THE PLACE OF RELIANCE IN FRAUD

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INTRODUCTION

One reason for putting negligence at the heart of first-year torts, and torts at the heart of the first year of law school, is that it confronts students directly with the fundamental and sometimes elusive concept of causation. It seems surprising, then, when we arrive at an ancient tort such as fraud—once better known as deceit—and discover that some courts break it down into elements without isolating causation by name, requiring instead: a statement of fact that is false, uttered by the defendant with *scienter*, upon which plaintiff justifiably relies to his detriment.[1] This puzzle may be paired with its converse, which can be identified by considering a different standard formulation of fraud and working outward toward torts more generally. In this alternative formulation, causation is listed as an element *along with* reliance,[2] which threatens to render the latter a fifth wheel.

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1. *See, e.g.*, Lama Holding Co. v. Smith Barney, Inc., 668 N.E.2d 1370, 1373 (N.Y. 1996) ("In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury . . . .").

2. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 525 (1977) ("One who fraudulently makes a misrepresentation of fact . . . for the purpose of inducing another to act

Once an actor has made an intentionally false representation that has caused a detriment to the victim, there seems to be a completed wrong. Why, then, is there a need for proof of reliance?

Faced with this pair of puzzles, it is tempting to suppose that the reliance element is really just the label under which the law tucks the issue of causation when it comes to the tort of fraud. In this view, there is not a missing fundamental element (causation) and an extra fundamental element (reliance). There is one element—causation—which, in fraud, goes under the name "reliance" and plays the same role that causation plays in other torts. At a theoretical level, the suggestion that reliance really is just causation has a certain plausibility. After all, the plaintiff's reliance connects the defendant's bad act to the plaintiff's loss. At an interpretive and practical level, the hypothesis that reliance is equivalent to causation permits courts to frame a seemingly sensible question: What reasons, if any, support fraud law's historical insistence on capturing the issue of the causal linkage between a misrepresentation and an injury in terms of the idea of victim reliance? If it turns out that there are good reasons for this restriction, then courts can continue to treat reliance as they have. If, by contrast, such reasons are absent, then general principles of causation should be adopted over the seemingly idiosyncratic causation stand-in called "reliance," at least to the degree that *stare decisis* and institutional and jurisprudential norms regarding the incremental evolution of the common law permit.

Our aim in this Article is to identify the role that reliance plays within fraud, giving particular attention to the question of whether there are reasons for requiring reliance independent of the typical tort requirement of causation. Our analysis will focus on the common law tort of fraud, but will also discuss other torts, as well as consumer fraud statutes and, very briefly, federal securities laws. In elucidating the place of reliance in fraud, the paper aims to capture what is special about the wrong of fraud, to distinguish fraud from other wrongs in which reliance is not central to the definition of the wrong, and to elucidate more generally the nature and purposes of tort law.

Part I argues that reliance is a distinctive element of the common law tort of fraud. For a fraud to occur, the defendant must succeed in inducing the plaintiff to believe his misrepresentation. And this is not merely because she must show a cause-effect relationship between the defendant's misconduct and her injury. Nor does reliance function as the sort of excessive-liability filter that proximate cause is sometimes said to provide in negligence law. Rather, there are independent conceptual and structural reasons for the requirement of reliance.

Conceptually, the wrong that is defined by the tort of fraud is *not* an interference with the victim's interest in being free from certain types of *harm*, but instead an interference with her interest in being able to make certain kinds of decisions in certain settings free of misinformation generated by others. This interest simply cannot be interfered with unless the defendant's misrepresentations are relied upon by the victim. In this sense, the tort of fraud cannot be

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or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.").

accomplished until there has been reliance by the victim upon the misrepresentation.

Structurally, the requirement of reliance is linked to a more general feature of tort law, namely, the relational structure of tort duties. To commit a tort is to breach a duty that is owed by an actor to a class of potential victims. Thus to prevail, a tort plaintiff must establish not merely that wrongful conduct has resulted in harm to her, but that conduct wrongful *as to a person in her position* has harmed her. When it comes to fraud, the plaintiff's reliance is essential to establishing that the defendant's conduct was wrongful as to her, and hence essential to establishing her right to recover. This is true, we argue, even for instances of common law fraud that have expanded the orbit of liability by recognizing, for example, forms of indirect or implicit reliance.

Having insisted on the centrality of reliance in common law fraud, we next note, following the lead of Prosser and others, that while the tort of fraud is in some ways the paradigmatic misrepresentation tort, misrepresentations also figure in the commission of many other torts.[3] Indeed, the word "fraud" is a source of great mischief in tort law precisely because it is used not only as the name of a discrete cause of action, but also to refer to any misrepresentation by which some other tort or statutory wrong is perpetrated. In these latter contexts, victim reliance may have a different significance and, indeed, may not have any role to play at all.

For example, as we explain in Part II.A, the private rights of action granted by state consumer protection statutes are somewhat different creatures than the right to sue for common law fraud. To be sure, these statutes aim to protect consumers from predatory merchant conduct, including interferences with consumers' interest in making choices based on information that has not been distorted by misrepresentations. However, these laws are regulatory in structure and spirit. They define the legal wrong of consumer deception less in the manner of a tort and more in the manner of a regulatory offense or a crime. Thus, the mere undertaking of a deceptive act or practice by the defendant is usually sufficient to complete the wrong. This is why violators are often eligible for fine and punishment at the hands of government officials *regardless of whether anyone suffers for having been misled by them*: the dominant underlying concern is to protect the public from illicit business practices. Appreciating the public-protection rationale for these statutes in turn helps us to grasp the significance of state legislative decisions to amend these laws to authorize suits for damages by consumers who have been harmed by misrepresentations. These private rights of action were enacted in the first instance to supplement executive branch enforcement efforts, rather than to ensure that those who have suffered losses because of fraud have the ability to respond to those who have defrauded them. In this respect, consumer protection acts resemble antitrust laws that aim primarily to protect competition, rather than individual competitors. Given these important

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3. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 85, at 701–02 (1941) ("Misrepresentation runs all through the law of torts, as a method of accomplishing various types of tortious conduct which . . . usually are grouped under categories of their own."); *see also* DAN B. DOBBS, THE LAW OF TORTS § 469, at 1344 (2000) (discussing misrepresentation as a component of many torts).

differences in purpose, there may be reason for courts entertaining actions brought under consumer protection statutes to take a more relaxed approach to reliance and perhaps to deem it not a required element at all. Similarly, we suggest at the end of Part II.A, the proper analysis of the place of reliance in damages actions brought under federal securities laws requires an appreciation of the subtle interaction between the public-law aspiration to have securities markets operate free of misinformation (and to deter and punish knowing misrepresentations made in these markets) and the private-law remedial scheme created by the Supreme Court's recognition of implied rights of action.

Part II.B turns from statutes back to common law. As we noted above, there are many instances of tortious wrongdoing involving misrepresentation that quite evidently do not involve interferences with a victim's freedom of choice. For these torts, we argue, reliance may figure in the causal story of how the victim came to be injured, but reliance by the victim is, for good reasons, not part of the plaintiff's *prima facie* case. For example, one can sometimes act tortiously toward a person by uttering a falsehood causing physical harm to that person. In such a case, reliance on the misrepresentation by someone —possibly even the plaintiff—can function as a link in the causal chain between misconduct and injury. Still, the plaintiff does not have to establish his reliance in order to recover, precisely because we are dealing with a different kind of wrong involving an interference with a different kind of interest (*i.e.*, the interest in bodily integrity). Roughly the same goes for intentional interferences with contract or non-contractual expectancy through fraudulent means. Here, the wrong is about interfering with an economic expectancy, rather than with the victim's ability to make certain decisions free from misinformation, which is why, again, plaintiff's reliance has no particular relevance to the actionability of the defendant's injuring of the plaintiff. Again, the take-away point is this: victim reliance is absolutely central to the particular legal wrong of fraud, but it need not be central to other legal wrongs.

I. RELIANCE AND THE TORT OF FRAUD

Reliance is a distinct element of the tort action of fraud or deceit. It is not enough that the defendant make a material, factual misrepresentation that causes injury to the plaintiff. The injury must come about by virtue of the plaintiff justifiably relying on the apparent truth of the misrepresentation.[4] Absence of reliance thus provides a ground for rejecting the plaintiff's claim even where there is a causal connection between the defendant's misrepresentation and the plaintiff's injury.[5]

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4. RESTATEMENT (SECOND) OF TORTS § 537 (1977); DOBBS, *supra* note 3, § 474, at 1358–59; *see also* Brackett v. Griswold, 20 N.E. 376, 378 (N.Y. 1889) (defining fraud or deceit as "false representation, known to be such, made by the defendant, calculated and intended to influence the plaintiff, and which came to his knowledge, and in reliance upon which he in good faith parted with property, or incurred the obligation which occasioned the injury of which he complains").

5. We will not discuss here the place of reliance in claims for negligent misrepresentation. As will become apparent, in pointing out the unavailability of fraud claims to the plaintiffs in the following examples, we mean to take no position on whether any of them could prevail on some other cause of action that does not require deception of

For example, in *Rosen v. Spanierman*[6] an art dealer represented to a couple, the Rosens, that a certain painting had been painted by a famous artist. After the couple and the dealer settled on a price of $15,000, the bill was sent to and paid by the wife's mother, Lipson, as her anniversary gift to the couple. Lipson and the Rosens later each brought actions against the dealer, alleging that he had lied about the painting's authenticity. The Second Circuit Court of Appeals affirmed dismissal of Lipson's fraud claim for lack of reliance. True, the dealer's alleged false statement had caused her to pay a sum of money she would not have otherwise paid. But there was no evidence that *she* had been *misled* by the content of the defendant's misrepresentation, either directly or indirectly, and the phenomenon of being misled stands at the very heart of the tort action for fraud.[7]

It might be tempting to explain away *Rosen* on the ground that the Rosens, who, unlike Lipson, did rely on the alleged misrepresentation, were acting as her agents. But there is no agency relationship here. The couple dealt with the dealer as principals—they were not transacting the business of the mother. Likewise the Rosens' apparent ability to bring a claim against the dealer for *defrauding them* out of an opportunity to receive a gift worth at least $15,000 had no more to do with the court's rejection of the mother's claim than did the prospect of the dealer being prosecuted criminally.[8] The court did not reason that Lipson had no claim *because* the Rosens had a claim. Instead, the court reasoned that Lipson had no claim because she had not relied upon the misrepresentation.[9]

Another New York decision, *Cummings v. Kaminski*,[10] makes the same point. Plaintiff, estranged from her husband, sued the defendant, her husband's paramour. The gist of the complaint was that the defendant, through misrepresentations to others, had rendered herself the beneficiary of the husband's life insurance policies in place of the plaintiff. The court threw out the plaintiff's fraud claims. Even assuming that the defendant's misrepresentations functioned as

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the plaintiff by the defendant. For example, a court today might deem the plaintiff in the *Cummings* case, discussed below, to have a cause of action for tortious interference with non-contractual expectancy. *See infra* notes 10–11 and accompanying text.

6. 894 F.2d 28 (2d Cir. 1990). Our discussion builds on the account first provided in Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 18–20 (1998).

7. As far as the court's opinion indicates, there was no communication of the content of the dealer's misrepresentation to Lipson: Her decision to issue the check was triggered merely by the request of the Rosens that she pay the dealer. *Rosen*, 894 F.2d at 33–34. Again, this is not to deny that Lipson suffered a loss because of the dealer's alleged misrepresentation. Because of it—but not in reliance on it—she apparently paid $15,000 for something which was worth much less than that. This fact might have entitled to her a claim for breach of contract, but it was not sufficient to support a claim for fraud. *Id.* at 33.

8. *See id.* at 34–35. There are plenty of cases, including some discussed and cited below, in which there is only one person who can plausibly claim to have been harmed by a given misrepresentation and yet who cannot establish reliance. Courts in these cases do not waive reliance to ensure that someone will be able to sue for the misrepresentation.

9. *Id.* Likewise, the apparent fact that Lipson failed to pursue in a timely manner a breach of contract claim as a third-party beneficiary was irrelevant to the court's disposition of her fraud claim.

10. 290 N.Y.S.2d 408 (Sup. Ct. 1968).

a cause of plaintiff's lost expectancy, plaintiff had neither received nor relied on defendant's misrepresentations, and therefore could not establish that the defendant had defrauded her.[11] A third example is provided by *Pegram v. Hebding*.[12] Plaintiff was fired from his job as a result of the defendant's having made misrepresentations about him to his employer. The court held that the plaintiff had no claim for fraud against the defendant because he, the plaintiff, had not been deceived.[13]

Finally, consider *Summit Properties, Inc. v. Hoechst Celanese Corp*.[14] Plaintiff homeowners alleged that they had purchased homes containing polybutylene ("PB") plumbing systems manufactured by the defendants. The PB systems allegedly failed, rendering them useless and causing severe property damage.[15] Plaintiffs sued for civil RICO violations,[16] asserting predicate acts of mail and wire fraud. In particular, they claimed that the defendants engaged in a coordinated campaign to misrepresent the virtues of PB plumbing systems to builders, plumbers, and officials responsible for drafting and enforcing building codes. Plaintiffs conceded, however, that they themselves did not rely directly or indirectly on any of these misrepresentations in purchasing their homes. Affirming dismissal by the District Court, the Fifth Circuit emphasized a basic difference between criminal fraud prosecutions, which may proceed independently of whether anyone has been deceived to her detriment, and a private litigant's ability to bring a cause of action for damages. The latter "must show an injury caused 'by reason of' the [RICO] violation"—in this case, by virtue of reliance on the defendant's misrepresentations.[17] Thus, even though, according to the plaintiffs' allegations, the defendants' misrepresentations functioned as an actual cause of the plaintiffs' losses, the plaintiffs' fraud claims failed as a matter of law because those misrepresentations "did not induce the purchase transactions."[18]

As these cases and many others attest, reliance is a basic component of fraud. To make this point, however, is not to say that the content of the concept of reliance has remained static, or that it is always easy to apply. On the first point, it is worth noting that, just as duty doctrine in negligence law long ago expanded past the privity rule in the area of product-related injuries, and just as proximate cause doctrine has extended past the idea of 'directly' caused harm, so fraud doctrine now clearly covers cases beyond the most straightforward scenario of *D* uttering a misrepresentation to *P*, intending for *P* to rely on it, and inducing such reliance to *P*'s detriment. Thus, today, one who makes a misrepresentation of fact

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11. *Id.* at 410.
12. 667 So. 2d 696 (Ala. 1995).
13. *Id.* at 704.
14. 214 F.3d 556 (5th Cir. 2000).
15. *Id.* at 558.
16. 18 U.S.C. §§ 1961–68 (2006).
17. *Summit Props., Inc.*, 214 F.3d at 559 (quoting Pelletier v. Zweifel, 921 F.2d 1465, 1498–99 (11th Cir. 1991)).
18. *Id.* at 560. The panel rejected plaintiffs' attempt to borrow the fraud-on-the-market conception of reliance developed in federal securities law, noting that there is little reason to suppose that housing prices are prone to reflect the sort of misrepresentation allegedly committed by the defendants. *Id.* at 561.

can be held to have defrauded a person who receives it via an intermediary.[19] If owner *O* intentionally misrepresents the worth of his company to prospective investor *I*, and if *I* communicates the misrepresentation to *P*, who proceeds to rely on it to his detriment, *P* can establish reliance, and may well be able to recover in fraud.[20] In doing so, however, the law has not thereby eliminated the requirement of reliance.

As for difficult cases, there is the particularly thorny problem of reliance where misrepresentation takes the form of non-disclosure. Following the U.S. Supreme Court's lead in the securities fraud case of *Affiliated Ute Citizens v. United States*,[21] some courts reason that, for cases of non-disclosure, a presumption of reliance ought to apply, in part because it can be difficult to prove reliance on a non-statement.[22] Others, however, suggest that the proof problem is more apparent than real.[23] We mention the issue here not to resolve it, but simply to acknowledge that the centrality of reliance to common law fraud does not mean that the concept is self-defining or self-executing.

As was suggested in the Introduction, it is tempting to suppose that reliance is just the name that courts have given to the actual causation element of fraud. Yet, as demonstrated by the examples above, as well as by the Second Restatement's treatment of them under separate headings, reliance and causation are not equivalent.[24] The question of whether the plaintiff has received, believed, and acted upon the defendant's misrepresentation is different from the question of whether that misrepresentation helped to bring about, in some way, an adverse consequence for the plaintiff. Indeed, when the reliance element operates to exclude liability, it often does so for injuries that have actually resulted from fraudulent conduct. In such instances, it does so on the ground that the injury, though caused by the misrepresentation, came about *in the wrong way*.

This last observation quite naturally leads to consideration of whether reliance is the counterpart in fraud to the concept of proximate cause in negligence law. It is difficult to give a straightforward answer to this question, however, because the latter is, infamously, a contested concept. If one understands proximate cause in purely instrumental terms—as the name that lawyers give to a doctrinal space within which judges and jurors can attempt to do equity or make macro-level social policy—then reliance does not fit any better under the umbrella of proximate cause than actual cause. Even if equity favors claims by innocent victims in cases like *Rosen* or *Cummings*, and even if there is little risk that a

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19. DOBBS, *supra* note 3, § 480, at 1370–71.

20. Recovery will depend in part on the jurisdiction's rules as to other elements of fraud, including the intent, knowledge, or foresight with which *O* must have acted in order to be held liable. *Id.* at 1371–73.

21. 406 U.S. 128 (1972).

22. *See, e.g.*, Ackerman v. Price Waterhouse, 683 N.Y.S.2d 179, 191–94 (App. Div. 1998).

23. Mirkin v. Wasserman, 858 P.2d 568, 574 (Cal. 1993) (declining to follow *Affiliated Ute*).

24. RESTATEMENT (SECOND) OF TORTS §§ 537–548A (1977) (treating reliance under Title C of the presentation of fraudulent misrepresentation law, whereas causation falls under Title D).

decision permitting the *Summit* claimants to recover will open up the liability floodgates or invite a rash of feigned claims, plaintiffs will still lose for failure to show reliance.[25]

On another rendition, proximate cause is not a doctrinal blank check, but instead functions within negligence law as a fairness-based limit on liability that is indexed to the degree or extent to which a wrongdoer can foresee that his wrong will produce the sort of injury suffered by the victim. Again, however, the examples above suggest that absence of reliance does not closely track unforeseeability. The defendant in *Cummings*, for example, generated exactly the sort of harm to the plaintiff that she intended by virtue of her misrepresentations, yet was held not liable in fraud because of plaintiff's lack of reliance.[26]

Still, if one conceives of proximate cause in a third way, one *can* find some resemblance between that concept and the reliance element of a claim for fraud.[27] On this rendition, proximate cause gives expression to the idea that a plaintiff cannot prevail on a negligence claim unless her injury is realized in the "right" way—that is, unless the defendant's careless injuring of the plaintiff consisted of the realization of a risk that rendered the defendant's conduct careless.

Here is an example meant to capture this idea in the context of negligence law. Suppose that, because of carelessness on the part of its manufacturer, a piece

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25. As we have just suggested in the text, scholars who approach tort as thoroughgoing instrumentalists—in particular, treating tort as a mechanism by which government harnesses private litigation to deter wrongdoing and compensate innocent injury victims—have a tough time explaining the reliance requirement. For any case in which misrepresentation causes a loss but not through reliance, there would seem to be an occasion to deter. Many such cases will also present an innocent victim who can plausibly claim that it would be fair to shift her losses to the wrongdoer who caused them. In these instances, reliance, like the requirement of proof of causation in other kinds of tort cases, seems to be dysfunctional with respect to deterrence and compensation. Worse, as we have also suggested, the insistence on proof of reliance cannot even be instrumentally justified as needed to filter out otherwise valid claims based on floodgates or administrability concerns. At least according to the Second Restatement, fraud has a separate proximate cause filter built into it for just those purposes. RESTATEMENT (SECOND) OF TORTS § 548A. Thus, to the instrumentalist, reliance ought to present itself not as a redundant fifth wheel, but as a fifth table leg that, because it is longer than the others, prevents them from functioning properly.

26. In identifying legal or proximate cause as a distinct element from reliance, section 548A of the Second Restatement defines the former in terms of foreseeability: "A fraudulent misrepresentation is a legal cause of a pecuniary loss resulting from action or inaction in reliance upon it if, but only if, the loss might reasonably be expected to result from the reliance."

27. To avoid confusion we should make clear at the outset that, in our view, reliance and proximate cause are not direct analogues, but rather doctrinal cousins. As we explain below, the direct analogue in negligence law to reliance is instead the rule requiring a negligence plaintiff to prove that the defendant's carelessness constitutes a breach of a duty *owed to her*, rather than a breach of a duty owed to someone differently situated. By insisting on a proper alignment between the duty and breach elements of a negligence plaintiff's prima facie case, this duty-breach nexus rule in turn bears a familial resemblance to the distinct element of proximate cause, which insists on a proper alignment between the causation and injury elements. *See infra* text accompanying notes 28–35.

of industrial equipment catches fire after being installed at plaintiff's workplace. Plaintiff, who is at the end of her shift, is set to leave the site just as the fire breaks out. She stays instead to help put out the fire, an operation that proceeds without incident. Hours later, as she returns home, a severe thunderstorm has set in. Plaintiff, through no fault of her own, is struck by lightning as she walks across her yard and is badly burned. (Assume that, had the defect not been present in the equipment, and had the fire not occurred, plaintiff would have been safely at home when the storm arose.) As is evident on the face of this far-fetched scenario, the relevant sequence of events extending from the defendant's carelessness to the plaintiff's injury has not unfolded in the right way. Even though the plaintiff suffers a burn because of defendant's carelessness in posing a risk of burns to persons such as her, the way in which she happens to have been burned cannot plausibly be described as the unfolding of those risks within a "natural" or "characteristic" sequence. Accordingly, her negligence claim against the manufacturer ought to fail for lack of proximate cause.

Fraud's reliance element bears at least a family resemblance to proximate cause on this understanding. For it, too, prompts an inquiry into whether the defendant's misrepresentation lines up with the plaintiff's injury in the right way. The issue in a fraud case, of course, is not whether the risks that are realized in the actual case are the risks that led us to characterize the defendant's conduct as negligent toward the victim. Instead, it is whether the defendant has actually succeeded in harming the plaintiff by virtue of *defrauding the plaintiff*, as opposed to having harmed the plaintiff by deceiving others.

Although this question is thus broadly analogous to the proximate cause inquiry, the more precise analogue in negligence law is the rule most famously associated with the majority opinion in *Palsgraf v. Long Island Railroad*.[28] This is the rule stating that, in order for a plaintiff to be able to establish a claim of negligence, she must show not only that the defendant's conduct was careless generally, nor that it was careless as to others who were differently situated from the plaintiff in relation to the defendant's conduct, but that it was *careless in relation to her* or to a class of persons including her.[29] Although most famously

28. 162 N.E. 99 (N.Y. 1928); *see* Zipursky, *supra* note 6, at 3–15 (discussing the rule of *Palsgraf* and connecting it to the reliance element of fraud and basic elements of other tort causes of action). Modern torts scholars and casebooks commonly present *Palsgraf* as a proximate cause case. Interpreting the case this way is in one sense understandable: *Palsgraf does* have something to do with the misalignment between the plaintiff's complaint of wrongdoing and the actual way in which the plaintiff ends up getting injured by that wrongdoing. Nonetheless, we believe this reading is mistaken as a matter of interpretation, *see id.* at 8–14, and in terms of failing to grasp the centrality of relational duties to torts. *See* JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 265–66 (2004); *id.*, Teacher's Manual, at 120–33.

29. *Palsgraf*, 162 N.E. at 100 ("What the plaintiff must show is 'a wrong' to herself; i.e., a violation of her own right, and not merely a wrong to someone else, nor conduct 'wrongful' because unsocial, but not 'wrong' to any one."). Zipursky has referred to this as the rule of "substantive standing." Zipursky, *supra* note 6, at 10. Goldberg and Zipursky have elsewhere described it as the requirement that a negligence plaintiff establish a "nexus" between the duty and breach elements of her claim. John C. P. Goldberg &

articulated in *Palsgraf*, the rule requiring this alignment between the duty and breach elements of a negligence claim is in evidence throughout negligence law. For example, in *Moore v. Shah*, the defendant was alleged to have carelessly treated his patient, such that the patient was put in need of a kidney transplant.[30] However, the plaintiff who sued for malpractice was not the patient, but the patient's father, who ended up donating one of his own kidneys to save his son.[31] Even conceding that the defendant had committed malpractice against the son, and even granting that a causal relationship existed between that malpractice and the father's loss, the court rejected the claim, concluding that the doctor's conduct did not amount to a breach of *any duty owed to a parent of his patient*.[32] No less than *Palsgraf*, *Moore* instantiates the rule that a negligence plaintiff is required to prove that the defendant's conduct amounts to conduct that displays lack of reasonable care for her physical well-being. And a comparable rule exists in the law of fraud. A fraud plaintiff must show reliance because a fraud plaintiff must show that the defendant's deceit amounted to a *defrauding of her*.

To say the same thing differently, reliance is an element of fraud because, like all torts, fraud is a relational wrong. Torts are ways of acting whereby one person breaches a legal obligation of non-injury that is owed to another person or persons. That is to say, torts form a sub-category of the category of legal wrongs that distinguishes itself by marking conduct as wrongful *in relation to some class of potential victims*.[33] In this respect, as the Fifth Circuit observed in *Summit*,[34]

Benjamin C. Zipursky, *The* Restatement (Third) *and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 709–12 (2001). They have also described it in terms of the more general idea that tort duties are relational or transitive in their analytic structure, as opposed to simple or intransitive. John C. P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733, 1825–32 (1998).

30. 458 N.Y.S.2d 33, 33–34 (App. Div. 1982). One might argue that *Moore* differs from *Palsgraf* in that the doctor owed no duty of care to the father, whereas the railroad clearly owed Mrs. Palsgraf a duty of care (even if nothing it did constituted a breach of that duty). Our response is twofold. First, the doctor may actually have owed a certain amount of care to the father (e.g., a duty to take care to detect in the son an infectious disease that might spread to foreseeable victims such as immediate family members). Second, regardless of whether the doctor owed any duties of care to the father, the *Palsgraf* rule is still needed to explain the outcome in *Moore*, for otherwise it would be open to the father to argue that he was entitled to 'borrow' the breach by the doctor of the duty to provide competent medical care owed to the son so as to establish the breach element of his (the father's) negligence claim. *Palsgraf*'s significance is precisely that it blocks this sort of borrowing by insisting that the plaintiff establish the breach of a duty owed to her, or a class of persons including her.

31. *Id.*

32. *Id.* at 34–35.

33. The tort of trespass to land provides an additional and particularly stark illustration of this point. It is defined, roughly, as the wrong of physically invading rights of ownership in property held by another. If *A* invades property owned in fee simple by *O*, thereby injuring innocent trespasser *T* who, by mistake, just happens to be on *O*'s land, *T* cannot sue *A* for trespass, even if *T*'s presence is foreseeable to persons such as *A*, and even if *T* is injured in a perfectly foreseeable manner. *A*'s trespass as to *O* is not a trespass as to *T*. *See* Zipursky, *supra* note 6, at 25–26. (Whether *A* may have committed some other tort against *T*, such as negligence, is a different question.)

torts stand in contrast to crimes, many of which are defined non-relationally. For example, it is criminally wrong to possess a controlled substance, or drive recklessly, or attempt murder. This is because each of these wrongs is defined in terms of a simple, non-relational directive to refrain from conduct of a certain description regardless of whether or how that conduct relates to or affects the interests of certain potential victims. Tort law, by contrast, consists of directives that concern how a person or entity ought to act or refrain from acting with respect to certain others. Reliance is what renders fraud a relational wrong and hence a tort. To defraud someone is to trick them by means of misrepresentation into making a decision that they would not otherwise have made. If the tricking of the victim does not occur, the particularly legal wrong of fraud—of one person defrauding another—has not taken place, even if the victim is injured in some other manner as a result of the trick. Just as the law of trespass sets a relational directive that says, roughly, "do not invade another person's property," and just as negligence issues relational directives demanding that certain classes of actors take reasonable care against interfering with interests of certain classes of potential victims, so, too, fraud is built on a relational directive requiring one to refrain from deceiving another to his or her detriment by intentionally making a misstatement.[35]

On the account that we have offered here, the core of the legal wrong that has historically been labeled "fraud" or "deceit" is the wrong of interfering with a particular interest of the victim, namely her interest in making certain kinds of choices in certain settings free from certain forms of misinformation. This interest is akin to the interest in undisturbed ownership that grounds the tort of trespass to land, or the interest in bodily integrity that grounds the tort of negligence as it applies to personal injuries. The most familiar and important setting for fraud is, of course, deception that interferes with decisionmaking in an exchange setting, and that results in financial loss to the victim, as well as gain to the defrauder. However, it is not obvious to us that this sort of case exhausts the domain of fraud—that is, that fraud is exclusively an "economic" tort.[36] Perhaps it is more accurate to say that the tort of fraud occurs when one person, through a knowing misrepresentation of material fact, induces another to make a decision in a transactional setting that she would not have otherwise made, and the decision is to her detriment, whether that detriment is primarily loss of wealth, or some other

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34. *See supra* text accompanying note 17.

35. *See* Zipursky, *supra* note 6, at 59.

36. Some classify the tort of fraud exclusively as an economic or business tort—i.e., a cause of action for the protection of economic interests. DOBBS, *supra* note 3, § 469, at 1344 (describing "fraudulent misrepresentation," which encompasses both fraud (deceit) and negligent misrepresentation, as a "stand-alone economic or commercial tort that causes financial harm without causing physical harm either to person or to property"). Although defrauding someone of assets or potential assets is undoubtedly the core instantiation of the tort, its application has not historically been limited to financial losses. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 105, at 726 (5th ed. 1984) (noting that fraud claims have primarily concerned economic transactions, but that "[t]here is no essential reason" why other harms could not give rise to fraud claims, and citing cases that have held defendants liable in fraud for, among other things, causing personal injuries and inducing marriages).

loss.[37] To commit fraud, in other words, is to violate a relational legal directive that enjoins the making of a misrepresentation of fact for the purpose of deceiving another into making a choice that is to the other's detriment. Regardless of the proper final description of the domain of fraud, it is clear that, on any plausible description, unless and until a deception occurs—unless and until there is reliance by the victim—the tort of fraud has not been committed.

To get a further handle on the kind of interest and kind of interference at stake in fraud, consider a case highlighting the difference between a potential claim of intentional infliction of emotional distress ("IIED") and a claim of fraud resulting in emotional distress. As is well known, one line of cases leading to the recognition by commentators and courts of the tort of IIED (or outrage) involved injuries resulting from practical jokes. Most famously, perhaps, the defendant in *Wilkinson v. Downton* was held liable for falsely reporting to the plaintiff that her husband, who was away, had been very badly injured in an accident.[38] This intentional misrepresentation had two effects on the plaintiff—it induced her to incur a minor expense in providing train fare for a person whom she sent to assist her husband, and it caused her severe trauma with accompanying physical manifestations.[39] The jury awarded a relatively large sum, almost all of which must have been for the trauma.[40]

The court first concluded that the plaintiff was entitled to sue in fraud for the modest sum spent on the train fare.[41] However, the court next ruled that the remainder of the jury award—the vast bulk—could not be upheld as damages parasitic on that claim. The plaintiff, it reasoned, was not traumatized over the fraud, or for having been defrauded by the defendant out of a small amount of money.[42] Instead, she was traumatized simply because of the upsetting content of

37. We use the word "induce" and not "cause," since we think it is an important aspect of fraud that the defendant's misrepresentation function not only as a force that acts upon the plaintiff, but as part of a scheme to replace the choice that the plaintiff would have made with a choice influenced inappropriately by the misrepresentation.

38. [1897] 2 Q.B. 57.

39. *Id.* at 58.

40. *Id.*

41. We assume without taking a view on the matter that the court was correct to treat this aspect of the defendant's mistreatment of the plaintiff as a fraud. Clearly the defendant had knowingly conveyed to the plaintiff a misrepresentation of fact, and clearly he thereby succeeding in inducing reliance by the plaintiff to the plaintiff's (modest) financial detriment. He may have also acted with an intent to induce that reliance, in that he apparently told the plaintiff that her husband had requested that she "go at once in a cab with two pillows to fetch him home." *Id.* Whether this is enough to establish fraud, or whether there has to be something "in it" for the defendant beyond the psychic satisfaction of knowing that the victim is incurring the detriment, is a topic beyond the scope of this paper.

42. *Id.* at 59 ("It was argued for [plaintiff] that she is entitled to recover [the remainder of the jury award] as being damage caused by fraud . . . . I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement intended to be acted on must make good the damage *naturally resulting from its being acted on*. Here there is no injuria of that kind.") (emphasis added). The court here does not deny that personal injury might sometimes give rise to a

the defendant's misrepresentation. Thus the court found itself facing the choice of either overturning the bulk of the jury award or recognizing a separate basis for recovery. Of course, it chose the latter option, reasoning that the gratuitous and intentional utterance of words to the plaintiff that could readily be expected to cause physical harm in the form of nervous shock was a wrong unto itself.[43] In other words, insofar as plaintiff sought recovery for her trauma, her complaint was not for fraud because the trauma did not result, either directly or indirectly, from the defendant's having made a misrepresentation so as to induce the plaintiff to alter her decision-making. Rather, it asserted simply that the defendant's lie, in and of itself, caused her to become very upset. Again, absent reliance, there can be no fraud, because fraud is the wrong of deceiving someone in a certain kind of decisional context.

Appreciating fraud's core concern with deceptions that induce certain kinds of decisions, as well as the more general point about the relationality of tortious wrongs, permits us to understand why the courts have drawn distinctions that otherwise would seem odd or pedantic. Reliance does not boil down to causation, and yet it is not a fifth wheel on the tort of fraud. It is the element that renders fraud a relational wrong. As such, it belongs in fraud just as the requirement of a duty-breach nexus belongs in negligence law.

To appreciate these points is not only to achieve greater conceptual clarity, it is to see that it is not open to lawmakers and commentators simply to dismiss courts' invocation of reliance in fraud cases as confused or unmotivated. Likewise, it is to recognize that one must come to terms with what this feature of this law is actually doing, rather than removing or altering it as if there were nothing to be said for its continued recognition. Indeed, in our view, the foregoing analysis puts an onus on would-be reformers to explain what might warrant a departure from general principles of tort law in this particular instance. Finally, one can find in the foregoing at least the beginnings of a normative justification for the reliance requirement. Insofar as tort law is not in the first instance a mechanism for shifting the losses of innocent injury victims, or for deterring antisocial conduct, but instead for providing victims of wrongs with an avenue of legal recourse against those who have wronged them, then reliance belongs in the tort of fraud.

Of course it is open to a critic to dispute whether tort law is, as we have claimed, a law of private or relational wrongs, or to dispute whether it is normatively desirable for American law to have a department devoted to the provision of recourse for wrongs. We will not, however, pursue these objections at any length here. For present purposes, it will suffice to say that the idea of torts as private or relational wrongs has a long lineage in Anglo-American law, tracing

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claim of fraud, if the injury is brought about in the right way. Rather, it reasoned that this claimant could not establish that her personal injuries were genuinely parasitic on the defendant's defrauding of her. *Id.* at 59–60.

43. *Id.* at 58–59 ("The defendant has . . . wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action . . . .").

back through the likes of Cardozo to eighteenth-century American commentators like Dane, Greenleaf, and Swift to the work of Austin, Blackstone, and Locke.[44] Conceptualizing torts as being built on relational duties also enables us not only to make sense of otherwise puzzling individual tort doctrines like reliance, but captures what is distinctive about tort law as a body of law, and why it links the task of defining certain forms of legally wrongful mistreatment to the creation of private rights of action for damages and other remedies.[45] (It is precisely because torts are wrongings of one person by another that the law treats their commission as an occasion for empowering the victim to respond to the wrongdoing by bringing a private lawsuit for damages.) Functionally, once one appreciates that tort law is a law of wrongs and redress (or recourse), one can better understand that its role in our legal system is not to deliver deterrence and compensation, but to enshrine and articulate in law norms of responsible behavior, and to empower citizens to respond to mistreatment at the hands of others in a manner that substitutes recourse through law for the private pursuit of satisfaction.[46] By performing these functions, tort law in turn delivers a number of benefits within a liberal-constitutional frame of government, such as reinforcing the bonds of liberal civil society, providing citizens with the sense that the government is committed, at least in some respects, to hearing and resolving their individual claims, and promoting the egalitarian principle that, with respect to basic obligations, each of us stands on a plane of equality to each other.[47]

To summarize: The idea of relational wrongs is the linchpin of a theory of tort law that makes better sense of tort doctrine and better captures what that body of law promises to deliver as one among many departments of the law. Reliance, in turn, is the expression of relationality in the tort of fraud. It is what ensures that, when a fraud plaintiff seeks recourse against a fraud defendant, the plaintiff will recover only if she proves that the defendant *defrauded her*. In this way, we can see that reliance is an utterly unmysterious feature of fraud. Like the requirement that a trespass claimant have rights in the property that is alleged to have been invaded, the reliance requirement is what makes the tort of fraud a genuine tort.

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44. Benjamin C. Zipursky, *Philosophy of Private Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623, 637–40 (Jules Coleman & Scott Shapiro eds., 2002) (discussing Locke); John C. P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435 (2006) (discussing views of Blackstone, Austin, Dane, Swift, and Greenleaf); John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 531–59 (2005) [hereinafter *Constitutional Status*] (discussing views of Coke, Locke, and Blackstone).

45. Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003).

46. *Id.*; *see also* John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the at Society*, 64 MD. L. REV. 364, 402–04 (2005).

47. Goldberg, *Constitutional Status*, *supra* note 44, at 606–11.

II. Reliance and Other Wrongs Involving Misrepresentation

Fraud is the archetypal wrong involving misrepresentation. But misrepresentation can play a role in the commission of various other wrongs, some of which are tortious, some not. In this Part, we consider the role (or lack thereof) of reliance in several causes of action that contain claims of misrepresentation. Section A concerns private rights of action authorized under state consumer protection statutes and also briefly touches on securities fraud claims. Section B turns our attention back to common law, considering various causes of action in which misrepresentation figures prominently in what the defendant has done wrong to the plaintiff, but that are distinct from the tort of fraud.

A. Consumer Protection Acts and Securities Fraud Actions

The historical origins of modern consumer fraud statutes lie in competition law, not the common law of tort.[48] They begin with the Federal Trade Commission Act of 1915 ("FTCA"), which was amended to protect consumer interests after the Supreme Court ruled that the original statute protected competitors exclusively.[49] The basic idea, of course, is that the Federal Trade Commission will set standards for fair business practices, and those standards will be enforced by FTC personnel. Notably, the concept of fair trade practices at the heart of the FTCA has always been broader than the category of non-fraudulent practices.[50] For example, a government prosecutor can establish a deceptive trade practice within the meaning of the act and regulations issued under it without showing that the merchant being prosecuted has made a false statement, or that the merchant intended to deceive, or that anyone relied upon the statement or was injured by it.[51]

As might be expected, the federal government, given its limited resources, had little hope of significantly suppressing deceptive trade practices.[52] Beginning in the 1950s states thus began to adopt their own "Little FTCAs," and

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48. *See* FREDERICK H. MILLER ET AL., CONSUMER LAW: CASES, PROBLEMS, AND MATERIALS 7 (1998).

49. *See* FTC v. Raladam Co., 283 U.S. 643, 652–53 (1931); Federal Trade Commission Act, 15 U.S.C. § 41 (1914) (amended by Pub. L. No. 75-447, 52 Stat. 111 (1938)).

50. Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 443–44 (1991).

51. *Id.* at 444–45.

52. William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 729 n.10 (1972) (discussing limitations on Federal Trade Commission enforcement of consumer protection laws, including modest staffing and geographic distance between communities in which improper conduct takes place and Federal Trade Commission offices); *see also* Note, *Developments in the Law: Deceptive Advertising*, 80 HARV. L. REV. 1005, 1017 (1967) (burdens of the common law action for fraud were "sufficient to dissuade all but the most persistent or most seriously injured customer" from suit).

by 1981, every state in the country had enacted such a statute.[53] These statutes followed the FTCA by vesting the power to enforce the law in the hands of state attorney generals or other officials. However, the states eventually realized that the same problems that hobbled the FTCA existed at the state and local level, and so eventually almost every state amended its statute to allow private rights of action for violations.[54]

Given this history, it is not surprising that the consumer fraud claims brought by private citizens under their state's deceptive trade laws sometimes look different than claims of common law fraud.[55] It is not our purpose in this paper to enter into the lively debate about whether the recognition of private rights of action based on the same standards as those governing officials' prosecutions is a good thing, especially given the rise of an entrepreneurial plaintiffs' bar.[56] It is sufficient at this point to observe that it would be a mistake to argue that reliance has not remained a central element of the common law of fraud based on judicial interpretations of consumer protection laws.

In the first place, even in this context, courts have often been reluctant to dispense with proof of reliance. For example, in *Weinberg v. Sun Co.*, the Pennsylvania Supreme Court held that Pennsylvania's consumer protection law requires individual proof of reliance and causation in suits brought by private individuals, as opposed to the Attorney General.[57] At issue was a class action brought by a consumer who claimed, among other things, that all consumers who

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53. *See* William A. Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271, 275 (1971); *see also* TANG THANH TRAI LE, PROTECTING CONSUMER RIGHTS § 2.10, at 21 (1987). In 1967 the National Conference of Commissioners on Uniform State Laws, working in concert with the FTC, drafted an Unfair Trade Practices and Consumer Protection Act ("UDAP"). Anthony Paul Dunbar, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427, 427 (1984). Eventually almost every state adopted a version of the UDAP. JONATHAN SHELDON & CAROLYN L. CARTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 8.2 (5th ed. 2001).

54. *See, e.g.*, Beslity v. Manhattan Honda, 467 N.Y.S.2d 471, 474 (Sup. Ct. 1983) (private claim provisions enacted because of "in large measure the inability of the New York State Attorney–General to adequately police false advertising and deceptive trade practices."); Sovern, *supra* note 50, at 448 ("To plug the holes in consumer fraud enforcement, nearly every state has now extended to injured consumers the power to sue merchants who engage in deceptive practices.").

55. "[M]ost state courts do not require plaintiffs in deceptive trade practice cases to prove that the defendant intended to deceive; some do not require plaintiff to show reliance on the deceptive statement; or that anyone was misled or deceived by it; and most, if not all, define deception in the same way as the FTC." Sovern, *supra* note 50, at 450–51 (footnotes omitted).

56. *See, e.g.*, Michael S. Greve, *Consumer Law, Class Actions, and the Common Law*, 7 CHAP. L. REV. 155 (2004); *see also* Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1 (2006) (arguing that courts ought to require reliance in private enforcement actions to prevent over-deterrence); Sovern, *supra* note 50, at 467 ("At present, deceptive trade practices statutes are written too broadly, and assume something in their application—judicious exercise of discretion—which is often lacking.").

57. 777 A.2d 442, 444–45 (Pa. 2001).

bought Sunoco's high octane gasoline were injured because some had been deceived by misrepresentations about the gasoline, thus raising its price. The court dismissed the class action, holding that

> [t]here is no authority which would permit a private plaintiff to pursue an advertiser because an advertisement might deceive members of the audience and might influence a purchasing decision when the plaintiff himself was neither deceived nor influenced. There is certainly nothing in the statute which suggests such a private right. The [statute] was enacted in 1968, and a private cause of action was added in 1976. . . . Nothing in the legislative history suggests that the legislature ever intended statutory language directed against consumer fraud to do away with the traditional common law elements of reliance and causation.
>
> The statute clearly requires, in a private action, that a plaintiff suffer an ascertainable loss *as a result of* the defendant's prohibited action. That means, in this case, a plaintiff must allege reliance, that he purchased [premium gasoline] because he heard and believed Sunoco's false advertising that [it] would enhance engine performance.[58]

Still, a number of state courts have interpreted statutory consumer fraud actions to reach beyond the ambit of common law fraud. For example, some do not require proof of intent to deceive[59] or of *scienter*.[60] Specifically on the issue of reliance, Massachusetts law requires only that the plaintiff establish a "causal connection between the deception and the loss"— reliance need not be shown.[61] New York law is also understood to require causation of injury instead of justifiable reliance,[62] while Illinois courts have likewise read that state's Consumer Fraud Act to require the plaintiff to show that the defendant's fraud "proximately caused" the injury without regard to reliance.[63] Some states require even less of a showing of statutory fraud plaintiffs. Until recently, in California a private citizen could sue under Business and Professions Code section 17200 even if no one relied on a misrepresentation nor suffered harm as a result of the defendant's conduct.[64]

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58. *Id.*

59. Regency Nissan, Inc. v. Taylor, 391 S.E.2d 467, 470 (Ga. Ct. App. 1990) (neither intent nor scienter required).

60. Dale v. King Lincoln-Mercury, Inc., 676 P.2d 744, 748 (Kan. 1984) (intent not required).

61. Int'l Fid. Ins. Co. v. Wilson, 443 N.E.2d 1308, 1314 (Mass. 1983).

62. Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 647 N.E.2d 741, 745 (N.Y. 1995).

63. Connick v. Suzuki Motor Co., 675 N.E.2d 584, 593 (Ill. 1996); *see also* Siegel v. Levy Org. Dev. Co., 607 N.E.2d 194, 198 (Ill. 1992).

64. *See* Podolsky v. First Healthcare Corp., 58 Cal. Rptr. 2d 89, 98 (Ct. App. 1996) ("The 'fraud' prong of Business and Professions Code section 17200 is unlike common law fraud or deception. A violation can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage. Instead, it is only necessary to show that members of the public are likely to be deceived.").

While it might be tempting to see in these cases some sort of trend toward a relaxation of the reliance requirement across the realm of fraud claims, such an inference is unjustified. As noted above, when asked to interpret the private rights of action created by state consumer protection statutes, courts must articulate a cause of action with elements that bring some structure and predictability to the incidence of liability for deceptive practices, yet also help fulfill the clearly stated legislative purpose of harnessing the threat of private law suits to reduce the flow of misinformation in consumer markets. Faced with this particular task, some courts have reasonably concluded that the public functions of deterrence and punishment can be better achieved by expanding liability to cases of deception that cause harm to the victim without reliance, and that doing so will not render claims for deceptive practices so broad or amorphous as to render them unduly difficult to administer, stifling of business activity, or otherwise problematic as a matter of policy or principle. To observe that they have reached this conclusion in interpreting broad statutory directives to protect consumers from deceptive acts is hardly to identify a trend that would suggest transforming common law fraud into a wrong that does not require proof of reliance by the victim.

A related yet distinct set of observations apply to the implied rights of action that have long been recognized by the Supreme Court for certain violations of federal securities laws.[65] In this domain, the Court has over time adjusted the concept of reliance, most famously in *Basic, Inc. v. Levinson*, where it decided to permit plaintiffs to invoke "fraud on the market" to create a rebuttable presumption of reliance.[66] Scholars and courts have generally understood the decision to rest on the following analysis: prices in efficient markets effectively convey to sellers and buyers of securities false information, such that their reliance on the market price amounts to reliance on the wrongdoer's misrepresentations.[67] That the court has sought to expand the scope of the concept of reliance in this context is both understandable and appropriate, given that 10b-5 actions are hybrids that simultaneously provide redress to victims of fraudulent practices while also helping the SEC to maintain the integrity of financial markets.

From the point of view of a lawyer or judge looking for authority to excise reliance from a common law fraud claim, *Basic* is no doubt an appealing decision to cite, for there is obviously some sense in which it downplays reliance. Our question is not, however, whether *Basic* made reliance a less formidable obstacle in some securities fraud litigation than it sometimes had been; plainly it did. Rather, we are asking what the analytical structure of a securities fraud claim

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65. Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 473–74 (1977) (affirming the availability of private rights of action under Section 10(b) of the Securities Exchange Act of 1934); J. I. Case Co. v. Borak, 377 U.S. 426, 430–31 (1964) (recognizing implied right of action under Section 14(a) of the Securities Exchange Act of 1934).

66. 485 U.S. 224, 245–47 (1988). Similarly, the Court has wrestled with the role of causation and proximate causation. *See* Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 344–47 (2005).

67. *See generally* Joel Seligman, *The Obsolescence of Wall Street: A Contextual Approach to the Evolving Structure of Federal Securities Regulation*, 93 MICH. L. REV. 649, 666 n.91 (1995) (explaining connection between fraud-on-the-market theory and efficient market hypothesis).

is after *Basic*. The question is therefore whether securities fraud claims are properly conceived of as *retaining* or as *eliminating* reliance in their analytical structure. At least superficially, the answer is clear: *Basic*, like *Affiliated Ute*,[68] expressly holds that reliance is *presumed* (in certain cases), not that it is eliminated.[69]

As in a wide range of doctrinal areas featuring presumptions, it is a fair question whether the presumption should be understood as a mere façade masking a controversial policy judgment on a substantive matter with the appearance of being merely evidentiary. A full examination of this issue would take us far beyond this paper. But for the moment, we note four reasons for reading *Basic* as having created a genuine presumption of reliance—beyond the fact that the United States Supreme Court has said (and continues to say) that reliance may be presumed rather than ignored in fraud-on-the-market cases.[70]

First, the presumption is rebuttable.[71] One of us has maintained—in the analogous context of determining whether market-share liability should be viewed as a genuine evidentiary device or as a more fundamental conceptual change from a regime of individual causation to enterprise liability—that the rebuttability of the presumption provides a strong reason to regard it as evidentiary. Conversely, irrebuttability provides a basis for thinking that the implementing court is using the language of presumptions to change substantive law.[72] Thus *Sindell*, the California DES case that launched the doctrine of market-share liability, is more plausibly understood as creating an evidentiary shift than imposing enterprise liability because it created a rebuttable presumption,[73] whereas *Hymowitz*—a decision that is in other ways New York's *Sindell* counterpart—is not plausibly so understood because it created an irrebuttable presumption.[74] From this point of view, the Supreme Court's initial and ongoing treatment of fraud on the market in terms of a rebuttable presumption of reliance is reason to treat the Court as having retained reliance as part of the conceptual structure of securities fraud law.

Second, the conditions that trigger the presumption of reliance will not always be satisfied, even in cases that are genuine and serious, and where there is evidence of causation of loss. *Basic*'s presumption exists only in cases involving publicly traded securities with regard to public material misrepresentation. If the Court were really deciding that reliance was not essential for a 10b-5 claim, it by the same token ought to have similarly recognized the irrelevance of reliance in cases that do not involve publicly traded securities. Yet instead, because of features unique to the market in publicly traded securities—namely the liquidity

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68. Affiliated Ute Citizens v. United States, 406 U.S. 128, 152–54 (1972).

69. *Basic*, 485 U.S. at 243 (rejecting the claim that fraud-on-the-market theory eliminates reliance, and agreeing with petitioners that "reliance is an element of a Rule 10b-5 cause of action").

70. *See id.*

71. *Id.*

72. Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS 214–49, 238 (Gerald J. Postema ed., 2001).

73. Sindell v. Abbott Labs., 607 P.2d 924, 936–38 (Cal. 1980).

74. Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1075–79 (N.Y. 1989).

and efficiency of the market in which they are traded—the Court decided that market prices could be presumed to transmit the defendant's misrepresentation and that, therefore, a victim's decision to buy at the market price amounts to reliance by the victim on the misrepresentation. The Court has not extended that presumption beyond non-publicly traded securities.

Third, the Court's stated reasons for adopting the fraud-on-the-market doctrine did not relate principally to substantive goals of securities law. Indeed, Justice Blackmun went out of his way to justify the presumption of reliance in traditional, evidence-policy based terms: "Presumptions typically serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult."[75] Likewise, he described them as "useful devices for allocating the burdens of proof between parties" that "aris[e]out of considerations of fairness, public policy, and probability, as well as judicial economy . . . ."[76] The fact that public trading of securities goes far beyond the face-to-face transactions of classic fraud law means that the courts' conception of how to demonstrate reliance must be adjusted (or so the Court reasoned).[77] These rationales speak directly to the evidentiary, rather than to the substantive, conception of presumptions.[78]

Finally, and most importantly, the Court's concern in *Basic*—and Congress's concern in the Securities Litigation Reform Act—was not a general concern to permit investors who probably have incurred losses because of fraud to recoup their investments. Rather, it was to permit those who have been *duped* into making certain transactions by fraud on the market to recover damages for having been so duped. In a fundamental sense, securities fraud retains reliance because it remains a variation on common law fraud. This is presumably one reason why Congress has displayed no interest in generally empowering securities plaintiffs to act as private attorneys general. Rather, Congress and the courts have continued to conceive of private rights of action for securities fraud as a means of empowering those who have actually been defrauded to sue their defrauders.[79]

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75. *Basic*, 485 U.S. at 245 (citing 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE 541–42 (1977)).

76. *Id.*

77. *Id.* at 244 ("The modern securities markets, literally involving millions of shares changing hands daily, differ from the face-to-face transactions contemplated by early fraud cases, and our understanding of Rule 10b-5's reliance requirement must encompass these differences.").

78. *See* Mirkin v. Wasserman, 858 P.2d 568, 593 (Cal. 1993) (Kennard, J., concurring in part and dissenting in part) (explaining that *Basic* set out presumptions for securities fraud cases and was not a substantive reinterpretation of the concept of indirect reliance in common law fraud).

79. This is not to say that victims of securities fraud are especially eager to pursue compensation from those who have defrauded them, even when others have mounted a lawsuit and generated a settlement. *See* James D. Cox & Randall S. Thomas, *Letting Billions Slip through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 STAN. L. REV. 411, 450 (2005).

B. Other Torts Perpetrated by Misrepresentation

It is not hard to find instances of tortious conduct that involve misrepresentation but do *not* amount to a defrauding of the plaintiff by the defendant. Indeed, one of the most famous early-modern tort suits—*Langridge v. Levy*[80]—is probably just such a case. There, the seller of a gun represented to the buyer, the victim's father, that the gun had been made by a reputable manufacturer and was safe for use. The seller knew at the time that the father intended the gun for use by himself and his sons. The victim was later injured when the gun burst as he fired it.[81] The Court of Exchequer upheld a verdict for the plaintiff, emphasizing the evidence indicating that the defendant had lied to the father about the gun having been made by a reputable manufacturer, and that the seller knew that identifiable others, including the victim, would be using the gun.[82] These conditions, along with the physical injury to the plaintiff from the exploding gun, were enough to generate liability.

Although the *Langridge* court mentions fraud and deceit, the suit was not forthrightly styled as a claim for deceit, but instead pressed simply as an action for trespass on the case.[83] Plaintiff's counsel identified two ways in which the seller had acted wrongfully toward the victim. First, he had acted in breach of the warranty made to the father. Because of the absence of privity, the victim could not sue directly on the warranty. Still, counsel argued, the action on the case provided the vehicle by which persons injured by breach of a contract could complain about it notwithstanding the absence of privity. In effect, he argued that the father had acted as the agent of the son, procuring the gun (with the warranty) for him, and as such, the injured son was the logical person to be empowered to sue for the breach, especially since the father could sue only for the lost contractual expectancy and the loss of the value of his son's services, not for the injury itself. Alternatively, counsel argued that the seller had committed a wrong against the victim by knowingly providing a dangerous instrumentality to another for the victim's use.

As in the subsequent decision of *Winterbottom v. Wright*,[84] Baron Parke was anxious to limit the plaintiff's potentially expansive theories. *Langridge* thus held that liability could attach, but only when a seller misrepresents the safety of a product to the immediate purchaser while knowing that identifiable others will use the product and thereby be put in physical danger by the combination of the product's dangerous defect and the misrepresentation to the purchaser.

Styled as a claim of common law fraud, the complaint in *Langridge* is awkward, in part because of the issue of reliance. Although the father could prove that he relied on the seller's misrepresentation, it seems as if his son did not. Perhaps one could argue that the gist of the seller's misrepresentation had been implicitly transmitted to the son when the father gave him the gun to fire, or that

80. (1837) 150 Eng. Rep. 863, 868 (Exch.).
81. *Id.* at 864.
82. *Id.* at 868 (Parke, B.).
83. *Id.* at 863.
84. (1842) 152 Eng. Rep. 402 (Exch.).

the father acted as the agent of his son. However, Parke's opinion seems to suggest that the plaintiff was entitled to prevail merely upon a showing that "[t]here is a false representation made by the defendant, with a view that the plaintiff should use the instrument in a dangerous way, and, [that,] unless the representation had been made, the dangerous act would never have been done."[85] In other words, the seller's utterance of a misrepresentation with the right sort of knowledge as to the risk of physical harm being posed to ultimate users, combined with a causal link between the misrepresentation and a user's being injured, suffices to complete the tort without there having been reliance by the victim.

So does *Langridge* stand as an early and impressive counterexample to our claim for the centrality of reliance to fraud in Part I? We think not. While the gravamen of any complaint brought by the father in his own right would surely be that he had been deceived into purchasing a gun that he otherwise would not have purchased, this is not the gist of the son's complaint. The seller's acts were not a wrongful interference with the son's decisional capacity. They were instead wrongful as to the son because the seller knowingly or carelessly posed a significant risk of physical harm, which risk was later realized. Thus, the son's complaint against the seller could be styled as one for negligence (albeit perhaps negligence accompanied by the sort of culpable mental state on the part of the seller that could warrant the imposition of punitive damages). Alternatively, it could be read to allege a wrong that does not amount to one of today's standard nominate torts, but rather constitutes the *sui generis* wrong of making an intentional misrepresentation that risks and causes, in the right way, physical harm to another. Either way, the absence of reliance on the part of the victim is rendered irrelevant. If the complaint is for negligence, a person in the position of the son would instead have to prove a breach on the part of the seller of a duty of care owed to him, injury, and an actual and proximate causal connection between them. If the complaint is for the innominate tort identified in Section 310 of the Second Restatement,[86] he would have to prove that the seller knew that he was making a

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85. *Langridge*, 150 Eng. Rep. at 868.

86. See RESTATEMENT (SECOND) OF TORTS § 310 (1977):

> An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor
> (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and
> (b) knows
> (i) that the statement is false, or
> (ii) that he has not the knowledge which he professes.

The Reporters for the "physical harm" provisions of the Third Restatement of Torts maintain that the wrong defined by Section 310 of the Second Restatement (and by its companion provision, Section 311) does not fit neatly within the confines of battery or negligence law. Yet they also seem to think that this wrong can and should be captured as an articulation of the "general doctrines" of tort law pertaining to economic loss:

> One basic type of negligence that is not dealt with in this Restatement concerns parties' misrepresentations that by affecting the conduct of others unintentionally bring about personal injuries or other instances of

false statement about the gun, that the seller intended to induce (or knew or ought to have known that he would induce) reliance on it by either the father *or* the son, and that the seller succeeded in inducing that reliance so as to cause harm to the son. The critical point in either case is that the son does not need to show reliance on his part because he is complaining of a different sort of mistreatment at the hands of the seller than that of being deceived into making a detrimental choice that he would not otherwise have made.

A similar point emerges if we fast-forward more than 150 years from *Langridge* to the decision in *Randi W. v. Muroc Joint Unified School District*.[87] According to the allegations in that case, defendants, various school administrators, wrote unqualifiedly positive letters of recommendation for a former employee named Gadams that were transmitted through a placement service to the middle school at which plaintiff was a student.[88] In part on the basis of those recommendations, plaintiff's school hired Gadams as vice-principal.[89] However, the letters failed to mention various instances, allegedly known to the recommenders, in which Gadams had harassed or otherwise interacted inappropriately with female students at other schools.[90] Plaintiff's complaint alleged that Gadams molested her on school premises. Her suit sought damages for negligence, negligent misrepresentation, and fraud, among other claims.[91]

After the suit was dismissed by lower courts for failure to state a claim, the California Supreme Court reinstated it.[92] Thus, like *Langridge*, *Randi W.* might look to be a case in which a court is prepared to permit a fraud claim to go forward without proof of reliance, since it seems quite clear that the victim herself never received, much less relied upon, the defendants' alleged misrepresentations as to Gadams' fitness for the job of vice-principal. Again, however, appearances are misleading. Despite centering on an allegation of misrepresentation, *Randi W.* is not a fraud case. This is why the California Supreme Court framed its analysis around Sections 310 and 311 of the Second Restatement, which designate as tortious certain misrepresentations that result in physical harm to others, and which do not require reliance on the part of the victim herself.[93] Specifically, the court

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> physical harm. The rules concerning negligent misrepresentation in physical-harm cases are derived, with appropriate modifications, from more general doctrines relating to misrepresentations that result in ordinary economic losses.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §§ 17–19 scope note (Proposed Final Draft No. 1, 2005). For the reasons offered in this section of our Article—particularly the absence of any requirement of victim-reliance in these sorts of cases, as opposed to true fraud cases—we are reluctant to endorse the idea that Sections 310 and 311 can be subsumed under "general doctrines" relating to misrepresentations causing economic loss.

87. 929 P.2d 582 (Cal. 1997).

88. *Id.* at 585.

89. *Id.*

90. *Id.*

91. *Id.* at 585–86.

92. *Id.* at 595.

93. *Id.* at 591. Section 310 is discussed above. Section 311 specifies that an actor (*A*) is subject to liability to another (*O*), or to a third party (*T*), if *A* negligently gives false

held that "the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third persons."[94] In other words, a victim who is physically injured by an employee whose qualifications are misrepresented by the defendant-recommender is, under certain conditions, entitled to recover from the recommender for her injury. As in *Langridge*, the crux of the victim's complaint (as opposed to a complaint that perhaps might be brought by her school) is *not* that she had been deceived by the defendants. She and they never even communicated. Rather, her complaint is that their misrepresentations to others (school officials) constituted a mistreatment of her that took the form, essentially, of being careless as to her physical well-being. In other words, the defendants' alleged misrepresentations (1) may have amounted to the wrong of fraud as to the school, (2) did not amount to the wrong of fraud as to the plaintiff, yet (3) amounted to a wrong such as negligence as to the plaintiff, and therefore were actionable by the plaintiff.

Finally consider a hypothetical case in which one person, *D*, successfully defrauds a testator, *T*, into changing his will to leave his assets to *D*, thereby depriving a beneficiary, *B*, of what *B* would have received under the will had not *D* defrauded *T*. In this scenario, *D*'s acts amount to two different wrongs to the two different victims. As to *T*, *D* has committed the tort of fraud by knowingly making a misrepresentation of fact to *T*, intending for *T* to rely on it, and causing a detriment to *T* by virtue of *T*'s justified reliance on it. As to *B*, *D* has not committed the tort of fraud, for *B* has in no way relied on *D*'s misrepresentation—he is not the one who has been deceived. Still, *B* has grounds to complain that *D*'s misconduct has cost him dearly. And the modern law of tort might well vindicate *B* by affording him a cause of action for tortious interference with non-contractual expectancy. While, ordinarily, convincing a testator to change his will to the detriment of another is not a legally cognizable wrong to that other, if it is achieved by "wrongful means," including misrepresentations, then it may well provide the basis for a claim for tortious interference.[95] The victim who presses such a claim has no need to establish that he relied on the misrepresentation, because, again, he is not complaining of having been tricked or deceived by the defendant. Rather, he is claiming that the defendant intentionally used trickery on someone else to deprive him of assets he reasonably expected to receive, and probably would have received.

The basic notion at work in the cases considered in this section is simple yet often ignored or glossed over. An act of misrepresentation can sometimes provide the basis for a fraud claim by a person who is adversely affected in a certain way by it, yet at the same time provide the basis for a different tort claim

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information to *O*, such that *O*, acting in reasonable reliance on that information, causes physical harm either to herself or to *T*. However, *T* may only recover if *A* could expect that a person such as *T* would be imperiled by *O*'s acting in reliance on *A*'s false statement. RESTATEMENT (SECOND) OF TORTS § 311.

94. *Randi W.*, 929 P.2d at 591.

95. *See* DOBBS, *supra* note 3, § 446, at 1261–62 (discussing tortious interference via wrongful means).

(such as negligence or tortious interference) by a different person who is adversely affected in a different way by it. The notion, in short, is that the same acts can constitute Tort α as to Victim *X* and Tort β as to Victim *Y*. Although not often remarked upon as such, the idea that conduct might be in this way *plurally tortious* is hardly esoteric, nor is it limited to the realm of misrepresentation. Consider, for example, a standard case of "transferred intent" battery, in which *S* shoots at *I*, intending to harm him, but misses *I* and ends up striking *V*, with respect to whom *S* had no intent whatsoever.[96] Now imagine a slightly different version of the same facts and you get a situation that, in its analytic structure, is quite close to that of *Langridge* and *Randi W.* Suppose that *S* succeeds in shooting *I*, but that the bullet passes through *I*'s arm, ricochets off a rock, and ends up striking and harming *V*, whom *S* had no desire to injure (and whom *S* did not know that he would injure). Presumably courts would say that this, too, is an instance of a straight-up battery by *S* against *I*, as well as a transferred intent battery by *S* against *V*. But, depending on the facts, a less fictional description of these events might be that *S*'s act of shooting constituted the wrong of battery as to *I* and a different wrong, such as the wrong of negligence, as to *V*. True, this particular act carried with it a feature that other instances of negligence do not carry, namely an intent to injure at least one person (*I*). And we can imagine that this fact might give a court a reason to classify this sort of negligence with respect to *V* as warranting different legal treatment for certain purposes.[97] Still, if we isolate the issue of what it is that *S* has done wrong to *V*, his unintended victim, it seems entirely apt to say that, as to a bystander such as *V*, *S* acted only carelessly (or perhaps recklessly) in purposely shooting at another person in a situation where he knew or should have know that others such as *V* might get shot.

The foregoing analysis makes clear, we hope, that even when we are confronted with common law tort suits containing allegations of wrongdoing in the particular form of misrepresentation, we do not know yet whether we are dealing with a case in which the plaintiff must establish that he was injured by virtue of relying on the misrepresentation. Some legal wrongs that are not frauds can be perpetrated by misrepresentation, and it is only the wrong of fraud, among the common law wrongs we have discussed here, that—because it is all about deceiving another into making a detrimental decision—requires a showing of victim reliance.

CONCLUSION

The key to unlocking the puzzles surrounding reliance is to appreciate that tort is a law of relational wrongs. For it is only by asking what the defendant has done wrong *to the plaintiff* that one begins to get a handle on the issue of when

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96. *See In re* White, 18 B.R. 246 (E.D. Va. 1982).

97. For example, in *White* the federal bankruptcy court was being asked by the shooter to discharge his tort debt to his unintended victim under a Bankruptcy Code provision that explicitly states that only 'deliberate or intentional' wrongs give rise to non-dischargeable debts. Reasonably, the court concluded that the Code is best read to deny dischargeability so long as the debtor's liability arises from a wrong that is deliberate *as to someone*, even if not the victim. *Id.* at 248–49. Just because torts require relationality does not mean the Bankruptcy Code is best read to require it.

reliance will matter and when it will not for purposes of imposing liability. Far too frequently, judicial and scholarly analyses of tort law focus only on the quality of the defendant's conduct—was it a misrepresentation or not?—to the exclusion of any consideration of the proper description of that act *as it bears on the relevant interests of persons such as the plaintiff*. Until analysis of tort law can get past this unilateral focus, there will be needless confusion. More generally there will be a continuation of the current mischaracterizations of tort law as a form of public, regulatory law, and a failure to appreciate what it stands or does not stand to deliver as a law of (private or relational) wrongs and redress.

We have argued here that the tort of fraud or deceit is defined in such a way that reliance by the victim quite naturally forms an essential part of it. Fraud protects the victim's interest in exercising a certain kind of decisional liberty free from misinformation. The wrong of fraud is the wrong of making a misrepresentation for the purpose of having someone rely on it to his detriment, and thereby interfering with the victim's interest in free choice. As such, reliance is critical to a claim of fraud, for without reliance there is no such interference. Yet this is not to say that whenever the law is concerned with wrongs involving misrepresentation it must require proof of victim reliance. In the name of deterrence, for example, a legislature might wish to arm victims who suffer economic harms because of misrepresentations to sue for damages without regard to reliance. This is what we see in some state consumer protection laws. In the name of protecting other interests, such as the interest in bodily integrity, the law might also render misrepresentations actionable without reliance. This is the message of Sections 310 and 311 of the Second Restatement. The key point in all of this—a point at once conceptual and practical—is that courts, ALI Reporters, and law professors more generally must attend closely to the contexts in which questions about the place of reliance arise. Reliance is central to the tort of fraud because that cause of action defines a particular wrong for a particular set of purposes. Appreciating this point in turn permits us to reason more intelligently about whether and when it is appropriate to relax or abandon that requirement in other settings.