her.



right that grounds the distinctive wrong suffered by competitors. A general right that others abide by the rules would not explain the wrong as committed against a particular party. Insofar as the complaint is that the competitor gains without paying the dues paid by everyone else in the cooperative scheme, then everyone else in the cooperative scheme must be similarly wronged by the free rider. A fast-food joint would suffer the same rights violation as the taxicabs when Uber breaks the rules. Even if there might be some sense in which this were true, it cannot be the basis for a *distinctive* wrong suffered by the disadvantaged competitor.<sup>121</sup> And that is what is needed. It was the sense that the wrong consists in the deprivation of business that led to the earlier temptation to characterize the wrong in property-like terms.<sup>122</sup> The current suggestion risks losing that entirely.<sup>123</sup>

One can see the problem another way relating more to the third criterion for a rights-based explanation: a right to fair contribution mischaracterizes the nature of the wrong. If the wrong is grounded in a violation of a right that others pay their share for the benefits they receive, then the wrong should be characterized by unpaid contribution or by the wrongful gain. The appropriate remedy would be a kind of disgorgement of profits.<sup>124</sup> But competition wrongs are, at least in part, about the losses imposed on competitors. Consider an example. Minute Maid took advantage of consumer trust in commercial representations. Its misleading labels might, in this way, be characterized as free riding or as taking advantage of a cooperative scheme without contributing. But suppose that

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121. Compare the ways that citizens are not granted standing to assert generalized grievances. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-78 (1992). This standing doctrine is sometimes put in terms of what it is to have a right. See *id.* at 578 (“‘Individual rights’ . . . do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public.” (quoting *Stark v. Wickard*, 321 U.S. 288, 310 (1944))).

122. See *supra* Section II.B.

123. There is a parallel here to a familiar philosophical problem for convention-based accounts of promising: if the wrong consists in the violation of a convention in the abstract, then it looks like no one is specially situated to complain. But the present suggestion is worse off than the conventional account of promising. At least it is clear that the person who makes a false promise deliberately avails herself of a determinate convention to which she then does not contribute. But, in the case of a competitor, it may be less clear that there is a determinate convention (i.e., rules of the market) or that she is deliberately availing herself of it. In sum, the present suggestion is vulnerable to the familiar problems with conventional accounts of promising, *plus* problems associated with establishing what the convention might be, *plus* the familiar problems about whether there can be a duty of fair play without intentional acceptance.

124. The Lanham Act does, in fact, allow for disgorgement of profits. See 15 U.S.C. § 1117(a) (2018). But it also allows for damages based on “any damages sustained by the plaintiff.” *Id.*

its gains were small, far less than POM stood to lose.<sup>125</sup> Is the wrong to POM correctly characterized merely in terms of Minute Maid's small gain? I think not. The wrong consists, at least in part, in the profits that POM lost. And that suggests that the wrong is not merely that of unfairly reaping a benefit.<sup>126</sup>

### *E. Other Possible Rights*

I have now discussed and ruled out what I take to be the most plausible candidates for a right that would ground competition wrongs. As such, I hope to have made out a prima facie case for the independence claim. But negative arguments always have a tinge of incompleteness. One could certainly propose other candidate rights. One might point to a right to one's legitimate expectations, or a right to compete on equal terms, or perhaps a right to sell one's labor and products in the market.

I think that these suggestions are either nonstarters, or else they will collapse into one of the previously considered options. We do not have a legitimate expectation that we will keep our customers or our profits. What we might have is a legitimate expectation that others will follow the rules. But that then collapses into the earlier thought that there is a right that others abide by some set of rules.

Similarly, we do not generally have a right to compete on equal terms in the market. A small startup hardly competes on equal footing with Comcast or Google, nor does it have a right to such equal footing. It might have a right to compete on *formally* equal terms. That is, perhaps competitors have a right to compete on equal terms where that means a right that all participants are subject to the same rules. That right seems, in the first instance, to be a right against the state, and not a right against the competitor. Insofar as it is a right against a competitor, then it seems to be simply a version of a right to fair play.

One surely does not have a claim-right to sell one's labor or goods in the market.<sup>127</sup> Nobody wrongs you by not purchasing what you offer. Perhaps one has a liberty-right to sell one's goods, but the illicit competitor does not violate

125. To make this concrete, suppose that the appearance of Minute Maid's pomegranate "flavored" juice on the shelf induces customers who otherwise would have purchased POM to be confused and simply purchase nothing at all. When this happens, Minute Maid does not benefit, but it does harm POM.

126. As in Section III.C., one might reply to the arguments in this Section by interpreting the right as not merely a right to fair contribution, but rather as a right against being harmed by non-contribution. My response here would be similar. Such a right would appear to serve merely as a placeholder.

127. For the definition of a claim-right, see Leif Weinar, *Rights*, STAN. ENCYCLOPEDIA PHIL. § 2.1.2 (Fall 2015), <https://plato.stanford.edu/entries/rights/#2.1> [<https://perma.cc/T8Z9-H7PE>].

such a right.<sup>128</sup> Any suggestion in this vicinity must be that one has a claim-right to a kind of institution, a fair market in which to sell one's goods. But this again seems to be a broad public right.

There is a reason why the various explanations gravitate in similar ways and then fall victim to similar problems. On the one hand, one wants an explanation that describes some unique entitlement of the wronged competitor. This will tend toward something like a property right, a meaningful *ex ante* entitlement. But such an explanation will, as we have seen, give too much to the competitor. Competitors do not have property-like rights to their customers or their profits or the like. On the other hand, one might appeal to a weaker, more general right to compliance or fair conduct by others. But that will give too little, offering the direct competitor nothing that distinguishes it from everyone else in the market. A right that is narrow enough to capture the distinctive wrong will be too strong; a right that is more general will be too weak. The recurrent problem, in other words, is that the duties seem general and public, but the grievances seem particular and private.

### III. COMPETITION WRONGS AS UNJUSTIFIABLE HARMING

At this point, I hope to have sketched a case for two claims. First, market participants have a special standing to complain that they have been wronged when they lose business as a result of illegitimate tactics by other market actors. And, second, this wrong cannot be explained in terms of some right held by competitors *ex ante*. What, then, is a competition wrong if it is not a violation of the competitor's rights?

#### A. *Competition and Justification*

To seek a positive account of competition wrongs, we might return to the initial observation that one typically does not need to answer for harm caused in the course of competition. Why would this be? Why would someone not have the standing to complain against the person who has harmed him or her? Why would we not have to answer if we have harmed another?

For Ripstein and Dworkin and many in the rights tradition, these questions are quickly resolved by the fundamental place of individual liberty. We have to answer only for violating another's sphere of sovereignty. Harm, as a general matter, is not something for which we must account. That is what it means to take liberty seriously.<sup>129</sup>

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128. For the definition of a liberty-right (or privilege-right), see *id.* § 2.1.1.

129. See *supra* note 6 and accompanying text.

But suppose that harm were something for which we were generally obligated to account. Might there be a different explanation – an explanation more particular to competition – for why the faster swimmer or whoever makes the better mousetrap need not apologize to fellow competitors who lose out? I think that there is.

In *The Possibility of Altruism*, Thomas Nagel defends the idea that we may be rationally required to consider what matters to other people.<sup>130</sup> But Nagel observes that competitive activities, like a boxing match, seem to present special contexts where self-concern is licensed in service of broader objective reasons:

I wish to suggest that there are patently objective reasons for each fighter to pursue his own success without the slightest consideration for his opponent. These derive from the objective reasons for holding the match in the first place . . . . These ends are ill served if the fighters assist each other. One cannot win a victory over a complaisant opponent. Certain limits to the outcome are set by the foul rules, heavy boxing gloves, and the presence of a physician who can stop the fight on medical grounds. But within those limits it is essential to the objective point of the match that the contestants themselves concentrate only on winning.<sup>131</sup>

Nagel's point is that competition may be a context in which objective reasons are best served by people focusing on their own subjective reasons. Altruism appropriately gives way to circumscribed egoism.

There are, of course, objective reasons for having market competition, as well. These reasons stem from the way that market competition can advance social value. As Adam Smith famously observed, social benefits may sometimes be better advanced by profit-motivated behavior than by pure altruism: "By pursuing his own interest [the merchant] frequently promotes that of the society more effectually than when he really intends to promote it."<sup>132</sup> Like Nagel's boxers, business competitors should – for everyone's sake – be free from worrying about one another. We would never have a better mousetrap if everyone worried about putting each other out of business. In other words, the efficaciousness of market

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130. THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* 3 (1970).

131. *Id.* at 131-32.

132. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 485 (Edwin Cannan ed., The Modern Library 1994) (1776).

competition seems to be a reason to license competitors not to concern themselves with benevolence towards one another, a license not to answer for a certain kind of harm.<sup>133</sup>

According to this second picture, our license to harm others without answering for it is narrower. It is not the default, but rather only an immunity that we hold only insofar as we are engaged in a valuable competition.<sup>134</sup> This does not mean that every choice must be assessed for its social value. Just as the boxer need not think about the permissible force of each punch, we have limited prerogatives to pursue our individual objectives. We can build a better mousetrap, close our hotel, and take the last carton of milk without stressing over the possible repercussions. But when our conduct has the effect of undermining the broader values for which the immunity is granted, we do not have the same license to be free from answering for the harm we cause.<sup>135</sup> When the mousetrap is a fraud, when the hotel is shuttered out of spite, or when one does not need

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133. Christopher McMahon describes this as a way in which “the implicit morality of the market” involves a relaxation of morality’s principle of nonmaleficence. Christopher McMahon, *Morality and the Invisible Hand*, 10 PHIL. & PUB. AFF. 247, 262-63 (1981). As he correctly points out, though, this is a limited license:

It must be emphasized, however, that while some relaxation of the requirement to refrain from harming others may be unavoidable if a free-enterprise system is to function optimally, it does not follow that this requirement has no legitimate place in such a system. For there are surely many economic situations in which respect for the principle of nonmaleficence would not reduce efficiency. And in such situations, there will be no economic justification for violating it.

*Id.* at 263. It is worth noting the contrast between this picture and Dworkin’s description of competition harms. McMahon’s thought, which I share, is that all harms are morally salient but that market (or other) competition can give us justification for them. Dworkin’s picture, in contrast, is that there is a range of harms that are simply not morally salient—that are merely a result of everyone swimming in their own lanes.

134. For a different inversion of the theoretical default of individualism to one founded in altruism, see Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1990).

135. There are parallels between my claims here and the idea of abuse of rights, which is discussed in Lee Anne Fennell, *Owning Bad: Leverage and Spite in Property Law*, in CIVIL WRONGS AND JUSTICE IN PRIVATE LAW 415 (Paul B. Miller & John Oberdiek eds., 2020); and Larissa Katz, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*, 122 YALE L.J. 1444 (2013). But the cases and literature on abuse of property rights focuses on deliberately harmful or spiteful conduct, see Fennell, *supra*, at 421-23; Katz, *supra*, at 1448-49, whereas I am considering a broader category. I think this makes it an even thornier problem for rights-based theories than abuse of rights, which is already quite a patch of brambles.

milk at all, then one may have to answer for one's conduct and the harms that result.<sup>136</sup>

In the competition cases that I have considered, there are potentially ready explanations for why the conduct in question is wrongful that connect directly with the interests of the public. The conduct that I have considered misleads consumers, or tends to make markets less efficient, or threatens the stability of beneficial social practices through free riding. It is all conduct inconsistent with the reasons for having the competition in the first place.<sup>137</sup> This is why the conduct is wrong: society as a whole can reasonably object to it.<sup>138</sup> And, as noted, courts and legal commentators repeatedly assert that competition law is concerned with protecting the public, not competitors.<sup>139</sup>

And yet, if I am correct, it does seem like competitors can be distinctively wronged when other actors engage in conduct that is at odds with these benefits to consumers. When they lose business, they suffer an injury. This injury is not a deprivation of right, for they had no right to their customers or their profits. Nor is it merely about the violation of the market norms, for what matters to them is the loss attributable to that violation rather than the violation itself.

We should take this structure at face value. *The wrong consists in a party suffering a loss (harm) caused by actions of another party that were inconsistent with the broader social value of the competition.* It is not a violation of the wronged party's

136. This claim about the milk purchase may strike some readers as implausible. Surely one does not wrong another by imprudent purchases, even if the others might have put the good to better use. I am less sure. If your wasteful use spoils my chance at a productive one, then it is not clear to me that I have no complaint. (Suppose you purchased the milk simply in order to pour it down the drain.) Especially in our current overstretched world, we would do well to regard conspicuous, excessive, or wasteful consumption as potentially grounding wrongs to others.

137. Cf. Craig L. Carr, *Fairness and Performance Enhancement in Sport*, 35 J. PHIL. SPORT 193, 195 (2008) ("I shall understand fairness to involve fidelity to social practice. . . . The unfairness is to be found in the fact that the cheater puts her interest in winning above the point and purpose of the game itself. If everyone cheats when and wherever possible, there is little reason to play the game, for it seems most unlikely that the purpose of play—the demonstration of the excellence the sport is intended to test—will emerge under these circumstances.").

138. Ultimately, I am following an old and intuitive conception of business ethics. Ethically, the businessperson may compete—which may harm her competitors—but only in forms that typically advance overall social welfare. See, e.g., Frank Chapman Sharp, *Some Problems of Fair Competition*, 31 INT'L J. ETHICS 123, 131-32 (1921) (defending this position and using it to explain why predatory pricing is wrong). For a more modern version, see Lynn Sharpe Paine, *Ideals of Competition and Today's Marketplace*, in ENRICHING BUSINESS ETHICS 91, 95-96 (Clarence C. Walton ed., 1990). Cf. Paul, *supra* note 51 (manuscript at 24) (arguing that "we should consider economic coordination rights a public resource").

139. See *supra* notes 50-51 and accompanying text.

rights, and yet it is a wrong for which that party has special standing to feel aggrieved.<sup>140</sup> The wrong is unbound from any individual right. It involves individual harm paired with socially unjustifiable conduct—a violation of duties owed to the public.<sup>141</sup>

Private law actually offers a model of this structure in an almost abandoned corner: public nuisance. At common law, public nuisance describes conduct that “involved some interference with the interests of the community at large.”<sup>142</sup> But not anyone can sue for damages. Rather, a plaintiff “must have suffered harm of a kind different from that suffered by other members of the public.”<sup>143</sup> Thus, structurally, public nuisance offers recourse for those who are specially harmed when someone acts in a generally wrongful way. Public nuisance has long been considered an anomalous cause of action, and its use has largely been cabined to certain fringe contexts. But competition law is rife with similar structures. Free riding, abuse of market power, misleading marketing, and so on are all essentially treated as public nuisances giving rise to private wrongs. In all of these cases, the collective concerns ground a prohibition that, in turn, gives rise to individual grievances.<sup>144</sup> Competition law, then, may be viewed as in part recognizing and responding to these grievances. Even if the standards for liability are entirely public-regarding, the law may still be adjudicating private disputes over genuine moral wrongs.

In what follows, I aim to illustrate this structure by thinking through two examples. My hope is to show that, in order to adjudicate whether a competition wrong occurred, courts inquire whether the defendant, who has caused harm to the plaintiff, has a justification for that harm. This is typically a question about

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140. Cf. David Owens, *The Roles of Rights, in CIVIL WRONGS AND JUSTICE IN PRIVATE LAW*, *supra* note 135, at 3 (defending the thought that a party may be wronged by violation of a general public convention).

141. It may be objected that this account appears to afford standing without limits. Even if POM should have standing to sue, surely the dry cleaner for POM’s employees should not, even if she does lose business. One might be tempted at this point to appeal to proximate cause. But that doctrine generally depends on a right, which then defines the scope of liability. It is harder to use the doctrine for matters of public right. More generally, my argument poses a challenge to proximate cause so conceived. My own view is that the limitations on standing should be understood—both legally and morally—in terms of either actual causation (also called factual causation) or pragmatic administrative concerns. Of course, actual causation is notoriously hard to theorize or know, but that does not mean that it is not the theoretically correct question.

142. RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (AM. LAW INST. 1979).

143. *Id.* § 821C.

144. One might wonder whether this does not ground the wrongs in a right after all—a public right. I have no deep objection to that locution. What is important to see is that the individual, private grievance is not grounded in an individual, private right.



society as a whole. The inquiry is not whether there was a violation of a norm grounded in the plaintiff's interests or grounded in what conduct the plaintiff might reasonably reject; indeed, the norm in question might have little to do with the plaintiff at all. But the harm is something for which the defendant must answer if its conduct was not socially justifiable.

*B. Tortious Interference and Justification*

Return to tortious interference with contract or prospective business relations. Few would dispute that it can involve a genuine wrong — that is, few would dispute that the disappointed party may have standing to feel aggrieved. Azar wronged Lehigh in stealing away its signed customers.

But what makes the interference tortious? One possibility is that contracts are property and any interference is tortious in the way that any trespass is tortious. But it is not true that all interference with a contract is tortious. Azar's interference would likely not have been tortious if he were acting only as a concerned citizen. Another possibility is that interference is tortious when it is otherwise illegal — fraud or intimidation or slander. The wrong would then be intelligible as based on a right to have competitors abide by the rules. But interference can be tortious without being otherwise unlawful.

Instead, what determines whether the interference is tortious will often depend on a question of justification. Consider the following lengthy but lucid explanation from Justice Traynor:

It is universally recognized that an action will lie for inducing breach of contract by a resort to means in themselves unlawful such as libel, slander, fraud, physical violence, or threats of such action. Most jurisdictions also hold that an action will lie for inducing a breach of contract by the use of moral, social, or economic pressures, in themselves lawful, unless there is sufficient justification for such inducement.

Such justification exists when a person induces a breach of contract to protect an interest which has greater social value than insuring the stability of the contract. Thus, a person is justified in inducing the breach of a contract the enforcement of which would be injurious to health, safety, or good morals. The interest of labor in improving working conditions is of sufficient social importance to justify peaceful labor tactics otherwise lawful, though they have the effect of inducing breaches of contracts between employer and employee or employer and customer. In numerous other situations, justification exists depending upon the importance of the interest protected. The presence or absence of ill-will, sometimes referred to as "malice," is immaterial, except as it indicates whether or not an interest is actually being protected.



It is well established, however, that a person is not justified in inducing a breach of contract simply because he is in competition with one of the parties to the contract and seeks to further his own economic advantage at the expense of the other. Whatever interest society has in encouraging free and open competition by means not in themselves unlawful, contractual stability is generally accepted as of greater importance than competitive freedom. Competitive freedom, however, is of sufficient importance to justify one competitor in inducing a third party to forsake another competitor if no contractual relationship exists between the latter two.<sup>145</sup>

Justice Traynor's description makes clear the role that justifiability plays in the determination of the wrong. The wrong does not depend on the conduct's being independently prohibited. Nor does it depend on its being done with malice. Instead, the wrong depends on whether there is "sufficient justification" for the conduct, which is a matter of how it impacts society at large.

In light of the social value of market competition, competitive freedom operates, for Justice Traynor, as a justification for a range of conduct, including trying to induce consumers to switch their allegiances when no contractual relationship exists. Like Nagel's boxers, market actors are justified in pursuing their own interests in such cases because there are objective reasons for allowing such pursuit.

But competitive freedom does not serve as a justification for inducing breach. Justice Traynor explained this by saying that contractual stability is of "greater importance," but we can put it more clearly: whereas competitive market behavior is generally beneficial for society, and thus licensed, interference with contracts for competitive gain is not similarly beneficial. Allowing parties like Azar to compete by undermining their competitors' contracts does not enhance social welfare.<sup>146</sup> One has a justification — traced to the social value of market competition — for cutting into another's profits by offering a better product, better prices,

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145. *Imperial Ice Co. v. Rossier*, 112 P.2d 631, 632-33 (Cal. 1941) (in bank) (citations omitted).

146. One possible response, at this point, might emphasize the parasitic nature of Azar's conduct. In *Private Wrongs*, Arthur Ripstein offers a fascinating argument that some torts, seemingly depending on the tortfeasor's motive, are actually based on the fact that the defendant uses the plaintiff's agency to his own ends. ARTHUR RIPSTEIN, *PRIVATE WRONGS* 168-71 (2016) (discussing *Hollywood Silver Fox Farm v. Emmett* [1936] 2 KB 468). I am not convinced that this argument can offer a rights-based account of these cases. See Nicolas Cornell, *Ripstein's Buttery Rights: Comments on 'Private Wrongs'*, 14 JERUSALEM REV. LEGAL STUD. 22, 25 (2016). But, even if Ripstein's argument is successful, I do not think that it can be generalized to cover all tortious interference. Azar may have been deliberately using Lehigh's agency in the actual case. But tortious interference requires only that there be a prior contract that is broken. The

or better promotion, but one has no similar justification for inducing breach of contract. That is not, however, to say that nothing can justify inducing breach of contract. Consumer groups can encourage breach to prevent harm to health or safety; labor unions can encourage employees to strike for better working conditions; and so on. Parties do not simply have a right that others never induce breach. And yet parties are wronged when they suffer losses because someone has competed in a fashion at odds with the value of market competition.<sup>147</sup>

*C. Antitrust and Justification: Apple and Amazon*

My claim is that this same basic structure is continuous across other areas of competition law. Let me offer one final legal case – moving from tort law to antitrust law – that illustrates the way that real, complex competition disputes involve questions of social justification, not questions of rights. In late 2009, Apple was preparing to introduce the iPad.<sup>148</sup> It hoped that an attraction of the iPad would be the ability to read e-books.<sup>149</sup> At the time, however, Amazon’s Kindle controlled ninety percent of the e-book market.<sup>150</sup> Amazon had attracted Kindle users by offering desirable titles at a price of only \$9.99, which was near or even below the wholesale price that Amazon paid to publishers.<sup>151</sup>

The book-publishing industry at the time was dominated by the “Big Six” publishers.<sup>152</sup> These publishers feared the “wretched \$9.99 price point becoming a de facto standard,” in the words of one Hachette executive.<sup>153</sup> The pricing threatened to undermine sales of hardcopy books, which would often be listed for thirty dollars or more.<sup>154</sup> Taking on Amazon, however, would be difficult. As one Penguin memo put it, “It will not be possible for any individual publisher to

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interferer need not be acting or gaining parasitically. The interferer may simply want the landlord to break the contract with a tenant so that he can lease the property himself.

147. There are interesting connections between the account that I am offering and the public-law account offered in Neyers, *supra* note 17, at 187-95.

148. *United States v. Apple, Inc.*, 791 F.3d 290, 296 (2d Cir. 2015).

149. *Id.*

150. *Id.* at 299.

151. *Id.*

152. *Id.* at 298. The Big Six were Hachette, HarperCollins, Macmillan, Penguin, Random House, and Simon & Schuster. *Id.* Penguin and Random House have since merged. See Julie Bosman, *Penguin and Random House Merge, Saying Change Will Come Slowly*, N.Y. TIMES (July 1, 2013), <https://www.nytimes.com/2013/07/02/business/media/merger-of-penguin-and-random-house-is-completed.html> [https://perma.cc/Y4JA-ASPQ].

153. *Apple*, 791 F.3d at 300.

154. *Id.* at 299-300.

mount an effective response, because of both the resources necessary and the risk of retribution, so the industry needs to develop a common strategy.”<sup>155</sup> Noticing this dynamic among the publishers, Apple seized on the opportunity. It realized that it could get publishers onto its e-book platform if it could offer them a way to coordinate in breaking Amazon’s \$9.99 pricing.<sup>156</sup>

The mechanism Apple devised was clever, dangling the possibility of a new pricing model as an incentive to take on Amazon together. Specifically, Apple offered publishers an agency model, rather than the traditional wholesale model, thereby giving the publishers control over pricing.<sup>157</sup> But, in order to ensure that Apple e-books were competitive, Apple’s in-house counsel contrived a mechanism to make the publishers take on Amazon: a “most favored nation clause.”<sup>158</sup> The MFN clause required that, if customers were offered a lower price by any other reseller, then the publisher would have to match that lower price with Apple.<sup>159</sup> In other words, if Amazon’s \$9.99 pricing continued, publishers would take even bigger losses. It was a commitment that made continuing a wholesale relationship with Amazon financially intolerable. Apple thus facilitated concerted action among the publishers by simultaneously offering contracts to each publisher that required confronting Amazon.<sup>160</sup>

The publishers signed on, and it worked: five of the Big Six publishers had accepted Apple’s terms when the iPad was publicly announced.<sup>161</sup> The next day, Macmillan delivered an ultimatum to Amazon: switch to an agency model or lose access to new releases.<sup>162</sup> The other publishers quickly followed suit. Within a few months, five publishers had agency relationships with Amazon.<sup>163</sup> And the

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155. *Id.* at 300.

156. *Id.* at 302.

157. *Id.* at 303.

158. *Id.* at 304.

159. *Id.*

160. Here is how the Second Circuit summarized the dynamic:

Apple wanted quick and successful entry into the ebook market and to eliminate retail price competition with Amazon. In exchange, it offered the publishers an opportunity to confront Amazon as one of an organized group . . . united in an effort to eradicate the \$9.99 price point. Both sides needed a critical mass of publishers to achieve their goals. The MFN played a pivotal role in this quid pro quo by stiffening the spines of the publishers to ensure that they would demand new terms from Amazon, and protecting Apple from retail price competition.

*Id.* at 305 (citations and quotations omitted).

161. *Id.* at 308.

162. *Id.*

163. *Id.* at 309.

prices shifted. According to DOJ experts, average e-book prices increased 23.9% over the year after the iPad's introduction.<sup>164</sup>

Did Apple's conduct wrong Amazon? One can see an argument that it did. To gain a competitive advantage, Apple deliberately helped publishers take on Amazon. This was not a matter of offering a better product or a better price, but of displacing the market leader through concerted action.<sup>165</sup> Apple effectively orchestrated a price-fixing conspiracy among the publishers. And, in 2015, the Second Circuit affirmed, on a 2-1 vote, a district court judgment finding Apple in violation of antitrust law.<sup>166</sup> Apple agreed to pay \$400 million to consumers in the form of cash and e-book credits.<sup>167</sup>

One can also see an argument that Apple did not do anything wrong. The dissent, which has found moderate support among commentators,<sup>168</sup> argued that the application of antitrust liability was inappropriate because Apple's move was arguably procompetitive.<sup>169</sup> Apple broke up Amazon's monopoly of the e-book market. According to this line of thought, Amazon's below-cost pricing was a barrier to entry designed to prevent competition and assure market dominance.<sup>170</sup> Apple's strategy broke into the market that Amazon was trying to wall off as its own. Viewed this way, Apple did not wrong Amazon because it was countering Amazon's own anticompetitive behavior.

164. *Id.* at 310. The average computed was a weighted average—that is, it measured the average increase in the price of e-books that were sold, thereby assigning greater weight to titles that sold more copies, rather than the average increase in price listings in the publishers' e-book catalogue. *See id.* at 310 n.14.

165. Admittedly, it can be hard to feel too much sympathy for a goliath like Amazon. But imagine a small, personal business confronted by similar tactics. Suppose you owned the local bookstore in a small town, and a would-be competitor entered the local market using similar tactics to Apple's—simultaneous MFN clauses with all of the major publishers ensuring a collective refusal to supply your store except on their terms. I think that one would—and should—feel resentment in such a situation.

166. *Apple*, 791 F.3d at 296, 314.

167. Adam Liptak & Vindu Goel, *Supreme Court Declines to Hear Apple's Appeal in E-Book Pricing Case*, N.Y. TIMES (Mar. 7, 2016), <https://www.nytimes.com/2016/03/08/technology/apple-supreme-court-ebook-prices.html> [<https://perma.cc/EN3E-WKSL>].

168. *See, e.g.*, Opinion, *Apple's Rule of Unreason*, WALL ST. J. (June 30, 2015, 7:25 PM), <https://www.wsj.com/articles/apple-rule-of-unreason-1435704900> [<https://perma.cc/PW59-LVQH>]; Alden Abbott, *The Second Circuit Misapplies the Per Se Rule in U.S. v. Apple*, TRUTH ON MKT. (July 7, 2015), <https://truthonthemarket.com/2015/07/07/the-second-circuit-misapplies-the-per-se-rule-in-u-s-v-apple> [<https://perma.cc/V6N7-V4DR>].

169. *Apple*, 791 F.3d at 341 (Jacobs, J., dissenting).

170. For a discussion of the potentially problematic nature of Amazon's strategy, see Khan, *supra* note 51.

Here is my central point: there can be wrongs committed in cases like this, but whether a wrong has occurred does not turn on whether any right was violated. If Amazon was wronged, it is not because it had any apparent right to do what it was doing.<sup>171</sup> Obviously it had no right to a dominant position in the market.<sup>172</sup> If someone else offered e-books with a more attractive price or format, Amazon would have no right to keep its customers from going elsewhere. Amazon also had no right to a wholesale relationship with the major publishers. To the contrary, every publisher had a right to refuse to sell e-books wholesale — it was only the conspiracy among them that was potentially impermissible. And Apple was yet a further step removed. Ultimately, if Amazon was wronged, it was not because its rights were violated, but because it lost out when Apple conspired against the public to raise e-book prices.

If Amazon was not wronged, on the other hand, it seems to be only because Apple's conduct was justifiable in light of its consequences for the market and consumers, not because Apple had a general entitlement to do as it did. The way for Apple to argue that it committed no wrong is to say that, in fact, its conduct was procompetitive. One might think that orchestrating price-fixing is simply against the rules. But perhaps not when it is used to combat predatory or otherwise abusive pricing by a monopolist.<sup>173</sup> That is the argument that convinced the dissenting judge.

Whichever argument one accepts, the relevant inquiry is whether the harm to Amazon was the result of action that was good or bad for the market as a whole. In this light, it is understandable that antitrust law has been dominated by economic reasoning whittling away at per se rules, shifting instead towards more case-specific inquiry into reasonableness.<sup>174</sup> But we should not conclude that, because economic reasoning figures in the inquiry, the law is not making a

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171. The point is not simply that antitrust adjudication tends towards standards that turn on context-specific, post hoc justification, though the recent evolution of antitrust doctrine squarely in that direction is strongly supportive. See Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 55-71 (2007) (describing the modern evolution towards standards over rules in antitrust). Even in a regime of fixed rules, there would still be a question of whether those rules generated rights in competitors.

172. It was the loss of this dominance that was probably the real harm to Amazon. Notice that the most natural party to regard as harmed by price-fixing would not be Amazon, a distributor, but rather the end-consumers.

173. Cf. Paul, *supra* note 51 (manuscript at 11-21) (describing the evolution towards a fixation on horizontal coordination in antitrust).

174. See ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE 358 (2002) (“[T]he Court systematically went about the task of dismantling many of the per se rules it had created in the prior fifty years, and increasingly turned to modern economic theory to inform its interpretation and application of the Sherman Act.”).

moral judgment about the relationship between the parties.<sup>175</sup> The economic reasoning captures a way that one market participant's conduct may or may not be justifiable to another.

In this way, antitrust law may be about efficiency and perhaps other public values, and it may be, simultaneously, about moral wrongs committed in the course of market competition. It is, in this light, a moral institution recognizing forms of relational accountability, like other areas of private law. Current theorizing about competition law seems to ignore this dimension, despite the fact that it is readily apparent in the law's doctrinal structure. Perhaps a richer picture of our possible moral relations can thus morally enrich our conception of competition law itself.

#### *D. Competition Wrongs Beyond the Market*

I have focused on wrongs that arise in the course of market competition, but the argument applies to wrongs in other competitions as well. Wrongs to competitors are hardly limited to the business world. In the rest of life too, we may find ourselves committing or suffering wrongs in the course of competition. And, in these contexts too, I believe that wrongs cannot always be explained in terms of the violation of a competitor's right.

Consider sports, for example. To return to Dworkin's evocative metaphor, we are swimming in our own lanes, and we have a right that others not invade that space. That is an important insight. But it does not follow that, because we cannot cross the lane lines, we are morally unconcerned with what happens in the rest of the pool. When contestants lose to competitors who have adopted new tactics potentially at odds with the underlying values of the competition – be it more buoyant swimsuits or human-growth hormones – it is natural to see the losing contestants as wronged, even though no transgression of the existing rules has occurred. The same may even extend to those who lose when competitors adopt strategies that appear at odds with the spirit of the game: the “hack-a-Shaq” in basketball, feigning injuries in soccer, the neutral-zone trap in hockey, and grunting or time-wasting in tennis. The complaint of the competitor when such tactics are taken to the extreme is at least intelligible. Whether we see the

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175. As McMahon puts it, “[E]conomic theory can be regarded as having normative implications for the behavior of consumers and firms in a free-enterprise system.” McMahon, *supra* note 133, at 254. The thought is that certain moral rules, shaped by economic theory, arise in market contexts – what McMahon calls “the implicit morality of the market.” *Id.* I am sympathetic with much of McMahon's account, though I am slightly resistant to characterizing the morality of the market as “public morality” in the way that McMahon does. *Id.* at 267.

competitor as truly aggrieved depends on whether we see the tactic as wrongful—as at odds with the general or public value of the activity—or as merely crafty. But it has nothing to do with the rights of the losing party.

Games are, however, an artificial context. In real life, competition wrongs arise with more organic nuance and complexity. Here it is even more clear that one may lose out on important goods because another transgresses—not against you but against another or against broader collective aims. One misses out on one's dream apartment because another applicant embellishes her application to the landlord; one is passed over for a promotion at work in favor of a coworker who will assist the manager in papering over, rather than addressing, the unit's lack of productivity; one's careful contribution to an intellectual discussion is overshadowed by another person's flashy obfuscation. It would be perversely antagonistic, I think, to view ourselves as perpetually having rights against one another as rival competitors. We should not respond to such cases by thinking that we simply need to be clearer about the lane lines in some metaphoric race. And yet these injuries from others' transgressions are real, and they are personal. The stinging resentment that they can generate when suffered is not inapt; nor is the felt need to offer moral repair when we have been the illegitimate victor.

One place where we see and feel this sort of injury most sharply is in love. In *Pride and Prejudice*, Mr. Darcy is wronged by Mr. Wickham's deceitful pursuit of Elizabeth Bennet.<sup>176</sup> Though it is Elizabeth to whom the lies are told, we nonetheless recognize this as a wrong to Darcy who loses in the comparison.<sup>177</sup> In Anthony Trollope's *Chronicles of Barssetshire*, John Eames is forever prevented from marrying his love, Lily Dale, because she was disingenuously courted and then scorned by Mr. Crosbie—a wrong justifying even a brawl.<sup>178</sup> In each case, the false treatment of a lover wrongs the scorned rival as well. Of course, no one has a right to reciprocation of one's love, but that does not mean that we are not wronged by the underhanded adversary when it is lost. In *Anna Karenina*, Levin reflects, "Yes, she was bound to choose him. That's the way it has to be, and I

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176. See JANE AUSTIN, *PRIDE & PREJUDICE* (Donald Gray & Mary A. Favret eds., W.W. Norton & Co. 4th critical ed.) (1813).

177. This is, admittedly, an imperfect example insofar as some of Wickham's lies concerned Darcy himself and might constitute a violation of duties owed to Darcy directly. But this does not seem essential. Darcy would have been wronged even if Wickham's lies had only been to inflate his own worth, never falsely portraying Darcy.

178. See ANTHONY TROLLOPE, *THE SMALL HOUSE AT ALLINGTON* (Dinah Birch ed., Oxford Univ. Press 2015) (1864). Trollope confirms that the effects of the wrongful courtship were never really overcome in the subsequent novel, *THE LAST CHRONICLE OF BARSET* (Helen Small ed., Oxford Univ. Press 2015) (1867), in which John Eames renews his proposals to Lily and is again tragically rejected.



## COMPETITION WRONGS

can't blame anyone or anything. It's my fault. What right did I have to think that she would want to join her life to mine?"<sup>179</sup> Such reasoning is mistaken: one may indeed have no right to hard-to-win goods like love, and yet one may still be wronged when those goods go to others who have won them illegitimately.

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179. See LEO TOLSTOY, *ANNA KARENINA* (Rosamund Bartlett trans., Oxford Univ. Press 2014) (1878).