

COMPETITION WRONGS

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1. INTRODUCTION: HARMS AND WRONGS IN COMPETITION

In a society with any developed economy, the possibility arises that market participants will 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. If my conduct is impermissible, then I have potentially wronged you.¹ How are we to understand these wrongs that occur in the course of competition? What explains why such conduct constitutes a wronging? I believe that answering these questions may shed light on central moral and legal issues surrounding what wronging itself involves.

The wrongs that occur in competition are noteworthy because the *harms* that occur in the course of competition do not typically amount to wrongs. Most instances of lost profits or lost consumers are hardly grounds for complaint. On the contrary, such economic harms offer a prime example of harms that are not wrongful. For this reason, harms arising in the course of competition are frequently cited by those who would like to illustrate the 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.²

The point is that many economic harms—even harms that may have grave repercussions for the livelihood of the sufferer³—are not wrongful. The competitor who drives others out of business through fair competition is not accountable to those who fall by the wayside. This is an important

¹ Notice that I'm using the noun and verb "wrong" in a sense different than merely the adjectival use. So I'm interested in instances of "a wrong to someone" in the sense that someone was "wronged"—someone can complain, resent, hold accountable, or demand compensation—not merely instances of someone acting wrongly—which might arise even though no one was wronged.

² Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215, 228-29 (2006)

³ *Id.* 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.").

insight, which I have no intention to dispute. Many harms arising from competition do not give rise to valid complaints in the harmed party.

This insight may lead one to think that the harms that arise in competition offer an illuminating contrast with other kinds of harmful conduct, which does wrong others. Ronald Dworkin describes the contrast in the following way:

“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 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 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 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.”⁴

Dworkin’s thought is that the various harms that arise in the course of competition can provide a useful contrast to illuminate the wrongs of deliberate (and negligent) harming.

For Ripstein and Dworkin and other like-minded thinkers, there is some element missing from competitive harms that prevents them from amounting to wrongs. 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. Each is not wronged precisely because no right has been violated, even if a harm has been suffered. The harm arises simply in the course of—to use Dworkin’s evocative metaphor—everyone swimming in their own lanes.

The missing ingredient, according to this line of thought, is something like a right or an entitlement.⁵ What is necessary for a wrong is a violation of a party’s rights. Wrongs arise when a

⁴ DWORKIN, JUSTICE FOR HEDGEHOGS, pp.287-88.

⁵ In the above-quoted passage, it is not explicit that Dworkin is contrasting competition harm with cases of rights-violation, as opposed simply to cases of “deliberate harm.” But it is clear elsewhere that the contrast is meant to evoke the idea of rights. See, e.g., p.288 (“The moral prohibition on deliberate bodily injury defines a core of control that we could not abandon without making a parallel nonsense of our assignment responsibility for our lives. Our responsibility

party's sovereignty is compromised—when a party is denied independence in a sphere where he or she is entitled to independence. That is, wrongs arise when someone crosses over into another's lane. Thus, from the fact that not all harms constitute wrongs, one arrives at the claim that wrongs are constituted by transgressions into one another's spheres of entitlement.⁶

I reject this lesson that rights-oriented thinkers like Ripstein and Dworkin draw from the existence of non-wrongful, competition harms. In particular, I believe that a rights violation is not, in fact, a necessary ingredient of a wrong.⁷ We can and do wrong one another in ways that do not involve crossing into their lane. This phenomenon is visible, I believe, in instances of competition harm that do amount to wrongings. Sometimes a competitor does wrong another competitor by his or her illicit tactics. My thesis is that at least some such competition wrongs exist and are not explicable in terms of any rights violation.

This thesis can be broken down into two sub-theses. First, I claim that that, in contexts of illicit competition, competitors suffer a distinctive wrong. Competitors have a special sort of complaint. To be sure, when a party engages in illicit competition, this conduct will often constitute a violation of community-wide standards. Nonetheless, I want to suggest that the competitor is specially (though not always uniquely) positioned to complain about this violation. The competitor is wronged, and she is wronged in a way that not everyone else is wronged. Call this *the standing claim*.

Second, I claim that, for at least some competition wrongs, the wrong cannot be explained in terms of some independently specifiable right of the competitor. That is, there is no right of the competitor on the basis of which we can explain 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. I have no deep opposition to talking in that way. But my question is whether the distinctive wrong to a competitor can be explained in terms of some entitlement of the competitor. Such an explanation, in

requires at a minimum that we be in sole charge of what happens to or in our bodies.... The distinction between competition and deliberate harm is therefore crucial to our sense of dignity, even when the injury is trivial.”); p.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.”).

⁶ This thought may be bolstered by the idea that, if wrongs were more extensive than this, that would be a restriction on freedom. See Ripstein, at 237 (“To protect me against the harms that I suffer as you go about your legitimate business, perhaps because you set a bad example for others, or deprive me of their custom, would be inconsistent with your freedom, because it would require you to use your powers in the way that most suited my wishes or vulnerabilities.”).

⁷ For more on how wrongs and rights may come apart, see Nicolas Cornell, *Wrongs, Rights, and Third Parties*, 43 PHIL. & PUB. AFF. 109 (2015).

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

In order to flesh out these ideas, I focus on American legal cases in competition law. My aim, in working through these legal cases, is to illustrate a thesis about our normative concepts, both within the law and outside it. In a sense, my aim is to make a moral point: I contend that, when examined carefully, it is hard not to view these cases as representing a commitment to the idea that plaintiffs have been wronged (the standing claim) and yet it seems that the explanations given for this wrong do not—and could not—trace back to ideas about rights and entitlements (the independence claim). If this is correct, it offers a window into a limitation in much rights-based thinking—namely, that it can overstate our independence from one another. Even as we each have our own spheres of moral entitlement—our own separate lanes—our mutual accountability extends beyond simply respecting those boundaries. As members of a community, we have a stake in how others act more generally, and not merely as rightholders.

While my argument's first aim is moral, I also aim to broaden the field of vision in private law theory. I think it unfortunate that theorizing about wrongs has focused almost exclusively on a tort law, narrowly construed.⁸ Other areas of law—including, but not limited to, marketing law and antitrust law—also involve one private party bringing a complaint against the conduct of another private party and demanding compensation. And yet these areas are often ignored or assumed to fall within the ambit of public law. In part, this paper aims to demonstrate the potential for thinking about private law in a broader way.

2. THE STANDING CLAIM

In this section, I defend the claim that market actors are sometimes wronged by the competitive practices of other market actors. Misconduct can wrong others in the market. I refer to this as the standing claim, because the claim is that injured competitors have a special standing to complain or hold wrongdoers accountable. To say that a party is wronged is to say that the party is not a mere bystander, but rather a party who might assert a complaint in his or her own name. A wronged party might feel personal resentment—not mere general indignation—and demand

⁸ On this characterization, my claim is that private law is more than just torts. But one might alternatively say that torts covers more things than typically described. I'm not sure whether anything hangs on the difference between these two characterizations.

remedial actions like apology or compensation. The standing claim is a moral claim about the relation between parties *ex post*.

In order to illustrate the special standing of competitors, I am going to describe some American legal cases and practices. As a matter of law, market actors are often afforded standing to bring a legal complaint. Of course, it is possible that such legal standing is either a mistake or a reflection of something other than a moral idea that the parties in question have some special standing to complain. I will return to these possibilities at the end of the section. But I hope that examination of the legal cases will at least provide a *prima facie* case for the moral claim.

2.1 *Tortious Interference*

Let me start with a run-of-the-mill case of sketchy 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 to talk to salespeople. Leroy Azar was a former Lehigh employee and familiar with Lehigh's business model. Azar then adopted a practice of following Lehigh customers—whom he said 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.⁹

Morally speaking, I believe that Azar wronged Lehigh. Lehigh might reasonably resent his activities. He is, after all, depriving them of their customers and not in an honorable way. And tort law agrees that there is a wrong here. The Florida court that considered the case concluded that Azar was tortiously interfering with advantageous business relations. That is, Lehigh had a legal complaint against Azar for his conduct. Tort law generally recognizes torts for interference with contractual relations and, in most jurisdictions, interference with prospective economic advantage. The basic idea is that a party who, like Azar, intentionally causes breach of contract can be liable for doing so. This legal standing is, I believe, suggestive of the standing claim—there is a distinct wrong suffered by individual parties like Lehigh.

One might grant this point but remain skeptical that this can be explained by anything other than a right held by Lehigh. It is not my aim to defend the independence claim yet. To foreshadow that discussion briefly, however, notice that tortious interference does not always track legal

⁹ Azar v. Lehigh Corp., 364 So. 2d 860 (Fla. Ct. App. 1978).

entitlements. In this particular case, Lehigh’s customers were entitled under Federal law to rescind their purchases any time within three days of signing—a right that Azar was deliberately exploiting. As this reflects, the wrong of tortious interference can arise even where the victim had no legal right to her customers or her deal.¹⁰ One might respond that Lehigh had a right not to its customers per se, but against Azar causing its customers to abandon their deals. On this score, it’s worth noting that Lehigh would have no tort claim against Azar if Azar had merely been acting as a concerned consumer advocate distributing literature or organizing a lawful boycott.¹¹ So the liability is not straightforwardly based on the idea that Lehigh had a right against Azar causing its customers to abandon their deals; for some purposes, Azar would have been free to do so. In sum, the wrong of tortious interference can arise where there is no separate legal entitlement and it can fail to arise even where there is an underlying legal entitlement. But this is merely to foreshadow. For the present purposes, the important point is that parties like Lehigh suffer distinct wrongs at the hands of parties like Azar.

2.2 *Antitrust Law*

Statutory antitrust law shares a great deal with common law economic torts. Antitrust law governs various potentially anticompetitive commercial practices—from price fixing and predatory pricing to tying and exclusive dealing. To see how closely an antitrust case can resemble tortious interference, consider the following case. In 1948, the *Lorain Journal* maintained “a commanding and an overpowering” position in Lorain, Ohio. It reached 99% of the families in the city. It was the only daily newspaper, and the only outlet for “the mass dissemination of news and advertising, both of a local and national character.” But in 1948, the FCC licensed a radio station, WEOH, to operate in the area. Threatened by this new advertising option, the *Journal* refused to accept local advertisements in the *Journal* from any Lorain County advertiser who advertised or who appeared to

¹⁰ 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) (“[C]ontracts which are voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of mutuality, or even uncertainty of terms, or harsh and unconscionable provisions, or conditions precedent to the existence of the obligation, can still afford a basis for a tort action when the defendant interferes with their performance” (quoting Prosser)).

¹¹ *See, e.g., Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301, 1316-18 (8th Cir. 1980) (holding that NOW’s boycott activities did not give rise to a claim for tortious interference).

be about to advertise over WEOL. The Supreme Court found that this plan constituted an antitrust violation.¹²

Whereas tortious interference with contract typically involves influencing a third party to breach an existing contract, the antitrust violation in *Lorain Journal* involved the correlate: influencing third parties *not* to enter a contract in the first place. The continuity between the two should be clear—they are wrongs of a similar form. In both cases, the wrongdoer influences a third party to modify its economic relationship with someone, denying that party prospective economic gains. It would be odd to think that one amounts to a wrongdoing or to a rights-violation and that the other categorically did not. Morally speaking, the conduct seems essentially analogous.

And the law too treats them in somewhat parallel ways. American antitrust law allows injured parties, like WEOL, to bring legal actions and recover damages that are a function of the harm that party has suffered. The case in *Lorain Journal* happened to have been brought by the Federal government, but it could easily have been a private suit.¹³ Many antitrust cases involve parties like WEOL as plaintiffs in what is effectively a tort case—though grounded in statutory law rather than common law. Such statutory torts should, I think, be seen as continuous with traditional tort law. They share the same legal structure, apply to similar conduct, and similarly offer injured economic actors an avenue for redress.

2.3 *Marketing Law and the Lanham Act*

Wrongs to market competitors arise not only from interference but also from marketing practices, and the law recognizes this fact. The Lanham Act authorizes a private cause of action for commercial statements that misrepresent the product described or that are likely to cause confusion.¹⁴ It is natural to think that the purpose of such a law is to protect consumers, and courts

¹² *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951) (“The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisement from whomever it pleases. We do not dispute that general right. ‘But the word ‘right’ is one of the most deceptive of pitfalls’ The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act. The operator of the radio station, equally with the publisher of the newspaper, is entitled to the protection of that Act.”).

¹³ For examples of private suits with similar structures, see, e.g., *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986) (refusal to lease stadium to a group attempting to buy the Chicago Bulls); *Berkey Photo v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (inducing GE not to sell camera technology to competing camera companies); *Taxi Weekly v. Metropolitan Taxicab Board of Trade*, 593 F.2d 907 (2d Cir. 1976) (inducing taxi operators to cancel subscriptions to *Taxi Weekly*).

¹⁴ 15 U.S.C. § 1125

often describe the law in these terms.¹⁵ We prohibit misleading commercial representations for the sake of consumers who might otherwise be misled.

But, structurally, the Lanham Act operates to enable commercial actors to sue one another for misleading advertising. And, when one examines the cases that are actually litigated under the Lanham Act, it is hard not to view these cases as concerning the grievances of competitors. Consider the case of *POM Wonderful v. Coca-Cola*.¹⁶ POM Wonderful grows pomegranates and sells various pomegranate juice products, including a pomegranate-blueberry juice. One of POM's competitors was Coca-Cola, which, under its Minute Maid brand, marketed a competing juice blend. The front label of the Minute Maid label displayed the words "POMEGRANATE BLUEBERRY." Below those words, in smaller lower-case letters, the label stated, "flavored blend of 5 juices"; and, below that in even smaller type it read, "from concentrate with added ingredients and other natural flavors." 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.

POM Wonderful brought suit under the Lanham Act alleging that the Minute Maid label constituted false or misleading advertising. Pause, for a moment, to appreciate why POM Wonderful would take itself to be aggrieved by Minute Maid's marketing. POM—which manufactures actual pomegranate juices—naturally regards Minute Maid as illegitimately capturing some of its would-be consumers. Morally speaking, I think that we should regard this as a perfectly coherent complaint. And 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 FDA's labeling regulations under the Food, Drug, and Cosmetic Act (FDCA). In particular, the relevant regulation stated that, if a juice 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." Minute Maid had done precisely that—indicating that its product was a "pomegranate blueberry *flavored* blend of 5 juices." The case made its all the way to the Supreme Court, which rejected Coca-Cola's preclusion argument.

The *POM Wonderful* case represents several features of marketing law that are worth observing. First and foremost, cases like this are structured as concerned with whether one

¹⁵ See, e.g., *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 such broad property rights on trademark owners. 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.").

¹⁶ *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014).

competitor has wronged another. POM is bringing suit because it believes that Minute Maid’s product is wrongfully cutting into its profits. POM is asserting a grievance of its own. It is saying, essentially, “you misrepresented things and we lost out.” The law agrees that this constitutes a wrong.¹⁷ And it goes about awarding relief to the successful plaintiff based on the damages it has suffered, not based on the magnitude of the injury to consumers or society at large. While, at a general level, the prohibition on misleading advertisements might be justified by the interest of consumers, each particular dispute is animated by an injury to a competitor—not to the consumers.¹⁸ In fact, the doctrine has explicitly evolved to excuse plaintiffs from any burden to show actual consumer confusion when the advertisement is deemed “literally false.”¹⁹ There are even some Lanham Act cases in which parties are held liable despite uncontradicted empirical evidence that consumers were not misled.²⁰

One interesting way to see the centrality of the plaintiff’s standing is through the available defenses. Like the initial right of action and the damage calculation, the available defenses are also about the particular plaintiff. For example, on remand, Coca-Cola was permitted to invoke a defense of “unclean hands,” arguing that POM’s own advertising had itself mislead consumers about both the content of its juice blends and the health benefits of pomegranate juice.²¹ If the law were only interested in Coca-Cola’s misconduct and not in POM’s standing to assert a grievance, the availability of such a defense would be inexplicable.

Second, notice that the private cause of action is not necessarily tethered to existing government regulations. Coca-Cola’s argument was that they were in full regulatory compliance and that this compliance should preclude liability under the Lanham Act. The Supreme Court concluded that these were simply two different matters. Here, again, we can see the distinctly private quality of the grievance. It is not the case that POM was simply empowered to do the FDAs enforcement

¹⁷ *Cf. L’Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F.2d 649, 651 (3rd Cir. 1954) (“It seems to us that Congress has defined a statutory civil wrong of false representation of goods in commerce and has given a broad class of suitors injured or likely to be injured by such wrong the right to relief in the federal courts.”).

¹⁸ As the Supreme Court itself put it, “Though in the end consumers also benefit from the Act’s proper enforcement, the cause of action is for competitors, not consumers.” *POM Wonderful*, at 2234.

¹⁹ *See Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 13-14 (7th Cir. 1992) (explaining that a representation is literally false when it states that a product “has certain qualities that it in fact does not actually have” and is impliedly false when the “statements . . . , while literally true or ambiguous, convey a false impression or are misleading in context, as demonstrated by actual consumer confusion”).

²⁰ *IDT Telecom v. CVT Prepaid Solutions*: “Because the advertisements go so clearly to the purpose of the product—the amount of time that they deliver—the statements are material as a matter of law.”

²¹ *POM Wonderful LLC v. Coca Cola Co.*, 166 F. Supp. 3d 1085 (C.D. Cal. 2016). This is hardly an unusual litigation tactic in such cases. In fact, Lanham Act suits for false advertising seem to be themselves a common retaliatory response to what are deemed abusive intellectual property tactics.

work for it. Rather, it was asserting a grievance not explicable simply in terms of the violation of previously available, publicly accepted regulations.

Finally, notice that POM was not alleging that Coca-Cola had said anything misleading about its own product. While some false advertising cases involve claims about—or comparisons with—a rival product and thus might appear akin to defamation actions, many cases simply involve allegations that a competitor is falsely or misleadingly marketing its own product. As in *POM Wonderful*, there need be no claims made about the plaintiff’s product. Lanham Act cases frequently involve only misleading portrayals of a product’s benefit—like portraying a vibrating razor as raising hair upwards for an especially close shave²²—or misleading promotional tactics—like having employees block vote for the helpfulness of positive Amazon customer reviews to raise those review’s salience.²³ In short, the Lanham Act only requires harm to a competitor, not false claims about that competitor.²⁴

2.4 *Competition Law as Private Law*

My aim, in walking through these cases, is to emphasize their continuity. If we accept that tortious interference with a contract is a private wrong redressable through private law, then it seems to me that we should similarly conceive of other areas of competition law. My primary aim has been to suggest that these competition cases involve wrongs—involve parties with a special standing to assert a grievance. That is, my primary aim is to make out a preliminary case for the moral claim that market participants stand to be wronged in a distinctive way by the conduct of their competitors. The harmed competitor is no mere bystander, nor merely in possession of a complaint shared by every other market participant. They have a special complaint and the legal practices are suggestive evidence of that fact.

One of my ancillary goals in making this argument is to suggest that private law should be understood more broadly than it often is, especially by high theory.²⁵ Competition law is private law

²² *Schick Mfg. v. Gillette Co.*, 372 F. Supp. 2d. 273 (D. Conn. 2005).

²³ *Vitamins Online, Inc. v. Heartwise, Inc.*, 2016 U.S. Dist. LEXIS 16355, 2016-2 Trade Cas. (CCH) P79,706, 99 Fed. R. Evid. Serv. (Callaghan) 830, 2016 WL 538458

²⁴ Indeed, one court has held that in a two-player market, any literally false advertisement will be presumed to harm the competitor. *See Merck Eprova AG v. Gnosis S.p.A.*, 760 F.3d 247 (2d Cir. 2014).

²⁵ Indeed, 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 INDIANA L.J. 569, 606 (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

in three important ways. First, causes of action under antitrust law or marketing law are structured as a drama between plaintiff and defendant. One private party initiates a lawsuit against another private party, who must then respond. The state serves as the neutral adjudicator of the dispute. The state neither initiates nor controls the course of the legal action. So, structurally, competition law can take the legal form of private law, proceeding no differently than a traditional tort case.²⁶

Second, remedies are calculated based on the injury suffered by the plaintiff. The law is, in this way, responding to the privately suffered harm. One might object, at this point, that the statutory torts often come with treble damages, departing from a purely compensatory measure. This feature of such cases might be used to suggest that these statutory causes of action should really be regarded as public law, albeit carried out by “private attorneys general.” But treble damages are still damages measured based on the injury suffered by the plaintiff. In fact, there’s an argument to be made that treble damages are perhaps more apt to be truly compensatory than traditional common law damages which typically undercompensate victims significantly.²⁷ If the presence of treble damages meant that the law should not be viewed as responding to the wrong to the plaintiff, we would have to say that civil rights cases are also not truly addressing wrongs done to plaintiffs—a rather surprising conclusion. To see that treble damages do not truly transform the case into public law with private attorneys general, consider *qui tam* actions, where this does seem to be an accurate description. In *qui tam* actions, private parties can 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. In American *qui tam* actions, the government has the right to intervene and take over the case if it believes it can better represent the public. Plaintiffs in antitrust or marketing cases are not, by any stretch, private attorneys general like this. 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 own grievance.

C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VANDERBILT L. REV. 1, 50-52 (1998) (contrasting substantive standing in torts with antitrust standing, understood in economic terms).

²⁶ Cf. A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 BERKELEY TECH. L.J. 1247, 1251 (2005) (“Critics on both the left and the right often seem to regard antitrust as in large part a kind of regulation, in which courts should decide cases in order to achieve the right result (that is, the procompetitive market outcome) in the particular case, or in which courts should abstain if that outcome seems beyond their remedial powers. Antitrust is better and more accurately understood to be a form of law enforcement, not regulation. Antitrust is a form of law enforcement because it depends on courts, not regulators, both for its enforcement and for its doctrinal evolution through a common-law type process. Unlike regulation, antitrust does not specify end states or required market conditions, and it does not entail affirmative commands or require prior government approval as a condition of private conduct.”).

²⁷ See Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?* 54 OHIO ST. L.J. 115 (1993).

Third, as I have tried to suggest, causes of action under antitrust and marketing law are continuous with existing tort law. The underlying conduct is similar; our pretheoretical sense of injustice regarding that conduct is similar; the relationship between the parties is similar; the ultimate harm to the plaintiff is similar. Of course, traditional economic torts have common law origins whereas modern competition law is statutory.²⁸ But, conceptually, there is little reason to distinguish antitrust plaintiffs and defendants from business-tort plaintiffs and defendants.

There are multiple ways of carving up the distinction between private law and public law.²⁹ Each may be illuminating in certain ways. But the distinction that potentially captures a unique relation between persons—what Weinrib calls “the idea of private law”³⁰—is about parties being able to go to court as plaintiffs and seek redress for a wrong done to them. And if we are interested in the law structuring that relation among persons, then we should see that it arises not only in traditional private law like torts and contracts; but it also arises in antitrust law, marketing law, discrimination law, labor law, constitutional tort actions, environmental law, and more.³¹ If theorists purport to offer a theory of private law, then they should not ignore these areas. They too seem to respond to a wrong to the plaintiff by the defendant.

3. THE INDEPENDENCE CLAIM

The second half of my thesis is that competition wrongs are not dependent on any underlying right of the wronged party. That is, though parties may have a 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. I will focus on the difficulties faced by three possible explanations.

²⁸ If this difference were important, it's 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* William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law*, 60 TEX. L. REV. 661 (1981); ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 409 (1948) (discussing the deliberately “open-textured” nature of the Sherman Act).

²⁹ *See* Randy E. Barnett, *Foreward: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J. L. & PUB. POL'Y 267 (1986).

³⁰ *See* ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

³¹ Even areas of law that border on criminal may have this character. In particular, the Racketeer Influenced and Corrupt Organizations Act of 1970 (“RICO”, 18 U.S.C.A. §§ 1961 et seq.) created a civil law cause of action (§ 1964) for violations of its provisions. It is often used by market actors where they have been injured by some sort of fraud or other organized criminal activity.

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 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 wrongings. Finally, the right should offer, qualitatively, a plausible characterization of the thing the absence of which the wrong consists in. Consider an example. You wrong me if you break into my house. An explanation of this wrong might very 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, it potentially figures in explanations of the reasons that others have for acting—the fact that it’s 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 internal character—the nature and magnitude—of the wrong involved in breaking into my house. When you break into my house, the wrong itself seems to consist at least in part in the denial of my control.

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 exist, they are too diffuse to explain the distinctive wrong of the competitor or too empty to offer any meaningful explanation.

3.1 *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.³² Marketing law can seem to protect commercial parties’ rights to their reputation.³³ One might think that competition wrongs are thus straightforwardly related to the rights of market participants—they are basically forms of theft or conversion.

³² 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.”).

³³ See, e.g., *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 781 (1992) (Stevens, J., concurring) (describing a dual purpose behind the Lanham Act).

Analogizing to property in this way is tempting because, as I have been emphasizing, parties do seem uniquely wronged—as though something has been taken from them. In order to see how far this approach might reach, consider a famous Supreme Court case: *AP v. INS*.³⁴ The Associated Press (AP) was the dominant news gathering organization in the United States; 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. During World War I, the INS began taking AP stories, from AP bulletin boards or AP employees or early editions of eastern papers, and selling them to INS newspapers which ran them—sometimes verbatim. 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 WWI. Without other direct access to the news of the war, the INS simply took the AP’s material. The AP brought suit alleging unfair competition.

The case illustrates the outer bounds of what a property-like rights might explain. In quite moralized terms,³⁵ the Supreme Court ruled in favor of the AP, suggesting that INS was “appropriating to itself the harvest of those who have sown.”³⁶ But a precise legal rationale was hard to come by. The news—facts about the current world—are 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”—though the news was not property with regard to the public, it might be regarded as property as between the new organizations whose business it was to profit from it.³⁷ That is, as between the competitors, what had been sown by one would be regarded as property, even though it is 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 statistics³⁸ to

³⁴ 248 U.S. 215 (1918).

³⁵ See Michael E. Kenneally, *Misappropriation and the Morality of Free-Riding*, 18 STAN. TECH. L. REV. 289 (2015).

³⁶ 248 U.S. at 239.

³⁷ “[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.” 248 U.S. at 236.

³⁸ *NBA v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

stock recommendations³⁹ to celebrity gossip.⁴⁰ It offers an avenue for courts to hold liable a competitor that systematically exploits the hard work of its competitor. The property-based explanation is tempting because, if true, it would tether that wrong to something independently significant—a right that the AP had *ex ante*.

The language of “quasi-property” is elusive, though. As Justices Holmes and Brandeis noted in concurring and dissenting opinions, it can be misleading to say that anyone holds a property right in the news.⁴¹ 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 that we are not prepared to grant. In this spirit, property law scholars have, as a result, typically tried to ground the misappropriation doctrine in some other way.⁴² I am agnostic on whether *AP v. INS* was correctly decided.⁴³

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 powers of ownership—beyond the ability to assert a wrong. The news seems to press the boundaries of what we might conceivably subject to such ownership, even only as between two parties. Other competition wrongs cannot be explained in this way. One does not have even quasi-property in one’s consumers, advertisers, suppliers, workers, or market share. And yet the loss of these things seem to be precisely the subject of paradigmatic competition wrongs.

3.2 *Two Ideas of Fair Play*

³⁹ *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011).

⁴⁰ *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102 (C.D. Cal. 2007).

⁴¹ See, e.g., *AP v. INS*, 248 U.S. at 246 (Holmes, J., concurring) (When an uncopyrighted combination of words is published there is no general right to forbid other people repeating them — in other words there is no property in the combination or in the thoughts or facts that the words express. Property, a creation of law, does not arise from value, although exchangeable — a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference, and a person is not excluded from using any combination of words merely because someone has used it before, even if it took labor and genius to make it. If a given person is to be prohibited from making the use of words that his neighbors are free to make some other ground must be found.”)

⁴² 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, 94–102, 106 (1992); Henry E. Smith, *Equitable Intellectual Property: What’s Wrong with Misappropriation?*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 42, 54–55, 57–58 (Shyamkrishna Balganesch ed., 2013); see also Shyamkrishna Balganesch, “Hot News”: *The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 444 (2011). See Kenneally.

⁴³ For a defense of the property-based account of *AP v. INS*, see Chris Essert, *Property in the Market* (unpublished).

Some scholars have suggested that the wrong committed by INS is better understood as a matter of freeriding than as theft.⁴⁴ A concern with freeriding might seem a more promising path forward in thinking about competition wrongs more generally. In particular, it might seem that competitors have something like either a right that competitors refrain from freeriding or, relatedly, a right that competitors abide by the rules of the competition. These ideas are frequently and naturally connected: A norm against freeriding may be invoked as an explanation of 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. Hart 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.”⁴⁵ John Rawls temporarily picked up on this idea, giving it the name “fair play” while dropping any reference to rights.⁴⁶ Since Rawls, an intermittently lively debate has persisted as to whether the principle of fair play can ground a duty to obey laws, like tax laws, that serve as the basis for cooperative activities.

The notion of fair play is evocative, but I think that we should distinguish two different ideas here. First, one might think that by benefitting from cooperative enterprise—in particular benefitting from the compliance of others 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 most

⁴⁴ See Shyamkrishna Balganesh, “Hot News”: *The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 429 (2011) (“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. Understanding that theory and its continuing relevance for newsgathering, appreciating how it differs from the traditional rationale for intellectual property, and analyzing the practical consequences that flow from it are but logical first steps in that endeavor. Hot news misappropriation did not and cannot create a property right in news.”); Michael E. Kenneally, *Misappropriation and the Morality of Free-Riding*, 18 STAN. TECH. L. REV. 289 (2015).

⁴⁵ H.L.A. Hart, *Are There Natural Rights?*, 64 PHIL. REV. 175, 185 (1955).

⁴⁶ John Rawls, *Legal obligation and the duty of fair play*, in SIDNEY HOOK (ED.), *LAW AND PHILOSOPHY* (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 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 benefits 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 of how it is to be shared, if it can be shared at all, it belongs in fairness to no one.”

philosophical focus. Hart aside, it is not typically framed in terms of rights. Still, we might think that it could offer a rights-based explanation of the wrong of unfair competition. I will refer to this proposal as based on *a contributor's right to fair contribution*.

An alternative 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 in the competition 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 it will place the complying participants at a disadvantage. Participants have a right against unfair 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*.

In what follows, I will suggest that neither of these proposed rights can ground the wrongs that arise in the course of competition. 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 any cooperative scheme have a right to contribution from those who benefit from the scheme.

3.3 *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. As the race example illustrates, the idea that market participants owe it to one another to abide by the rules implicitly analogizes the market to a game or a sporting contest. And many philosophical discussions of competition take sports or games as the starting point.⁴⁷ Dworkin, one will recall, starts with the metaphor of swimmers competing in their own separate lanes.

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,

⁴⁷ See, e.g., John McMurtry, *How Competition Goes Wrong*, 8 J. OF APPLIED PHIL. 201 (1991) (taking ice hockey as a model of thinking about competition and its pathologies).

I am entitled to draw attention to this failure and demand that you correct it. Assuming 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.” I have a right grounded in an implicit—if not explicit—agreement to follow the rules of the activity. There are two elements here: established rules and mutual agreement among co-competitors to be bound by those rules. When both are present, then competitors may indeed have a right to compliance.

I want to suggest, however, that competition wrongs are not typically captured by such rights. In particular, I mean to argue that a competitor’s right to rule compliance would be both under- and over-inclusive 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. I worry that taking games and sports as the paradigmatic examples for competition ethics may be misleading. Games are artificial. An all-too-tempting idea about business is that business constitutes its own game—a game that, like poker, admits of some conduct that would be impermissible in ordinary life.⁴⁸ But the market is not a game. Games are typically characterized by well-codified rules, mutually accepted by all competitors upon a demarcated entry, constructing artificial aims for the players. The market is not like this. Rather, the market is 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.⁴⁹ While competition wrongs in games may often be understood in terms of claiming a right to compliance with some established rule, that model is less apt for the competition wrongs of real life.

First, the wrongs that arise from illicit competition are not limited to co-competitors who have entered into the same competition and thereby share some implied agreement. 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

⁴⁸ See Albert Z. Carr, *Is Business Bluffing Ethical?*, HARV. BUS. REV. (1968).

⁴⁹ For the idea that players ends in games are systematically different, see the discussion of “disposable ends” in C. Thi Nguyen, *Competition as cooperation*, JOURNAL OF THE PHILOSOPHY OF SPORT, 44:1, 123-137 (2017).

mutually agreed to be bound by the rules of that competition. Such an idea seems to be behind the Court’s logic in *AP v. INS*: as between those who opt to gather news, a special set of rules implicitly applied. The notion that a right to rule compliance only applies among rival competitors is essential to circumscribe who counts as wronged—to explain why the competitor has the standing that other parties do not. Otherwise, it might look like the noncompliance of any market actor might wrong every other market actor—e.g., underhanded tactics of a medical device manufacturer would wrong a fast-food chain. If we are seeking a right to rule compliance, then it is natural to find it only among those who have agreed to compete against one another directly, like the board gamers or the swimmers.

And yet competition wrongs spill out beyond direct competitors. A recent Supreme Court case, *Lexmark v. Static Control*,⁵⁰ illustrates this point nicely. Lexmark manufactured laser printers and toner cartridges. It designed its printers to work only with its own style of cartridges. Other businesses, called “remanufacturers,” acquire used toner cartridges, refurbish them, and sell them in competition with new and refurbished cartridges sold by Lexmark. Static Control was “the market leader [in] making and selling the components necessary to remanufacture Lexmark cartridges.” Lexmark introduced what it called a “prebate” program, which enabled customers to purchase new toner cartridges at a discount if they would agree to return the cartridge to Lexmark once it was empty. Those terms were communicated to consumers through shrinkwrap licenses. To enforce the prebate terms, Lexmark included a microchip in each prebate cartridge that would disable the cartridge after it ran out of toner; for the cartridge to be used again, the microchip would have to be replaced by Lexmark. Static Control developed a microchip that would mimic the Lexmark chip. Lexmark sued for copyright infringement, and Static Control counterclaimed for Lanham Act violations. Static Control’s claim was that Lexmark had engaged in campaign to purposefully mislead end-users into thinking that they were legally required to return their cartridges to Lexmark. So, to be clear, the allegation was that Lexmark was lying to consumers about remanufacturers, and the supplier of the remanufacturers, Static Control, tried to bring a complaint.

The trial court initially denied Static Control the standing, holding that Static Control’s 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.” But the Supreme Court—a Supreme Court that has been

⁵⁰ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

highly reluctant to open to door to plaintiffs⁵¹—concluded that Static Control did have standing to bring its suit even though it was not a direct competitor of Lexmark. As the Court put it, “when a party claims reputational injury from disparagement, 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 suffered collateral damage.”⁵² The opinion is clear that, at least in the context of the Lanham Act, competition torts are not limited to direct competitors.

Morally speaking, I think that this conclusion is unavoidable. If a business engages in misleading marketing tactics, it may not be only its direct competitors who are wrongfully injured. One might protest that injuries to downstream parties like a supplier are indirect—not the direct rights violation. But I believe that 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...”⁵³ Thus, insofar as any competitor is wronged by illegitimate marketing tactics, it seems that one must be willing to accept some sense of indirect injury. 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 by various taxi companies.⁵⁴ Uber wanted to claim that it was just a technology company, not actually a competitor to the taxi companies. 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.⁵⁵ If that’s true, then the wrong cannot be based on an implicit agreement among those in a particular competition.

The reverse problem—over-inclusivity—exists as well. 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 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*

⁵¹ See *Twombly*, *Iqbal*, *Celotex*, *Scott v. Harris*, *Walmart v. Dukes*, *AT&T v. Concepcion*, etc.

⁵² *Lexmark*, at 1394.

⁵³ *Id.* at 1391.

⁵⁴ *Yellow Group LLC v. Uber Techs. Inc.* (N.D. Ill. 2014)

⁵⁵ To see the continuity with traditional economic torts, consider *Diamond Resorts Int’l, Inc. v. Aaronson*, 2018 WL 735627, No. 17-cv-1394 (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.

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 decides, against the rules, to swim with a parachute trailing in the water behind her, but perhaps. A business, however, would hardly seem to have grounds to complain if its competitor engages in ill-conceived false advertisements or price-fixing schemes that serve only to drive that competitor into the ground.⁵⁶

There are two possible responses here. On the one hand, one might insist that, in fact, competitors are wronged, albeit harmlessly, by even the ineffective noncompliance of their rivals. These are basically cases of harmless trespass. This response strikes me as implausible but as an appropriate response for one who thinks that there is a right at play here.⁵⁷ 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 is an odd right. It seems more to name an injury than something one can claim. It backs off the idea that my competitors owe it to me to abide by the rules, and it says instead that my competitors owe it to me to abide by the rules *if failure to do so will harm me*. I fear that a right like this is really only a placeholder, serving no independent function. It does not describe to anyone what counts as within their sphere of entitlement. 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.

3.4 *The Contributor’s Right to Fair Contribution*

⁵⁶ The spectrum from board gamer to the swimmer to the business competitor may be illuminating here. My intuition is that, without further filling in the details, the swimmer does not have any complaint. But I can see my way to the thought that the swimmer does have a complaint the closer that I can bring it to the board game case. This difference reflects, I think, the greater plausibility of a right that all competitors abide by the rules in a sporting context than in a market context.

⁵⁷ Normally, we think that a violation of a right may still count as a wrong even if it does not harm—or even if it benefits—the rightholder. But I find it quite a strain to say that I would be wronged if my business competitor engaged in an illegal tactic that backfired and turned customers my way. The idea that competitors are wronged even by counterproductive rule violations starts to get more intuitive grip when the noncompliance threatens the integrity of the activity. For example, I suppose that an elite race winner might be plausibly be resentful upon realizing that the casual runners in the main pack all cut the course. Somewhat similarly, David Owens offers an interesting discussion of whether a competitor might be wronged by the poor effort of a rival. SHAPING THE NORMATIVE LANDSCAPE, pp. 29-31. I can allow that there might be wrongs in such cases, but I only get this intuition insofar as I can make out there being a harm—it tarnishes what the elite runner or the rival accomplishes. It seems odd to think that every instance of noncompliance constitutes a wronging.

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 of 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 freeriding. In the political obligation literature, the duty of fair play typically refers to this notion of not benefitting without contributing. 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.

It seems plausible that, in at least some contexts, there does exist a duty to contribute to a scheme of cooperation from which one accepts benefits. Whether this duty can generalize enough to ground political obligation across the board is considerably less clear.⁵⁸ But, for the 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.⁵⁹ What I want to argue here is that, assuming that there is a general duty not to benefit without contributing, competition wrongs are not explained by a right that others not benefit without contributing. Either there is no right correlative with the duty of fair play or, if there is such a right, it does not ground competition wrongs.

First, consider whether there is a right to fair contribution—that is, a right of contributors correlative to the duty of fair play. 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 quite 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.⁶⁰ To have a right, one might think, is not merely for another party to be under a duty, but also to be able to make a claim on the performance of that duty. Can those who contribute to a cooperative scheme make a claim on those

⁵⁸ See Nozick, M.B.E. Smith, Simmons, etc.

⁵⁹ 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 freeride 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’s 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.

⁶⁰ See Feinberg, *The Nature and Value of Rights*

who have benefitted? Perhaps collectively they can.⁶¹ It is a bit more strained to say contributors have individual claims. I pay my taxes and you should pay yours, but I don't think that I have an individual, personal claim that you pay your taxes. Ben & Jerry's doesn't commit antitrust violations and Microsoft shouldn't either, but I don't 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. What is sought is a right that explains the distinctive wrong suffered by competitors. A general right that others abide by the rules would not explain the wrong as a wrong to a particular party. Insofar as the concern is that the unfair competitor gains without paying the dues of everyone else in the cooperative scheme, then everyone else in the cooperative scheme must be similarly wronged by the freerider. 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.⁶² And that's 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. The current suggestion risks losing that entirely.⁶³

One can see the problem another way: 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 the wrongful gain—what the freerider acquired without fair contribution. But competition wrongs are about the losses imposed on competitors. Consider an example. The *Lorain Journal* was reaping the benefits of an Ohio advertising market. Its anticompetitive behavior might, in this way, be characterized as freeriding or

⁶¹ I'm 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, 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 don't have a right to demand that she contribute. She ought to, but they can't claim it from her.

⁶² Compare the ways that taxpayers are not granted standing to assert generalized grievances.

⁶³ 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 an unfair competitor, it is 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.

as failing to contribute to a cooperative scheme from which it was benefitting. But suppose that its gains were small—far less than the radio station stood to gain. Is the wrong to the radio station correctly characterized in terms of the *Journal's* small gain? I think not. The wrong consists in the good that the radio station was denied—not in terms of the goods that the *Journal* may have reaped without contributing.

3.5 *Other Possible Rights*

At this point, I have 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, of course, negative arguments always have a tinge of incompleteness. One could certainly propose other candidate rights. For example, one might say that there is a right to one's legitimate expectations. Or one might suggest that there is a right to compete on equal terms.

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 would be a legitimate expectation that others will follow the rules. But that then collapses into the earlier thought that there is a right that other abide by some set of rules.

Similarly, we do not—in general—have a right to compete on equal terms in the market. A little 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.⁶⁴ That is, perhaps competitors have a right to compete on equal terms, which is to say, a right that all participants are subject to the same rules. That right seems, in the first instance, to be 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, already discussed.

There is, I think, a reason why the possible explanations naturally gravitate in these ways. 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*

⁶⁴ Even that seems like a difficult idea to maintain. In very many instances, we have laws that pick out a particular class of market actors. There would be nothing unusual or inappropriate about having a regulation that applied to Google but not my small startup or vice versa.

entitlement. But such an explanation will, as we have seen, give too much to the competitor. Competitors do not have a property-like right to their customers or their profits or the like. On the other hand, one might seek a right that does not overstate the entitlement of the competitor. Such an explanation relies on a general right to compliance or fair conduct by others. But that will give too little, offering the direct competitor nothing that distinguishes them 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 insufficient.

4. COMPETITION WRONGS AS UNJUSTIFIABLE HARMS

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 market participants *ex ante*. So what, then, is a competition wrong if it is not a rights violation?

4.1 *Competition and Justification*

An answer to this question might start by saying something about the value of competition. In *The Possibility of Altruism*, Thomas Nagel observes that competitive activities, like a boxing match, seem to involve 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 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.⁶⁵

So the point is that competition may be a context in which objective reasons are best served by people focusing on their own subjective reasons. In market competition, the objective reasons for

⁶⁵ THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* 131-32 (1970).

holding the competition are social benefits. The reasons for valuing market competition arise from the benefits that society receives. But, as Adam Smith famously observed, social benefits may sometimes be better advanced 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.”⁶⁶ This provides a justification for market activity. The efficiency of market competition is a reason to license competitors not to concern themselves with benevolence towards one another—a license not to worry about others in certain respects.⁶⁷

The converse of this point is that, when a class of conduct is not conducive to the broader objective reasons, one does not have the same license to pursue it. Notice that, in the cases that I have considered, there are potentially ready explanations for why the conduct in question is wrong, which connect directly with the interests of the public as consumers. The conduct that I have considered misleads consumers, or tends to make markets less efficient, or threatens the stability of beneficial social practices by freeriding. It is all conduct that is inconsistent with the reasons for having the competition in the first place.⁶⁸ This is why the conduct is wrong: society as a whole can reasonably object to such conduct.⁶⁹ In this vein, courts and legal commentators repeatedly assert that marketing and antitrust law are exclusively concerned with protecting consumers. It is for consumers’ sake that market conduct is rightful or wrongful.

⁶⁶ WEALTH OF NATIONS

⁶⁷ Christopher MacMahon describes this as a way in which “the implicit morality of the market” involves a relaxation of morality’s principle of nonmaleficence. *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. MacMahon’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—they are merely a result of everyone swimming in their own lanes.

⁶⁸ *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.”).

⁶⁹ Ultimately, I take myself to be 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. OF ETHICS 123 (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 C. C. WALTON (ED.), ENRICHING BUSINESS ETHICS 91-112 (1990).

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 generally—for what matters to them is the loss attributable to that violation and not the violation itself.

I think that we should take this structure at face value. *The wrong consists in a party suffering a loss caused by another party's actions inconsistent with the broader social purpose of the competition.* It is not a violation of the wronged party's rights, and yet it is a wrong for which that party has special standing to feel aggrieved. The wrong is unbound from any right—it turns entirely on the injury caused by socially unjustifiable conduct. In what follows, I aim to make this structure clear by thinking through two examples. My hope is to show that, in order to adjudicate whether a 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 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.

4.2 *Tortious Interference and Justification*

Return to tortious interference with contract or prospective business relations. Few would, I think, dispute that it can involve a genuine wrong—that is, few would dispute that the disappointed party may have standing to feel aggrieved. Azar committed a wrong against 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 is tortious interference. Recall that 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 that 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 that 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.⁷⁰

Traynor’s description makes clear the role that justifiability plays to the determination of the wrong. The wrong does not depend on the conduct being independently prohibited. Nor does it depend on it 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 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. Traynor explains this by saying that contractual stability is of “greater importance” but I think that we can

⁷⁰ *Imperial Ice Co. v. Rossier*, 112 P.2d 631, 632-633 (Cal. 1941) (J. Traynor).

put it more clearly: Whereas competitive market behavior is generally beneficial for society and thus licensed, interference with contracts for purely competitive gain is not similarly beneficial. Allowing parties like Azar to compete by undermining the contracts of others does not enhance social welfare.⁷¹ 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, or better promotion, but one has no similar justification for inducing breach of contract. That is not, however, to say that no justification for inducing breach of contract can exist—consumer groups can encourage breach to prevent harm to health or safety; labor unions can encourage employees to strike for better working conditions; etc. 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.

4.3 *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 November 2009, Apple was planning to introduce the iPad.⁷² Apple hoped that an attraction of the iPad would be the ability to read e-books. At the time, however, Amazon’s kindle dominated the e-book market, accounting for 90% of e-book sales. Amazon had attracted Kindle users by offering desirable titles, such as new releases and New York Times bestsellers, at a price of only \$9.99. This price was near or even below the wholesale price that Amazon paid to publishers.

The book publishing industry was, at the time, dominated by the “Big Six” publishers, which accounted for the overwhelming majority of major fiction and non-fiction titles. These publishers feared the “wretched \$9.99 price point becoming a de facto standard,” as one Hachette executive

⁷¹ One possible response, at this point, might emphasize the parasitic nature of Azar’s conduct. In *Private Wrongs*, 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. See PRIVATE WRONGS, at 168-172 (discussing *Hollywood Silver Fox Farms*). I am not convinced that this argument can offer a rights-based account of these cases. See Nicolas Cornell, *Ripstein’s Buttery Rights*, 14 JERUSALEM REV. OF LEGAL STUDIES 22 (2016). But, even if Ripstein’s argument is successful, I don’t think that it can be generalized to cover tortious interference. Azar may have been deliberately using Lehigh’s agency. But that is not essential; Azar would have committed tortious interference even if he had not systematically approached Lehigh’s customers. Tortious interference does not require that the tortfeasor achieve his ends through the other party’s action.

⁷² The following discussion relies the fact described in *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015).

put it. The pricing threatened to undermine their sales of hardcopy books, which would often be listed for \$30 or more. Taking on Amazon, however, would be difficult. As one Penguin memo put it, “It will not be possible for any individual publisher to mount an effective response, because of both the resources necessary and the risk of retribution, so the industry needs to develop a common strategy.”

Apple, seeing this dynamic among the publishers, seized on the opportunity. Apple realized that it could get publishers onboard with its e-book platform if it could offer them a way to break into Amazon’s \$9.99 pricing. In this spirit, Apple offered publishers an agency model, rather than the traditional wholesale model, meaning that the publishers would get to control pricing, simply paying Apple a fixed percentage. Apple would not have the ability to set final prices the way that Amazon had been.

But this could only work if publishers also shifted their relationship with Amazon to the agency model. Apple’s in-house counsel contrived a mechanism to make this happen: a “most favored nation clause.” 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. This meant that, if Amazon’s \$9.99 pricing continued, publishers would be taking even bigger losses. It was a commitment that made continuing a wholesale relationship with Amazon economically intolerable. By simultaneously agreeing to the terms that Apple was offering, the publishers collectively forced themselves to confront Amazon.⁷³

By the January launch of the iPad, five of the Big Six publishers had signed onto Apple’s terms. The day after Steve Jobs announced the iPad, Macmillan delivered an ultimatum to Amazon: switch to an agency model or lose access to our new releases. The other publishers quickly followed suit. By March, four publishers had agency arrangements with Amazon, with Penguin becoming the fifth in June. According to DOJ experts, average e-book prices increased 23.9% over the year after the iPad’s introduction.

Did Apple’s conduct wrong Amazon? One can see a natural argument that it did. In order to gain a competitive advantage, it deliberately facilitated the publishers ganging up on Amazon. This

⁷³ 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.” *U.S. v. Apple*, at 305.

was not a matter of offering a better product or a better price, but a matter of displacing the market leader through concerted action.⁷⁴ Basically, Apple orchestrated a price-fixing conspiracy among the publishers. And, in 2015, the Second Circuit affirmed 2-1 a district court judgment finding Apple in violation of antitrust law. By the terms of a settlement, Apple agreed to pay \$450 million to consumers in the form of Amazon credits.

One can also see an argument that Apple did not engage in any illegitimate competition. The dissent—which has found moderate support among commentators—argued that the application of antitrust liability was inappropriate because Apple’s move was actually pro-competitive insofar as it 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.⁷⁵ 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 its tactic was countering Amazon’s own anticompetitive behavior.

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. Obviously it had no right to a dominant position in the market. 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. What each publisher did was perfectly permissible—it was only the conspiracy among them that was potentially impermissible. Even here, it is implausible to suggest that Amazon had a right that the publishers not engage in price-fixing. Perhaps consumers or other competitors have such a right, but there is little reason to think that *a distributor* would have such a right. If screwdriver manufacturers conspire to fix prices, that might violate the rights of consumers or other screwdriver manufacturers but it probably does not violate the rights of hardware stores. In short, no action of the publishers was anything against which Amazon had any

⁷⁴ 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.

⁷⁵ For a discussion of the potentially problematic nature of Amazon’s strategy, see Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710 (2016).

apparent right. And Apple was yet a further step removed as merely the one who facilitated the scheme among the publishers.

On the other hand, if Amazon was not wronged, 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, the conduct was pro-competitive in this instance. One might think that orchestrating price-fixing is simply against the rules. But perhaps not when it is used to combat predatory pricing by a monopolist. That is the argument that convinced the dissenting judge. Whichever argument one accepts, then, 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 that has whittled away at per se rules, shifting instead toward more case-specific inquiry into reasonableness, which typically looks toward market effects. But we should not conclude that, because economic reasoning figures in the inquiry, the law is not making a moral judgment about the relationship between the parties.⁷⁶ 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 it may simultaneously be about moral wrongs committed in the course of market competition.

4.4 *Competition Wrongs beyond the Market*

I have focused on wrongs that arise in the course of market competition, but I want to say something about wrongs in other competitions. 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 these wrongs cannot always be explained in terms of the violation of a competitor's right.

This is, I think, true of sports. To return to Dworkin's evocative metaphor, we are swimming in our own lanes; there is a space into which we have a right that others not invade. That

⁷⁶ As Christopher MacMahon puts it, "economic theory can be regarded as having normative implications for the behavior of consumers and firms in a free-enterprise system." *Morality and the Invisible Hand*, 10 PHIL. & PUB. AFF. 247, 254 (1981). The thought is that certain moral rules, shaped by economic theory, arise in market contexts—what MacMahon calls "the implicit morality of the market." I am sympathetic with much of MacMahon's account, though I am resistant to characterizing the morality of the market as "public morality" in the way that MacMahon does.

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 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 hormone—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, 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 competitor as truly aggrieved depends on whether we see the tactic as wrongful—as antithetical to 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 when a coworker makes a quid pro quo arrangement with the boss at the expense of the company; 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. Though it is Elizabeth to whom the lies are told, we nonetheless can recognize this as a wrong to Darcy who loses in the comparison.⁷⁷ 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

⁷⁷ This is, admittedly, an imperfect example insofar as some of Wickham’s lies concerned Darcy himself and might have constitutes a violation of duties owed to Darcy directly. But it does not seem to me that this is essential. Darcy would have been wronged even if Wickham’s lies had only been to inflate his own worth, in no way falsely portraying Darcy.

scorned by Mr. Crosbie—a wrong justifying even a brawl. And, in Thomas Hardy’s *Jude the Obscure*, Arabella Donn helps bring about Sue Bridehead’s misery by her repeated meddling with Jude’s heart. In each case, the false treatment of a lover ends up wronging the scorned rival. Of course, no one has a right to reciprocation of one’s love, but that does not mean that we are not wronged when we lose out to an underhanded adversary. In *Anna Karenina*, Levin reflects, “Yes, she was bound to choose him. So it had to be, and I have nothing and no one to complain about. I am myself to blame. What right did I have to think she would want to join her life with mine?” Such reasoning is, I think, a mistake: One may indeed have no right to hard-to-win goods like love and yet one may yet be wronged when those goods go to others who have won them illegitimately.