Tort Wars

Joel Levin

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Tort Wars brings together the diverse and usually insufficiently related strands of tort law and treats the moral, economic, and systemic problems running through those strands with a single analysis and a single theory. In that tort law employs theory at all, it is typically theory measured against notions of corrective justice or appeals to utility. Both have severe prescriptive restrictions and limited explanatory power and often stray from any useful description of tort cases in the courts. *Tort Wars* looks at the nature of dispute resolution techniques, criticizes the blasé justice and more esoteric utility theory, and examines the problems of both the legal academy and the veracity vacuum in the courtroom. Further, it explores the conceptual differences between tort and contract, locating contract as a subset of tort. It uses examples drawn from the edges of tort law in an attempt to measure central cases by the marginal ones and to provide a barometer of emerging legal and social change, achieved by imposing an individualized peace.

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For Mary Jane
Once, Now, Always,
and Forever

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Preface

This book represents a personal journey, with all the parochial, idiosyncratic, and narrow-minded limitations of such journeys. Having started life focused on an academic career in social science and history, I, like many who saw the waning of professional opportunities in the early 1970s, turned to law. Unlike my more focused colleagues, the tug of the academy continued to beckon, be it at an angle, and I went to Oxford to study philosophy – and proper British analytic philosophy at that. Philosophy degrees having much the same market currency as (and perhaps less caché than) social science degrees a decade earlier, I have spent my life practicing law, mainly, surprisingly enough to me, in a field few choose and hardly anyone with a "decent" degree mentions: tort law. Having handled several thousand tort cases of every kind and having tried close to two hundred while, at the same time, reading just enough in various fields to pass minimal competency to qualify to teach at several law schools that generously overlooked my limitations as a scholarly dilettante, I observed the obvious: academic studies (from economics to history to philosophy to science) present a small and remote voice typically lost in the din and clatter of the law courts.

The most daunting concern in writing this book is illustrated by a story a friend told me about the European history faculty where he taught. A senior and eminent member of that faculty wrote a book globally treating European history and asked for comments of the draft from his fellow historians. They all gave the same basic response. The book was brilliant, in general, but the treatment of their own particular field was just not right. Only ignorance of a field produces a free ride. Such is the problem with any treatment of law (although typically without the brilliance). In fact, as the question of "what is law?" remains so contentious, one could hardly expect that applying the controversial and inexact tools of philosophy, logic, economics, neural science, or common law reasoning – each themselves at least as contentious – would appease anyone. My apology to the reader who is more widespread than that, as I try to illuminate the dark by the candlelight of the obscure. The perspective here is rooted in readings, references, and subject matters whose choices are meanderingly my own, based on perhaps indefensible tastes in seminars, fields,

books, and, of course, my legal practice, which is often a function of what client walks through the door.

However, that said, despite a seasoned cynicism gained from working within a tort system often teetering on the brink of catastrophe, a system too often populated by indifferent judges, ethically challenged and marginally competent lawyers, avaricious clients, hired-gun experts, dissembling witnesses, and increasing statutory reforms that are at once inscrutable, biased, ignorant, and arbitrary, I have become something of a proponent of tort law, if much less than an enthusiastic fan. Two events have helped to contribute to this conversion. First, having lived in Russia, my exposure to a society that views the legal system only as a last resort was chilling. Those skeptical of the Anglo-American legal system's ability to resolve disputes through a cumbersome, procedurally driven mechanism, with vague delineations of duty and finders of fact amateurish in their sophistication and knowledge, ought to ask what happens when all of this disappears. Blood-feuds, warlordism, mafioso remedies, and self-help all make for a thuggishness that permeates a daily life bereft of resort to law. Second, politics has become more directly involved with tort law – from tort reform to the Contract with America – and the focus has not been on improving a dysfunctional process but on stopping disagreeable results. The politics of reform represent a fundamental move from populism to authority. Juries are restricted, judges kept on tight leashes, remedies limited or assigned according to a schedule oblivious to individual needs. The driving force seems to be this: allowing everyone to have a hand in deciding tort cases is at least rash, probably imprudent, and occasionally dangerous. My own observation is that the mediocrity of the tort participants, like the mediocrity of the voters, yields vastly better results than the decisions of authoritative elites. Thus, parts of this book are not only more celebratory than I would have thought possible, but they are more celebratory than I, at almost any given moment, feel.

In any case, although this book's topic and plot are mine, a number of people have read and criticized drafts of the content, and, given my obstinacy in the face of enlightment, their help is particularly appreciated. Friends who have performed this favor include David Forte, Mark Gamin, Bob Lawry, Bill Leatherberry, Richard Mason, Max Mehlman, Tom Muzilla, Charles Ruiz-Bueno, Mike Ungar, Bob Warren, and Bob Yovovich, with Kathy St. John, Mary Jane Levin, Apu Paul, and Chris Vlasich providing long-suffering and invaluable service by closely reading and criticizing the entire manuscript. I appreciate the kindness of the American Bar Association, and its *TTIPS* journal, for giving me permission to use Chapters 3 and 4, modified and supplemented, for this book; and the gracious support of John Berger and Cambridge University Press in publishing this book. Finally, Mark Gamin encouraged me to begin this book, and my wife, Mary Jane, encouraged me to finish it. I owe them special thanks.

TORT WARS

Introduction

Why tort? Worse yet, why philosophy of tort? The reason here is certainly not to achieve an elegant, theoretical model or to transform tort as an entire area into a coherent and consistent whole. In fact, it is not clear how either of these understandings could be accomplished, as it is far from certain that the disparate matters we call "tort" fall into a single, discrete category. They are much more, to use Wittgenstein's famous metaphor, like a group of individuals sharing family resemblances, with remote cousins looking quite different than siblings.[1] Securities fraud is not very much like an auto accident, but an accounting malpractice matter might share a number of important features with each. In any case, from antitrust to civil rights cases, from toxic cleanup to defamation, from defective products to converted goods, there are enough features in common – imposed duties, private remedies, compensatory damages, proximate cause requirements, defenses of contributing or assuming or misusing fault, jury findings largely final and related concepts of intentionality – to be able to speak coherently about tort law as a field.

The idea of using philosophy to analyze law, particularly tort law, is one too easily reflexively protested. Such a protest would be misguided for two reasons. First, law is a contingent social activity, with few necessary constraints or required structures. Put simply, it can always be otherwise than it is. Philosophy of law has been labeled "descriptive sociology,"[2] and there is a strong suggestion of the contingent, empirical, political, and even irrational in all of law. One indication of all those things is the fact that, after decades or even centuries, any particular legal doctrine may be ever more unsettled and controversial. If some internal rationalizing or ameliorating force were at work, we would expect fewer legal disagreements, not more. Yet explaining this remains, and remains the task largely of theory. Without such theory, not only does law look chaotic, its force as a civilizing, equitable, just, and peace-making possibility

[1] Ludwig Wittgenstein, Philosophical Investigations §67 (1953).
[2] H. L. A. Hart, The Concept of Law vii (1961).

disappears. This theory need not be grand, but its does call upon us to make consistent the scattered legal fragments and to create a common set of justifications across disparate legal fields. Second, most legal philosophy is dissimilar from the philosophy conducted in universities and academic journals. The conceptual apparatus, semantic analysis, truth-theory consideration, quantification to propositional logic, and comfort with the most abstruse concepts is missing. Rather, philosophical tools and methods are used to illuminate (or at least attempt to illuminate) a field cluttered by practitioners and politicians (judicial or legislative) motivated to achieve certain ends often without concern of how they get there. Put differently, bad theory and shoddy logic are the prevailing practice, and bringing them to light provides a method to dislodge it.

Law is very much ends-driven, with talk of process values a fog to keep concealed a conflation of weak theory and facts delivered by those hired to prove them. American law has various actors who play the roles that provide the jerky dialogue of the action, but consider for a moment who they are and how they are picked. Parties to a suit may speak of justice, but they are driven almost entirely by self-interest. They participate because they are at the wrong end of a contract breach, an automobile accident, a property controversy, a failed sale, an employment dispute and, not unnaturally, they want what is best just for them. They hire lawyers as their agents to do that. Assertions that the advocate/adversary system – pitting championed opposing clients, washed through a system of procedural regularities and third-party remedy agents – aims at either truth or justice are just plain false. It aims at winning, and truth or justice (or both) may be, in some times and some places, a partial by-product. If the matter is tried, balancing tactical and financial decisions about what evidence to introduce and how thorough or lengthy to be in presenting that evidence on the one hand, with concerns about the quality, competence, attentiveness, thoroughness, and neutrality of the trier of fact on the other are the mundane concerns of legal participation. They are enormous matters, and involve huge factual swings. Arriving at the truth, if something better than a random activity, still remains largely a matter of chance.

If lawyers are not hired to find truth, what of the other actors? Before we can consider judges, federal, state or local, we need to return to the matter of legal theory. Jurisprudence, the theory or philosophy or science of law, is concerned with the larger, conceptual questions of law and legal systems. Done well, it provides insight on the one hand and a basis for criticism and reform on the other. However, in America, it is only a slight exaggeration to suggest that it is hardly done at all. It has been replaced or superseded by constitutional law theory, with a number of disturbing consequences. Consider, first, what is missing. The entire range of theoretical inputs – from logic, anthropology, history, economics, science, and, of course, philosophy – is included if and only if they bear on some theory of constitutional interpretation, and then only through the filter of that interpretation. Thus, although instruction in jurisprudence

is virtually required, often several times, in law schools throughout most of the world, not only is it nowhere required in America, it is often not even offered. Instead, constitutional law courses abound, with various offshoots covering individual rights, federal jurisdiction, and particular Amendments offered widely and repeatedly.

But crowding the field is just part of the problem. The practice of constitutional law involves an element of the interpretation of holy writ, with federal judges the priests and priestesses uttering the authoritive, if delphic, meanings. Ultimately, this involves an argument not from reason but authority, that of the text and its gospel writers. Aside from the insane task of divining who thought what and why, when they argued, compromised, dissented, kept silent, promoted private agendas, traded votes, or failed to show up – and whatever we make of the thoughts, largely unrecorded, of a small, unrepresentative, white, male, Christian, slaveholding, prosperous group of oligarchs – the question is: why should those thoughts and that text be the end of the matter? Should we be at all concerned as to what Madison really would think, after providing for separate constitutional treatments for patents and copyrights of how to categorize computer source codes. Because we read, is it more like a book or because we use it to run a computer, is it more like a machine? Even if this process might be relevant (Madison turned electrical engineer), why is it (largely) the beginning and end of the process?

If neither the Constitution nor federal judges were granted authority from a deity atop a mountain, despite murmurings to the contrary, then the validity, morality, utility and completeness of the text is also open to question. For example, how should we treat the Declaration of Independence, or the intent of its author or authors?[3] What significance should we afford the term "equality" when the text included mentions of slaves and the requirement to count their potential votes as three-fifths of a human, with rights assigned their masters?

This is not a matter of doing better constitutional theory alone. What is required is more than a sharper self-examination in the constitutional mirror, more than a self-referential logic. It requires a metatheory, a philosophy, or theory of constitutional law. For example, among candidates representing shades of homage to textual authority – similarly (perhaps, given the politics, suspiciously, so) to Biblical textual exegesis and the arguments spanning the

[3] Being originalist about the Declaration of Independence is no easier, conceptually, than being originalist about the Constitution. The draft was largely the product of Jefferson, with large changes made by the Continental Congress, enough that Jefferson refused to allow it as part of his gravestone epitaph (unlike the Virginia Constitution or his founding of the University of Virginia). Moreover, Jefferson's own ideas were lifted as a social contract theory based on the (capitalist, anti-Church of England, subject countrymen) Scottish Enlightenment thinkers. Should we put these ideas back in their natural habitat to understand them and make David Hume and Francis Hutcheson founding fathers? The problems are well set out by Garry Wills, Inventing America: Jefferson's Declaration of Independence (2002).

range from liberal theology to fundamentalist belief – which should be used, why and when? What other authority counts, why and when? To pick just one problem, suppose an imaginary couple, George and Martha, who were married in 1759 in the Virginia Colony. One of their neighbors, John, took several of their horses in 1775; a second neighbor, Quincy, ran over Martha with his wagon in 1777; whereas a third, Sam, called George a traitor in a local Loyalist newspaper in 1780. The Declaration of Independence was signed in 1776, the British surrendered at Yorktown in 1781, the Constitution was ratified in 1789. The Articles of Confederation left most legal (and all tort) matters to the states, whereas state statutes explicitly deferred to the laws of England as their sovereign. In 1782, George files suit against John and Sam for conversion of his property and defamation, and also files a consortium case for his financial and other losses to Martha against Quincy. What law applies? If English law survives, then the wrong George is about to be made President. If American law applies, pursuant to what authority, and what in the world is it? If it is Virginia law, how can we explain the statutes of the Virginia Colony turned Commonwealth to the contrary? As for the torts, they arise in part as a consequence of breaching the King's peace, hardly noticeable given the large carnage of the American Revolutionary War.[4]

Preoccupation with constitutional law has not only made us soft and clumsy with large legal issues, it also has caused an outlook best described as constitutional reductionism. A basic look at the problems of tort serves as a ready antidote to this. It also reminds us of how much is missing from a pure constitutional focus. Many of the notions we prize most – privacy, equality in the workplace, rights to travel and procreate and choose one's mate, freedom from sexual or racial harassment – came late to constitutional law, whereas others – the right to a safe environment, to choose one's own death, to clean air and water – remain on the constitutional horizon. Many of these matters are tested in tort – privacy, nuisance, and harassment all come to mind – and the reasoning there becomes the basis, often coopted, for constitutional decisions.

[4] Of course, they also arise as a result of the creativity, expansions, embellishments, jurisdictional turf wars, and political battles of the various English courts: King's (not people's) Bench, Common Pleas, Exchequer (of the Crown), the (King's Chancellor's, never an office in the United States) Equity Court and a writ system originating from the King's Court itself. How these facts would help solve the question of "what is the law" is at least as puzzling as solving the "trespass protecting the King's peace" first cut of the problem. One early court was clear about the disconnect between the systems:

> In all these respects, the policy and spirit of our Laws are the reverse of those of the English Laws. We have no appeal, in which the right to a civil action can merge. We have no forfeiture to the public, of the stolen goods or even of those of the felon; no fresh suit, or active prosecution, on the part of the injured person, is required by our Laws, to entitle him to restitution. We have no Law of waifs, nor any subjecting the Hundred to make satisfaction in any case; and our Law, upon the whole rather *discourages* then *invites* individual prosecutions. *Allison v. Farmers' Bank*, 6 Rand. (Va.) 204, 223 (1828).

So, part of the motivation for this book is to present ideas and methods successful outside law to straighten out a number of legal issues that a (purposely) biased process and the hegemony of constitutional law fails to address. But the motivation is not just to be contentious. Constitutional history is often understood to be largely explanatory of American history, from the Marshall Court's establishment of federalism through and past the Warren Court's emphasis on civil liberties. Indeed, it is. But even as legal history, it is only part of the picture. Just concentrating on the statutory reforms of tort law by Congress since the Civil War is evocative and explanatory of many of America's social upheavals and much of its history. Consider just a few acts by the federal government in an area that is universally conceded to be primarily a state concern.

Following the Civil War, neither freed slaves nor previously emancipated men were safe to work, to go to school, to vote, even to exist in the former Confederacy. With some success early, the Civil Rights Acts of 1871 and 1875 protected these individuals when little else (short of the quickly withdrawn Union troops) did.[5] These acts allowed former slaves to sue in tort in federal courts for deprivation of federal and Constitutional Rights. Later in the nineteenth century, national markets and small businesses appeared endangered by combinations, cartels, trusts, and monopolies that conspired to fix prices, divide the marketplace, eliminating fair competition. Thus, in 1890, the Sherman Antitrust Act was signed.[6] Early in the next century, America's largest employer, the railroads, saw high numbers of its workers maimed, disabled, or killed, with no real remedy or available compensation. Thus, in order to provide a safe workplace, some compensation, and perhaps to promote industrial peace, in 1908, Congress enacted the Federal Employers Liability Act (FELA) to protect railroad workers.[7]

After stabs at civil rights, enterprise rights, and workers' rights in the late nineteenth and early twentieth centuries, Congress went on to enact various pieces of legislation to correct the social ills witnessed in the remainder of the twentieth century through tort legislation (or legislation with private remedies as part of a larger statute). Both Democratic and Republican administrations promoted such legislation. The undermining of the integrity of large companies, in the face of the market crash of 1929 and ensuing depression, was addressed by the Roosevelt administration in sponsoring the passage of the Securities Exchange Act of 1934, allowing recovery under §10b-5 for price manipulation, insider trading and fraudulent securities practices.[8] President Johnson signed the Voting Rights Act of 1965, protecting minority rights.[9]

[5] These, essentially, are now part of 42 U.S.C. §1983 and 28 U.S.C. §1343(3).
[6] The Sherman Antitrust Act is 15 U.S.C. §1 *et seq.* Section 7 allows private suits and treble damages.
[7] FELA is 45 U.S.C. §51 *et seq.*
[8] 15 U.S.C. §78j.
[9] 42 U.S.C. §1973.

During the Nixon administration, to combat the influence of organized crime or simply those ethically challenged, Congress passed the Racketeer Influenced and Corrupt Organizations Act (RICO)[10] in 1970. The issue of encouraging vaccines to come to market, even imperfect ones, for the greater good, and in light of the achievement of the polio vaccines, was signed by President Reagan as the National Childhood Vaccine Act of 1986.[11]

Congress, having protected those who own stock, belong to a minority, might become ill, or are victims of mobsters, finished the century improving the lot of the worst and best off in the nation. It passed the Americans with Disabilities Act (ADA), protecting employment and access to the least healthy in the country in 1990.[12] Pursuing the Contract with America, Congress, over a presidential veto, passed the Securities Litigation Uniform Standards Act (SLUSA).[13] It protected corporations from shareholder suits prompted by problematic changes in the corporate stock price.

Not only, then, does tort cut across a myriad of issues, but as these issues become more central to the core of the civil society, they move from state to national attention and from judicial to legislative action. However, substance aside let us take one final, brief look at the other actors in the systems: politicians and academics. The politicians come in two flavors, judges and legislators. American judges are chosen in a manner often indifferent to talent, experience, qualifications, or independence. Once on the job, they are thrown in without training or apprenticeship and, at the trial level, immediately judged by their success at docket clearing. The present system is in extended overdrive from the criminal docket, with its endless drug cases and violent crimes of young and directionless men of the underclass, demoting civil law to the status of the neglected stepchild of the court system.[14] More importantly, any resolution is as good (in general) as any other. Finally, the larger factors that count in any full analysis of a particular issue may or may not have been illuminated by the parties and the controversy, and might remain unknown or obscure to the judge. As to legal review, appellate courts are explicitly formed to examine error from below, but not to go beyond that. Thus, although the occasional

[10] RICO, 18 U.S.C. §1961 *et seq.*

[11] 42 U.S.C. §300 *et seq.*

[12] 42 U.S.C. §12101 *et seq.* The act has basically been gutted by hostile courts as part of the tort wars. See, for example, *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999) and *Albertson's Inc. v. Kirkenbur*, 527 U.S. 555 (1999).

[13] 15 U.S.C. §780-4 *et seq.*

[14] There are exceptions, such as parts of Texas and New York City, where the civil side has a separate judiciary from the criminal. The pressure against extending that reasonable division of labor, and judicial talent and inclination associated with it, comes from a telling place: the criminal defense bar. It is their, no doubt accurate, perception that former prosecutors so harsh on their clients and their rights would gravitate to the criminal bench, while those more moderate on sentencing and cognizant of defense rights are originally trained at the civil end and would likely want to continue to be there.

brilliant jurist – Coke, Mansfield, Marshall, Holmes, Hand, or Traynor – transforms legal doctrine, the perspective is almost always that of an actor allowed to embellish a script and add some crucial asides or extemporaneous words, but always circumscribed within the original story. Finally, there are the legal academics, a group treated in Chapter 3. Often armed with little more than an undergraduate law degree, given scant training in any outside methodology (not even comparative or historical law, perhaps critical if one wants to understand one's own system), and required to publish in journals run by students with little greater knowledge of the world than children, they write at a pretheoretic level with a sheltered and parochial insidedness, analyzing bits of law cast adrift from any social moorings and larger conceptual concerns, all the while oblivious to their isolation. Meanwhile, the need for theory remains entirely unaddressed.

However, tort has hardly been forgotten. In fact, it has become highly politicized. One interest group after another, first potential plaintiffs, then defendants, have pled their case not in the courts, but robustly in the media and before the legislatures. One can see much of the tort law of the last century or so as matters of special pleadings. The injured potentially casting themselves as victims looking to correct uncompensated wrongs – workplace injuries, discrimination everywhere, unfavorable treatment by governments, lack of access for the disabled, securities shenanigans, consumer fraud – have successfully seen their lobbying result in waves of workers' compensation, civil rights, disability rights, blue sky, and lemon laws. The potentially injuring tort feasors have also cast themselves as victims, and achieved real success in this role, particularly more recently. Tort reform of medical malpractice and product liability, SLUSA – and Private Securities Legislation Reform Act (PSLRA) – curtailing securities suits, and Class Action Fairness Act (CAFA) regulating class actions: each involves successes in shutting down or greatly restricting tort suits.[15] That said, much of the talk in favor of or against particular reforms is disingenuous, as economic, political, and personal goals supercede the ideals of truth, candor, and accuracy. The extent to which tort talk is far from straight talk is addressed in Chapter 4.

Returning, however, to the congressional statutes: they are instructive, not least because they at once point to a perceived failure of the existing system, an unwillingess to trust precedent and "the rule of law" to correct systemic excesses, and a willingness to balkanize the legal system, leaving little in the way either of organizing principles or a mandate to treat similar cases similarly. These reforms provide a hodgepodge of statutes of limitations for indistinguishable claims, require prescribed cases to be venued in certain courts (presumably in the hope of tamer judges), cap damages for specific wrongs but not for others

[15] PSLRA is the Private Securities Litigation Reform Act of 1995, 15 U.S.C. §772-1 *et. seq.* CAFA is the Class Action Fairness Act of 2005, Pub. C. No. 109-2, 119 Stat. 4.

(leaving otherwise identical victims more or less prosperous or impoverished), and change levels of intention, proof, and defenses. No justification other than the thinnest pretext of grand justice is given, with interest group politics usually the transparent motivating force. But the politics are instructive. The legislation is meant to open or close the courthouse to entire sets of claims but not by going to those who might best understand the entrance parameters, namely those who work there. Instead, through the usual political lobbying methods of accusing vilification and claiming victimization and of mischaracterizing rules and characterizing particular outcomes, a wide swath of change occurs.

Tort is politicized with such heat, from the Sherman Antitrust Act to the Americans with Disabilities Act to state tort reform legislation, not because rulings and verdicts are fallible. It is politicized because tort is so important. Some of these political concerns are addressed in Chapters 6 and 7, whereas the centrality of tort to ordinary affairs is addressed in Chapter 1. The purpose here is reformist in that (some small part of) the cant, inconsistencies, improper shortcuts and inadequate justifications are addressed in the larger context of measuring ideals against results and various methods by the metric of clarity and consistency. The ultimate test is whether we can produce a civil society that defuses the small conflicts – whether arising because of unfairness, violence, greed, indifference, overreaching, undue influences, corruption, bigotry, sloth, or even malice – by solving them in a tort system sufficiently trusted and sufficiently trustworthy to resolve conflicts as tort and not as social wars. Perhaps the secret of doing so lies in the wisdom of Socrates and Gladstone, the subject of Chapter 2. Let us hope that somehow we can pass the test.

1

Digesting Torts: An Explanation

Consider a blizzardy Monday morning at 8:30. Our hero, not finding his morning paper, snatches his neighbor's, but not before his neighbor's dog takes a bite out of him. Blood-stained, paper in hand, our hero drives to the local café secretly to meet his main rival's CEO, John D., to discuss dividing the market. Bad news awaits. John D. fails to appear, while the morning paper reveals the entry into the market of a new competitor, Standard Nonsense. He is shocked by the news, particularly as Standard Nonsense's president, J. P., told him yesterday on the back nine, off-the-record, of huge inventory losses. Our hero is irate, labels J. P. a liar and criminal to all within earshot, and flings his cup, striking the cashier. Muttering apologies, our hero leaves and, not noticing the icy build-up from the café's broken gutter, slips, badly bruising himself. Yet more upset, he enters his car, calls his broker to sell his shares in Standard Nonsense and to short Standard Nonsense further. Paying scant attention to the road, our hero runs a stop sign, slams into a conductor on the commuter train, and then sideswipes another car. Finally, arriving at work and needing caffeine (having thrown his portion at the cashier), he screams for his elderly secretary to make fresh coffee pronto and, when her age and orthopedic problems prevent her from scurrying fast enough, he calls her sexually offensive names and fires her. He then phones John D. to discuss a strategy to keep Standard Nonsense out of the market. They agree to keep prices down temporarily and, in a series of e-mails, discuss dividing the market between them. Well-satisfied, our hero signs the tax returns prepared by his outside accountant, failing to notice that profits from certain exercised warrants are improperly treated as income rather than losses, and then heads to his doctor to treat the bruises from the bite, the fall, and the auto accident. His physician overestimates the risk of infection, forgets our hero's reaction to certain medications, and orders needless and hazardous tests. Our hero goes upstairs to the lab for, and is provided, one such medication, which makes him violently ill. He is then given a new drug for nausea but, poorly tested, the drug renders him unconscious. The city's EMS

is called, connects him to an ancient life support system, which sparks a fire, burning our hero to death. It is 9:30, an hour full of torts.

We might look at the events swirling around our hero. They seem to involve a number of acts that have no easily discernable organizing principles: taking a newspaper, being bit by a dog, hitting a car, throwing a coffee cup, firing a secretary, slipping on ice, price-fixing, missing a tax break, being medically mistreated, dying of an adverse reaction to a poorly tested product (and these are but a few). The number of different tortious actions is not intended to be some sort of law school problem for the benefit (or to continue with the law school metaphor, humiliation) of the readers. Rather, it is the ordinariness coupled with the breadth of actions that is interesting. Torts, if not ubiquitous, are everywhere in the air.

Let us then walk through tort's phenomenological thicket, attempting to gain a sense of not only the geography, but perhaps the logic, order, and even odors of the place.[1] How, then, did our hero's day start? With the most primitive of torts, a trespass, followed by a theft and an attack from an animal. Our hero looked outside for his newspaper, either misdelivered, buried under snow, or perhaps taken by a fellow thief, and not finding it, trespassed on his neighbor's property and took ("converted" in tort parlance) his neighbor's paper. However, his conversion has the downside of a dog bite, the emaciated remnant of the more widespread panorama of medieval animal torts. Should the neighbor have the right to sue and should our hero have the right to sue back?

First of all, was our hero's neighbor harmed by the walk across the lawn? If not because of any substantial property damage, what about an expectation of privacy or a property right to exclude that, if unpunished, puts one on a slippery slope to extinction? This presents the threshold and thorny problems in tort law of what interests should be protected. Crunching an icy lawn is inconsistent with full and constant use of a property right by its owner, but that right is neither vested nor capable of full, ongoing, and constant use. Property rights are not only complex and differentiable (e.g., right to include, use indefinitely, use for a period of years, lease, traverse, mine, farm, log), they are, as John Locke's famous failure demonstrates,[2] nearly impossible to justify with any

[1] There is something of an allusion here to Daniel Dennett in his Consciousness Explained (1991), but only as a borrowing of the terminology and storytelling, not as to methodology or theory.

[2] John Locke, in §27 of The Second Treatise of Government (1690), allows each person to have "property in his own person," the "labor of his body and the work of his hand" and other property involving his labor so long as "there is enough and as good left in common for others." Essentially, he can improve or leave matters even for others, but not make things worse. Putting that together with use of land, resources, liberties, and pollution, to name just a few matters private property infringes upon, in a way that meets Locke's criteria has proven impossible. Nozick's attempt in his Anarchy, State, and Utopia (1974) is probably the best known effort to save Locke, though it is riddled with problems. One devastating attack on any method of saving Locke, including that of Nozick, is Onora O'Neill, *Nozick's Entitlements*, in Reading Nozick 305 (Jeffrey Paul, ed., 1981).

moral thoroughness or consistency. Whatever complex calculus could justify a possible set of property rights, undoubtedly there are moral imperfections in the acquisition for value or the title chain of our hero's neighbor. That is, at some point, force, fraud, sham, or fundamental unfairness taints all known title. Do we care in tort? Not even a little. The system suffers from a congenital case of presentism, unable to notice past injustices in distribution or the irrational, but absolute, certain misfortunes of the future. Do we care about the damage to the property, the intent to intrude, or both? It turns out that the intent to harm is more important than the harm itself, and even in the (relatively) stricter look at trespass – being tossed onto the land and ruining a valuable statue gets a free pass, while our hero does not.

It could be otherwise. We could have an insurance model, one either victim- or actor-motivated. A victim model – it might resemble normal homeowner's insurance coverage – would limit any remedy to the victim's own resources or insurance. The loss would remain where it falls, with only antisocial behavior, our hero's or perhaps that of a more malevolent counterpart, being a basis for liability, and criminal at that. The costs could be more easily rationalized and internalized, as the expense of shifting the costs could be avoided and the risk of nonpayment reduced. An actor model, on the other hand, would place responsibility entirely on the shoulders of whomever or whatever causes it, not unlike much of liability insurance, with intent being irrelevant. If a tornado lifts my car through your picture window, I, or my insurance carrier, would pay you. Again, the costs of the system would be minimal, with criminal law covering the marginal, more sociopathic cases.

We have neither, or rather a system that fails to cover some property damage and then operates at great expense based on intentionality, a subject we shall continue to examine. Here, a few words about intent. The notion of intentionality dividable neatly into the categories of specific or general intent, recklessness, gross negligence, and negligence is based more on moral theory than any medical or neurological reality. The very terms refer to concepts of mind and mentalism that cannot account for the physicality of the brain and are without explanatory power for much of neuroscience or ordinary behavior. The moral theory, often untroubled by determination and mental health issues, suggests that how much the actor knew or was wrongly motivated determines compensation. The nonsequitur is evident. Tort law centers on returning the victim to his original position. Why he was dislodged is not, strictly speaking, relevant.

So we are beginning to see the basis for the foundation of tort law. Corrective justice involving a complete theory of the justification to rights in the property harmed or taken is not sought because neither distributive justice nor moral clarity in ownership is relevant. Compensation itself is not strictly sought, as the huge costs of the system and the irrelevancies of intent count. What about the intentions of the dog who bit our hero? The problem is one of the excluded

middle. We ideally must separate the world into the responsible and the not responsible, typically along a human versus nonhuman divide. Responsibility is attributed to those able to choose, and animals seem to be on the wrong side of that divide. However, some training in responsibility is available, and that ought to count positively or negatively: the historically well-trained retriever against the historically menacing pit bull. But is that no more than product liability, with violation a metaphor for unsound engineering? The question then is whether dog bites involve intermediate or vicarious liability, with consciousness (if the test) perhaps pushing past either toward direct responsibility.

One intermediate case is that of an unborn baby, although under almost any scenario,[3] as a potential plaintiff rather than defendant. Here we have a muddled picture. For example, we allow a mother to kill the baby, and it is not just an "ending" or "termination," but a killing. We allow tort recovery against third-party killers (someone kicks the mother or injures her through an automobile accident, causing a loss to the unborn child). What of the mother's liability? Suppose she is feeling unwell and takes thalidomide, either as a sedative or for morning sickness, the drug's original intended uses. Should her child be able to sue her either nine months or twenty years later? Would it matter if she took the drug for ENL,[4] with its potential for deadly skin cancer? The notions of autonomy and self-preservation arise, but the issues are not resolvable independent of larger moral and political notions about how we treat individuals, without regard to individual ranking on some relevant scale, perhaps morally, hedonistically, or cognitively. The issue of categorizing such an individual is not new. Consider *Walker v. Great Northern Ry. Co.*[5]

> A woman who is with child is in a railway accident, and the infant when born is found to be deformed. Can the infant maintain an action against the company for negligence? . . . The pity of it is as novel as the case – that an innocent infant comes into the world with a cruel seal upon it of another's fault, and has to bear a burden of infirmity and ignominy throughout the whole passage of life. It is no wonder, therefore, that sympathy for helpless and undeserved misfortune has led to what is literally a kind of creative boldness in litigation. . . . The carrier would be surprised to hear, while he was paid for one, that he was carrying two, or even three, for it might be a case of twins, as Mr. Walker suggested. He carries for hire. That is the fundamental account of his position and liability. The case put, of a child born and hurt during the journey, whether the liability could be enlarged to comprehend a case of that kind, in which there was no contract and no consideration,

[3] It is barely possible that Thompson's example of a rapidly expanding, in utero child growing to the point of destroying her mother, but unaffected by the resulting explosion, could be later held liable, but only if strict liability is taken to new and absurd lengths. See Judith Jarvis Thompson, *A Defense of Abortion*, 1 Phil. and Public Aff. 47 (1971).

[4] Erythema nodosum leprosum.

[5] (1891), 28 L. R. Ir. 69, 81.

> may involve much difficulty. . . . In law, in reason, the common language of mankind, in the dispensations of nature, in the bond of physical union, and the instinct of duty and solicitude, on which the continuance of the world depends, a woman is the common carrier of her unborn child, and not a railway company.

The problem is not due to some mystery. We know a great deal about the fetus and certainly enough to make decisions. The problem concerns analogy or categorization. Do we think that it is relevant that it is capable of pain like a frog's or linguistic listening trainability like a dog's, of potential to be something greater, like an acorn becoming an oak, of dependence like a ventilator patient, a dialysis patient, a Siamese twin, or even bacteria? Does it matter if the child is a souled (in a religious, but hardly scientific, sense) and right-possessing thing? The pull of the analogy hardly rests with logical axioms or common law precedents – common carrier or otherwise. Personal judgment is at play.

But are we done with possible intermediate cases? Hardly. Assume we have complicated, preconscious computing machines. Would the fact that they can be turned on or off, or have fungible, off-the-shelf parts, relieve them of tort responsibility, or relieve us as their owners (if ownership is allowed under the Thirteenth Amendment) or developers, directly or vicariously? It may be that to achieve the responsible cognitive state a bit of carbon (the stuff of the brain, with proteins, amino acids, RNA, and DNA) could be placed into the silicon chips. Would that make a difference? That is, we might be able to match or map cognitive events with certain neurophysiological states, and both with a mechanical computing hardware device running on source code. What would that commit us to when we consider how to care for and whether to junk such machines?

The only sad precedent, to much of this discussion of an inferior or hybrid reasoning individual, is in the law of subjugated groups, women, and minorities. In this law, from Biblical and Roman times to the present, slaves, and, to a lesser extent, women were treated as intermediate cases: human, responsible, intentional, and volitional for some purposes, mere chattels, or property, subject to destruction or forfeiture, for others. The types of problems in that area are macabre and perplexing. Who should pay for the slave's destruction of a neighbor's property? What should be the remedy for a negligent injury to a slave? What is the law's position on a slave testifying as to a tort (the theft of a chicken) when he is the only witness for the plaintiff slaveholder? We might want, and need, then to distinguish between responsibility because of conscious intent and responsibility because of moral autonomy. Slaves have often been held to have the former but not the latter, and given the varieties and vicissitudes of particular slave laws, have seen disparate consequences attach.

Yet, the precedent of slavery is still compelling, worth remembering here in order both to appreciate the results of placing humans outside the protection of

the law and to realize the need for a methodology to treat those both sentient and yet excluded from legal protections.[6] Consider the case of a slave committing a tort: perhaps allowing a cooking fire to spread to a neighbor's field;[7] fighting among slaves of different owners ending in the wrongful death of one of them;[8] burning a barn and stable of a neighboring landowner by slaves under orders from their master;[9] or simply, causing a traffic accident when a slave drove a dray against a gig.[10] Who should pay for the slaves' torts? The courts split: no one is responsible, as slaves are not agents or servants but mere property;[11] the slaves themselves, being "responsible moral agents," are liable;[12] the owner is liable, so long as the tort is committed within the scope of the slaves "employment" as a slave;[13] or the owner is liable, but only to the extent of the slave's market value.[14] The issue arises as to the limits and reach of duty.[15] The issues for us are not which tortured logic defending slavery to use. They are, rather, several. First, the normal reasoning of tort law can rather too readily accommodate the worst of human conduct, if not easily, at least with reasonable effort. Second, insofar as authority, duty, humanity, liability, and autonomy are not always simple, self-explanatory concepts, what happens when these concepts or their boundaries are challenged and tort is pushed to employ uncomfortable, if at times reforming, analogies? Are slaves like tame cattle or vicious animals,[16] are

6 The area is covered historically, if relatively uncritically (vis-á-vis tort law), with a discussion of some of the cases cited below in Thomas Morris, Southern Slavery and the Law, 1619–1860 (1996).

7 *Snee v. Trice*, 1 Brevard 179, 2 Bay 349 (S.C. 1802).

8 *Garrett v. Freeman*, 50 N.C. 89 (1857).

9 *Boulard v. Calhoun*, 13 La. Ann. 100 (1858).

10 *Gaillardet v. Demaries*, 18 La. 490 (1841). For those not taken with nineteenth Century novels, a dray is a wagon without sides and a gig is a two-wheeled carriage drawn by a single horse.

11 *Snee*, op. cit.

12 *Wright v. Weatherly*, 7 Yerg. 367 (Tenn. 1835).

13 *Stratton v. Harriman*, 24 Mo. 324 (1857). In *Stratton*, the slave's burning of the barn and stable was held to be done on his own, not in the performance of the master's business. Metaphysically, and it might appear legally, there can be no "own," meaning his own doing and business for a slave, who was, to use the same language, "owned." Moreover, errant servants were not slaves and did control their own time, discretion, possessions, and, most critically, freedom. The limitation of liability though, as often in these cases, was to damages "not exceeding in amount the value of the slave." The easy analogy here is the limited liability of shareholders of a corporation whose exposure for investing is limited to the amount of that investment.

14 *Ingrara v. Linn*, 4 Tex. 266 (1849).

15 The converse of the duty of an owner of a slave to a third person is the duty of a third person to the slave's owner. This is part of an old doctrine allowing a master to recover the loss of the service of a servant. The symbiotic relationship of duties was as recently criticized by a court as 1983, when one federal judge, in rejecting *Snee*, held that "The reception by the South of the common law of master-servant as applied to the peculiar institution is, of course, part of the perversity of rationalizing slavery." In re *Security Lighting Co., Inc.*, 30 B.R. 10, 11 (Bankr. E. D. Mich. 1983).

16 Animal analogies were made more than once but without much success. The analogy to cattle was rejected in *Campbell v. Staiert*, 6 N.C. 286 (1818), and to wild animals in *Ewing v. Thomson*, 13 Mo. 132 (1850). The reasoning used to reject the analogies appears to our

they sufficiently intelligent to be guided,[17] or are the limits of their liability the costs of their purchase? These shocking questions were treated as worth reasonable contemplation by the same group of bench and bar that created the rest of tort law. Third, there is the matter of proof. Slaves were victims and tort feasors, but as either, they were witnesses. Yet they were not allowed to testify under oath, but rather they "should, however, be tortured . . . because slaves are, as it were, desperate men, on account of the condition of servitude in which they are, and every person should suspect that they will easily lie and conceal the truth when some force is not employed against them."[18] Tort's boundaries have always been problematic.

What, then, of a nonhuman machine, whether silicon, carbon, both or neither? We have here the intersection of diminished ability or partial capacity with that of shared and vicarious responsibility. When looking at traditional carbon-based entities, we might ask how well should the owner (to use a politically charged term) have trained or restrained the dog, how obedient or well-trained did the dog allow himself to be or become, and what opportunity did that relationship provide for tortious mischief.[19] We have seen rules that either distinguish inherently dangerous animals (pet pumas) from tame

eyes, and perhaps even to some of the eyes of the antebellum South, further evidence of the outrageousness of slavery.

17 In *Snee*, op. cit, the court refers to slaves a "headstrong, stubborn race." One wonders what the judges' own reactions would be to being enslaved, having their daughters raped, being worked to death, and seeing their children sold.

18 Mark Tushnet. *The American Law of Slavery, 1810–1860. A Study in the Persistence of Legal Autonomy*, 10 Law and Society Rev. 119 (1975), quoting Les Siete Partidas, the fourteenth Century codification of Spanish law. Tushnet makes the point that slaves were given a measure of intellectual respect, but not moral respect. He cites two interesting cases to support this belief. *State v. Jones*, 1 Miss. 83 (1820), held that a slave, who was a victim of murder, "is still a human being" and worthy of certain rights. Yet in *George v. State*, 37 Miss. 316 (1859), the same court, 39 years later, held that a slave, given his innate moral depravity, could not be indicted for raping another slave.

19 Judging the reach and scope, let alone intent and animus, of animals, and the foresight of their masters in assessing future conduct is, at least in the case law, a completely haphazard activity. Consider *Fardon v. Harcourt-Rivington* (1932), All E.R. 81, 146 L.T. 391, where a driver parked his car on the side of a London street, with his dog inside. Obviously, being unhappily imprisoned (not entirely unexpectedly so) the dog began jumping, and broke the glass of one of the car windows. The flying glass splinter put out the eye of a passing pedestrian *cum* plaintiff. The court held there to be no liability. "People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities." Which fact is fantastic is not elucidated. As to specifics, is it relevant that "the dog himself [had] no vicious tendencies"; that it was a large Airedale in a small area; that terriers are an excitable breed; that the car was parked in a crowded side street by Oxford Street, where probable claustrophobia and looming specters coming upon the car would be evident to anyone inside, man or beast; or none of these things? The court also comments on foreseeability. "[W]ould any person expect that in jumping about he would break a small window with a blow directed at such an angle as to project a fragment of the glass into the face of a passer-by on the pavement?" However, in a normal automobile negligence case, almost no particular injury would be foreseen or maybe foreseeable by a given driver. Who would think hitting another car would cause the loss of an eye to a pedestrian perhaps 20 yards away? Is any of that a relevant consideration?

animals (cats) or allow or don't allow a dog his first bite. Perhaps the second problem collapses into the first, but, in a situation where the issues of the responsibility of the impaired, the demented, children, and those with brain trauma are largely unresolved, and the specter of full or partial determination is lurking, hope for solving the problem of low-level consciousness of computing machines (computers who know their own strength) is optimistic.

But let us move away from home. Our hero and John D. intend to meet to tilt the capitalist table. They hope to fix prices, change locations, perhaps divide markets, all with the desire of keeping Standard Nonsense out of their market. Such actions involve clear violations of antitrust laws, racketeering laws, and rules against unfair competition and tortious interference. But why should these activities be considered improper in the first place? Should there be a right to be in business, to compete, and to be protected when entering new business arenas? Clearly not. A small hardware store has no rights, and can only predict a short life expectancy if, for example, a Home Depot opens across the street from it. The playing field is rarely level, with buying power, financing, advertising, organization, and every economy of size and scale against the hardware store.

Moreover, why should it matter if two companies conspire against a third? We allow it, often, if two companies merge, and we are unconcerned if the conspiracy involves fundamental interests other than the price of goods. Churches can merge and jointly venture to the detriment of peripheral congregants and congregations, to the detriment of charitable and spiritual services, and perhaps to the extent of endangering parishioners' eternal souls. Moreover, suppose mangos or stationary bikes become the products of a single supplier or cartel. Is this something that law should notice and stop? We can change fruits or exercise equipment. In fact, we do it all the time anyway, often for reasons (tastes, weather, energy and transportation costs, technology, material costs, or (with fruit) an invasion of mango-loving weevils) indifferent to individual actions and motives. There is a theoretical problem here as well. We think of the market as the rational, self-correcting, efficient, and hardy arbiter of proper price, distribution, value and (for the celebratory) wealth. Surely it ought to be sufficiently hardy to survive a few pathetic attempts to rig it, doomed as they are (and always have been) and insignificant (compared to most market forces) as they are.[20]

The tortious interference aspects are even starker. In an economic system that looks to create efficiency through price-cutting and ruthless competition, why should inserting oneself between supplier and customer by (perhaps belatedly) beating current price on either side be considered improper, even

[20] As Bork put it clearly, referring to the elimination of rivalry theory, the "theory – that competition is injured by the agreed elimination of rivalry – is less than a half-truth." Robert Bork, The Antitrust Paradox 135 (1978).

actionable? That is, why allow the resources of the law courts to be loaned, and government through judicial process to subsidize a remedy that is economically dubious and typically financially insignificant? The problem is the more egregious, as the calculation of what constitutes, for example, a proper market, necessary to circumscribe and assess if in fact it is being harmed, is not a matter easily determined in adjudication, as opposed to journals and seminars, congressional hearings, or a lively debate throughout the academy and business community. Is cornering the American aluminum market significant, for example, or should we look to international production on the one hand or aluminum substitutes as a percentage of functional use on the other? Even on the local level, how do we measure the effect of a hospital merger, particularly when third-party pay carriers drive, if not fix, prices? None of this seems best to leave to the courts.

The picture is murkier even than all this. The wrong in antitrust matters, at least by way of theory, justification, and apology, is done to the relevant consuming public, not the complaining competitive plaintiff. It is thus a third-party beneficiary tort, again in theory, as the damages go to the competitor, not the injured public. This provides an easy metaphor to the tort class action cases, often condemned for their disproportional pay-out to the lawyers rather than the members of the class. In antitrust, the injured party does not receive the damages at all, not even paltry ones. Moreover, the resolution, particularly by way of settlement, may be more injurious to the consuming public than no suit. Class action settlements are void unless blessed by a court. Antitrust settlements not only fail to be blessed, they may be bargains with the devil.[21]

However, John D. failed to appear, so our hero is forced to engage in an intellectual rather than economic activity and read the newspaper. There he learns that the insider, improper information he obtained was misleading. The number of securities issues touched upon by insider information, with the concomitant alphabet rules, agencies, and monickers – Blue Sky, NASD, SEC, NYSE, SLUSA, PSLRA, TIA, PUHCA, 1933 Act, 1934 Act, 10b-5, u-4, u-5, s-7, CRD, RE3 – and their various connections keep a not-so-small legal industry going. Regardless of that, it spells trouble, potentially, for our hero. Again, why should it? We can imagine markets lightly or virtually unregulated – the Vancouver exchange comes to mind – that, assuming enough Latin is known to understand *caveat emptor*, misleads no one when insider trading and price manipulation occur. No one ought to have thought otherwise even of the New York Stock Exchange before the 1934 passage of the Securities Exchange Act. Even today, one might buy or sell Exxon or buy BP long or sell it short knowing that OPEC artificially manipulates supply and price for political,

[21] Certainly, arrangements involving merger, joint venture, market division, standstill arrangements without long-term entry of new competition or payments by stock swaps: none of these would necessarily encourage consumer or public confidence.

economic, sectarian, diplomatic, or megalomaniacal reasons. Why should we create expectations that, once dashed, create claims? Again, this is a protection of the market claim, presumably for the benefit of investor and invested company.

But this protection is essentially anticapitalist and antimarket in its universality. Suppose there are two competing marketplaces, one self-regulating, one not. There would be some basis for believing the self-regulated, for certain customers and companies, possesses an advantage. If that is the case, then the enforcement and continuation of the additional degree of protection will naturally succeed. Why is it, then, an advantage to make such protection universal?

There is a different kind of defense of regulation available: the importance of economic markets. Such markets are central to health, welfare, and prosperity and are regaled as the success of the body politic. Are they, however, more fundamental, or of a more profound significance, than, for example, science? Science has no such protections.[22] It has provided modern medicine, plentiful food, efficient transportation, technologically laden and highly successful hospitals, safe and comfortable houses, the engine, the telephone, the air conditioner, and the computer, all making use of a common set of principles, methods, shared truths, and a universal chemistry, physics, and mathematics. Yet, it is under constant attack, defamation, and ridicule, the object even of dismissiveness. The onslaught arrives in the form of religious attacks on evolution, carbon-dating, basic obstetrical truths requiring not-so-immaculate conception, global warming, the big bang and related theories, ecological science, ozone depletion, and even quantum mechanics. It can be found in a variety of religious leaders, sectarian opportunists, shamans, and pagan supporters and those confused, frustrated, and angry at a world beyond their understanding. We can be hurt by these attacks, and not just if we happen to be Galileo. The often untested claims of homeopathic medicines and the environmental damage condoned by those dismissive of fossil fuel pollution and the cynical claims of manufacturers of tobacco, asbestos, and lead products are serious matters, and ones outside the normal purview of tort law.

Let us continue. Our hero clearly defamed J. P., Standard Nonsense's president. He labeled him a liar and criminal, both matters of fact not opinion, and both possibly harmful to J. P. personally and professionally. It was overheard by others. Should J. P. be allowed a claim against our hero? We might allow a claim because such defamation is harmful, even if true, under the traditional

[22] The fact that evolution when challenged in the public (only) schools by Intelligent Design finds support in the courts is not really a counterexample to this. Rather, Intelligent Design is regularly struck down under the Establishment Clause of the First Amendment. Otherwise, Intelligent Design can be promoted, everywhere from private schools to colleges to political campaigns to the media. Whatever harm comes from that, involving perhaps as a methodology contingently antithetical to genetic therapies, is allowed. The most well-known public school case is *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Penn. 2005).

English rule.[23] Surely the harm is largely the same once the defamation occurs, true or not. Whether the underlying fact – the lie, the crime – is public or secret has never been the point, although in many respects that is a more interesting test than the truth of the statement. It would intuitively seem to matter more if it were not known that J. P. was a liar, a criminal, or otherwise a scoundrel. Then the telling would genuinely be harmful. There are certainly times when publicly telling the truth can be disastrous. There are times and places when, for example, reporting that a woman has been raped can lead to her death. In fact, English law has traditionally allowed one to sue for defamation under just such circumstances.[24]

In general, is lying itself normally a thing we consider actionable? Absolutely not. It is not only that politicians, advertisers and all of us from time to time, for reasons from convenience to avarice, are untruthful, the law, itself in pleadings, argument, and briefs, clearly encourages dissembling. Moreover, we have the (Kantian) problem of lying to achieve a moral end, such as misleading a totalitarian regime soldier seeking the capture of an innocent victim. Basically, then, why should we care if J. P. is called a liar, whether or not it is true?

More interesting is the problem that so captivates tort law, that of intent. Intent comes in different flavors, or perhaps more typically, in the same flavor but in different strengths. The normal civil spectrum moves from intent to recklessness to negligence, with occasional interim cases (gross negligence) or metacases (specific intent). In considering the market torts above, intent is the standard. Dog bites usually look beyond intention, imposing liability as a risk of the activity. What of defamation? We might think negligence is not quite enough, there needs to be negligence plus. Whether or not we call that recklessness, it might mean one of two quite different things: greater knowledge or greater desire to hurt. It may mean that our hero knows the extent of the actual criminal wrongdoing of J. P., more than merely repeating a rumor he heard, or that he greatly wanted to harm J. P. and was quite indifferent to any prudent manner of minimizing that harm. Safety and knowledge are not the same thing and indifference to the first is not equivalent to possessing a greater degree of the second.

What then of the assaulted and battered cashier? The largely overlapping torts of assault and battery are paradigms of tort law, hardly problematic, but do they occur here? We live in crowded, active, aggressive urban societies where

[23] As Winfield put it, "It is not that the law has any special relish for the indiscriminate infliction of truth on other people, but defamation is an injury to a man's reputation and if people think the worse of him when they hear the truth about him, that merely shows that his reputation has been reduced to its proper level." P. H. Winfield, A Text-Book of the Law of Torts 272 (1948).

[24] One case is *Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T.L.R. 581. Similarly, suggesting insanity or insolvency also allows suits for defamation. See, respectively, *Morgan v. Lingen* (1863), 8 L.T. 800 and *Cox v. Lee* (1869), L.R. 4 Exch. 284.

pushing, shoving, elbowing, and jostling are routine. Trains, elevators, queues, subways and their stations, stadiums, rallies, airports, concerts, funerals, and celebrations all involve frequent and often unpleasant touchings, if not more. Even in ordinary, less-crowded activities, people may strut and run with effects not completely unpredictable, and may be reckless in doing so. Are we going to promote lawsuit inflation by allowing each such action to count as an assault? Our hero did not intend to hit the cashier, but did intend to throw the cup. Is that the intent we need?[25] Was he negligent vis-á-vis the cashier? Why? Because he is a bad shot (if he were aiming elsewhere, perhaps at the sink), because he knew that he was a bad shot (maybe either he did not realize it or, having played college baseball as a pitcher was in fact a great shot who made an extraordinarily unusual errant pitch), or because taking any shot constitutes negligence or a *prima facie* breach of duty (but to whom, other than the cup).[26]

Our hero finally manages to make it out of the café, but his safety is temporary. He slips on the ice from the gutter. The savage dangers of a meteorologically aggressive planet have been visited on our hero. Premises liability raises its head. Here we have an unnatural formation of ice, one that begins life not in the sky but in the gutter. Should that make a difference? Politically, is all ice created equal? Semantically, is ice "ice"? Suppose we know that 98 percent of all slipping occurs on natural ice. Why are we attaching liability in the other 2 percent? Certainly not to encourage the purchase of insurance by pedestrians, as a 2 percent increase is not significant and certainly not because the health hazard is significant: it isn't.

Perhaps penalizing negligence deters faulty decision making. That is, drainpipes, downspouts and gutters otherwise neglected are repainted, repiped, and repaired because of the severe costs of failing to do so. The problem is finding any evidence for this theory, or for the beneficial effects of negligence liability generally. The problem arises in large part because the reasons to be prudent (or at least nonnegligent) are so numerous, ingrained, diverse, and powerful that the ordinary observation "if it has costs, people will be reluctant to pay those

[25] The problem of the connection between intention and result in understanding culpability is an old one. Consider the analysis of *Reynold v. Clark* (1726), 1 Strange 634, 92 Eng. Rep. 410: "[I]f a man throws a log into the highway, and in that act it hits me; I may maintain trespass, because it is an immediate wrong; but if as it lies there I tumble over it, and receive an injury; I must bring an action upon the case; because it is only prejudicial in consequence, for which originally I could have no action at all."

[26] There is the colorful doctrine of transferred intent. Basically, the bad intentions one has toward the intended victim are superimposed upon the unfortunate actual victim. But here, even if our hero intentionally, maliciously, hatefully, zealously, and with venom in his heart wanted to damage the sink, are we ready to transfer intent? Throwing the cup at his neighbor's dog earlier in the morning, with the result of hitting the neighbor, is perhaps a more interesting problem. One look at interspecies transferability is that of one intending to shoot dogs hanging around a slaughterhouse whose bullet missed, ricocheted, and killed a human (also, presumably, hanging around a slaughterhouse). The court gave no recovery. *Cleghorn v. Thompson*, 62 Kan. 727 (1901).

costs" is not enough. Did, for example, drivers of Salvation Army trucks drive more carefully when charitable immunity was abolished, or do surgeons cut more carefully, less carefully, or in just the same way if statutes of limitations, caps on damages, or other impediments to medical malpractice recovery are imposed or removed? If anyone is running any tests on this theory, the courts, who claim to desire this information, are ignorant of the results. Moreover, how could this be measured when the law has always allowed a defense of imprudence?[27] Given that the necessary conditions of forming unnatural ice also include the possible formation of nature's frozen water, how could any theory of extra precautions be limited to these cases when the failure to be prudent in looking where you are walking is not an issue? Even with the tools of multiple regression analysis, correlation coefficient techniques, methods of estimating parameters of binomial and polynomial distributions, and chi-square approximations and goodness of fit, the answer, statistically speaking, is that it can't.

Leave aside the compounding of our hero's manipulation of Standard Nonsense stock for the moment – although stock manipulation gives rise to claims against it, as does potentially the profits made at the expense of sellers harmed by stock too low and buyers by stock too high – and look at that most ordinary of torts: the motor vehicle accident. To do so, we need to revisit, briefly, the issue involving the biting dog and the accumulating ice: that of negligence.

Negligence is taken to be a want of due care, an act of imprudence, a variation from the course of reasonableness. The definitions are worse than hackneyed and vague – they are typically circular, with negligence being other than the actions of a reasonable man and a reasonable man being one not acting negligently. The matters are typically left unresolved by triers of fact – usually juries, but also judges and arbitrators – who are free to impose almost any standard and spin that they want on the conduct, and never tell anyone why they did what they did.

In case of difficulty in elucidating standards, one reaction is to check history, to see how we got where we are. However, sorting out obscurity by employing more obscurity is problematic. One response is to say all of it is new.

> The common law had little to say about personal injuries brought about by carelessness – the area of life and law that underwent most rapid growth in the (nineteenth) century. The modern law of torts must be laid at the door of the industrial revolution, whose machines had a marvelous capacity for smashing the human body.[28]

Although this is not the place to begin historical arguments centering on controversial textual exegesis, the quoted response seems wrong on both the

[27] It has never been called that, but that which is otherwise labeled "assumption of the risk," "last clear chance," "contributory negligence," or "misuse" is, essentially, imprudence.

[28] Lawrence Friedman, A History of American Law 467 (2nd ed., 1985).

law and facts. The law itself, from the earliest English Year Books and plea rolls to the development of complex causes of action midmillennium, is replete with civil cases of death, mayhem, bloodshed, savagery, and harm, often in pared-down legal language, but certainly involving personal injuries.[29] Regardless of the language, earlier times were more brutish and life was more precarious than today. As to more recent machines, which smash the body, it is not clear whether farm life was safer than modern city life, but machines certainly cause accidents in a way that permits negligence suits. That is, not only is there harm and a culprit, but there is a culprit who has the wherewithal to pay. Even today, suits against the poor and uninsured are hardly flooding the courts. That said, the reason to pay, that is, the culpability of the culprit, is a matter often more finessed then addressed.

What then of the road accident? We have one bad judgment, two accidents, and two entirely different (at least possibly) defendants. The second accident is easy, but what of the first? Under FELA, a railroad employee hurt on the job may have the right to sue the railroad in court for his injuries. Recovery may be based on criteria quite divergent from the state motor vehicle law – with regard to proximate cause, contributory fault, consortium, future damages – and may allow the injured conductor a significantly worse or better recovery than if he were driving home in his own car when hit. The disparity is centered on the intersection of two political forces, the parallel tort system for those injured at work, and the system within a system for those injured at particularly dangerous work: railroads. The workers' compensation system arose largely because of a bar to recovery for injuries on the job, namely the (always indefensible) fellow servant rule.[30] Rather than change the rule, they (state legislatures)

[29] Plucknett speaks of "an immense miscellana" of cases other than trespass involving all sorts of wrongs, as well as early "violent trespasses." T. F. T. Plucknett, A Concise History of the Common Law 468–469 (1956). Moreover, it is clear that for at least 700 years, trespass involved personal injuries. "But there is one all-important action which is stealing slowly to the front, the action of trespass (*de transgressione*) against those who to a plaintiff's damage have broken the king's peace with force and arms." Frederick Pollock and Frederic Maitland, II The History of English Law 525 (1895). Lawyers recognize the reference as one to trespass *vi et armis*.

[30] The fellow servant rule barred recovery for workplace negligence against an employer, when, basically, the agent who caused the harm was a coemployee. That coemployee's agency was treated as aligned with the worker, not the employer, a doctrine that ought to have been able to be overturned without involving the massive upheaval of the workers' compensation laws. One insight into the stubborn loyalty to the rule can be found in the unanimous Cardozo court decision, but not an opinion by Cardozo, of *Saenger v. Locke*, 220 N.Y. 556 (1917), which captures the system in transition. There, Ms. Saenger was a worker "engaged in the millinery business and in the making of hats and feathers in New York City. This was a hazardous employment." While so employed, as a result of a "difference with her boss," "she became nervous and hysterical and fainted." A coemployee, attempting to help, doused her with what was thought to be water but was, in fact, ammonia. She was injured. The court held that as "a fainting such as is shown in this case and such as was given is not a natural incident to the business," the matter was not one for workers' compensation and barred

changed the system. The differences are interesting – scheduled damages, no need to prove breach of duty, very limited notions of proximate cause, no contributory negligence or assumption of the risk defenses, no consortium – and invite comparison on achieving some efficiency, speed, and certainty at the cost of textured responses. In a case where the two systems come together, the possibilities of differentials and windfalls arise.

What about the basic automobile accident? Putting aside the fact that there is negligence per se, as our hero's running a stop sign violated the traffic ordinance – what about the basic, negligent accident? The concept of negligence is, as already stated, largely empty. There are terms meant to give context: reasonableness, prudence, assumed risk, last clear chance, to pick just a few. But the proceedings are legal theater, and these terms mere props.

Whether theater or reality, is this a bad thing? It is, if we take seriously the maxim of procedural justice that we should treat like cases alike. In that the discretion of the trier of fact is as great as all outdoors, is bereft of any concrete standards that limit, imply, infer, circumscribe or determine results, then obedience to the "treat like cases alike" maxim is a sham. Filling in content not only allows divergence of judgment (what duty has been breached and how), but allows them to be filled in by bias, prejudice, ignorance, redistribution, or whim. Treating like cases alike has severe limitations. Bad precedent for anything hardly merits repeating and the law has a great deal of bad precedent. Moreover, we hardly want to risk a slide to the bottom with any particularly odious past decision. If one suspicious outsider is tried with little in the way of rights and treated then to summary execution, and the next is granted a full panoply of rights and appeals, it would stretch any normal concept of justice to say that the second outsider, though treated differently, was treated unjustly.

But this is to give far too much credit to the niceties of a much more rough-and-tumble system. Perhaps we are simply not interested either in rules or consistency, except at the margins. That is, negligence allows us to overcome the clumsiness of rules that can never be sufficiently finely tuned to account for all the relevant detail. For example, suppose our hero, hearing of an emergency on his cell phone, and speeding to the hospital to make critically necessary decisions for his young child, swerves to avoid his neighbor's dog (although remembering it had, in fact, bit him) and finds himself careening toward a café table with John D. and J. P.[31] To a very great extent, our hero is put in

under the fellow servant rule from negligence recovery. Generations of lawyers made to read the *Palsgraf* case (limiting a claim caused by an unfortunate and lengthy sequence of odd events) will recognize this same famous court's judgment of a relatively static society, with the individual held liable if but only if there is some hint of voluntary, moral responsibility. That notion is not rigidly held by anyone today. *Palsgraf's* full citation is *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339 (1928).

[31] The older cases involve errant horses rather than errant cars. Thus what spooks a horse or who (rider or officious pedestrian) puts a whip to that horse determines whether there

a difficult position, in large part not of his own making. Should he have a defense of difficult circumstances? It might seem not, as it would appear to reward indifference to trouble, if not a positively cavalier attitude to those asleep in the road or playing ball in the street.[32] Our hero must in an instant make a decision to avoid his friend John D., killing his new competition J. P., who, in any case, was sitting largely obscured, except for the distinct bright red Standard Nonsense cap, by a low-hanging tree to avoid being spotted with a rival. If our hero had been wearing his sunglasses, he would likely have spotted J. P., but perhaps (even our hero is unsure on this one) he would have done so without regret. Could we make rules to nail this case down ahead of time? Should we?

Our hero eventually makes it to work. He treats his secretary in such a way as to trigger a number of violations of civil rights laws against gender and age discrimination, of the Americans with Disabilities Act, and perhaps sexual harassment, hostile workplace, further defamation, and the intentional infliction of emotional distress. Perhaps all this in less than two minutes. Invoked here are the Constitution, federal statutes, state statutes, and a variety of complex, inchoate, and difficult-to-measure actions. Here we see an abandonment of the common law of tort, the set of interlaced doctrines, concepts, and principles that, since earliest legal times, have (with various degrees of success and cynicism) protected persons and property through civil remedies. The statutes express (but do not necessarily represent) a failure of the system. They do so, though, in a very typical way. Tort law has been at war with contract law for hundreds of years, with the implied or express rights to bargain used as a trump to what otherwise would appear to be unfair conduct. Thus waivers, consents, warranty limitations, and remedy restrictions have been the specifics of general concepts of contractual hegemony regarding relationships that create torts. It is because employment law is contract law that spurs statutes enacted to regain the lost opportunity to require civilized behavior.

Our hero fell into a wider statutory snag than this, however, when he cut his deal with John D. This joint conduct continues, if not increases, the antitrust and unfair competition torts, but it also potentially triggers the racketeering statute, RICO,[33] a draconian criminal and civil statutory scheme meant to curtail mobsters and racketeers, but sufficiently broadly drafted to penalize

ought to be liability. As always, analogous precedent is far from self-applying. See, on horses, *Gibbons v. Pepper* (1695), 1 Ld. Raym. 28.

32 Consider the famous so-called Donkey Case. There, the plaintiff bound the feet of a donkey and left him to graze near a highway, confident he would be unable to run away. Defendant's wagon, led by three horses "coming down a slight descent, at what the witness termed a smartish pace, ran against the ass, knocked it down, and the wheels passing over it, died soon after." Baron Parke, the judge, held that "although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief." *Davies v. Mann* (1842), 10 M. & W. 546, 12 L. J. Ex. 10, 6 Jur. 954.

33 Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §1961 et seq.

any two individuals committing even minimally illegal acts using the wires or the mail. He is at risk for treble damages and attorney's fees, first under the Sherman Antirust Act, now under RICO, with punitive damages available for the unfair competition, and compensatory damages for all of it. Unlike the common law, with its potential ability to recalibrate and synthesize competing doctrines to stop double counting, overkill, and basically civil overindictment, the statutory schemes roll on.

Our hero, having now violated a number of federal (and almost certainly parallel state) statutes, enters the politically charged world of malpractice. Typically the controversy centers on medical malpractice – doctors, nurses, hospitals, nursing homes, labs – but it is hardly confined to that. However, our hero, being the subject of two distinct types of malpractice, the accountant who schedules gain as income paying more than double in taxes and the physician who misreads the symptoms and orders a risky procedure, is something of a rarity.

Malpractice gives rise to a question at the heart of understanding and defending any standard of negligence. Suppose we know that a given professional makes a thousand significant judgments over a given time.[34] Fifty will be wrong, with forty-eight of those benign or reversible. Two will be costly to the client or patient. Reasonable, competent, prudent practices give rise to two costly errors in a thousand and these, for all practical purposes, cannot be eliminated. Should those facts give rise to liability?

The answer to that question involves two quite different considerations. One has to do with behavior modification. The answer might seem obvious. As I am driving, I am busy discussing a brief on my cell phone and, oblivious to a bicyclist on my right, run into him. The accident, injury, and lawsuit would have to have some effect on me, certainly causing at least for some time and to some degree a more prudent pattern of conduct when driving. Similarly with malpractice. The failure to consider a medical film leading to late detection of a tumor, with injury and lawsuit to follow, would (we would think) necessarily change behavior.

Almost certainly it would, but look what is packed into the answer. Consider just the failure of duty of attentiveness, whether driving or doctoring. Some instances would not be routinely deterrable. I could be ill, tired, angry, or in a desperate hurry, and my deterrence instincts would be shut down. Perhaps we need always, at this point, to ask, how deterred? Does it count as deterrence if it works one time in ten, a hundred, a million, or fifty million? Do we want to justify a tort system on a very occasional or extremely rare conditional behavior? Perhaps the question ought to be not when, but whom. Who learns from their

[34] I am assuming any particular judgment is sufficiently askew to constitute a breach of duty. This would involve more than a discretionary judgment call that invokes the defense of the professional or business judgment rule.

lessons? For the incorrigible, and that may be most of us, the lessons are not learned easily.

But the core question is not have we learned, but what have we learned from? Is the lawsuit, as opposed to the near miss, the direct hit, the death of a pedestrian in a crosswalk, or a child dead of a preventable cancer, the learning experience? Civil society is only possible – as thinkers from classical liberals to libertarians to neoconservatives to social contract theorists all hold to be the case – when there is a shared core of fundamental beliefs; beliefs that if they fall short of the unity of shared fear or blasé consensus, still as a set (or nearly converging sets) reach similar results with regard to the issues about life, rights, autonomy, privacy, duty, and value.

How well (or for diversity enthusiasts, how poorly) America does globally aside, we can certainly count on this kind of belief in a goal (avoid killing because of inattention) as so profound that it is not obvious what the lawsuit adds in changing future conduct. Moving from intuitions to empirical evidence would be almost impossible here because, unless an experiment or survey could be constructed to eliminate the moral and humanitarian notions of regret, conduct change could not be measured. The difficulty would, in fact, be worse than that, as issues of price, professional self-regard, community or family or colleague opprobrium, other financial consequences such as insurance hikes or cancellations, medical peer review, or automobile damage to the driver's car, as well as psychological issues of guilt, self-worth, and self-respect would cloud any measure. That said, no one ever asks.

The other consideration concerns who should bear the risk of unintentional and unintended loss. We might have a no-fault automobile system with scheduled payments for property loss and injuries outside of negligence, or a third-party health system that links disability payments to health premiums that replaces the medical malpractice system. In fact, but for the institution of insurance, the tort system would wither away. Insurance would rate not at the liability end your prudence but at the compensation end on one's risk of being a victim. Bad drivers and doctors would be analogues to fires and floods. Old houses and low elevation houses would put you at a premium. The initial problem is the demographic unfairness: those in fact at risk for being in the most dangerous jobs, hit by the least careful drivers, being treated in the least well-equipped and staffed hospitals are the most likely to be the societal underclass. A faultless system penalizes them through high premiums for the grave risk of getting hurt. Adding insult to injury, here at least, is not a metaphor.

The morning is not over for our hero. The EMS is city-owned, and subject to the protection of sovereign immunity. This defense, based on the unity of the concept of court between the King's court and the law court, maintains a dogged vitality as a method to avoid additional costs to financially strapped municipalities. No real justification is offered, or can be offered, to a doctrine

beginning life and continuing that life through late middle age as "the king can do no wrong." Yet, contrary to all reason and morality (other than that postulated by the burden of collecting additional taxes), it continues in various forms at the federal, state, and local levels.[35]

Our hero's death was due to a faulty product, a mainstay of tort law from asbestos cases to dangerous drugs to unguarded punch presses. But, as an aside, the law treats the café as additionally responsible because, per the legal rules, it is always foreseeable that medical malpractice is a natural consequence of an injury that sends one to a doctor. Common sense aside, the café set in motion a process that contributed, in this remarkable way, to our hero's death. That said, let us return to faulty products. It is true that products are often dangerous, although there is an annoying circularity in labeling them dangerous or even defective only when they, in fact, hurt someone. The product that harms someone is dangerous to them, in the way that water down the wrong pipe or in a swimming pool for a cramping swimmer is dangerous. The cup our hero flung at the cashier was dangerous to her, and that danger may have a history with prior, highly charged consumers of overpriced, prestige-seeking, coffee-swilling addict cafés, full of customers testy at every disappointment and armed only with a cup. A well-used sword or even a fork misplaced may prove to be deadly weapons, but are they defective, that is, failing to do the job of a well-ordered and properly behaving sword or fork? Worse yet, why pick on products, as opposed to other things? Real estate can be dangerous, from quicksand to snake pits to fast-moving creeks, but should standards be distinct for products but not real estate, as they are? This raises all the problems of intermediate cases – elevators, chandeliers, bolted-down machinery, ceiling tiles – and for all the elusive reasons.

The more interesting intermediate case is that of animals. Is a dog a product, perhaps, if the dog were cloned? We often see liability attached to dangerous animals as we do to dangerous or defective products. Perhaps a pit bull is functionally a punch press, a pet cobra the same as asbestos. What would be the justification for the equivalence? It might be that engaging in the activity triggers an intent to assume the risk of a disaster because disaster is foreseeable. But surely this is literally false, and the assumption of risk or responsibility would have to be imposed. Could we impose it because disaster is actually foreseen? No, because it often is not (i.e., were unexpected results actually foreseen? If so, why are they unexpected?[36]), because the bad results of drugs

[35] For example, the federal government allows prescribed contract claims to be heard in the Court of Claims, pursuant to 12 U.S.C. §1295, whereas it allows prescribed tort claims in Federal District Court, pursuant to 28 U.S.C. §1346 *et seq.* Neither provides for a jury. For most other claims, the putatively injured party is out of luck.

[36] The scale here is continuous. For example, thalidomide causing problems for offspring of pregnant users was apparently a complete shocker, whereas DES (diethystilbestrol) causing

or chemicals or building materials would require a science and a scientific talent not always ascribable to manufacturers of these products. Being in the business of producing things that could go awry is a kind of foreseeability of the awriness, but why should we think making closet hangers or shoelaces is more likely to endanger someone than our driving a car or driving a golf ball?

It, finally, might be reasonably simple to hold responsible those engaged in particular types of activities potentially dangerous. Aside from the fact that car and airplane travel, as well as high school football, YMCA swimming, drinking, and quite a number of activities (from scuba diving to sky jumping) that we pay a great deal of money to do, are much more dangerous than most products, why should we penalize a vital activity such as manufacturing? Part of the answer is not if, but how soon. If we let a dog be entitled to his first bite, we might be inclined to let a product manufacturer be absolved of its first kill. The recoil at this notion is a moral one. It seems that between our completely innocent hero (here, not our trespassing hero with the neighbor's dog, but the first ill, then prostrate, hero on life support), and the party guilty in the way that more strenuous effort might have prevented the injury, we choose the completely innocent. The political question is: when should "might" become "ought to?" Here, science is the proponent of liability.

Finally, virtually gone, our hero suffers his last tort. He obviously cannot bring an action, but, nevertheless, it can be filed posthumously as a wrongful death action. Who is it that suffers that injury? Not our hero: gone, he suffers nothing. Rather, his next-of-kin, those supposedly closest to him, are the only individuals who can bring this tort claim. They can claim the loss of consortium – sex, service, and society – or put otherwise, lost income and emotional distress. Why this odd tort? Certainly, not because his family members are necessarily those who are most hurt. Aside from the fact that our hero himself, in some weirdly counterfactual way, ought to be the most upset,[37] but is hardly in position to bring the claim, are we sure that his family are the most upset to see him go? Partners may suffer more greatly financially, friends socially, mistresses emotionally. Entire populations suffer the loss of a leader, an artist, a scientist, yet we only give the family standing to sue. Only our hero is not included in the grieving.[38]

a different set of problems for offspring of pregnant users was not completely unrelated, though still quite surprising, to earlier, animal studies.

37 The late Bernard Williams made the argument that we should have little real reason to be upset about dying and none about being dead. It draws heavily on the notion that, after a while, perhaps a very long while, one would be so bored that death would be preferable. It is not, perhaps, his most compelling argument. See Bernard Williams, *The Makropulos Case: Reflections on the Tedium of Immortality* in Problems of the Self (1973).

38 Here, Williams puts tersely, and well, the salient facts. "That is to say, death is never an evil in the sense not merely that there is no one for whom dying is an evil, but that there is no time at which dying is an evil – sooner or later, it is all the same." *Id.* at 83.

What of the emotional component? It is an edgy claim, but an ancient one. Many lawyers begin their law school career with the assault *cum* emotional distress case from the fourteenth century. Passing over the Latin and the medieval plea, the case of *I. De S. and Wife* begins:

> And it was found by verdict of the inquest that the said W. came in the night to the house of the said I., and would have bought some wine, but the door of the tavern was closed; and he pounded on the door with a hatchet, which he had in his hand, and the female plaintiff put her head out at a window and told him to stop; and he saw her and aimed at her with the hatchet, but did not hit her. Whereupon the inquest said that it seemed to them that there was no trespass, since there was no harm done. Thorpe, C. J. There is harm done, and a trespass for which they shall recover damages, since he made an assault upon the woman, as it is found, although he did no harm. Wherefore tax his damages.[39]

Here, we have a woman frightened, and recovery for that intent to frighten. Emotional well-being has been protected for more than six hundred years, although, interestingly enough, for some time, wrongful death was not allowed as an action under common law. Yet the elements were always there: indirect victims, emotional harm, protection of things difficult to see or feel, quantify or count. These are the elements lying near the heart of tort law, often providing its motivation for gaining recovery by the victim and providing it by courts.

Tort law, like any substantive law, is hardly useful or finished merely because its elements are discussed and analyzed apart from the judicial, procedural, and evidentiary context in which it operates. It is as though we can speak of platinum alone as an asset, without any understanding of finding it, extracting it, separating it, selling it, and then processing it into earnings or catalytic convertors. Although, in a larger sense, tort is similar to any other legal arena, it is punctuated by a number of legal issues that have particular significance for it.

The first thing to understand is what tort is not. It is not a private remedy that operates as a mirror to criminal law. The point may seem obvious, but from the O. J. Simpson trial to antitrust prosecutions to insider trading investigations, the point is often lost. However, at a level perhaps above the popular and partisan din, several slightly less transparent points need to be made. In tort, the actual victim drives the case, not a separate, governmental interest with its own agenda. Deterrence, just deserts, public chastisement, retribution, legal reform, and political ambition are, to a very great extent, put aside for the goals of restitution, risk allocation, and allowing the victim some measure of

[39] *I. De S. and Wife v. W. De S.* (1349), Y.B., Liber Assisarum, f. 99, pl. 60.

compensation for nonpsychic recovery.[40] If the victim is satisfied, then all other matters of justice can be suppressed.

The general practice of sealing settlement documents, often with forfeiture sanctions in place for violating the confidentiality involved in the sealing, is one consequence of this difference. Suppose one plaintiff, similarly situated in the injury done him by many others (one who is, perhaps, a cigarette smoker), through luck or skill or the aggressiveness of a skeptical judge, uncovers a smoking-gun memo. The defendant may be willing to overpay to gain silence and suppress the memo. Conversely, if poor luck, sloth, or a different cranky judge disinclined to aid a struggling plaintiff sets the stage for rulings and a result that, as precedent, would chill the willingness of other plaintiffs to come forward, then a defendant potentially tortious on a grand scale would have the incentive to try the matter. In the first instance, sealing documents that might save the life of others (e.g., consider early drug studies in animals indicating lethal side-effects) makes the plaintiff little better than a morally pernicious accessory-after-the-fact, whereas in the second instance, creating bad precedent against weak or weakly placed opposition works to extend the mischief or misconduct. This is indicative of a general condition. An acceptable selfishness drives civil actions very differently than criminal ones.

If tort is not a mirror of criminal law, neither is it necessarily subject to clear and discoverable standards. It is fact-driven, ad hoc, based on evolving notions of reasonableness and improving methods of proof. Tort has a stubborn habit of plodding along one case at a time, perhaps using principles that are general and analogies that unify but are still doggedly singular in outcome. It seems to matter whether the vehicle that hit you was a car or a truck, front- or rear-wheel driven, on ice or snow, on roads plowed or unplowed, in dark or light, whether you were stopped or moving or moving slowly, and there is always more. Generating standards from such specifics, as difficult as this appears to be (and that might be impossible), is worse yet. The decisions that are reached by deciders of fact, jury or judge, are almost always bereft of stated justification. We are left without knowing not only how to construct standards, but when we have candidates for putative standards, which ones will be chosen.

We might expect greater certainty in law, and often, we get it. Property owners and contract makers might need to rely on strict rules in order to proceed. The future conduct necessary to govern property and contract, enterprises with hugely beneficial consequences, might need a significant degree of certainty. Do

[40] It might appear that there is a significant deterrence aspect to civil litigation, one seen most clearly with recurring torts, such as product liability cases. However, the deterrence is generally irrelevant to the plaintiff, whose status as victim indicated a failure of historical deterrence on the one hand, and unlikely repetitive status with the need for future deterrence on the other. The obvious distinctions between past and future and specific and general deterrence are surprisingly blurred. They are well-made by Ted Honderich in his Punishment (1976).

we wish to accord those who are defined by their nonbeneficial conduct, that is, tort feasors, the same deference?[41] That is, the conduct in some way caused harm, for if not, there is almost always no tort. So in that another was harmed, should the ability to rely on safe-harbor precedents be as firmly entrenched as in, say, commercial law? In any case, in general, it is not.

Aside from showing little public interest and few public rules, tort law has limited public accountability. That is, there is little consequence to misbehaving during the tort litigation process. Plaintiffs are free to bring cases of limited or even perverse merit, claim wildly inflated or ludicrous damages and sue marginal or uninvolved defendants, and then further, make those defendants contribute an enormous amount of time, energy, effort, and money into defending the case. These same plaintiffs can refuse to settle, in most jurisdictions unilaterally dismiss their case, present the slimmest of evidence in the most sympathetic, defamatory, and theatrical manner, and, win, lose or draw, never owe a cent to any defendants.[42] The irresponsibility, though, is mutual. Defendants, perhaps defendants who knowingly have caused devastating injury to the plaintiff, can refuse to pay until the jury, appellate court, and supreme court, perhaps following a decade of litigation, tell them to do so. Meanwhile, typically well-funded – it is usually a losing, if not insane, strategy for plaintiffs to sue insolvent, impoverished, uninsured, and uncollectible defendants, and the greater the injury and the more complex the issues, the more insistent the reason to be sure that the defendants are far from judgment proof – defendants are free (without adverse consequence) to delay, obfuscate, and make plaintiffs spend huge amounts of money. The supposed leveler is plaintiffs' counsel. Often, they act both as lawyers and bankers, bankrolling the litigation to the end.[43] Although this at times levels the playing field, if only somewhat

41 Ronald Dworkin makes a similar point in Taking Rights Seriously (1977).

42 Of course, litigants are subject to court sanctions, usually under Federal Civil Rule 11 or its state court equivalent, as well as the torts of abuse of process and malicious prosecution. That said, the scarceness and poverty of these remedies are well-known if not notorious. The problem, though, is not just due to the skittishness of courts to impose such sanctions or the lack of sufficient knowledge to reference the misbehavior conflict. A tough stance on frivolous suits could jeopardize legal change and growth, particularly direct reversals. *Brown v. Board of Eduation* comes to mind.

43 There are now companies who will do the same thing, under certain restrictive conditions. Such a practice was once banned as champerty or maintenance, essentially the financing of another's lawsuit. Insurance carriers were never accused of this, but lawyers using contingency fees were. Consider the not atypical views of one leading writer on professional responsibility. "The condemnation which attaches to 'champerty' and 'maintenance' may equally be applied to an insistence on a 'contingent fee.' It is not the size of the fee which matters: the lawyer would be justified in sending in a bill, at the conclusion of the successful suit, of exactly the same amount. The objection to the contingent fee is that it subordinates the professional services to the possibility of remuneration *in that particular case*. The lawyer, of course, as a rule, secures for himself, by contracting for the contingent fee, a larger fee than he could conscientiously charge after a suit has been won." Carl Teausch, Professional and Business Ethics 223 (1926).

(consider the tobacco litigation for decades), that leveling has two distinct limitations. First, in that an impoverished plaintiff needs the money soon – long delays cause a sufficient negotiating imbalance to push a short settlement or unilateral dismissal. Second, plaintiffs' lawyers-turned-investment-bankers are generally restricted to certain torts: medical malpractice, class actions, product liability, and smaller injury cases (auto and premises). Additionally, there is some limited banking in employment cases and certain smaller commercial torts, but even there, expenses advanced are famously a contentious issue. For other torts, economic disparity can be dispositive.

In any case, being slow to pay is not penalized.[44] In fact, it is often rewarded. A large part of the reason is that the justice system is provided rent and wages free. There is no cost to the delay that requires additional case management conferences, hearings, pretrials, or any other occasion requiring a visit to the courthouse, or any expenses for the enormous amount of time entailed in the reading of pleadings, briefs, and motions of every flavor: to dismiss, to clarify, to amend, to gain summary judgment, for judgment, for a new trial, *in limine*, to certify, to disqualify, and for sanctions, to name just a very few. Finally, having taken the time of clerks, staff attorneys, magistrates, externs, and judges (plus their various staff members and the employees who police, clean, and maintain the courthouses) for many months, perhaps years, litigants can demand more. They can request a virtually free trial.[45]

We can easily imagine a system where private wrongs are not resolved at public expense. The English and European systems move part way there, not on the public end, but by doing generally what the American system does rarely: charging the losing party for the winning party's legal fees. As for charging fees for courthouse services, in general, we do not need to go abroad to see such a system, private judging and arbitration are ubiquitous, if still only in a minority of specialized, and largely contract not tort, set of cases. We can see a compelling justification for using public funds to solve private dilemmas, but we shall save that for the next chapter. The usual reason given is one of distributive justice. The need for access to the courthouse is sufficiently great that it ought to be provided free to all. Even if that were true – and why courts should be free when medicine, daycare, hospitals, colleges, and basic shelter are not, is at least puzzling – it would not explain why there is no means test. Some at least can, and presumably should, pay. Others can pay part of the costs and presumably, as well, ought to do so. That said, the central thesis of this book, found in Chapter 2, looks to provide that answer.

[44] The law in certain jurisdictions has introduced prejudgment interest provisions, typically at a lower rate than corporations or insurance companies earn, whereas the award of interest is often discretionary based on the failure to negotiate in good faith, a matter courts are reluctant to find.

[45] The losing side may be charged with the jury fees, but that typically is in the very low hundreds of dollars a day.

We have largely been seeing what does not happen procedurally with tort cases. What does happen is a long story, but at least several points not already made should be added. These points revolve around the issue of evidence.

Truth is not automatically the same as evidence, and it is an interesting question as to who has the task, if anyone, of turning truth into evidence. The only real candidate for the job is the system itself, and that candidate is simply not up to the task. But backing up and considering the system in parts, we should examine, if only to disqualify, the other candidates. These are the parties. Not only are they not even vaguely interested in uncovering truth, they are positively interested in hiding that truth if it appears in too stark and (for them) too revealing a form. Prior notice, a suggestion of bad habits, the ingestion of drugs or alcohol, embarrassing historic test results, an attitude or talk suggesting a knowing understanding of the risk taken, admitting the authority of an agent, chats with a competitor at a trade show, due diligence disregarded or not completed – these are a small sample of material, relevant statements that, if true, can devastate a party's case. Hiding such statements may be crucial to success.

The easy response is that the truth is revealed because the other side, the opposing party, will discover it and present it. Taken as more than generalized platitudes, neither is true. First is the process of discovery. The tools of tort litigation are limited by money and time, but also by honesty and jurisdictional strictures. It may be that a pharmaceutical maker knew of a problematic foreign test result, but in the face of its denial, there may or may not be the ability of a particular plaintiff to discover that fact because of expense, limited time periods imposed by increasingly "rocket-docket" courts to find that information, or the wherewithal to get information from another state (and jurisdiction) or even another country. Consider for a moment that even finding a witness to an automobile accident can be beyond the ability of a particular party, sometimes any party. Finally, the almost never-mentioned fact, by any analysis, journal articles, or studies (although widely reported anecdotally), is the stunning span of legal ability among members of the bar. The disparities in ability, intelligence, energy, dedication, and talent are vast. But so is basic training. Not only is trial practice a secondary aspect of law school training, to some extent it should be. Swimming is best taught in the water, not the classroom. But that is hardly the issue. Rather, discovery and courtrooms are ultimately managed, overseen, and controlled by a subset of members entirely unrequired to prove competence or readiness or ability, before or after their assumption of office: the judiciary.

It is commonplace that crucial witnesses are never presented to the jury. They may be too dangerous for either side to sponsor (even as so-called hostile witnesses taken upon cross-examination). Witnesses with criminal records, personal agendas, overt biases, substance abuse problems, or more typically, with testimony that is uncomfortable (although in different ways) to both

sides are unlikely to testify for anyone. This does not even count unattractive witnesses: those whose looks, accents, ethnicities, skin color, religion, voice, disability, or just plain antimagnetism make them unlikely to appear on the witness stand. The "system," whatever that might be, is not calling the witness.

Perhaps the loss of truth is best illuminated by the evidentiary problem of expert testimony. Each side presents one or more opposing experts in the hopes not only of explaining complex events, but of persuading the jury that their own explanation is correct. It is competitive science when it is science at all. Consider a fire loss accompanied by an explosion, where the set of possible experts includes firefighters, arson investigators, electrical engineers, professors of engineering, and specialists in large-scale industrial fires and explosions. Who would be the most able, knowledgeable, and the most likely to shed light on problems of cause and origin, spread, and fault? These are usually the wrong questions, at least if you are a party to the suit. Advocates posing as experts who are persuasive, charming, comfortable on cross-examination, and more sure of almost everything than a good scientist is – these are the desirable and durable candidates. Complex, textured opinions are disclaimed, and long-winded ones positively abhorred. Price and availability are the next concerns. But even expertise, the original issue, is not just about expertise, it is about perceived expertise. Will the average juror be impressed by a heroic firefighter, with perhaps a thousand real fires to his credit, who bets his life every day and night that he has a sufficient understanding of a fire to put it out safely and properly? Or will the juror be more impressed by an electrical engineering professor with degrees from universities so obscure they fail even to field a football team, with theories rather than experience, whose theories of cause and origin of the fire are counterintuitive, who says the explosion was an acoustical illusion based on a back draft, and who never extinguished any fire greater than one in his backyard grill? Are science and truth somewhere alive in these considerations?

Of course, modern evidence law grants judges a so-called gatekeeper function, barring the proverbial courthouse door from the entrance of "junk experts."[46] But, even if we thought judges had any real ability to man the gates – to understand that Einstein and Galileo, counterintuitive thinkers that they might be, got it right when those universally considered to be the more credentialed and learned got it wrong[47] – each of our possible experts would, in fact, qualify easily. Surely a firefighter knows something more about fires than

[46] The key cases are *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999).

[47] The exuberance of gatekeeper enthusiasts ought to be tempered if not entirely degraded by the experience of scientific, peer-reviewed, professionally edited journals who, despite careful review procedures and a close editing policy, continue to publish articles with bogus claims, inferior methodology, and fraudulent results.

ordinary laymen, a sufficient basis to meet the criteria required by the typical evidence rules.[48] Moreover, neither the firefighter nor the college professor may know what really caused the fire. It is easy to imagine that only the industrial fire and explosion expert has the real expertise. Consider early drug liability cases. Perhaps only a handful of researchers have the expertise to speak on the issue and they could be barred as being employees of the CDC or NIH, are too expensive to retain, are unsettled in their views, or have been retained by the defendant to shepherd the science through both drug and legal trials.

The point is that truth is an early casualty. But let us move away from the issue of partisanship and advocacy and ask what we could mean, in a tort context, by discovering truth. The first problem is impatience. We cannot wait. Suppose a recently introduced drug had a statistically small but significant incidence of associated heart attacks among its users; or suppose an accounting firm's tax shelter package attracted IRS auditing attention that began a long review process destined for even longer court challenge; or suppose residents living downstream from a chemical plant had a suspicious number of miscarriages. Each of these results waits for scientific confirmation. It may be that a ten-year look will definitively determine whether the heart attacks are an aberrational blip or a side-effect of the medication, whether the Supreme Court or a majority of the Courts of Appeals will bless or penalize the tax shelter, and whether the miscarriages are due to waste from the chemical plant or from some other toxin or pathogen. Let us suppose further that the medicine, accounting, and chemistry are likely to give unpredictable and unreliable early results. Premature forensics (here) are junk forensics.

In medicine, business, and science, if we know all this, we ought not be dogmatic about any early announcement of the truth. We can wait and get it right, or at the very least, quite a bit better. In the meantime, our actions can be prudent and preventative, in a way calculated to minimize potential risk, but can remain presently unsettled as to the truth or fact of the matter. We can always look at the best evidence available, but understand that possessing the best evidence available, when crucial evidence is missing for the moment, is not the same as possessing the truth. We can understand this, but tort law courts cannot, or at least do not.[49] They decide cases as they come, and juries hear the state of the incomplete art as it is presented in the courtroom. That

[48] For example, Federal Rule of Evidence 702 requires only that "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Literally taken, an auto mechanic has the same *prima facie* right to explain the complexities of a transmission or engine failure that the scientific community might think requires a Ph.D. in physics or engineering as an MIT Nobel Prize winner in physics.

[49] To some extent, neither does Ronald Dworkin, who conflates best evidence with truth in *Hard Cases*, 88 Harv. L. Rev. 1057 (1975).

said, good early results hardly provide comfort that they will be proven to be right later.

It is, in fact, worse than that. The standard in tort cases, in general, is that of the preponderance or greater weight of the evidence.[50] The evidence to be judged is the evidence admitted. Suppose we wanted to understand the causes of the French Revolution, and we knew there were 1,000 relevant facts; 400 were known, but any particular expert had time only to understand 150 and, when writing a book on the French Revolution, present only 50 of those.[51] Those writing from France typically share thirty of these facts, whereas French versus American historians of the French Revolution share twenty. Now, suppose a book on the French Revolution needs to be submitted to two juries: one of historians, the other a legal jury. The issue might concern competing claims of responsibility for ideas of equality, the setting of national borders, ethnic reparations, the propriety of using public funds to erect either a statue of Danton, or Abbe de Sieyés, the legal basis of portions of once French-Louisiana law, or some issue that understanding the French Revolution would require.

The legal jury would decide its issue by a preponderance of the evidence. What does that mean here? If exactly two books are submitted, and have conflicting views and conclusions, the jury may decide that the fifty facts of one book are more persuasive than the fifty facts of the other, or more exactly, that the twenty different facts of one beat the twenty different facts of the other. If all potential (or theoretically possible) evidence were considered, then twenty material facts would represent 2 percent of the evidence. If the known possible evidence were considered, then the same twenty facts represent 5 percent of the evidence. The percentages would be different, of course, if the two books came from a French-based and an American-based historian, because they share a different number of common facts. We could also imagine sets of books, each set with perhaps five volumes or 250 facts, multiplying the issues in predictable, arithmetic ways.

Pollsters look not only for numbers, but for indicators of confidence in those numbers. How confident are we about the French Revolution numbers?

[50] Occasionally, torts requiring greater degree of intentionality, such as fraud, generally require proof by clear and convincing evidence. Whether that, in fact, causes juries to turn away claims otherwise proven by a preponderance of the evidence, or just provides pseudoscientific smugness to lawmakers is an open question searching for an answer. As jury decisions are nonverifiable experiments, black boxes methodologically, resolution of the issue of whether there exists real space in decision making between various standards of proof is hardly just over the horizon.

[51] Facts here might mean large confluences of facts, like the role of the *sans cullotes*, the foreign debt, the rising expectations of the middle class, the influence of Voltaire and the Enlightment, infighting among the European royal families, the role of the Roman Catholic church, the royal financial crises, the calling of the *Estates-General*, the urbanization of the nation, the role of the colonies in transforming France to a mercantile economy, the books of Rousseau, and so on. If the numbers are still too low to imagine, multiply by 1,000 or 10,000.

For some events (the storming of the Bastille in 1789) very confident, and for others (a secret meeting of a particular time and place between Lafayette and Robespierre) very reticent. If the jury were historians, the reluctance to be confident would be accepted, even applauded, as the rational way to think and behave. The jury of historians can wait, perhaps for the discovery of a later manuscript or relic that sheds light on the issue, perhaps never getting further in knowing. Legal juries decide immediately.

The results of deciding now can be disastrous. Why should we think that one side proving 3 percent of the truth ought to be determinative against the other side proving 2 percent? Even if the numbers were 30 percent and 20 percent, we would hardly accept this anywhere unless we thought the 30 percent and 20 percent were representative of the whole (then even 3 percent and 2 percent might, as in polling, count as accurate). But that is almost never an issue we can count on in tort law. Nor is it one that tort proof appears to require. There are two ways we might judge sample representation: either from the books' authors or independently. The second is unavailable to the juries (or, in general, the judge as gatekeeper), whereas the first is problematic of likely veracity and possibly controversial as to methodology. Using a tort-like example, do we know if mouthwash that, when tested on domesticated turkeys for bad breath in poultry, with the inferred side-effect of tingling wings on a bird that essentially does not fly, is counterindicated for the treatment of bad breath in humans? Avian neurologists, like French historians, do not count their chickens early, but juries, needing to decide today, do.

Even if bad facts don't make bad law (bad judges make bad law, in reality),[52] bad facts can build a faulty foundation for any judicial doctrine or set of legal rules. Deciding cases as they come has a consequence of using present art, often extending it beyond any defensible implications, requiring up or down answers on where facts stand, and using as your guide experts who know a little or lot of what little or lot there is to know to build a set of rules and a system of rights. Justice Holmes's insight that all tentative rights tend to become absolute

[52] The adage about bad facts and bad law is stated so often by so many who ought to know better that one despairs of asking anyone simply to look at the actual judicial decisions. Consider a typical "bad facts" case, that of *Jacob & Youngs Inc. v. Kent*, 230 N.Y. 239 (1921). There, a plumbing contractor used a pipe different than called for in the contract, but not of a grade significantly poorer than that specified by the language of the agreement. The plumbing contractor simply and clearly breached the agreement, but tearing down the walls and floors appeared a to be a draconian solution. The court more or less invented the doctrine of "substantial performance" to solve the problem. Cardozo's language is telling in defense of his opinion. "Those who think more of symmetry and logic in the development of legal rules than of practical adaption to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard." Yet today the doctrine is the mainstay of contract performance doctrine. The "bad facts" there allowed an attentive court to fashion good law.

rights[53] is thus all the more disturbing if we think that at least some of the rights, whether they be held by the defense or the plaintiff, rest on quicksand. Yet courts must decide, cannot tarry, are barred from waiting, and must resolve conflicts as they see them. If justice is a casualty, we need to turn to Chapter 2 to see why we need to mourn its loss less tearfully than we might think.

[53] "All rights tend to declare themselves absolute to their logical extreme. Yet all, in fact, are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." *Hudson County Water Company v. McCarter*, 209 U.S. 349, 355 (1908).

2
Discovering Tort Law

While awaiting execution, Socrates is visited in jail by his old friend Crito. Crito proposes an easy, and relatively painless, escape from unguarded Athens to a new city where Socrates can live safely in those preextradition times. Socrates famously protests this proposal on a number of grounds, both prudent – it would be humiliating, others would be tainted or penalized for participating, non-Athenian cities have cultures antithetical (slovenly) or inimical (militaristic) to his liking – and moral. The moral grounds are simple and extraordinary, prompting a prediction of future moral behavior rarely, if ever, made in Western culture or in its literature. Central to Socrates' reasoning is the absolute irrelevance of the misconduct of others in justifying a response of the aggrieved.

Socrates: Then we ought never to act unjustly?
Crito: Certainly not.
Socrates: If we ought never to act unjustly at all, ought we to repay injustice with injustice, as the multitude thinks we may?
Crito: Clearly not.
Socrates: Well, then, Crito, ought we to do evil to anyone?
Crito: Certainly I think not, Socrates.
Socrates: And is it just to repay evil with evil, as the multitude thinks, or unjust?
Crito: Certainly it is unjust.
Socrates: For there is no difference, is there, between doing evil to a man and acting unjustly?
Crito: True.
Socrates: Then we ought not to repay injustice with injustice or to do harm to any man, no matter what we may have suffered from him. And in conceding this, Crito, be careful that you do not concede more than you mean. For I know that only a few men hold, or ever will hold, this opinion. And so those who hold it and those who do not

> have no common ground of argument; they can of necessity only look with contempt on each other's belief.[1]

Socrates' view provides a motivation and justification for modern tort law. In fact, those motivations and justifications that stray from Socrates' principles, and from what I awkwardly will now call the Socrates–Gladstone theory, and later the peace principle, create a tort system at once politically problematic and morally self-defeating. It is precisely our wandering from Socrates–Gladstone that causes the credibility of tort (and the rule of) law so easily to be called into question.[2]

Let us look at what Socrates is proposing.[3] Socrates has been tried and sentenced to death for what might be called "corrupting the morals of the youth," a significant accusation. He is likely guilty of it, at least to the extent that the corruption consisted in promoting intellectual curiosity, free inquiry, skepticism of authority, and thinking for one's self. Specifically, as restated by Socrates himself, the indictment reads:

> Socrates is guilty of engaging in inquiries into things beneath the earth and in the heavens, of making the weaker argument appear the stronger, and of teaching others these same things.

and

> You are accusing me, and bringing me to trial, because, as you say, you have discovered that I am the corrupter of the youth.[4]

The basis of his conviction is, by current moral or legal thinking, reprehensible, whereas both the procedure and motivation of the accusers are tainted. Together, there is overwhelming justification for calling into question the guilty verdict.

The details of Socrates' trial are both well-known and largely irrelevant here.[5] The corruption of the youth charge has some force. Without question, his antiauthority critique and skepticism of the inherited and prevailing wisdom

1 Plato, Euthyphro, Apology, Crito 58–59 (Robert Cumming, ed., 1948).

2 That is, we think that the freedom to think for yourself, and the encouragement to do so, hardly count as wrongs, let alone crimes. However, demagogues aside, even a nominal democrat such as Devlin manages to demonstrate that the ideal of freedom of thought and action can run afoul of the notion of a society protecting itself from corrupting, and perhaps debilitating, attacks. Mainstream defenders of liberty, from Mill to Hart, of course have no use for such an argument. See Devlin's defense of parochial, wrong-handed societies' right to protect themselves from iconoclasm, freedom, science, and deviation in Patrick Devlin, The Enforcement of Morals (1965). An excellent marshaling of the arguments against that position is made by A. R. Louch, *Sins and Crimes*, 43 J. of Phil. 163 (1968).

3 Here, and in all the dialogues discussed here, there is the caveat that this is the Socrates portrayed by the young Plato. A sterner, more anti-Socratic view is taken by the older Plato in, for example, Laws.

4 Plato, *Id.* at 23.

5 They, essentially, constitute the dialogue, the Apology.

challenged the Athenian establishment, suggesting to his often youthful audience that both conservative and sophistic thinking were without logical basis or moral justification. In that morality, or at least public morality, was wedded to societal consensus or respect for authority, Socrates undoubtedly undermined it. Rather, he argues for an objective standard of morality (and everything else), which is nothing less than a methodology that purports ruthlessly to seek truth. Although there may have been some argumentative badgering, there was no insistence on his view in general.[6] Under Socrates' own terms, he was improperly convicted and sentenced. However, he argues that, even with these caveats, he may deserve the punishment simply by his acceptance of Athenian citizenship and perhaps of Athenian rules of law.

Let us combine the two notions: that one should never repay evil with evil, with the imperative that debts, even those improperly accrued, must be repaid. The conclusion is not that restitution is not owed: in fact, it is. Rather, any notion mandating that the debt is due makes it so on something like an all-or-nothing basis. The degree of violation or compliance with the duty, along with volition, scienter, intentionality, or moral conduct, in general, comes down to a single question: is reparation due and owing?

Of course, this is a notion radically at odds with traditional moral thinking. Normally, for example, the degree of wrongdoing determines the punishment.[7] This is essential to the most moralistic legal arena, that of criminal law. In a homicide, consider the following scenarios: a driver accidentally runs over a pedestrian, a hunter recklessly fires in the direction of picnickers, a prematurely arriving husband stabs his wife's lover in the heat of passion, a disappointed and intoxicated gambler strikes a fellow poker player in a drunken state, or a greedy heir plans the poisoning of his wealthy uncle weeks or months in advance. Each situation calls for a nuanced reshaping of our notions of the proper degree of punishment. Put differently, complicity matters. For tort, and perhaps more importantly contract, the degree of wrongdoing and the calculation of intent remain largely irrelevant to the richness and diversity of the remedy. For Socrates, there is no link between wrongdoing and punishment other than one of threshold.

Consider the civil law context. Suppose a party to a contract intentionally, maliciously, purposely, wickedly, and with hate breaches an agreement to sell

[6] This is well-illustrated by his confrontation with that sophistic pillar, Protagoras. The dialogue so-named proceeds by argument, parody, and even exaggeration in what seems to be a protest, but far from an intolerant insistence, that virtue is reducible to knowledge and morality is not merely convention.

[7] Even here, the caveat of moral luck in the guise of, for example, bad aim allows disparate treatment for the same murderous intentions depending on unintended results. The same intentions often lead, between individuals and for the same individual at different times, to quite disparate results based on the complexities and chance of the empirical world. The subject is treated in Bernard Williams, Moral Luck (1981).

his set of the collected works of Plato for the very reasonable price of $20, when every bookstore and Web site charges $120. If the wronged buyer sues for that breach, she would receive $100, without further deliberation. There is, of course, the argument that for disparate torts (a myriad of claims in a variety of jurisdictions), punitive damages cover just such situations. If there is a coherent theory or justification for such additional and punitive damages, it challenges the all-or-nothing view of blame.

A brief detour to consider the quagmire of punitive damages. Their purpose can be to punish, discourage, or make an example of a wrongdoer, with intent and malice counting in the determinations of the award. (Although these purposes are quite different, they are typically and improperly conflated in the case law.) Their very existence yields a two-tier system, one allowing routine restitution (in the ordinary, not legal, sense of that term) and another something plus that. The worse the conduct, the more the wrongdoer ought to pay. This amorphous area operates by its own logic and set of rules as it makes its way through the tort system. Including it in almost any theory makes the logic of that theory problematic. The two-tiered damage rubric has the feel of randomness, with the dominant compensatory-only situations ignoring the occasional occurrences of the punitive.

Moreover, the importance of punitive damages is easy to overstate. Its reach is subject to specific limitations. First, it is impure, as deterrence (apart from intent) counts, such that if others are dissuaded, damages may be imposed absent scrupulous regard for intentionality or foreseeability. Second, the award of punitive damages is sufficiently rare and increasingly in retreat, as it generally succeeds only in indicating the random scourge of legal judgments, defeating the purposes achieved when law and decisions are (or are seen to be) predictable or universal.[8] Third, it operates with few guiding principles or constraints, and then only inconsistently, so that its effect on the system is murky, difficult to measure, slight, and often disregarded. Fourth, in that the Socrates–Gladstone theory is prescriptive not descriptive – what ought to be, not what always (although, in actual fact, usually and with increasing frequency) is – then a

[8] For example, with any badly made, ill-conceived, or challenged product or drug, from asbestos insulation to L-tryptophan, a single adverse judgment among many has the feel of a lottery, with the possibility of multiple judgments over many cases overpenalizing a defendant. Limited criteria exist to measure aggregated awards. Consider the Ford Pinto cases. Ford was sued reportedly for designing its Pinto hatchbacks with the gas tank behind the rear axle, leaving only 9 to 10 inches of crunch space to the rear bumper. Crash tests revealed that a 20-mile-per-hour, rear-end collision could cause an explosion, but for financial reasons, Ford put the risky design into production. The jury in *Grimshaw v. Ford* awarded punitive damages of $123,000,000, an amount reduced to $3,500,000 by the trial judge, affirmed on appeal. 119 Cal. App. 3d 757 (1981). Multiple awards would bankrupt Ford (perhaps also having the effect of preventing later victims from recovering), but the reduction in itself was a random act, with no basis other than the flim-flam test of using multiples of compensatory damages. The only limitation on aggregation seen constitutionally is a function more of federalism than rationality. *See Phillip Morris USA v. Williams*, 127 S.Ct. 1057 (2007).

peripheral, marginal, atavistic, complicated to rationalize, and more difficult to defend exception to the pervasive, descriptive picture is not particularly disquieting.[9]

Punitive damages aside, tort law operates in a manner oblivious to moral intentions. Once the elements of a claim have been met – existence and breach of duty, proximate cause, the absence of dispositive defenses – liability attaches and damages flow – and flow as though the trigger hides in a black box. Neither punishment nor social mortification counts in this minimalist approach to finding a remedy to the disturbance of the social order. Moreover, social engineering, either through efficiency maximization or rational risk allocation, is largely and overtly irrelevant in determining liability or fashioning a remedy. Not only would it be possible to imagine a system with the shades of fault determining the gradations of damages, it might be thought that such a theory would have the useful consequences of deterring misbehavior and making minimal misconduct less punitive. For example, consider at the same time how this would work with premises and product liability. A landowner observes, over time, his decaying barn, every week the worse for wear, whether by rain, snow, or termites. The barn is visited by a chicken-feed provider whose service includes delivery directly to the barn. The product manufacturer of the chicken-feed receives weekly reports of disturbing incidents of side-effects of users of the feed and published articles of problems in earlier studies. At some point, the barn collapses, killing the chicken-feed delivery man, but not before his feed kills a number of the chickens and their consumers. If damages were tied directly to fault, each passing week of increased knowledge before the barn fell or the feed killed a chicken or chicken eater would give rise to greater damages. Instead, dead is dead, and the difference between bare and enriched knowledge largely fails to count. Meanwhile, the feed contributed to the death of the poultry. Is this a set-off, an argument against payment? For the barely aware, tort is a treacherous world. For the knowledgeable, there is a free pass on increasing moral culpability.

Not only could tort be otherwise, two powerful theories are employed, almost universally by one camp of adherents or another, to argue that it is

[9] The literature and court opinions are breathtakingly vague and exemplars of contrasting and contradictory justifications and limitations. The reason is almost certainly that the thinking itself, at least bipolar, is alarmed at the consequences that there be any firm view on the matter. Consider the seminal United States Supreme Court thinking on the issue, *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). The majority holds that the standard for imposition of punitive damages based on the test set forth in *BMW v. Gore*, 517 U.S. 559 (1996) is crystal clear just incorrectly applied. Justice Ginsburg in dissent finds the standard crystal clear, and correctly applied. Justice Scalia in dissent finds the standard incoherent, so it can never be applied, correctly or otherwise. Justice Thomas in dissent states there to be no legal basis for the court to develop a standard, whether the putative one is or is not coherent or correctly applied. Such analysis is breathtaking in its implicit admission that the fog is thick indeed in the legal wilderness.

otherwise. They are recognized by the basic claim each makes about tort, and somewhat generally civil law. The traditional theory holds that what is central to tort is the achievement of corrective justice. The cost–benefit theory holds that what is central to tort is the achievement of utility. Maximizing the central goal is what defines each theory.

First, then, is the traditional theory. It roughly holds that the loss should fall on the greater wrongdoer and, essentially, the existence of wrongdoing is tied to intentionality. Intentionality is parsed, judged, and categorized, using knowledge, foreseeability, and other concepts loosely drawn from psychology and morality. Even in those surprisingly few cases where the more modern addition of comparative fault comes into play, loss follows wrongdoing, both the victim's and the defendant's, doubling rather than reconciling intentionality issues. Of course, reconstructing intent can be an evidentiary nightmare. It involves a severe disconnect between legal rules of thumb (e.g., knowledge and training allowing a ready inference of intentionality, denials by wrongdoers often being sufficient to detect intent) and any neuropsychological reality. However, a formula to gauge fault is necessary to any noninsurance-only system, that is, a system where loss is left not only and always to those who have suffered the loss. That said, severe modesty, if not contriteness, is required for our system. Voluntariness and knowledge have been the guiding principles for hundreds of years and have undergone remarkably little change. They are tied to discredited theories of mind and action, insupportable in the face of modern neuroscience on the one hand, and what we know of the reliability of many forms of evidence on the other.

All of this could be improved, except that the traditional theory relies on a robust notion of public morality, perhaps public moralism, that cannot be saved.

That is, part of the truth is entirely before us, yet completely obscured. Law and morality should not be the same. Debate about law is often framed by assessing the shortcomings of any particular legal system, and worrying how to fix it. The obvious comments against a phantom opponent that natural law – which conflates law and ethics in some manner allegedly illogical, fallacious, or meaningless – is a mistake by one confusing law and morality through an (often imaginary) argument are usually beside the point. Certainly, natural law remains on the sidelines in a market-driven, liberal, western legal system; perhaps it is not quite so in a traditional, theological, closed legal system. In any case, that issue is largely semantic without being terminological, in that it tests whether, for any particular population, the concept of law is coincidental with that of political morality. Our focus on the limitations of the traditional theory is different. It is not that morality fails to count, is not real, is a metaphysical mistake, or such other nonsense. It is that, on the one hand, law is more than merely morality. It must include use of such concepts as prudence, security, prosperity, and politics. On the other hand, law is frightening when it is largely

just morality. Consider the simple moral precept to treat all persons equally. Should that legally imply a requirement to provide financial support entirely general, support provided to strangers equally with one's spouse, children, and parents, with sanctions, penalties and enforcement for those who (selfishly or at least unethically) choose kin over strangers? It is not merely, to use Fuller's terminology,[10] that some legal goals should be aspirational – that they should constitute what is the best in professional behavior, good samaritanship, or equitable redistribution within a tangled web of misdeeds – it is that they should not be legal goals at all. It is their very rejection that makes law successful and sufferable.

The second, and equally powerful, theory is cost–benefit theory. It suggests that policy considerations, separate and apart from the interests of the potential opposing putative litigants, ought to count significantly in remedying any civil wrong. The choice of policies differs widely. Liberal theorists often want to saddle the loss on those most financially able to bear it. Conservative theorists want to resolve conflicts in the manner that best promotes efficiency or maximizes economic utility. Libertarians presume that the loss remains where it falls in those cases where insurability is a viable option, so as to promote individual choice. The legal system nods at these goals and provides some deference in specialized areas (antitrust decisions are replete with efficiency analysis, while product liability decisions are full of discussions of manufacturers' abilities to absorb and accept risk), but, in general, despite the endless drumbeat of reforming and ever agitated commentators, ignores cost–benefit analysis.

Returning, then, to Socrates: how do his remarks in the *Crito* differ from the logic of traditional theory? Certainly, intent, morality, and some rough notion of *lex talionis* figure in. Moreover, there is the central concept of consent, seemingly the core of any contractual analysis that is repeatedly presented. It is this concept of consent that bears initial examination.

Socrates is facing criminal charges, and has the right, under Athenian law, either to accept banishment or to risk death at trial. He consents to the latter.

[10] Lon Fuller divided allowable conduct into the decent (duty) and the good (aspirational). Although he claims law to be concerned with the merely decent, tort law might be the most aspirational. Consider Fuller's distinction: "The morality of aspiration is most plainly exemplified in Greek philosophy. It is the morality of the Good Life, of excellence, of the fullest realization of human powers. In a morality of aspiration there may be overtones of a notion approaching that of duty. But these overtones are usually muted, as they are in Plato and Aristotle. Those thinkers recognized, of course, that a man might fail to realize his fullest capabilities. As a citizen or as an official, he might be found wanting. But in such a case he was condemned for failure, not for being recreant to duty; for shortcoming, not for wrongdoing. Generally with the Greeks instead of ideas of right and wrong, of moral claim and moral duty, we have rather the conception of proper and fitting conduct, conduct such as beseems a human being functioning at his best. Whereas the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible." [citations omitted]. The Morality of Law 5 (1964).

Do we accept that Athenian consent today as legitimate consent? Suppose we know the legal procedure to be flawed and the terms of banishment to exceed Socrates' life expectancy. Suppose, further, we believe Socrates' protestations of innocence and, taking a realistic view of discourse, think that in spreading truth he did nothing wrong, even under the law of fifth century B.C. Athens. Is Socrates' choice sufficient to determine a consent that is worth enforcing? Undoubtedly not.

This, however, is not quite Socrates' own position.

Socrates: . . . Much might be said, especially by an orator, in defense of the law which makes judicial decisions supreme. Shall I reply, "But the state has injured me by judging my case unjustly?" Shall we say that?
Crito: Certainly we will, Socrates.
Socrates: And suppose the laws were to reply, "Was that our agreement? Or was it that you would abide by whatever judgments the state should pronounce?"[11]

Socrates states this position rather than argues for it. Given his usual enthusiasm for every position he endorses, however, this short shrift serves as an implicit denial of consent to the punishment. In the next line, he launches into his other, and better known, position – that of an implied social contract.

Socrates: And if we were surprised by their words, perhaps they would say, "Socrates, don't be surprised by our words, but answer us; you yourself are accustomed to ask questions and to answer them. What complaint have you against us and the state, that you are trying to destroy us? Are we not, first of all, your parents? Through us your father took your mother and brought you into the world. Tell us, have you any fault to find with those of us that are the laws of marriage?" "I have none," I should reply. "Or have you any fault to find with those of us that regulate the raising of the child and the education which you, like others, received? Did we not do well in telling your father to educate you in music and athletics?" "You did," I should say. "Well, then, since you were brought into the world and raised and educated by us, how, in the first place, can you deny that you are our child and our slave, as your fathers were before you? And if this be so, do you think that your rights are on a level with ours?[12]

This position, whatever its validity, is essentially tort law, not contract law. Socrates never bargained, consented, countered, shopped the field, or went into the marketplace to choose Athens. He was born there and had decisions,

[11] Plato, *Id.* at 60.
[12] *Id.*

benign or otherwise, foisted upon him, many as a child. Socrates owes what debt he does, at least in part, because of some concept of restitutionary fairness. Essentially, the state enriched him, and it would only be fair to reciprocate in some reasonable and proportional way. This is a concept far from the traditional view.

The traditional theory, again, is that loss follows fault, and when a civil dispute arises, it matters who is morally at fault. Lawyers commonly shy away from the term "morality," but it is central. Loss can as easily be caused by inadvertence, accident, or action despite one's intentions as it can by negligence or intentional design. A potential defendant can drive carefully, cautiously, and prudently and yet be forced by another vehicle into the path of a pedestrian. He can be forced into the same path by a tornado's wind, a faulty steering rod, or an icy road. Each time, the pedestrian is injured and to the same degree. Alternatively, the driver could be a young child, a mentally ill adult, or a senior experiencing a heart attack. Each of these circumstances would count, and count significantly, in the traditional theory. So far, so good, even, more or less, with regard to the Socrates–Gladstone theory.

The problem comes when taking the traditional theory seriously. Each degree and case of moral intention ought to count, producing a picture murky and unattractive. Suppose one driver knows that speeding, mild drinking, lack of sleep, blaring the radio, using a cell phone, or trying to check mentally the putative solution to Poincare's Conjecture for three-dimensional objects causes him to lose some control over steering, limit his attention, slow his braking, and make him, in general, a greater risk. Perhaps he worries about that and disregards those worries, perhaps not. Perhaps he, knowing this, is sufficiently self-centered or self-regarding that, despite an awareness of the heightened risk he presents, in general, to others, he is indifferent to, even contemptuous of, that risk because he is indifferent or contemptuous of his fellow human beings. Should any or all of this matter? In the traditional theory – yes.

Consider, for example, that automobiles are more destructive to human life, health, and the environment than most wars, many diseases, and any number of other vicissitudes. Consider further that it is easy to realize that matters of prudence, temperance, reasonableness, moderation, judgment, and revenge make a significant difference to the number and extent of automobile accidents, as noted, but not completely captured, in the categories of road rage, teen and geriatric driving, and drunk driving. One solution would be to follow Turkmenistan and require passing a morality test in order to obtain a driver's license.[13] Yet in stating this, the suggestion seems at once ludicrous, a joke

[13] Whatever the merits of a morality test in assessing the degree of responsibility given to those who drive automobiles (or any other vehicle for that matter), the actual morality test given in Turkmenistan is alien, if not entirely antithetical, to almost any ordinary notion of western morality. Candidates need to pass an exam based, in large part, on the late President for Life

perpetrated by a remote, bananaless-banana republic, hardly worthy of real consideration. But why? If intentionality counts and moral judgment should be taken at face value, then attitudes of indifference, disregard, and defiance matter, and dispositions that turn those attitudes into habits would be issues of the first concern.

Morality has neither borders nor edges. Everything counts. Yet, when looking at the many ways to be an errant driver, in ordinary court proceedings, little of this counts. Intentionality and morality are typically glossed over. Inquiries into mental geography and ethical fine points are not only a matter of reluctant trepidation, whether for conceptual difficulty, paucity of evidence or moral controversy, they are routinely ignored as being largely irrelevant.

Law is not just about personal decisions, just as private morality is not quite concerned with the same actions and arenas as public morality. Power, authority, and a healthy regard for the interests of the many over the interests of individuals count in judging any public action. Under the traditional theory, if a defendant is morally culpable, a claim arises against her unimpeded. In the public realm, should the same concerns arise, that is, wrongdoing and related injury, and should authority and power allow for redress, then, under the traditional theory, the action ought to go forward. This was the setting in 1850, when the English Parliament debated the so-called Don Pacifico affair. The house of a wealthy British citizen living in Athens had been sacked by Greek youths remotely connected to the Greek government. Restitution was due, the Greek government wrongfully refused to pay, and the British Foreign Secretary, Palmerston, ordered a blockade of the Greek coast.

Let us put aside some of the historical considerations here and look, instead, at Gladstone's protestation to his government's actions. The wrong was clear, the response calculated to achieve redress, and the matter public (involving power and authority). Nevertheless, Gladstone is deeply critical.

He rejects the contention that possessing the power to compel redress necessarily requires its use. Although this might seem obvious, particularly in the mocking manner Gladstone states the case, it is a retreat from traditional notions of imposing just deserts on wrongdoing, the doctrine of *lex talionis*. Put otherwise, it undermines the position that the authority to punish implies the duty to punish.

> [The British Viscount and Foreign Secretary, Palmerston,] vaunted amidst the cheers of his supporters, that under his administration an Englishman should be, throughout the world, what the citizen of Rome had been. What, then Sir, was a Roman citizen? He was a member of a privileged caste; he

Niyazov's spiritual writings contained in his book, Ruhnama. Niyazov enacted a decree that requires drivers to complete a sixteen-hour course on Ruhnama in order to ensure "that future drivers are educated in the spirit of high moral values of Turkmenistan's society." For those wanting to enjoy the benefits of a license, but short on time, the state generously excerpts large displays of Ruhnama on billboards along Turkmenistan's roads.

> belonged to a conquering race, to a nation that held all others bound down by the strong arm of power. For him there was to be an exceptional system of law; for him principles were to be asserted, and by him rights were to be enjoyed, that were denied to the rest of the world. Is that the view of the noble Lord as to the relation that is to subsist between England and other countries?[14]

But it is not restraint and reluctance due to prudence, caution or a cost–benefit calculation that gives Gladstone pause. Rather, getting the moral balance right requires too robust a program. Law, here, is less than morality, less than obtaining justice, and less than teaching a lesson. As his biographer puts it, "Gladstone then contested and mocked the doctrine of Britain as a universal arbitrator."[15] Gladstone, however, does more. He essentially suggests that there is no arbitrator to be had, none wanted, none desired. No one qualifies as a candidate for the role.

When these ideas of Gladstone are put together – morality being something greater than law when considering redress and justice alone being an insufficient basis for action – his conclusion is compelling:

> Does he [Lord Palmerston] make the claim for us that we are uplifted upon a platform high above the standing-ground of all other nations? It is, indeed, too clear, not only from the expressions, but from the whole spirit of the speech of the noble Viscount, that too much of this notion is lurking in his mind; that he adopts in part that vain conception that we, forsooth, have a mission to be the censors of vice and folly, of abuse and imperfection, among the other countries of the world; that we are to be the universal schoolmasters; and that all those who hesitate to recognize our office, can be governed only by prejudice or personal animosity, and should have the blind war of diplomacy forthwith declared against them. And certainly if the business of a Foreign Secretary properly were to carry on such diplomatic wars, all must admit that the noble Lord is a master of the discharge of his functions. What, Sir, ought a Foreign Secretary to be? Is he to be like some gallant knight at a tournament of old, pricking forth into the lists, armed at all points, confiding in his sinews and his skill, challenging all comers for the sake of honour, and having no other duty than to lay as many as possible of his adversaries sprawling in the dust? If such is that idea of a good Foreign Secretary, I, for one, would vote to the noble Lord his present appointment for his life. But, Sir, I do not understand the duty of a Secretary for Foreign Affairs to be of such a character. I understand it to be his duty to conciliate peace with dignity. I think it to be the very first of all his duties studiously to observe, and to exalt in honour among mankind, that great code of principles which is termed the law of nations.[16]

[14] Cited in Roy Jenkins, Gladstone 119 (1995).
[15] *Id.*
[16] *Id.*

In short, and in a manner somewhat unexpected, the driving force here is not that of authority, justice, morality, or redress. It is peace. What is even more unexpected is that peace is the driving factor in civil law, in general.

Peace appears an odd notion, out of place in the civil law system. The primary civil categories of torts, contract, restitution, and property seem far from the landscape of warring nations, battles, diplomacy, and violence. The parties are private, with governmental entities entering the arena not as authoritative sovereigns but only in the same position as private players, dressed in after-hours mufti. Coercion is technically set aside and remedies are, by battlefield standards, mild. Moreover, the cry is one of justice. The system, or at least its adherents, seeks to right wrongs, remedy injustice and make whole, complete, full, satisfied, and well-with-the-world what was upset by various breaches of duty. In some kind of convoluted way, *status quo ante* regains the field from *status quo post.*[17]

The dominance of the notion of justice is startling. Remedy agents are labeled justices or Mr. or Mme. Justice; buildings housing dubious activities are called "Justice Centers," "Halls of Justice," or "Justice Buildings"; bureaucracies concerned with matters as diverse as debt collection for central governments or prosecution of smugglers are called "Justice Departments"; whereas civilian administrators sorting out minor traffic and petty financial problems carry the imprimatur "justices of the peace." The last appellation, for the least trained group, is virtually the only (prepositionally phrased jetsam, at best) mention of peace. Justice is ascendant.

But does anyone really want justice?

The guiding principle of the Socrates–Gladstone theory is peace, not justice. Nowhere has Socrates suggested that justice would be achieved by his execution (whatever injustice might or might not arise by his escaping Athens). In fact, the entire force of his argument was that virtue ought to be the goal of a society, that his quest for truth embodied virtue, and that no crime did or could occur under such circumstances. Accepting punishment does not promote justice or make things right in some greater metaphysical sense of restoring some originally correct state of affairs. Rather, the preservation of civil society was primary. Gladstone concurs, distancing himself from the entire conversation about achieving redress and justice by righting the wrong. In fact, his argument concedes that he fails to right it.

The British citizen and the subject of his redress are forgotten while the failures of the Greek government to achieve internal justice of international

[17] Hegel speaks of punishment (or here, damages) annulling the wrongful act. There would be a cancellation and a return to a previous state of affairs. G. W. F. Hegel, Philosophy of Right 69 (Oxford, 1942). The full doctrine takes us into the Hegelian mysteries of Absolute Idealism. As Honderich, looking at Hegel's theory of punishment, points out, "All this, of course, is obscure. It is by Hegel." Ted Honderich, Punishment 45 (1969).

repayment are ignored; rather, the language of Gladstone's speech is one of caution, circumspection, prudence, and peace. In that some notion of corrective justice was previously in play – a notion of deterring or correcting misconduct that upsets a *prima facie*, putatively nonobjectionable social, property, or financial landscape – it was allowed to lapse. To be clear, Gladstone never justifies Greek misconduct. He merely promotes British inaction and hails it as a virtue. To measure more carefully how the Socrates–Gladstone theory differs from the two other contenders, traditional and cost–benefit, a closer look at these two theories is in order.

First, the traditional theory. There is no canonical or standardized form of this theory, not only because of the failure to locate coherent and persuasive theorists (those are presently scarce), but because, strangely, the theory is so straight-forward and pervasive among various proponents that it is largely internalized pretheoretically. What, then, are its tenets? They are:

(1) Preventable loss caused by humans should not invariably remain on the sufferer of that loss, but rather should be redistributed according to some moral notion of fault. Harm without fault is, generally, insufficient to raise the right of redress.
(2) Once fault is established, the victim will be made whole. That is, full compensation is due upon a showing of fault, with little room for nuanced concerns regarding blame or intentionality. A little negligence or a lot, only complete redress constitutes justice.
(3) Defenses mirror liability. The victim's own actions are judged according to a moral scale. Here, as with the wrong doer, although fault counts, the judgments are often calculated in the language of cognition or reasonableness. Reasonableness, though, is not about intelligence, but looks more like the moralistic platitudes of everyday living. Almost any of them could begin with "take care to."
(4) The justice of any distribution of goods, wealth, or status prior to the questioned conduct is largely if not entirely irrelevant. Thus, remedies allowing a return to justice ante-bellum or to right the wrong are indifferent to any notion whatsoever of corrective or distributive justice, for it is blind to the world that most recently was. Moreover, this return counts, *prima facie*, as a net increase in morality. It is a moral achievement.

The traditional theory, in its pre-twentieth-first–century days, is a great advance over other early contenders. The settling of civil disputes has a bloody pedigree. In early historical times, from Genesis to the Iliad, civil disputes were resolved at best through private murders, at worst through sectarian or international warfare (consider the consequences of the kidnapping and false imprisonment of Helen). Although Pericles-era, Greek rationalism put a brake (but hardly a stop) to these practices, that Greek influence was limited in

geographical and political scope. For example, the Icelandic sagas, written 1,500 years later, are not atypical of misconduct worldwide and provide compelling, if barbaric, illustrations of how petty trespasses, slanders, and assaults trigger blood-feuds, civil wars, and the destruction of entire societies. Clearly, a court system rationally assessing moral turpitude and actual harm provides a stunning triumph over these darker and atavistic times. Perhaps that triumph is seen most clearly in its modern retreat – in the decay of post–Soviet Republics, in the warlordism of middle Africa, and in urban slums where gangs and gangsters are rampant – although its effects are often overlooked by the larger conflicts and pathologies evident in those situations.

What, then, is the problem? The traditional theory, after all, provides for the use of rational concepts of intentionality, morality, and proportionality, all unexceptional if commendable inputs. Yet despite being historical advances, even achievements, each has become suspect. Take intentionality. We no longer believe in a world shaped by wanton and malevolent gods, or in unrestricted notions of absolute liability where remedies are given to the victim against the causer regardless not only of fault, but even of intent.[18] A parked car carried by a tornado through the window of a nearby house does not provide the basis for a legal action against the car's owner, either for property damage to the house or injury to its occupants, or even for technical trespass to the property. Gone are the days of the deodand, when a belligerent and wandering bull goring a neighboring farmer can be tried and executed by hanging.[19]

[18] In tort law, there is liability without fault in peripheral but nontrivial cases. It may be that one could argue that engaging in the enterprise puts one on notice of due care (as, for example, keeping a dangerous animal), but that is a semantic and empirical stretch. There simply are cases of ordinary actions leading to treacherous consequences. Conversion of a stolen item without any consideration of knowledge, intent, or fault clearly triggers liability, as does, traditionally, publishing a libel or an employer's responsibility for medical bills for workers injured on the job. That said, the collapse to absolute liability is a mythical apparition, with the usual case of defective products trotted out and, once inspected, still finding notions akin to knowing fault everywhere. Even so shrewd an observer of the law as John Finnis sees a move in tort from fault to distribution in tort, but tellingly, as with almost everyone, without citations, and with a caveat of "in some places more than in others." John Finnis, Natural Law and Natural Rights 180 (1980).

[19] The complexity of attributing responsibility to nonhuman malefactors is described, among other places, in Bracton and in Maitland. See, in particular, Pollock and Maitland, II The History of English Law 472–473 (1895). As Maitland states in capturing the ambiguity of justification of the case law itself, "Ancient law will sometimes put the beast to death, and will not be quite certain that it is not inflicting punishment upon one who has deserved it. But the most startling illustrations of its rigour occur when we see a man held liable for the evil done by his lifeless chattels, for example, by his sword." *Id.* at 472. Oliver Wendell Holmes, in his Common Law (1881), is more critical of the entire process, particularly the execution of the animals that cause injury while wandering off the land. Interestingly, one of his successors on the court, Justice Hugo Black, made his reputation originally in his first case as a trial lawyer by protecting the rights of a trespassing bull, found to have had his way with a cow of uncertain intentions. Black represented the owner of that bull in recovering half the value of the fruit of the trespassing seduction. Specifically, a bull jumped

Intentionality matters in the traditional theory, and ascertaining it becomes the major project of much of the litigation process. Each party, individual or corporate, is deemed to be a knowing, autonomous, voluntary being. Obvious disabilities count, particularly if they completely vitiate intent, but they hardly matter according to any medical measure explainable by cognitive psychology or neurophysiology. Research stopped 150 years ago, at least according to the traditional theory.[20] Part of the blame lies with a system based on the historical authority of old and older precedents counting as good reasons regardless of present scientific basis. Part is due to the isolation of the legal academy and part to the recalcitrance of the traditional theory itself. Part is also simply due to the fact that its premises are wrong. Its metaphysics – ghostly and soulful rather than material, mental rather than neurologic, free-willed without concern of background or conditioning – are just the beginning of the problem. Intentionality is complex, cloudy, and ambivalent on the one hand and problematic of proof on the other. The complexity is easily demonstrated either by observation or self-inspection: thought-to-action is rarely a straight-forward, pure process. Diversions and doubts, as well as *akrasia* (weakness of the will) and cognitive dissonance, characterize actions routinely. Motivations are multi-stranded and typically reconstructed later in ways that justify further motivations. A piece of personal property arguably not yours might remain in your possession for any number of reasons: mistake in or of identity, delivery, or ownership, a lucky find, a failure to take a good Samaritan stance of integrity to return it, fear of being charged with theft, an intention to return the item that is delayed initially by sloth, then by fear or any combination of these. Any of these considerations could explain a neighbor's unreturned package at your door. The hot breath of fear and the amnesiac effects of bad motives might cause the mental interior landscape to change, even in relatively good faith. Perhaps, given some faulty labeling, it was an anonymous gift after all. In any case, circumstances count and characterizing legal intent is problematic.

Specific actions have specific mental requirements to do, understand, or intend something. These are, more or less, impossible to define precisely, but they can be sketched generally, or at least compared by degrees of increasing awareness. The task of providing a complete set of definitions or characterizations is not only difficult, it is usually unhelpful. There are always what might appear to be small squabbles at the edges, but, unfortunately, the legal action occurs at those edges. For example, does prior negligence in a specific situation, perhaps a manufacturer's failure of its slitting machine at a work site, give

the fence to mate with a cow in heat, producing a calf. See Hugo Black, Jr., My Father, A Remembrance (1975).

20 The inability of tainted beliefs to die is analyzed in Steven Pinker, The Blank Slate (2002), where he lays out three doctrines – "The Blank Slate," "The Noble Savage," and "The Ghost in the Machine" – all of which, bereft of scientific basis, are used by many, including many in the legal system, to justify indefensible beliefs.

rise to a charge of recklessness, which in turn gives rise to additional liability beyond a workers' compensation award, overcomes certain defenses such as comparative negligence (there would be nothing to compare, or put differently, any amount of recklessness trumps all quantities of contributory negligence), and allows the award of attorneys' fees or punitive damages? When attempting to take the measure of intentionality, the question is not always about doing the enterprise well, it is about whether what is being done is worth doing at all. Switching examples, at some point the question moves from safer or more useful (efficient, pleasurable, enriching) asbestos, cigarettes, or ponzi schemes, to none of these being entitled to exist in the marketplace at all.

Take then the trip-wire of intentionality liability: negligence. Justice Holmes famously remarked that even a dog understands the difference between being tripped over and being kicked. Aside from the authority of Holmes, how would we know if that were true? In fact, that is the characteristic problem here: can, in any sense – perhaps clinical, perhaps behaviorist – negligence be firmly identified? What about keeping one's eyes firmly level or ahead, knowing dogs are in the room, in the house, in the neighborhood, or in the world? Where does negligence begin? What if looking forward steadily is helpful, but not necessary to keeping eyes on snatchable or careless young children or Alzheimeric or wheelchair-challenged geriatrics? How does intentionality translated into negligence – taking reasonable care under the circumstances – provide any guidance, let alone set measurable standards?

For example, what about automobile drivers? How should we judge their performance and discover whether or not it might be negligent? The ambient world is cluttered and complex, and one's awareness is complicated, shifting, unsteady, and inchoate. Should one examine the medical literature, looking for neurological deficits, frontal lobe effacing, early indications of dementia, genetic or traumatic physiological remolding, or sensory misfirings? To what end? Suppose a driver continues to get behind the wheel despite any particularly chronic, but relevant, quiescent and generally controlled medical condition – perhaps hypertension, diabetes, epilepsy, or severe arthritis – that under very rare circumstances causes a momentary loss of vehicle control. Suppose those conditions each are less frequent than ordinary inattention due to an attractive pedestrian, a consuming preoccupation with work, or a fervor brought on by a nostalgic song on the car radio. In what sense should we speak of intentionality or of breach of duty? There is no psychological norm at work, no moral calculus in play. There may or may not be good reasons to find liability, but how do they figure in the traditional theory? The first tenet of the theory holds that loss is necessarily tied to fault. The world is a complicated place, risk universal, hazard ubiquitous, choices poor but enormous, and foreseeability a luxury too dear and too elusive to find familiar. Why is the driver at fault, or even, why not? The default answer requires a move from moral psychology to risk-allocation and for the system to function, ready collectibility in the form of insurance. Standard

insurance policies never mention negligence, a fact surprising to many insureds. Rather, they cover loss due to negligence, but loss that is neither expected nor intended. Morality is set aside in favor of foreseeability and intentionality.[21] This is fine for coverage, whether actual or even under reservation of rights, but it produces an unruly system. A driver causing mayhem due to an unpredicted heart attack, a random lightning strike, a carjacker, or a distracting wasp in the back seat or an unexpected pedestrian in the crosswalk unnoticed by a driver engrossed in music of such power as to cause him to close his eyes: all are treated the same.

The second tenet of the traditional theory involves the requirement to make the victim whole, providing, so to speak, full recovery. Recovery in the tort system overwhelmingly relies on the common currency of money. Thus, an injury must be so translated, that is, monetarized, in order to provide full recovery. Interestingly, with personal injury torts (and occasionally commercial ones), each party criticizes the other's translation, often for the same reasons, if different motives. The argument is one from incommensurability.[22] Money is taken to be an insufficient, inadequate, even improper substitute for the loss of a hand, mobility, a wife, or a child. Plaintiffs suggest that money is not enough; defendants respond, then why ask for it? To a lesser moral extent, the loss of a business, home, photo album, or pet evokes the same dialogue. In any case, money remains the currency of tort law.

To arrive at recovery, though, a victim-turned-plaintiff must establish a link between liability and damages. That link is one of threshold: once liability is established, it is relegated to history, irrelevant thereafter. The traditional theory is often charged with implying a great deal more. It is said to be committed to a close tie between fault and compensation as to degree or, as once Dean, now Judge Calabresi puts it, "This [the traditional theory or what he calls the "theory of individual treatment"] holds that the injurer should pay damages according to the degree to which he wronged the victim."[23] This requires too much from the traditional theory and opens it to two corollary attacks, both perhaps unfairly alleged. First, as morality requires payment in moral scrip, and as the institution and scope of insurance have become ubiquitous, a theory requiring payment to be taken from one's hide for wrongdoing is fatally flawed. Again, Calabresi:

> The moment one accepts the notion that justice does not require that an individual injurer compensate his individual victim – and the allowance of

[21] In this sense, the atypicality of tort from insurance and contract also makes it atypical from much of criminal law.

[22] Even when there is an agreed analogue available to translate injury, disability, and pain to money, there almost certainly remains the more fundamental disagreement about how much is enough.

[23] Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis 299 (1970).

> insurance for faulty parties is clear indication that this notion is accepted – and the moment one realizes that wrongdoers can be punished for wrongful acts quite apart from whether they must compensate victims, it becomes very hard to see how the fault system can be supported on grounds of justice.[24]

But why should use of moral reasoning in any single instance commit the law (or anyone) to a universal use of moral reasoning? Legal rules and decisions are often propounded with sharp corners, and with good reason, not least because law courts require immediate and final decisions, not enjoying the luxury of waiting until all the evidence is in. The sharp corners are everywhere. For example, we want both voters and the accused to possess some minimal requisite of moral maturity; thus we limit to those at least eighteen years old the right to vote and the onus of being tried as an adult for crimes. No maturity magically fastens at one's eighteenth birthday, nor does anyone think it does. Rather, the costs of knowledge and problems of proof make it reasonable to use an all-or-nothing metric, namely that of chronological age. Morality cannot be like this. Instead, everything counts in ascertaining responsibility. We can thus use morality to determine legal responsibility, but only partially. The same holds true throughout civil law.

The parallel charge is that strict liability, vicarious liability, and agency liability provide counterexamples to the intentionality predicate of the traditional theory. These each require, seemingly, not only no bad intent, but no intent at all. Strict liability replaces intention when assessing certain specified risky activities, from presses to mines to explosives, whereas agency theory holds individuals liable by mere association. For example, putting a new drug on the market may expose the pharmaceutical manufacturer to strict liability, whereas other acts of its representatives or employees, committed without the employer's knowledge, can expose it to vicarious or agency liability. These collective no-fault doctrines are easily explained by the cost–benefit theory: it is reasonable to charge those engaged in certain risky activities with the necessary and probabilistic negative consequences of that activity, internalizing the economist's dreaded externalities, thus absorbing costs in service of greater social benefits. However, this rationale requires endless epicycles and apologies from the traditional theory. But are they, in fact, actually counterexamples?

Not quite. As to remote, vicarious, or other once-removed liability, the picture of the traditional theory is fine, with merely an implied consent proviso for voluntary associations: benefits derived are paired with attendant risks. Although this explanation is not altogether satisfactory, constituting a significant challenge to the unity and power of the traditional theory, it nevertheless permits the traditional theory to hobble along. As to strict liability, intention only partially splits from fault because, as harm is sufficiently foreseeable, we

[24] *Id.* at 302–303.

impose adverse consequences against the actor for engaging in certain activities when the harm is realized.

Less abstractly, producing certain drugs or manufacturing particular stamping machines are activities fraught with danger. Does it matter if their design or manufacture were defective in some manner – short on testing, bereft of safeguards, easy to misuse, obscurely labeled, full of greater than expected risks – or whether the manufacturer has some minimal level of intention necessary to reach negligence? Almost certainly not in practice, but the traditional theory needs a translation analysis, perhaps finding heightened foreseeability of the result to be the functional equivalent of a lackadaisical stance toward prudence in avoiding it. This would maintain a significant degree of theoretical integrity.

The traditional theory's third tenet sets up a moral face-off between plaintiff and defendant, with the litigation a campaign – including the attendant name-calling, financial drain, and smears – for the high ground of protection of person and property. The difficulty of locating either morality or any high ground in practice is well-known. Situations abound where there is plenty of sin to go around; that is, all parties have breached duties to others and themselves. Put simply, imprudence is universal. However, the immediate loss lands disproportionally and typically upon the plaintiff. Cigarette smokers unable to quit, asbestos workers needing jobs, punch press operators of jerry-rigged modifications required to meet quotas, slandered and maligned minority or female employees acquiescent in accepting hostile workplaces, owners of land or goods slow to stop the continuing trespasses or conversions, procrastinating patients suspicious of medical advice, victims of fraud wary of the representations even as they were heeding them: the disregard of prudent practices resulting in harm, even self-harm, falls mainly on the original victim of a failure to pay attention to implied warning bells, even if further imprudence is necessary to bring upon the result. Threshold analysis fails here: both sides possess fault that must be weighed and compared. Yet the system invariably enters into endless locutions to avoid just such a weighing.[25]

In large part, this is because the very bland, threshold-based morality of the traditional theory is too primitive to serve as a calculus useful to ascertain comparative fault. Part of the universal attraction of the traditional theory lies within the various natures of the morality in play. That is, despite the attempts of theorists from liberals and social contract writers on the left to libertarians and social conservatives on the right or, ontologically, from skeptical consequentialists to those who believe in natural law, the traditional theory is more

[25] There is the area of comparative fault. However, other than in automobile cases, its appearance is surprisingly infrequent. Even there, how one weighs fault as a function of damages, or adds the mix of both to proximate cause to calculate a percentage, looks like voodoo math.

a set of platitudes than of ethical analysis.[26] Labeling the theory with a name of any particular complex, fully developed thinker would be to pay it theoretical and conceptual praise utterly unmerited. The Boy Scout oath is not a theory. Neither is much of tort law. Thus, the ethical analysis necessary to assess comparative fault is generally beyond the law. Tort law typically offers no measuring of fault. For example, how do we compare a salesman's puffing to naive buyers with his fraud to sophisticated ones, or his driving a car tired with driving it drunk? How do we compare the difference in culpability between that same puffing salesman and the tired driver continuing down the highway or between the fraud and the drunk, or either with that of a racist employer? In that there may be a severe disconnect between misspent actions and the damages they generate, the vacuity of the theory looks worse. That is, should momentary inadvertence causing death cause catastrophic ruin for one defendant, while another escapes a lifetime of failed petty frauds to plaintiffs suffering small and even then potentially uncollectible damages that fail to merit initiating an expensive and exasperating lawsuit?

Finally, the traditional theory's examination of corrective justice is myopic, raising the well-known attendant difficulties and inequities of a dedicated look at corrective justice only. The problem can be illustrated when trying, for example, to ascertain the net justice of returning a fugitive slave to his owner. How just is the correction? Of course, corrective justice is always, if not simplified, at least encapsulated for it to be manageable. It is, to some large extent, the failure to miniaturize or encapsulate, and rather bring in all the world, that causes the growing corrective justice continuum best to be labeled, at some point, distributive justice. That larger issue avoided, a restoration of the status quo requires an argument that such a correction actually produces an increase in morality. Put in general terms, and restricting the field to economic loss, the correct look back would require something approaching a replication of the fairness of the original distribution. Anything more demands a look at individual circumstances.

This then is the traditional theory. Even ignoring some scars, limitations and signs of aging, will it do? The answer is no, and the reasons are only partly apparent from its inherent structural problems. The main problem is political, not conceptual; explaining why the theory is so often not attacked, but rather quietly ignored. A fault model resting on blame, rooted in voluntariness, and looking to a restored justice that undoes the blameworthy injury is, in and of itself, far from attractive. It provides no place for restraint, inaction, or walking away, or for changing from precedent and expectation by a more aggressive and charged stance. It can hardly explain any important case that hails significant

[26] By those on the left, I think of such thinkers as Ronald Dworkin, Thomas Nagel, and John Rawls; on the right, Robert Nozick, Patrick Devlin, and Richard Posner; by skeptical consequentialists, H. L. A. Hart and John Mackie and as a natural law proponent, John Finnis. There are others, but these are representative.

legal change and, in fact, is often caught flat-footed, unaware of the legal winds, and suggestive of a self-destructive and contrary result.

Testing theory against doctrine, the routine stuff of legal commentators, critics, and politicians, is a risky business. When legal decision and legal doctrine diverge, is that so much the worse for the doctrine or so much the worse for the decision? That is, who got it wrong? Moreover, when there is a divergence, does that create an exception (to law or theory) or does it create a new paradigm?

Part of the problem is the ambivalence between promoting a view of good law (prescriptive theory) and analyzing whether any particular law is well-reasoned (descriptive analysis). The ambivalence has pathologically moved beyond any ability to salvage the patient in constitutional analysis, where, for example, the Constitution's Ten Amendments and the Biblical Ten Commandants are judged by their many proponents to have similarly and related immaculate pedigrees. Even though, in the more mundane field of civil law, the stakes appear lower, the emotions are sufficient to continue to conflate prescription and description. The terminology itself – reasonableness, due care, good faith, misuse – invites a collapse of the distinction through its very language.[27] Legal terms are often morally laden. One thinks easily of "murder" or "fraud." However, the confluence is more general. Consider that the descriptive term "promise," which when descriptively employed, can commit the utterer to moral blame for the failure to follow it; whereas the descriptive adjective "cruel" can hardly be understood apart from moral judgment.[28] These examples challenge as not so fallacious the idea of a naturalistic fallacy.[29] Nevertheless, criticizing an undesired result as bad reasoning rather than good reasoning built upon poor premises hardly serves as a solid basis for analysis.

There is an additional caveat to address before testing theory against results. That involves recognizing the black box mystification of decisions by the finders of facts. Most commonly in tort law, this means the jury. Because conclusions need not be justified, or justified in any thorough or robust manner, doctrine can, in the abstract, imply results rarely or never reached. Moreover, discrepancies remain hidden. Take professional negligence. The standard for a breach of the duty of care by a professional generally cuts across occupations. Stockbrokers, physicians, attorneys, architects, nurses, teachers, investment bankers, and veterinarians all are basically held to the same abstract standard. Did they follow that vague and often difficult to locate measure: the standard of care for professionals in their field? Yet, in a given community, the popularity of, say, teachers over investment bankers might tend to lead to skewed,

[27] This has been pointed out by Ronald Dworkin, Taking Rights Seriously (1977).

[28] The example is from John Searle, Speech Acts (1969).

[29] The problem of the naturalistic fallacy, confusing what is with what ought to be, was developed a century ago in G. E. Moore, Principia Ethica (1903). Its reach and validity have been a matter of controversy ever since. If I say "he is cruel," have I made a prescriptive statement, a descriptive statement, or both?

interprofessional results. The legal standard regarding duty, though, would remain untouched, even absent parallel results. Again, Plato is instructive here. In *Euthyphro*, Socrates discusses the private prosecution by a son against his father for murdering a neighbor who killed the father's slave. Socrates looks to a jury of the gods to see whether such a prosecution is proper or just (or pious, to use Socrates' additional test). The jury chosen, Socrates is unwilling to predict any unanimity.

> Socrates: Then, my good friend, you have not answered my question. I did not ask you to tell me what action is both pious and impious; but it seems that whatever is pleasing to the gods is also displeasing to them. And so, Euthyphro, I should not be surprised if what you are doing now in punishing your father is an action well pleasing to Zeus, but hateful to Cronos and Uranus, and acceptable to Hephaestus, but hateful to Hera; and if any of the other gods disagree about it, pleasing to some of them and displeasing to others.[30]

Moreover, how to treat defendants on trial is considered to be a matter of personal judgment. This leads to arguments, for Socrates, about fundamental questions.

> Socrates: Then they do not disagree over the question that the unjust individual must be punished. They disagree over the questions, who is unjust, and what was done and when, do they not?
>
> Euthyphro: That is true.
>
> Socrates: Well, is not exactly the same thing true of the gods they quarrel about justice and injustice, as you say they do? Do not some of them say that the others are doing something unjust, while the others deny it? No one, I suppose, my dear friend, whether god or man, dares to say that a person who has done something unjust must not be punished.
>
> * * * *
>
> Socrates: . . . What proof have you that all the gods think that a laborer who has been imprisoned for murder by the master of the man whom he has murdered, and who dies from his imprisonment before the master has had time to learn from the religious authorities what he should do, dies unjustly? How do you know that it is just for a son to indict his father and to prosecute him for the murder of such a man? Come, see if you can make it clear to me that the gods necessarily agree in thinking that this action of yours is just; and if you satisfy me, I will never cease singing your praises for wisdom.[31]

[30] Plato, *Id.* at 9.
[31] *Id.* at 9–10.

Notice that, as the original proponent of the Socrates–Gladstone theory, Socrates uses piety as a justification to avoid exacting restitutive justice. This is hardly the place to ponder the premodern religion, nonmonotheistic, polis-based, Greek notion of piety, let alone Socrates' own complex variation of it. Nonetheless, whether piety and peace are pursued, the same end is accomplished. Corrective justice is shelved in favor of other values. But that is an aside, if a somewhat irresistible one.

The point is perhaps sufficiently obvious without invoking Plato. Triers of fact, whether gods, judges, arbitrators, or lay jurors, are likely to agree on a number of legal standards – whether called principles, statutes, rules, decisions, constitutions, customs, or any other legal norm – yet reach disparate results. Legal standards offer bland and platitudinous opportunities to reach quite different views. In practice, those views result in widely divergent conclusions rooted in political, ethical, social, and sectarian idiosyncrasies and, far from rarely, in mistakes of scientific, logical, or empirical fact. However, those conclusions leave the standards largely unchallenged. At the margins, the standard, if not challenged, is ignored. This phenomenon has been the subject of widespread and virulent criticism, not just from a logical point of view, but from the views of disappointed suitors and institutional litigants. Being different is not the same as being wrong. There may be reasons for a normal convergence of views based on different standards. That the convergence disappears occasionally, revealing that there never was a consensus or a shared set of standards, is not necessarily cause for dismay. Weber's comment that an essentially non–self-justifying, oral commentary system for finding facts is *prima facie* irrational aside,[32] even jury nullification can be a perfectly acceptable result.[33]

[32] Weber's astonishment at the common law's jury system and his belief that it was irretrievably irrational could be put down to his training in continental civil law, with its quite different set of assumptions. The deeper implications he draws are not so easily set aside: basically, his view is that any system that hides its reasoning and yields black box decisions can never be considered rational. Weber's analysis, one hundred years later, still has bite. "The jury, as it were, thus took the place of the oracle, and indeed it resembles it inasmuch as it does not indicate rational grounds for its decision. There was to be a distribution of functions between presiding 'judge' and jury. The popular view which assumes that questions of fact are decided by the jury and questions of law by the judge is clearly wrong. Lawyers esteem the jury system, and particularly the civil jury, precisely because it decides certain concrete issues of 'law' without creating 'precedents' which might be binding in the future, in other words, because of the very "irrationality" in which a jury decides questions of law. Indeed, it is this aspect of the civil jury's function which explains the very slow development in English law of certain rules of long-time practical validity to the status of fully recognized rules of law. As the verdicts intermingled issues of law with questions of fact, it was only to the extent that the judges freed the properly legal from the factual portions of a verdict and articulated the former as legal principles, that these verdicts could become part of the growing body of law." Max Weber, On Law in Economy and Society 79 (Rheinstein, ed., 1954).

[33] Clear nullification, not just complaints about an adverse outcome, can be seen most clearly in the trials of William Penn. Consider the case of the criminal trial of one of Penn's acquitting jurors, Bushel, *Bushel's Case* (1670), 124 E.R. 1006. Before appellate vindication, Bushel was sentenced to be "locked up without meat, drink, fire, and tobacco." Here, as appears to be the case in smaller and more subtle instances of this phenomenon, seeming agreement on

Consider Plato's example of Euthyphro's father. Euthyphro was contemplating filing charges against his father. His father had murdered his neighbor because that neighbor in turn had previously murdered the father's slave. The case against Euthyphro's father would be brought, more or less, as a private prosecution, at a time when civil and criminal law blurred and police departments and prosecutors' offices were institutions of the future. The two murders – the neighbor's of Euthyphro's father's slave and his father's of the neighbor – are set against the backdrop of a society at once hierarchical, chauvinist, protoracist, sexist, obviously slaveholding, and organized under conditions often verging on starvation, invasion, and civil war. Killing a slave was not identical to killing a free man or a citizen. Killing the killer was a different matter than death otherwise delivered. The prosecution was not to be led by the state (polis) or the victim's family, but by the prosecuted man's own son, who held deeply felt and community imposed duties of piety, respect, homage, and loyalty.

Suppose these attitudes are reflected in a series of standards universally accepted by Euthyphro's jury. What result? What result today? What result before 10 juries, or 100? Undoubtedly, the result depends on a range of beliefs and attitudes. At any given time and place, those beliefs and attitudes may lead to sympathy or enmity for Euthyphro's father. How should we treat a vigilante in a society with primitive enforcement mechanisms? Is reckless disregard of a neighbor's life more like negligence or more like premeditation? Was a slave's life worth the same as a citizen's in ancient Athens? Is the source of the prosecution, Euthyphro, a factor in analyzing that prosecution? Is self-help aiming toward the same ultimate end as a trial in a law court, that being capital punishment, a proper, or at least noncriminal, activity? Is the fact that this occurred in a society that, within recent memory, was staggering out of Neolithic atavism a relevant consideration? Does it matter if the slave were a captured warrior, a criminal, a foreigner, a member of a lower caste, or something else? For all of this, the standards of the decision makers, including their attitudes, beliefs prejudices, and self-interests, matter a great deal.

This individual interpretation process is writ large in tort law, and to some very large extent, it must be. Mechanical standards, major premises so to speak, fail to do the trick. Take negligence. Individuals have tacitly assumed duties or had those duties of care imposed on them, with the goal of not proximately causing harm to others. The imposition of duties relates to role, applying, for example, to truck drivers, certified public accountants, civil engineering bridge builders, product manufacturers, and the local veterinarian. The difficulties with constructing standards for every possible role in each situation with sufficient specificity to overcome the vagueness of general legal language

standards often masks political disagreements about result. Certainly, some of it is due to the weight one attaches to each standard. Put differently, one person's nullification is another's well-reached outcome.

are well-known, as are the failures of attempts to do so. Society is at once complex and evolving. Presumably, so too would any related set of rules need to be. How could we determine, once and for all or with the necessary specificity, whether a particular doctor employed reasonable care in diagnosing a particular patient? What of changes in the medical science, the history of the patient, the training, or experience or specialty of the physician or medical specialty group, the amount or veracity or cogency of the information provided by the patient or the role of other health providers seen by the patient? Triers of fact decide cases according to their own views and attitudes about what count as prudence, sufficient information, shared responsibilities, professional judgments, and whether, in a larger context, they see doctors' intentions as therapeutic or financial, malpractice suits as corrective or opportunistic, tort law as useful or destructive in improving medical services, and themselves as future victims of medical negligence or higher health care premiums triggered by such suits. Consider an Athenian jury. None of this necessarily then or now has much to do with clear or measurable legal standards.

That said, let us return to our examination of the traditional theory. We see its frailities. Many wrongs and indignities occur routinely without consequence. This might be forgiven because of the costs of litigation, but a robust fault and corrective justice theory would provide significant condemnation in any case. A more serious matter is that of legal fees and expenses other than the small and regularly recoverable court costs. Generally, the parties absorb their own. That is, they are largely external to remedies, constituting charges against what otherwise would be thought to be a resolution that, by some measure, compensates fully for a loss. There are various tinkerings in the system to correct this, including extra compensation or attorneys' fees for a limited number of misdeeds, from consumer fraud to civil rights abuses, often with the explicit intent to overcome the crush of litigation expenses limiting the possibility of achieving a fair remedy or disincentivizing suit altogether. However, these are not only few, they are one-sided even when they apply, typically covering the plaintiff's but not defendant's costs. Moreover, they are meant to achieve ends lying far beyond the ken of the traditional theory. Attaining civil rights, limiting antimarket monopolistic practices, and preventing retailers from purveying automotive lemons on unsuspecting drivers: these laws are driven by policy considerations far beyond a two-party, zero-sum game, fault-based compensation system. Consider RICO,[34] a civil sister of a statutory scheme to dismantle organized crime. The advantages of national jurisdiction, treble damages, attorneys' fees, and threatening the taint of being labeled a "racketeer" were meant to assist in solving a perceived problem of mobsters infiltrating legitimate businesses. The statute was hardly intended to become

[34] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961–1968.

a bandage to civil remedies otherwise too costly to pursue, and no theoretical justification was made in the act's defense to do so.

But none of this, or of other claims of inconsistency and remote liability, is the main issue. A theory is hardly defective if, at odd or well-traveled points, it is shopworn or falls short. The remedy would be more, not less, of the same theory, a corpuscular infusion of red blood for the anemic. The criticism instead is this: where the traditional theory fails to seek within the relevant communities the achievement of peace, it is reformed or ignored, whereas in those cases where it is employed to achieve peace but fails, it is discarded. In the middle, it might work well, but so does everything else. Not much theoretical energy needs be expended to justify requiring a careless utility to pay for the loss of a building and inventory from a warehouse fire when it acted in derogation of a relevant statutory provision.[35]

Put otherwise, almost any reasonable theory will reach the same result as any other theory on a variety of vanilla issues. Drunk drivers, narcoleptic surgeons, innumerate engineers, churning stockbrokers, snoring lifeguards: these are the easy targets. Even otherwise conflicting views converge in the middle.

But the middle is not the place to judge the traditional theory. Why are individual cases decided the way they are? Are they rightly or wrongly decided? How can they be justified? These are distinct questions, and ones difficult to answer with comfort or complacency. Nevertheless, let us take four fairly well-known decisions, picked not for their randomness but for their familiarity and, to a great extent, their typicality. In examining those cases we can ask, not if the traditional theory was used to decide them or whether they are correct under some version of that theory, but rather how one would justify those cases' decisions in light of that theory. The cases are *MacPherson*,[36] *Roberson*,[37] *T. J. Hooper*,[38] and *Robbins*.[39] The facts of these cases are familiar to many lawyers, but it would be useful to restate them.

MacPherson was a lawsuit brought by the owner of a Buick, purchased from a dealer, whose car collapsed while he was driving it. One of the wooden wheels crumbled into fragments, throwing MacPherson from the car and badly injuring him. He sued Buick, seemingly in derogation of the rule that the seller owed a duty only to the direct buyer, the one with whom he was in

35 That said, tort lawyers can always find cases close at hand to the supposedly easy rule that cause problems. If the power to a factory is negligently cut, are the factory's lost profits recoverable? Put differently, what recovery do we allow? Can the loser of a kingdom sue the person responsible for want of a nail? The famous case on loss of power and the limitations of recovery is *Spartan Steel & Alloys Ltd. V. Martin* (1973) 1 QB 27. The controversy in *Spartan Steel* shows the weakness of the traditional theory, as the limitations on full recovery is perhaps the only thing agreed upon by all.

36 *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916).

37 *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902).

38 *The T. J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

39 *Robbins v. Footer*, 553 F.2d 123 (D.C. Cir. 1977).

privity, but none to an indirect or remote one. That is, MacPherson could sue the Buick dealer, but could not sue Buick directly. The one exception to this rule, called the "privity rule," included cases of imminently or inherently dangerous products. Poisons and explosives qualified, tumbledown houses did not. A horse-drawn carriage traveling eight miles an hour was not within the exception, but MacPherson's Buick, at the same speed, at least according to the court's majority, was. The court purported not to change the rule, but that was a sham. Following *MacPherson*, all manufactured goods become tautologically inherently dangerous (they hurt someone, didn't they, after all, that is why we are here). All seems well with the traditional theory. The court discusses Buick's disregard of apparent danger, that the plaintiff's injuries ought to be compensated, and that moral fault leads naturally to just compensation. Then why does the court need this justification?

> Yet the defendant [Buick] would have us say that he [the owner of the car dealership, who bought the car from Buick and sold it to MacPherson] was the one person who it was under a legal duty to protect. The law does not lead us to so inconsequential a conclusion. Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.[40]

The second case is *Roberson*, an early right-to-privacy case. Ms. Roberson, apparently a woman of sufficient attractiveness to sell baking ingredients, found her photograph reprinted without her permission on 25,000 packages of ground meal sold by a milling company, with the caption "Flour of the Family." She sued the company for a violation of her privacy rights and lost. The court held that because the picture was accurate, she could not have been defamed. Further, because her property was not taken, she could not have been the victim of conversion. Thus, no recovery. The reasoning of the court has little, if anything, to do with precedent or with the principles of the traditional theory and, in fact, runs counter to it:

> [F]or the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness but must necessarily embrace as well the publication of a word-picture, a comment upon one's looks, conduct, domestic relations or habits. And were the right of privacy once legally asserted, it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely let alone. An insult would certainly be in violation of such a right and with many persons would more seriously wound the feelings than would the publication of their picture. And so we might add to the list

[40] *MacPherson* at 391.

> of things that are spoken and done day by day which seriously offend the sensibilities of good people to which the principle which the plaintiff seeks to have imbedded in the doctrine of law would seem to apply. I have gone only far enough to barely suggest the vast field of litigation which would necessarily be opened up should this court hold that privacy exists as a legal right enforceable in equity by injunction, and by damages where they seem necessary to give complete relief.[41]

The court is concerned with the nature of the social fabric, the way individuals live their lives and conduct their social affairs, and applies a brake to the tradition of compensating injuries.

The third case, *T. J. Hooper*, involves sunken ships. Two barges were lost at sea while under tow by two tug boats. All four vessels were found to be unseaworthy and a series of suits were initiated by the owners of the cargo on the barges, with the usual counterclaims and crossclaims by the various parties against each other (legal finger-pointing). The interesting issue was the responsibility of the tugs. On the night the ships went down, the weather reports were dire, predicting a prolonged gale. However, those reports were only helpful to ships having a radio, a device possessed by neither tug, or customarily by tugs at that time.[42] The issue in the case might appear to turn on the traditional theory – does custom need to be breached to establish fault, with some type of shared experience, turned habit, expected to create a duty of care – but that is not quite right. The court explicitly states, and one might say the court goes out of its way to state, that normal, ordinary behavior is insufficient in and of itself to constitute a complete defense:

> Is it then a final answer that the business had not yet generally adopted receiving sets? There are yet, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. . . . Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.[43]

If the imperative trumps normal notions of duty, then something other than a scolding with the appropriate apologies is occurring.

The final case is *Robbins*, a medical malpractice suit brought by the parents of a child whose death claimed to be the result of misdosing of the labor-inducing drug, pitocin. The issues here pertain to custom, with the court rejecting the

41 *Roberson* at 545.

42 There was a nonoperating private radio on the one tug, but it was considered to be "partly a toy," and did not figure in the court's reasoning.

43 *T. J. Hooper* at 740.

narrow holding (but not necessarily the politics) of *T. J. Hooper*. The issues were whether customs are dispositive of duties owed by doctors (the answer being yes or, put differently, there is no other way to make sense of all or even most of them being wrong or in breach of a duty), and whether customs are local. The court changed the rule from local to national practice. The reasons had little to do with the traditional theory:

> Even the most liberal application of the "similar locality" rule carries with it the unstated assumption that some characteristics of a geographically defined area justify a different and perhaps lower standard of care in the exercise of medical judgment than the standard followed in localities which do not share those characteristics. In nineteenth century America, the validity of this assumption may have been obvious enough for courts to accept without empirical proof. Its continuing validity in our age of ubiquitous national communication networks both within and without the medical profession is extremely doubtful. Even as the courts applied the locality rule it did not go unrecognized that the increasing standardization of medical training significantly undermined the application of geographic limitations to the population from which a qualified expert witness could be drawn to testify as to the required standard of care.[44]

What should we make of these four cases? Their concerns stray from those of the traditional theory. Novel technology with different types of risks, new intrusions (whether automotive, radio, or photographic) that bombard and expose us, changing ways to look at risk (with high-speed cars that fail or radios that warn), knowledge (whether through broadcast or national medical training) that alters the nature of duties we wish to impose. All this initiates a judicial conversation, largely prompted, directed, and even ghost-written by tort lawyers. The conversation might be titled "the limits of adjudication." When and where should remedies stop, liability end, and duties be extended? What drives the engine of change that orders extension or retraction of limits? The considerations are political, not legal, and the larger guiding hand of the politics, at least per the Socrates–Gladstone thesis, is peace. How does that work?

Tort law is only one of many possible remedies to a conflict. Others, from mere acceptance of the loss without protest to civil war, are also available. Clearly, most loss remains where it lands. Disease and death, social inclusion and ostracism, educational and employment disappointments, family failures: this is the stuff of everyday living, legally accepted, even though scorned and railed against privately and socially as outrageous. The question becomes when should that loss be shifted, when should a loss become a private law grievance. The issue is rarely located solely in a notion of pure fairness. In fact, it is perceived rather than actual fairness that counts, as conflict or redress is justified

[44] *Robbins* at 128.

very much in the eye of the beholder, whether warrior or beneficiary. The problem is one of resolving potential conflicts in a way that works. One can imagine a society superstitious, authoritarian, religious, and homogeneous, where conflicts are sent to shamans, medicine men, oracles, or primitive remedy agents who, hocus-pocus, decide how loss should fall. If the members of the society approve of this method, its lack of moral fairness or scientific rationality – regrettable, irritating, irrational, unethical, and perhaps counterproductive – remain secondary to the political ends of satisfaction and peace.

The courts use tort law to solve private disputes. Consider cars. Clearly, automobiles are a riskier business than horse-drawn carriages. The number of accidents and the scope of harm they cause is greater and graver. Placing the matter beyond the reach of the tort system through enforcement against the direct buyer only leaves many without a remedy. The automobile manufacturer, Buick, prior to *MacPherson*, was at no greater fault under the traditional theory than would be a wagon-maker also, no doubt employing wooden wheels. That is, even if cars were typically sold through such middlemen, wagons would have a nontrivial incidence of being resold, and a higher incidence (as possessing a greater seating capacity) of having a not-in-privity passenger injured by a manufacturing defect. The occurrence of more accidents cannot be a reason for expanding liability under the traditional theory, as occasional tort feasors ought to be as liable as frequent ones, just not liable as often. To hold otherwise (under traditional notions) would be the same as giving the one-time murderer a free (or reduced payment) pass because of some charitable comparison with a fellow defendant at the criminal dock who is a serial killer. In fact, Buick has an additional argument. It ought to enjoy some measure of reliance or degree of comfort based on the inherently dangerous, privity, fault rules in place. Being law-abiding should count for something.

The nonlegal reasons to extend or restrict liability are largely political. Even the administrative excuse, that of opening the floodgates of litigation, can hardly be justified by judges too hard at work. Rather, it can be restated as whether allowing a great deal more claims, with the usually problematic issues of proof and collectibility against newly minted defendants, can be justified. Most other reasons fail even that test of nonpolitical respectability. Making it easier or more difficult, for example, to prove discrimination in the workplace by lowering or raising burdens of proof is a matter essentially and even profoundly political. Evidence can be equivocal, history tainted, documents dubious, and testimony biased. Where the proof lies in the twilight landscape of good cause to remove an employee belonging to an historically discriminated group, which side basks in the moral sunlight and which not, is not necessarily a technical, neutral, principled, legal matter.[45] It is one of changing or not necessarily changing the way society conducts itself.

[45] Whether any of these things is ever other than political is, of course, problematic. See Joel Levin, How Judges Reason: The Logic of Adjudication (1992).

Expanding liability against car manufacturers in *Buick* and radioless tugs in *T. J. Hooper* has clear political consequences. It allows a wider number of claimants, certainly as many or more than opening the door to privacy claims would allow in *Roberson*. Yet it is easy to see what is gained. The anger produced by the immediacy of car accidents is civilized through a process allowing for potential peace. Insurance here is irrelevant. It is not some lesson anthropomorphically taught the manufacturer. If insurance comes into play at all, it is the perception that a severely injured individual ought not to be remediless. Privacy is a downstream luxury that comes later to civilization. That it was not given great deference is hardly surprising, at least at that time. After all, at that time, *de facto* slavery still lurked at the extremes in an America that promoted child-labor, sweatshops, and long-houred working conditions, and government thinking had yet to broach anything approaching state safety codes or OSHA.[46]

Medical malpractice is perhaps the most politicized area of current tort law.[47] Competing positions are staked out, typically bereft of much empirical

[46] Law courts' decisions are at (too many) times judged in the abstract, looked at as hermetically sealed, created in some ivy (or more barren) tower uncontaminated by society. Of course, this is ridiculous, but the myth is often promoted as useful disinformation. For one scholar and former Attorney General of the United States who promotes this view, that is, to achieving community loyalty to law, who does not look too closely at its illogic, see Edward Levi, An Introduction to Legal Reasoning (1948). Returned to its natural habitat, *Roberson* was decided in the America of 1902, when the protection of personal space and integrity was far from maturity. A generation from the western frontier and two from the Civil War, Upton Sinclair's The Jungle four years from publication, *Lochner* and *Bailey* were still to be heard. In *Lochner v. New York*, 198 U.S. 45 (1905), the Supreme Court famously struck down a state law setting a ceiling of ten-hour work days and sixty-hour work weeks for certain employees whose working conditions, the state legislature had found, posed significant threats to their health and welfare. Later, in 1911, the Supreme Court in *Bailey v. Alabama*, 219 U.S. 219 (1911), over the vigorous dissent of Justice O. W. Holmes, attempted to end slavery (again) in Alabama, well over half a century following Appomattox. Bailey was indicted for fraud, fined $30 court costs, and ordered to work, essentially as a slave, for a specified employer for 136 days. Alabama disregarded the ruling and saw its renegade position again overturned three years later in *U.S. v. Reynolds*, 235 U.S. 133 (1914). Holmes continued to think that a deal is a deal, but softened in *Reynolds*, to a Brahmin, patronizing condescension, writing in concurrence that "There seems to me nothing in the Thirteenth Amendment or the Revised Statutes that prevents a State from making a breach of contract, as well a reasonable contract for labor as for other matters, a crime and punishing it as such. But impulsive people with little intelligence or foresight may be expected to lay hold of anything that affords a relief from present pain even though it will cause greater trouble by and by." It is, in fact, troubling, although far from uncommon, that it took a racist attitude to find slavery improper. Some insight into the court's politics and Holmes's thinking can be found, if perhaps overly apologetically, in Liva Baker, The Justice from Beacon Hill 471–475 (1991).

[47] The literature on the efficacy of medical malpractice largely masquerades as fact while behaving like politics. Non–interest group conservatives have, to some extent, opted out more recently, seeing the answer of gutting malpractice cases as such a clear first step to reforming the healthcare system generally that they refer to that step as picking the low-hanging fruit. The better literature includes the [Institute of Medicine's, To Err is Human: Building a Safer Health System (1999)]; George Annas, The Rights of Patients (3rd ed., 2004);

authority and in the most hyperbolic manner, by lawyers, doctors, and insurance companies concerning the apocalyptic consequences of changing or of retaining medical malpractice law. Medical practice is routinely claimed to be adversely or constructively affected by existing tort law. Even candidates for public office and political platforms take positions on the matter. Of course, the results of any survey of the actual consequences of traditional medical negligence law and trials would necessarily be mixed, as any complex set of judgments about a wide variety of related, but not identical conduct would occupy a range of validity and efficiency in its results. That said, the results themselves recapitulate the policies.

Robbins hints at this larger drama, although hardly anticipates much of it. For example, in the controversy of whether professionals should be held to a local or national standard, the debate often turns on whether we should protect a sanctuary of incompetents to practice unfettered in rural America or, rather, allow physicians to serve small town America without the tools of ongoing training, better equipment, teaching hospitals, and an adequate supply of specialists. There is a clear trade-off, and even the goal of better medicine is murky. Some patients need immediate, if poorer care; some ought to go to the city and get superior care. Moreover, customary practice provides immunity for physicians, but not for tugs. Why? Clearly the answer lies in who we want to see as responsible for what, in a manner defying fault or utility theory. Do we want to hold Drs. Albert Schweitzer and Marcus Welby to the same standards as corporations? Do caring professions receive a pass for having, in some nontrivial way, purportedly eleemosynary rather than profit motives?

It might seem not only to be unnecessarily vague, but entirely wrong, to conflate peace and politics, albeit in the arena of dispute resolution, the overlap is profound. Nevertheless, a legal system concerned with the principle of peace[48] would see that principle as containing these core elements.

(1) The dispute resolution process must be sufficiently inclusive to capture virtually all relevant disputes. It must then offer hope, and some degree of success, in achieving a politically satisfying result. This does not look to justice, although justice may largely overlap here, but to what is perceived by the members of the society as fair.

Lucian Leape and Donald Berwick, *Five Years after 'To Err Is Human', What Have We Learned?* 293 JAMA 2384 (2005); Paul Weiler, *Reforming Medical Malpractice in a Radically Moderate – and Ethical – Fashion*, 54 DePaul L. Rev. 205 (2005); George Annas, *The Patient's Right to Safety*, 42 Trial 38 (2006).

48 "Principle" is used here in the way it is in equity, a use Dworkin can fairly be thought to have borrowed. In any case, Dworkin's reformulation is superior, setting forth a standard involving moral concerns, with greater weight given the more compelling the moral circumstances and, when set aside, done so because the particular principle seems out of place rather than wrong or overruled. See Ronald Dworkin, Taking Rights Seriously (1977) and A Matter of Principle (1985).

(2) The process must, paradoxically, not be ruthlessly efficient and full-blooded, but restrained, mitigated, and applying the brakes to the dispute. Merely achieving corrective justice typically constitutes failure. There is something of a downward spiral to bloodshed about any process that continues to avenge previous wrongs with commensurate strong, measured steps. Cynically, wrongdoers, although not getting away with it, might be best allowed to get away with a little of it. *Lex talionis*, R.I.P.
(3) The process must profoundly discourage self-help. That is, society in general and disputants in particular must, at the outset, buy into its legitimacy and, at the end, accept the process's resolution as, if not fair or just, final.

In practice, it is always difficult to evaluate the use or success of larger principles (larger meaning weightier, as, for example, the prescription to respect human life is weightier than that not to litter), including the peace principle. Courts that appear to follow a particular principle, or weigh it in a decision, may be aberrational, incorrect, following a similar path driven by other reasons, or seeming to follow it but only in a token and insincere way. Moreover, most cases are decided, if not by rote, without grand theory in mind. The most transparent way to assess both use and success is to judge law in transitions. Look at the four cases – *MacPherson*, *Roberson*, *T. J. Hooper*, and *Robbins* – and apply the peace principle. Each, in fact, characterizes tort law using that principle, or at least wrestling with it. *MacPherson* and *Hooper* claimed to be changing neither rules nor precedents but merely incorporating technology improvements. However, technology changes constantly, and we hardly need commensurate legal re-examination. Safety advances get us closer to legal change, as there is a significant convergence among conflict, resolution, safety, and peace. If safety is put at increased risk (*MacPherson*) or danger not decreased when it easily could be (*T. J. Hooper*), legal reinspection needs to occur. But both cases, despite allowing a larger set of potential victims to recover, give only mitigated comfort. Radios are not required and cars still need to be shown to be dangerous. *Roberson* limited liability, but suggested that property damage (perhaps a stolen engraving) could serve as the basis of recovery. *Robbins* allowed limited recovery, in the case of relevant customary practice.

The point here is not who prevails. Rather, we need to consider whether there are sufficient numbers of injured to merit inclusion. The step to inclusion is slow, the hesitations clear, the subterfuge of continuity not without utility. At every point, the inclusion moves only to the edge, as the black box of the jury is the voting booth of decision. Where the system fails, as it clearly did for decades in civil rights, self-help, and violence are predictable. A by-product of the system is certainly a condition precedent to peace: transparency or knowledge of motivations. Why did the ship go down? Why did the woman get fired? These

questions are addressed when a remedy is potentially available. That said, the failure to grant the remedy is unrelated to the benefit of the transparency.

Let us finally return to the traditional theory's usual competitor, the cost–benefit theory.[49] The theory is often at home among conservative, monetarist, and economic theorists, but it need not be found only there. In any case, cost–benefit theory is largely self-descriptive. A policy or law under this theory ought to be measured on some grid of the costs to society and weighed against the benefits. The currency of the measurement is almost always utility, although that concept takes such a beating in the literature that it turns shy many of its proponents and causes them to feel the need to attack utility in the front yard before letting it sneak in the back.[50] Under this theory, individuals have little in the way of rights, and decisions are made at a larger societal level. All is weighed in the equation, and, in some Panglossian manner, the best of all policies is achieved.

The literature here is breathtakingly vast, even in law. Moreover, although it is generally situated on the political right and in favor of freedom over equality, wealth over rights, and development over tradition, there are schisms.[51]

The cost–benefit theorists put forward a very persuasive case, at least in tort law. There are severe costs to remedying injuries one person at a time, and these costs are regularly incurred at the expense of greater societal benefits. Moreover, any analysis of improving social welfare – using any metric, whether wealth,

[49] Economists also speak of formulating any theory in order to achieve Pareto optimality, a principle that suggests that if everyone is better off by a change, it should be made. Although it is hard to find anyone anti-Pareto, sightings of its success in solving real problems are, to say the least, rare. Even updated Pareto efficiency, in the form of the wealth maximization of the Kaldor–Hicks criterion hardly leads to solving real legal problems. This can be seen by looking at the exercise of fine talent in the manipulation of such economic tools with extremely modest substantive results in Thomas Miceli, Economics of the Law: Torts, Contracts, Property, Litigation (1997).

[50] For example, Richard Posner begins his book, The Economics of Justice 13 (1981), with a have-it-both-ways statement. "The purpose of this chapter is mainly negative – to arouse the reader's mistrust of utilitarianism by examining the thought of its most thorough practitioner, Jeremy Bentham. Utilitarianism has not wanted for critics, and many of my criticisms are old ones. What is perhaps new is that not only do I agree with Bentham that people are rational maximizers of their satisfactions in all areas of life, but I believe that economic efficiency is an ethical as well as scientific concept – and is not economics simply applied utilitarianism?" Of course, the answer is no. More recently, Cass Sunstein, in Risk and Reason: Safety, Law, and the Environment 10 (2002), starts his book with the same query as to whether "people have rights" or whether, instead, there should be a rational "assessment of our consequences" of policy. Reason, not surprisingly, wins out over intuitions and fears, as utility triumphs again.

[51] Without being overly parochial, it could be characterized as Oxford against Chicago, with Hart, Hare, and Parfit epitomizing a liberal social policy orientation against Hayk, Friedman, and Posner, who epitomize a laissez-faire, private enterprise orientation. The difference might be seen as Harold Wilson verses Ronald Reagan or, academically, Jonathan Glover, Humanity: A Moral History of the Twentieth Century (2001) verses Richard Epstein, Takings: Private Property and the Power of Eminent Domain (2005).

life-expectancy, satisfaction, happiness, or benefit – may show that traditional or seemingly obvious methods of compensation are, counterintuitively, wrong. The power of cost–benefit analysis is impressive. To take just two examples that intrude on tort law: it allows us to measure the efficiency of new drugs against their side-effects, all the while assessing alternatives, other therapies, and the health of relevant populations over time; and it allows analysis of the safety of design and materials for highway bridges compared to other methods of carriage, looking at costs in lives, construction, maintenance, policing, and access for emergency vehicles along the way.

Cost–benefit analysis can put otherwise disparate areas into revealing contrast, as when, for example, it measures aesthetics against safety. This would seem to be an easy area for resolution: life trumps beauty. But this is far from the case in reality. Consider the most mundane area in tort law: automobile accidents. Preventing them is an unexceptionable goal. Take public parks. Increasing their beauty, perhaps by planting and maintaining traditional tall, overhanging, or weeping trees is also a readily embraceable aim. Yet the trees may block drivers' visibility on curved parkways and cause a statistically significant number of predictable traffic deaths. Is it obvious that we should trim back, if not destroy, the very trees that give parks their beauty? Is it clear that we should routinely choose safety-driven deforestation over beauty?[52] Cost–benefit analysis offers a calculus for examining these decisions and providing confidence that the conclusions one reaches – perhaps a certain number and methods of tree trims and erection of particularly apparent warning signs, but no lumbering, with some attendant increased safety as a result – are justified and justifiable.

However, for all its technical power and impressive set of analytic tools – statistics, game theory, econometrics, and access to quantitative methods, in general – the theory has never enjoyed the popularity in law it has attained in social science and public policy making. That failure has not particularly been because of its lack of appeal in policy, but rather its discomfort in the courtroom. Triers of fact are often not poised to perform the correct analysis. Part of this has to do with finding the proper forum. Where, in fact, should the analysis be done? Administrative fact-finders in a workers' compensation system or NASD arbitrators from the securities industry in brokerage liability cases may not suffer disabilities (in theory) from doing cost–benefit analysis, but they are the rarity.

There is a different kind of argument used against cost–benefit analysis without limits-of-adjudication concerns, but one that has special force in law: such analysis makes no room for justice. That is, maximized happiness or utility not only would fail to take justice into account by definition, it often

[52] I owe this example to Jonathan Glover, although he can hardly be held responsible for any conclusions I draw from it.

is antithetical to it. Unjust results are often trotted out and, although they may have a point, they are often weaker than they seem. Let us examine one example.[53] Suppose a sheriff can prevent riots and civil unrest only by framing and executing an innocent man. Hundreds of lives would potentially or actually be saved at the expense of one. (We could change this to a tort case for monetary compensation, one that would logically operate the same way, but it would lose some of its impact). Cost–benefit proponents might well be in favor of such an execution as the better result, even if they are perhaps in some despair about the result.

There are a number of reasons why this example is not as damning as it seems. The first is the weighing is not as clearly in favor of life as it seems. We count the enjoyment of life and the attendant productivity, integrity, and respect as part of that in the initial weighing. We find there to be a difference between the knifing deaths of a patient whose surgeon's scalpel has slipped and that of a robbery victim by a switchblade. It matters how or why an individual dies. Some of this could be avoided by strengthening the example by making the condemned man a suicidal masochist unfazed by incarceration and unconcerned about death. Perhaps this makes the case against the cost–benefit analysis worse, perhaps it strengthens it in other ways. One of the strengthening ways is that moral intuitions in favor of justice are simply wrong, and the counterintuitive thinking is the right thinking.[54] Perhaps it is better to execute the occasional innocent, whether or not a masochist with low self-esteem, than to have many die, or at least the idea is not obviously wrong, otherwise disqualifying of cost–benefit analysis. Moreover, all of this might be so rare, not only in its setting but in the fact that the matter could help not but be revealed and thus, in some significant way, be self-defeating. The unlikely success, so the objection goes, might show that exotic and improbable examples ought not be used to degrade an otherwise successful theory.

However, even if what might be thought to be the main ethical objection is found less than completely debilitating, there is a quite different political objection: at least in court decisions, judges and juries are incompetent to perform the analysis. The political objection is often made more broadly, demeaning the cost–benefit project generally, suggesting no one can do that analysis

[53] The example was suggested by H. J. McCloskey, *A Note on Utilitarian Punishment*, 72 Mind 599 (1963). It is discussed by Smart, without his usual crispness, perhaps because he is disarmed (as he admits) by McCloskey's characterization of his position, in J. J. C. Smart and Bernard Williams, Utilitarianism: For and Against 69–73 (1973).

[54] There is an undercurrent of such thinking in English utilitarianism, often with apologetic patches to the underlying theory to make it more palatable. For example, Mackie looks with approval to David Hume to state that view with authority. "But Hume insists, a single act of justice, considered on its own, may do more harm than good; it is only the concurrence of mankind, in a general scheme or system of action, which is advantageous." John Mackie, Ethics: Inventing Right and Wrong 111 (1977). Mackie allows for justice in that it is generally beneficial. He refuses to endorse it when it is not.

competently. Part of this is because of the inherent problems in the project, problems well-known in the nonlegal literature but often considered elliptically or not at all in the legal literature, and even then sparsely and on an occasional basis. Thus it may be worth pausing to examine whether those problems debilitate cost–benefit theory in law, or at least tort law, conceptually.

The initial problem involves defining what counts as a benefit, usually, if not always, measured in terms of utility. We want to increase utility and decrease disutility. The problems in measurement are large, happiness achievement versus preference maximization involving a bipolar jumping back and forth as the metric of choice. Suppose it is happiness. Then paternalism turning to authoritarianism becomes a legal dilemma. Suppose a hard rock fan finds himself bombarded by a loud, unwelcome, and neverending stream of Mozart played through a neighbor's outdoor speakers. The neighbor intends to improve the happiness of the hard rocker by expanding his musical vistas. The hard rocker sues under claims of trespass and nuisance, asking that the music stop and compensation be paid. The Mozart-loving neighbor claims that the suit is misguided. She offers impressively credentialed authors of studies to show that individuals are universally happier, whether they know it or not, by hearing Mozart. Their stress is lowered, their peace of mind enriched, their ability to work and earn money increased, their family life improved, and their life expectancy increased. Moreover, the neighbor produces as favorable witnesses the hard rocker's employer, who states that his employee's work has improved; the hard rocker's doctor, who opines that the rocker's blood pressure has dropped; and the hard rocker's wife, who testifies that he is more caring and loving since *The Magic Flute* et al. previewed next door. Suppose, based on this, that the trier of fact finds that the hard rocker is in fact happier. He has net-benefited in a relevant, cost–benefit way. Should this fact be dispositive in denying the hard rocker either an injunction stopping the music, or damages thereafter, or both? A paternalist – one who believes that it can be legitimate to act in the best interest of another with little or no regard for the individual's own wishes – could easily applaud the neighbor, but should the law?

One way to solve this dilemma is to judge not happiness but preferences. We should respect the choices individuals make, regardless of their prudence or rationality. The hard rocker has an anti-Mozartian preference, and the law should respect that. One problem here is that of the utility monster. Donald Trump may have more preferences than a modern cave dweller in the Atlas mountains south of Tangier. Moreover, it commensurately may require greater and higher quality goods to make Trump happy. Thus counting, measuring, or even keeping track of preferences may prove psychologically interesting, but have little connection with public policy benefits or well-being, let alone ethics. However, that noted, let us return to our hard rocker. Is his preference (for hard rock alone) sovereign? Does it trump the preferences of his neighbor, wife, doctor, and employer? Surely we think so, as one's embodied preference

that directly affects oneself is supreme over (it trumps) that of others. What if the preference is disembodied? Suppose our musically put-upon hard rocker dies, leaving as executor of his estate Mick Jagger, who wishes to continue the suit by substituting the estate as the plaintiff. Should the suit be allowed to continue? Should we care about a disembodied preference? Suppose, instead of dying, our hard rocker falls into a coma and offers no preferences? Should his court-appointed guardian continue the suit, and if so, under what theory? If we worried about rights and wrongs, the traditional theory, then clearly the answer to all these questions is yes. For cost–benefit analysis, the answer is highly problematic. Where is the utility?[55] Who receives the benefit?

The problem of measuring utility or benefits can be widened. We have already encountered this when settling on the relevant population in providing a definition of the cost–benefit theory. We have used the population as that of the society. The force and persuasiveness of the theory is in part a function of its scope. For a family or extended family suffering from emphysema, government spending on pulmonary and respiratory medical research is extremely beneficial. For the family members, it has a greater benefit than other types of medical research, let alone advance, other goods such as public education, the fine arts, a competent army, a well-functioning highway grid, or a sound economic system. For those already afflicted, steps to abate long-term pollution that leads to emphysema may be unappealing. Let us suppose a group of former smokers sue a group of tobacco growers, not based on their contracting ordinary emphysema, but for developing emphysema X, a disease restricted to a single family. Would it be fair to take the measure of utility to be just the genetically occult family, or just the growers, or just the union of the two groups? Clearly, looking to small groups skews results. What if the family could properly blame penicillin rather than tobacco? Would that make penicillin suspect, a basis for suit, or a label not discussing the specific risk defective? Obviously any resolution of that issue is a function of the size of the population.

International environmental issues, and their increasing prominence in legal claims brought for nuisance and environmental torts, make the point. Local pollution perhaps may be tolerated given attendant benefits, raised employment or increased prosperity. Looking nationally or internationally changes the calculation. Legal systems are territorially restricted. Generally, because law is territorial[56] and courts restricted by benefits and costs judged locally,

[55] The literature setting forth macabre and compelling counter-examples, including the problems of disembodied preferences (although not in the legal arena), to ordinary experience and much smug ethical theory is full of interesting contributors, including Strawson, Williams, Wiggins, Nagel, and Parfit. An older, superb introduction to the literature more accessible than his well-known later book is Derek Parfit, *Personal Identity*, 80 Phil. Rev. 3 (1971).

[56] It can also have a population element. For example, the law may cover all those residing in the United States and all American citizens, wherever they reside. The problem is just the same, with simply an additional variable or parameter.

the larger effects on humanity – the litmus test of the traditional cost–benefit theorists – are out of bounds. Excluding a group from consideration makes the calculation morally suspect. Utility is restricted to the population that counts. It would be like weighing the westward movement in nineteenth-century America in terms of the utility to eastern city dwellers, migrants, and the U.S. government without considering the Indians. The policy of westward migration obviously looks good if land and resources are settled and put to their highest and best use by the migrants, that is, farming and ranching rather than roaming and hunting. The lot of the settlers has improved. However, the potential tort plaintiffs, the Indians, are not part of any consideration. In fact, even the inclusion of all of humanity may be too limited (at least according to Singer)[57]: for example, the buffalos might be left out. The issue is generally clear internationally: whatever the benefits to Americans, the costs of stopping Mexican immigration or atomic and hydrogen bomb testing on the Bikini Islands would be born largely by Mexicans and the Bikini Islanders. Similarly legalizing the consumption of dog meat does not do much for dogs. Courts are, in the same way, parochial. Whether Ohio industrial coal production and burning ought to be stopped because of the devastating effects on New England waterways is very much a function of whether Ohioans and New Englanders count equally. This works the same in reverse. In the field of antitrust, or unfair competition, as it was once less grandly and more accurately labeled, those previously having control over relevant markets may lose their monopolistic position as the market increases in size and scope. Dominating Mississippi is not the same as dominating Europe, Asia, South America, and Mississippi.

All this might seem to be quibbling. It is not, or not quite. The appeal of cost–benefit analysis at a basic level is that it claims to do the heavy lifting of moral analysis without prejudice, parochialism, and rancor, and with impressive precision. It offers a substitute for traditionally messy and subjective ethics. In that it is continually or logically defective because it fails to account for the total relevant population, its initial attraction dims. Consider again, as a fundamental problem, the area of environmental torts, where utility is often achieved through the constant and increasing use of scarce resources and the prosperity attained by so doing, but at the cost of global degradation, depletion, and warming. If we measure utility by the entire world's population, surely a large set of individuals, there may be little or no measurable disutility now. That is, the clear benefits to the globe's population in terms of housing, transportation, and economic prosperity may be enormous when compared to the relatively small health costs or environmental scarring issues. Even these may be overcome by the increased medical and reclamation resources available in a society made so affluent. That said, the costs to the population will arise significantly

[57] Peter Singer, The Way We Eat: Why Our Food Choices Matter (2006); Animal Liberation (1975).

in the next one hundred years, when fossil fuels will be greatly depleted, the ice caps begin to melt, climate changes arise, seacoasts and agriculture threatened, and the ozone layer breached. No one today has decreased happiness or pleasure as a result of this contingent future, except possibly for those few for whom there might be (misplaced present) anxiety. The disutility inures to the detriment of future generations, the now unborn. Should we respect their preferences? How could we ever do so? Even if we could know their number and thoughts, a matter, given any reading of history, about which we should be extremely modest, why (i.e., under what theoretical formulation) should they count, yet alone count now?[58] In an extreme example, should my very distant bacteria, insect, or sponge ancestors care about my present and firm antiseptic habits, insect-killing preferences, or use of sponges to clean toilets, as their distant offspring?[59]

Consider the following scenario: there is a society of liberal, permissive, rights-loving, atheistic, hedonistic, and slightly licentious individuals attempting to formulate long-term political and social policy. The adult members of that society begin to notice a disturbing tendency among their emerging-to-adulthood offspring. These offspring share none of the qualities just listed with their parents. The children are religious fundamentalists, who believe salvation is tied to predestination, with the additional need of the component of faith, but without regard to any need to perform good deeds. Theology is central to their lives and law, other than divine law, is irrelevant. Rights are trumped by religion. Moreover, the offsprings' habits are stoic, spartan, antisocial, intolerant, and celibate, with their conduct leading to the return to rudimentary and noncommercial lifestyles. Clean water is a valuable asset to them, but fossil fuels are not. The infrastructure of higher education and an interstate highway system are not thought worth preserving. Finally, a Christian Scientist view of no medical intervention for most infectious and other diseases is accepted as dogma.

What should be the cost–benefit legal planning for the adults in the society in view of their children's contrary belief system? Do we think, and do we want to take into account, some type of additional generation-skipping strategy? For example, should they take expensive (to them) steps today to preserve highways for the benefit of their grandchildren, if not their children? What if we determine that such an attitudinal flip occurs every other generation, or every ten, or one hundred? How should we account for preferences if they are so

[58] I am not taking into account here the additional problem of respecting future preferences. We had societies once largely racist, sexist, and sectarian. Should the members of those societies respect the (perhaps even predictable) liberal and tolerant leanings of their direct and remote offspring? Should they become more rigidly cast to apartheid to avoid maximizing their own happiness and avoid that dilemma?

[59] Richard Dawkins reduces this question to the microscopic, by arguing that the level of interest in the future is the genetic, not the human. Richard Dawkins, The Selfish Gene (2nd ed., 1989).

radically different from our own? Suppose there is a court decision about to be announced, or a referendum about to come to a vote, on the right to or availability of abortion. Suppose we know that if abortion is legal or more readily available, the preferences of future populations will more closely resemble those of their predecessors than if abortion is banned. How would the cost–benefit analysis work?[60] If abortion is allowed, and we factor in future generations' preferences, then we must consider those preferences in considering the abortion ban. But that leads to a vicious circle, not unlike inviting your enemies to vote on your decision to surrender. All of this, to various degrees, affects our analysis in such matters as misappropriation of patents, product liability, trespass, antitrust, nuisance, and cases involving lost opportunities, occupational disease, or simple property loss. Who we are protecting from what for what period at what cost presents a moving or even invisible target.

The future planner must take a profound leap away from ordinary cost–benefit analysis. He or she needs to make ethical or at least subjective choices about the desires, preferences, and happiness of future generations. Those choices would determine the size, constitution, attitudes, health, and diversity of that population, so that nothing properly designatable as a measurable, future population exists. That is, an ascertainable future population is not an intelligible concept. It simply cannot be identified.

The problem here lies not just with those areas of tort law so dependant for their parameters, even sensibilities, on future generations as nuisance and antitrust, although those, certainly, can hardly be made intelligible if planning is left out. The problem is general. There may be an objection that temporal distance does not, in fact, present any special difficulties. All that is needed is some of type of regression or present-value analysis to solve time-related issues. We discount the future using some reasonable rate, in the same way we might discount nephews or cousins in our will from our children and grandchildren. What rate could be used is more than problematic, though it appears arbitrary. Moreover, why should anyone be discounted?

In any case, the real concern is always with the assumptions, and the primary one, that of level satisfaction parameters among all individuals, presents an empirical leap in the dark to planners. To take one example, consider the fact that populations have largely increased their membership in religious, particularly fundamentalist religious, organizations while shedding such membership almost universally for all other associations.[61] Or consider a different kind of

[60] The right's theory approach to the eroding connection between abortion and concern for future generations is analyzed in James Sterba, *Abortion, Distant Peoples, and Future Generations*, 77 J. Phil. 424 (1980). He is undoubtedly right that there is a disconnect between the empathy many feel for future generations while, at the same time, having an antipathy to restrictions on abortion. Fetuses surely are the first future generation. The entire attitude is a recapitulation of Schulz's aphorism: "I love humanity. It's people I hate."

[61] The radical loss in a generation of hundreds of years of club and association joining is chronicled in Robert Putnam, Bowling Alone (2000). In that membership in organized

dilemma, but one at any moment upon us. There are those who see value in work, perhaps as personal wealth creation mechanisms interchangeable with spiritual uplifting or with professional intellectuals speaking of the value of scholarship and cerebral stimulation; and there are those who would allow individuals to vegetate on pleasure-inducing drugs. This dilemma presents a skewing of any utility equation, as what counts as satisfaction, pleasure, or happiness simply comes apart. The problem is universally poisonous to all such analysis. The reasons, examined here very briefly, center on the lack of interpersonal identity.

We mentioned earlier the problem of utility monsters, those individuals who need more than what is usual or normal in order to make themselves happy. There is, further, Sen's well-known utility dilemma in choosing who to hire among three individuals based on the consideration of utility, or cost–benefit analysis, as the sole criterion: an individual who is the poorest and most in need of the income to live, an individual with a curable disease most able to benefit by lifting herself out of poverty with the income by using it to treat the malady, and an individual recently impoverished and desperately depressed whose self-esteem would be most raised with such income. When facing this choice, we are left impotent.[62] However, stated flatly, the problem is global. People are not alike. I may value clean water and equality, whereas you may value prosperity and freedom. This is always a problem, and no talk of reasonable trade-off (supervenient as such equations are on the fundamental dilemma) makes it otherwise.

Whatever this general concern means to any cost–benefit theory, tort law has its special issues. Put in terms of our concerns, the cost–benefit theory fails the Socrates–Gladstone test. Simply, the cost–benefit theory fails to account for the peace principle. Torts arise as legal matters because people believe they are victims. They have been assaulted, defrauded, injured, taken advantage of, the subject of unfair employment or competition or, in some other way outside the context of voluntary agreements,[63] treated unfairly to their detriment, if not injury. Victims, almost certainly, think of their own injury as special, personal, and unique. They want redress, their literal day in court. The perception and motivation is that the nonlegal world – whether one sees it as the highway, the workplace, the market, or the media – has failed them.

groups brings associated happiness or the achievement of mass preferences, its unanticipated disappearance presents a general problem for utility theory. For example, why reward (through tax breaks or otherwise) large charitable gifts for endowment funds, members' families' scholarships, or new buildings when the organizations are disappearing?

62 See Amartya Sen, Development as Freedom 54 (1999).

63 See Chapter 5, herein, for a larger treatment of the boundaries of tort and contract. Views on the role of fairness in contracts can be found in Joel Levin and Banks McDowell, *The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations*, 29 McGill L. J. (Revue de Droit de McGill) 25 (1983); and *Striking the Balance in Contract Theory*, 40 Clev. St. L. R. 19 (1992).

Much of this is because the nonlegal world is perceived to be unfair. It is. Power, wealth, advantage, nepotism, connections, prejudice, bias, meanness, arrogance, vengeance, revenge, mischief, neglect, carelessness, chicanery, dishonesty, avarice, arrogance, selfishness, ambition, stupidity, disease, imbalance, drugs, alcohol, vanity, and demagagory (to name just a few factors) are present, if not omnipresent. Without stretching the semantics, their composite might be stated as political. That said, not only are neither merit nor fairness necessarily relevant or weighty in politics, they are not expected to be. They are, however, expected to be in the courtroom. Holmes's denunciation of the economic law of the jungle in the form of Social Darwinism ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics")[64] became legendary not for its Constitutional accuracy or its claim of economic neutrality.[65] The resonance is due to the explicit rejection of Social Darwinism, a political (not economic) theory that candidly endorses and legitimizes much of the previous list of unfair, nonlegal world factors. Put differently, the laws of the jungle or survival of the fittest are not the laws in American courthouses. Each story is its own. It needs to be seen to be judged on a nonpartisan basis, including ethical or at least equitable grounds that are not political, where the components of power and interests count. Litigants seek to step away from the political storm and the economic jungle, removing themselves from the terror of the selfish and avaricious, and to what they take to be the balmy, peaceful sanctuary of the legal system. Little matter of the mythical neutrality or the obvious frailties of the system. The rules are different than those on the outside. If the perception is that the wall between the inside and the outside is kicked down or the reality is that the wall is illusory, the space between war and peace disappears.

Some of this is stated as a matter of justice, and a large piece of it is. We need both to do justice and to be seen doing it (a well-established legal maxim exemplified by, for example, the legally ubiquitous, morally relativistic, and incoherent phrase "the appearance of impropriety").[66] But that is not enough. Peace needs to be achieved. The Socrates–Gladstone theory calls for allowing the courts to settle disputes without going full throttle toward ideal justice.

64 *Lochner v. New York*, 198 U.S. 45, 54 (1905).

65 The claim of Holmes is not self-evident. Certainly, Social Darwinism is not mentioned in the Constitution, with Darwin, after all, writing more than half a century later after its adoption. That said, the concept is an old one, with roots in Roman writers and Hobbes. Moreover, neither "federalism" or "capitalism" nor "privacy" or "democracy" is mentioned in the text, but their incorporation in Constitutional decisions has not been precluded by that absence.

66 The incoherence is this: what may appear improper or constitute an impropriety might be both morally compelling and legally mandated. Consider, for example, vigorously defending in a criminal trial one the lawyer knows to be guilty. If appearance is meant to be a popular and relativistic notion, it is unsupportable; if a legal and ethical principle, it is unexceptionable and largely unnecessary. Formulations and interpretations of the problem can be found in the case law interpreting DR 9–101 of the Code of Professional Responsibility and Canon 4 of the Code of Judicial Conduct.

This is not just the same as the Solonic view that constitutions need to be written for sinners, not for saints, but something quite different. Regardless of the result, certain methodologies are off-limits. Cost–benefit analysis is part of that.[67] How the remarkable gymnastics of incommensurate parameters are performed is left to the reader's imagination. Utility clearly counts, but how courts ascertain it and how they then weigh it (by the employment of some utility function) against such matters as decency or enjoyment is left obscure. In general, this is not the place to argue that neither the Restatement's nor the cost–benefit's writer's words, generally, do not match up to the theory (they

[67] Of course, it could be protested that such analysis is written into the tort law. Certainly, it is mentioned, as for instance in the Restatement of the Law, Third, Torts: Product Liability (1998), where the issue of a tort (that of a defective product) separated from intention is set out:

> SS2 Categories of Product Defect:
> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
> * * * *
> (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor on the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

The test, per comment d, is that of "riskutility balancing." Elsewhere, the Restatement of the Law, Second, Torts (1979), in §§826–831, the sections on private nuisance also discuss risk and utility (if not concatenated). The language is explicitly cost–benefit, but the program for carrying it out remains problematic. In relevant part, it states:

> SS826 Unreasonableness of Intentional Invasion:
> An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if:
> (a) the gravity of the harm outweighs the utility of the actor's conduct . . .
> SS827 Gravity of Harm – Factors Involved:
> In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
> (a) The extent of the harm involved;
> (b) the character of the harm involved;
> (c) the social value that the law attaches to the type of use or enjoyment invaded;
> (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
> (e) the burden on the person harmed of avoiding the harm.
> SS828 Utility of Conduct – Factors Involved:
> In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
> (a) the social value that the law attaches to the primary purpose of the conduct;
> (b) the suitability of the conduct to the character of the locality; and
> (c) the impracticability of preventing or avoiding the invasion.
> SS829 Gravity vs. Utility – Conduct Malicious or Indecent:
> An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm is significant and the actor's conduct is:
> (a) for the sole purpose of causing harm to the other; and
> (b) contrary to common standards of decency.

don't), that an exception is not the whole rule (it is not), or that the analysis is not used in some metamorphisized form from time to time in certain limited circumstances, particularly at the edges (it is). That said, being invited to court should not provoke illusions of grandeur. Cost–benefit theory suggests that something other than rights violated or fault derailed is central. This might be protested as pushing cost–benefit aside by definition, but it is attitude not terminology that matters. Politics, essential to cost–benefit theory, is deemed out-of-bounds by litigants entering what they take to be a nonpolitical fray. If they thought otherwise, then the attitudinal, Socrates–Gladstone objection would disappear. If I live near a factory and am making the lowest and worst use of my property or I am an inefficient competitor to a near-monopolist or ought to have chosen insurance as a property owner or a driver, should, based on these considerations, liability otherwise present be defeated? These are political judgments, at once rooted in self-interest, differing visions of the world, power, sectarian-interests, a variety of views about the good or useful or achievable, and partisanship. They are impermanent, local, and shifting. Should fortunes change, so would the judgments. If lowest and worst use against a factory otherwise constituting a nuisance allows an indifference to an air pollution argument newly made, justice is rewritten. That not only fails to promote peace, it, by its very temporariness, destroys any chance peace has.

If economic loss in tort is a problem for the cost–benefit theory, personal injury cases present a qualitatively more dramatic difficulty. The basis for much of the theory rests on what is called the Kaldor–Hicks criterion.[68] Kaldor–Hicks suggests that an outcome is more efficient, and to be preferred and performed, if those made better off by the outcome would be able, at least in theory, to pay those made worse off and still come out ahead. Putting personal injury aside for the moment, suppose I promise to sell you my set of philosophy books for $1,000 and then refuse because I discover keeping them allows me a $5,000 tax credit (having overpaid for them originally). I then offer you $1,200. You purchase the equivalent used philosophy books for $1,500, and we are both ahead. Even if those books cost you $1,500, we still comply with Kaldor–Hicks as, measured together, utility has increased. For economic loss, perhaps this is fine so far.[69] That is, we might find it acceptable if the winner is so much better off that he could pay the loser her losses and still be ahead or have something left over.

[68] A long and brilliant look into the type of problems inherent with Kaldor–Hicks can be found in Amartya Sen, Collective Choice and Social Welfare (1970). There are technical issues as to whether Kaldor–Hicks succeeds in maximizing utility in all cases, but here we are concerned with its success, not failure.

[69] "Perhaps" here is qualified by the fact that any maldistribution of goods is considered irrelevant. That is, inequality never counts. This results in the criteria for compensation being both inherently controversial and very much based on which side of the equation one lands.

What of personal injury torts? Suppose a manufacturer produces a car that occasionally causes death. Perhaps the transmission slips from park to reverse, the gas tank rests against the rear bumper, or the high center of gravity causes the car to flip over when navigating curves. Initially, let us assume that, as is true in many states, there is a limitation or cap on wrongful death damages. Let us make it $500,000. If $500,000, then, is the legislated maximum value of a life, with many lives presumably worth far less, then it would benefit the car maker to design the vehicles to kill victims at that cost. Kaldor–Hicks would be satisfied. For example, suppose the manufacturer sells two million cars at a saving of $1,500 per car, or $3 billion. If 1,000 people die as a result at $500,000 per death, the legislated loss amount is $500 million. Kaldor–Hicks specifically, and cost–benefit and utility theory generally, would be satisfied. It is not obvious that such satisfaction would tempt many decedents or placate their families.

But, it might be argued, that is only a reason to reject monetary caps. It is.[70] What happens, then, when caps are rejected? Kaldor–Hicks is satisfied if the benefit to the manufacturer exceeds the compensation to the decedent's estate. Would that test ever be satisfactory to the dead driver? We might think of life insurance policies, and analogize to the purchase of such policies as a demonstration that even the loser here, the dead driver, in the guise of a holder of life insurance, would, in theory, agree to a reasonable trade-off of dollars for death. That would be a mistake. Even if we could put aside issues of the risk adversity of the buyer of the insurance, the ability to afford insurance and the motivation to protect particular beneficiaries at a particular time, the insurance is not self-beneficial. It exists for the benefit of others. Moreover, why would people trade their own lives for money to other people?[71] For Spartan loners, the kill would be free. In any case, explicit recognition of the legitimacy of such a trade-off would appall anyone interested in corrective justice and would be catastrophic for peace. The cost–benefit look provides a mediocre perspective for designing a wrongful death legal system. The same arguments could, with less impact but the same logic, be applied to all of personal injury. Should we think of the loss of an arm in the terms of its market value alone? If so, a runaway version would allow a trade in harvested organs not only without restriction, but with sufficient encouragement to reward self-help, even battery and mayhem.

[70] This is one argument about caps. There are many. To some extent, the real action lies with who should make the decision: an administrative process with scheduled payments, a legislature invoking caps with a broad brush, a virgin jury listening to its first case, or a judge after the fact correcting a jury with remittiturs and additures. The question is really: whom do you trust?

[71] This is not to discount the occasional suicide for the financial benefit of kith and kin. It only suggests that there are other, presumably more common, causes.

Let us return to Gladstone. The last quarter of his political life was largely centered on the concerns of Ireland, and the issue of peace within or without a radically altered British union. Gladstone's view on Ireland was always a minority one, at least in Parliament. Justice was the theme of most of those caring about Ireland, with reference to the outrages (variously) of Cromwell, William III, James II, Corn Laws, Sectarian churchmen, expropriation, intolerance, bad legal rules, and blood-feuds. Utility was the theme of much of the English talk on the Irish question, with reference to the same Corn Laws, land holdings, labor, captive markets, historic battles, religious controversies, and prejudices, and the same bad rules and misbehaving churchmen. Everywhere justice was demanded by one group, economic protection by another. Gladstone's solution was to ignore almost all of it. That is, there was no thought of a just or a prosperous solution in the corrective justice or economic development senses. Law interested in the correction of past wrongs sees justice as historical, looking backward as to claims and rights, property and persons violated, converted or harmed. Ireland had that in abundance. Sorting out what the law would have been and how claims and counterclaims would have come out involves an impressive and even Herculean effort in the viewing of past wrongs, just in the tally of bloodshed alone. Along with his famously tragic Irish partner, Charles Stewart Parnell, Gladstone sought an answer agnostic to claims of justice and oblivious to utility. Instead, he suggested, simply, to let all, including Irish, participate in a legislative process to achieve only peace, letting all other concerns wither. Peace would be the guiding principle:

> I propose to examine whether it is or is not practicable to comply with the desire widely prevalent in Ireland, and testified by the return of 85 out of 103 representatives, for the establishment, by Statute, of a legislative body, to sit in Dublin, and to deal with Irish as distinguished from Imperial affairs; in such a manner, as would be just to each of the three Kingdoms, equitable with reference to every class of the people of Ireland, conducive to the social order and harmony of that country, and calculated to support and consolidate the unity of the Empire on the combined basis of Imperial authority and mutual attachment.[72]

The view of Gladstone, perhaps vaguely stated, promises a rosy peace, but a peace stripped of the full exaction or redress of wrongs. He simply endorses entering the process, issues of justice notwithstanding. It is worth noticing three elements in Gladstone's peace principle, and perhaps peace principles generally. First, conscience is set aside. No mention of or concern with ethical difficulties is to be broached. Whether the peace be fair, just, or corrective, these concerns are not made apparent and there is no talk, or even room for talk, of

[72] Jenkins, Gladstone at 543.

past grievances, wrongs done, property taken, opportunities lost, and people killed. Neither retribution nor correction rises to the surface. Second, peace has no moral expectations beyond platitudes. In terms of tort issues (let alone war crimes, genocide, or crimes against humanity), peace is simply its own good or end, something to be desired while (possibly) being oblivious to traditional ethical or utilitarian concerns. These things count but are not constitutive of the peace principle. Put differently, these other concerns when enumerated fail to capture and are themselves not captured by the peace principle. Thus, Gladstone can say blithely:

> I ask that we should apply to Ireland that happy experience which we have gained in England and Scotland, where the course of generations has now taught us, not as a dream or a theory, but as a practice and as life, that the best and surest foundation we can find to build upon is the foundation afforded by the affections, the convictions and the will of the nation; and it is there, by the decree of the Almighty, that we may be enabled to secure at once the social peace, the fame, the power and the permanence of the Empire.[73]

Tort law is not, of course, international diplomacy. Courts are not countries and litigants not armies. But civil unrest parallels international unrest and grievances loom large to their victims. Participation in the system robs the participant of the right to complain, and turns one's attention, rather, away from the past (with its attendant concerns of corrective justice, revenge, retribution, recovery, restitution, and reward) and to the future. The traditional theory looks to the past, while cost–benefit analysis suggests that the participation process may be explicitly indifferent to the individual participant. Both the traditional and the cost–benefit theories are necessary to a civil law system but, lacking the peace principle, they are insufficient. The dark side of agreeing that participation would be the only remedy is losing. The final word belongs to one who voluntarily participated and lost, Socrates.[74]

> But when I was defending myself, I thought that I ought not to do anything unworthy of a free man because of the danger which I ran, and I have not changed my mind now. I would very much rather defend myself as I did, and die, than as you would have had me do, and live. Both in a lawsuit and in war, there are some things which neither I nor any other man may do in order to escape from death. In battle, a man often sees that he may at least escape death by throwing down his arms and falling on his knees before the pursuer to beg for his life. And there are many other ways of avoiding death in every danger if a man is willing to say and to do anything. But, my friends, I think that it is a much harder thing to escape from wickedness than from death, for wickedness is swifter than death. And now I, who am old and slow,

[73] Jenkins, Gladstone at 553.

[74] We need to recall that, under the Athenian system, Socrates could have accepted banishment for a period of years without trial, a remedy lost to him once his trial began.

> have been overtaken by the slower pursuer: and my accusers, who are clever and swift, have been overtaken by the swifter pursuer – wickedness. And now I shall go away, sentenced by you to death; they will go away, sentenced by truth to wickedness and injustice. And I abide by this award as well as they. Perhaps it was right for these things to be so. I think that they are fairly balanced.[75]

Socrates wants us to enter the legal system and Gladstone wants us not to press our advantage once in it. Peace is always a middle ground.

[75] Plato, *Id.* at 46.

3
Schoolyard Spats

Much of what we prize in the concept "the rule of law" involves the settling of disputes through a neutral, textured, rule-laden, principled, and predictable civil process unswayed by power or influence and allowing an outcome resting on fairness, not coercion. History, both in the case of invading armies and bickering neighbors, continually demonstrates that for reasons ranging from bare inadvertence to deliberate malice, human beings harm one another. As worthy of pride as any achievement in modern society is the development of the rule of law, a concept that allows disputes to be resolved through civil actions rather than blood-feuds.

The role of law and culture is widely discussed in various professions and by a myriad of professionals – from philosophers to economists, lawyers to social psychologists, anthropologists to sociologists to political scientists – with varying degrees of insight and nonsense. Very near the core of civil law is what the Anglo-American tradition labels tort law. It is the intersection of tort law and culture that apparently motivated the title, if not the entirety, of the distinguished law professor Marshall Shapo's latest book.[1] (He has written perhaps twenty books before this title.) Professor Shapo writes explicitly from the perspective of a law professor, and makes clear it is this perspective that guides his view.[2] In illuminating the subject, he travels the traditional ground of any able legal academic, weaving legal precedent with statutory change, examining small alterations in legal doctrine as they contribute to global legal transformation,

[1] Marshall S. Shapo, Tort Law and Culture (2003), hereinafter "TLC."

[2] One might wonder why there is a somewhat extended treatment of a single tort author, Marshall Shapo. It is because Professor Shapo is characteristic, at the high end, of many of the traits, learning, and culture of those who teach tort law, at least to judge by his writings. His focus is thus representative and emblematic of others and will be used here, without engaging in the wearisome exercise in textual exegesis of the similar yet slightly different flavored writers who populate the field. Of course, there are significant exceptions to any groupings. The main alternative group, those interested in utility theory, is treated in Chapters 2 and 5. Shapo, in general, holds to the traditional theory set out in Chapter 2, but it is as to other matters that we analyze his work here.

and specifically parsing particular areas of the law, suggesting that such changes are not independent but somehow related to American culture.[3] All the while sitting safely in the academy, standing apart from the barrage of the tort conflicts that often characterize various areas of American culture, and forming beliefs largely through the lens of other writings of the legal academy, Professor Shapo's book represents all that is well-known, fiercely admired, and frequently celebrated about the American legal academy. In that way, it demonstrates, as so much of such writing demonstrates, the complete irrelevance of such works.

Part of the reason a book like Professor Shapo's fails to shed a clear light on the dynamics of tort law is because of the failure of the American academy to understand law, or at least law in the field. Most law professors are undergraduate alumni of the law, having received a bachelor's degree, now inflated to a J.D., to give (us all) pseudo-, quasi-, crypto-doctoral status, status maddeningly and consistently ignored by the outside world.[4] Then, after several years spent receiving a second undergraduate degree, future legal faculty migrate to the back rooms of large firms or appellate courthouses engaged in writing memoranda on the minutiae of legal doctrine. Having safely earned "real lawyer" expertise doing that, and perhaps idling somewhere to pick up a masters in

[3] That said, a number of doctrinal discussions in Shapo's book were, at least, disappointing and, at worst, confused. For example, in Shapo's discussion of the area of primary versus secondary assumption of the risk, he notes with, if not approval, at least no criticism, the court's decision in a skiing accident case that primary assumption of risk can be proven by analysis of the plaintiff's subjective state of mind. In general, the case law could not be more confused, as all assumption of risk defenses for several hundred years (at least) constituted a complete defense, so that distinctions between primary and secondary assumptions were unnecessary and sloppy. The two types are quite different. Primary assumption of risk involves no duty cases, while secondary assumption involves the voluntary encountering of a known risk, or at least choices made that might be considered part of comparative fault. For example, there is often taken to be no duty with regard to a customer finding bones in fish chowder or being hit on the head by a home run deep in the bleachers. If the victim of each of these were a five year old, there would still be no liability under any coherent and consistent analysis, as there is simply no duty. Thus, looking to the knowledge of the plaintiff/victim is looking in the wrong place. Endorsing a case such as the one mentioned by Shapo (TLC at 104), namely *Smith v. Seven Springs Farm, Inc.*, 716 F.2d 1002 (3d Cir. 1983), exhibits at least an indifference to, and perhaps a total misunderstanding of, this concept. Although this book, in general, is not concerned with small errors made in the presentation of doctrinal tort law, it is interesting that, from the leisure of the academy, such missteps can be made. For the old law, see, for example, *Hudson v. Kansas City Baseball Club*, 349 Mo. 1215 (1942) and *Cincinnati Base Ball Club Co. v. Eno*, 112 Ohio St. 175 (1925). For the modern law, see, for example, *Bush v. Parents Without Partners*, 17 Cal. App. 4th 322 (1993); *Randall v. Mammoth Ski Area*, 63 F. Supp. 2d 1251 (E. D. Cal. 1999).

[4] Of course, there is the obscure S.J.D., an emaciated doctorate that appears, in general, to allow those who wish to teach, but who attended an insufficiently tony law school, to secure a faculty position. Several years of more of the same (in the undergraduate law program) instills the proper pedigree without the work of a real, traditionally earned Ph.D. The embarrassing inconsistency of awarding a second doctorate in exactly the same field appears to bother no one, certainly not law schools (which profit thereby).

law consisting in more of the same, they return to the academy, now entrusted with teaching legal undergraduates the ways and means of the vast profession.

In the case of tort law, such lack of training and experience is particularly interesting, for much of it would hardly be familiar territory to the blue book finalists who have spent their subsequent years on the esoterica of legal doctrine. As Professor Shapo implies, but never elaborates nor states quite explicitly, there are two categories of tort law: personal and impersonal.[5] Personal injury law – using that term in the way that most in the profession do, to include auto accidents, medical malpractice cases, toxic exposure cases, premises liability matters, and other related injuries to one's person – is dominated by those who spend their time not having ever been in large, prestigious firms but rather are in small personal injury firms or in small-to-moderate insurance defense firms. The practice is driven by facts and only to a lesser extent by legal doctrine. The day-to-day business of tort law involves client contacts, numbing paper discovery and motion practice, rote depositions, and encounters with overworked and often hostile judges, with lawyers laboring to bring the matter to a jury of someone's peers – peers who, if they would have arrived individually at the lawyer's door at night, would cause a call to the local police.

This is a world law professors rarely visit, except as voyeuristic tourists gawking at occult rituals.[6] It is a Runyanesque world of struggling solo practitioners,

[5] Impersonal torts, what might broadly be thought business, property, or economic torts (although losing an arm can cause a severe economic hardship on the average wage-earner), are peripheral to much of Shapo's analysis and are thus necessarily forced to the periphery of any discussion of his work. That said, two things are true. First, tort analysis always suffers by fragmentation, here meaning personal from economic torts, although such fragmentation is, unfortunately, typical. Second, some tort issues discussed in this chapter are universal to tort law (if not all conflict resolution), including problems in negotiation, the central place of morality, and the need to understand human behavior to make sense of conflicts and their solutions.

[6] That is not to say that there are not superb chroniclers of legal behavior, often using sophisticated empirical methods drawn from sociology, anthropology, and economics. Certainly, that list is long (although nowhere near long enough) and would need to start with the work of Marc Galanter and much of what was done under his supervision and by his colleagues at the University of Wisconsin Law School. See, for example, Marc Galanter and Thomas Palay, Tournament of Lawyers: Transformation of the Big Law Firm (1991), where use of the economists' statistical methodology such as kinked linear functions and chi-square analysis is employed. See, particularly, chapter 5. Other good work in the field, to pick just one representative if excellent example, would be that of Robert Mnookin, in a number of his works (often coauthored), including Beyond Winning: Negotiating to Creative Value in Deals and Disputes (2001), particularly chapter 6 on psychological barriers, or with Eleanor MacCoby, Dividing the Child: Social and Legal Forms of Custody (1992), particularly the economic analysis in chapters 6 and 10. The problem is not just that there is not some empirical work, albeit often scattered and without reference to other work, that is, lacking a coherent literature. It is that the middle-level approach of the legal academic, that is, the worship of process values in appellate cases, seems not only to be free-floating without roots elsewhere, but quixotic in its claims of usefulness beyond restating legal doctrine. The lack of theory (that is, if there is to be a hierarchy of practice and empirical work at the basic level, then process value work in the middle, and theory at the other end) is another matter.

squirrely private investigators, avaricious expert witnesses, pontificating magistrates, preoccupied and ambitious judges, courthouses filled with a Dickensian menagerie of low-end (and not so low-end) government officials exhibiting various degrees of sloth, myopia, partiality, vindictiveness, and partisanship, and of clients whose court case trumps their marriage as their single most important life cycle event. Thus, the particular criticism of foreignness, akin to unmusical outsiders watching the veteran but arcane jazz band, although traditional and well-worn, has hardly been met in the academy. The reason for noticing all this is that before looking with more detail to Professor Shapo's work, there is some doubt that such work could accurately give any help to the practicing professional, except reiterating doctrine. Moreover, the doctrine necessarily would be elliptical and of limited value, covering too many jurisdictions and too many areas. The question then is this: is there some special expertise that might be brought to bear on tort law and culture by the traditional writers in the legal academy?

The answer is undoubtedly yes. Tort law is not a naturally occurring object. It is a product of thought, and controversial thought at that. Thus, the tort wars. Complex economic, demographic, sociological, political, and other such forces are often at work in changing our perceptions, our psychology, and our expectations. Tort law is not just about what judges say. In fact, it is often just the opposite. Clients tell compelling (if often incomplete, inconsistent, incoherent, and improbable) stories to creative lawyers, who argue, with various degrees of persuasion, to eclectic juries under shifting instructions (sometimes obeyed and sometimes not) from the court, all of which, taken in large numbers, can cause sea changes in legal doctrine.

Take the example cited by Professor Shapo, and by everyone else, of *MacPherson v. Buick Motor Co.*[7] In that most classic of twentieth-century tort cases, the New York Court of Appeals eliminated privity with regard to the injured driver (the remote vendee) of a defectively made Buick.[8] What did Professor Shapo (and here he often stands in for many of his colleagues in the academy) look to in this decision? He suggests that Cardozo "overcame the privity bar" by

Legal theory in general, although a thriving industry throughout the world, is marginal to the point of disappearing in the American academy. The best of it, even by Americans, is often the work of expatriots. See, for example, the Oxonian work of Ronald Dworkin, including A Matter of Principle (1985) and Law's Empire (1986).

7 217 N.Y. 382 (1916). This case was also discussed in Chapter 2 of this book.

8 More concretely, the plaintiff, Mr. MacPherson, brought suit not against the car dealer from whom he purchased his car, but the remote seller, Buick. He claimed that the wooden wheel that Buick supplied, which was easy to inspect for defects, went uninspected, and as a result, it was allowed to be sold, to crumble, and to cause an accident injuring MacPherson. Prior to this, only those directly related, in privity, could normally be sued for negligence, with the exception of two kinds of products: imminently dangerous products, such as falsely labeled poisons; and inherently dangerous products, such as improperly constructed scaffolds. An automobile with a wheel that had lasted five years before breaking seemed, obviously, not to fall into either category.

focusing on "the manufacturer's knowledge of the probable peril to 'life and limb'" of a "negligently made vehicle."[9] Does this have anything to do with how this incredible change occurred? How did the rare rule of eliminating privity for certain kinds of inherently dangerous products get promoted into the general elimination of the privity bar for all manufactured goods? Do we have any way of knowing why the Court of Appeals arrived at its decision, any way of understanding how it was that Cardozo basically reached the wrong answer (or student Cardozo potentially failing in law school for minimizing and then dispensing with privity, should the matter have come up in an exam question in 1916), how Cardozo managed to convince his fellows to follow him, and how every other state suddenly followed New York?[10] Perhaps a simple understanding is when customers bought wagons from blacksmiths or directly from manufacturers, and they themselves (that is, the customers) knew a thing or two about fixing those wagons – the privity rule might have made sense. Presumably, prairie schooners with bad wheels were not easily returnable from Colorado to Pennsylvania, and undoubtedly the long chain of title with regard to manufactured goods then was, in general, much shorter. In fact, the ordinary consumer may well have known just as clearly how to fix such wagons, even if he lacked the further craftsmanship and tools to do it as well as the blacksmith. Cars are another matter.

That type of analysis above, one actually hinted at by Cardozo,[11] is not some esoteric reason for understanding how a rule changes. It is, in fact, the driving force of legal change. The tort world is one driven by the perils of harming others, where the victim, not state supreme courts or U.S. Courts of Appeals, begins the process of change.

[9] TLC at 88.

[10] The question of how one judge transformed his court and then all courts to his way of thinking involves a process less Svengali-like and less elitist (we just followed him because he was so much smarter) than might appear. It lies with a truth that Socrates knew well: people are often persuaded by superior arguments when required to defend inferior ones. Of course, that means that people must listen, including judges. My own peek into the success of the Cardozo court in New York comes from the late Arthur Goodhart. Although the Cardozo court had no law clerks, Goodhart spent his vacations and summers while at Yale Law School in Albany, de facto clerking for his uncle, Justice Lehman. Goodhart told me that the single most important fact to understanding the success of the court was realizing just how boring Albany then was. It had no movie theater, no television or radio, no real social, intellectual, or cultural activities of interest to the justices, many of whom had previously lived in New York City. All there was to do was to talk to each other. That talk involved conversations beginning with breakfast together and lasting into the evening. An astounding body of law was created as the result.

[11] The opinion states, among other things, that "precedents drawn from the days of travel by stagecoach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be." *MacPherson*, *supra* at 391. The stagecoach analogy is the Court's and ought to be considered in any attempt to understand the decision.

American tort law, at least throughout the twentieth century, has been driven by two very specific engines, neither emphasized in Professor Shapo's or virtually any other standard tort book: the contingency fee and the American jury. Those harmed not only during the Industrial Revolution, but during the Middle Ages, in Roman times, and presumably even in the neolithic era, tended to be the worst off, the weakest, those without the resources of money, mind, body, and connections.[12] After being injured, their status can only be characterized as worse than when they started. In that recovery was sought, there was not a level playing field under any normal conditions for securing that recovery. The contingency fee leveled that field. That is, the worst off in American society could afford highly competent counsel based on the high reward the lawyer would gain by his successful prosecution of the tort case. Despite the mud-slinging against lawyers that is part of our current tort wars, the economic basis is absolutely compelling. Only by an economic incentive sufficient to allay the potential risks of loss could a system arise that would allow the impecunious potential plaintiff full access to legal recovery. Furthermore, given this structure in theory (although market imperfections in the legal system occur with the same regularity they do elsewhere), fee gouging in the face of an expanding bar ought to be a drag on the percentage of such contingency fees, particularly as the risks decrease and the competition becomes greater. This has characterized airplane crash litigation,[13] although the usual problems in economics of buyers' lack of knowledge, creates certain rigidities in the marketplace that have not necessarily worked to the benefit of consumers elsewhere. Simply put, because consumers (plaintiffs) do not know how successfully to shop for attorneys, they are saddled with little flexibility on fees. Specifically, the failure is due to the lack of ability to evaluate those qualities – competency, experience, expertise, available time, drive, past success – which would determine intelligent choice.

The other significant driving force in tort litigation has been the American jury. Considered to be an irrational political aberration, at once arbitrary and unjustifiable by many,[14] juries daily decide tort cases in idiosyncratic ways. Any particular jury award, as any real-world tort lawyer would be the first to say, can be irrational, prejudiced, ignorant, vindictive, the result of passion, or absolutely mysterious in its outcome, yet over a large number of jury cases, the result of much empirical analysis typically concludes that the jury system does not stray far from any other decision-making process when judging the

[12] The long history of how this works is yet to be written. For some (if limited) analysis of the interplay between law, economics, and public morality on this problem in the last two centuries, see W. W. Rostow, The Process of Economic Growth, chap. 3 (2nd ed., 1960).

[13] See Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?* 25 Card. L. Rev. 65 (2003).

[14] This would include the founder of modern social science, the German sociologist-economist-lawyer, Max Weber. Max Weber, On Law in Economy and Society 79 (Max Rheinstein, ed., 1954).

peculiarities of individual cases.[15] Moreover, the cynical, but compelling, argument relating to juries contributing to a leveling playing field already seeded by the contingency fee is this: the American jury is the only political (or perhaps any) institution uncorrupted. That is, money, influence, friendship, incentives, threats, promises, future consideration, loyalty, and ties to politics, ethnicity, family, sectarianship, and class all fail to operate in any direct or explicit way. Juries misbehave, but unlike everywhere else, that misbehavior cannot be encouraged and abetted by interested parties. This lack of corruptibility, if only because of the randomness and inaccessibility of the jury, is unique, and for those accustomed to having their way, utterly stupefying.

The fact that two sets of decision-making procedures, in general, yield similar results in the long run does not guarantee that, with regard to any particular subset of decisions, the results along the way may well be thought undesired, wrong, or even loathed by a particular sector of society. Hence, the tort wars. Physicians are unhappy with medical malpractice, manufacturers are unhappy with product liability, property owners are unhappy with both premises liability and environmental nuisance suits, pharmaceutical houses are unhappy with class actions, and plaintiffs are unhappy everywhere with short monies, long delayed, after repayment of liens, subrogation and large legal fees. In general, everyone is unhappy with something.

The interesting assumption for anyone writing as though there is to be a tort standard that is singular, neutral, and accepted, or, in fact, that there ought to be such a standard – and this includes the many who labor away on various versions of the Restatement of Torts – is the belief that somehow there is such a thing as "the law." In that law is tied to culture, and in that the beliefs about what counts as validity in law are tied to cultural beliefs which are fragmented and varying, there may be no reason to believe that a unified concept like "the law" exists. However, what we can be certain about is that the core belief that law reflects culture in some kind of direct way can only be true in certain societies, and then only in the blandest and least incisive sense. An example from Professor Shapo is instructive here. He, as a legal celebrant, states that "the legal system does have ways, imperfect though they are, of sorting out the phony phobia from the genuine one."[16] He makes such a statement in the context of claims based on the fear of future disease by, for example, asbestos

[15] The studies are not all in accord. Those that support the rationality of the jury include Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 Va. L. Rev. 1055 (1964); Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 Mich. L. Rev. 68 (1981); and Valerie Hans and Neil Vidmar, Judging the Jury (1986). The most condemning typically attack the punitive damages juries award. See, for example, Dorsey D. Ellis, Jr., *Fairness and Efficiency in Law Punitive Damages*, 56 S. Cal. L Rev. 1 (1982); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1 (1982); and, in general, *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), (O'Connor, J., dissenting).

[16] TLC at 60.

workers. But what does it mean to say the legal system has ways of properly sorting anything out? Sometimes the legal system gets it right, sometimes it gets it wrong, and sometimes it gets it right after so many years or even centuries that in no way should it be able to take credit. It took western law perhaps 2,500 years to realize that slavery was wrong criminally, constitutionally, and as a matter of tort law, and even longer to see that certain kinds of injuries based on race or gender were improper. Is Dred Scott comforted in his grave by the fact that he would possess constitutional tort action claims against those who would imprison him or detain him because of race, claims that had a legal basis arising following the civil rights legislation in the 1960s and thereafter?[17] What would it even mean for one dead for one hundred years, and returned to slavery, to feel exhilaration about new, distant, posthumous causes of action?

Of course, law, in every real sense, is a subset of culture. What that means in reality is murky, if not meaningless. To start, all social conduct is part of culture, so that revealing law to be part of culture is no more startling than to reveal that geology is governed by physics. All science is governed by physics.[18] The connection is no better at the semantic level. As complicated as it would be to find a definition of the term "law," it is a quantum leap more difficult to find some satisfactory definition of culture. Let us, then, begin modestly. Tort law is just one branch of law, and it might be well to consider just what space it occupies.

Professor Shapo speaks of three kinds of civil law: tort, contract, and property. His distinctions are muddy, beginning with the problem of defining tort. He admits that "the term tort is not susceptible of an easy, crisp definition." He then continues that, "for our present purposes we may describe it as an action for personal injury, for property damage, and sometimes even for injury to economic interests that the law denominates a 'wrong' – except for the sort of wrong chalked up as a breach of contract."[19] This circular definition is reminiscent of what Hart described as a case of "Scorer's Discretion."[20] That is, if one needs to know what the score is, one simply asks the scorer, and that score is just a matter of his personal discretion. There are no further rules. Hart simply asked if law is just like what the scorer decides. That is, if it is just what the judges say it is, then how would the judges themselves know what the law is? They would somehow need to photograph their own mind, engage in Freudian psychoanalysis, perform self-hypnosis, or perform some other act of reading their own brain patterns. We need to know what a tort is, that is, what things are actionable with regard to injury, property damage, or economic interests.

17 Scott's despicable treatment is the subject of, and contributed to, the decision in *Scott v. Sandford*, 60 U.S. 393 (1857).

18 The argument for the primacy of physics can be found throughout Roger Penrose, The Emperor's New Mind (1989).

19 TLC at 5.

20 H. L. A. Hart, The Concept of Law (1961).

One cannot simply say that those things that are tort law are those things that are tort law. Ruling out contract is not particularly useful.

The beginning of analysis between tort law and contract law is simply this: tort law concerns the area of imposed duties, whereas contract law covers the area of assumed duties. I have no choice but to drive safely, practice law prudently, keep my front steps uncluttered always, and (to avoid being sued for slander) tell no deliberate untruths about the criminal record of my neighbors. Those duties are imposed on me without my choice. Should I agree to sell my neighbor a bicycle, work as a lawyer for the government, or lease an apartment, I would assume certain duties. With regard to those assumed duties, to some very larger extent, I can set the parameters of my own obligations through the dynamics of the negotiation and the terms of the ultimate bargain. Imposed duties are not in the united set. They are noncohesive, sometimes inconsistent, often directed at cross purposes, sets of obligations that are imposed, without the willingness and consent of any particular person, on all of us in certain situations with regard to owing a duty of care to some third party. Thus, by fiat, there can be no unified theory of torts, despite the noisy protestations of any particular law professor or Restatement writer who wishes to say there is.

It is important to remember that tort duties are imposed for not only a variety of, but often for, conflicting reasons. In that sense, they are no different than tax law, with its revenue-producing, redistribution, enterprise-abetting, saving-encouraging, spending-encouraging, and other goals. Any particular tort rule may be pro- or anticapitalist, pro- or anti-individual responsibility, pro- or anti-anything in our society. Safety, prudence, risk-shifting, risk aversion, compensation, punishment, competition, and care: the platitudinous list is long. Moreover, the very basis or justification for tort rules changes over time, or even swings 180 degrees, as perhaps it has more than once with regard to the anticompetitive tort rules of antitrust and unfair competition.

That said, one of the most salient features of American tort law is the logic of vagueness.[21] For those unfamiliar with the dreary literature of philosophical logic, vagueness refers to concepts that have reality and meaning, but lack crisp edges. Thus, it may be clear with regard to a concept like baldness that Farah Fawcett is not bald and Michael Jordan is, but if (arbitrarily), Farah Fawcett has 150,000 hairs on her head and Michael Jordan has 15, then there are undoubtedly individuals with every single number in between. That for some intermediate case of hairiness it is difficult to know whether or not to label someone bald does not, in any way, challenge that the concept is useful,

[21] The vagueness literature is vast, numbing, and usually requires reading larger works to find it. See, for example, W. V. O. Quine, Word and Object (1960), Michael Dummett, Frege: Philosophy of Language (1973), and Robert Nozick, Invariances: The Structure of the Objective World (2001). There is some legal treatment of the subject in Joseph Raz, The Authority of Law: Essays on Law and Morality (1979), and more classically and directly in Georg Henrik Von Wright, Norm and Action: A Logical Enquiry (1963).

viable, real, and wanted as part of ordinary language. It is no different, for example, from other concepts of physical attribution, whether they be height, handsomeness, thinness, or variously with regard to any other type of attribution for a person, place, or thing. In fact, vagueness is ubiquitous, the norm, and for all of us to employ in all the useful concepts we use to describe the lush, complex, overlapping, and textured world we inhabit.

Much of tort law rises or falls based on the use of vague concepts like reasonableness, due care, proximate cause, recklessness, intentionality, and foreseeability. Such concepts are mocked and berated because they are vague but only by those who fail to understand that vagueness is indispensable to our ordinary language and intelligence. Thus, even if legal rules remain unchanged – that is, for example, rules about duty of care, assumed risk, foreseeability, and causation – because reasonableness becomes a component in all of them, the jury, in essence, rewrites the rule on a minute-by-minute, if not second-by-second (when one looks at all the juries sitting in any given week) basis. This is culture at its most minute, and is reminiscent of Holmes's description of certain legal concepts as moving from the molar to the molecular.[22] The molecular changes in particular juries, often without changing any rule, contribute to longer movements. One might feel a sharp pain in the back of one's mouth without always knowing just where or why it arose.

Let us turn more explicitly to Professor Shapo's thesis. It appears to be just this: judges determine tort law and culture determines the views of judges. He then illustrates how, with regard to a number of basic tort areas – in particular, such issues as products liability, malpractice, consent, and emotional distress – they are driven by a culture that is judicial directly, and governs judges through culture indirectly. It is the judicial balancing of social values that determines individual decisions. The only sense in which any or all of this is true is the trivial sense. Let us look at these issues in turn.

Certainly, judges rather than legislatures determine most legal rules and principles, even if later codification freezes certain of these in statutes. Moreover, juries are given instructions to follow, and their willingness to follow these instructions or otherwise come to a correct decision can be second-guessed and revisited by the trial or appellate courts. The instructions, that is, the basic rules, can also be judged above. All this is obvious, conceptual pap about basic procedure. Is there more?

The answer is no, both because of the enormous space within rules to decide most matters and because of the idiosyncratic manner in which cases reach appellate courts. The narrative space first.

We could imagine a legal system or some subset of that system whereby rules are packed closely together, such that at any given moment textual exegesis of decisions and statutory codes would be a prized and marketable commodity

22 *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917), (Holmes, J., dissenting).

(which, to some extent, it is) and where the atmosphere between the rules is anaerobic. To some extent, the tax system, if one includes codes, regulations, and tax court opinions, fits this model. If indeed there were triers of fact in such cases, their job would be to judge simply the credibility of parties to intentions, or the verifiability of certain underlying tax facts. The law would, however, dominate every single move.

We could also imagine a system where there is virtually nothing but space. Here, the tort system looks very much like deep space, with a few medium-sized bodies breaking up unimaginable distances of nothingness. The space is filled in tort law with facts, every size and shape about all aspects of human behavior, human attitudes, beliefs, opinions, and deeds and misdeeds of every type. In many areas of tort law, including most of what occupies tort law (that is negligence law in some shape), there is no interesting legal activity. The action is in the facts. Was this driver speeding, did this radiologist overlook a mass, was that crack in the sidewalk a defect, was the design on the punch press reasonable, did the pedestrian look before he or she crossed, did the parachutist understand the risk, did the truck driver have an opportunity to get out of the way – these are the questions, the very essence of tort law. Even in the high-end world of esoteric tort law, antitrust law, most of the space is taken up with the reasonableness of any particular action, often as interpreted by the loquacious talk of the self-appointed priests of antitrust law, economic pricing theorists.

Restricting research and discussion to a reading only of appellate court, or even trial court, opinions in tort law can be very dangerous. Decisions upon review do not, as Professor Shapo seems to suggest throughout, primarily concern themselves merely with the edges or changes in the law, although they do that from time to time. Rather, they are typically motivated by the particular confluence and confusion of facts that cascade down the judicial pike, often calling for sorting and sifting by a trial judge. The type of expert testimony offered, the completeness and precision of a particular jury instruction, the credibility of an emotional distress claim, the applicability of a particular standard to a particular product, the relevance of repairs to product or place, the competency of children or experts from related fields to testify: these are the data of ordinary judicial review. In fact, review is more often concerned with procedure and evidence, not substantive legal issues. Even when viewing the shifting boundaries of the substantive law, the rules themselves are sufficiently vague and the space between them sufficiently vast that seeming restrictions at the level of theory often have very little effect at the level of practice. There is hardly a theoretically interesting issue available in the law as to specific standards of care. An individual radiologist's duty in detecting a suspicious shadow on an imaging film or the general professional negligence are issues exclusive (usually) to the jury. That is, it is always a specific, in fact the specific, fact issue whether a particular doctor in a particular hospital missed a particular patient's lesion that a nonparticular reasonable radiologist would have discovered.

The interesting questions when examing legal rules and principles here, really, should be how and when do they change. Presumably, without being quite that explicit, this is the stuff of Professor Shapo's book. Judge-made law changes for any number of reasons, and moreover it can appear to change when, in fact, the change is illusory. It is worth spending a moment to look at this issue more carefully.

Much of legal education highlights the important cases that change the law. Whether it is an ancient decision such as *Shelley's* case[23] or *Foone v. Blount*,[24] the great constitutional decisions of *Marbury v. Madison*,[25] *Erie R. R. Co. v. Tompkins*,[26] or *Brown v. Board of Education*,[27] or the case law that might concern us in examining the tort field, decisions such as *Scott v. Shepherd*,[28] *I. De S. and Wife v. W. de S.*,[29] or *The T. J. Hooper*[30] case, the assumption is that an important judge – from Coke and Mansfield to Marshall, Holmes, Cardozo, and Hand – changed the law from what it was.[31] Did they simply make a mistake? That is, are each of these decisions simply wrongly decided?

Here we must be careful. Normally, we wish to distinguish between what is and what ought to be, between the descriptive and the prescriptive.[32] Sometimes this is seen as the distinction between fact and value.[33] Whatever the terminology, the meaning is clear. One can contrast "Admission to the Art Museum is not free" with "Admission to the Art Museum should be free"; or legally, "An infant has only four years to bring an action in tort" with "An infant ought to have more than four years to bring an action in tort."

Little time is needed to show how problematic the edges of this distinction are in law. Legal facts or legal descriptions necessarily include values or

23 76 Eng. Rep. 206 (1581).
24 [1776] II Cowper (K. B.) 464.
25 5 U.S. (1 Cranch) 137 (1803).
26 304 U.S. 64 (1938).
27 347 U.S. 483 (1954).
28 2 Wm. Blackstone 892, 3 Wils. 403 (1773).
29 Y. B., Liber Assisarum f. 99, pl. 60.
30 60 F.2d 737 (2nd Cir. 1932).
31 Whether a law is changed or explained, modified or clarified, altered or affirmed is often the entire point of the controversy. Whether or not *Marbury* represents a change or a recognition of the constitutionally obvious is discussed, in terms of the political outlooks, in Jean Edward Smith, John Marshall: Definer of a Nation 309–326 (1996). Edward Levi argues that the life of the law includes a healthy dose of legerdemain in An Introduction to Legal Reasoning (1948).
32 The distinction, whatever its pedigree, is associated with David Hume, A Treatise of Human Nature (L. A. Selby-Bigge, ed., 1888; reprinted, 1973; orig. pub., 1739). More recent treatments include A. J. Ayer, Logic, Truth, and Language (1936) and John Searle, Speech Acts: An Essay in the Philosophy of Language (1969).
33 See, for example, G. E. Moore, Principia Ethica (1903) and his famous discussion of the fact/value distinction and its conflation, the so-called naturalistic fallacy. An attempt to put this problem in the context of reasons and mental processes can be found in Thomas Nagel, The View From Nowhere (1986).

prescriptions. For example, consider the set of complex moral, value, or prescriptive judgments contained in and associated with each of the rights in the Bill of Rights. The guarantees of speech, jury trial, or due process are facts. The content involves values. This is the stuff of ordinary legal argument. The argument works this way. I say symbolic speech is protected as a fact of the First Amendment, whereas you say it is not. You then add, after citing the constitutional parameters of the facts, that you suspect me of engaging in personal values, prescriptive in nature, and stating law conveniently to be merely what I think ought to be the case. I counter similarly. At this point, we are agreeing that the facts reign, that personal values and prescriptive judgment have no place in law, but disagree as to what the facts are.[34]

Shapo refers to this distinction, although he uses the unfortunate term "normative" in place of "prescriptive"; unfortunate, in that normative is more or less synonymous with any rule-based system, and applies to everything legal. It thus confuses a clear distinction.[35] He discusses, in a confusing way, that judicial dissents sometimes, but not always, reflect the prescriptive, the majority the descriptive.[36]

The flight from the prescriptive by the majority illustrates the space between rules. The appeal to overt change is the rarest form of dissent (it may more likely call for a concurrence) and is, as Shapo rightly points out, explicit endorsement of legal change by judges.[37] Then how do we explain change?[38] Perhaps we should stop looking in the wrong place. The driving forces are everywhere but the appellate courthouses, who stay with old concepts, are driven (when driven) to move law along by litigants and lawyers (who are driven, generally, by society) and are ecstatic when the most atypical judge, brilliant, learned,

[34] There is an active debate in jurisprudence as to whether this agreed position, that of facts only, is coherent. For our purposes here, we can remain neutral as to that debate. See Ronald Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1057 (1975), Jules Coleman, *Negative and Positive Positivism*, 11 J. of Leg. Studies 139 (1982), Lawrence Tribe, God Save This Honorable Court, chap. 3 (1985), and Robert Bork, The Tempting of America (1990).

[35] The classic exposition here is that of Hans Kelsen, General Theory of Law and State (1945), with a more recent improvement being that of Joseph Raz, Practical Reason and Norms (1975).

[36] TLC at 273. Shapo has a maddening habit of couching every single assertion with an "on the one hand while on the other hand" approach. I make the comments here as elsewhere from what I take to be his majority or primary view. Shapo's equivocation, far from unusual, has undoubtedly been an academic necessity in process value academies, where authoring texts on internally contradictory law so as to be consistent requires endless balancing, equivocation, and a firm commitment never to make a firm commitment.

[37] TLC at 282.

[38] Shapo lists a number of factors to explain judicial decision making. They include principles, such as self-reliance, honesty, progress, and sacrifice, and rationales, such as compensation and attitudes toward risk and paternalism. The problem here is two-fold. First, reasons are not necessarily causes. Second, how would (we, the judge, the parties or) anyone know which factors had or should have what weight. The discussion of principles is in TLC, at 103–193, of rationales in TLC, at 140–175.

courageous, and creative, comes along to rescue them. Again, the salient fact of *MacPherson* was not that Cardozo eliminated privity, it is that he took everyone else with him.

How does Shapo suggest we should proceed in specific areas? His primary field is products liability, where among other things he has been an advisor to the Restatement of Products Liability. He adequately discusses here a number of historical developments, retracing well-known ground. What is missing is the why. Take a simple example. With the onset of the Industrial Revolution, most product injuries occurred on the shop floor, down the mine shaft, at the construction site, on or by rolling stock, or in other unguarded, poorly designed, dimly lit, potentially explosive, and dangerous workplaces. Such injuries led to tort suits involving now such forgotten notions as the fellow servant rule.[39] Today these claims are resolved, in part, in the workers' compensation arena. Third-party workplace cases and personal products liability disputes remain in the courts. Why? Is this for the better or worse? Is the FELA model, a hybrid of workers' compensation and negligence law, a good alternative?[40] The economist would say that the workers' compensation system efficiently internalizes external costs, cuts total costs, spreads loss to a wider group, and more directly rewards safety. However, compensation is low. Take, briefly, another example. How do juries treat differently a defective products case from a case of a negligently made product? Do they? Is this a distinction with a difference? Platitudes about responsibility fail to capture the precise differences in the legal standard, which cases are now won or lost, and whether this is or is not a good thing.

Much less satisfactory than the merely incomplete products analysis is Shapo's discussion (sporadically located) of medical malpractice.[41] He believes that "'informed consent' is a significant part of the landscape for medical injuries," arguing that negligence is only the "default rule" when informed consent is not feasible.[42] This is a difficult position to take seriously. If I consent to the risk of having the wrong leg amputated, knowing full well that in one out of five million cases that occurs, is that the end of the matter? Would an otherwise clearly negligent physician enjoy immunity? Would doctors as

[39] That rule barred suit by an employee (a so-called servant under the common law) against an employer (the master), if the negligence was due to another employee (a fellow servant). Thus as Cooley states, "§277. Risk of fellow-servant's negligence–General rule. The rule which exempts the master from responsibility for injuries to his servants, proceeding from risks incidental to the employment, extends to cases where the injury results from the negligence of other servants in the same employment." He cites as the leading cases *Priestly v. Fowler*, 3 M. & W. 1, *Farwell v. Boston, etc., R. R. Co.*, 4 Met. 49, 38 Am. Dec. 339; *Murray v. Railroad Co.*, 1 McMullen, 385. See Thomas Cooley, A Treatise on the Law of Torts (Stud. ed., 1907).

[40] The Federal Employers' Liability Act, 45 U.S.C. §§51–60.

[41] TLC at 38–41, 165–167, 285–286.

[42] TLC at 39.

patients be barred, because of their knowledge of events, even absent special instructions by their fellow physician, from bringing a medical malpractice suit? I know more drivers run red lights than doctors have surgical misadventures. Does that bar me from suing one who hits me?

Instructive here is the lack of placing medical malpractice in the larger setting of professional negligence, whether attorney, accountant, broker, architect, or otherwise. Professional malpractice cases, for any vocation, are a peculiar and uncomfortable blend of tort and contract. That is, these cases are ones of assumed duty to the extent of parties voluntarily entering into the professional (and concomitantly, legal) relationship, but tort to the extent that the parameters of the duty cannot be fully circumscribed by agreement. Moreover, the reach of the duty incorporates (by reference) the practice and competency standards of the profession, rather than the tort standards of due care or even fully negotiable contractual standards. For example, there are risks and procedures legally off the table, or put differently, agreeing to quackery is not defense. In any case, the prominence of medical malpractice, separate from other professions, is an interesting cultural fact, omitted by Shapo and many others, and a symptom of how the tort wars have caused a social distinction otherwise legally unjustified.

Shapo misses the opportunity to address the current, worrisome, and polarizing issues of medical malpractice, those causing hysteria on the public relations front, a crisis for the insurance rates and carrier viability, and purported physician unavailability in certain specialities and geographical areas. Part of the solution almost certainly would involve reevaluations of both the traditional notions of negligence and of compensation. Take, for example, the most dramatic cases, those involving birth trauma. Suppose (using fictitious numbers), one hundred babies are born in some time and place with the most severe symptoms consistent with (but not necessarily caused by) negligent delivery, twenty-five of those bring suit (although perhaps not the right twenty-five, that is, some being *prima facie* products of negligence, some not, some uncertain), and three of those prevail and win $1,000 each. Plaintiffs only are just better than random in their ability to prove their points by any scientific standard. The indemnification cost is $3,000, all internalized within the medical system. The system above is expensive, pay-outs generally are about one-third of the system's total cost (i.e., the cost of indemnity as opposed to the cost of prosecution and defense), proof and success are uncertain, with the successful (only in the most degraded sense of that word) baby winning a litigation lottery. Suppose further that any obstetrician will occasionally make a birth trauma mistake (i.e., stipulate to fallibility if not humanity), and assume also that the baby-trauma lottery has many contestants. A few might require small pay-outs. The external costs could then rise another $3,000. These many suits, though not successful, drive insurance premiums, which in conjunction with the occasional lottery pay-out, become *in toto* too high for many practitioners.

What can we conclude? That is, what can we conclude if we are civilized, decent, and interested in compensation, not vengeance? First, that of all the babies annually in identical need, three percent of them receive significant help, that is, three of every one hundred. Second, the American tax and medical systems, and the individual families pay for the other ninety-seven. Third, if the hypothetical costs were evenly spread, then, in theory, with the $12,000 ($3,000 for indemnity, $3,000 for costs of defense, $3,000 for costs of prosecution, $3,000 for other cases), for one hundred cases, each family would receive $120 plus whatever is saved in annual premiums. If medical care is guaranteed to these children (and the system already assumes that cost in supporting the lottery losers), then that money is also available. Something else could be put into the mix, similar to the defective vaccine system[43] or various other compensation systems. The September 11 Victim Compensation Fund of 2001, new and controversial, also provides a model.[44]

Put differently, simply and starkly, suppose ten brain-damaged children are born within some relevant space/time, with one recovering a $15 million award, costing an additional $5 million (in litigation fees and expenses) along the way. The other nine children receive nothing. Each child is equally damaged. Should (a) one child get all and the rest get nothing, or (b) tort reform be employed without apology and all ten receive nothing (or some token amount), or (c) some other solution, perhaps $2 million per child, regardless of the etiology, be considered? Whatever meter of fairness or utility one uses, given our simple and stark example, neither (a) nor (b) ought to be considered either a very good answer or one that anyone should be proud to offer.

Are any of these happy solutions? Happy would be too strong. Is it, in some undefined sense of life's lottery, enough? Can we afford the tort law solution? Maybe, maybe not.[45] Can we afford the hypothetical solution, with any set of real numbers being staggering? Is no-fault a serious alternative when it may well fail to deter bad behavior, incompetency, carelessness, poor training, bad lifestyle choices, smugness, indifference, a failure to maintain knowledge, skills, and medical ties, or just plain sloppy work?[46] Maybe not. In that we as a people

[43] See, for example, The National Childhood Vaccine Injury Act of 1986, now 42 U.S.C. §§300aa-10–33.

[44] 49 U.S.C. §40101.

[45] That is a controversial question. One study shows the cost of medical malpractice to be 0.76 percent of national health expenditures in 1985, 0.65 percent in 1994. See J. Robert Hunter, Medical Malpractice Insurance: A Report of the Insurance Group of the Consumer Federation of America (1995). See, for a good analysis, in general, Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 Md. L. Rev. 1093 (1996).

[46] The larger issues are debated, with some indecision, in Paul Weiler, Medical Malpractice on Trial (1991). His suggestion is to shift the burden of defending all suits to hospitals or health care systems (solo practitioners would remain a problem). This would only increase suits by giving plaintiffs a larger target with deeper pockets and without the availability of the "I'm a cross between Marcus Welby and Albert Schweitzer, just trying to help people" defense.

might fairly be judged by how we treat our worst-off citizens,[47] no one should expect credit for a job well-done in the present lottery system. Somewhere, in the overheated debate of self-righteous doctors, sanctimonious lawyers, and opportunistic politicians, we ought to do better for the damaged children.

As for informed consent, other than the problematic role of the "informed" part in excusing lack of knowledge of impending negligence, it is an extremely murky concept with regard to the "consent" part. Shapo states that an "important piece of tort bedrock lies in the concept of consent. The simplest rule is that consent cancels the effects of conduct that otherwise would be a tort."[48] Consent, in general, is a contract, not a tort, concept. Consent itself is a complex, often elusive, and at times quite unsatisfactory concept. What is the thing that any client, agreeable contractor, or promissor actually agrees to, particularly when foresight, knowledge, and the entire future may be largely unknown, unconsidered, unpredictable, and in flux? Consent as a justification for duty seems to imply prescience when ignorance is the empirical norm. In any case, consent in tort is difficult to find as a nonemaciated concept, and is typically recognized only by its absence. (For example, X failed to consent to Y's action.) In this sense, it is ubiquitous but trivial. It is always circumscribed when put to greater use in personal injury, as we do not allow consent by the victim to his own murder, amputation, and so forth. In the property field, turned more recently tort, such as with trespass, it has more life, but only in a sense tied to its medieval roots, for instance linked to the feudal notions seisin, fealty, tenure, and the King's peace.[49] We must remember how consent, when put back in habitat, operates. It gives rise to assumed duties or, put negatively, concedes existing rights. Consent must be voluntary, knowing, and fair to work in contract law, a standard there is no reason to jettison elsewhere.

How is consent a "bedrock of tort"? Tort duties are imposed. Does giving consent forfeit rights? Of course, if lack of consent is an element of a tort (e.g., civil rape), then consent counts. Otherwise, how impressive is it? Should it vitiate a wrongful-death action in a case of Russian Roulette,[50] a usury

47 One justice system that makes this the guiding principle is that of John Rawls, A Theory of Justice (1971).

48 TLC at 67.

49 See, in general, S. F. C. Milsom, Historical Foundations of the Common Law (1981). For an example of how an entire book can be written concerning consent without any attempt at defining it, nailing down its parameters, or in any way figuring what commitments it involves, see Alexander Bickel, The Morality of Consent (1975).

50 The limited treatment of Russian Roulette by the courts has typically turned on pleading matters, and particularly on whether or not assumption of risk is held to be a complete defense. That is, given the old case law, where one scintilla of assumption is enough to be deemed 100 percent consent to any impending tragedy, the cases turn on an analysis of the scintilla. The overall analysis is generally unsatisfactory by any standard. See *Muldovan v. McEachern*, 271 Ga. 805 (1999). For a contrast, see the Model Penal Code §210.6(4)(c), where whatever defense Russian Roulette may provide in a tort case, it constitutes second-degree murder under the code.

case,[51] or even a defective product injury, if one consented to use a dangerous but not necessarily defective product?

There is a larger issue here. What we make tortious tells us about the morality and decency of our culture in the way that contract duties do not. Consent is often imperfect, as the product of limited choice and knowledge, insufficient perspicacity, lack of foreseeability of consequences, haste, and preoccupation. If society deems conduct tortious, should consent be the end of the story? Whatever the answer, analysis is necessary. A short example from utility theory might be helpful.

Suppose we ran a tort system in a manner so to increase total utility, that is, increase pleasure, happiness, satisfaction or the fulfilling of choices (however utility is defined).[52] Any situation that increases utility would, *prima facie*, not be tortious. Suppose further that a sadist is discovered torturing a masochist. The masochist had consented. Both expected to enjoy the experience, thus total utility would be increased. This behavior ought, *Q.E.D.*, to be encouraged and is not tortious, if Shapo's view of consent is applied. Thus, if the masochist later has buyer's remorse, he might be held to be barred from court. Is this any way to run a tort system? Although the answer to that question may be complex, citing to consent hardly counts as a complete answer.

What is too often absent in tort talk, certainly missing in Shapo's analysis, is any mildly rigorous discussion of culture and moral theory. Whatever the various efficiency, floodgate, risk-sharing, and violence-avoiding purposes of tort practice and doctrine, crucial to the logic of any justification is, if not moral theory, at least moral proclivity. Although that body of theory has hybrids, shades, and even skeptics,[53] moral theory has traditionally rested on one of three points of view. These might be seen, for simplicity, as the virtue/vice view,[54] the good/bad view,[55] or the right/wrong view.[56] Seen in terms of what

[51] See, for example, *Jiffy Lube Int'l, Inc. v. Morgan*, No. 92–1249, 1993 U.S. App. LEXIS 24334 (4th Cir. September 21, 1993), (Unpublished); *Comm. v. Donoghue*, 250 Ky. 343 (1933).

[52] The proper definition or currency for utility is widely debated. A good starting place is found in David Lyons, Forms and Limits of Utilitarianism (1965). The appropriateness and even coherence of utility are a controversial matter. See J. J. C. Smart and Bernard Williams, Utilitarianism: For and Against (1973).

[53] Two skeptical positions can be found in John Mackie, Ethics: Inventing Right and Wrong (1977) and Gilbert Harman, The Nature of Morality (1977). Mackie's is the more rigorous and thorough treatment.

[54] This is the view most closely associated with Aristotle and Aquinas. See Aristotle, Nicomachean Ethics. The Basic Works of Aristotle (R. McKeon, ed., 1941). More recent expositions and defenses can be found in the work of John Finnis. See Natural Law and Natural Rights (1980); Fundamentals of Ethics (1983).

[55] This is consequentialism, whose only viable incarnation appears to be utilitarianism. Its followers include Jeremy Bentham, John Austin, H. L. A. Hart, and Richard Posner. The classic exposition can be found in John Stuart Mill, Utilitarianism (1957; orig. pub., 1861).

[56] Rights theory, part of deontology (which is either rights or duty theory, properly speaking), is associated with Immanuel Kant. See his Foundations of the Metaphysics of Morals

is being sought or promoted, virtue looks to the conduct of the actor,[57] goodness looks to the consequences of the actor's conduct,[58] rights theory looks to the entitlements of the actor.[59] These theories do not guarantee the same result, at either the micro or macro level. For example, take a guilt-ridden, low self-esteem, pain-desiring, suicidal defendant (criminal or tort), who is innocent of the charges (criminal or civil) against him. That defendant might nevertheless admit to the factually incorrect charges against him with some enthusiasm. This admission would give him pleasure or happiness and give the same to the prosecutor, the victims, society, and the state. The execution, imprisonment, or award of damages against the defendant, no matter how baseless or misguided, would increase utility everywhere, achieving the goal of goodness theories (which are virtually always utilitarian in fact). It would not, however, advance a rights theorist's view; in fact, it would do the opposite. Both an individual's rights and the achievement of the right answer would be violated. Similar examples equally abound with virtue theory when compared to the others. It is not difficult to find instances of mischievous conduct yielding rewarded results, either because of the favorable consequences of that conduct (avarice, selfishness, and greed spurring economic growth, creating jobs, etc.) or because the right to misbehavior might be deemed worthy of protection (e.g., pornographers and racists have civil rights, and suits based on the real harm they do might be treated unfavorably).

Few of us have complete and consistent moral theories, but the inclination to favor one or the other of these, or put differently, to view the tort system through the filter of one theory or another is very real. Should the careless be compensated for mishandling an admittedly easy-to-mishandle product? Should a factory's neighbor, one with multiple chemical sensitivities, be able to force the closing of the plant because she predated it in the neighborhood? Should smokers be successful as plaintiffs against tobacco manufacturers or unsuccessful as defendants when working in a cubicle adjacent to the complaining plaintiff? Should racist editors have immunity from libel? Are class actions with large numbers of plaintiffs recovering individually small but in gross, devastatingly large awards against start-up companies in securities

(Lewis Black, trans. 1959; orig. pub. 1785). An entertaining, libertarian treatment can be found in Robert Nozick, Anarchy, State and Utopia (1974).

57 Conduct here involves the study, discipline, and training to be virtuous, that is, the tendency to be truthful, tolerant, humble, courageous, self-disciplined, and so forth.

58 Consequentialism typically employs what is often called the hedonistic calculus. The idea is to have some weighing (calculus) of all the utilities to judge what is the best decision in any given situation. Utility itself might consist of a number of candidates, including happiness, pleasure, or choice, each with its own difficulties.

59 The basis for rights, that is, the metaphysics or epistemology of rights, is problematic. Even if one dismisses Bentham's comment that talk of natural rights is nonsense on stilts, how one finds a (solid, agreed, objective, or coherent) set of rights presents an ongoing problem.

cases, a good way to run a legal system or a sane way to run an economic system?[60] The answer to these questions depends in part on moral judgment, and starting place and method make a large difference.

Our system has elements of all three theories – as, for example, intentionality is closely tired to virtue theory, product liability law to utilitarianism, and negligence law to rights theory – but how the mergers occur, where the compromises are made, and how vivid are the blended shades change the result. Moreover, consistency matters, and some blending might be logically indefensible.

Moral theories are not famous for engendering either light-heartedness or tolerance in their followers. Although this is most evident in religion[61] and politics, it also resounds in law. Executing criminal defendants, gerrymandering

[60] The answer is highly charged based on economics, politics, and the state/federal divide. Investor protection historically has been a matter of dual federal and state regulations. Yet, when Congress believed that duplicative regulation and strike suits were impairing capital formation, it enacted the NSMIA and SLUSA, intruding on the traditional areas of both state statutory securities and common laws. Roberta S. Karmel, *Appropriateness of Regulation at the Federal or State Level: Reconciling Federal and State Interest in Securities Regulation in the United States and Europe*, 28 Brooklyn J. Int'l L. 495, 547 (2003); National Securities Markets Improvements Act of 1996, Pub. L. No. 104–290, 110 Stat. 3416 (Codified as amended in scattered sections of 15 U.S.C.); Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105–353, 112 Stat. 3227 (Codified as amended in scattered sections of 15 U.S.C.). The congressional purpose in enacting SLUSA and the PSLRA was to protect issuers, especially those in the high-tech industry, from class action "strike suits." Barbara Black and Jill I. Gross, *Making It Up as They Go Along: The Role of Law and Securities Arbitration*, 23 Card. L. Rev. 991, note 156 (2002). The passage of SLUSA and the Private Security Litigation Reform Act of 1995 ("PSLRA") has been attributed as arising less to considerations of corporate fairness than to the efforts of corporate lobbyists and the professionals who served them persuading Congress that corporations were routinely being victimized by strike suits, too often frivolous lawsuits brought merely to force the corporations into extortionist settlements. Joseph S. Morrisey, *Catching the Culprits: Is Sarbanes-Oxley Enough?* 2003 Colum. Bus. L. Rev. 801, 826, (2003). See also David M. Levine and Adam C. Pritchard, *Securities Litigation Uniform Standards Act of 1998: The Sun Sets on California's Blue Sky Laws*, 54 Bus. L. Rev. 1, 2 (1998) and John W. Avery, *Securities Litigation Reform: The Long Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 Bus. L. Rev. 335 (1996). Moreover, the PSLRA was a shift away from traditional securities statutes because the PSLRA sought to protect companies instead of shareholders. Thad A. Davis, *A New Model of Securities Law Enforcement*, 32 Cumb. L. Rev. 69, 79 (2001). Ultimately, however, the benefits of the PSLRA do pass to shareholders because of higher corporate profits that result from not having to defend as many strike suits. The PSLRA did not answer all of the procedural questions, however. The next reform act proposed and passed was the Securities Litigation Uniform Standards Act (SLUSA), which sought to remove securities class actions to federal court and to prevent the redirection of litigation to state court to escape the substantive pleading requirements of the PSLRA.

[61] It always seems necessary to repeat the point, tiresomely ignored by too many religious devotees, that morality stands, logically and necessarily, apart from religion, else how can we judge the ethics of any particular faith. The point is Immanuel Kant's, in his Religion within the Limits of Reason Alone (Harper ed., 1960). A typical rejecter of this type of argument, at home with the title of "religious philosopher," is Jacques Maritain, Man and the State (1951).

voting districts, mandating bussing, quasigovernmental condemnation proceedings: all of these explicitly put moral theory into play. The fact that tort law views morality through a fog or disguises it in muddied rules or amorphous concepts does not mean that moral theory is anything less than fundamental to tort law, as it is central to our culture. Deliberate avoidance is not only a failure of analysis. It is dangerous.

Morality is generally contrasted with rationality, often seen as a debate as justice versus prudence or some other set of contrasting motivations.[62] Here, too much of the legal literature, and more worrisome, the actions and understanding of practitioners are both complacent and misguided. Platitudes, truisms, and common sense are taken to be as good as analysis, empirical studies, research, and theory, with little realization that, here again, a literature exists, largely unread and untapped, that has both explanatory and reforming power for tort law.

So let us look briefly at where the explanations might lie in any reshaping of tort concepts, a reshaping that is, in certain ways, prior to considerations of morality. That is, one might think that in order to engage in moral reasoning, a necessary part of legal reasoning, one must understand what is involved in reasoning in the first place. Much of this understanding comes from what is sometimes called "game theory," but it is also found in the literature of conflict resolution, utility theory, mathematical sociology, economics, and econometrics. Law school academics typically ignore this literature. We can only assume that this is out of ignorance of its existence, rather than any studied attempt to avoid outside help. In that they do mention it, it is more as a polemic exercise than making much use of it to solve problems.

How might any of this work? Take the problem of tort settlements. Let us simplify the area to a two-person or binary game where the plaintiff and defendant are the two parties. Each wants to pursue a rational strategy to determine what is best for him or her. Even if there appears to be only two parties, there are, of course, always at least four, and often more. The lawyers have their own self-interests and, to some extent, rationally pursue them. Moreover, insurance companies, creditors, lien-holders, principals, and consortium holders have their own interests.[63] To simplify, let us disregard these other parties. Morality

[62] There are many attempts to show the connection between morality and rationality. One of the most intriguing is that of Thomas Nagel, The Possibility of Altruism (1970). Nagel essentially connects the move of helping your future self, which is not entirely coincidental with the present you, with the move to help present others. The reasoning or logic, per Nagel, is analogous. Thus, if it is rational to help your future self, as it seems to be when you enroll in medical school or open a retirement account, it can be rational altruistically to help others. Neither type of move involves a specified person helping him or herself.

[63] There are often cases with more than two parties anyway, typically with multiple plaintiffs with overlapping interests that are directly linked, and with defendants whose interests, if overlapping, are not. These defendants usually do not have coincidental interests with any other party. This fact only complicates any analysis, and we shall leave it alone here.

and justice are often captured within the rules and procedures of the system. What drives each of the parties is his or her own interests. He or she wants to pursue those interests rationally. If justice is achieved, so much the better, but personal interests are primary.

In order to pursue this strategy rationally, lawyers might (and usually do) hold some or all of the following rules of rationality in conflict. These include:

1. It is always a better (more rational) strategy in making a decision for there to be more information rather than less. It is worth expense and time to gain that information.
2. It is always a better (more rational) strategy to get the most money or give the least money to the other side in any resolution. One acts irrationally to the extent one settles (opts out) for an amount less optimal than one could secure with more effort.
3. It is always a better (more rational) strategy to disguise one's own strategy, tactics, and intentions. Stealth is superior to candor.
4. It is always a better (more rational) strategy to pursue a competitive stance in a two-party game rather than a cooperative stance.
5. It is always a better (more rational) strategy to promote the parties' own stated choices rather than imposing a particular result or choice.

Each of these five actions has a component of plausibility and common sense. That said, each is false. Worse yet, not only are they false because there are exceptions to the specific general rules, the rules may not even be generally or hardly ever true in certain situations. Let us look at each in turn.

The first rule holds that more information leads to a better or more rationally advantageous outcome than less information. This rule fails with information typically or easily misinterpreted, but it can fail even with information well-understood. A tropical storm warning (but not a storm alert) may lead to rash and imprudent behavior (or similarly, with panic on viewing the stop light system of the Homeland Security system) because of the problem of misunderstandings, whereas the issuance of a traffic report about a slow-moving highway may cause individuals to change their behavior in such a way that they take the secondary road, create a worse bottleneck, and a worse result than would have occurred had there been no report. That is, providing information on available alternative roads may be worse for any particular individual learning that information because too many will act upon it, creating a worse situation than ignorance would produce.[64] More information may cause the receiver of that information to act in a way less likely to serve his or her own

[64] An excellent short analysis of these problems, and the source of some of the examples here, is Thomas Schelling, *Hockey Helmets, Concealed Weapons, and Daylight Saving*, 17 J. of Conflict Resolution 381 (1973).

interest.[65] Jointly learning of the existence of hundreds of thousands of documents or each employing a high tech software and hardware package for presentation at trial may well be an informative and expensive, but nonoptimal, move.

The second rule suggests that it is always a better strategy to gain the most or lose the least from an opponent. In a zero-sum game, the more one party gains, the more the other loses. Think of taking a share of my apple pie or splitting our uncle's estate. In that there are increasing costs to participating in the conflict, then the game is no longer zero-sum. Suppose our uncle left us his estate in a series of wills, with the second-to-last will giving me 20 percent of a million dollars, the last only 10 percent. You get the rest. The final will is suspect because of our uncle's creeping senility. It will cost me more than $100,000 to challenge the will through a full trial and appeal, and I may not win. If you offer me $30,000 early, it could be rational to take the money then, even if I am both likely to prevail at trial and be offered substantially more late in the litigation. The problem though with the second rule is more general than just this. In that each side moves along a course that would increase or maximize its own interests, there is no reason to believe that the equilibrium or tipping point for each would coincide. That is, there may a range of dollars, perhaps a significant range, where any settlement in that range would be in the rational self-interest of each side. You would be advantaged if I had a 90 percent chance of winning by securing agreement to any amount less than that. The guarantee of a shared equilibrium is a myth.[66] Put otherwise, a plaintiff leaving money on the table, or a defendant paying more than he or she needs to pay, may both be rational strategies among a number of alternative or rational strategies.

The third rule holds that it is always a better strategy to disguise one's moves and tactics. If the other side is clueless as to one's intentions, it is more difficult to prepare to counter them, and they would thereby be weakened because of their ignorance. The first objection here comes from the set of problems labeled "the prisoner's dilemma." Suppose two people are arrested for a crime they committed and were not allowed to communicate with each other. The best joint strategy might be for each to remain silent, for dual confessions would result in moderate jail sentences (five years) for each. However, confessing first would lead to a minimal sentence (one year) if only one prisoner confessed. The

[65] This is sometimes called the "problem of 'the commons,'" a problem of our grazing. See Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968).

[66] Schelling, in analyzing a coalition of rational risk-takers in a uniform, multiperson prisoner's dilemma with uniform payoff rankings, looks at an individual seeking the best choice. Then there is some number k (greater than 1) such that, if individuals numbering k or more make certain ("dominated") choices and the rest do not, those who make dominant choices are better off than if they had all made dominant choices, but if they number less then k, this is not true. Schelling, *Id.* at 385. Realizing payoffs, then, is just a matter of reading the curves on a k/n axis.

nonconfessor would then receive twelve years. The cost of no communication is likely longer sentences if each prisoner acts rationally for his or herself and confesses. The second objection is one that reminds us, in general, that shared information, from scheduling meetings to knowing whether the opponent's briefs are in Word or Word Perfect, is often essential to making rational decisions. If one's opponents are to settle, they ought to know why. Of course, tort suits often spin awkwardly toward trial based on false assumptions, missing information, and hidden tactics.

The fourth rule holds that competition is always superior to cooperation in achieving one's best interest in a two-person game. This contention is part of an ideology of almost religious proportions by its adherents. Nevertheless, it is false. It is not only that there is a technical literature that shows the superiority of cooperation over competition in a wide variety of circumstances,[67] it is also that simple examples abound. These range from sharing guard duty at night for stranded campers to mutually conforming behavior as to which side of the road one should drive. For litigants, sharing the costs of discovery and travel (flying a distant witness to the location of several parties rather than the reverse, a usually failed feat) would be a rational strategy. In fact, making the opposing side spend less, *prima facie*, can be a mutually beneficial approach.[68] If a peaceful resolution short of a full trial can produce an optimum result, then money spent during litigation depletes the total amount available from a rationally risk-assessing defendant and shortens that needed for a rationally risk-assessing plaintiff.

Finally, the fifth rule states that one's litigation choices should, rationally speaking, be his or her own. But we just saw an example that could falsify this rule. Suppose no side is willing either to agree to flying witnesses to the place of the litigation or to the sharing of transcript copies. However, if ordered to do so under a rule or by a court, not only would all the parties benefit, they in fact ought to realize that they will each benefit. This appears to be a paternalistic move, acting in the best interest of those unwilling to do so themselves. We think of such cases as requiring motorcycle helmets, automobile seatbelts, or vaccines. The move may be just that. It could also be a pseudopaternalistic case. Pseudopaternalism arises if the party benefited withholds consent but hopes, in fact, to be overruled. High school boys protesting an unwillingness to attend a dance scheduled at the same time as a football game and girls unwilling to attend the same dance because of the formal dress code may both be hoping for a greater authority to compel attendance, allowing them to enjoy both the dance and the opportunity to dress more formally.[69] We can certainly imagine a litigant glad of a jury result that he or she would, at least officially, have

[67] One thinks of such writers as Nash, Simon, Sen, and Schelling.

[68] The operative word here is "can."

[69] Schelling considers formal dress in a related way. See Thomas Schelling, *Hockey Helmets*, op. cit.

rejected by way of settlement. Issues of suspicion, timidity, uncertainty, pride, hostility, belligerency, anger, and procrastination about turning one's mind to the resolution of a situation as difficult as the one being litigated can hinder what a party, it turns out, would willingly accept.

What would rejection of these litigation rules of rationality suggest? One thing would be that strong-armed early resolution attempts by the court to settle tort conflicts could be a rational and mutually beneficial procedure. The choice of the parties to forego early resolution, a choice typically made in the uncoercive federal courthouses,[70] is often irrational and weakly felt. Waiting for more information is not guaranteed to strengthen one's position and even strengthened may fail to optimize the benefits to either client.

The optimal strategies might include partial proofs to pseudo–decision makers: summary jury trials (perhaps arguments only), nonbinding arbitrations, and out-of-the box mediations.[71] One method is the triple-blind compromise. Here, the judge would hear early and brief arguments from each side, listen to settlement positions, and then propose a number to settle. That number would be evaluative, not merely splitting the difference between the parties' positions unless the evidence is evenly weighed. Each side, by paper, would tell the judge's proxy (bailiff, clerk, secretary) whether or not they agree. If they both agree, the case settles. If only one side says yes, neither the judge nor the other side will know that, for the cost of information, good consideration for the asset, is saying yes. If the move for either side is beneficial, even if only marginally so – they would be somewhat better off than risking going further – they ought to settle. Moreover, saying "yes" prematurely and putting oneself under pressure to move yet further later is not a risk, as the only way to gain that information by an adversary is to resolve the dispute. The strategy to do this, or use any such method, would be the result of a false choice, likely based on pseudopaternalism. The choice would necessarily be imposed, as a competitive posture may be unavoidable.

[70] If both sides do not each check a box allowing early dispute resolution, it is discarded.

[71] Summary jury trials present an illustration of the problems of paternalism, pseudopaternalism, and game theory. They have been, at one time, compelled. Some courts take that fact to be dispositive, striking them down, as they do not want "an unwilling litigant to be sidetracked from the normal course of litigation." *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1987). Others have held such a procedure "encourages judicial high-handedness." in re *NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993). The worry is that coercion will reign. However, a more complex, textured view prevailed In re *Atlantic Pipe Corp.*, 304 F.3d 135 (1st Cir. 2002), where the court held that "none of these considerations establishes that mandatory mediation is always inappropriate. There may be specific cases in which such a protocol is likely to conserve judicial resources without significantly burdening the objectors' right to a full, fair, and speedy trial. Much depends on the idiosyncracies of the particular case and the details of the mediation order." It then spoke of a resistance due to unfamiliarly or a showing of lack of confidence, the first being a paternalistic, the second a pseudopaternalistic, concern. Finally, the court understood that such a process provides the "parties an opportunity to explore a much wider range of options, including those that go beyond conventional zero-sum resolutions."

In any case, the lessons of rational choice and game theory can provide significant aid to pacifying any conflict, including a tort conflict. To do so, knowledge of their methodology must be related by someone, perhaps those in the legal academy, to the tort arena. In doing so, they would operate, if not completely oblivious to morality or justice, positively in promoting conflict resolution, or the peace principle.

Finally, we come to the intentional infliction of emotional distress cases, or what Shapo calls the "morality tort."[72] He argues that "it is the judge who does the heaviest philosophical lifting for this tort."[73] Presumably, this lifting is as gatekeeper to the jury, in the spirit of the traditional gatekeeping role, to secure the floodgates. In fact, a large problem with this tort is evidentiary, not substantive. Proof is difficult, experts are suspect, and evidence is controversial. Even loss is problematic. Sadists deprived of victims, racists of subjected minorities, smokers of public space opportunities, medicated schizophrenics of once comforting voices: all experience emotional stress, yet recovery of damages for any of them contravenes sound social objectives and impeccable ethical norms. If shooting buffalo from train cars was once considered acceptable sport, as shooting deer and pigeons is today, does the deprivation of a modern bison killer of his sport, by bumping into him as he is ready to fire, merit recovery? Should it? We often intend to upset people emotionally – with every interaction intending to change behavior from gentle persuasion to education and argument to strong coercion – yet not want tort suits to ensue.

It is certainly correct that societal notions determine the limits of the tort – it is an upsetting world at every turn, personal, political, moral, and mortal – but how, why, where, and when standards evolve, here, as elsewhere, is an exercise left to the discretion of the reader. Of more particular interest is the nonpolitical, low-key life of the cultural impact here. The noise from this tort is not only unable to be heard among the larger explosions in today's tort world, it makes very little contribution to that noise.

The emotional distress area presents a number of issues in neural science (the intersection of neurology, psychology, philosophy of mind, artificial intelligence, and biophysics), and prompts the question: what is the shape of our culture absent a discussion of science? Shapo touches on science briefly, and very peripherally, in his discussion of expert evidence in technical matters, the so-called junk science problem.[74] His entire focus is, as usual, on appellate cases, here *Daubert*, and the various judicial opinions it generated.[75] Let us turn instead more directly (if briefly) to the issue of science.

[72] TLC at 266.
[73] TLC at 266.
[74] TLC at 170–173.
[75] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), revisited and restated in *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999).

The problem of the disconnect between science and law is not new, and in fact is part of the problem of two cultures, living separate but not apart in western society.[76] For law, science often appears either as an intrusion, involving such matters as qualifying experts and getting DNA evidence admitted, or a marginal concern, relegated to remote legal corners, such as intellectual property law. However, Shapo, and most legal commentators, aside, science is not only central to culture, it often drives it.

But back to emotional distress. Much of the case law centers on the connection between the physical and the emotional.[77] Such a distinction assumes what neural scientists have labeled "dualism,"[78] the disconnect between brain and mind. The fallacy of dualism is this: it requires the mind not to be made of ordinary atoms and molecules, but of some other impossible-to-explain, not-of-this-world matter. It assumes, to use the well-known metaphor, a ghost in the machine. How could that be?[79]

If mind and brain are unified, if physicalism or materialism (in some form) is right, then there is no distinction between the mental and the physical, and emotional injuries ought to be (in theory) charitable in just the same ways as fractures and tumors. If that is so, then even if current detection techniques are weak (as they were for soft-tissue injuries before the MRI or hairline fractures before the x-ray), the reality is unified. Moreover, the entire issue of intent (in the intentional infliction) equally becomes one of at least biology, if not biochemistry or biophysics. Some degree of physical determination looms as a significant, even portentous, possibility (and maybe more), and traditional legal ideas of freedom to act, responsibility, and intentionality undergo radical scrutiny and revision. Can we choose how free are we to act, do we have discretion for our actions and intentions, and to what degree does determination rule in theory and circumscribe us in practice? These are all questions that are widely discussed, but not in law.[80] Answers to these questions might yield

[76] See C. P. Snow, The Two Cultures and the Scientific Revolution (1950), and his novels Homecomings (1956) and The Conscience of the Rich (1958) for a salient view of how the cultural clashes occur.

[77] In the most obvious sense, the fact that one can speak of the intentional (or for that matter, the negligent) infliction of emotional distress presupposes the mind/body, physical/emotional distinction. Otherwise, why is there no tort of intentional infliction of hand harm or of leg mayhem or of kidney destruction? The mental or emotional is singled out. For the actual cases going one step further, with discussions of how physical insult aids (if no longer always is strictly required by) the nonphysicality breach of duty cases, see, for example, the ambivalence in the two opinions from the same court of *Womack v. Eldridge*, 215 Va. 338 (1974) and *Russo v. White*, 241 Va. 23 (1991).

[78] The term, if it did not originate with, at least gained currency through, Gilbert Ryle, The Concept of Mind (1949).

[79] It can't. See Daniel Dennett, Consciousness Explained 33–42 (1991) for many of the compelling arguments.

[80] For a sampling of the more accessible literature, see Ted Honderich, How Free Are You: The Determinism Problem (2002); Daniel Dennett, Freedom Evolves (2003).

dramatic changes in (among other areas) tort law, but they remain not only unexamined, but unmentioned.

Perhaps an example from neurosurgery, brain bisection, might be useful.[81] The brain is made up of two separate cerebral hemispheres, each with its own ability to cause consciousness, thought, and behavior. They communicate with each other through a band of nerves called the "corpus callosum." At one point, the corpus callosum was surgically severed as a treatment for epilepsy, with certain unforeseen consequences.[82] The result, at times, was an individual at variance with himself, including one patient whose obvious ambivalence to his wife was expressed by holding her tenderly with his right arm while pushing her away forcibly with his left arm.[83]

Suppose the confused if not mangled wife sues her brain-bisected spouse for assault. What should be the analysis? Should he be required to pay damages? What if the left-sided hemisphere, that controlling the right arm and being the more loving and genteel, were responsible for earning the income? Does the hug constitute a set-off? If the man's left arm killed his wife, would both hemispheres be at risk for execution? Should the hug now be a fact in mitigation? It would be fair to say that the tort literature, as it stands, is bereft of tools to handle such cases. It would also be fair to point out that cases situated at the limit often test the validity of concepts smugly at the center.

Culture, then, for Shapo, as for many lawyers, is a restricted concept, limited to the popular, the political, and the accessible. Science, even relevant science, is not included. Consider more dramatic science. For example, how do small alterations in one part of law fundamentally lead to basic changes in another, remote part (the so-called butterfly effect), or how might the chain of legal reasoning be characterized less by whole number dimensions than by fractals (fractional dimensions)? These are both issues treated in chaos theory in modern physics[84] and of real potential to legal theory. In the legal literature, these issues remain unconsidered.

What about the wars? Shapo does not speak to tort wars, but to cultural wars. As always, the lens is sharply focused on one feature of the legal landscape,

[81] A general overview of brain bisection can be found in Michael S. Gazzaniga, The Bisected Brain (1970).

[82] The first study was M. S. Gazzaniga, J. E. Bogen, and R. W. Sperry, *Some Functional Effects of Sectioning the Cerebral Commissures in Man*, 48 Proc. of the Nat. Acad. of Sci. 1765 (1962).

[83] This example is mentioned, and the entire issue of brain bisection is analyzed with regard to the mind–body problem, in Thomas Nagel, *Brain Bisection and the Unity of Consciousness*, in his Mortal Questions (1979). Nagel's position is analyzed and the problem given a more profound treatment in Derek Parfit, Reasons and Persons, chap. 12 (1986). A more mathematical solution, employing the methods of weakly aggregative modal logic can be found in Gert-Jan C. Lokhorst, *Counting the Minds of Split-Brain Patients*, Logique and Analyse, Nouvelle sériè, 3 ae année, No. 155–156 (Septembre–Décembre 1996), pp. 315–324.

[84] A superb introduction to the field can be found in James Gleick, Chaos (1987).

the judiciary, with such statements as "courts must make judgments at two levels of culture war – one involving a question of what the facts are about choice, and the other concerning broader questions of whether such choices are socially tolerable."[85] Aside from the exasperation one feels in such academic Disneyworld creations – the real world is missing and a new stylized replacement without substance, basis, or etiology is substituted, fine for vacations but only constitutive of reality for those in therapy – where only judges count, the question of where is the war is frigidly cold and whose bodies are being bagged naturally arises. Of course, the larger societal disagreements occur in tort law, what Shapo calls the "struggles in our collective and individual psyches concerning the meaning of justice,"[86] as well as everywhere else. So much for the commonplace. The entirety of law involves divergent beliefs and attitudes,[87] whether it is the enforceability of harsh contracts, the inviability of property, the rationality of the exclusionary rules, the efficiency of the antitrust laws, or any of the various views respecting any number of legal issues and concepts. Some divergent beliefs and attitudes can be characterized as bickering, some conflagration. Certain controversies that were conflagrations once, such as official or state-sponsored segregation, have simmered and cooled.[88] Others, such as the capital punishment battles, have ebbed and flowed. Finally, still others, such as the tort wars, have moved from background static to the shrieking, screaming levels.

Why the move in tort law? Professor Shapo fails to tell us, perhaps because he thinks we already know. However, tort law differs from other areas, and certainly there is no comparable combat in the areas of contract and property. The failure to tell any of this story in a work on tort law and culture is a large one, and the reason for the failure centers on the almost total omission of politics and insurance entirely from the book, two issues that have altered the culture and changed tort laws.

Tort law arose to allow compensation for those readily deserving of it, with the notion of just deserts fluctuating, dependant largely on evolving moral judgments about deserving and progressive technical judgments about accident

[85] TLC at 113.

[86] TLC at 300.

[87] The terms "beliefs" and "attitudes" are useful to keep separate and are here used (roughly) to be statements that might be true or false ("Bush is President"), a belief; or statements that include as part of their meaning that which is not entirely susceptible of truth or falsity because incorporating politics, religion, taste, emotions, etc. ("The Patriot Act is a disaster"), an attitude. The distinction is laid out in Roger Scruton, *Attitudes, Beliefs and Reasons*, in Morality and Moral Reasoning 25, 54–55 (John Carey, ed., 1971).

[88] The process from the judicial perch is covered in Jack Bass, Unlikely Heroes (1981), where the conduct of the attorneys and judges of the Fifth Circuit in enforcing desegregation after *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and *Cooper v. Aaron*, 358 U.S. 1 (1958) is chronicled.

prevention.[89] The battleground was always the individual courtroom and the warriors the particular players with stakes in that one courtroom. Mass tort law and class actions changed that picture by allowing larger social issues to be telescoped into single events, thus challenging all at once a drug or hazard or product. Yet, the politics of the system somehow lagged behind, with the perception that individual, nonlegislative justice (rather than social policy) was all that was being accomplished, a notion obviously untrue, if otherwise defensible as a reasonable method of rough compensation from harm.

Ultimately, though, the politics had to change, and they did. Significant wealth was redistributed from product manufacturers to a large group of victims and a much smaller group of lawyers. At the same time, the mainstay of tort law, the automobile accident, was sputtering (no doubt, due to some combination of seatbelts, air bags, MADD, crash-worthy design considerations, advances in materials engineering, and an aging population). Tort law's contribution, if nontrivial, is problematic. The ordinary plaintiffs' bar for tort accidents turned increasingly to medical malpractice, with great success, to supplement that financial loss. The juxtaposition of corporations under attack mixed with physicians under scrutiny and then at risk of losing their livelihood caused the perhaps inevitable larger social upheaval. Tort law became politicized. Decisions were attacked or defended en masse rather than individually, with such attacks or defenses often being overblown, recklessly inaccurate, or viciously personal. Some plaintiff verdicts are irrational and some defense verdicts are indefensible. Some suits are well-founded, some frivolous. "How could it be otherwise?" we ask until we realize that the rhetoric is otherwise. Across America, tort reform has become a mantra for institutional defendants, whereas the right to a jury trial has been the constitutional and self-righteous retort of those maintaining the institutions.

At the level of the actual treatment of injured parties, the result of the tort wars has been action of an as-yet undetermined nature on three fronts: legislative, judicial, and jury pools. The indeterminacy is not just a matter of awaiting the results of good survey research or empirical data crunching, although such results would (if a design for achieving good results is manageable and the results are obtainable) be interesting. Results would vary from jurisdiction to jurisdiction, courthouse to courthouse, and as a function of the nonpolitical ebbs and flows of the process. However, the three fronts have real frontlines.

First, the legislative. Tort reform has become a legislative way of life. Long, complex, convoluted bills, fed by lobbyists in undigested form to legislatures

[89] Justifying this comprehensively would require, to some extent, a reinterpretation of eight hundred years of Anglo-American case law. The argument is made briefly with some historical citation in Robert E. Keeton, Venturing to Do Justice, particularly chap. 9 (1969).

usually lacking legal knowledge, education, understanding, interest, and attention, are enacted by many who, attributing the most benign of motives, would be labeled political. It is difficult to be against reform. The antiplaintiff side thus occupies the terminological high ground. In the end, the result of any particular tort reform may be justifiable, even beneficial, but the route of achieving such reform makes the notorious sausage-making process appear pristine. No gathering of attorneys (presumably those most familiar with the legal concepts), judges, economists, injured parties, academics, or for that matter, those who are the presumed beneficiaries (the institutional defendants) are convened to arrive at coherent, defensible, integrated, principled reform. The conservatives in these matters, that is, the plaintiffs' bar, are hardly clamoring to be included. In general, they take the Luddite[90] position that the old ways are the best ways, or perhaps the Panglossian[91] position that the (tort) world we live in is the best of all possible (tort) worlds. This is clearly false. The patchwork of rules, with enough space between them to justify virtually every kind of contradictory and contrary jury award, is not only not derived from holy script, it is clearly in need of real reform. Politicized conflict, whether in the Balkans or in the courtroom, is antithetical to reform.

Next, the judges. Judicial appointments and races, whatever their various weaknesses and faults, traditionally were (at least) neutral as to the litmus test of tort ideology. No longer. Appointed judges are vetted and elected judges forced to choose sides. Like capital punishment or abortion, we now have judges committed, at least on record, with enforcement problematic as commitment evaporates over judicial tenure, in advance to a large and at times intractable set of positions in tort law – on such matters (here, check your local jurisdiction) as the constitutionality of damage caps, what counts as junk science in the case of experts, when class certification requirements are satisfied, the discovery rule and statutes of limitation, the parameters of insurance coverage, the scope, reach, and appropriateness of punitive damages, the enforceability of arbitration clauses, and when and which matters should be removed from the jury. Tendency freezes into commitment, and prior practice once amended or altered becomes grounds for nonsupport when promotion, reappointment, or reelection arises.

Finally, juries. Billboards, airwaves, advertisements hawking services and seeking clients, the very literature in one's doctor's office when seeking life

[90] The Luddites, a group of workers suffering under poor wages and bad working conditions, took the name of the mythical Ned Ludd of Sherwood Forest and engaged in acts of industrial sabotage, including smashing textile machines, in order to gain a return to a simpler, less mechanized and, for them, more prosperous, age. See E. P. Thompson, The Making of the English Working Class 547–602 (Vintage ed., 1966).

[91] Dr. Pangloss was a character in Voltaire's *Candide* who rationalized every disaster. After elaborate and inane reasoning, he would arrive at his inevitable best of all possible worlds conclusion.

and death help: these influence, probably profoundly, the American jury pool. Particular juries may react by punishing tobacco companies based on what they saw in the media or withhold an award from a difficult plaintiff based on concern for losing a local doctor or paying more for their own health insurance. Whatever the results, they are different results than before the war began.

A great deal of the dynamics and focus of the tort wars centers on insurance.[92] Insurance, except for a passing reference to bad faith cases, is entirely missing from Professor Shapo's book, but it is absolutely central to much of tort law. Insurance companies, in most cases, hire counsel, direct the defense, make decisions about discovery, experts, and negotiations, and typically, whether through settlement or judgment, indemnify the alleged tort feasors. Furthermore, insurance companies often participate in litigation directly, as additional parties to the case through declaratory judgment claims to limit their exposure, subrogation actions to have bills repaid, representation on the plaintiff side when defending counterclaims, and this is merely the beginning. Large segments of the tort bar are either in-house with an insurance company, dedicated insurance attorneys with long-term clients, or regular, insurance-defense counsel. The attitudes of all cannot help but be influenced by that association, whether that influence is good, bad, or ugly (or all three).

Thus, in the tort wars, insurance companies are major players, and not just in litigation. They run advertisements and public relations campaigns, lobby editorial boards and legislatures, fund judicial and political candidates, and initiate or fight referenda on issues ranging from workers' compensation to limitations on damages. They control the process of tort suits through the underwriting process and decide when to be aggressive and when passive during litigation in claims matters. The particular results of all these efforts are, being vast and complex, necessarily ambivalent, often confused, and occasionally contradictory. For example, the medical malpractice premiums issue – with its sinister implication of driving out the benevolent, local family obstetrician because of unwarranted claims by irrationally disgruntled patients and avaricious plaintiffs' counsel, rather than due to a physician's sloppy practices or poor insurance company investment choices – originates with insurance carriers. They become players in one final way: the veracity of their numbers and shrillness of their threats often unite the otherwise warring medical and legal professions in their joint skepticism, if not cynicism, of insurance industry motivations. That said, insurance largely supports and is inseparable from the personal injury side of tort practice. It is essential to the system we now have.

The absence of any mention of insurance in a discussion of tort is suggestive of a mindset that sees torts purely as an arena to correct wrongs and achieve justice. Yet tort is far more than that. It is concerned with the spectrum of

[92] See Banks McDowell, The Crisis in Insurance Regulation (1994); Kenneth Abraham, Distributing Risk: Insurance, Legal Theory and Public Policy (1986).

individual lives and projects disappointed, and an attitudinal atmosphere that allows those disappointments to be remedied. It is disruptive, contentious, and profoundly unfair: only a few of the disappointed benefit from the system, either because most of life's failings are one's own or no one's fault or because the system can only afford limited justice. Insurance is not primarily part of the search for justice. It is part of letting the tort system work and achieve some efficiency, more than a bit of justice and a real measure of peace.

Where does that leave us? Perhaps with Nietzsche, who claimed that ancient people felt pain less than we do. Injuries once endured are now challenged, and lawsuits are now ubiquitous, filed by all of us seeking redress from those we hold somehow responsible, whether by intention, inadvertence, design, or creation. The traditional solution, as again Nietzsche expounded upon, rooted in harm and hurt, and motivated by anger and frustration, was revenge, blood-feud, self-help, vigilantism, and war. Metaphorical war is an improvement over real war, in the area of torts (and everywhere else), but metaphorical or not, an attitude of achieving *detente*, rather than getting even, clearly should be what matters most.

4
Fighting Words

The central idea of language is to convey true information. We speak and write in a manner that expresses truth in two ways: the conveying of an actual state of affairs about the world (e.g., I now sit in an indifferent office in a decaying building on an undistinguished floor, or the buyer signs an agreement on a certain date with a certain intent) and the assertion that we actually believe this state of affairs to be the case (e.g., we really believe we are in our own office when we are writing this and not just saying so for the purpose of misleading or deceiving the reader, or again, quite differently, that we actually believe the buyer signed a particular agreement with a certain intent). Of course, language can be used for many other purposes, including to emote, to question, to insult, to humor, to console, and even to love, honor, and obey. Speakers are often mistaken, always fallible, occasionally misled. Something short of truth, apart from truth, in search of truth or confused, as to truth are the commonplaces of communication.

That said, truth remains the central notion of language, as evidenced, perhaps most clearly, by the fact that the falsity of any statement almost always constitutes grounds for impeaching it.[1] Without seeing statements as being paradigmatically concerned with truth by, for example, dropping truth from the process, language becomes meaningless, empty talk. Exceptions are only sensible when measured against a norm. In any case, for matters held most important – from science to warfare, from medicine to finance, from history to intimacy – truth is unquestionably the overwhelming, salient, operating principle. Indifference to it changes the fundamental take or attitude on any matter, rendering both the speaker and the subject on which he or she is speaking vulnerable to dismissal as unworthy of serious attention. What then of legal talk? We might state several principles about legal communication that suggest conflicting attitudes.

[1] The centrality of truth is analyzed specifically in Michael Dummett, *Truth* in Truth and Other Enigmas (1978) and, in general, in his Frege: Philosophy of Language (1973).

First, the adversary system is supposed to prove or disprove the facts of the matter, or put differently, arrive at truth. The myth (as hardly anyone signs on as a true believer) is this: with both sides putting forward their own claims while attacking the claims of their opponents, truth emerges from the legal battle dust. However, let us put aside the dubiousness of the proposition that a battle between two partisan, incompletely (if not poorly) informed and indifferent to truth, legal adversaries will any more discover reality than would two five year olds arguing who is the world's best singer when they are the only contestants, bereft of knowledge of the existence of the Grand Ole Opry, let alone the Metropolitan Opera. We are still faced with the issue of the degradation in the quality of assertions made for the sole purpose of advocacy, ones indifferent to accuracy. The proposition that truth arises from an adversary system is shown to be more implausible when one considers that truth is largely irrelevant to either side. The goal is either to receive more or lose less in some type of (roughly) two-person contest, treated (often mistakenly) as a zero-sum game.

First, there is the platitude that in a negotiation or mediation activity (or game), a good result is achieved if all sides leave unhappy. If "good" here means something akin to a proper resolution to what originally gave rise to the dispute, that is, a result that comports with some theory of corrective justice that remedies a wrong to the extent it was a wrong and there was fault, or under some market analysis where the result comports with what the (theoretical, capitalist, or perhaps economic) market would actually achieve, then the platitude is more than trite, it is false. Suppose two former criminals driving their own cars collide. One sues the other. The accident was without fault. The defendant pays so as to avoid the fact of his partial intoxication, whereas the plaintiff (although she has a convincing case despite the actual issues of proximate cause and violation of traffic rules because of a sympathetic and convincing (though mistaken) independent witness) settles short because of her own criminal past. Is truth present anywhere in this good result of mutual unhappiness? Is it present when insolvent patients settle for less because of impecunity or the opposing physician overpays to stay within insurance limits? Similarly, does it reside when a corporate plaintiff settles for pennies on a trade-secret matter because it is in the midst of a merger or the opposing corporate defendant pays only because the risk of revealing the intellectual property secrets in question outweighs any benefits of a spirited and likely successful defense? A bad settlement may spare third-party witnesses from cross-examination, save money, lower anxieties, or prevent further legal bloodshed. If it fails to embody the realities that underscore some type of corrective justice, if it is, in short, indifferent to truth, it remains a settlement, but it also remains, on any number of scores indigenous to an imperfect and mediocre system, a bad settlement.

Second, the legal system and many in it are contemptuous of truth in the search for justice. It may not matter that what was actually discovered during an unlawful search, what could be learned from an utterance declared to be

hearsay, or whether a particular criminal sanction deemed cruel actually deters or prevents crime. In fact, justice generally is expected to trump truth, although one always hopes for significant overlap. This is quite different from the attitude in, for example, science where, at least in theory (and this is a theory hardly disputed within the halls of science, although occasionally decried from the adjacent alcoves and stairwells by those critical of scientists) one is expected to shed any number of otherwise sacrosanct beliefs in favor of clear scientific evidence.[2] In the past, dedicated observers have been forced to accept such notions as the Earth being an insignificant satellite of a peripheral star in an undistinguished area of the universe, the picture of evolution trivializing the centrality of humans in the biological picture and quantum physics destroying any notion of orderly causation and purpose. It would not appear to be an argument against any of these views that some moral principle is violated by accepting them. In law, if one could prove inequality in genetic fact, it is far from clear that such a finding would have any particular effect on legal thinking. Moreover, a jury verdict resulting from evidence rightfully excluded, but clearly contradictory, is not necessarily sufficient to impeach the integrity or even the propriety of a result.

Third, legal reasoning is not susceptible to verification or truth analysis in the same way as matters that are either empirical or formal. With regard to what we think of as empirical matters – for example, how many planets revolve around the sun, what is the molecular structure of a squirrel's DNA, when did Napoleon begin his retreat from Russia, were declines in commodity prices a cause or an effect of the Great Depression – we believe that these are matters that normal, scientific, empirical tools are designed to solve. We look at the quality of observations, the ability to reproduce results, the experience of things and individuals in similar situations, the probabilistic and statistical formulae that are relevant, the fit of theory with the observations, and then how that theory predicts other observations, whether mathematical theorems can account for the data: all in a fairly recognizable way to solve the problems and become ever more sophisticated in our observations. Furthermore, as to formal matters – areas including mathematics, theoretical physics, games, and the structure of language – even though these matters are not naturally occurring in the world, grounds for asserting them can be found in the nature of the enterprise. That is, there are no triangles in nature, but once we invent triangles, it then follows that if two sets of triangles have sides of the same length, each triangle has the same internal area. None of this looks very much like law. It is hard to see

[2] One compelling account of how dearly held, even sacred, beliefs are shed in the face of scientific methodology and findings can be found in Richard Dawkins, A Devil's Chaplain: Reflections on Hope, Lies, Science and Love (2003). His more recent work in the area, The God Delusion (2006), strays into other, more political matters, involving the relative social and moral records of religious versus atheistic political groups, often in a manner convincing in biology but problematic in terms of physics, logic, and psychology.

or touch or feel, let alone confirm, verify, or falsify, or deduce or solve legal propositions. It is not necessarily true that one suing a remote seller must be in privity (although that to all the world might look like most law in the United States before *MacPherson v. Buick*[3]) or that the court was wrong in deciding that privity could or should be eliminated (as it did after *MacPherson*). One might think that Cardozo had the better argument in *MacPherson* than the judges in prior decisions, but a better argument based on what? Certainly not on anything that occurred as a natural object in the world or dictated by some formal reasoning such as propositional logic, calculus, or the rules of chess.

Fourth, there is a feature, perhaps unique, about the law's concern with truth. That is, it can't wait for it. We might think for some possible assertion that it can be made with 80 percent certainty, or that it is likely true based on evidence that is partially in, or that it conforms to what we know about other things but awaits further facts or experiments or testing. We can be quite satisfied holding back in order to be more certain from the point of view of truth (if not from other issues, such as waiting for drug trials to be completed or alternative energies to be developed or DNA testing in capital cases to be refined) in general, or at least, expressing a qualified or tentative attitude. What of the legal system? Can it wait? Of course not. Not only must it decide (whatever the state of the evidence or the law), the decision has the status of any other decision, whether jury verdict or appellate court precedent. Was there consumer fraud, was the product dangerous, was the intellectual property converted? On the appellate level, is recklessness sufficient to constitute fraud, is foreseeable misuse a complete defense, is shared software convertable? All these questions must be determined years short of a state or federal supreme court, definitive review. Nothing waits. Ignorance, caution, and uncertainty are pushed aside. The result, though, is that the factual or legal end product is declared "true," when we would otherwise be embarrassed to declare, determine, or find anything.

Legal discourse, then, operates under a set of principles and procedures quite different from many other discourses and is subject to various analyses, perhaps difficult to specify. However, it is not the theoretical nature of these problems that is the subject here, but the consequences down the line, in the day-to-day operation of law, consequences that have moved a conceptual puzzle into an Orwellian world of sham, charade, pontification, and illusion. This is a world bereft of sure and certain markers of reality, where truth is a dispensable and inessential commodity rather than the basic currency or principled meter. In short, we have entered the world of tort talk.

Tort talk has a number of components and aspects. It is worth taking a moment to review the factors that motivate tort chatter for (at least some of the) reasons other than conveying accurate information.

[3] *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, (1916).

Tort lawyers enter the legal scene only after a mishap (or worse) has occurred. They are rarely, if ever, called on to plan, arrange, draft, or propose peace, serenity, security, or compromise.[4] Instead, some putative wrong has arisen, some person or entity has been harmed, and some aggrieved victim is claiming a causal connection. Neither the wronged nor the wrongdoer is much interested in an accurate, academic, and objective assessment. Rather, both sides bring in lawyers as advocates, whether prosecutors or defenders of their positions (or with counterclaims both), to prevail. The motivation for entry of counsel is this and nothing more. Of course, truth as a component of good advice is not unvalued, but it is only expected to serve advocacy, otherwise lacking an independent life.

In fact, the lore of the profession, calling for zealous advocacy and the pursuit of all plausible positions on behalf of clients, celebrates this sporting theory of justice. However, no one ought to be fooled into thinking that the sport necessarily achieves compromise, reasonableness, moderation, or verisimilitude. Moreover, given the general lessons of history showing the disparate results between understanding and disclosure on the one hand and combat and secrecy on the other, and the specific lesson of the equilibrium theorem demonstrating the benefits of cooperation in various social situations,[5] one could hardly be complacent about the likelihood that two adverse sides fighting will achieve fairness or a justifiable result.

The lawyer's task then becomes one of advancing a partisan or political position, one where normative, jural, or precedential validity or veracity is not so much a matter of controversy or concern as a matter of indifference.[6] This attitude of indifference, benign or otherwise, is not one of dishonesty. That is, one who lies can in some sense be said to have a certain respect for what is actually true, in that he or she goes about setting out some type of deception in order make false statements appear to be true. Truth is the model to be presented, or through legal prestidigitation, appears to be presented. The liar thus, in this somewhat perverse way, pays homage to the truth in the same way that a hypocrite flatters or a plagiarist admires.

Typically, lawyers remain unconcerned one way or the other with matters of truth, but are interested only in a certain kind of benefit for the client. It is important to realize just what this means. It does not matter, in very

[4] Of course, they engage in these activities to a more limited extent later, postbellum, in the course of settling a dispute. However, keeping the peace and negotiating an armistice are two different activities. Moreover, the skills and training of litigators, their professional second natures, are combative, whereas deal makers, lawyers or not, are less likely to have that second nature, and typically not in its more virulent forms.

[5] See John Forbes Nash, Jr., *The Bargaining Problem*, 18 Econometrica 155 (1950); *Two-Person Cooperative Games*, 21 Econometrica 405 (1953).

[6] One excellent if somewhat abbreviated discussion of indifference to truth as a philosophical issue can be found in Harry Frankfurt, On Bullshit (2005), a title no doubt appropriate for many a lawyer's autobiography.

general terms, whether the driver ran the red light, the radiologist missed the tumor, the accountant failed to schedule the deduction, the engineer converted the software, the medication constituted a defective product, the competitor defamed, interfered with, or unjustly competed against the target company, or, in fact, whether various specific pleadings' minutia – from estoppel to the statute of fraud defenses, from loss of consortium to belated discovery of the obvious past limitations deadlines, from mild deceptions to promoted RICO conspiracies – have any colorable basis. In this way, claims and counterclaims, defenses, rebuttals, and rejoinders become meaningless maneuvers. They are put forward either because they can be put forward (they are available in the way drink is available to the alcoholic passing a saloon with misplaced dollars at its entrance) because they promote a bargaining position or because they appease, annoy, or satisfy the passions, jealousies, wrath, or amusement of any of a number of parties. But at what expense? Is disguising malpractice the same as believing none occurred? Is showing the existence of failed predictions during telephone conversations the same as mail fraud, let alone racketeering? Is a case of a speeding and then flipped SUV one where either side surely believes that, on the one hand, the speed and, on the other, the SUV's high center of gravity had nothing to do with the accident? Put more generally: does telling the truth just mean not getting caught?

Lawyers are ready to argue that such questions are beside the point, as representing one's client becomes the central driving principle of legal representation. Truth becomes irrelevant in just the same way it may well be irrelevant in the world of advertising, lobbying, or politics.[7]

The pervasiveness of the advocacy agenda has, of course, tainted both bar politics and the legal literature. As to bar politics, the profession has become bipolar, if not outright schizophrenic, with lawyers linking their principles, politics, and economics to those of their usual sets of clients, at least with the personal injury bar and with in-house counsel. Entire sets of otherwise intelligent individuals express beliefs that either virtually all lawsuits of a certain type – soft tissue, automobile, medical malpractice, defective drugs, and asbestos – are meritorious or virtually all are frivolous. As to commercial torts, the landscape is more complex, without formal bar association stances one way or the other on any particular sets of claims. Side switching is not only commonplace, it is universal. That said, specialization within commercial tort practice often leads to more microlevel specializations, with those who, whether defending accountant malpractice, representing or suing brokers, or litigating RICO claims, engage in bar politics on a smaller but equally exorcized and politicized basis.

[7] One revealing if somewhat overheated account of the damage done in a political discourse at sea from truth is that of F. G. Bailey, The Prevalence of Deceit (1991).

The literature follows the money. The plaintiffs' bar writes for various trial lawyer magazines, from publications by ATLA[8] to the state and local journals, featuring a healthy peppering of self-aggrandizing, up-by-their-own-bootstraps, success stories. The plaintiffs' bar generally sees itself as a cross between Albert Schweitzer and Clint Eastwood, often in self-glorifying, autobiographical accounts promoting its so-called heroic victories achieving victims' rights.[9] Meanwhile, defense counsel, generally more reticent to sponsor partisan articles and books, complain, often under the auspices of conservative and libertarian think tanks, of a legal system gone amok. Here "amok" is a loose synonym for the concept of juries awarding injured parties too much money. Put differently, people ought to live with their pain and are reminded to do so regularly by those free of any pain. Finally, the legal elite, inhabiting larger firms, who regularly litigate in the tort area but from the more pristine vantage point of protecting economic interests rather than human flesh, in accordance with their clients' general views, decry any system that unduly enriches potential voters (plaintiffs) and contributors (plaintiffs' lawyers) to the Democratic Party.

It would be remarkable, of course, if a system could be established where truth was not only incidental, but often at odds with other primary goals (e.g., justice, equality, liberty, privacy, and security), and yet achieved. People casually speak of a confluence between the adversary system and truth (as though the just always triumphs or truth prevails at all times) in exactly the same casual and unreflected way they speak of doing the right thing as being coincidental with being rewarded. Different methods in pursuit of disparate goals will achieve varying results, a platitude hardly worth repeating except that, in legal circles, it counts as breaking news. Certainly, goals such as justice and liberty are critical, and other matters occasionally need to be compromised if those goals are to be achieved. This is not the place to look for purity of purpose or to set forth

[8] The well-known organization ATLA is, as of the end of 2006, no longer ATLA. That is, a group accurately named "The Association of Trial Lawyers of America" chose to be called by the more challenging moniker AAJ, "The American Association for Justice." The name is not completely wrong, but misleading and with regard to its professional, trade-activity, information sharing primary activities, irrelevant. Lawyers are often for justice, the way doctors are for health and police for safety, but professional groups are constituted for activities. Moreover, everyone ought to be interested in all three, including justice, but it is doubtful that AAJ is soliciting members from the medical or police communities. It is a lawyers' trade association, period. Truth, if not a victim here, is an afterthought. For a sanctimonious recitation of the reasons to change names, see the *President's Page* in 43 Trial 9 (2007).

[9] The literature is as extensive as it is egomaniacal on the one hand and lacking in rigor and analysis on the other. Two of the best-known and best-representative accounts (often better written but characteristically flawed) are F. Lee Bailey, The Defense Never Rests (1972) and John Edwards, Four Trials (2004). They provide compelling anecdotal accounts but remain unconcerned with endemic problems in the larger legal system.

a textured theory of how the blending and balancing of purposes might occur. Let us instead return to ground level and examine several examples where tort talk strays from talk of truth. We might briefly examine four such examples, drawn randomly and without suggesting that they represent the area, in general: self-protection, avarice, paranoia, and tactics.

Corporate protection is generally dressed up as privacy. Claims are made. documents must be sealed, settlements kept confidential, payments remain secret, and any number of matters guarded from the public light of day. Privacy is the purported goal, although everything from safekeeping intellectual property to incentivizing settlements to securing the floodgates are offered as further, if weaker (more far-fetched), justifications. What is lost by moving away from transparency and clarity in the public realm hardly needs to be stated.[10] Dangerous products, faulty drugs, hazardous waste sites, improper accounting schemes, self-interested handling of securities, and even (for governmental entities) repeated incidents of indifference to child abuse all hide in the darkness of so-called privacy, a misnomer masquerading as a principle, in service to the greater good of organizational protection. Knowledge useful to ensure public health and safety, to prevent environmental degradation, and to bolster the integrity of the financial markets is kept secret, whereas tort talk of the contrary – with complacent reassurance about what certain products or conditions are – can flourish.

Avarice arrives as billing opportunities dressed up as due diligence. The common talk of the need to take more discovery, file additional motions, depose yet more witnesses, or redepose existing ones – all done in the name of gaining sufficient information to ensure reasoned decision making – demeans lawyers' perceptions and self-perceptions by suggesting their inability to predict what is experientially obvious. Avarice disguised as truth-seeking adds spectacularly to legal costs, delays the movement of the judicial system (initiating drifts that cause the prospects of resolution to languish from weeks to years), and subjects any number of witnesses (innocent and not, first and third party) to the mind-numbing, belligerent, self-aggrandizing, time-destroying, and often irrelevant processes of vacuously fuller discovery. Do we really expect that examining a witness on his or her distant high school record, getting straight a veteran expert's precise opinions, or adding to the neverending requests for production will create the joyous "eureka" that clarifies the discussion, erases the ignorance, and focuses the debate? Although that can happen or happen imperfectly, it is disingenuous always to claim its unadulterated necessity.

Advocacy and money often create a mix that spirals out of control, leading to irrational results even when each move by the parties is justified, prudent, and

[10] There is an active literature on this issue. One recent review of the problem with solid analysis is David Sanson, *The Pervasive Problem of Court-Sanctioned Secrecy and the Exigency for National Reform*, 53 Duke L. J. 807 (2003).

rational, and causing a legal arms race. One illustration of this can be seen by the well-known dollar auction, an imaginary auction game requiring at least two participants other than the seller.[11] Essentially, a dollar is auctioned to the highest bidder, with the additional condition that each losing bidder must contribute his or her last bid to the seller. Rationality here is judged by the conduct of the bidders. It would clearly be irrational for any of them to buy the dollar for more than one hundred cents. Suppose however, after some initial trepidation, in an auction involving five-cent minimums and involving only two buyers, the bids stand at fifty cents for A and forty-five cents for B. It would be rational for B to bid fifty-five cents as, at that point, B otherwise forfeits forty-five cents by inaction, while standing to gain forty-five cents profit by a further bid. That, then, conversely puts A in the same position. A's fifty-five cents are gone unless he or she makes the prudent, justified, and rational bid of sixty cents. Notice that even at ninety-five and one hundred cents, the logic remains the same. If B is at ninety-five cents, but behind A's $1.00, the rational move for him or her is to bid $1.05, for it is more prudent to lose five cents with a raise to $1.05 than to remain at ninety-five cents, and come in second. The reasonable logic of the players in the game causes them to reach an ever spiraling, ever continuing irrational result.

The analogy of law to the dollar auction is perhaps too obvious to need explication. In the case of a typical jury verdict, the losing side will have spent a great deal on legal fees, deposition costs, expert witnesses, travel, and copying and received a thousand little financial cuts for, if not always nothing, an extremely marginal return. Settlements themselves share this same quality of imprudent expense, at an increasing rate over time. The specifics work similarly. One side engaging an additional expert to fine-tune or enrich the story causes a similar move to be made by the other. In a nastier downward spiral, aggressive motion practice laced with name-calling and requests for sanctions put both (or all) sides in an often unrecoverable financial posture. The very employment of a pricier, better-prepared legal team, or even a team with a reputation such as to require the other side to arm itself similarly, creates the dollar auction paradox, where seemingly warranted moves prove to be self-destructive. The only solution in decision theory is to disengage from the game, in essence, to stop the legal arms race. In tort law, where disengagement is not always easy or available, the solution must involve nonadversarial options in pursuit of an adversarial achievement. In a nontrivial way, truth achieves some of that goal.

Paranoia is viewed as jury fallibility masquerading as protection of the integrity of the legal system. There is the arcane set of evidence rules, known to all lawyers and largely crafted and concerned with ensuring that fallible lay jurors, insufficiently educated and indoctrinated into the legal mysteries of

[11] Invented by Martin Shubik, *The Dollar Auction Game: A Paradox in Non-Cooperative Behavior and Escalation*, 15 J. of Conflict Resolution 109 (1971).

ascertaining truths, will not be led astray. However, aside from how well the actual rules work, and we should be modest about their efficacy, much is lost by these derailments from the normal value of getting things right.[12] We might stand chastised by the argument that law's indifference to truth contributed to the assassination of Abraham Lincoln.[13] The argument is this: under the American legal system of its day, anyone involved as a potential coconspirator could not testify on his or her own behalf as a witness, not even as a witness against the primary wrongdoer in the assassination, John Wilkes Booth. In that Booth involved others at an early stage, inadvertently on their part, in what turned out to be a murderous conspiracy, he reminded them of what was then common knowledge in America, namely that it would be self-defeating to attempt to reveal the plot or conspiracy because they were already parties to it, and were thus, under the law, legally barred from testifying as to their own innocence.[14] Thus, any revelation that they may have would only contribute to their own demise. They were therefore cowed into a silence that allowed the assassination to proceed. Although exclusion of coconspirators' testimony, and criminal defendants' testimony, in general, has rightly since been overturned,[15] we should hardly be smug about the routine tradeoffs made because jurors can occasionally get things wrong. They can also get things right, and one should at least mourn the parsed evidence that fails to come jurors' way and contributes to their inability to ascertain the facts of the matter. It is as easy to show that coconspirators' testimony might be as misleading (false, self-regarding, prejudicial) as that of today's routinely excluded insurance evidence (annuities rather than future damages, workers' compensation set-offs, liability insurance, subrogation, and insurance monies paid by codefendants). Both exclusions rest on the premise that partial is better than complete truth; trust is expendable and the price paid for keeping secrets from adults neither endangers democratic attitudes nor makes us cynical about holding such attitudes.

Finally, there is the somewhat eclectic example of negotiation tactics concealed as the duty of loyalty. The field of negotiation is well-known to be complex and counterintuitive, to involve a number of moves that may be

[12] Fairman says the gap is between the rules of evidence and the rest of the law. "The law of evidence is concerned primarily with workable rules for determining truth . . . [But the Supreme Court] does not sit to enforce Wigmore on Evidence . . . In asserting the voice of the Constitution the Court rises far above the mere law of evidence." Charles Fairman, Fundamental Law in Criminal Prosecutions 71 (1959) (footnotes omitted).

[13] Michael Kauffman, American Brutus: John Wilkes Booth and the Lincoln Conspiracy (2004).

[14] A relatively and certainly interesting history of how the right against self-incrimination metamorphized in America into a rule that barred any testimony whatsoever can be found in Judge Wisdom's opinion in *De Luna v. U.S.*, 308 F.2d 140 (5th Cir. 1962).

[15] The first repeal of the accused testifying on his own behalf occurred in 1864 in Maine, followed by California in 1866. It was not until the 1960s that Georgia finally followed suit, making it unanimous in the states. Most of the changes were by statute, not common law. The statutes are set out in J. H. Wigmore, Evidence §2272, n. 2 (McNaughton rev., 1961).

unattractive and strategies that border on the immoral, and to be used typically by many who have only the dimmest idea of what options are in play and ought to be exercised.[16] That said, one typical move made by attorneys involves what game-theorists call the "timely destruction of communication." This can occur in a number of ways. One can appear to ignore gestures from a judge indicating sidebar, expressing disapproval with a question or formulation, or involving some other nonverbal signal, all in the knowledge that inadvertence is not as dangerous as disobedience. One can feign ignorance of the explicit testimony of a witness by behaving as though one failed to hear or understand it or was insufficiently conversant with the technicalities or subtleties of the response to prevent the question from being revisited or reprised in search of a better (more impeaching, less damning, less assured) answer. Moreover, consider when intentionality is greater, as when lawyers employ the strategy of suggesting that their lines of communication are cut from those who have the bargaining authority: the insurance adjuster is unavailable, the family is not unified as to its wishes, leading members of the certified class are unavailable or have disparate positions, the corporate board of directors has not voted on counsel's authority, or some governmental agency needs to push things further up the chain of command prior to making a decision. Although any of these can be true, they are typically used as negotiation techniques, with a suggestion that counsel's duty of loyalty is absolute. Of course, typically nothing of the sort has occurred. That is, there is no incongruence between counsel's position and the desires or even expressed position of the client: it is only that, given privilege, the veil of secrecy remains impenetrable. The tort talk here becomes equivocal, obfuscatory, noninformative, misleading, tentative, cavalier, inconclusive, and of a posturing mode.

It would be easy, in the way character attacks and prejudice, in general, are easy, to characterize the tort bar as disingenuous. The characterization would not only be hyperbolic, it would be, to use tort talk, defamatory. It is the profound indifference to the truth, along with an attitude of casualness and impatience, rather than any disingenuity that saddles the tort bar at its core. That is, there is no reason to think that lawyers possess any less integrity than anyone else, and there may well be any number of reasons – including proximity to courts, regulation, acquaintance with the values of justice and equity, knowledge of criminal and civil penalties, oath-taking conduct as notaries and witnesses, and sanction practice – to think otherwise. However, the actual ailment, even if the carriers are no more blameworthy than the uninfected, is quite serious. Indifference to truth as a normal matter of legal discourse, in general, and tort talk, in particular, has contributed to a degenerative vocabulary, a

[16] In fact, Thomas Schelling's well-known pejorative comment about international strategy, calling it "the retarded science," could just as easily be applied to legal strategy. See Thomas Schelling, The Strategy of Conflict 3 (1960).

sinking morale, a toleration of the false and the insipid, an incoherence in legal concepts and reasoning, and even a certain shunning by serious individuals.

There is the notion that the entire matter of communication, difficult in law, has to do with the generality of language. If one could only be specific and clearly set things out in advance, in some kind of cogent way, legal argument would not need to descend to the rhetorical depths of indifference to candor and revelation that it does, and the courthouse steps and the steps of an advertising agency could no longer be confused. Such an analysis, however, is faulty. Language is necessarily general and vague for a number of well-known reasons. Anyone attempting to write even a simple computer program setting forth unambiguous directions may come to realize, a quarter of a million lines of source code later, that one has not necessarily been clear on the one hand and, on the other, has not necessarily covered much ground. Moreover, the logical and semantic indeterminacies of language make impossible any easy or sure equivalence between action and language, or language and action.[17] That aside, the vagueness and generality of language, irreducible or not (and it is not), is often extremely useful in allowing complex concepts in the law without having to specify in advance every small, contingent matter. This might seem to be so commonsensical that no one could impugn it. However, at least one prominent author, Philip Howard, who bemoaned the death of common sense, believes otherwise:

> To most experts, the highest art of American lawmaking is precision. Only with precision can law achieve a scientific certainty. By the crafting of words, lawmakers will anticipate every situation, every exception. With obligations set forth precisely, everyone will know where they stand. Truth emerges in the crucible of the democratic process, and legal experts use their logic to transform it into a detailed guide for action. The greater the specificity, the more certain we are that we are providing a government of laws, not of men.[18]

[17] In fact, there is no possibility of even obtaining linguistic equivalence, at least without a significant loss of meaning. As Quine pointed out: "Sentences translatable outright, translatable by independent evidence of stimulatory occasions, are sparse and must woefully under-determine the analytical hypotheses on which the translation of all further sentences depends. . . . There can be no doubt that rival systems of analytical hypotheses can fit the totality of speech behavior to perfection, and can fit the totality of dispositions to speech behavior as well, and still specify mutually incompatible translations of countless sentences insusceptible of independent control." W. V. O. Quine, Word and Object 72 (1960).

[18] Philip Howard, The Death of Common Sense: How Law Is Suffocating America 29 (1994). Howard's book, something of a minor bestseller, is so ready to draw huge and unwarranted conclusions from idiosyncratic and anecdotal evidence as to cause the cautious reasoner conceptual bewilderment. One might already suspect this in a work that takes two, almost unanalyzable and stunningly complex concepts (common sense and law), and anthropomorphicizes them in a simplistic, related, and textually implausible manner. Most statutes and decisions are, of course, commonsensical in an America deindustrializing, deficit-producing, trade-imbalanced, pension-deprived, urban-decaying, and health-care

Such a suggestion, particularly in the tort context, is ludicrous. Of course, such notions as the reasonable man, contributory negligence, assumption of the risk, and proximate cause have been sources of endless difficulties, debate, and obscurities. That is hardly the point. What is reasonable under one circumstance may not be reasonable under another, and no set of legislators would have the presence and perspicacity to be able to set out in advance all the various situations of what would constitute reasonableness. For example, with regard to ordinary matters of negligence, what is reasonable for surgeons, accountants, truck drivers, drug manufacturers, brokers, mechanics, gym teachers, actuaries, animal trainers, insurance carriers, daycare providers, boards of directors, or someone just simply crossing a busy street in Manhattan? These are hardly matters to be determined in advance. The number of possibilities, intervening events, individual proximate players, and various evolving conditions are bewildering, numbering in perhaps the trillions of trillions. State legislatures, which often seem unable to pass any intelligent, well-considered, and textured statutes involving tort law – from uninsured motorists coverage to enforceable damage caps, to the enumeration of sovereign immunity, to peer review, to restrictions on completion, and even to passing unambiguous traffic laws – are not necessarily qualified to predict the future course of civilization. In fact, it is worth repeating, yet again, the caricature of such attempts to prescribe and to delimit reasonableness in the famous delineation of A. P. Herbert, who set out what Philip Howard apparently wanted: greater precision and specificity with regard to what constitutes a reasonable man.

> He is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or a bound; who neither star-gazes nor is lost in meditation when approaching trapdoors or the margin of a dock; . . . who never mounts a moving omnibus and does not alight from any car while the train is in motion . . . and will inform himself of the history and habits of a dog before administering a caress; . . . who never drives his ball until those in front of him have definitely vacated the putting-green which is his own objective; who never from one year's end to another makes an excessive demand upon his wife, his neighbors, his servants, his ox, or his ass; . . . who never swears, gambles or loses his temper, who uses nothing except in moderation, and even while he flogs his child is meditating only on the golden mean.[19]

For litigators, truth is typically treated as dispensable early. Consider two documents bereft of accuracy, meaning, information or even, to some extent, any grounding in reality: the complaint and the answer. Counsel for the plaintiff must construct a complaint despite being short on facts, hurried on time,

collapsing that has greater breathing problems than brought about by a few, inane ordinances and judicial rulings.

[19] A. P. Herbert, Misleading Cases in the Common Law (1930).

and skeptical as to his or her own client's veracity. That said, complaints are amazing stories. They detail nefarious, conspiratorial, almost criminal behavior, at once intentional and malicious, known to the defendants and mysterious to the plaintiffs. The typical picture painted is one of plaintiffs innocent and ignorant of the risks of ladders, tobacco, junk bonds, guns, alcohol, motorcycles, construction, security, and securities, with defendants possessing the prescient qualities and knowledge of an Einstein and an indifference to harm of a Bourbon King. At the more minute level, answers take extraordinary positions, suggesting that, for example, a corporation is without knowledge of whether it is, in fact, a corporation or that last month's events fall afoul of a two-year statute of limitations. Fantasy pleadings are not just a function of ignorance, prudence, or orneriness, although each of these makes its own contribution. Significant blame lies with courts that restrict amendments, coerce scheduling, and, oblivious to the motivation of the original reform of the civil rules, punish pleading incompleteness while rewarding overblown and false claims, defenses, and counterclaims.[20] Court appointments too often unskilled and inexperienced in civil practice,[21] combined with the mistaken belief that resolution of a case (in any form) has a necessary connection to a just resolution, is a well-known and increasingly problematic phenomenon. In brief, tort cases open on a false note. Pleadings are just the beginning. Preparing a witness becomes an exercise in disguising and hiding information without getting caught. Not answering more than is asked, not clarifying obscurities, not clearing up confusions, not aiding understanding, and never volunteering: these are the mechanics taught witnesses. Aside from prolonging depositions, enlarging billable time, frustrating opponents, raising the level of rancor in litigation, enriching court reporters, abetting motion practice, causing some slippage into perjury, and frustrating any real search for truth, it is hard to fathom how anything but contempt and disrespect for such a system could occur to those unfortunate enough to wear the title "witness."

It might be worth imagining a particular example of how tort law can change in a specific area to see whether, even when the alterations are benign if not

[20] The sixty-year shift can be seen when examining *Erk v. Glenn L. Martin Co.*, 116 F.2d 865, 871 (4th Cir. 1941), where the court was vigilant with regard to any constraints on amendments ("[w]e are of the opinion that the plaintiff should now be given leave to amend his complaint. The history to date of practice under the Rules of Civil Procedure shows a strong liberality among district judges in allowing amendments under Rule 15(a)" with the more recent case of *O'Connell v. Hyatt*, 357 F.3d 152, 154 (1st Cir. 2004), which held "we review the denial of a motion to amend the pleadings for an abuse of discretion if any adequate reason for the denial is apparent from the record."

[21] In that the skill level necessary to be successful in tort law typically is accompanied by income greater (often significantly) than that of judges, and in that elevation to the bench is a career move of prosecutors, other political careerists, and those looking for a pay raise, it is hardly surprising that a sophisticated understanding of civil practice is often absent from the trial and appellate bench.

beneficial, truth can be a casualty. Suppose that in the late nineteenth century, a local council passed an ordinance prohibiting any vehicles in the park.[22] No legislative history, comments, or precedents exist, and the ordinance passed quietly absent comment or dissent. Moreover, immediately upon enactment, city signs were promptly posted stating the ordinance in full, namely that there were to be no vehicles in the park. Since the enactment, the ordinance has been enforced, but there are no reported decisions from any court about the parameters of that enforcement.

Originally (based on local lore) horse-and-buggies had been banished from the parks as vehicles. Later bicycles were barred, followed by cars upon their arrival. By mid-twentieth century, the only movement in the parks was by pedestrians. By the early twenty-first century, as people found horses cute and buggies quaint, horse-and-buggies began to reappear in the parks, with the benefit of encouraging children and tourists to enjoy a nostalgic, pastoral, and city-revenue enhancing experience. In the meantime, wheelchairs had become common, eventually supplemented by electric wheelchairs. Eventually a court case arises when an electric wheelchair driver is cited for driving a vehicle in the park. It is pointed out that since the driver is not walking, he is obviously on a vehicle, and, even in that more traditional animal-driven vehicles had been allowed, it could hardly automatically be assumed that motorized ones are legitimate. The driver was, given the peculiarities of the statute, not charged with criminal violation, but sued in trespass, perhaps the oldest of the original common law torts, for entering upon the property for an illegal purpose. The city brings a lawsuit, but the wheelchair driver successfully defends, claiming that as a disabled veteran, he ought to be able to enjoy the quiet and beneficial effects of the park. The city loses its motion for summary judgment and later a jury verdict.

A number of different analyses spring to any tort lawyer's mind about this matter. One begins by examining considerations of legislative intent: the changing conceptual analyses of trespass, public parks, and the disabled, policy considerations of the disabled, statutory and constitutional protections of those in wheelchairs, unanticipated technological changes involving motorized vehicles for those who once would have perished either at birth or after the trauma that left them nonambulatory on the one hand, or the thought that dirty animals pulling rickety-wood sulkies could somehow be a pleasurable experience on the other, all come to mind. Moreover, the obviously satisfying outcome for the most disadvantaged to enjoy one of the diminishing pleasures still remaining seems to make any squabbling about strict construction seem downright mean-spirited. Such is the typical tort talk about such a case.

[22] The example is vaguely drawn from, as is so much of modern jurisprudence, H. L. A. Hart, The Concept of Law 123 (1961), although he uses it only to illustrate the concept of the open texture of law and mentions only cars, bicycles, airplanes, and roller skates.

In fact, it might be asked where, in any of this, does truth matter? That, of course, is just the point. To most lawyers and, in fact, observers of the tort system, it doesn't. One could find a very long or even long-winded discussion of this case, appropriately bluebook cited with the required greater number of words contained in footnotes rather than text, cross-referenced to every other case about wheelchair trespassing in public places, without any mention as to whether the following is a true statement: "the wheelchair driver committed trespass." Truth of the accusation of trespass might be considered either in passing at best, or likely irrelevant, to the various more pressing issues such a case poses, including matters of disability policy, fair use of public resources, and evolving notions of what constitutes a vehicle. If it were always so benign, that is, if it were always the case that truth could be pushed slightly to the side of the very obvious important moral and public policy considerations, but otherwise take its place as central as to other statements, the result would be functionally like an intellectual speech impediment to the language user, but perhaps not be worthy of dire handwringing. Ducking the issue of truth when the matter is peripheral in favor of more central moral considerations, however, is just the beginning. In other words, the duck starts here.

The daily language of the litigator is, at least when on topic, unconcerned with conveying the truth. Pleadings, motions, briefs, cross-examinations, mediations, opening statements, and closing arguments: these fundamental techniques and tools of the litigator are blithely unconcerned with conveying true statements. This might appear so obvious as hardly to merit comment, but let us pause to consider both what occurs and what results. Perhaps let us begin with the misnamed "brief" and compare it to a chapter of a history book. Of course, the two could be virtually identical. But even if they initially appear that way, the stance toward truth is fundamentally different. Again, our example.

We have the situation of the disabled veteran riding to victory. It is one that can engender easy analysis by any experienced legal reasoner, some of it no doubt profound, some of it undoubtedly mundane. The analysis would be something like this. There are changing notions of recreational and park usage and increasing recognition of the disabled and the debts owed to veterans. These present strong policy reasons on which to predicate the existence of duties and to defend their breach on the one hand, while becoming part of evolving concepts of reasonableness and fairness in legal reasoning and benchmarks to set the parameters of duty, on the other. General normative language can be tested by reasons other than intent. In fact, it can plausibly be argued (and has) that rule-making bodies, in using general language, compel subsequent interpreters, using tools of linguistic interpretation and conceptual analysis to instill both fairness and viability into that language as it is used by subsequent legal officials over time. New duties and new rights not once recognized, from equality to privacy to access, change the legal landscape, in general, and tort language, in particular, allowing the disabled the rights all enjoy.

What of truth? Perhaps it sounds petty and even mean-spirited to point out that an electric wheelchair is a vehicle, if anything is a vehicle, in that it transports individuals, it is motorized and mechanized, it is noisy and polluting, it can potentially run others over and disturb their quiet enjoyment, and it is unnatural and potentially dangerous. It is simply, and without doubt, a vehicle. It might well be argued that the truth of the matter and any good semantic or linguistic or conceptual analysis of meaning are misplaced as other considerations trump truth. That may be so. The point here is a different one. It is worth recognizing where the truth lies, even if one decides that something other than truth ought to dictate policy or motivate conduct. We might well have a jurisprudence whereby rather than saying that x does not imply y, when everyone knows it does, x does imply y, but the parameters of x are not coincidental with the implications of x. We might think that a motorized wheelchair is a vehicle, but be willing to keep that as a tentative conclusion, for when a legislature states there will be no vehicles in the park, there may be times when vehicles might nevertheless be allowed in the park.

This is perhaps too radical a notion for those who want to keep a lid on any hint of discovery that we live by something other than the rule of law. Great power and authority, including pompous majesty and baroque celebration, are ceded to courts of law, to judges, and even to those in subservient roles who might actually educate the courts. That is, lawyers who do the difficult work of shaping the legal opinions for which judges often need only to pick one and then take credit for prose drawn from the winning lawyer's brief without attribution or footnoting, all in bland and utter disregard of normal rules of theft and plagiarism – such opinions are occasionally deemed brilliant and celebrated.

The lack of concern with notions of candor, correctness, accuracy, verisimilitude, and truth is neither casual nor recent in its encounter with the fabric of the judicial system. The lawyer and the advocacy system exercise power and control indirectly, often at a distance from elections or consent, in a manner technical and often obscure to the population, but also in a self-protecting manner where the myth of legal application is perpetrated even in the clear face of legal innovation and change. Judges hide their methods, disguise their assumptions (if not biases), and deny their agendas. As a general rule, it would be heresy to admit that "the Supreme Court from time to time makes and alters the law of the Constitution."[23] Interpretation and exegesis are celebrated. The edifice constructed, often for purposes other than truth or candor, is judicial reasoning. However, there are occasions where the indirection and obfuscation are explicit and intended. For example, an ancient and sturdy tradition in judicial reasoning has been that of so-called legal fictions, although not unlike the

[23] This is just what the courts actually do, according to Justice Jackson. See Robert H. Jackson, The Supreme Court in the American System of Government 79 (1955).

concept of the Holy Roman Empire, which was neither holy nor Roman nor an empire, legal fictions are, as we will see shortly, neither legal nor fictions.[24] Legal fictions have been used to justify all manner of things fair, reasonable, and promoted as worthwhile morally and politically, but they have, at their best, only a random relationship with the truth. Matters implied, deemed, or assumed are often euphemisms for other matters where none of those things actually occur, even without legal fictions. For example, unfair competition law has smaller term recastings, based on political and economic fashion, redefining for special purposes concepts of locality[25] and noncommercial manufacturing,[26] even when such recastings might be better termed "fantasy" than fiction.

Legal fictions are not quite lies or, as they have been called by one writer (now deemable as politically incorrect), "white lies."[27] This is not because, as some have written, legal fictions were not meant to be believed, but again, as with so much of tort talk, because no one cared one way or another whether they were believed. What was important was how useful they were, and in that truth was crushed, so be it. As one writer put it, legal fictions were "a device for obtaining desired legal consequences or avoiding undesired legal consequences."[28] The twin blessings of both cynicism and deception aside, such a comment seems to be, again, that truth consists simply in not getting caught.

Take one straight-forward, well-known and notorious legal fiction, that of the attractive nuisance doctrine. Under that doctrine, where a child has been injured on the defendant's property entered without consent, the land-controlling defendant is deemed to have invited the children to visit the premises. The child is promoted from trespasser to invited guest as a matter of law. Of course, no invitations were issued, no child was asked to enter, the land may well be far from attractive, and the defendant might be (in all likelihood probably is) not only ignorant of the child's entry upon the land,

[24] The best known work on the subject is that of Lon Fuller, Legal Fictions (1967). Fuller's treatment is annoyingly indirect, disappointingly ambivalent, largely absent on doctrine-specific analysis, and entirely obscure in its conclusions.

[25] The relevant decision is *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), a case in which, quite notoriously, baseball was ruled exclusively to be a local or state matter. To quote Justice Oliver Wendell Holmes, "the business is giving exhibitions of baseball, which are purely state affairs . . . the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words." *Id.*

[26] The reference is to the well-known case of *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895). The court held that monopolization rules did not apply to a sugar trust controlling 98 percent of the country's sugar refining capacity because "commerce succeeds to manufacture, and is not part of it." *Id.* at 12.

[27] Cited in Lon Fuller, Legal Fictions, quoting Rudolph von Ihering, III, Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwickelung 297 (6th ed., 1924), translatable as: The Spirit of Roman Law in the Various Stages of Its Development.

[28] Oliver R. Mitchell, *The Fictions of the Law: Have They Proved Useful or Detrimental to Its Growth?*, 7 Harv. L. Rev. 249 (1893).

but ignorant of the existence of the child altogether. In plain terms, the child (issues of intent aside, and intent is a fairly low threshold in trespass) is clearly a trespasser, or under the most charitable of cognitive circumstances, a licensee (i.e., one permitted on the land, but there purely for his or her own purposes). Even as a business invitee, it would be hard to find the kind of duty owed to one entering upon the land with which the attractive-nuisance defendant finds itself saddled.

It might now seem obvious, but it is worth noting again that legal fictions are neither legal nor fictions in light of this brief review. It seems essential for any notion of legality, of the rule of law, of what it means to have a system of law rather than something else (say, perhaps, warlordism, civil war, despotism, or some other far worse alternative), that there be, in a manner central and clear, principles of legitimacy, candor, transparency, and truth. All of these notions involve a basic principle of the law, which has been, but should never be, overlooked, namely that of trust. In that any of the participants in a legal system – and, here, by participants one might fairly include unwilling players such as criminal or tort defendants – no longer trust the system, then notions of candor, legitimacy, transparency, and truth not only go by-the-board, the going by-the-board destroys the system. Trust is essential. In earlier times, when knowledge was maldistributed and often in shockingly short supply (with naturally arising concomitant economic coercions and political restrictions on freedom, which if not approved, at least were tolerated), opportunities for system-breaking distrust may have been lower. Of course, this was never desirable. However, desirable or not, it is not possible today. In a parallel context, calling for trust as a precondition not to law, but to political freedom, Amartya Sen describes how central the notion of trust, derivative of truth, is:

> In social interactions, individuals deal with one another on the basis of some presumption of what they are being offered and what they can expect to get. In this sense, the society operates on some basic presumption of trust. *Transparency guarantees* deal with the need for openness that people can expect: the freedom to deal with one another under guarantees of disclosure and lucidity. When that trust is seriously violated, the lives of many people – both direct parties and third parties – may be adversely affected by the lack of openness. Transparency guarantees (including the right to disclosure) can thus be an important category of instrumental freedom. These guarantees have a clear instrumental role in preventing corruption, financial irresponsibility, and underhanded dealings.[29]

The point here is not one of theoretical or conceptual analysis concerning the existence conditions for legal systems. At the edges of political breakdown or of governmental legitimacy, when social pathology rather than community

[29] Amartya Sen, Development as Freedom 39–40 (1999).

health characterizes legal systems (e.g., under fascism, totalitarianism, Stalinism, Maoism, or apartheid), there may be room for debate as to whether, under some rigorous definition, a legal system exists.[30] Rather, we are moving from the logical to the commendatory, asking whether any legal system worth having can be based on deception or indifference to the actual state of affairs that can be said to exist in any particular time frame for any particular purpose.

If "legal" fails in legal fictions, so does the notion of "fiction." One might think of fiction as an unambiguous exercise in storytelling, with whatever elegance the story is told and the moral revealed, there need be no attempt to stay within the strictures of believed or accurately recounted events. That is, even though there may be some debate as to how or which events actually occurred, the writer of fiction, in terms of that writer's own intentions, is at best incidentally concerned with getting it right. In that coincidence is achieved between fiction and some factual data or picture of reality and that advances the story, achieves the purpose, makes fiction more alluring, accomplishes some political or heuristic purpose, displays the writer's knowledge, or serves some other purpose along the way, all the better. It is not essential to the enterprise. *War and Peace* has added dramatic power because of its resemblance to the historical realities; Napoleon and Kutusov are characters in both the fiction and the history. Yet Tolstoy's near contemporaries, James Joyce and Franz Kafka, fared perhaps equally well as storytellers without looking over their shoulders at any discernable historical reality. That is quite different from, for example, an attempt to provide an account of quantum mechanics, the French Revolution, or the history and development of the law of negligence. It is an interesting question whether one might be said to make true statements with regard to fictional accounts[31] – what was Lear's intent in gifting his property or did Gatsby and Daisy really have a future, all judged within the context of the convention of the literature – but that is hardly any reason to confuse fiction and truth. Sadly, though, the fact is that the deception here is not one always seen as worth an apology; rather it is often promoted. Blackstone refers to legal fictions as

[30] This perhaps less than enlightening debate sprung to full glory in the 1960s and 1970s when, in light of the totalitarian experience in Europe, writers questioned whether there was such thing as a legal system. The debate can be found, among other places, in the writings of H. L. A. Hart, The Concept of Law (1961); Lon Fuller, The Morality of Law (1961); and Ronald Dworkin, Taking Rights Seriously (1977).

[31] There is a long and lively literature on this. Bertrand Russell held that talk of fictional characters is talk of an author's story, whereas others, such as Searle, have written of "pretended assertion," and still others such as Keith Donnellan, that it is the speaker's intention that matters. Bertrand Russell's views are set forth in a lifetime of articles and books, often involving modifications in his thinking. See his *Meinong's Theory of Complexes and Assumptions*, 13 Mind 204–19, 336–54, 509–24 (1904), his *On Denoting*, 14 Mind 479 (1905), and his *Mr. Strawson on Referring*, 66 Mind 385 (1957); John Searle, Speech Acts (1969); Keith Donnellan, *Speaking of Nothing*, 83 Phil. Rev. 11 (1974). The problem is addressed generally in Richard Rorty, Consequences of Pragmatism 110–138 (1982).

being "highly beneficial and useful,"[32] whereas others have suggested that legal fictions should simply replace truth:

> Consider how much would our controversy over the nature of truth have been enriched if, instead of our easy dichotomous division of propositions into the true and false, we had taken notice of what lawyers call legal fictions.[33]

The problem is not just that legal fictions have existed or that they are fairly common, although that presents any number of difficulties. Certainly, Bentham had reasonable concerns, even if his particular terminology was somewhat overblown, when he stated that "in English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness"[34] or his comment that "Fiction of use to justice? Exactly as swindling is to trade."[35] The problem is programmatic. The transparency of purpose and the revelation of the etiology, history, and prior events to outcome disappears. Trust in legal propositions is compromised as legal integrity becomes a foreign and degraded concept. The problem does not lie only, or even primarily, with legal fictions. It certainly does not lie in the use of devices to amend or to change law for any particular purpose or with the result that many legal fictions have achieved of greater equity, fairness, and consistency in the system. Rather, why should one trust a system supposedly based on precedent scrupulously followed, legal logic rigorously applied, with outcomes firmly rooted in an advocacy system supposedly causative of truth, when one knows none of that is the case?

The line between legal fiction and mundane legal doctrine may be thin and shifting, but a casual stance toward truth is too often a common feature on both sides of it. Take perhaps the most pernicious doctrine in all of modern tort law: that of sovereign immunity. The full name, of course, is "The King can do no wrong," a stunning statement in a legal system founded on the seminal fact of the American Revolution being that King George III could do nothing right. Aside from the many obscurities and conceptual difficulties of this notion of sovereignty,[36] the doctrine is factually false. Moreover, given a legal system of limited and divided government, legal restraints on power, democracy, and the brilliance of judicial oversight of an errant government

[32] William Blackstone, III, Commentaries on the Law of England 43 (Lewis, ed., 1897).

[33] Morris Cohen, *Jurisprudence as a Philosophical Discipline*, 10 J. Phil., Psych., Sci. Method 225, 227 (1913).

[34] Jeremy Bentham, V Works 92 (John Bowring, ed., 1843).

[35] Jeremy Bentham, VII Works 283 (John Bowring, ed., 1843).

[36] The notions of sovereign and of sovereignty, often blithely used in international law as though unproblematic as to meaning but only difficult as to measurement, upon close scrutiny are employed in a manner going from the maddeningly vague to the paradoxically incoherent. One classic treatment of many of these issues can be found in William Buckland, Some Reflections on Jurisprudence (1945).

embodied in *Marbury*,[37] it is legally untrue. Those unabashed by endorsing a Lewis Carroll picture of law justify the facially unjustifiable by torquing it into a doctrine that states that no sovereign (whatever that means) can be sued without its permission, as that sovereign (perhaps) owns (but certainly is linked to) the law courts. Government is held responsible for its actions routinely, whether it likes it or not, in criminal law, zoning law, takings law, public contracts, election law, and, in fact, almost everywhere but tort. Indeed, tort suits for wrongful imprisonment, trespass, or simply being hit by a mail truck are not only sensible, they are part of the fabric of any legal system that has some minimal level of concern for its citizens.[38] The absence of that sensibility has matured on the doctrine that proclaims the wishes of a despotic tyrant, uninformed or unconcerned with his subjects, to be infallible and omnipotent. A little care with truth might yield a large dividend for justice.

The most obvious examples appear in the cases of civil rights torts. One might view many of the conditions that led up to the Civil Rights Act, 42 U.S.C. §1983, and certainly its development after enactment, as a battle between those who wished to hold, however imperfectly, government officials liable, or at least responsible, and those who believed in a special immunity from what might otherwise be classified as ordinary misconduct. This can be seen starkly viewed in the context of a policeman beating a detainee. Prior to the civil rights laws, for nine hundred years of legal history, no recovery was possible. If the notion that the King can do no wrong has a lot to explain and more to answer for, so does any legal system that allows obviously false statements to be praised as cogent legal doctrine.

At the level of the trial lawyer, the problem is significantly greater. Individual lawyers may be called on to argue matters they know to be scientifically unsound. For example, at any given period, the realization dawns on them that tobacco does cause cancer,[39] breast implants are not statistically linked to autoimmune diseases,[40] and asbestos eventually kills almost anyone who experiences too close an encounter with it. Nevertheless, in letters, depositions, briefs and motions, trials, and all statements made on behalf of a client, the obvious scientific matter is denied. There is an air of inevitability to this. Asbestos

[37] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[38] This is a point made generally, in the area of habeas corpus, by the Murphy and Jackson dissents in *Korematsu v. U.S.*, 323 U.S. 214 (1944).

[39] One example of a lawyer's statement made in a manner oblivious to honesty or candor can be found in Mark Curriden, *The Heat Is On*, 80 ABA J. of Litig. 58, 60 (1994), where one lawyer is quoted as stating "we have been able to show that there are a lot of people who smoke who never get sick, and most jurors know people who have been able to quit cold-turkey after years of smoking without side effect." So much for the Surgeon General, epidemiology, oncology, modern medicine, and reality.

[40] Somehow despite dispositive studies to the contrary, and despite lack of any nonjunk experts testifying otherwise, the cases appear to go on. See *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878 (10th Cir. 2005).

companies are not interested in retaining public service lawyers for a safe work environment to represent them in defense of wrongful death suits brought by grieving and extremely jury-sympathetic widows. In fact, the argument then gets extended quite logically, if somewhat viciously. In matters important or minute, counsel consistently and without equivocation are expected to take the side of the client. This is more than maintaining a game-face during matters of business negotiation and is quite different than the lack of candor during certain play, such as bluffing in poker. It is an all-consuming activity.

Take negotiation. Plaintiff's counsel states he will take nothing less than $1,000,000 or he will try the case, whereas defense counsel states that she will pay nothing more than $50,000. Plaintiff's counsel states that the case is easily worth more than $1,000,000, that breach of duty is clear, that the affirmative defenses of contributory fault and misuse are frivolous, and that his client is the poster child for overly loved plaintiffs. He states that in the clear light, perhaps, of a client with a criminal past whose inane misconduct may possibly have contributed to his own injuries, which are themselves complications of a preexisting condition unlikely to receive overly sympathetic treatment by a jury, all of which has made plaintiff's counsel certain, in his own mind, that anything north of $300,000 would be cause for celebration. Defense counsel, meanwhile, struts the weakness of proximate cause, along with the hired-gun reputation of plaintiff's expert and the high quality and character of her own client, knowing full well that plaintiff's expert is seasoned because he is extremely articulate and convincing, the complicated matter of causation is far too obscure and occult to be appreciated by any jury likely to be chosen, and that she would welcome sobriety in her own client, all the while hoping that this case will not cost her client (or the carrier) more than $500,000. Such a situation is fairly typical and has a number of implications.

First, lawyers get in the habit of simply doing something other than making true statements. Truth-telling is, like almost every other piece of human conduct, habitual, and its disregard is equally habitual. Moreover, such habits pollute the greater discourse, impugning the integrity of the entire process. The devalued currency of truth is difficult to resuscitate.

Second, the value of tort talk is diminished by ignoring what might potentially be called "sentential truth value," or perhaps more clearly, "simple candor." Increasingly, in tort litigation, no one takes each other's talk seriously, and third parties watching the Kafkaesque or perhaps Orwellian world, depending on what fictional account of communication pathology triggers an individual's anxiety, lose any confidence in lawyers' integrity. Why believe anyone agnostic about truth?[41] Aside from the serious blow to the legal system engendered by

[41] At a fundamental level, it is problematic as to whether one could coherently hold to such agnosticism, but that is not a topic for this paper. See Ludwig Wittgenstein, On Certainty (1969).

that lost confidence, it certainly does nothing to contribute to the emotional well-being of those who have passed the bar.

Put differently, in such a situation where, perhaps like the exception to hearsay, statements are rendered for purposes other than their truth, information becomes difficult to come by. Because neither side has knowledge or is able to rely on plain meaning, lawyers speak in code, use clues and secret keys to decipher obscure, ambiguous, or duplicitous meaning, and rely on such imperfect knowledge to make judgments and to counsel clients. Striking insincere positions – whether concerning settlement, witnesses, scheduling, discovery, precedents, or one's own confidence – has some justifications, but its ubiquitous use comes at a steep price.

In fact being elliptical or evasive in conveying information to others, while gaining misplaced confidence because of concerted introspection and the examination of one's own knowledge base is a dangerous strategy. As Frankfurt stated:

> As conscious beings, we exist only in response to other things, and we cannot know ourselves at all without knowing them. Moreover, there is nothing in theory, and certainly nothing in experience, to support the extraordinary judgment that it is the truth about himself that is the easiest for a person to know. Facts about ourselves are not peculiarly solid and resistant to skeptical dissolution. Our natures are, indeed, elusively insubstantial, notoriously less stable and less inherent than the natures of other things. And insofar as this is the case, sincerity itself is bullshit.[42]

Let us be clear about the argument here. Truth is but one among other values and, at times, those other values take precedence or trump at least candor, if not information. To some limited extent, statements can be made that are part of a language-law game where, like lines spoken during a theatrical production, bluffs during poker or far-fetched promises during advertisements, truth is not intended. Very occasionally, this is because the statement is a performative speech act[43] – a lawyer saying "I do agree" to a settlement offer or a judge – saying it makes it so. The speech itself is the act, or specifically, to state "I find for the defendant" is not to make a statement that admits to being either true or false. Making the statement is the act of acceptance, just as would be a nod, a handshake, or a seal. Typically, there are more ordinary purposes.

[42] Harry Frankfurt, On Bullshit 66–67 (2005).

[43] This type of speech act was first labeled as a performative by J. L. Austin, Philosophical Papers 233–252 (2nd ed., 1970). The point of a performative speech act is that, in a very central way, truth is irrelevant. A bride saying "I do" to a question about eternal faith, fidelity, and love can easily be imagined not to mean it, believe it, or even entirely wish it. However, saying so completes the nuptial act and makes the putative bride a bride in fact. Crossing one's fingers is not grounds for nullification.

Confidentiality, privilege, strategy, privacy, and reputation: these are worthy of protection. It is the ease with which truth, honesty, candor, and knowledge are discarded in their alleged and false service that is at issue. Moreover, promotion of truth is not meant to be platitudinous. There are real consequences.

Third, knowledge, the object of truth, is not only a precondition to any freedom worth having and to any markets that function fairly and efficiently, it ought to be promoted and gifted as part of any legal (or equity) system. That is, all other things being equal, we would want a legal system that promotes an aspiration to convey information and spread knowledge.[44] Knowledge is plainly a good thing, with many side and unintended beneficial consequences. Those who write of open markets, open societies, civil liberties, and the benefits of science all provide ample testimony to this.

In fact, the very nature of the conversational obscurity can disguise the complete ignorance of a speaker. Since truth is not put into issue, a proof of falsity is not a devastating or dispositive rejoinder. It is a commonplace that it is not unusual for lawyers to be wrong on the facts, wrong on the law and, (perhaps most importantly) wrong on the dynamics of dispute resolution. This ignorance is not challenged by the same kind of peer review process available to physicians or the computer-crunching analysis of large insurance carriers. How would self-assessment be conducted of one's case? How would one know if a trade secrets claim or a business defamation matter, to pick two examples, should be negotiated up or down? Certainly not because counsel's statements are worthy of carefully parsed consideration, or because any of the lawyers likely had much jury experience (or would be *simpatico*, in some familiar way, with a typical juror), or because a series of admissions all around had allowed a more candid appraisal of relevant probable outcomes. The conclusory argument, one that needs to be made elsewhere, is that lawyers have limited knowledge of probabilities, chance, game theory, negotiation theory, or the comparative outcomes of similar cases. Although the mathematical skills of the bar (or more likely, their paucity) are relatively difficult to address, let alone cure, understanding, analyzing, and addressing the relevant problems and data necessary to understand and to advise a client are impossible when not only are all sides making assertions irrelevant to truth, they have historically always

[44] T. M. Scanlon writes of this as rising to a duty to provide useful information, in What We Owe to Each Other 317–322 (1999). Moral duties are certainly not legal duties, but one might make the case of a pared-down or mitigated duty here. The terminology that comes to mind is that of Thomson, who speaks of the distinction between a Good Samaritan and a Minimally Decent Samaritan. The notion is this: there may not be a tort duty to jump into a pool to aid a drowning child, but perhaps a duty ought to attach for the failure to kick a life-preserver into that pool, which would have saved the day (and the child). The Samaritan distinction terminology is found in Judith Jarvis Thomson, *A Defense of Abortion* in 1 Phil. and Public Aff. 47 (1974), but the example is mine (and made in a context foreign from and without any necessary or even expected endorsement by Thomson).

made such assertions.[45] Historical information is sullied, self-examination biased, and knowledge from history and communications tainted.

There are unintended, adverse effects to nontruth conditional linguistic behavior that are not only benign, but even beneficial. That does not mean that the benefits have the greater weight or that truth is a necessary sacrifice (particularly in any full-blooded manner). One seemingly distant, but in fact, compelling analogy can be seen in the medical profession: the issue of placebos. In such circumstances, physicians, providing drugs to patients they might otherwise never provide, become part of a process that refuses candor and truth-telling and even deceives, thus jettisoning the trust requisite to a professional relationship. Certainly, some of the benefits are great. However, these benefits come at a cost, and to think otherwise, as Bok has pointed out, is simplistic:

> Such a simplistic view conceals the real costs of placebos, both to individuals and to the practice of medicine. First, the resort to placebos may actually prevent the treatment of an underlying, undiagnosed problem. And even if the placebo 'works,' the effect is often short-lived; the symptoms may recur, or crop up in other forms. Very often, the symptoms of which the patient complains are bound to go away by themselves, sometimes even from the mere contact with a health professional. In those cases, the placebo itself is unnecessary; having recourse to it merely reinforces a tendency to depend upon pills or treatments where none is needed.
>
> In the aggregate, the costs of placebos are immense. Many millions of dollars are expended on drugs, diagnostic tests, and psychotherapies of a placebic nature. Even operations can be of this nature – a hysterectomy may thus be performed, not because the condition of the patient requires such surgery, but because she goes from one doctor to another seeking to have the surgery performed, or because she is judged to have a great fear of cancer which might be alleviated by the very fact of the operation.
>
> Even apart from financial and emotional costs and the squandering of resources, the practice of giving placebos is wasteful of a very precious good: the trust on which so much in the medical relationship depends. The trust of those patients who find out they have been duped is lost, sometimes irretrievably. They may then lose confidence in physicians and even in bona fide medication which they may need in the future. They may obtain for themselves more harmful drugs or attach their hopes to debilitating fad cures.[46]

[45] The ability to understand and analyze statistically recurring situations, difficult under any circumstances, becomes impossible when knowledge becomes undervalued. The general problems for professionals encountering skewness, asymmetry, randomness, nonlinearity, coincidence, and other problems of prediction are discussed in Nassim Nicholas Taleb, Fooled by Randomness: The Hidden Role of Chance in the Markets and in Life (2001).

[46] Sissela Bok, Lying: Moral Choice in Public and Private Life 66–67 (1978).

Each of these concerns applies to lawyers. Fees and costs increase during periods of posturing, puffing, pontificating, and prevaricating. Momentary victories (motions granted, witnesses embarrassed, experts garnered) evaporate, and the debate or warrior points gained early, often mistaken for real life benefits, can lead to cynicism in light of later events. Finally, trust is typically a nonrenewable commodity, which, once lost, is very difficult to replace. The legal profession, in general and those in tort law (specifically, personal injury tort law), in particular, are held by society in low regard, and the loss of esteem (and self-esteem) may prove difficult to regain. The disanalogy with physician placebos is that the indifference to truth is justified not only as an individual matter of life and death but a matter of huge benefits in epidemiology, infectious disease medicine, and public health. These justifications are more weighty than those involved in advancing claims of intentional ignorance on behalf of volitionally motivated clients, whether designers of dangerous products, lifelong smokers, or converters of the intellectual property or partnership interests of others. That said, the price of deception is always dear.

The temptation to protest all of this is great, with the strong suggestion that in an adversarial system, where the disconfirmation of false statements is a goal, and an advocacy system, where professional disconfirmers are employed as counsel, all providing a cushion from any overly intrusive closeness to a client's own knowledge, truth is achieved indirectly: by not going after it. Advocates in an adversary situation are unconcerned about how messy this looks, and if the public, clients, the press, and even their own kind (here meaning, to some extent, those who draft, counsel, plan, incorporate, or probate rather than litigate) are, then so be it. Lawyers are not hired to be researchers, scientists, or academics, they are hired to advocate.

Some measure of truth occurs in all this, but again, truth is what this is all about. Doctors are not hired by their particular patients to do anything other than cure them immediately, but a physician's duty to the problems of environmental health, patients' lifestyles, and the spread of disease beyond their patient base to the entire community all count. Moreover, doctors may well be seen as having independent duties to hospitals, their peers, their peers' patients through reviews and to medical and scientific research. Why not lawyers? It is to this point that we must turn and conclude with a brief look at where advocacy hits the legal system's pavement: namely, during the litigation process.

Lawyers are typically presented sets of facts and lay putative legal theories by their clients. The facts are notoriously incomplete, tentative, and even wrong. A speaker's veracity is always an issue and the legal theories are even more suspect. Plaintiffs arrive grieving of injury (to their health or their wallet) and claim some wrong done them by the potential defendant or defendants; whereas defendants, often at the disadvantage of not even knowing (particularly in personal injury matters) the plaintiff, typically claim ignorance of the injury but also make strong protestations as to their performance of any and all

duties of care with regard to any breach. Unraveling the parties' stories and beginning the investigation of both law and fact often lead to some skepticism as to the factual accounts of one's clients and the legal soundness of their arguments. That said, beyond the duty not to lie, what more can really be expected, particularly in that the lawyer is being paid not by a law school, a government body, an investigatory team, or some muse of objectivity, but by a client.

Perhaps the question is rhetorical, because if one sees no benefit from attention to the truth, one hardly needs to hide in the skirts of advocacy. That said, the many unpleasantries of ignorance, cynicism, distrust, and ignorance must inevitably follow. Even the so-called higher standards, formulated and tuned in recent years under federal pleading requirements, are oblivious, in this sense, to truth.

Federal Rule of Civil Procedure 11 is concerned, of course, with, among other things, lying. Misrepresentations are punishable, subjecting one not only to the possibility of monetary sanctions, but to dismissal of actions, defaults, and contempt. But it is worth looking closely at that rule, in that it fairly embodies the thinking among the litigation community, to see what it says and does not say. Rule 11 has two sections, one that requires the propriety of appending signatures. Pleadings and other court documents need to be properly signed by the proper attorney, with information on just how to locate that attorney. More interesting is Section B, titled "Representations to Court," which puts four distinct burdens on attorneys appearing before the court.[47] Although these requirements are concerned about deceit, none of them are concerned with truth. The requirements are that actions are not being taken "for any improper purpose"; that the positions have some basis in "existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law"; that the allegations "are likely to have evidentiary support"; and that "the denials of factual contentions are warranted on the evidence."

Look at what is missing. Suppose one's client is not credible. Suppose the sequence of events fails to comport with any plausible understanding counsel has of corporate culture. Suppose assertions of informed consent or waiver or agreement failed to comport to the attorney's understanding of what normally occurs in such situations or what almost certainly happened, despite protestations of an idiosyncratic, oral murmur timely made to the contrary. Suppose counsel has actual knowledge of facts that really did occur, that would prove a client's position wrong, all the while knowing that truth will never see the light of day, either because witnesses have died, documents are missing, matters have been stated under privilege (his or others), witnesses or exhibits have left the jurisdiction (including perhaps the country), or for some other reason

[47] It also applies to unrepresented parties, not a matter of concern here. See Federal Rule of Civil Procedure 11(b).

that gives comfort in the due-diligence sense and a different kind of comfort in terms of winning in the litigation sense. Under any of these circumstances, does Federal Civil Rule 11 stop attorneys from taking positions, making motions, signing pleadings, or advancing a position on behalf of a client that they well-know are almost entirely lacking in truth? The answer, without question or equivocation, is no.

The direct results of indifference to truth are complicated by the noise of the adversary system itself. Tort talk – adrift from the constraints of veracity, candor, completeness, accuracy, and the desire to get things right – can look like the puffing, pandering, and braggadocio of advertising. The goal becomes solely one of winning, getting to, or guarding the money. Skilled argument in service of that goal is the measure of success with advocacy being indifferent to truth. This is what Socrates, wary of those only skilled in the art of persuasion, thought of as sophism.

If then you chance to be an expert in discerning which of them is good or bad, it is

> safe for you to buy knowledge from Protagoras or anyone else, but if not, take care you don't find yourself gambling dangerously with all of you that is dearest to you. Indeed the risk you run in purchasing knowledge is much greater than that in buying provisions. When you buy food and drink, you can carry it away from the shop or warehouse in a receptacle, and before you receive it into your body by eating or drinking you can store it away at home and take the advice of an expert as to what you should eat and drink and what not, and how much you should consume and when; so there is not much risk in the actual purchase. But knowledge cannot be taken away in a parcel. When you have paid for it you must receive it straight into the soul. You go away having learned it and are benefitted or harmed accordingly. So I suggest we give this matter some thought, not only by ourselves, but also with those who are older than we, for we are still rather young to examine such a large problem.[48]

Cross-examination becomes meaner, discovery more contentious, correspondence more self-aggrandizing, court conduct more strident, disputes more partisan, and client choice and protection more political. The rhetoric of the advertising executive, the ferocity of the soldier, the dedication to task of the academic, and the patience of the pastor all blend into the conduct of lawyers adrift from the lifeline of truth.

Grandstanding is self-escalating. The skills that sustain battles of perception, persuasion, intimidation, and shrillness predominate, and the ensuing talk becomes more heated and emptier. Consider the peripheral disputes. Medical malpractice discussions are talk of one side ranting about the consequences of

[48] *Protagoras* in The Collected Dialogues of Plato 313 (E. Hamilton and H. Cairns, eds., 1961).

medical mistakes and the pull on premiums due to poor investment choices, while the other side looks at the consequences of suits, either with little basis or being based on second-guessed, judgment calls and the reality of difficulties in finding coverage because of carrier failures. Clearly, mistakes occur in some predictable way, and the questions of where the risk should fall and what constitutes the most efficient administrative vehicle for apportioning that risk are real questions, admitting of knowledge, discovery, and truth. However, they typically appear irrelevant to a pontificating debate oblivious to any search for knowledge.

Tort law and tort lawyers today are disparaged, if not reviled. The entire arena is increasingly seen not only to be in need of reform or even purification, but elimination. Extreme libertarian analysis suggests barring the courthouse doors to all but those in need of criminal remedies, or perhaps, at most, charging anyone else who wishes to enter. Self-serving capitalist analysis often sees the costs of tort suits as so high the better solution would be to allow harm to fall where it may without legal consequence and ask that individuals be sufficiently prudent and prescient to ensure against any risk coming from whatever direction that may befall them. In terms of ensuring a peaceful civil society, all this is nonsense. Allowing the tort system to degenerate and ultimately dissipate, such that vengeance becomes the sole remedy, encourages not only a vengeful, posse, blood-feud mentality,[49] it mars and disgraces a society built on concepts of autonomy, equality, and human dignity. In that the system is crumbling, it is of no help that tort talk is indifferent to, if not contemptuous of, the truth.

Moreover, both deception and mutual self-destruction can be rational strategies in any individual case. Perhaps the advantages of deception are sufficiently obvious to need no explication, and they appear to be so to those who regularly or occasionally seek them, but the legal system, unlike much of life, is in a position to disincentivize those advantages. That is, in ordinary affairs, there is a paucity of remedies for small or large lies, deceptions, misleading or verbal sleights-of-hand. The legal system can potentially both investigate and paralyze these acts, but neither the culture nor the procedure, other than in those cases typically both egregious and repeated, appears interested in doing so. Part of the reason lies in the prudence and self-interest of lawyers worried about their own occasional infelicities, part with the distrust for the referees of such deceit, usually judges and, less commonly, bar disciplinary committees.

[49] It is worth noting how simple assault and wrongful death cases in pretort societies, often based in ordinary negligence, resulted in revenge murders, blood-feuds, and mass killings. A classic account from Norse history is Njal's Saga, a thirteenth century account of how an Icelandic killing led to a fifty-year blood-feud. A wrongful death suit could have saved over a hundred deaths. A very different (but brutal as well) analysis, relevant to Balkan history, is found in Margaret Hasluck, *The Albanian Blood Feud*, Law and Warfare (Paul Bohannan, ed., 1967).

They are too often thought to be unable to get the decision right or more exactly, sort through the shades and blends of misconduct to get the color or the texture just right. Yet here, some indifference to the more egregious untruths and deceptions, while morally unattractive and politically often kept hidden, serves a number of useful purposes. It prevents a diversion of the debate from the real issue of the underlying tort litigation, reduces the heat of conflict, and often provides the underlying dispute a chance for resolution. Venting clears the air, as it should. A strategy of ignoring the deception that allows finger pointing as to who started what first allows the consequence of an undiverted scrutiny of the original misbehavior. In this way, widespread indifference to truth is more pernicious than the occasional contempt for it.

A brief word about mutual self-destruction, which might appear to be an irrational strategy. As game theorists have pointed out, irrationality can be a rational method to achieve an aim.[50] Take Parfit's illustration.[51] A homeowner is being robbed, and told that if he fails to open his safe within five minutes, his family will be killed, one after the other. The police will arrive but not for at least fifteen minutes. The homeowner is worried that if, in fact, he follows the orders of the burglar and opens the safe that, once having handed over its contents, the burglar will nevertheless kill both him and his family. To prevent this, the homeowner reaches for a drug that renders him temporarily irrational. By rationally consuming a drug to make himself irrational, he counters the dilemma posed by the burglar. That is, being irrational, he is no longer susceptible of being rationally deterred. The threat to his family and to himself has no force. A rational burglar, in such circumstances, in despair of gaining the contents of the safe by threat, is likely uninterested in gratuitous (as opposed to prudent or beneficial) violence. Moreover, the drug potentially has a mutually beneficial effect. It could make any identification by the police doubtful, which makes killing the homeowner unnecessary. Understanding all this, and being rational, the burglar flees. It would thus be rational for the homeowner to choose to become irrational.

Irrationalism and irrationalism in the service of mutual self-destruction are formidable weapons in tort litigation. Three simple examples are given here, although there are many more. It may be in both sides' interest to negotiate a settlement, but an irrational stance on one side leaves the other with a choice of continuing down a mutually destructive course or paying more. Similarly, costly discovery – more depositions, more briefs, additional expert witnesses, and additional travel – may be mutually unwarranted, yet reward one side irrationally, indifferent to the costs. Finally, the use of any particular piece of evidence may prove mutually embarrassing, even destructive (perhaps revealing bad or criminal misbehavior that triggers additional, negative

[50] Thomas Schelling, The Strategy of Conflict (1960).
[51] Derek Parfit, Reasons and Persons 12–13 (1984).

consequences), yet it is revealed or threatened to be so by one side to gain an advantage.

There are a variety of strategies to counter irrationalism and mutual destruction, including recurrent judicial intervention, multiple mediations, and resort to sanctions. Two strategies, one positive and one negative, are more interesting. The positive strategy involves barring the fruits of irrationalism to the irrational party. Court rules shortening or formalizing discovery; requiring settlement demands early, in writing and with justification; or penalizing settlement positions too far astray from judgments might achieve some of this. To some extent, the more draconian possibilities of participation and cooperation with the irrationalist by giving in and then being penalized, as were those who under English law paid pirates under threat and then found themselves severely prosecuted by the State for doing so,[52] are less attractive in tort law. Nevertheless, endless briefings, third-party subpoenas, multiday depositions, and, in particular, meandering, self-indulgent, harassing, expensive, and endless trials can be discouraged and, in lieu of that, penalized. It all allows the position "I would agree, but I can't."

The other, a negative strategy, is more common. It is complementary irrationalism. Domestic relation disputes are perhaps infamous for this between the parties, but it strikes tort twice. The first concerns the litigants. Here the system, even in disarray, may have the beneficial effect of moving hostility from the home, road, workplace, and boardroom to the courthouse, a dramatically safer and more benign setting. The problem is the second strike, that of counsel. Cut adrift of what perhaps has always been only the fantasy of a morally high ground professionalism, locked into adversarial fights institutionally driven by clients prealigned (or no clients at all for plaintiffs in class action cases), and driven to generate fees first and resolutions second, strategies devoid of rationalism become attractive. In that this proliferates rather than ameliorates conflicts, it is a frustrating consequence of lawyers seeing themselves as institutional players rather than as aids to dispute resolution.

The class action problem is worth a further mention. From the plaintiffs' counsel's end, class action cases present the opportunity to jettison ordinary clients altogether. The class is created – perhaps invented, perhaps discovered, perhaps constructed, usually degrees of each – and assembled in a manner potentially prior to, and unconnected with, clients. Normal notions of duty, confidentiality, privilege and loyalty are absent or at least reshaped beyond normal recognition, whereas the personal experience of a professional relationship – counselor, advisor, confidant, traffic cop, therapist, and handholder – disappears. The class constitutes a lonely crowd,[53] distant from counsel and

[52] Schelling speaks of the consequence of this English law as stripping the pirates of their power to intimidate. This might be a little overly optimistic. See Schelling, *Id.* at 19.

[53] The concept is, of course, that of lawyer turned sociologist David Riesman, The Lonely Crowd (rev. ed., 1969).

from each other. Strategy, negotiation, or particularized problems never rise to the level of mutual discussion and a general loss of voice, presumably at the benefit of significant compensation otherwise unobtainable, occurs. The price of success is silence. Loneliness affects truth: information, knowledge, and experiences unconveyed can hardly inform, let alone become the basis of further informational growth and richness. The larger, class-action photograph taken from a distance may or may not accurately incorporate or reflect any of these concerns.

These issues present a basic challenge to the integrity of any tort system, and more pertinently here, leave long behind the bedrock of rational discourse. Before one can assess veracity and then accuracy, there needs to be agreement about the purpose of the discourse. Irrationality can be put into the service of selfishness directly or indirectly through the achievement of mutually destructive results. Either way, it undercuts that agreement. This problem presents a fundamental concern to a system which, although it allows selfish if rational self-interest, runs that interest through a nonpartisan forum putatively operating by reasoned and justifiable standards. The system often fails in practice, but irrationality challenges even the aspiration of success. Feigned irrationality has thus been something of a cottage industry in the profession, with many practicing that irrationality so well as to throw into question the feigning of it.

What can we conclude? Candor for the lawyer is like reluctance for the soldier. It challenges and undermines the institutional integrity of the system, courageous after the fact if the challenge is warranted, while undermining the morally justified and being insubordinate and illegal if not. Unfortunately, American tort law often invites comparison to a valiant army defending a tainted government. Soldiers and sailors performing their duties on behalf of such a government – even assuming the rules of performance themselves are justifiable, humane, minimally intrusive, and within the reasonable confines of due process – pay a steep personal and institutional price for doubt. Treason, death, the death of friends, the loss of battle, and the abandonment of cause and country can arise from such doubt. Instead of loyalty directly tied to moral principle or political good, the combatant is required to offer loyalty directly to the government, with presumed indirect gains achieved down the road. The wisdom of historical perspective deals harshly with many such campaigns, but that is armchair politics. The lawyer is not as fully engaged – the stakes are lower, the choices more attractive, the time-frame wider, the conscription absent, the maneuverability greater, the resort to neutral third parties (courts, disciplinary processes, other corporate, organizational, family, or insurance players) more common – as the soldier. That suggests that role performance, conduct on behalf of an organizational or politically driven agenda rather than morality or conscience, should not have the same degree of insistence or loyalty foisted on soldiers.

That is not the issue here. This is not the place to enumerate specific dos and don'ts. It is the place to suggest that lawyers realize what soldiers often also understand: they are defending the indefensible or, at least, employing tactics

and brandishing weapons that ought not to be used, or used readily. The duty to speak truly, though out of school, is inversely proportional to the quality of that school. Put otherwise, the worse the system – the junkier the experts, the more obscure the discovery, the fewer the peers in a jury of one's peers, the more the insurance coverage exposes, the more checkered the whole truth, the slower the speedy justice, the less reforming the tort reform, the more absent the justice in the justice center or on the panel of justices, the more tort law is driven by money, politics, power, ignorance, stupidity, perjury, ignorance, sloth, or avarice – the less compelling are the claims of loyalty to it. The tort talk issue, then, like historical events, occurs twice: first as tragedy, then as farce.[54] Initially, the talk is sanctimonious or (among the better informed) hypocritical, with the championing of both rules and results clearly legally mediocre, morally compromised, ethically unjust, and factually disingenuous, all spoken with a false reverence. Later, the verbal reiteration becomes either celebratory or pervasively condemning – praising procedure, form, myth, and process or proposing that the system be put to rest with no cogent alternative suggested – lauding or berating a system absent concern for candor or truth. From complaint and answer to closing arguments, does the legal system ever get it right? Does it try? Does it, or anyone, seem to care?

[54] The reference is to the insight of Marx, building on Hegel. "Hegel remarks somewhere that all facts and personages of great importance in world history occur, as it were, twice. He forgot to add: the first time as tragedy, the second as farce." Karl Marx, The Eighteenth Brumaire of Louis Bonaparte 15 (New World ed., 1963; orig. pub., 1852). The early Marx, like his mentor Hegel, was often a shrewd observer of the passing show, but (again like Hegel) too often drew the wrong conclusions from those observations. The later Marx got neither the facts nor the implications right, with well-known savage and tragic results.

5

Tort Encounters Contract

We live in a society that celebrates freedom. In nearly every respect, that value judgment is lauded over others. Political and social contests race to claim the title of "the most favoring freedom," "the greatest champion of liberty," and "the most likely to protect individual rights." Regulation, on the contrary, is a concept requiring a great deal of apology, and equality (other than, of course, equality of freedom as, for example, with rights of educational opportunity a prerequisite to being able to implement one's freedom) is always somewhat suspect, perhaps socialistic, marginalized to those areas where free-market forces produce a bad result, like racism or monopolies, without any justification, or at least any justification we wish to hear. Of course, equality is important. Yet stripped of the equal right to liberty – that is, the equal rights to vote, to education or employment, or to other rights of participation that are more about freedom than equality – the entire concept of equality typically comes down to fairness or justice arguments concerning participation in the political process. For example, everyone deserves a fair trial.

It could be otherwise. We could think, "Ah, I live in a society with great equality," "I like to see that others are similarly situated to me," or "I love the fact that wealth is distributed with unusually low standard deviations from the norm." We could glory in the hardy and shared air of an equal society. We could be pleased by how much other members of society have prospects like our own. We could think this, but, in general, we don't.[1] Whether many or a few share our income, achievement or happiness, our good looks or mediocre talent, our fraught anxieties or our genuine pleasures is a concern typically so remote that it would be surprising to hear it mentioned. Freedom is different. We celebrate it, revel in it, and think of many issues involving systemic political

[1] Nor have we done so historically. As Tawney noted, "Those who dread a dead-level of income or wealth . . . do not dread, it seems, a dead-level of law and order and of security of life and property. They do not complain that persons endowed by nature with unusual qualities of strength, audacity, or cunning are prevented from reaping these full fruits of the powers." See R. H. Tawney, Equality 85 (4th ed., 1952).

problems (e.g., with poor urban schools and the alternative of charter schools) as solvable by the infusion of more freedom. The brake on this worship at the altar of freedom is not equality, but, in general, bodily integrity, a category that includes public safety and public health. Thus, controls on crime, drugs (therapeutic and recreational), machinery, borders, and terrorist activities are often given a free pass by freedom-lovers in the name of the protection of bodily integrity.

Of course, regulation is vastly more widespread than that. The economy, the workplace, the professions, energy, education, transportation, mining, shipping, manufacturing, banking, insurance, and communications, to name just a few areas, are tightly regulated, with little apology. Yet, that is not quite accurate. Under scrutiny, regulation, when not pure corruption, is sent on its heels when reasons of freedom or bodily integrity cannot be cited as its justification.

The legal system, while it carves out the enormous additional arena of corrective justice, appears to follow this lead. Contract law is deemed ascendant over tort law. Contract represents freedom, choice, open markets, and the exercise of individual rights. In fact, freedom is so clearly advantageous to the celebrants of open markets, in general, and contract, in particular, that the ideal would be that any thought of the need for coercion, regulation, or even law fades away.

> The coherence of many social institutions – organized religion, international trade, criminal societies, families, clubs, the private arbitration tribunals maintained by many trade associations and stock exchanges – is minimally and sometimes not at all procured by threat of public coercion. An important example is the ordinary commercial contract. Most such contracts would be obeyed even if there were no legal sanctions for breach, simply by the implicit threat of the disappointed party to refuse to engage in mutually beneficial exchanges with the breacher in the future.[2]

One measure of how we value contracts is our indifference to many of the consequences of contract choice. This indifference extends to a vast array of contract arrangements that, barring agreement, would be hard to justify enforcing in any law court. Bank loans may be overreaching, utility arrangements onerous, waiver of substantial civil rights in hiring outrageous, whereas adoption, surrogate, and marital settlements often create little protection for parents about to lose, forever, their children. Yet, such contracts are common and unexceptionable. Consider some of the types of bothersome-absent-agreement agreements briefly.

For instance, there is the ignorance agreement. I think I am selling you my great aunt's art class project; you recognize it to be a Rembrandt. Some of these

[2] Richard Posner, The Economics of Justice 142–43 (1981).

ignorance agreements are labeled as unilateral mistakes of fact, but this only is partly suggestive. We are endowed with or acquire vastly different storehouses of knowledge, wisdom, and shrewdness. If we wish to promote freedom, we need to let unfairness lie where it falls, even on the ignorant, uneducated, untalented, unaware, and unwily.

There is the low voluntariness agreement: I accept a job without decent pay or benefits, take a loan with draconian repayment conditions, or accept services that waive rights, remedies, and benefits. The lack of voluntariness is defended, and to some degree is defensible, by the direness of the preexisting situation. Individuals often face a myriad of poor choices, and stripping them of the one least terrible (by their own calculation) does little more than deprive them of freedom of choice. Take a well-known example of such stripping, *Williams v. Walker-Thomas Furniture*.[3] There, an overreaching department store's credit practice involved taking a mortgage on, basically, every table, chair, and towel possessed by a new consumer, no matter what that consumer bought. Miss a payment on a tea kettle, and every possession in your house is fair game for the sheriff's sale. The court struck down the practice, but what is significant is the loneliness of that decision. One can only suspect that the market-based argument has proven universally persuasive, that is, that the economics of operating an otherwise marginally profitable, innercity store requires tougher credit practices, but in total, this inures to the overall benefit of local consumers otherwise deprived of a place to shop within easy access.

In other words, in the law of contracts, freedom's demands trump the troubling issues raised by the results that freedom achieves. Freedom's vehicle is contract. If not fraudulent in their formation or illegal in the purpose (one can't sue one's drug dealer for specific performance when, although cash was paid, the heroin was not delivered, let alone one's prostitute or killer for hire for failed performance), contracts reign triumphant and enforced. We can see this in the squeamishness to enforce paternalism, the policy that recognizes that many individuals fail to act in their own self-intent. We could stop (or attempt to stop) smoking, drinking, mountain-climbing, even overeating and suicide, if we wanted to impose prudence on a risk-taking population. In fact, unless the imprudence is costly to others – second-hand cigarette smoke or helmetless motorcyclists whose hospital bills are absorbed by the state – personal, if unintelligent, choice is largely sovereign. Thus consent – whether ill or well-considered, knowledgeable or ignorant, tempered or hasty, risky or prudent, flippant or serious, sane or possessed – supersedes morality, justice, fairness, even decency. Thus, consent trumps morality, justice, fairness, and decency and does so whether ill or well-considered, knowledgeable or ignorant, tempered or hasty, risky or prudent, flippant or serious, sane or possessed.

[3] 350 F.2d 445 (D.C. Cir. 1965).

Tort, by ideological contrast, is law's shoddy stepchild. It regulates and dictates absent choice and consent, assessing liability and damages according to formulas from on high (often with apparently floating standards of conduct), and gives little or no credit to the intentions of the parties. The picture that might appear as realistic, then, is this: we applaud and apply contractual efforts and look to tort law only in two areas: where contract law has not come into play or where concerns of bodily integrity are sufficiently serious to render consent unnecessary. Such a picture, however, would be mildly distorted. The reality is that tort is dominant, and contract typically marginalized. What I want to share here is not only that that is the case, but that it is a good idea. Tort ought to be what it is: ascendant.

There are good reasons for thinking tort to be a concept worth having, and not only as a supplement to failed contracts (a subject we shall return to later). Worker and product safety, automobile and train accidents, professional malpractice, and sharp and fraudulent practices all look to be situations where a tort remedy is useful, even necessary. In fact, those promoting a freedom-loving, minimalist government, whether capitalist or libertarian motivated, might applaud tort as the least intrusive way to correct imperfect markets, or at least, the failures of those markets to achieve the happiness, pleasure, benefits, and utility that market advocates champion. Rather than have the government prosecute indifferent asbestos manufacturers, shady stock promoters, manufacturers of poorly labeled drugs, or those who attempt the most apocalyptic of all antimarket tactics, monopolists, let the product liability, blue sky, negligent labeling, and antitrust laws serve the public good at private expense.

The idea of a parallel market, perhaps a policing market, is not as far-fetched as it sounds. The policing market would include both various government entities and private actors. Coordination might be seen to be a problem, but that is true for all markets, and when coordination is mutually advantageous – as in the case of NASD or NYSE arbitration, where semigovernmental forums host and regulate claims, and then have licensing forfeiture clauses in the case of nonpayment of damages enforceable through governmental powers – it occurs, just as in economic markets. Moreover, there can be role cross-over, as when state attorneys general file either as private or public entities to abate a nuisance or control insider trading. Those who see market disanalogies often look to insurance, which, like a catalyst, enters and regulates the equation without formally being part of it. But that analogy is both wrong and incomplete. The incompleteness lies with the powerful institution of plaintiffs' lawyers, their organized bar associations, and the introduction of the contingency fee, particularly in class actions. Luban has spoken of the plaintiffs' bar as being, more or less, incentivized bounty hunters that save the state the costs of enforcement of public safety rules by allowing high rewards in the case of punitive damages. But why stop there? The behavior is ubiquitous. Plaintiffs' lawyers trawl for business, advertising and politicizing at every opportunity, and support

a structure of wildly inflated special damages and wondrous general damages that allow both for satisfactory recovery for their clients and affluence for themselves. If actual awards were limited to real losses only, under any calculation of that figure, then there would be no room to pay counsel. The wink and nod at a correction that is to achieve justice simply ignores this fact.

The policing market is not one designed (by default, intention, or an invisible hand) to achieve justice. It does not pretend to do so. In that there is a restoration of matters to what they previously were, the overall level of justice may or may not rise or fall. If an impoverished poacher kills the wealthy earl's rabbit, and is made to pay damages for it, does that remedy increase the overall level of justice (other than in some uninteresting and circular way) in society? Not unless we use the term "justice" to mean an amoral correction in the way the stock markets or housing markets, after a period of greater or longer than usual growth, are said to correct. The problem is that "justice" as a term gets considerable political and ethical mileage. Stripping it of at least part of its core of fairness without changing the term is, to say the least, problematic. More likely, it is disingenuous.

The issues of corrective justice here, which at some point blend with distributive justice (who has what, and why), are more contentious in the criminology and ethical literature than perhaps they need to be, but are, in any case, largely not a theoretical problem in tort.[4] The problem rather, is social or political. That said, we should be clear about what occurs in the courtroom. For example, Coleman is concerned about our earl and poacher (though Coleman looks, not surprisingly, to automobile accidents for a more topical illustration), and sees that awarding damages to the earl presents a problem for distributive justice. He nevertheless allows that the earl, "has a valid claim that he has suffered a wrongful loss and is, therefore, entitled as matter of corrective justice to its repair."[5] The dubiousness of calling it "justice" at all involves a large and controversial set of political judgments, and is not in any clear way merely definitional or able to be shown to be objective. But there is a related defect, in terms of justice, fairly attributed to the tort system, best noticed by Coleman's argument getting it wrong. He believes that:

> Corrective justice requires that wrongful gains and losses be annulled. The principle of corrective justice is thus both *backward-looking* and *conservative*. It is backward-looking because it seeks to recompense individuals in order to annul their undeserved losses, not to influence their future behavior. Of course, compensating those who are entitled to repair and not compensating

[4] A recent textured and thoughtful look at these issues, with reference to the usual literature, is Jeffrie Murphy, *Presidential Address of the American Philosophical Association, Legal Moralism and Retribution Revisited*, 80 Proceedings and Addresses of the American Philosophical Association 45 (2006).

[5] Jules Coleman, *The Structure of Tort Law*, 97 Yale L. J. 1233, 1248 (1988).

> those who are not will affect the behavior of both; no one denies that. The point of compensation, however, is not to influence future behavior, but to annual [*sic*] wrongfully inflicted losses. (Notes omitted.)[6]

This simply is not the case. It is only very occasionally, most centrally with restitutionary claims, that wrongful gains are annulled. This is true throughout the civil system, both in the case of contracts and torts. Of course, it is well-accepted going back to Holmes's famous comments that contractors ought to be allowed, even incentivized, to break a contract when the breaking is good, good being less than the benefit gained by breaching. The same is true in tort. Suppose when trespassing on your land, I find a wallet, putting me well ahead of the nominal damages of $1.00. I owe you for the trespass. Suppose by driving recklessly and hitting your parked car, I manage to get my wife to the hospital in time to deliver a healthy daughter; that benefit is infinite when compared to the dent and scrape. Suppose I defraud you on my accounting bill and, though you recover the overcharges later (perhaps, and then some, with legal fees and punitive damages), the sum taken allows me to complete the purchase of a gold mine. My overbilling would be a great success. Annulling wrongful gains is rarely part of the tort picture.

We need to spend another moment on this notion of corrective justice, Coleman's or anyone else's.[7] Of course, we should be reluctant to attempt to clarify a complicated concept (tort) by the use of a much more difficult concept (justice). In fact, the issue can be ducked, for an emaciated notion of justice (perhaps a mitigated notion, to be more Humean) is all that is required. Let us again ask what would be involved in annulling the benefits received by the wrongdoer. Suppose an ambitious surgeon wants to use a dramatically new surgical procedure, one that if only he could use it once might well bring him fame and fortune. However, finding the right patient (perhaps because of a need for a lack of complicating factors, so-called comorbidities, or one not too far advanced in the disease or condition) has so far proven difficult. Such a patient finally comes along, the procedure issued, and it proves a great success. While the surgeon glows in the light of therapeutic success, the patient, though relieved of his underlying condition, dies of an easily curable, opportunistic infection. The surgery, indeed, sky-rocketed the surgeon's career, allowed him to secure a promotion to a far better hospital, gained him a prestigious medical school

[6] *Id.*

[7] Coleman is hardly alone on wanting disgorgement of gains. MacNeill wants profits from the sale of an item beyond market value returned to the victim. It would thus be advantageous to be the victim of a particularly good salesman. Farnsworth, equivocally dividing the baby as usual wants to split the profits. Stealing $10 for a winning lottery ticket would be treated accordingly. Any moral or utilitarian theory supporting any of this is difficult to imagine. Ian MacNeill, *Efficient Breach of Contract: Circles in the Sky*, 68 Va. L. Rev. 947 (1982); E. Allan Farnsworth, *Your Loss or My Gain: The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 Yale L. J. 1339 (1985).

appointment, landed him a job as a television network medical commentator, and even impressed a colleague sufficiently, who, noticing a new and more brilliant side to him, became his wife. He also was sued for malpractice. Does a single thing that happened to our surgeon's career and marriage count in liability or damages? Should it?

The corrective justice issue works both ways. Consider the same patient, who, though physically cured, continues to be, due to the underlying disease process, emotionally abusive, and quite aside from the disease process, wealthy, selfish, and likely to live a long time. The only individuals who would have the right to sue if he died, his next-of-kin, are in fact subjectively (in their own, perhaps selfish, minds) worse off, and objectively (by the legal criteria of loss) also worse off. The benefit to them occurs immediately upon death, with or without any law suit for negligence. Let us return to the original case, the patient's death. Though far from unhappy at the course of events that took his life, his next-of-kin file a wrongful death, medical malpractice case. Liability is admitted. We will put aside the fact that the highest and best use of the decedent's property would be to leave it where it now has landed: in the hands of his next-of-kin. Thus, any economic analysis singularly promoting utility through this criterion would find no damages. (In fact, economically, the surgeon merits a reward. It was a good killing.) Rather, let us look to the normal (more traditional) way to assess losses or measure damages suffered by the family. Should their relief at the end of psychological suffering, cessation of verbal abuse, relief at not observing the Scrooge-like avarice of their own relative, and pure pleasure at receiving their inheritance early and with certainty count in any damages assessment? Perhaps there was a life insurance policy ready to lapse or the fear of a radical change to their detriment in the decedent's will. Perhaps the deceased patient was thinking of leaving his estate to his surgeon. Should any of this count? That is, do we mitigate compensation by the side-benefits of the tort? Typically not, because justice is weighed against peace, and peace only requires a not too queasy blood-letting short of war. Give the victim something, but don't scrutinize the matter too closely. Where we draw the limits of recoverable damages has always been a political issue. For example, personal injury victims' families in tort law routinely have consortium rights, the rights variously to companionship, services, and society from their injured spouses or relatives. In contrast, for railroad workers and longshoremen hurt on the job, liability is broad, but damages do not include any consortium claim.[8] Similarly, for ordinary employees (those not in a special class, including, for example, rail, federal government, uranium, or dock workers), a castrated worker's wife fails to have the rights of similarly situated spouses of product liability mishaps or the victims of automobile accidents. The sole remedy a worker has from his employer is with the workers' compensation system. We allow expedited and

[8] See Federal Employers' Liability Act, 45 U.S.C. §51 and Jones Act, 46 U.S.C. §688.

less expensive remedies in FELA and workers' compensation as a trade-off to more cumbersome but more full-blooded remedies.[9] An economist may well see a useful trade-off (or equivalence) between an expedited, certain remedy and a more prolonged, riskier one, but the justification lies within the realm of politics, not with justice.

Let us now return to the core of contract's central governing principle. On the one hand, we have seen that even when voluntariness and fairness operate under some disability, we still embrace the notion of choice. On the other hand, fairness in the guise of corrective justice is hardly guaranteed in a tort system oblivious to the concerns of freedom. If freedom represents the highest value, the choice between the two seems clear. Contract is the vehicle that gives the most desirable results and the one, in close or borderline matters, that ought to be controlling. But it is not; and the reasons it is not are myriad, and worth considering. They involve, mainly, either the boundaries of contract or the core purposes of tort. Before considering them, we need to take a longer look at the connection between freedom of choice and contract.

The defining feature of the justification of contract is freedom of choice. But to move contract to freedom involves a step at once complicated and interestingly controversial. It takes (at least) two to contract, and communicating choice is accomplished with various degrees of success in different ways. Miscues, mishearings, misunderstandings, and agreements not normally considered to be binding (I think it will rain, you say you agree and plan a picnic) leave us short. There is the old phrase of "the meeting of the minds," but that is at best metaphorical and question-begging. Brains receive input and respond, minds may well do the same and form intentions, but if by "meet" we mean line up neurologically parallel or having formed mirror intentions, that is asking for too much at an evidentiary level to find and extremely unlikely in reality to expect. Moreover, it is hardly necessary. The legal question always comes down, more or less, to this: once you say or do something that should cause

[9] Providing different rights and remedies to injured-on-the-job workers for essentially the same conduct can be seen by even a glance at longshoremen with the Jones Act, railroad workers under FELA, other on-the-job employees governed by state or federal workers' compensation acts, and third-party construction cases with independent contractors hurt on the job site. Anyone sanguine about generating a consistent set of principles or grand theory that would, at the very minimum, treat like cases alike, would be anxious when looking at conduct that, in any Skinnerian sense, is identical but yielding disparate treatments. The debate as to which law to apply, borrow, or use, and how any particular legal scheme may operate under different or at cross purposes from its legal cousins is well-illustrated in the majority and dissents in *Sea-Land Services, Inc. v. Gaudet, Adm.*, 414 U.S. 573 (1974) as to the connection between state court settlements and Jones Act claims, and *Norfolk & Western Railway Co. v. Freeman Ayers*, 538 U.S. 135 (2003) as to whether fear of developing cancer secondary to job-related asbestos exposure is the proper province of FELA liability. The concern that there exists any single, logic-driving result when there appears to be an indefinite number of different such results based on the same facts is reminiscent of the skeptical musings on the logic of sequences by Wittgenstein in his *Foundations of Mathematics*.

me to think we have some basic, agreed rules for future action reliant on each other's future acts, have I done enough to allow you justifiably to believe this and can either or both of us rely on this something? Concretely, when does a prediction become a promise? When does a promise provide grounds for a claim? When do you get to enforce that claim? These concerns are based on the larger issues of the concept of agreements. We often never get there. Obviously, the opportunities for mishaps are everywhere, not only because of the vagaries of language, the miscues of communication, and the misreadings of intentionality. The content of free choice, the initial step, is itself always problematic and often illusory. What is it that has been chosen, freely or otherwise? It turns out that any choice attributed to any likely contract maker involves choosing only some of the facts and less of the law.

Part of the lure for contract enthusiasts is the attraction of the paradigm case. That case is clear, friendly, and widespread. I agree to sell you my racing bicycle for $600. I could keep the bike, gift it to a relative, donate it to charity, fix it up and use it, offer it at a yard sale or on eBay, or junk it. It is my choice to sell. Similarly, you have many uses for your $600, and those uses are yours. You could buy another bike, another recreational activity (membership at an upscale health club or a more pedestrian YMCA), or other goods or services, keep it, gift it, loan it, invest it, or squander it. We each make a free choice, or put slightly differently, we exercise our freedom, our liberty, by buying and selling voluntarily and knowingly, uncoerced, and for our own hedonistic, utilitarian, pleasure-seeking purposes.[10]

Let us tarry a moment and look at another central or paradigm case, taken roughly from Nozick, concerning services and employment.[11] Suppose a professional athlete is considering whether to continue to play for another year or to retire. His team sufficiently incentivizes him to stay, at the cost of higher ticket prices. Everyone is happy. The athlete has increased his wealth while only slightly delaying his retirement, the team owners have a more valuable

[10] Clearly, this is the central type of case for Hayek's widespread attack on government involvement and regulation. "It is necessary in the first instance that the parties in the market should be free to sell and buy at any price at which they can find a partner to the transaction and that anybody should be free to produce, sell and buy anything that may be produced or sold at all. And it is essential that the entry into the different trades should be open to all on equal terms and that the law should not tolerate any attempts by individuals or groups to restrict this entry by open or concealed force. Any attempt to control prices or quantities of particular commodities deprives competition of its power of bringing about an effective co-ordination of individual efforts, because price changes then cease to register all the relevant changes in circumstances and no longer provide a reliable guide for the individual's actions." Friedrich Hayek, The Road to Serfdom 37 (1944).

[11] See Robert Nozick, Anarchy, State, and Utopia 161–164 (1974), where he uses Wilt Chamberlain's superior bargaining position to allow him to weigh wealth versus leisure. Nozick uses the example as an illustration of how liberty upsets and triumphs over pattern distributions (regulation). However, whatever its literary or central case merits, it suffers in its attractiveness from the same problem as more peripheral cases, in general.

and competitive product, and the fans are willing to pay slightly more to see an event that is significantly more attractive. Each has made (or will have the opportunity to make) a free and uncoerced choice, highest and best use parameters are being respected, and the whipping-boy of regulation is shoved aside. Of course, fans may be peeved by higher ticket prices, but that concern hardly rates as one involving the concept of justice or potential need that would trigger regulation. Not only might fans be content to pay more for superior compared to less for mediocre athletic entertainment, but the choice of entertainment venues is theirs to make. If the NBA is too expensive, they can go to high school basketball games for a dollar or stay home and watch the pro game on cable.

Of course, many agreements are not like this. Impoverished, sick people buying expensive medicine or workers with poor skills and few opportunities taking on dangerous work are probably more common examples of contracting parties than racing-bike sellers and professional athletes. There, the value of contract may wane, or at least need justification and argument against competing values. I want to make, however, quite a different point with regard to tort law. Our bicycle seller and athlete know what it is they want, their choice is (relatively) clear, their expectations unproblematic, and the consequences of their action subjectively and objectively foreseeable. They know what it is they have done by entering the deal. To some extent, we can explain the de facto limitations of contract law, or the complementary reach of tort law, by examining the other deals, the ones where intentionality, foreseeability, and consequentiality are unexpected, uninformed, surprising, incomplete, unknowing, unplanned, or unsuspected.

What kind of deals are these? The unfortunate answer is "all kinds," and dividing territory is a messy, Balkanizing process. We are, frankly, seduced by the attractiveness of the racing bicycle example. Singular sales transactions for real estate or for goods present an alluring paradigm of straight-forward intentionality meeting reasonable expectations. So do loan agreements, stock purchases, and most goods for a price transactions. Perhaps more important, these transactions are not only singular, but instantaneous. They lack duration. Finally, they are relatively transparent. What could go wrong?

If life were only that simple. Consider a construction contract marked by (to name but a few of the often unforeseen contingencies) labor strikes, an influenza epidemic, fire, material shortages, access-road closings, supply shortages, subcontractor insolvency, theft, sink holes, terrorists, packs of wild dogs, hurricanes, floods, tornadoes, excavations that lead variously to environmental concerns, Indian burial grounds, cave drawings, a Mafia killing ground, or an oil field, electrical utility failures, gas explosions, or a blizzard. Lawyers may or may not add language covering some or all of these contingencies. This is a stale and irrelevant point. It is not the lawyers' intentions that matter, but the parties'. The parties may well be oblivious, ignorant, myopic, or blithely nonchalant. It would not have dawned on them that they could be building on an ancient

and (to some) sacred burial ground. No one figured in the possibility of a sink hole swallowing a largely complete building or a leaky gas pipeline blowing it up. We want to protect expectations, intentions, and choice. But what if none of that is in play? Why should we care about extracting in some tortured and torturous manner the intent that is not there? In fact, we don't care, and we can see that by looking at areas once dominated by contract and now almost purely tort.

We can start with product liability. The history is one of the law moving from contracts with express, assumed, intended, contracted warranties to undesired, unexposed, undisclaimable, undeniable, unforseen, and foreseeable strict liability in tort. Two major steps were made on the way, although even stating that makes any close observer of the common law cringe. The actual steps are too numerous to mention, and are characterizeable as uneven and faltering, made in fits, starts, and regressions, and becoming props in legal competitions judged for attractiveness, utility, and desirability to be awarded a medal for being major. A lawyer, litigant, or judge looks at an opinion that seems right, appears just or equitable, or moves precedent in the right way. The credit typically goes to what is considered the breakthrough decision. That said, picking out the one decision that warrants being dubbed the work of genius is analogous to picking a certain species as the inevitable evolutionary winner. The logic may be different – a logic driven by judicial politics and political ethics versus genetic mutation and natural selection – but the arbitrariness of a singular stopping point and the vanity or egoism of seeing selection as naturally coming your way is analogous. Nevertheless, all the apologies, caveats, and noticed complexities aside, there can be seen to be two major decisions in moving from contract to tort: the discarding of privity and the elimination of negligence. Both, on their face, are surprising steps.

At one time, in order to sue a seller for a defective product, one had to be the direct buyer of that product. Subsequent, or downstream, buyers, or others who might use the product, had no rights to file a suit for injuries they received from a product poorly manufactured, designed, or assembled. The idea of direct connection, called "privity," is firmly contractual. It had exceptions, concerned with so-called inherently dangerous products, and justified by the animistic idea that certain things, once put in the marketplace, could continue (inherently) to do danger. Life was said to be put in imminent danger by such products. The list of things recognized as inherently dangerous was idiosyncratic. Poisons, scaffolds, and coffee urns made the list, circular saws and steam boilers did not.[12]

[12] See *Thomas v. Winchester*, 6 N.Y. 397 (1852) (poisons); *Loop v. Litchfield*, 42 N.Y. 351 (1870) (circular saws); *Losee v. Clute*, 51 N.Y. 494 (1873) (steam boilers); *Devlin v. Smith*, 89 N.Y. 470 (1882) (scaffolds); *Statler v. George A. Ray Mfg. Co.*, 195 N.Y. 478 (1909) (coffee urns). The law is interestingly summarized in what was not realized to be the beginning of its decline in *Huset v. J. I. Case Threshing Mach. Co.*, 120 F. 865 (8th Cir. 1903).

The selection process was suspect for being both under- and over-inclusive. Of course, every product was sufficiently dangerous to hurt someone, hence the existence of lawsuits. Yet most of the time, none of the products hurt anyone. In any case, inclusion on that list allowed a free pass on privity, but it never had either logical consistency or empirical support as to risk or hazard. If the creation of a duty rested with contractual intentions – part of the sales agreement included or implied what might in modern parlance be either a warranty of safety or a warranty of fitness for its particular purpose and no duty otherwise existed, then strangers to the contract (or at least strangers not intended to be beneficiaries of the contract) could not have rights under it. If the issue is making safer otherwise dangerous products, or minimizing the danger inherent in any product, then the intentions of contracting parties to one another, rather than to the world (a general duty of care, as, say, automobile drivers have to one another and pedestrians), would be irrelevant. If we are protecting choice and freedom to contract, privity, which limits duties to those freely assumed in the deal, would be paramount. Calling the object of the deal "dangerous," inherently or otherwise, would not change any of that.

In *Buick v. MacPherson*,[13] the ghost of privity was finally exorcized. Poorly manufactured or assembled cars could create liability, and no contract intent mattered. (Eventually, in *Henningsen*,[14] not only was liability implied, contracting it away was barred). The case law seems to suggest that there is an objection of contract here, but that is either trivial or false. Contract intentions do not come into play, whereas concerns of safety, central to a peaceful, civil society, are central.

The second development is that of strict liability in tort. Here, the entire notion is explained as historically contractual, an extension of express warranties.[15] The issue is how delusional one wants to be about intentions creating warranties. Strict liability grows out of implied warranties, a euphemism for conditions never agreed to, never thought about, never part of the deal. Again, as with privity, historically there had been a carved-out section of strict liability

[13] 217 N.Y. 382 (1916).

[14] *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358 (1960).

[15] There are parallel developments historically, complicated by the fact that the phrase "strict liability" never appears in any of the early cases. That said, Gregory views strict liability as having roots in trespass whereas Malone finds it with fire cases. One reasonably thorough treatment of all of this is Gary Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 Yale L. J. 1717 (1981). See also Charles Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359 (1951); and Wex Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 La. L. Rev. 1 (1970). Certainly, convergent forces typically are in play, but it is clear that the triumph of negligence as the dominant doctrine peripheralized competing notions of strict liability or at least chased them to the edges of tort. That said, negligence doctrine may well have been tainted by that strict liability, as Gilles has argued. See Stephen Gilles, *Inevitable Accident in Classical English Tort Law*, 43 Emory L. J. 575 (1994).

law, famously flowing from the quagmire doctrine of *Rylands v. Fletcher*.[16] That case, whatever it holds or has come to stand for later, stated:

> We think that the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at its peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape.[17]

This slim exception, one of only three,[18] concerns abnormally dangerous activities, but more than that, activities unnatural and abnormal. Whether judging naturalness either from a theological or a Darwinian point of view, it is hardly sound or sufficiently solid to be a basis of expanded liability. But then entered the self-appointed judges and legislators of the American Law Institute, an elite, self-perpetuating body of experts on everything legal.

In a patchwork of cases involving products that caused injury, various courts have felt the need to find liability (with or without much justification), looking to contract warranty as supplying a basis of reasoning. The cases were diverse and inconsistent, and hardly worth any rationalized reconstruction now, but were often rooted in notions of implied or express warranty. These were notions of contract – although, given the tortured history of English legal procedure, warranty can be claimed as a tort concept of sorts originally, arising out of the tort of assumpsit, which itself may or may not have merged into contract, but in any case it reentered the contract shelter,[19] perhaps not unlike adult salmon returning to fresh water after an adult life in the sea – and allowed liability in the strict or so-called absolute sense characteristic of contract law generally.

The American Law Institute, creating its Restatement of the Law of Torts, 2d, wanted the results of a mentalistic-free liability but valued at least the appearance of consistency, or perhaps some minimal semantic integrity sufficient to look for a way to draw a rule without resort to warranty. To use the chief drafter's words:

> All this is pernicious and unnecessary. No one doubts that, unless there is privity, liability to the consumer must be in tort and not in contract. There is

[16] The full citation, as the case moved and metamorphosed, is *Fletcher v. Rylands* (1866), L.R. I Exch. 265; 4 H. & C. 263; 35 L. J. Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur. N.S. 603; 14 W.R. 799; on appeal *sub. nom. Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J. Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest (Repl.) 283, 334.

[17] *Fletcher v. Rylands* (1866) L.R. 1 Ex. 265, 279–80.

[18] At least according to Philip James, General Principles of the Law of Torts 11 (1959).

[19] The field covering the evolution of strict liability and warranty carried on the backs of the medieval causes of action is arcane and not worth a leisurely (or even hurried) journey. The classic article is that of James Ames, *History of Assumpsit*, 2 Harv. L. Rev. 1 (1888). The first case is one in tort, *Fitz. Ab. Monst. de Faits*, pl. 160 (1383); but the matter had safely returned to contract four hundred years later in *Stuart v. Wilkins*, 1 Dougl. 18, 99 Eng. Rep. 15 (1778).

> no need to borrow a concept from the contract law of sales; and it is 'only by some violent pounding and twisting' that 'warranty' can be made to serve the purpose at all. Why talk of it? If there is to be strict liability in tort, let there by strict liability in tort, declared outright, without any illusory contract mask.[20]

Thus, in successive drafts, a provision that first was limited to food and drink was then extended to products for intimate bodily use, and then to every product under the sun. Of course, as theory outpaced both case law and less theoretical or more anxious practitioners, a comment m was added, allowing anyone who was stodgy or hide-bound or too slow to change to continue to use warranty, and a few courts, for some time, did exactly that.

The seminal case adopting, legitimizing, and then propagating the new standard was *Yuba Power*,[21] something of an incestuous *tour de force* by Prosser (the Restatement's author) through his former colleague, Justice Traynor. *Yuba Power* jettisoned intent without apology.

> Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purposes for which such liability is imposed.[22] (Citations omitted.)

We see here a retreat from consent, from contract, and the intention of the obligated party. Moreover, the justification in *Yuba Power* looks solely to health and safety concerns. But what is really lost? Answering that question is problematic only if we focus on the intentions of the obligating party. There may or may not have been a promise, with the idea that, for various reasons, a promise has force once expressed.[23] That is, one should accept the consequences of one's

[20] William Prosser, *The Assault upon the Citadel*, 69 Yale L. J. 1099, 1134 (1960).

[21] *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57 (1963).

[22] *Id.* at 63.

[23] See the treatment, for example, in P. S. Atiyah, Promises, Morals, and Law (1981), where he looks to the consequences of promising, although backs away at times from the reasons for enforcement of promises alone, where no performance has yet occurred (executory contracts). He does show the start of the process when, for instance, he writes "The notion that a bare promise is, prima facie at least, a binding moral commitment, irrespective of the reason for which it is given, was known to the later Roman lawyers. In modern times it can be traced back at least to the Natural Lawyers of the sixteenth and seventeenth centuries." *Id.* at 8.

own speech or acts, and voluntary liability is one such consequence. But to focus on the intentions of the parties in this context can never be fully satisfactory as part of the entire apparatus is missing: there never was agreement. Nothing mutual happened. The victim was not invited to the contracting table. This might seem obvious, but, in fact, too readily it happens that two separate goals are conflated: the desirability of protecting individual freedom by effectuating the manifestation of that freedom in contractual intent, and the desirability of protecting individual freedom by not imposing liability on those who neither assumed it nor foresaw it. The second notion – that of being free from tort – weighs less. Given the limitations often inherent in the first due to limited foreseeability, the contract giant shrinks significantly.

But what about two-party relationships where there is a contractual arrangement? What place does tort have there, and what place should it? Consider the area of professional malpractice. Politically the mind jumps to medical or hospital malpractice, but the area is vastly larger than that. Architects, accountants, pharmacists, various types of appraisers and realtors, dieticians, teachers, stock brokers, investment bankers, pension managers, talent agents, literary agents, business agents, sports agents, acting and sports coaches, actuaries, construction managers, tutors, civil and structural engineers, therapists, social workers, psychologists, private investigators, interior decorators, photographers, computer consultants, lawyers, clergy, veterinarians, Web designers, stylists, personal trainers, even dog walkers, babysitters, and personal shoppers: each can be held to owe a duty of care based on their profession or occupation. The duty arises based on an initial contractual relationship. Here we need to be careful for a moment, more careful typically than is the case law or legal doctrine generally. In order to parse the distinction between the activity that gives rise to a duty and the nature of the duty thus incurred, we need to digress and look at the metaphysics of contract.

There is a belief that a contract is a piece of paper, maybe even self-identifying (and self-referential in the regularly problematic and occasionally paradoxical way that many things self-referential can be)[24] with a heading stating "Contract"

The answer to the question "Why do it?" (i.e., why enforce promises?) is left maddeningly vague.

[24] Nothing is meant more (or less) than the problem highlighted by, for example, the APA sweatshirts that on their front state that the sentence on the back of the shirt is false, with the back stating that the sentence on the front is true. A more interesting self-referential paradox is, of course, Russell's Paradox. The problem is well-recognized in the philosophy literature but hardly so in law. Contracts are full of language referring to their own validity, with statements trumpeting that they are well-understood, voluntarily entered-into, and recognized as giving up certain rights. These statements are often interspersed between paragraphs indecipherable without years of extensive training and experience in the art of legal hieroglyphics. Do we really think that prisoner-of-war denunciations of the prisoners' own country are voluntary and freely made just because they say it is so? We can make the move in contract law from problem to paradox if we look at a contract provision

or "Agreement." If one wants to know the terms of the contract, one needs merely refer to the paper itself. If that paper states that there be "six flying reindeer for one night annually" in exchange for "eternal gratitude," then those things, reindeers for gratitude, constitute the precise terms. But this is clearly incomplete, even when both parties have signed the piece of paper, perhaps even under oath. An actor playing Shylock might sign such a piece of paper nightly – for much harsher terms, of course – but that hardly makes reference to the paper the end of the matter. Part of the problem is that one needs to intend to be bound, mean it when one says it, and that is hardly self-evident from any piece of paper. Shylock's portrayer does not really believe he is entitled to exact a pound of flesh. But that is only the problem's beginning. The contract terms are as much in play as the intent to be bound, and exactly for the same reasons.

Suppose I sign an automobile insurance contract with my local insurance broker, who also signs it as an agent of the insurance carrier. I also sign an additional, much shorter, excess or umbrella policy. Both policies provide liability and uninsured motorist coverage. Uninsured motorist coverage offers just that: it protects a victim of negligence on the road from having no remedy when the tort feasor has no insurance (perhaps not even a valid license) by allowing, subject to certain restrictions, the right to seek redress from the victim's own insurance carrier, which steps into the shoes of the tort feasor. The main insurance policy has an intrafamily exclusion in the liability section, but is silent about that exclusion in the uninsured-motorist section. The umbrella policy is silent altogether. No discussion concerning the policy terms occurred before or during the policy signings. I drive home, pick up my son, and promptly hit a fast-moving tree. My wife, as a natural guardian of my son, sues me on his behalf. I naturally call my insurance agent and he contacts the carrier. The carrier examines the policy and denies coverage. The intrafamily immunity clause apparently prevents any responsibility on the carrier's part for the harm I cause my son.

Who thought what? Who intended what? I might well have had a dim or no understanding of intrafamily immunity, either as an insurance clause or a legal concept, whereas the agent may easily (as little more than a salesman catering to risk aversion) have had less. The policy was purchased (explicitly) to protect all the members of my family. My minor son lacked the knowledge, intent, or capacity to enter any contract to protect himself, and if the immunity kicks in, he is left without protection. The carrier, some of whose employees (perhaps) understood the exclusion, never reviewed (or had the opportunity to review and

announcing knowing and voluntariness (perhaps a waiver or an indemnity specifically, perhaps the entirety) that is crossed-out and initialed as rejected. If I reject understanding then I have not understood what I denied, so I have not rejected the understanding, so I have understood it, and so forth. There may be a fine line here between vicious circle, infinite regress, and paradox, but the idea is clear: there is trouble. A short and entertaining introduction to these issues is that of W.V.O. Quine, The Ways of Paradox (1966).

agree to) the policy before the claim was made. But that is not all. By having been denied coverage on liability, my son has a case against the uninsured motorist tort feasor (me). Does that provision kick in? Again, intentions. I had none, whereas my agent had only the foggiest idea what uninsured motorist coverage entails. From the carrier's viewpoint, the underwriting considerations of allowing lower premiums on the liability policy provision by excluding an ordinary risk are often (even typically) unconsidered in pricing the uninsured motorist exclusion, as the kinds of risks involved in one exclusion in the same policy triggering payment in another are too subtle and complex to quantify. Finally, the excess policy is silent as to the exclusion. Does that mean that anyone – the agent, the carrier, or the purchaser (me) – has any specific intentions regarding that excess rider trumping, following, supplementing, or modifying the underlying coverage?

Insurance surely is the paradigmatic tort contract. It not only defines the scope and depth of coverage and the type, range, and quality of the legal defense, it often determines whether there is sufficient collectability to merit bringing a lawsuit. That said, in our example, who agreed to what? In a classic sense, was there a meeting of the minds[25] or, more interestingly, was the actual mind-meeting coincident with a sophisticated and mutual understanding of the written contract language? There is a literature designed to aid in ducking the issue.[26] Some in that literature argue that insurance contracts are form contracts and form contracts are special and immune from normal analysis. No one reads,

[25] This is a notion often ridiculed as some type of occult mind meld far from the realities of economic markets or actual behavior. For example, if I put four quarters in a soft drink machine, and it delivers a can of cola, have I had a mentalistic shared experience with the metallic machine? That said, there is something deeply revealing about the mind-meeting metaphor, for some shared union of linguistic understanding and predicted future conduct with mutual involvement is at the core of how we think about contracts. The classic theory was developed by Samuel Williston. Williston's influential ideas on contract formation can be found both in the first Restatement of Contracts (1932) in which he was the principal reporter and throughout the various editions of his multivolume The Law of Contracts (first pub., 1922).

[26] Even absent that issue, the mere interpretation has, in some courts, a bipolar aspect. To quote a typical court, "our goal in construing insurance contracts as with contracts generally, is to give effect to the parties' mutual intentions. If the terms are ambiguous, we interpret them to protect 'the objectively reasonable expectations of the insured,'" *Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal. 4th 495 (2005) (citations omitted). What the court actually is holding is that, if the contract is clear (and so are concomitant intentions of the parties) then follow it; if not, make it up (be objective without regard to the intents of the actual, litigating, squabbling parties to the suit). There are those who wish, more or less, to drop any facade of following contract language altogether, and move to a tort standard of reasonableness. Thus, Keeton argues that, "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations. Robert Keeton, *Insurance Law Rights at Variance with Policy Provisions* (pt. 1), 83 Harv. L. Rev. 961, 967 (1970). Keeton's view is largely unaccepted. See, for example, Mark Rahdert, *Reasonable Expectations Revisited*, 5 Conn. Ins. L. J. 107 (1998).

negotiates, or understands these form contracts. Based on that, (according to this literature), we can either conclude such agreements are invalid and that ordinary understanding counts (it would be relevant whether I had thought about this situation, or a legally reasonable person had thought about it, and concluded coverage would or would not apply), or that they are valid and the language does count. However, this makes a special case for avoiding reading what you sign, a distasteful and disfavored idea that rewards sloth, ignorance, and deceit on the one hand or that the paper controls when there has in fact been nothing like agreement, assent, or consent, a self-defeating and trivializing idea on the other. Others argue that such contracts ought to receive closer review or heightened scrutiny because of the disparate bargaining positions between insured and insurer or that, as consumer transactions, such agreements merit special treatment. However, insurance companies are far from monopolistic, with competition often being overtly intense and new products and new entrants to the market common, and there is no particular reason why the market ought not to be trusted here regardless of power. Discount stores and grocery chains can be wealthy and powerful, yet consumers, even relatively impoverished ones, can apparently exercise significant pricing and selection power with minimal scrutiny and through individual choice. Moreover, what thing is it that "consumers" are: whether as insurance or retail purchasers, they have the money *ab initio*. Finally, others argue insurance is too important to be left to the market. It can hardly, however, be more important than spousal selection (marriage contracts), job selection (employment contracts), or education selection (college tuition agreements). The argument might as easily be made that something this important ought to be exactly what is left to the market.[27]

The problem needs to be addressed by putting aside the issue of the meaning of the terms. The question for us is a social, political, and moral one. What and whose interests ought to be protected? Contracts are not prized because

[27] There is some dissent to the notion that democracy and capitalism are tied together or that freedom of choice and market efficiency are entirely compatible. Thurow argues that "Democracy and capitalism have very different beliefs about the proper distribution of power. One believes in a completely equal distribution of political power 'one man, one vote,' while the other believes that it is the duty of the economically fit to drive the unfit out of business and into economic extinction. Survival of the fittest and inequalities in purchasing power are what capitalistic efficiency is all about. Individuals and firms become efficient to be rich. To put it in its starkest form, capitalism is perfectly compatible with slavery. The American South had such a system for more than two centuries. Democracy is not compatible with slavery." Lester Thurow, The Future of Capitalism 242 (1996). Thurow would be hard-pressed to name names here, as the type of purified capitalist embracing slavery is rare indeed, whereas many forms of democracy, including ours (the electoral vote, to pick just one example), do not embrace one man, one vote. Hyperbole and caricature here, though, make the point that adherents to one or the other, or both, concepts need to do some work to make their extensions coincident.

they promote markets. They are prized because they are vehicles for personal freedom, choice, and autonomy. They are how we do much of what we want to do, from obtaining food to selecting leisure activities to gaining education and work to finding entertainment. But in the cases that are displayed as triumphs of choice, intent and meaning are, if not always transparent, relatively straightforward. We allow the expensive, complex, cumbersome, and fiscally disastrous legal machinery to be used to enforce a breached deal of $600 for a racing bike because we prize and celebrate the free choices we make.

What about the automobile insurance policies? No meeting of the minds has occurred. That is, the insured did not have the same understanding of the state of the relevant deal as the agent or the carrier. Moreover, given the complexities of uninsured motorist protection, neither insured nor insurer (the carrier) had an understanding even of what they were mutually talking about. Of course, contracts commonly have boilerplate clauses that reference complicated legal issues – venue and choice of law provisions, integration clauses, act of war language[28] – and the ordinary explanation that resort to counsel solves the ignorance (perhaps vicariously, perhaps not) varies only slightly in its persuasiveness, perhaps from weak to dismal. But that is different than confusion about the central terms. What are we protecting when we enforce the intrafamily exclusion? Not my choice or freedom of choice or interests, projects, expectations or felt, expressed desires, as I (relevantly) have none of these. Does the insurance agent? Not per the example. What of the carrier? Maybe, but it is not at the table, it is not negotiating, and it is not sharing any real agreement with me because I have not agreed to anything. What of my child, for whom I am self-appointed agent, legal guardian, fiduciary in fact, and the only method to get to the bargaining table? The case is actually even worse, as insurance contracts are typically standard across fifty-one disparate jurisdictions, whereas neither the ability to contract away intrafamily liability nor the clarity of rebounding coverage in uninsured motorists provisions when liability is barred in the same policy, remains the same in different states. The intent of the carrier in making sales decisions, underwriting calculations, and pricing policy, in that it anthromorphically belongs to underwriting and not to the claims or legal departments, is typically formed knowledge-free, not unlike gamblers unaware of the odds. That is, motor vehicle accident statistics fail to reveal all the information a careful actuary would need. Suppose the excess policy is written by a different carrier than the underlying policy, with that second carrier's employees using their own knowledge, experience, understanding, and pricing. Is that worth the cost of the legal apparatus?

[28] The universal title is *force majeure*, hardly a term inviting further reading or instant understanding. Its long-time irrelevance, depressingly, may, as of 9/11, be over.

In any case, we honor contracts when and because there is agreement. The fact is that the scope of any real agreement is often deceptively narrow. Complete agreements ought to be honored, whereas for the rest, not only should enforcement dim on an intentionality continuum, in fact, it does. From consumer protection and lemon laws to restrictions on the practices of banks, utilities, and (indeed) insurance carriers, attempts to enforce contracts outside the intended core of the mutual intent to be bound by specified and understood terms often fail. Conversely, the actual mutual intentions and concomitant terms, whether written or oral, form the basis for enforcement.

That said, let us return to malpractice. The initial step in the formation of the usual professional relationship is contractual, although often far from a clear, integrated writing. (This is not always the case as, for example, when emergency room physicians treat an unconscious accident victim delivered by ambulance or for lawyers, in the case of appointed counsel.) A patient, client, or other individual in need of specialized services from one with specific skill or training is essentially trading money for services, perhaps services of a certain level. The duty by the professional is assumed; that is, he does not need to promise it to owe it.[29]

In fact, because of its use in one popular casebook on contracts,[30] for decades the first contract decision seen by many American law students involved a suit against a surgeon by his former patient. The case is *Hawkins v. McGee*.[31] *Hawkins* involved a contract suit for a cure, where the allegation was essentially that the surgeon, Dr. McGee, made a number of statements – including that the patient would "complete the hospital treatment in three to four days," that he "would be able to go back to work within a few days thereafter," and that the surgeon would "guarantee to make the hand a hundred percent perfect hand." The surgery involved a skin graft taken from Mr. Hawkins's chest to be transplanted to cover burns on his hand. The unfortunate consequence of the surgery, among other things, was that hair grew from the palm. This caused Mr. Hawkins some humiliation directly from his peers and at a distance by those teaching and attending law classes, who made the predictable remarks

[29] As to the issue not of providing the service but of its level of competency, there is an interesting libertarian twist, based on positions long advocated by Milton Friedman. Friedman's argument about professions, essentially, is that modern governments ban them all, then grant individuals licenses to practice them (from doctors to plumbers) based on arbitrary criteria and for a governmental fee. "Licensure therefore frequently establishes essentially the medieval guild kind of regulation in which the state assigns power to the members of the profession. In practice, the considerations taken into account in determining who shall get a license often involve matters that, so far as a layman can see, have no relation whatsoever to professional competence." Milton Friedman, Capitalism and Freedom 141 (1962).

[30] The book is Lon Fuller's. The first of many editions and revisions of Basic Contract Law was published in 1947. The so-called Concise Eighth Edition, merely 729 pages, was published (coauthored with Melvin Eisenberg, but with Fuller present only in spirit) in 2006. Hawkins, by this time, is demoted to page 190.

[31] 84 N.H. 114 (1929).

about the hairy hand case.[32] The claim for damages included that of pain and suffering.

The court's treatment was idiosyncratic, cavalier, and, in parts, almost occult. It found that the timing statements – length of stay in the hospital and time away from work – were predictions or puffing, matters as different as weather reports from a television meteorologist and the sales pitches of car dealers that punctuate these reports nightly, quite different things. They should not be lumped together by anyone attempting a real understanding. Although the guarantee of a 100 percent cure was neither, but rather a promise giving rise to a contract. Why the 100 percent was also not puffing or prediction – that is, whatever criteria were used in determining that an early return to normal daily routines was just puffing in a manner that one would take to be emotive not factual, or a prediction not meant to be relied upon as a promise, while accepting as a binding promise the statement that the hand is 100 percent normal (the hand is cured) cannot be determined from the case or from common sense – is a seemingly mysterious matter. Furthermore, the pain and suffering of Hawkins, rather than being an element of damages, was (it would be hard to make this up) consideration for the contract.

Notice what the court is saying about the basic deal. The only liability is based on promised performance according to specific terms and that liability is absolute. Absent a promise (I will use anesthesia, sterilize instruments, be sober when I cut) no liability attaches, whereas if I promise a cure and, absent any fault, fail (you are told you will have your appendix removed easily and be back to work in a week, but learn later that an extremely rare and completely unpredictable tumorous lesion had attached to the appendix, requiring a lengthy and heroic procedure, saving your life, but greatly delaying your return to work), I am in breach. None of this appears to be any way to run a legal system. In fact, it isn't.

Contracts create torts, or at least the opportunity for tortious conduct, but they do not necessarily provide a measure of the duty. But assuming one duty and being held to another is not necessarily a bad thing. Dr. McGee's statements (or apparent or putative statements, as one might be doubtful that he made them all) offer a poor basis for liability. They are peripheral to the enterprise – getting a good result in a professional manner – and may well be peripheral to either side's expectations. That is, there are two matters, often improperly conflated, one of whether tort liability infringes on the intentions of the parties

[32] My late friend and former colleague, Banks McDowell, an exceptionally decent human being, told the story, against himself, of finding Hawkins's great niece in class when he, in typical law professor style, was providing his annual ridicule of Hawkins's situation. The niece, though a first year, in fact a first day, student dressed him down, recounting how her uncle's sense of his dignity and self-esteem were destroyed by the surgery. Banks was properly chastised, but the issue of abstraction of real injury by law teachers, lawyers, and courts reading this, and almost every other case, remains otherwise unabated.

and the other of whether liability is imposed absent any intentions whatsoever. Malpractice in tort hardly seems to do either. Statements of future status are, in some global policy way, fairly unimportant. We want to encourage good practice, which is hardly coincident with the ability to predict, forecast, or foresee precise outcomes. That, in fact, looks to be gaming, not medicine. Liability rooted in professional duty looks more like the expectations of the parties than stray statements anyway.

Of course, the actual intentions at times vary between the parties and stray from ordinary expectations. Matters can be messy, with contracts looked by one side to restrict duty and on the other ignoring or oblivious to that restriction. What then? Consider the Scottish case of *McCutcheon v. David MacBrayne Ltd.*[33] The issue is well-stated in the decision:

> McCutcheon's brother-in-law, McSporran, shipped McCutcheon's car on MacBrayne's ship. The ship was negligently sailed into a rock and sank. McCutcheon sued for the value of the car. MacBrayne relied on condition 19 of their elaborate contract of carriage which purported to exempt them from liability for negligence. It was their practice to require consignors to sign "risk notes" containing these conditions; but on the occasion in question the purser forgot to ask McSporran to sign. McSporran had consigned goods on a number of previous occasions. Sometimes he was asked to sign a risk note, sometimes not. He had never read the risk note. He knew it contained conditions but did not know what they were. MacBrayne contended that, because of the knowledge gained by his agent, McSporran, on these previous occasions, McCutcheon was bound by the terms.[34]

The court's reasoning, contained in a typically British, five-opinion decision, is neither clear nor compelling, bouncing among altered contract analysis, implied negotiation theory, newly made oral and rejected written agreements, courses of conduct arising or not arising, and the status of McSporran's spurning of the contract. There was held, more or less, to be an oral agreement, without an exclusion, although why anyone would think that that is what the parties in fact agreed to is utterly mysterious. However, the facts are the interesting thing here.

MacBrayne relied on the exemption. It may have influenced his thinking on pricing, insurance, what goods he would board, personnel and their training, even what kinds of ships to buy and when to sail (presumably ferry by motor) them. Suppose McSporran had signed, without, as always, reading or understanding the exemption. Would the duty that might follow be functionally a speech act but without regard to the meaning of the terms, or further, any need for an intention to be bound? Thus, one can say "I do" at a wedding and it is

[33] House of Lords (Scotland) [1964] 1 W.L.R. 125; [1964] 1 All E.R. 430; [1964] 1 Lloyd's Rep. 16; 1964 S.L.T. 66.

[34] *Id.*

the very act of saying it, not any required intention to mean it (by it, meaning to have, hold, love, or to be true, loyal, and faithful) that matters.[35] You are wed by saying the words of incantation, while meaning it but remaining silent or varying the terms fails to do the trick. It is performative, akin to a physical act, not meant to be a statement that otherwise is treatable as true or false. Do we think contracts, here a contract of carriage, are like this? Only if we are protecting a situation with intent on one side and sloth and indifference on the other. That is not the same as protecting a mutual bargain, only one side's justifiable, rational, protectable interests given a certain state of affairs in the world; that is, given tort.

This is because the deep secret of contract is that, to a great extent and in a significant way, it is a subclass of tort law. Certainly, in the *McCutcheon* situation, if choice would be threatened – perhaps an attempt at a particular type of free ride by McSporran if, in the face of needing to sign the exemption in order to sail, he knowingly feigned signing or instead, had a momentary lapse in not signing, defeating the intentions of MacBrayne – tort offers remedies both directly and indirectly (but tort, nevertheless, despite its restitutionary nomenclature) in unjust enrichment. That is, the real protection for MacBrayne lies with tort and that includes directly his ability to price correctly, insure, and compete in the market. The alternative is looking only to those cases where the exemption was signed, and that protection is at every moment under attack. No meeting of the minds, exchange of promises, negotiated bargain, or any other similar thing occurred, as McSporran never understood that there was an exemption; that is, condition 19 was not part of his conceptual understanding. Under any number of analyses, such a contract could crash on difficulties of consent, agreement, and simple understanding of shared terms.

This points to the larger issue. We only enforce some contracts in some situations for some purposes. I promise to sell you some goods for $1,000. You agree. A contract? Not in Anglo-American law, if oral, for the sale of an object over $500 needs to be in writing.[36] Not in most countries today, if the object is illegal (heroin), stolen (a painting), or part of a scheme to extort or blackmail (compromising photographs). Not in many countries for hundreds of years, if humans were sold for bondage (slaves) or consumption (cannibalistic

[35] The idea of performatives is developed in J. L. Austin, How to Do Things with Words (1962).

[36] See, for example, the Uniform Commercial Code §2–201 (1) (1998), which provides that "a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker." No economist or pure market rationality could create a rule that voids a $500 sale of battered paperback novels but allows (because it does not involve goods but services) the oral agreement with one's broker to buy or sell $1,000,000,000 in securities. Only legislatively created legal rules could come up with this insanity.

meals). Not even under libertarian economic models, if the result of monopolies, price-fixing violations, or cabals. But the rules for judging what deals or even mere conversations give rise to duties (or more properly, contractual duties) are hardly limited by these examples. Issues of assent, agreement, mutuality, mistake, capacity, duress, foreseeability, and consideration are not only in play, they appear (though empirical evidence here would be difficult to obtain or measure) to be on the increase. That is, the psychology of consent, the morality of duress, the perplexity of mistake, and the wide expanse of excuses for imperfect performance are all combatants in an evolving legal arena charged with new and changing concepts, all exhibiting wider tolerances for long-winded explanations as to why a deal is not a deal.[37] These rules for judging contracts – metarules, secondary rules, governing rules or whatever they might be called – are not freely chosen by the parties, generally cannot be waived, are typically not considered or are not part of the bargain, are dictated by the courts or legislatures (or government generally), and are not driven in any direct way by market forces. They are, quite simply, tort rules.

The point is that the rules of the game, including those that impose liability and document damages, are not the bargaining parties' own. They are imposed. There might be a logical objection to this analysis, pointing to the difference between rules and metarules. The objection would look like this. All metarules are by their nature imposed. They concern individual conduct, but are one step removed. Because a step removed, they are necessarily public, imposed, general, and universal. The underlying conduct, however, consists of rules either made by the parties (contract) or imposed on the parties (tort). Second-order semantic rules common to French and Spanish hardly make French the same language as Spanish.

Part of the problem with this objection is that it is incoherent, part that it is simply wrong. The incoherence lies with trying to individuate and then order rules hierarchically in some clean way.[38] It cannot be done. Is the proposition that we should enforce sale-of-legal-goods agreements a rule or a metarule? Is it one rule, or the running together of several or dozens or even hundreds of rules? Is every contract rule a metarule, except those that are voluntarily assumed? That is, we might propose two kinds of rules: those made by the parties and those made by the law (whether judicial, statutory, or even constitutional, as with the Thirteenth Amendment's barring of slave contracts). You and I might make a rule that for every hose you produce, I will buy it for $1 and you will deliver it within two days. Those conditions constitute a rule or set of rules

[37] This trend is long in coming, predicted sixty years ago by John Dawson in *Economic Duress – An Essay in Perspective*, 45 Mich. L. Rev. 253 (1947).

[38] The problem of individualizing laws is a technical one in jurisprudence, justly obscure. Bentham and Kelsen each took a stab at the girth of laws or norms, but Joseph Raz made the most valiant attempt at finding a coherence here when there is none. His failure, nevertheless, can be found in Joseph Raz, The Concept of a Legal System (1970).

that did not exist before, did not create duties before, did not infringe on our freedoms before. Are they logically different from the requirement of a writing for goods of $500, a metarule?

One way to solve this problem is to ask if our rule, goods timely for cash, has any exceptions. Is, in fact, the writing requirement an exception, if you (always) bundled hoses in cartons of one thousand units, and I always took delivery of sealed cartons? If it is an exception, then a full accounting of the rule requires its inclusion. That is, an accurate and complete statement of a rule specifies the conditions under which it applies. This requires our agreed rule to include the public rule of a writing, allowing talk of metarules to be metaphorical or illustrative but not a distinction with a real (logical or ontological) difference.

Suppose, however, we treat it (our new rule) as having no exception, either because it is complete, but subject to higher authority, or in the nature of an equitable principle, which is exceptionless but operates with greater or less force and application depending on the environment.[39] Would this allow for a clean rule—metarule distinction? Clearly not. If the rule has no exception but is merely treated in different ways at different times – something akin, perhaps, to a company boss who states he takes directions from no one, but then obeys everyone, from orderly to nurse to resident to surgeon, when in a hospital setting – the coherence of the rule, or at least any attempt to state it, is thrown into doubt. If the rule is that the boss need listen to no one, then it is false. If it is that he listens occasionally, then the more general statement of the rule is equally false. A principle substituting for a conventional rule fairs no better. By principles, here, we mean standards that do not apply in an all-or-nothing fashion, but have greater weight and fit depending on the total circumstances. In the tort world of automobiles, driving reasonably, carefully, or prudently are all applicable principles (or the restatement of the same principle), while driving no greater than twenty-five miles-per-hour on a residential street per the posted speed limit is a rule. One might be criminally or civilly liable for violating the principle by driving twenty miles per hour during an ice storm, but not liable for driving fifty miles per hour to rush a dying child to the hospital. The rule, for purposes of its compliance or its violation has no exceptions. What then of contract?

Freedom to act is real, but freedom from governing rules is a myth. Of course, not all governing (or meta-) rules are tort, just because they are imposed, public and legal system driven. However, contract governing rules largely are. They are concerned with safety and equality, and they involve regulation to license, to control freedom's excesses, and to protect that part of autonomy that Brandeis thought to be the most important of all rights, the right to be left alone.

[39] The concept has been brilliantly developed by Ronald Dworkin in a number of articles and books. See Ronald Dworkin, A Matter of Principle (1985) and Taking Rights Seriously (1977).

The rules do this by ensuring that one is able to agree (capacity, minority, and linguistic clarity rules), that the agreement is voluntary (duress, coercion, unconscionability, and legality rules), that the agreement is knowing (mistake and fraud rules), that the agreement is not extended past the parties' expectations (foreseeability and impossibility rules), that the agreement is really a deal (consideration and blackmail rules), and that the tort idea of peace controls the outcome of disputed deals (substantial performance, damage limitation to direct losses, and the limited use of specific performance and punitive damages rules). These are rules that are interchangeable with tort rules. The master rules of tort and contract are often more than just interchangeable, they are indistinguishable.

In fact, looking at behavior and actions, contract-like situations are often brought to court as violations of tort duties. Failed promises are brought as promissory estoppel or fraud matters, whereas employment contract breaches come before the courts as discrimination cases. Of course, the claims are not the same in tort and contract, not just because of some problem in determining conceptual translation, but because translation is not even available. Negligent misrepresentation and contract breach are not the same. Intent is different, remedies disparate and breach involving a variety of empirical considerations. Does it really make a difference with regard to any basic value, whether freedom of choice or economic opportunity? Surely not yes in favor of contract. That is because contract cannot account for many of the most basic facts about human beings, facts that tort is well-equipped to recognize: they are unfairly unequal.

The myth of contract is the myth of market economics: everyone starts from relatively the same position. That assumption allows procedurally unexceptionable rules to justify the conduct that flows from those rules. Of course, it is false and no one actually thinks it to be true. Yet, nevertheless, it is treated as true, and such treatment allows for very sophisticated analysis.[40] It is as though we know there are no straight lines, but we still do geometry and civil engineering, accounting for deviation but stating its rather trivial importance. That, in fact, is incoherent in contract analysis, as the reasons to protect expectations, and the

[40] The tendency of economics to look to idealized but false models in the face of the empirical evidence to the contrary, a shocking accusation for social scientists, is well-known in market analysis, but (unfortunately) hardly limited to that analysis. As one shrewd observer of the professional scene put it:

> "Until quite recently, wage theory did not recognize the unions. Their importance was not denied. But, by an agreeable convention, one was allowed in pedagogy and scientific discourse to assume away their effect. 'Let us suppose,' the lecture began 'there are no unions or other impediments in the labor market.' The modern corporation has not yet been assimilated into economic theory, although the corporate system is all but coterminous with mining, communications, public utilities and manufacturing – in short the largest part of economic life."

John Kenneth Galbraith, Economics Peace and Laughter 9 (1971). It is not the *ex hypothesi* idealizations that are the problem, it is the later amnesia that they are *ex hypothesi* that is inexcusable.

choices, preferences, liberty, and personal projects associated with such expectations, arise because there is sufficient equality. To some extent, the matter is certainly one of degree and detail, but the problem is that of mind-set. Is one basically assuming real choice (an idealized notion of equality and autonomy used to anchor the notion of freedom) or an empirical look at disparity (the economic, intellectual, demographic, neurological, and other differences that social scientists, not lawyers or philosophers particularly, examine as part of their daily regime)? At the extremes of the present state of rational discourse,[41] the positions are dependant on myths and methodologies that look past, if not completely ignore, each other. We are perhaps in Wittgenstein's world, where reasons and reasoning run out, and politics and persuasion are the only means of exchange and communication.

> 609. Suppose we met people who did not regard that [i.e., the propositions of physics] as a telling reason. Now, how do we imagine this? Instead of the physicist, they consult an oracle. (And for that we consider them primitive.) Is it wrong for them to consult an oracle and be guided by it? – If we call this 'wrong' aren't we using our language-game as a base from which to *combat* theirs?
>
> 610. And are we right or wrong to combat it? Of course there are all sorts of slogans which will be used to support our proceedings.
>
> 611. Where two principles really do meet which cannot be reconciled with one another, then each man declares the other a fool and heretic.
>
> 612. I said I would 'combat' the other man, – but wouldn't I give him *reasons*? Certainly; but how far do they go? At the end of reasons comes *persuasion*. (Think of what happens when missionaries convert natives.)[42]

This might seem extreme, but the positions staked out are extreme, and the battleground, in fact, is that of the tort versus contract world views. Consider the entire environment and how the politics recapitulates the economics.[43] We can look at any advocate for environmental and health safety, particularly workplace safety, and the talk always centers on the plight of the victim. That

[41] These extremes might be represented by a variety of theorists, perhaps Hayak, Friedman, Nozick, and libertarians at one end, versus Harrington, Mills, perhaps Rawls, social democrats, and social critics at the other.

[42] Ludwig Wittgenstein, On Certainty 80–81 (1969).

[43] Epstein thinks the right term here is religion, and perhaps that is more evocative. "Yet too often environmental issues evoke inconsistent forms of quasireligious fervor. On one side stand those individuals and groups who insist, with Vice President Al Gore, that stringent environmental measures such as the Kyoto accords are needed to save the planet from destruction by its most notorious species. On the other side, many commentators with equal intensity bemoan the bloated, officious, and heavy-handed bureaucracy that comes in the wake of high-minded environmental regulation." Richard Epstein, *Review, "Too Pragmatic by Half, Eco-Pragmatism: Making Sensible Environmental Decisions in an Uncertain World*," 109 Yale L. J. 1639 (2000). Epstein is hardly, himself, agnostic.

talk, in literature from Thomas Hardy and George Orwell, in science from Barry Commoner, in cinema from Al Gore, in statutes from OSHA to the Clean Air Act[44] and internationally in the Kyoto Accords, looks for regulatory help for the otherwise helpless consumer, worker, or individual on the planet, with consequences (including tort consequences) for the greater risks to that safety. Consider a completely different look at the problem, one rooted in contract, set forth by one observer.[45]

> First consider the question whether workers exposed to cancer risks are voluntarily or involuntarily so exposed. If workers do not know about such risks – if they lack relevant information – we seem to have an easy case of involuntariness. Thus it makes sense to say risks are run involuntarily when the people running them do not know them. Lack of adequate information provides a perfectly legitimate case for a judgment of involuntary exposure to risk. But of course information itself can be obtained at some cost, pecuniary or otherwise. If people do not have information, they have chosen, in a sense, not to do so. (Of course, their choices might be constrained in multiple ways, as through a lack of education.) We are thus dealing, in cases of kind, with high notes of risk avoidance – in the distinctive form of high costs of acquiring relevant information.

The difficulty with this suggestion, of looking at risk as rational choice, is the choice of hands that individuals are dealt. Those hands often have few cards, and perhaps low ones at that. Tort begins in another place, assuming decisions are often made from bad choices. However, as we saw in the contract analysis, the core of real choice is left autonomous, and the complaints about the rest – contract restrictions and tort law, in general – appear to lack any theoretical objections to solving the reality of the unfairly unequal. With mixed success, the search for solutions is firmly a tort search.

[44] Both acts look to be proenvironmental rather than antienvironmental. OSHA finds that personal injuries and illnesses impose a substantial burden on the economy and encourages ways to prevent disease in the workplace, whereas the Clean Air Act finds dangers to the public health and welfare and the problematic air pollution throughout the country and the economy. Both see regulation as the solution. OSHA is found in 29 U.S.C. §1651 *et seq*, the Clean Air Act in 42 U.S.C. §7401 *et seq*.

[45] Cass Sunstein, Risk and Reason: Safety, Law and the Environment 68 (2002). In fairness, Sunstein at least appears to leave open the extent to which he may wish to pull back from the position presented as a "case."

6
War without the War

Peace is a dangerous goal. It rewards misconduct. A history of bad activity by one careless, reckless, or genuinely aggressive can be rewarded at the negotiating table, as the wrongdoer's bargaining strength may be disproportionally great just because of the wrong he has done. Negotiating peace is a distasteful business, often involving further concessions to one already enriched by his own negligence, and involving participation in a process that no notions of justice, equity, or good conduct could bless. Nevertheless, although the process allows wrongdoers not only to keep the fruits of their actions, and occasionally promotes them to leaders of countries or rulers of new territory, peace is universally praised. The pictures evoked, from negotiating with terrorists to cutting a deal with extortionists, vary in the international and criminal arenas. These pictures all appear more extreme than in tort, where it might be thought that violence, wrongdoing, retribution, self-help, and abuse of civil society are given extremely short shrift. They do more than linger in the area of private legal wrongs: they drive the process. Yet, against this violent backdrop, peace is promised and, to a large extent, only peace should be. Peace is notoriously political and specific. Platitudes aside, it is hard to see why any grievant or injured party wants to pursue peace. Such parties are, in some way, worse off because of the activities (as they see it) of the wrongdoer, and justice or fairness cries out for a remedy. But the remedy will almost certainly be short and incomplete. Peace truncates justice. That is because, simply, any remedy will be less than freely given. The tension in the legal system between the requirements of justice and the desire for peace is not about parties settling or resolving a particular matter to avoid risk, putting the matter behind them, getting on with their lives, and all the other syrupy clichés judges and lawyers provide to parties, clichés often delivered in a manner a parent provides an upset child bent on a wayward course of retribution. Rather, the tension is systemic. Entering the legal system involves participation in a procedure that enjoys a monopolization of power and no opt-out provisions. Thus, the design is driven by the need to

keep everyone in the system, and once everyone is there, they are sufficiently satisfied to remain.

There is no possibility of reduction to a single political stance or even a small set of unified principles, both because it is the actual expectations that individuals contingently hold that matter and because these expectations so dramatically change over time and place. That is, the system is bottom-up, not top-down. A particular person, in one time and place, comes to have an expectation of privacy, ownership, calm, security, profitability, employment, freedom, or kinship. These expectations are not necessarily rooted in rights or liberties. They may not be guaranteed at all or, at least, not guaranteed very well. They may in fact be expectations of politeness, deference, or, in a more concrete sense, of to-be-expected, shared virtues.[1] Once, no one held these inclinations. Consider how many tort actions today, from intentional infliction of emotional distress to securities fraud to civil rights actions to anti-monopoly cases, are peculiar to a modern, affluent society, one with sufficient resources, prosperity, liberty, and equality to raise expectations sufficiently. Laws do not spring unwanted from the idea that there ought to be protection for these concerns, but rather these concerns give rise to a demand for such protection originally and, when trampled, give ongoing occasion to felt grievances that trigger lawsuits now. Moreover, concerns here not only mature, they can arise from, apparently, nothing. Consider that the recent idea that government information ought to be public gave rise to freedom of information acts (state and federal) that now allow for tort damages for the failure to open the vaults early or often enough. Surely, the felt loss of government knowledge, timely gained, was not an ancient concern.

These tort inclinations are meaningless if limited only to potential plaintiffs. Within a civil society, some degree of respectful conduct among its members is required in order to make it a success. Imposed rules, shared values, mutual self-interest, common virtues, fear of sanctions, and taught respect: there are any number of candidates for the origin of such conduct, with even more candidates vying for how things ought to be done in order to increase success. Nevertheless, neither Attila's Huns, Montezuma's Aztecs, nor Davis's Confederates acted toward their fellow human beings in a way that would make other than ludicrous the claim of tort grievants and not only today.[2] Four traditional torts – trespass, deceit, debt, and assault – have a very different and degraded meaning in the

[1] McCloskey makes a persuasive case for a matrix of virtues – religious, gendered, and androgynous – which allow for the achievement of happiness in a modern, capitalist, bourgeois society. See Deirdre McCloskey, The Bourgeois Virtues: Ethics for an Age of Commerce (2006).

[2] With regard to much of the glorified nonsense of the honor and neighborliness of the antebellum South and its supposed unfair retroactive vilification by hindsight of twentieth (now twenty-first) century Northerners, reading the contemporary abolitionists provides a compelling antidote, and shows how at home the Confederacy is with other monster societies. See, for example, the compelling legal work of William Goodell, The American

societies that created them, societies grounded in plunder, human sacrifice, and slavery. Thus, the necessity to respect the evolving expectations of greater protections is implicit for any tort system to work. Consider Auden's haunting words:

> That girls are raped, that two boys knife a third,
> Were axioms to him, who'd never heard
> Of any world where promises were kept,
> Or one could weep because another wept.[3]

The pretort model is one of private remedies through vendettas, blood-feuds, raids, and wars. It is wonderfully exemplified in a passage of ancient religious literature[4] that, although involving international politics and criminal atrocity, also involves, at its very core, tort law. The story is from a less-often cited section of Genesis, chapter 34, edited freely, without ellipsis.

> Dinah, daughter to Jacob, went to visit the land. Shechem son of Hamor the Hivite, chief of the country, saw her, took her and lay with her by force. Being drawn to Dinah and in love, Shechem said to his father, "Get me this girl as a wife."
>
> Jacob heard that he defiled his daughter; Shechem's father Hamor came to Jacob. Meanwhile Jacob's sons, having heard the news, came in from the field. The men were distressed because he had committed an outrage in Israel by lying with Jacob's daughter – a thing not to be done.
>
> Hamor spoke saying, "Shechem longs for your daughter. Please give her to him in marriage. Intermarry with us. You will dwell among us, and the land will be open before you; settle, move about, and acquire holdings in it." Then Shechem said, "Do me this favor, and I will pay whatever you tell me."
>
> Jacob's sons answered Shechem, "We cannot do this thing, to give our sister to a man who is uncircumcised, for that is a disgrace. Only on this condition will we agree: that you will become like us in that every male among you is circumcised. Then we will give our daughters to you and take your daughters to ourselves; and we will dwell among you and become as one kindred."
>
> Hamor spoke to their fellow townsmen, "These people are our friends; let them settle in the land, for the land is large enough for them; we will take their daughters to ourselves as wives and give our daughters to them. But only on this condition will the men agree to dwell among us and be as one kindred: that all our males become circumcised." All males, the fighting men in his community were circumcised.

Slave Code in Theory and Practice: Its Distinctive Features Shown by Its Statutes, Judicial Decisions, and Illustrative Facts (1853).

[3] W. H. Auden, *The Shield of Achilles* in Selected Poetry of W. H. Auden 136 (2nd ed., 1970).

[4] A tour de force in understanding Genesis as literature is Harold Bloom's The Book of J (1990).

> On the third day, when they were in pain, Simeon and Levi, two of Jacob's sons, took each his sword, came upon the city unmolested, and slew all the males. The other sons of Jacob came upon the slain and plundered the town, because their sister had been defiled. They seized all that was inside the town and outside; all their wealth, all their children, and their wives, they took as captives and booty.
>
> Jacob said to Simeon and Levi, "You have brought trouble, making me odious among the inhabitants of the land. If they unite against me and attack me, I and my house will be destroyed." They answered, "Should our sister be treated like a whore?"

Aside from the obvious observations – a blended criminal/civil system is at work, no third-party remedy agent appears available, women are bartered commodities, wrongdoing is met with escalated wrongdoing, and any number of complete innocents are killed, kidnapped, or enslaved as a consequence of a feud involving others – there are clear conclusions to be drawn that provide some insight into the anatomy of any viable civil system lacking tort law. The first is the collapsing of individual and joint responsibility. The second is neither the individual victim's nor the individual wrongdoer's opinions are dispositive in resolving the problem. Third, the set of remedies available are severely limited. Fourth, there is no sorting out of the real facts, the evidence in question. Taken together, they suggest what many consider the strength and equally many others condemn as the inherent weakness of the tort system: its one-on-one treatment of liability, responsibility, remedy, and evidence. A fifth point is the collapse of naked contract into deceit or misrepresentation absent metarules about what duties arise and when they ought to be enforced. These all are worth examining at greater length.

Perhaps, then, the most telling aspect of this ancient story, an aspect needing to be understood to make sense of the story at all, at least other than its wanton brutality, is the collapse of individual and joint responsibility. Shechem was (at least) the initial tort feasor, Dinah the initial victim. Neither was directly involved in the deal to solve the problem. Responsibility was, more or less, assumed by the Hivites generally and the compensation taken by Jacob's clan, generally speaking, Israel. Placing the larger responsibility on both the defendants and the plaintiffs collectively involves an enormous escalation of the stakes of the dispute. It allows, from the beginning, for example, a number of adverse consequences to befall the Hivites. They are agreeable to being circumcised, to giving up sole sovereignty over the land, and to sharing access to their female marital stock. Yet, as tort observers, we might wonder why? They, the additional Hivites, not only did nothing wrong, they did nothing at all. Meanwhile, Shechem is clearly at fault. In modern terms, he is liable for assault, battery, false imprisonment, rape, and the intentional infliction of emotional distress. Yet, his penalty is no greater than that of his fellow tribesmen, a solution to our eyes too great for them and too lenient for him. Indeed, following the rape, he appears to be rewarded by receiving the victim as his new wife.

Dinah gets nothing. To the contrary, she receives a life sentence of living with her assailant. She is provided no compensation, damages, remedy, solace, or even an apology. The injury is largely treated as not hers, or at least not primarily. The main wrong belongs to Jacob's clan. It is not merely injury to honor, although that particular injury is historically perhaps the most dangerous of all injuries. Even the defilement is not just to Dinah but to Jacob through defilement of "his daughter Dinah." But that is only the first cut. Dinah's brothers see "an outrage in Israel."

What are we to make of this? Individuals are not the basic unit of any system of redress, clans and peoples are. Tort law, at least recent tort law (recent here being within the last one thousand years), places redress and responsibility at the level of the individual. The consequences of doing so are dramatic, but not always happy. Certainly, the kind of escalation we see in the passage from Genesis is highly unlikely to occur when the action is at the personal level. One wrong, even a terrible wrong to a single individual, is not an occasion for war. We are reminded here of Chapter 2, and Gladstone and the Don Pacifico affair. Gladstone railed against moving from individual to collective guilt, and ridiculed solving the wrong done a single British citizen by moving against the entire Greek government.

It is worth pausing to see what is lost, or at least potentially lost, by individual solutions. Of course, they are different depending on whether you are looking at the Don Pacifico matter or Dinah's ravishment. But picking the right example is often the trick in making one's theory look more attractive. Consider the issue of the wrongs done by one group to another just because the two allow easy differentiation and because that differentiation caused disparate (and worse) treatment. For example, consider twenty-first century African-Americans. They are significantly worse off because of wrongs done their ancestors and themselves by many now dead and some still alive. How do we sort out compensation? In the tort system, the matter must be one-to-one. Of course, the motivation for the wrongdoing originally was group-wide, with individual wrongs often incidental. That motivation and intention are not captured in the tort system. Let us see what is.

Civil rights and race-related torts (slander or assault, for example, racially motivated) involve an individual harmed by a particular defendant. That misses a great deal (likely most) of the action for African-Americans. Suppose one assumes a pervasive cultural deprivation due largely to an impoverished language level and unawakened mathematical skills from the mind-numbing practices first of slavery and then the terror of Jim Crow, *de jure* segregation, and ghettoization. The worst harms were visited on those no longer eligible to be plaintiffs by those no longer eligible to be defendants. All are dead. Nevertheless, a large group of partially affected plaintiffs are alive. What are their remedies? They have none against deceased defendants. Even if they had a remedy against institutional survivors (perhaps a once slave-holding insurance company still existing or a formerly segregated university), the harm is indirect, difficult to

show, and problematic of definite damage calculation. Even that, if overcome, leaves the enormous problem of proof. To take one issue, there are more people today passing as "white" than claiming to be African-American who have slaves as ancestors.[5] The tort system provides little comfort to any of this. But suppose damages could be ascertained, at least in some global way. Would that help?

Not in the right way. If a significant percentage of the population had educational deficits, small sums would hardly change matters. In fact, as a group, the compensation may be skewed in distribution to help many not in need of help (as is the accusation in many entitlement programs). Instead, consider financing primarily black colleges, such as Fisk and Grambling, funding daycare and head-start programs in inner-city neighborhoods, financing the expansion of community colleges, donating personal computers to city schools, providing tuition forgiveness to those who teach where need is greatest. These remedies are both complementary to the problem (they reflect what was not done, in fact barred, earlier) and distinctly un-tort.

Let us try to imagine an appropriate tort. Let us call it the Wittmalion tort. It combines the truth of Henry Higgins that well-spoken speech is critical to success ("You see this creature with her Kerbstone English: the English that will keep her in the gutter to the end of her days")[6] with Wittgenstein's insight that the limits of language are the limits of thought.[7] The first of these concerns is largely social. Accent, pronunciation, inflection, intonation, pace, colloquialisms, profanity, and manner of speaking mark us socially. Poorly assembled, they can be virtually insurmountable barriers to success. The second concern, that of Wittgenstein, is a logical and semantic limitation. It holds that an impoverished vocabulary limits one's creative thought process. If an individual is stripped of vocabulary – for example, "improbable," "evolution," "formulation," "proposition," "criteria," or "abstract," to pick a few at random – then concepts and thinking are commensurately limited. Depriving an individual of the ability to use language clearly and fully would constitute the tort of Wittmalion. Suppose African-Americans, stripped of their native language originally, isolated and educationally deprived later, were victims of this tort and wanted to sue. Unlike Jacob and his sons, they would need to point to specific breaches in order to go after actual wrongdoers, not just their kith and kin. Many of the gravest offenders, those slaveholders who stripped their ancestors' native language from them with little to replace it, are gone. What

[5] See Boris Bittker, The Case for Black Reparations (1973).

[6] George Bernard Shaw, *Pygmalian* Act I, in The Complete Plays of Bernard Shaw (1937). The better known version of the story of Henry Higgins and the subject of this quotation, Liza Doolittle, is, of course, "My Fair Lady."

[7] Ludwig Wittgenstein, Tractatus Logico-Philosophicus (1921). Wittgenstein's point may be more logical than empirical, although the distinction (even for him) can be tricky, given the contingent aspect of language itself. If a Wittgenstein scholar disagrees, think of the "Witt" as short for "Wittgenstein-like" or "Wittgenstein-inspired."

about the beneficiaries of that stripping, we who (arguably) are farther ahead semantically, not having been the victim of Wittmalion? We are no greater endowed intellectually or otherwise, yet we profit and move ahead? Can we be sued?

Not under tort theory, at least not without stretching it to the breaking point. It might be suggested that we are unjustly enriched by the wrongful acts of our predecessors in interest (but not in fact predecessors by family, genes or social grouping, as any particular one of us may, during the period of American slavery, have had our ancestors living in Czarist Russia, Ottoman Bulgaria, Ching China, or Tokagawa Japan or starving as a peasant in Ireland, Italy, Mexico, or Poland). We and likely our ancestors, though not our predecessors in this instance, have breached no duties, and have committed no wrong. Corrective justice makes no demands on us. Tort law cannot find a proper defendant for the Wittmalion tort and that failure is indicative of the severe limits a one-to-one system imposes. Group reparations are not generally for tort. Yet, in that they are at the edges, as perhaps in the case of enterprise liability for manufacturers of dangerous products whose origin can no longer be traced, the justification lies with achieving social peace.[8]

We might ask why each of the parties in Genesis who actually made decisions, setting Shechem aside, had any standing to be involved in the first place. Their interest in the matter seems to center on honor and insult. ("Should our sister be treated like a whore?"). Yet, honor and insult appear to be indirect harms, in the way we might be offended by the exercise of another's freedom. For example, seeing interracial, interreligious, gay, wheelchair, or obese couples together might offend someone. In fact, we see a merger in these notions of offensiveness, honor, and insult in complaints not about religious freedom, but religious symbols. Working on another's holy day; insulting his deity; being improperly clothed on his holy ground: these are indirect matters, unwelcome in the tort system. Tort law generally shuts down such claims, as it looks to actual and personal physical or financial loss.[9] What of the standing of the family unit? Again, any robust notion of individual autonomy, implicit in any tort system where the injured, Dinah, must prove her own case, provides little

[8] For a discussion of the issues in enterprise liability, seen in the context of unidentified blasting caps injuring children, see *Hall v. DuPort*, 345 F. Supp. 353 (EDNY, 1972).

[9] Defamation and emotional distress appear to be special cases, but they are not. A full analysis is not possible here. The fact is that emotional distress and assault (the apprehension of an unwanted touching) are seen as an outgrowth of antiviolence and pacific tendencies, whereas defamation is tied to notions of reputation and good-name necessary to survive in a world of unknowns. Perhaps closer examples are the torts of criminal conversation (sexual intercourse by an outsider with a spouse) and alienation of affections (the deprivation of a spouse of the conjugal affection, society, and comfort inherent in the marital union). These torts are tied to earlier notions of the marital relationship (before the days of ready divorce) and now, if not discarded, are everywhere in retreat. They have managed, finally, to have had a measure of gender equality on their way out.

deference to the larger social unit. Tort promotes such a notion of autonomy, not only by featuring as the center of attention the individual plaintiff, but by according her the full panoply of tort rights, often long before the constitutional and political arenas catch up.[10] Ironically, the ability to cross-examine a party to within an inch of her life – scrutinizing her history, habits, health, companions, dispositions, recreations, and work – gives credence to and helps establish the importance of that life.

The individual treatment is missing in the Genesis story. This absence applies not just to rights and duties, it also covers the input the real tort parties, Dinah and Shechem, have in the process. Shechem was at least asked to consent to an offer he originally extended (any terms in exchange for Dinah as his wife). Dinah was not asked at all. Shocking to us, she appears in those days of arranged, political, and economic marriages to be unconsulted about wedding her rapist. This process is alien to a modern system that would require satisfaction on the part of the victim, or at least her right to be heard in a public trial.

But, of course, the entire notion of a public trial is impossible here. The idea of the rule of law often seems to be vacuous pap until we find ourselves faced with the facts of stories such as this. What are the possibilities here? There are a series of promises, unenforceable and unenforced, that provide very cold comfort to those who might try to make them again. Consider the actual moves. An initial tort (rape) was followed by the torts of deceit, wrongful death, conversion, and false imprisonment. (There were undoubtedly others.) Moreover, Jacob suggests matters are not done ("If they unite . . . my house will be destroyed").

The intention of the only two sensible and arguably moral agents in this scene, Hamor and Jacob, was to achieve peace. Notice that neither one asked for justice or offered it. Shechem was not offered up, compensation was not tendered or requested by either, and both men saw an advantage arranging that the Israelis "will dwell among you and become as one kindred." Dinah's needs and desires were clearly irrelevant, but very relevant were the consequences of an escalating exaction of revenge.

The gathering of evidence, always an advantage, has an additional aspect often seen as problematic, but here (and generally) supportive of peace: it delays the matter. If rather than thinking that justice delayed is always and everywhere justice denied, we might rather think that retribution delayed is peace given an opportunity. Encouraging sloth is not the point. The heat of passion is not the time to make irreversible conflict-resolution decisions.

[10] Michael Sandel discusses this movement from tort to constitutional rights for privacy rights in Public Philosophy 126–136 (2005). However, in seeing that movement as involving a movement from old privacy to new, with the movement being from "quaint" perfection of reputation to the new protection of sexual freedom, he overstates a distinction that disappears under scrutiny. People sue over what was important to them then, not what is important to us now.

Finally, there is the contract breach or, in these precontractual days, failed promise. In a time when many (quite improperly) see contract in its death throes,[11] contract here is in the throes of a violent birth. It might seem obvious that the Israelites and the Hivites have formed a legitimate contract – and under any modern legal and perhaps ancient social practice, they have – but enforcement is not merely lacking. Its absence almost ensures future conflict. Being able to count on an agreement's enforcement surely reinforces the practice of employing such agreements.

Looking at the passage from Genesis, what can we conclude? Left to their own devices, people easily get it wrong initially, and often go to war not much later. Jacob's sons are the most brutal culprits, but consider the position of Hamor. He went to Jacob, not to apologize, and to Dinah, not at all. But the example may seem too distant to be cogent, an atavistic illustration of an era bygone. In an age when such events are commonplace throughout a world where law is absent and locally where individuals opt out, that distance is too short.

If peace is the goal, politics makes up its contents. That might sound antithetical to any thought of the rule of law. Politics is concerned with interests generally, perhaps rights, occasionally, and almost always, is partisan, inconsistent, cynical, exclusionary, and sectarian. None of this looks like the work of courts with tort law, even bad courts doing a particularly poor job. To understand what politics count and how they count, we need to take a short journey through the morass of legal reasoning.

Although the running of the tort system often rightly focuses on the generality of the rules on the one hand and the indifference juries show those rules on the other, the system is far from being entirely vague or adrift. There are, in fact, as with all of modern law, thousands of different rules governing conduct, defenses, proof, jurisdiction, damages, time limitations, set-offs, subrogation, insurance, competency, and appeals, to name just a few areas. Much of this is shared with other areas nontort – appeals and jurisdiction are concepts common to all legal actions, whereas proof and set-offs apply to much of civil litigation generally – whereas some rules focus almost exclusively on tort, including defenses like assumption of the risk or misuse or the elements for interference with prospective business advantage. But how is all of it put

[11] Gilmore and Atiyah, in different ways, see contract ending, as notions of mutuality of obligations dim and the scope of reliance as a basis for achieving damages takes over from expectations. The problem in Genesis is not contract's (prematurely predicted) death, but its impending birth. Gilmore writes, "Speaking descriptively, we might say that what is happening is that 'contract' is being absorbed into the mainstream of 'tort.' . . . It should be pointed out that the theory of tort into which contract is being reabsorbed is itself a much more expansive theory of liability than the theory of tort from which contract was artificially separated a hundred years ago." Grant Gilmore, The Death of Contract 95 (1974). Gilmore, prematurely predicting death, is speaking of remedies, not metarules (as discussed in Chapter 5). Despite his sparkling analysis, he is just plain wrong. Contract lives.

together? How are rules created or discarded? How are standards evolved or shut down? How are disagreements rationally resolved?

There are three models, each well-known to be not entirely satisfactory, to explain legal reasoning.[12] Rather than look at the models in the abstract, let us examine them (perhaps unfairly) in a single tort context. Let us consider the tort of wrongful birth. Generally, the action is brought by parents of a child who would not have been born except for the failure of another, for example, a doctor performing a failed tubal ligation or a drug manufacturer with impotent birth control pills. As technology improves, the same logic would allow suits for failure properly to interpret the results of amniocentesis, ultrasound, or some other pregnancy test to inform the parents regarding the pregnancy continuation decisions they might make; or, for the same decision, testing in vitro embryos. Suppose the child is born damaged and a suit for future medical and nursing expenses (and perhaps emotional distress) is brought.[13] The child himself may or may not be thought to have suffered damage. He suffers greater problems than children routinely suffer (we might think routine here to be within one standard deviation of the norm), but how he would be better off not being at all is a contention morally, politically, and ontologically difficult to maintain. The example is one, then, of wrongful birth, not wrongful life.[14] Assume the issue is new and the rest of tort law more or less exists. Now for the models.

The first or natural model suggests that the tort law is generally based on principles drawn from ethics and religion, and the habit of such borrowing from those spiritual motherlodes, and the borrowed standards themselves, provide a basis for new rules and rules for new situations. The lode of principles may well prove unhelpful here, as the sanctity of life may trump or be trumped by responsibility for life damaged. However, resort to narrower legal precedents, ones that might give guidance as to who owes a duty to whom (can it be owed to

[12] There are hundreds (or more) of hybrids, and a group of less-accepted theories, the best known of which is probably legal realism, a theory skeptical of authoritative norms, or at least their employment. This is hardly the place to critique the successes and failures of any single, satisfactory unified theory of adjudication. Suffice it to say, a self-evidently successful and settled theory of any social conduct – ethical, political, or legal – would be a surprising and hailed achievement.

[13] Suit could be brought, at least in theory, for a breach of duty leading to the birth of a healthy, albeit expensive to raise, child. That type of suit has met with little favor in the courts. One dissent puts the problem starkly. "It is no answer to say that a result which claimant specifically sought to avoid, might be regarded as a blessing by someone else . . . The doctor whose negligence brings about . . . an undesired birth should not be allowed to say, 'I did you a favor,' secure in the knowledge that the courts will give to this claim the effect of an irrebuttable presumption. Dr. Ramey did not do Edith and John a favor. This is what this Court should hold. Since it did not, I must dissent." (citation and internal quotation marks omitted). *Fassoulas v. Ramey*, 450 So.2d 822, 830 (Fla. 1984).

[14] A competent examination of the related issues of wrongful birth and wrongful life, as well as rejected set-offs for the parents' failure to have an abortion or put the child up for adoption, can be found in *Greco v. United States*, 111 Nev. 405 (1995).

a thing not in existence, or even about that life?) are shelved. Such a model allows dramatic moral growth and avoids the problem of endless restrictive precedents increasingly at odds with the changing social practices it governs. Medical and pharmaceutical practice changes rapidly, our concepts of personhood evolve, knowledge of the fetus and its viability increases yearly, and one ought to be careful about prior fact-driven legal decisions.

That is, we might want to weigh the benefits of child birth, healthy or not, that wrongful birth cases trample. Moreover, we want to consider the consequences of extending the holding of any decision to analogous cases as we consider the rapid scientific changes afoot. If we require a duty of care to be assumed by a reluctant parent in caring for the child initially, then we must look at an array of possible consequences later. For example, the result of failure may not be an unhealthy child, but simply a child unwanted, inconvenient, or arriving (years) too early. There may be real, ascertainable costs to such a child.

Or consider the following: the technology of child-delivery has increasingly involved in vitro fertilization and the science has become sufficiently sophisticated to allow fine-point DNA selection for desirable traits. Particular parents can contribute traits both (in their own, certainly subjective, eyes) desirable and undesirable, and want only the former for their child. They might want such traits to include the lack of any genetic deficits, of course, but they might also want intelligence, athleticism, height, or fair-hairedness, or want to avoid baldness and plumpness. The promise of unusual talent, with the predicate of increasing scientific precision in genetic selection, might be available in mutually talented couples. For instance, both the Agassis (Andre Agassi and Steffie Graf) won grand-slam tennis finals, whereas both the Clintons (Bill and Hillary) ran for President of the United States. Each couple may be able to produce specialized offspring who could accomplish these feats. The Agassi child might inherit certain neuromuscular, optic, reflex, tenacity, and strength qualities, DNA traceable, which together create the unique combination of physical traits necessary to win international, grand-slam tennis events. The Clintons, interested in continuing a political dynasty and knowing some percentage of their offspring will have the cognitive qualities, frontal-lobe peculiarities, memory and personal charisma, and congeniality to be candidates for the Presidency, want to give birth only to that child. Left to nature, only 10 percent of either the Agassi or Clinton offspring will repeat their parents' performances, but all, given the family history, will try. Watching the failure of the others would be the Agassis' and Clintons' sorrowful lots in life (as would, similarly, the consequence of producing a not untalented, but hardly virtuoso, offspring of musically genius parents). The original duty owed is not to any offspring, not having the fortune to exist, or if existing in vitro, having the good fortune to enjoy the fruits of the mistake: life. It is owed to parents, who can show a loss, at least to them. Should they have the right under tort law to do so? Put differently, is delivering the wrong child akin to a restaurant serving the wrong entree?

Here, the natural theory may splinter. Questions of choosing life, even in vitro life, may draw strong objections whereas quality of life issues for others (are high achievers happier?) are dangerous territory. Religious differences may dictate the answer, but might reveal a seeming consensus disintegrating. In any case, the very real concern arises as to whether what is going on is law at all. "Theocracy" does not carry the same meaning as "legality," nor should it. All that is lost when we look at the savagery of the Genesis illustration can be lost again when ethics and morality are conflated with legal principles and rules.

A second model is positivism, a model that suggests that law is basically an interlocking set of rules, with those rules enjoying a special pedigree and judges determining the proper basis for inclusion in that pedigree.[15] In tort law, this overwhelmingly means the rules come from judicial decisions or legislation. The right thing to do, outside this set of rules, is largely irrelevant. What does rule following indicate in wrongful birth cases? Taken at its word, the dilemma of such cases is that they are at best frozen without sufficient rules to make a decision, and hence are awaiting legislation; at worst, they are encrusted in older concepts and unable to change. There is the political rant that judges should not make law, but that is, at least in tort law, unhistorical, contrary to practice or reason, impractical, and simply wrong. However, the positivist model is not necessarily committed to such a view. If, by consensus, new decisions evolving from the old count, then judges can try to handle the problems of wrongful birth. But how should they do that? If only the rules in place provide the sources of legal input, how should new problems be treated? It may be that past law is not a good way to solve this issue. No direct cases might exist, and those suggested by analogy are potentially misleading.

Suppose there is legislation declaring that the public policy of a state favors of all human life, is against discrimination based on disability and stands firm on permitting the right to an abortion. The prior court decisions allow malpractice suits for the failure properly to perform a procedure, product liability suits for the failure of drugs to perform as warranted, and consequential damages broadly awarded when either of these failures is proven. Would the crossed purposes of a political Agassi and an athletic Clinton give rise to claims in tort from this type of failure alone? If we have nowhere to look but the internal, positivist model, then the quality of decision making is severely restricted. Moreover, neither justice nor peace is likely to be served. Positivism does allow for growth and change, but slowly and if and only if there is a consensus. Absent that, it appears (to positivists) that something like politics is at work, and that politics is not law.

[15] Positivism has a long tradition – with the major figures, historically, being Bentham, Austin, Kelsen, and Hart. This sketch is based on H. L. A. Hart, The Concept of Law (1961); Joseph Raz, Practical Reason and Norms (1975); Neil McCormick, Legal Reasoning and Legal Theory (1978); and Jules Coleman, *Negative and Positive Positivism*, J. of Leg. Stud. 139 (1982).

But why should we assume that a consensus will save the day? Do all of us think parents should be able to eliminate left-handedness, swarthiness, brown-eyedness, gaucheness, high-pitched voices in boys and low in girls, or tone-deafness in their children? Is that a decision belonging to the parents, society, those alive who are similarly situated (other left-handers), or no one? We can hardly expect anything like an early consensus, and might even find one emerging very slowly or not at all. Locking out politics does more than lock out potential solutions, it bars the felt-claims of those invested in the process. What should count is excluded.

The third model is that of rights theory, holding that there exist principles of the legal system related to past legislation and decisions, but not limited by them.[16] Such principles are embodied in any individual case by particular rights – the principle of free speech gives me the right to speak at a political rally or in a public park. The enormous problems relative to where these principles originate, how they interact with narrow rules to the contrary, and which principles among several or many contenders are supreme aside, what about wrongful birth? Rights theorists will agree that the specific interest group, goal-oriented, partisan politics are limited to what is existing in the rules (largely the specifics of legislation and narrowly drawn cases), whereas the principles are broader and ethically laden. Moreover, they are the right ones. They fit or are appropriate for the legal system at hand.

What of wrongful birth? Precedents count, but given how necessarily anachronistic the science can make them, not too much. The difficulties with principles having ethical content is that they may well conflict in fundamental ways when addressing new problems. My principle of autonomy and your principle of the sanctity of life may look to be mirror images of each other with regard to historical battles over slavery, women's and minority equality, and the rights to marry, travel, vote, and be provided equal treatment and access. Yet, here, they may fall apart. My principle of automy suggests that I have a basic right to choose the traits of my offspring whereas your principle of the sanctity of life bars any tampering with future individuals and thus any such choice. How do we solve the conflict? The rights model suggests a singular procedure, involving mechanisms of weight of the principle, fit with the existing law and gravitational force of the statutes and precedents. In short, it offers little help, and worse yet, claims that the problem is rigorously solvable as a legal problem. It wants to do what all of these models do: deny politics in order to prove that law exists.

The reason these three models fail is that they forget to keep in mind a simple but crucial distinction: that between the politics of general concern and the politics of judicial concern. The first involves all the elements of garden-variety politics, whereas the second sees such politics through the lens or filter

[16] The seminal proponent of the rights theory is Ronald Dworkin. See, for instance, his Taking Rights Seriously (1977) and Law's Empire (1986).

of the judicial role. Simply put, and apart from (but undoubtedly related to) other beliefs, we each might have an idea or concept or theory of how a judge should act as a judge – what he or she should look to and look at, what ought to be his or her notions of equity, comity, and even decorum, what standards ought to be employed when using discretion, and the degree of deference to be paid to other judges, nonjudicial officials, prior text, and larger legal concepts. In that one has a concept of a legal system, these issues are considered differently vis-á-vis judicial role than in the general political arena. I might think abortion wrong or capital punishment abhorrent yet believe an American judge ought to allow them both under a complicated set of notions involving a judge's role of constitutional authority and deference to prior decisional rulings.

When the two arenas, general and judicial, are exactly the same, there is a vertigo to legal thought. Nothing seems clear or solid. If pornography is bad, stop it. If the defendant is guilty, convict him. If the product is defective, let the injured plaintiff recover. Regardless of whether the quality of counsel or veracity of witnesses prevented the truth from being seen, or whether independent concerns of the protection of free speech, the problematic use of wrongfully obtained evidence, or the evidentiary and finality issues creating concerns about lapsed statute of limitations intrude, it is imperative to achieve the desired concern of the moment. Yet this is rarely, if ever, what we think. We do want the judge to behave as a moral or prudent or even decent human being and the legal system to reflect this and consider a myriad of concerns and ideals. We do not want only to go after the truth or teach the wrongdoer a lesson or make the injured party whole. Our politics are judicial in that we want the judge to behave differently, to behave as a judge. If a reasonably just tort system mandates a statute of limitations for a claim to be two years and an otherwise compelling, meritorious, even heart-wrenching matter is brought two years and a day after the tort,[17] we want that judge, at the very least, to give great weight, perhaps dispositive weight, to the time limitation, even if we think two years to be too short.

Using the judicial filter, we reconstruct our politics as standards (rules and principles) assembled by what we take to be an ideal judge. In a manner analogous (but hopefully more successful than) the move of act-utilitarianism reassembling itself as rule-utilitarianism,[18] judicial politics are used while general politics are not. That said, politics matter nonetheless, and those politics are always in play. They are the essence of the debates about deference to legislatures, respect for prior written authority, innovation in remedies, scope of rights, firmness of precedence, reliance of parties on past rulings, fullness of remedies, and the readiness of fundamental or catastrophic politics (war, riots,

[17] Of course, when statutes of limitations begin and when they may be tolled are contentious matters. However, we are simply assuming here the statute has been triggered and has run.

[18] For the successes and failures of such an agenda (usually failures), see David Lyons, Forms and Limits of Utilitarianism (1965).

famine, invasion, depression, or terror) to trump ordinary processes. But even the trumping is one step removed. As the politics, though, manage to remain, the comfort of a unified right answer – guaranteed in a natural model by moral imperative, in a positivist model by a rule consensus, and in rights theory by the best answer for achieving rights through the proper fit and weighing – is gone, and legal systems become local, even personal. If there is no underlying consensus, or at least convergence of similar and parallel opinions, the system breaks down. All of that is only a problem if one holds the mistaken view that law exists prior to and apart from a widespread social agreement. No one looking at civil wars could long hold that view.

Let us then return with this final model, that of what we might call judicial pluralism, to the tort of wrongful birth. We have a conflict of potential rights, perhaps even between parents and child. Perhaps a politically based Agassi offspring or an athletic junior Clinton, seeing the large damage awards to their respective parents for the distress triggered by occupational and talent disappointment, might sue or third-party sue these same parents. Their claim might be based on emotional distress, ridicule, defamation, or some other breach of parental duty for essentially, via public pleadings, wanting their child dead (or at least never to have existed). But the larger politics are also evident. Should parents benefit from bringing children into the world? Should physicians or drug manufacturers be without consequences for their own failures of duty? Should the outcome of the child, from autistic to albino, be a matter of monetary judgment, not to the offspring, but to his or her parents? Is adoption or abortion relevant or required? Does the lost opportunity to have other children matter, and is that matter the same in societies underpopulated rather than overpopulated? The politics intrude at every moment, if in a filtered way.

These examples, taken from Genesis and wrongful birth, may seem farfetched and laced with counterfactual, subjunctive suppositions. Isolated extremes clarify positions, but, that said, let us return, more briefly this time, to some of the politics swirling around our hero from Chapter 1, or perhaps now, our late hero. Our hero was involved in perhaps dozens of torts, both as a potential plaintiff and a potential defendant, all in just an hour. Most of them – the dog bite, the trespass to property, the assault with the coffee cup, the defamation of his new competitor, the slip on the icy build-up, and the automobile and medical negligence – are judge-created torts. They each come with hundreds of years (if one looks to the horse-and-buggy as the logical and empirical predecessors to automobiles) of baggage, and in those years, a hodgepodge of political forces have been at work. Consider the dog bite. Should animals be allowed in a suburban yard, with or without a fence? What about more notorious dogs, or less domesticated animals? Does it matter how big the yard is or how isolated it might be or how many other, adjoining property owners have similar animals? What if the property has thousands of acres with wild animals never under a master?

The domestication and breeding of animals, the fencing in of pastureland, the use of animals to deter trespassers, the keeping of imperfectly domesticated animals either to guard or as exotic pets, and the replacement of animals with other methods of transportation or available food: these are large trends that influence our simple dog biting its errant neighbor, our hero. The frontier is fenced and closed; pigs, chickens, and horses are rarely found in cities; and property lines are blurred and disregarded in a nonfelonious way with great regularity. One might write a book, perhaps a multivolumed set, on the contentious politics of all of this, yet it has been managed (perhaps imperfectly) one bite at a time through the courts. That is, the danger of the animal, the ruralness of the setting of the incident, the legal status and age of the victim, the history of the culprit (is every dog entitled to its first bite) and the cogency of analogies from other torts (is a dog like a dangerous condition, an irresponsible servant, a disobedient child, or a defective product) create a particularized law. It is also highly political, in that individual interests push the case law at every point. For example, the extent to which we judge dogs to be important or a menace is highly personal. The occasional baying at the moon of a seeing-eye dog appears very different to the dog's owner than to her neighbor. To a large extent, the issue is based on the character of a society. A sign placed on the public commons in the town center in 1877 barring vehicles in the park may well have had the intention of stopping noisy, clattering, snorting, smelly, dangerous horses drawing carriages. The same intention to have a relaxed, peaceful, enjoyable day at the park, we might now think is best achieved by having horses drawing carriages on the same public commons.

The result is a state of peace, if an occasionally guarded one. We might see this as interspecies, as we have moved from punishing animals for causing injury to judging them based on fixed criteria (e.g., domestic versus wild) to seeing them as morally worthwhile beings in some impending legal moment. We also want to promote peaceful coexistence among neighbors, economic competitors (farmers and ranchers), and economic and administrative users (the problem of police dogs inadequately tethered). The politics are microscopic, the concerns of precedent and rights *de minimus*, and the law always in flux without apology.

Let us consider one final tort of our hero: his use of insider information on the company Standard Nonsense to sell stock at an advantage. This is a tort that can hardly be extended to all sellers who failed to understand the value of what they sold, nor is it based in any coherent way on protecting those misled or defrauded by the seller himself. That is, lemon laws or deceptive practice acts protect against a one-to-one relationship involving duress, deception, duplicity, deceit or undue influence. Instead, the special laws aim to protect sellers as well as buyers, but do so only in extraordinarily limited circumstances: those participating in securities markets. Those markets are the life-blood of capitalism and they, like the antitrust laws, essentially exist to protect a particular form of capitalism. That form is by definition neither unfettered nor self-destructive.

Securities sales allow for corporations to raise the money needed to run the American economic system. It could run on *caveat emptor*, with insider information as legitimate as that acquired by a sophisticated data gathering system, advanced econometric techniques, a profound understanding of market forces, or just a good hunch. All have, vis-á-vis a single trade, the same consequences to the seller.

Yet the lack of such insider rules might scare away sufficient investment dollars to threaten the system. Conversely, for individuals further from the Wall Street epicenter, there would be a perception that those inside had an unfair advantage. The politics here are complex, as the perception of fairness seems to be at least on a par with fairness itself.

A certain amount of cynism is involved in torts meant to protect an imperfect, unfair, skewed, inefficient, and slanted in favor of the wealthy, connected, and insider market from fraying at the edges. Yet, perhaps some cynism is part of the reality. Adam Smith wrote that "civil government . . . is in reality instituted for the defense of the rich against the poor."[19] That attitude is hardly a cause for dismay, let alone a call to arms. It merely states that institutions that create the perception and usually the reality of opportunity for advancement and fairness of access allow a civil society to exist. Civil society is more or less the antithesis of civil war and the politics follow opportunity, access, and social perceptions. For Smith, peace was the goal, and to some extent the premise, of capitalism and a market society. Pacifying markets is the latest in a long line of pacifications: of people, property, products, and professionals. The world becomes a safer place, or at least has more safe places in it, when one can venture forth protected.

That said, the tort system often fails miserably in achieving its purposes. But that is inelegantly stated. The purposes splinter as the politics and political aims diverge. There is no single answer as to what ought to be done in most tort situations as there is no political consensus across the tort spectrum. In fact, to the extent it is taken literally, the term "tort reform" is nonsensical, as there is not a possibility of unequivocal reform so much as there is the possibility of a changed political agenda. Goals, purposes, principles, and money push toward or away from various contenders for the best tort solutions. Let us, as a final look, examine these at torts' narrowest and most cluttered realm and then at its broadest and least litigated one. These areas, workers' compensation and international human rights, will be examined through two legal cases: *State ex rel. Gross v. Food, Folks & Fun, d.b.a., KFC*[20] (the *KFC* case) and *Filartiga v. Pena-Irala*[21] (the *Filartiga* case).

[19] An Inquiry into the Nature and Causes of the Wealth of Nations 715 (R. H. Campbell, A. S. Skinner, and W. B. Todd, eds., 1976; orig. pub., 1776).

[20] 112 Ohio St.3d 65 (2006).

[21] 630 F.2d 876 (2nd Cir. 1980).

The workers' compensation system is a no-fault tort[22] system that largely avoids the normal litigation paraphernalia of suit, defense, depositions, pretrials, motion practice, and jury trial. Instead, a truncated administrative process, with scheduled payments for particular injuries and no discussion at all of how the worker got injured other than at work is in play. The system is more efficient, faster, and less contentious. The trade-off for the worker is surer, certain money now rather than potentially greater recovery, but with less certainty, later. The trade-offs are mirrored with employers: shortened, certain exposure for diminished litigation costs and downside risks.

This is the background of *KFC*. Gross, a 16 year old working at KFC for less than three months, was severely burned while using water to clean a pressure cooker. He sought workers' compensation for temporary total disability (TTD), was awarded TTD, and then was denied it. The state Supreme Court eventually took the case and held that Gross had voluntarily abandoned his job simultaneously with being burned and thus, not being an employee, was not entitled to TTD. How did Gross accomplish this voluntary abandonment?

Gross did it, not by stating or writing that he was quitting or abandoning work, but by disregarding written and oral instructions. During training, Gross received an employee handbook stating "*Never boil* water in a cooker to clean it," with emphasis in the original. Gross acknowledged, in writing, receiving the handbook. Furthermore, a warning label was affixed to the pressure cooker, which read that employees should "not close the lid with water or cleaning agents in the cook pot." As to oral warnings, a coworker previously saw Gross using water to clean it and stopped and admonished him as to the potential risks. Moreover, just before the accident, two coworkers, seeing Gross add water to the cooker and close the lid told him to stop and gave him further warnings of the danger. Gross ignored all of it – handbook, label, prior warnings, and contemporaneous warnings – and opened the lid, severely burning himself and two other employees. In holding that Gross was not entitled to workers' compensation benefits under these circumstances, the Court[23] reasoned that

[22] It might be argued that the workers' compensation system is an administrative one, opting itself out of the tort system. But these are mere labels, not concepts. The system handles tort issues in a specified manner, using administrative not common law procedures. The segmentation of legal areas can easily create a false sense, not only of what is going on, but the problems endemic to specific legal concepts. Thus, labor law and insurance law are worth considering on their own, but they involve labor contracts and insurance contracts and too restrictive a segregation can cause a significant lapse in solid conceptual analysis. That said, it is tort that is going on in the workers' compensation system and tort problems that are being solved.

[23] Interestingly, the court's majority opinion is unsigned. Although this is technically allowed under certain limited conditions of state law, in general, such limited conditions involve no new law being announced. This is clearly a judicial dodge of individual responsibility in a state where judges are elected. No individual justice wants to be tagged as the opinion's author and perhaps, should there be political consequences later, a by-then retired justice can be implicitedly attributed to be the moving force. No one then needs to take the political

the disregard of instructions constituted a leaving or abandonment of the job. Essentially, Gross was deemed to be cleaning the cooker for his own reasons or benefit, perhaps even constituting at this point a trespasser encountering a known risk. He is acting for reasons imprudent, even inscrutable, and, like our hero filching his neighbor's paper while unable to outrun the dog, taking his chances in an environment known to be hazardous.

In addition, the Court acknowledges that:

> Gross offers a thought-provoking argument, but we do not find that these particular facts are conducive to further discussion of that proposition. Gross *wilfully* ignored *repeated* warnings not to engage in the prescribed conduct, yet still wishes to ascribe his behavior to simple negligence or inadvertence. To address his argument further is to validate that categorization – something we decline to do.[24] (Italics in original.)

The majority wants to appear to be addressing a number of purely legal concepts – voluntariness, employment, negligence, and fault – but that attempt is transparently a failure, in that politics is doing the work.[25] Let us recast the situation. Gross is a high school student performing a low-paid, menial job with some risk to it. He is behaving irresponsibly, perhaps the outstanding and salient characteristic of teenage boys, and is irreverent toward and oblivious to authority, that being irresponsibility's natural sequelae. At sixteen, he likely has had minimal work experience. KFC, on the other hand, has taken significant measures to minimize injury and has, apparently, a generally cognizant work force able not only to act prudently to protect itself, but to assist others in doing so. At the economic end, KFC has spent money in manuals and training to minimize its exposure, while a large claim (from Gross and his burns) would raise any insurance or self-insurance costs. Arguably, KFC has done everything

fall. In fact, as an end of the term (December 28, 2006) opinion, at least one justice in the majority would retire from the bench within one week, at the beginning of 2007.

24 *KFC* at 69.

25 In fact, politics has continued to work through interest group lobbies. Almost a year later, while this book was in press, the Ohio Supreme Court issued an extraordinary reversal, *State ex rel. Gross v. Indus. Comm.*, 2007 Ohio 4916, based on an aging motion for reconsideration. Charitably, the arguments (rather than voting strength) through *amici* briefs of a number of trade unions, a bar association, and a fraternal order of police trumped those of a myriad of business interests, including a chamber of commerce, insurers, and manufacturing and retail organizations. That the matter had become overtly politicized can be seen by Justice Pfeifer's concurrence, where he writes that "The Chicken Littles in dissent predict a workplace apocalypse where employees bob for drumsticks in hot oil, ultimately resulting in an increase in the price of a bucket of 'extra crispy'. . . . That [lead] dissent's Dickensian dreamworld – where presumably the Union workhouse, the Treadmill, and the Poor Law remain in full vigour – does not exist." Regardless of the reconsideration and full-blown politics, either decision, original or modified, illustrates the same problems facing tort law, its tools, and theories, on the ground, under stress, forced to consider the options of charging or retreating, weighing an armistice, and perhaps seeking a nostalgic, Burkean equilibrium.

it should, and perhaps more. It is difficult to see how it could do a better job protecting its employees.

The essential problems are political. First, we want to achieve the goal of safety. That means that everyone needs to be prudent; KFC toward its employees, Gross to himself. We want to reward that prudence and deter its lack. Second, we want to avoid the disruption and expense of workplace litigation. Not only do we want to avoid placing undue financial burdens on either employer or employee (although the sympathy toward one side or the other is typically skewed by political ideology)[26] by requiring everyone to ante up for the litigation process, we want to avoid workplace wars by resolving differences between those who must continue to cooperate and interact with each other daily short of the usual belligerency of lawsuits and courtroom trials. Third, we want those who need medical help to receive it. Likely, either Gross had workplace health insurance or was (insurance) bare. Being other than employed at the time of the accident leaves him potentially unable to pay for treatment. Those without such insurance typically are left untreated or treated at public expense. Fourth, we want to protect fellow employees from the reckless frolics of a maverick worker. Fifth, we may have a number of concerns about the proper level of complicity in fault to trigger a defense. The fact is that employers need low-end (in terms of talent, training, and performance) workers for menial jobs, and must choose from a population often suspect for intelligence, prudence, competence, stability, sobriety, resolve, rule-following, understanding, loyalty, coherence, passivity, energy, or even sanity.[27] If that population is held to a standard of no greater than carelessness, then the available workers may routinely be at risk for forfeiting the protection of the workers' compensation system. Eventually, this could lead to the absurd result of the least deserving having a toe-hold on the most potentially lucrative remedy: a lawsuit. In fact, there is precedent here, again idiosyncratically belonging to the Ohio courts, of the possibility of a return to the law courts for workplace disputes, those because

[26] One might see the twentieth century spectrum as being constituted by the positions ranging from Eugene Debs to Milton Friedman.

[27] This is not to say that any particular employee in those types of jobs has any one of these concerns, or to make any judgment about percentages. It is obvious that a single instance does not imply a general occurrence or that the failure of a general occurrence implies that there is no single instance. Logicians start with the difference between existential quantification (it exists at least once) and universal quantification (it always or universally exists) and back-to-basics would be a good idea in most political discourse. The same issue arises in the Wittmalion tort. The problem in reflexive political correctness – African-Americans aren't all or even mainly inarticulate and low-end workers aren't all or mainly unstable – is that we miss the problem of addressing a population being mistreated because we are so anxious not to offend that population. OSHA and Headstart are good ideas. Their complete justification involves some political incorrectness. If we ran public health the way we speak of political groups, ignoring real disparities between groups, we would begin mammograms and colonoscopies at puberty.

of recklessness by the employer. In those cases, the courts find a wrong akin to an assault, allowing an additional recovery.[28]

The concerns here – safety, economics, industrial peace, and health – are political concerns, and any particular tort case can cut across some normal spectrum that otherwise divides them along political lines. The court in *KFC* was six to one Republican, and the sole Democrat joined the *per curiam* majority. The dissent, with one other justice joining, suggests that the idea that Gross abandoned the job, voluntarily or otherwise, constitutes a dramatic shift in the concept of abandonment. That concept had previously been limited to situations where performance, for reasons medical or otherwise, was impossible. Further, the dissent suggests that negligence had never been the limiting standard in workers' compensation. "No fault" means no fault, not no fault greater than negligence.

> I am also concerned that the majority is tacitly injecting fault into a no-fault system of compensation and reintroducing contributory negligence as a basis for defeating the right to recover compensation. Our workers' compensation laws are intended to compensate a worker who suffers an industrial injury without a determination of fault or wrongdoing. Yet KFC assessed fault for the accident and acted according to its conclusion. This is contrary to worker's compensation principles, and we should not condone such actions.[29]

Pushing categories and concepts into places they had not been before is commonplace to judicial decision making. Sometimes we widely applaud it (as in *Brown v. Board of Education*,[30] where semantically "equal" does not mean equal any longer when it is used in the phrase "separate but equal") and we sometimes are appalled by it (as in *Comm. v. Welosky*,[31] where the court held women are not persons, when looking at filling jury pools. What they are, in fact, is left something of a puzzle).[32] Our concept of voluntariness does not

28 The original case was *Blankenship v. Cincinnati Milacron Chem. Inc.*, 69 Ohio St. 2d 608 (1982), but it spawned voluminous subsequent litigation.

29 *KFC* at 71.

30 *Brown v. Board of Education*, 347 U.S. 483 (1954).

31 *Commonwealth v. Welosky*, 276 Mass. 398 (1931).

32 The logic in *Welosky* could be dismissed as bigoted, ignorant, irrational, unscientific, and legally insane, except that, for those who believe in the authoritative preserves of original intent, who think that what long-dead lawmakers believed in their centuries ago times and places trumps all progress and decency, the logic of *Welosky* marks a jurisprudential triumph. Essentially, the legislature originally held that a person qualified to vote shall be eligible as a juror; that, at that time, women were not eligible to vote; that the Nineteenth Amendment thereafter covered voting rights only; and that "It is clear beyond peradventure that the words of G. L. c. 234, §1, when originally enacted could not by any possibility have included or been intended by the General Court to include women among those liable to jury duty. The Constitution forbade the words, 'A person qualified to vote for representatives to the general court,' to comprehend women." Thus, women are not persons and cannot serve. It is hard to know what purpose such authority-worshiping, exegesis-limiting,

normally extend from voluntarily not following orders to following them badly, but perhaps it should. We often think of the obstinate practices of strong-willed children as a paradigm of negligence, but perhaps that is letting them get away too easily.

The larger issue is industrial peace. Workers' compensation laws followed in the wake of industrial wars, with real battles between the members of newborn unions shooting at and being shot by mine and plant owners' private armies, and at times, the state militia. The peace process that ensued was part of the Progressive Era transformation of American society: the establishment, legalization, and success of unions; the abolition of the harshest working conditions, with shorter work weeks and an end to child labor; industrywide bargaining practices; social security, unemployment compensation, and other safety nets for the worst off of the working or formerly working class. One would normally examine workers' compensation in habitat, in its entire ecological environment, but that level of generality and abstraction hardly suits the character of tort law. Tort is micromanaged and analyzed on a single case at a time basis, with consequences that cause changes in the social fabric, if not as random as natural selection in evolutionary biology, at least with some affinity to the invisible hand in marketplace economics.[33] Each decision is rationalized, poorly or well, through a filter of the judicial role, decided, then reconstructed with new facts, again through the judicial filter of what it is believed courts ought to do. Courts themselves rarely speak of industrial peace, but they do analyze what a no-fault system means. The two – peace and fault to solve problems – do

head-in-the-historical-sand thinking could possibly serve if one is trying to build a better and more decent society.

[33] There may be a more complicated analogy to evolution. There is a picture painted by Richard Dawkins, through a series of books, that the genetic process of mutation and natural selection causes genes to form (essentially) comfortable permanent housing, including human beings and their progeny (further human beings) and also, to transform the larger environment, ecology and globe to suit their needs. That is, the microlevel recreates a macroworld, one more conducive to its needs, rather than simply the other way around (the world determining genes and species). "Earlier generations of scientists would have treated the weather and the chemical composition of the atmosphere as givens too. Now we know that the atmosphere, especially its high oxygen and low carbon content, is conditioned by life. So our thought experiment must allow for the possibility that in successive reruns of evolution the atmosphere might vary under the influence of whatever life forms evolve. Life could thereby influence the weather, and even major climatic episodes, such as ice ages and droughts. My late colleague W. D. Hamilton, who was right too many times to be laughed away, suggested that clouds and rain are themselves adaptations manufactured by micro-organisms for their own dispersal." The Ancestor's Tale 584 (2004). Similarly, tort law recreates the environment to be more conducive to resolution through further and altered tort law. That is, it gradually tames the bellicose and creates precedent that alters future behavior. In fact, it creates human beings (lawyers) to carry all this out, often in specially created shelters (tort-houses *qua* court-houses) Put differently, people don't cause torts; torts create the conditions that give rise to tort lawyers, tort situations, and even tort victims who together create tort suits against tort feasors that, *in toto*, cause torts. For Dawkins's main argument for humans as genes' castles, see The Selfish Gene (2nd ed., 1989); for the environmental reworking argument, see The Extended Phenotype (1982).

not quite come down to the same thing. Translation alters meaning, whereas a look at metaphors and analogies to prove a point inevitably changes the point. The move in administrative programs from grants to entitlements is often imperceptible, but it is crucial.

That said, does Gross's conduct survive scrutiny? That is, in the case of an unread handbook, an unconsidered metal plate warning on a machine, an officious comment out-of-memory a month prior, and simultaneous comments during the performance of a tricky procedure: is that more than garden-variety negligence? The majority opinion cares for none of this (although in emaciated form, the dissent murmurs about the real intention here). Perhaps the larger question is to what extent do we wish to accord special treatment to novices and juveniles? How we treat children is tied to larger issues, often centering around education, driving, criminal responsibility, alcohol, sex, corporal punishment, and our view of the rights of junior human beings.

The solution to these matters is not determined merely by employing legal rights or corrective justice to solve every civil dispute. Moreover, as the social landscape changes, both the issues and the appropriate solutions change as well. The *KFC* case may or may not have worker safety issues because of the pressure cooker, and the activity of regulators such as OSHA to enforce or back away, to intrude directly or to mail paper for bulletin board postings, in the face of such exploding equipment. Child labor laws at one time barred certain, more hazardous employment. These laws became more peripheral as employers created new types of jobs for short-term employees and perhaps parents, looking for work experience and money for their children, became complacent. This has allowed a hazard creep to occur at the work site. Meanwhile, the industrial wars seem like a relic of history in a nation relentlessly individualistic, acquisitive, and suffering historical amnesia about almost everything. That said, tort often has a beneficial role in its use of general principles to solve specific conflicts. Even if wrong, it illuminates the debate by the light of real people with real disputes.

The second decision is *Filartiga*, a case where a Paraguayan police chief kidnapped, tortured, and murdered a Paraguayan seventeen year old in Asunciòn, Paraguay. Suit was brought for kidnapping, assault, and wrongful death, in tort, in New York City, by the child's father. Essentially, the child was tortured to death in retaliation for the father's, Dr. Filartiga's, political activities and beliefs.

The basis for allowing the suit in the first place was the Alien Tort Statute.[34] That statute, dating back to the original Judiciary Act of 1789, provides:

> [T]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

[34] 28 U.S.C. §1350.

Thus, if the act committed was against "the law of nations," then the case is actionable anywhere, at least as a civil, tort matter. The Court of Appeals found, in fact, that kidnapping, torture, and the murder of a child, all in the cause of silencing and warning his father, to be a violation of such a law.

> In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani* genesis, and enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.[35]

The *Filartiga* suit opens the door to a flood of problems centering on international law, world politics, legitimate states, sovereignty, peace and war, diplomacy, and evolving standards of decency and punishment. To begin, what is the law of nations? International law for centuries was mainly a combination of large moral principles, often under the heading of natural law and the concomitant customs and usage that grew up alongside those principles. Treaties would often arise governing certain behaviors – the conduct of war, piracy, smuggling, and slavery – but they rarely met the strict formation requirements of normal contract agreements. Often the offending parties never signed, whereas many who did never allowed enforcement for their own violations. The horrendous wars and mass murders of the twentieth century changed this landscape, with further agreements on the law of war, genocide, and human rights law generally. Finally, new multinational institutions arose, such as the United Nations and the European Union, which allowed the growth of new laws as they also saw an increased jurisdiction for those laws through the weakening of the nation-state. Those who weighed in on such issues were often portentous and pretentious. They looked to global issues for the planet and rarely focused on individual and particular situations. Into the sea of concerns about peoples and the planet enters that legal plebeian, tort.

In *Filartiga*, the court clearly thought tort law to be a legitimate remedy. The concern of the floodgates of litigation was largely unaddressed (the victims of such abuses as are now circumscribed by institutional law are, depressingly, always in the millions), whereas the issues of what counts in a particular society as necessary self-protection versus collaboration versus active wrongdoing appear uncomfortably local. Even torture is a complicated matter. Is it reached with the use of the death penalty or corporal punishment, or in the case of

[35] *Filartiga* at 890.

any particular form of interrogation, incarceration, discipline, isolation, or segregation? The answer lies in the grisly details.[36]

The law of nations is not only evolving, it is difficult to pin down. But the claim of such law is both firm and dramatic: it holds that there is one law oblivious of place, government, society, creed, traditions, or any other geographically or culturally relativistic belief. Sacrificing virgins, killing worshipers of variant religions, enslaving anyone, and torturing anyone: all are forbidden, and if any excuse or justification could be found in special circumstances, it would need to be universal and general. That is, it would need to apply everywhere, with no credit given to privileged parties.

Of course, that need for universality is itself a severe restriction on what qualifies as an international tort. To some extent, those disappointed at the restrictive use of the *Filartiga* case have misconstrued just what universality means. Not every local tort (or bad behavior) counts. As one court held:

> From our necessarily global perspective, conduct, particularly verbal conduct, which is humiliating or even grossly humiliating in one cultural context is of no moment in another. An international tort which appears and disappears as one travels around the world is clearly lacking in that level of common understanding necessary to create universal consensus. Likewise, the term "against his will or conscience" is too abstract to be of help. For example, a pacifist who is conscripted to serve in his country's military has arguably been forced to act "against his will or conscience."

Would he thus have a claim for degrading treatment?[37]

That lack of universality of bad conduct is different from a lack of universality on agreed source of duty. Deciding what behavior is a fundamental violation of the law of nations returns tort to its particularized, bottom-up roots. Treaties and unified nation conventions are not the test. Central government is pushed aside.[38] That is, particular authority is, at least at times and in some places, unable to stop, if not the right thing (no torture), a relatively good thing (some recompense for the torture).

Such a remedy may seem to be so tame as to be nothing more than a sly wink at the world's wrongdoing. That reaction, perhaps viscerally satisfying,

[36] Some of the problems of delineating torture are discussed in Malcolm Evans and Rolf Morgan, *The European Convention for the Prevention of Torture: Operational Practice*, 41 Intl. and Comp. L. Q. 590 (1992).

[37] *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988).

[38] Not everyone is happy with this method. Then Judge Robert Bork wrote that international rights could only be a basis for suit under the Alien Tort Act in those rare instances where treaties or international rules explicitly grant individuals a "cause of action." *Hanoch Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801 (D.C. Cir. 1984) (concurring opinion). International standards of conduct almost never arrive bearing a tort cause of action as part of the standard. The larger issues of international law are clearly set out in Anthony D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations Is Seriously Mistaken*, 79 Am. J. of Intl. L. 92 (1985).

is completely mistaken. The rise of human rights, the decline of torture, the abolition of slavery: all have been processes at once slow, faltering, back-sliding, and stubbornly recurrent. Authority has too rarely been the motivation for reform. Individuals, victims, publicists, and a moral community have led the push, or put differently, abolitionists and civil rights leaders, from Garrison to King, have pulled reluctant governments into belatedly doing the right thing. Their and their colleagues' triumphs and missteps are reiterated (sometimes directly) in the tort system, which often stumbles toward the right answer. Justice is achieved imperfectly, with killers trading money for lives and thieves returning the remaining small change for lost dreams. Even in the calmer seas of negligence, payment is poor solace for a lost child due to crossed wires, careless driving, untested drugs, preoccupied physicians, or a faulty foster care system. Dead is dead, and the system makes modest claims now, and dramatic ones down the road.

Why our examples here? Why Genesis, Wittmalion, wrongful birth, reckless workers, and international torture? To begin with, they display the breadth of the tort system, its creative tendencies to solve problems newly brought to it, the risks of excluding tort from the debate and, most interestingly, the driving force of justice to initiate it, the brake of utility theory to contain it, and the environment of peaceful resolution of every dispute in a manner, if not indifferent at least not perfectionist, to the concerns of morality and efficiency.

Look at what the system allows. As we saw with our hero, every intrusion, indignity, assault, and unfairness – personal, collective, and economic – can find its way into the tort system. Take the Wittmalion tort. Racial injustice in this case, but group mistreatment as a general problem, is notoriously resilient to countermeasures, but then so were three thousand years of dangerous work places: in fields, in caves, at sea, in dangerous buildings, and in more dangerous mines. Workers' compensation laws have tempered this problem, but hardly eliminated it. Tort's character is typically one-on-one, allowing worker safety more easily than racial fairness. Civil rights torts take on discrete new wrongs, but are frozen when dealing with old ones. Circumscribing the wrong and the injury can allow it to be treated with the tort system.

The breadth offers the comfort that can be obtained by what game theorists think of as beneficial externalities. I can take comfort in the fact that you and others have received a flu vaccine. I am not only relieved from worrying about caring for you, I am comforted by the fact that a potential failure of my flu inoculation will be less likely to harm me, as I am surrounded by flu-less, vaccinated family and colleagues. This was the root of Jacob's concern in Genesis, and a nagging anxiety about excluding the reckless teen, Gross, from the workers' compensation system. Self-help, revenge, and larger trouble brewing: this is suggested by excluding tort as a remedy. Jacob and his followers are jeopardized by those loyal to the slain Hivites, and he is troubled by that jeopardy.

It might be thought that a system that allows claims against wrongdoers causes those wrongdoers a fair degree of discomfort. Torturers of children in Asunciòn can be put at risk by a jury in New York. Seen from a view other than the torturer's, that discomfort pales against the gains in corrective justice and the nonbelligerent method used to gain a measure of satisfaction far short of war against Paraguay. Left without a remedy, torturers and racists as tort feasors, and the Hivites as victims, must act, or act or be acted upon, in a vigilante and escalating manner.

Damages for the murder of Dr. Filartiga's son, for Dinah's rape, or for the murder of Shechem and enslavement of his family seems diluted justice indeed. It is. But if these are unwanted damages from a despised system, they would not be sought in the first place. Such suits have a number of benefits: the discovery of truth, a declaration of public outrage and condemnation, the bloodless revenge and vindication of wronged family members, and the possibility of apology, remorse, and healing. Jacob's sons opted out of this possibility, whereas new torts, including the imaginary Wittmalion one, look to opt in.

If justice drives the initiation of the suit, some agreement or consensus drives the resolution. As we saw with the wrongful birth example, politics matters in our treatment of parents who fail to receive with equanimity news of future children or children different from those they thought they had ordered. Part of the politics concerns utility, both the happiness of those in society and the cost of achieving that happiness. One issue is who counts or matters when we think of society. Peace requires drawing lines to be ever more inclusive as confrontation occurs. It allows the inclusion of the villages in Genesis, the children of Paraguay, the races of Wittmalion, even the future generation manipulated by the science of artificial procreation: separated, they war or kill or retreat to their own kind; barriers collapsed, they file suit, but survive.

To a large degree, within tort, wrongdoing is left incompletely punished. It might be thought by those bitter at a mitigated win that tort even rewards wrongdoing. If the tort weapons are dull, the tort judges remain ignorant amateurs. Manhattan jurors decide South American politics. Meanwhile, dully educated, middle-class Americans sort through racial history, linguistic and semantic analysis, the interdependence between language and thought, and the role of particular institutions in contributing to particular language patterns in order to determine a Wittmalion tort. Appellate judges, remembering their high school biology and grade school prayers, must determine wrongful birth cases. The results taken as a whole are diffuse, checkered, and individual. They are also often inconsistent and more than occasionally indefensible. Yet they are results, and they replace the self-help triggered by the festering of unrighted wrongs.

The individual nature of tort is one of its salient features. Specifics count and there is little efficiency or larger utility maximization in the process, as the costs of information is difficult to share with others. Dr. Filartiga confronts

his son's torturer, whereas the burned teenager Gross can look across the table at the manager of the KFC reminding him of his sheer impertinence. Close confrontation is a mixed process, but it has a potential upside. It contrasts with the nontort alternative of war:

> Close combat also requires overcoming the moral resources. Combatants need to escape the inhibitions of human responses: of respect and sympathy for others. They need to escape the restraints of moral identity: of their sense of not being a person who would wound and kill. Mostly, the moral resources fail to prevent killing in combat because they are neutralized. Armies need to produce something close to a 'robot psychology,' in which what otherwise seem horrifying acts can be carried out coldly, without being inhibited by normal responses.[39]

The difference, from the Genesis of Jacob to the Southern District Court of Dr. Filartiga, is striking.

Tort results typically appear to be mediocre. Over time, as we disarm belligerence and await justice, as we foster an environment of resolution, and as we become satisfied with imperfections and limitations we see in tort as in all of life, we cannot help but notice improvement.

The sum of modest results early is large and better change later. In that way, the principle of peace offers the promise of justice.

[39] Jonathan Glover, Humanity 48 (2001).

7
Once and Future Battlefields

Talk of the marketplace of rights is rare, even jolting. It brings together two traditionally antagonistic perspectives: the laissez-faire, libertarian, free-market perspective with that rooted in the paternalistic, egalitarian, and in entitlement. In fact, separate talk by many from each camp, holding self-regardingly superior and preemptive beliefs, makes any merger conversation between rights and market advocates formidable. Consider the simple stories each side tells to show the obvious validity of its point of view. The market advocates suggest that we make choices – to attend college or to enlist in the military, to invest in bonds or to buy options, to purchase additional insurance or to add a deck, or to start a business or to take a job. Each decision has potential risks and rewards, but two things are true: at an individual level, choice and freedom are maximized, whereas at a global level, a high degree of rationality and prosperity is achieved. Collective or governmental decisions defeat that freedom and prosperity and ought to be kept to a minimum.

The rights story is equally compelling. We ought to respect individuals blessed with differing talents, inheritances, abilities, and luck. Those blind, born to great poverty, or subject to discrimination on the one hand or in need of clean air and water, ready medications, or a safe workplace on the other, might claim particular rights based on these circumstances. At some basic point, both views, market and rights, hold that each individual has certain entitlements – you can't punch me, burn my house, or take my pension – and that the market is central to making those entitlements worthwhile. I can sell my labor, I can rent or sell my house, I can spend, borrow against, or purchase goods for my children with my pension. Restricting the market restricts my freedom, but market participation assumes some ability to compete and is justifiable, under any scenario, only if the competition is fair.

All this may be so obvious and self-explanatory that it is rarely said. Market analysis without rights scrutiny, if comprehensible at all, risks leaving the least healthy, able, intelligent or trainable to their own devices, begging on the street corner, inherently lacking the tools to have participated (without more,

at least easily) in the educational and employment arenas. That is, it makes a certain amount of sense to allow those who achieve more by effort, hard work, and contribution to enjoy greater benefits, but the justification for those benefits includes the assumption that effort, hard work, and the ability to contribute are universally distributed assets. If one is barred from participation, disqualified at the outset from the possibility of receiving a reward, the lure and the glow of the market dim.

To a great extent, economics assumes certain rights, whereas politics involves the battle to change the weight and distribution of those rights. Economics assumes or works with the existing market model (feudal, capitalist, state socialist, totalitarian, or more commonly, some complex, even inconsistent, hybrid), whereas politics changes or modifies or protects such a model. For example, labor unions and antitrust laws have changed the nature of employment and competition. They once did not exist and may not exist in the future.

If economics assumes rights and markets while politics modifies them, one battleground between rights and markets is tort law. Should an employer be able to fire an employee based on her status, perhaps increasing its profits by doing so? Or does that employee have the right not to be fired, despite the fact that the employer's customers' biases make retaining a female or black or Muslim employee unprofitable? To pick a different kind of example: does a homeowner near a factory have a right to clean air that trumps the manufacturer's need for a smoke stack that emits sulfur dioxide? In fact, is there a right to a safe workplace, school, or shopping mall that requires fire or antiassailant protection at significant cost for employers, school districts, or mall owners? These questions more than just meet during tort litigation; they give rise to it in the first place.

Is there an alternative to tort litigation? One might want to think so. Litigation is slow, expensive, inaccurate, tedious, biased, and wasteful, not to mention more than occasionally economically ignorant and morally pernicious. Part of that lies in the procedure, with its entrenched defenders, its partisan interests, the beneficiaries of its arcane rules, its sincere true-believers, and its sheer glacial inertia. Part is due to the players: judges and officials selected or self-selecting because of ambition, politics, sloth, partisanship, greed, and careerism. That is, advancement may be achieved for every reason, not excluding competence.[1]

[1] Judicial selection has one rare, almost unique, reason, one which is something of a hybrid of kicking one upstairs and banishment. Troublesome or difficult individuals are at times appointed to a court just because of their trouble or difficulty. They are thought then to be gone, virtually forever. One interesting example would be President Wilson's appointment of his disruptive, controversial, and misanthropic Attorney General, James McReynolds, to the Supreme Court, producing an explicitly sexist, racist, anti-Semitic, unpleasant, mean-spirited, and horrendous Justice, whose nomination safely removed him from the Wilson cabinet. See John Knox, The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Clerk in FDR's Washington (Dennis Hutchinson and David Garrow,

At the same time, advocates may be motivated by fees while indifferent to larger goals of merit and progress, and parties – typically bitter, belligerent, fuming, avaricious, stubborn, unhearing, and far from candid – have motivations at once personal and self-centered. Part is the politics, often the result of legislative battles splitting differences, evading responsibility through vague or incoherent language, or achieving partisan goals for election ends at the cost of any sane effect on civil society.

If that were it, failure would everywhere be the cry. It is not, however, quite that. The lack of universal failure leads us to why alternatives to tort law are so difficult to find. It is not because the system in place is unimprovable or incorrigible. Opportunities to improve are legion and such improvements when implemented make things better. Historically, the workers' compensation system, the endless tinkerings with securities laws, the end to privity in product liability cases, and later restrictions on punitive damages in those cases: all edited bad and abusive rules, improved efficiency, and achieved greater justice.

It is not that we disagree about ends, stand differently as to the rules in society, are sectarian in our interests, vary in our beliefs and knowledge about methods and institutions, or just plain value things differently, although we do. The problem is more general. Should imprudent, risk-taking youths who turn into emphysemic, cancer-ridden adults be able to sue cigarette manufacturers who knew the product they were selling had risks greater than the average consumer generally appreciated? Answering this question is not just a matter of correctly applying economics or legal procedure. It requires a consensus on what rights we have and what procedural balancing tests apply to weigh those rights. There typically is not agreement on these issues and, thus, no method or procedure or forum to get them right. What is right is just the problem.

The tobacco litigation problem, at least as originally brought without the later overlay of fraud, is emblematic of tort, in general. Let us assume that a large group of smokers knew there to be some risk in smoking, whereas tobacco companies knew the risk to be both great and generally underrated.[2] Should the failure of the companies to provide more information give rise to a legal claim? Would that type of reasoning apply to claims by motorcyclists, ladder and mountain climbers, football players and ice skaters, and chocolate or sushi lovers? What of parents who purchase foreign toys of unknown lead content or any painted toy of unknown origin? We know that buying a house with asbestos, taking a job in a coal mine, or enrolling in a college in a high-crime neighborhood are riskier choices than deciding on a newer house, office job,

eds., 2002). President Madison attempted to remove a less contentious but still problematic appointee, John Quincy Adams, from his government by appointing him to the Supreme Court, a likely brilliant choice. Adams turned him down, after he was confirmed. See Garry Wills, Henry Adams and the Making of America 268 (2005).

[2] This exact process is described by Allan Brandt in The Cigarette Century: The Rise, Fall and Deadly Persistence of the Product that Defined America(2007).

or suburban school. Is that all there is to the story? Asbestos litigation, mine safety, workers' compensation penalties, and negligent security suits would then have no traction. The issues here are psychological at the individual level, political at the institutional level. Some people are risk averse, some risk takers. Some need immediate gratification, some are more prudent and accept delayed gratification. Some value immediate consumer objects over long-term good health, others do not. The knowledge gap of the smoker is only part of the story. Risk, prudence, timidity, and choice also count. A perfect market requires complete knowledge. Where to draw the line when knowledge falters must be inherently controversial.

Disagreement has always been with us. Trespassers to land have engendered complaints from the time of the Roman Legions' conquests to the Spanish Conquistadors' plundering of the Incas to governmental taking by eminent domain of American backyards for highways and shopping centers. Upstream polluters, slave traders, and monopolists are the ugly faces of those who see the benefit of their bargains challenged by others crying rights violations. That said, not every bamboo farmer whose seeds drift, perhaps hundreds of miles, to blight my yard is a trespasser or the creator of a nuisance. As the world becomes more crowded, complex, diverse, and mobile, individual acts ripple more widely and more intrusively. There is no line, thin or otherwise, between one person's freedom and another's privacy, only the issues of how to treat the contentious overlap.

If a solution is not at hand, the tort process achieves its perhaps limited justification by measuring success by a different standard, that of keeping the peace. Tort law allows the bazaar of rights its democratic day in the sun to solve matters maddeningly piecemeal. It clearly provides an unsatisfying peace, achieved often at the costs of tonier values and too frequently at the price of truth.

Certainly, tort suits resolve disputes, almost by definition. But not all resolutions are created equal or, put otherwise, not every resolution is a good – just, efficient, correct – resolution. It would be difficult to believe that a system populated by haphazard, arcane, and politically motivated rules and undertrained and self-interested personnel indifferent to, or dismissive of, truth would necessarily be better than a mediocre job. But, to a great extent, that is hardly the main point. These problems can be ameliorated by improving the process in the usual ways: better formulation and clarity of rules, improved selection of judges, fact-finding reforms, and the usual roundup of process reforms. They cannot be solved, however, by having some ready formula in advance that is easy to apply or finding a grand theory that will settle all disputes in a principled, consensual way.

Critics of law generally apply some variety of the billiard table model of tort. The model is this. There are a number of equal, autonomous, sovereign, and independent billiard balls occupying the table. If one ball hits another, chips

its paint, takes it spot, intrudes on its space, blocks its movement, or hinders its sight line, then that offending ball must pay. That said, cooperation among the balls can lead to a pleasant game of billiards. Tort law operates directly to protect the balls from each other and indirectly to make sure that the rules of movement are cooperative and fair. The playing field is literally to be kept level.

Formulating rules and procedures for identical balls with known and non-controversial properties in a defined and certain space is complicated but hardly impossible. We might look to assault rules, speeding rules, trespass rules, perhaps even noise and bumper rules, all based on the reliable set of immutable information. But is tort like this? Consider trespass: you are on my property, in my space, interfering with my immediate environment, or ruining the area that I am near. It is always clear that the property is, somehow, mine. You can't bite me, perhaps clearly, because if anything is mine, it is my body.[3] Can you raise bees next door, knowing with some statistical certainty that they will bite me? Is the size of that bite or the danger of its venom important? What of killer bees or cheetahs or rattlesnakes? The problem here is that the degree of harm appears to determine the scope of the duty. We care more about protection from rattlesnakes and cheetahs than from bees. We might be concerned about bumping a billiard ball, more concerned about chipping its paint, yet more concerned about denting it, and the most concerned about knocking it to the floor.

Fitting rights and duties into neat packages is only the beginning of the problem. Let us make two changes to the table: it now sways and the balls differ in size. The sway is gentle but unpredictable, occasionally dislodging a ball and sending it against another. At the same time, the disparity in ball size causes the mayhem of normal level practice to be accentuated. Should we want to infer intent – the balls can move or remain on their own or perhaps by their sponsor's accord – or should we want to introduce fairness, consider how these two changes alter the billiards world. The mental geography of each ball must now be understood in order to figure out if the ball moved voluntarily or was swayed and whether the receiving ball could have averted a collision or was caught in the swaying storm. Meanwhile, the fairness issue arises because of the differing sized balls, creating bullies and victims or, at least, balls that suffer inherent advantages or disadvantages on a level playing field, with greater rewards and risks on the surface of a swaying one.

Suppose that one ball evolves the ability to emit light, allowing it to navigate more successfully and to benefit through sharing that light with other balls. Then suppose an ordinary ball grows a mirror to reflect the light and glory of the beaming ball, or reflects it to a billiard ball buddy. Has the shining light been stolen? That is, is it like a case of shared beauty, merely unprotected, like

[3] That is not meant to be dogmatic about the problematic issue of shared bodies, such as conjoined twins or pregnant women. In fact, dogma in this area is particularly troublesome.

the pleasure I receive from my neighbor's gardens made mine because I can see them from my front porch? Or, rather, is it like the case of a play my neighbor writes, mine only if I purchase her script or pay to see it in production? What we take to be worth protecting reflects what we see as valuable to safeguard. Bees and cheetahs are the flip side of dramas and gardens.

Back, then, to the light. Perhaps the beaming ball is like the claim of Viacom in its suit against YouTube.[4] Viacom claims it has property rights in certain television shows, notably *SpongeBob SquarePants*, *The Daily Show with Jon Stewart*, and *South Park*.[5] Unauthorized copies of these shows are regularly posted on the YouTube Web site and viewed tens of thousands of times daily. YouTube essentially reflects the valuable billiard ball and beams it to others for their use and perhaps pleasure. By doing so, YouTube degrades the currency of the self-lit ball and makes problematic the profits Viacom might enjoy as the billiard table's sole beacon.

The *YouTube* case resembles privacy and self-promotion tort cases but with this difference of reflection rather than direct appropriation. In privacy cases, the image is used or revealed unwillingly, whereas in self-promotion matters, the image's use is permitted, but the limits of permission are disputed. Both cases involve only two parties: the owner and the taker. YouTube neither takes or receives, nor owns or steals. It provides a meeting place for characters of varying character. In this way, it resembles a public park, highway, hotel, or meeting hall. Technically, YouTube is an Internet Web site acting as a forum for users to share video content. It is neutral, like a park or highway, indifferent to those who use it and the activities they conduct. Yet in the lawsuit, it is accused of

> harnessing technology to willfully infringe copywrites on a huge scale, depriving writers, composers and performers of the rewards they are owed for effort and innovation, reducing the incentives of America's creative industries, and profiting from the illegal content of others as well. Using the leverage of the internet, YouTube appropriates the value of creative content on a massive scale for YouTube's benefit without payment or license. YouTube's brazen disregard of the intellectual property laws fundamentally threatens not just Plaintiffs, but the economic underpinnings of one of the most important sectors of the United States economy.[6]

We shall not attempt to determine what claims or defenses should prevail, let alone consider the overblown language of legal outrage. It is clear that basic rights conflict: the rights of content users to the content, as they are, in fact,

[4] *Viacom Interactive, Inc. et al. v. YouTube, Inc. et al.*, Civil Action #1:07-CV-02103-LLS (S.D. N.Y. 2007).

[5] It also claimed stolen rights in *The Colbert Report*, *Ren & Stimpy*, *MTV Unplugged*, *An Inconvenient Truth*, *Mean Girls*, and others. Here taste determines value and nothing else, a matter obvious from a perusal of what is thought worthy in Internet sites' use of the works of others.

[6] From paragraph 2 of the Complaint.

supposed to be watching *SpongeBob* and *The Daily Show*, at least on their television, that is how Viacom makes a profit; the rights of YouTube to operate as a communication arena, such as FedEx or Chicago's McCormick Place Convention Center, or, for other purposes, the public library; and the rights of Viacom as owners of television shows and films. The rights are unfixed and floating, but they also enjoy a large degree of interdependence. Viacom needs viewers, wants discussion, enjoys publicity, and encourages secondary talk. It benefits from some degree of theft – the recounting of a particularly witty episode of *The Daily Show* or *SpongeBob* – in the same way as do sports teams covered in newspapers and highlighted on television sports programs. It wants both use and certain appropriated reuse. The question is one of ever shifting degree. Here traditional notions of corrective justice and utility theory seem shopworn, not quite up to the analytic task. Politics and technology can alter the marketplace of rights faster than traditional notions can reach a consensus as to which rights trump others. That some ideas are protected by copyright would appear to be a good idea, but the extent to which they remain copyrighted after initial payment, particularly when some recasting is welcome ("Did you hear what Jon Stewart said about the President?") is problematic when considering corrective justice alone. Claiming rights is one thing, encouraging the use and discussion of content following initial payment another. What has been bought? Utility and economic counting hardly fare any better. Viacom makes a profit through cable fees for television shows. It seeks to gain the interest of potential customers and, perhaps, aided by the very cutting and posting of dubious quality taping by its own customers on YouTube. In any case, the economics are complex and unclear, unlikely to be known very well by anyone at the time the suit resolves or known at all by those who resolve it.

Let us push the analogy. If the lit ball agrees to share its light with another and thus allow that ball to gain certain information, but requires it to keep that fact-gathering enterprise secret, what would happen if it reneges on that promise? What if it shares the information both balls learned with a ball on a distant billiard table, to the horror of the darkened ball. We might then have a case arising under the Alien Tort Act, the Act used by Dr. Filartiga to seek justice in New York City for the murder of his son in Paraguay.[7] The case would be analogous to that brought in San Francisco by a tortured and imprisoned Chinese activist and his wife against Yahoo, for sharing his Internet writings with the People's Republic of China. Specifically, Wang Xiaoning and his wife, Yu Ling, filed suit against Yahoo, claiming a violation of the Alien Tort Act when Yahoo, "turned over specific identifying information about the Plaintiffs and their electronic communications to officials who used this information as a basis for arbitrarily arresting, detaining, and torturing the Plaintiffs." Yahoo

[7] See Chapter 6 in this book, and specifically *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1988).

and its partners did this despite the fact that they "had every reason to know and understand that the electronic communication user information they provided to authorities could well be used to assist in the infliction of such abuses as arbitrary arrest, torture, cruel, inhuman, or other degrading treatment, and prolonged detention and/or forced labor, to punish what might be viewed by authorities as pro-democracy or human rights activities."[8] Wang Xiaoning was sentenced to a forced-labor prison for political prisoners for ten years, under severe and abusive conditions. Also, his property was confiscated.

The problem here is that there is more than one table, each with its own balls and its own rules. Should Yahoo be held responsible for what happens elsewhere, when it has perhaps followed the right rules on each table and is itself horrified by the distant table's violent billiard ball? The matter is a variation of the cliché that moves from a slice of the pie to a slice of the dynamic pie. Yahoo operates globally, often making deals in and with countries employing unpleasant ethical norms and legal systems distinctly different from those of the United States – here with catastrophic consequences.

Yahoo provided China with the information through an exclusive partnership agreement, requiring shared information, and thereby identifying dissident journalists and human rights activists. In doing so, it gained exclusive rights to the Chinese market. The tug of rights – Yahoo's to operate a Web portal and be transparent in sharing public information to a yet wider public and the Xiaonings' right to engage in protected speech and democratic activities – occurs because of the ever-widening plain of responsibility. If all politics is local, then all morality is global. We find connections between individuals and their social networks that give rise to shared responsibilities. Yahoo did not torture, but neither do employers usually condone or know beforehand of wrongs by their employees: not trucking companies for their negligent drivers, brokerage firms for their churning agents, hospitals for their inattentive residents, or cities for their overly zealous police. The web of legal duty is cast wide, but that is because we accept, even demand, an increasing breadth in our social and moral duty to look out for others.

The billiard ball analogy of independent, autonomous, circumscribed, rights' bearing balls is shaky, although we hardly want to replace it with an Orwellian one of corals merging into a coral reef. The billiard analogy runs into special problems of the frontier of the mind. There are any number of concerns, but two loom large: intention and identity. Intention first. Billiard balls hardly have cognition, thought, and freedom, but suppose, per the analogy, that they do. If we thought a billiard ball made a decision to strike a fellow ball, we might want to improvise a remedy quite different from the situation where we found that the ball was struck by a cue stick. Yet, as we have discussed, there are any number of situations – from brain bisection to the ordinary facts

[8] From the plaintiffs' Complaint, respectively Paragraphs 26 and 25, in *Wang Xiaoning et al. v. Yahoo!, Inc. et al.*, Civil Action # C-07–2151 (N.D. Cal. 2007).

of sociological and psychological conditioning, cognitive and emotional lapses, or miscues in rational decision making – where the decision making is relevantly clouded. The number of complex, hybrid cases is endless. The balls may be taped, pitted, slickened, chipped, warped, or termite-infested. Do we want to rearrange the balls where the loss they caused falls because we think an individual, or person, can be deterred even where deterrence is limited, ineffective, or irrelevant, or, from the point of view of justice, unduly harsh? That is, do we care when your tree falls through my roof whether it was due to your chainsaw or nature's lightning?

Corrective justice concerns typically focus on the existence of intent, whereas economic analysis considers its degree. Suppose the space needed for a ball to survive on the table is limited, and balls hatch various, and often nefarious, strategies to occupy more green space. We might notice certain balls striking others, pushing them to increase their own space. Is occupying more green felt, perhaps through a misuse of the normal billiard rules, a wrong? Consider the recent United States Supreme Court decision in *Tellabs*.[9] There, the question was whether the claim of securities fraud was stated sufficiently strongly to draw the necessary inference that, more probably than not, there was deception, manipulation, or fraud.[10]

Here, contrary to the widespread complaint that judges usurp power, Congress delegated such power to the courts. The problem lay in interpreting the vague standard in that delegation so as to allow those claiming to be tort victims to bring an action. There needed to be a "strong inference" of (more or less) intentional wrongdoing. The purpose of this heightened requirement of a strong inference was to prevent those accused from incurring the costs of defending a frivolous case. But the requirement involves both a circularity and a fallacy. The circularity is this: the heightened requirement of proof makes few defendants liable, thus proving its own validity. If we need to find the defendant holding the smoking gun in order to prove guilt then, of course, mere motive, opportunity, habit, and some gun shot residue will be insufficient. It will fail whether pled or proven. The fallacy is slightly more complicated, and perhaps counterintuitive.

Suppose we begin a sequence with "1, 2, 3, 4, 5." Can we infer that the next number more likely is 6 than 10? No. Suppose I am counting my pocket change, and have five pennies and five nickels. If the idea were to find numbers that

[9] *Tellabs v. Makov Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007).

[10] Behind the term "probably" is quite a lot of legal obscurantism. The Private Securities Litigation Reform Act of 1995 (PSLRA) amended the Securities Exchange Act of 1934 to require the initial complaint to show a strong inference of scienter. Both acts were political solutions to controversial problems within the financial markets and were fashioned with at least a partial eye to partisan constituencies. The routine gloss of blithe reforming spirit imported to the legislation, routinely stripped of interest group motivation rather than genuine reform, let alone beneficial, principled rule making, is seemingly part of court ideology. Put differently, judicial cynicism remains underground.

corresponded to the cents in my pocket, then the sequence would continue 10, 15, 20. What of a sequence of 5, 10, 15, 20, 25? Again, examining my pocket change, the next number (representing cents) would be 26. My money could be represented as 1, 2, 3 . . . 10 if I were counting coins. But as a likely sequence, the probable answer to finding the next number after "1, 2, 3, 4, 5" is nonsensical. It is no more likely 6 than 10 or, for that matter, any other number. Similarly for the right sequence to represent the coins. It is no more likely 1, 2, 3, 4, 5, 10, 15 or, for that matter, 1, 6, 7, 12, 13 as I count pennies and nickels alternately.[11] In order to have confidence in the continuation of a sequence, a theory or explanation of certain facts is required. More grandly, there needs to be a representation of the world, at least some world. If the theory or facts concern what ordinary humans do when asked for the number following 1, 2, 3, 4, 5, then 10 would be a poor answer. That, however, is because of typical human behavior, not failing to find the right answer. The answer lies with facts about ordinary people, modern culture, or perhaps a theory about how our brains work. It is not just there.

What, then, of inferences of intentional wrongdoing? Absent facts or theory, they are problematic, unable to be the right or probable inferences. But the problem is deeper. Justice Scalia, in concurrence, asks about the probabilities being a tie, absent a theory.

> If a jade token were stolen from a room to which only A and B had access, could it possibly be said there was a 'strong inference' that B was the thief? I think not, and I therefore think that the court's test must fail. In my view the test should be whether the inference of scienter (if any) is *more plausible* than the inference of innocence.[12]

Perhaps Scalia has a point, but determining who did it is at least usually a solvable problem. Determining intent, scienter, malice, or any other volitional act is typically not. It requires drawing inferences from results of the mental landscape. It is not even clear that one could obtain the mental state of sellers of stock even by asking them later. It might be helpful if they kept a diary, were cognitive psychologists, could read their own, daily administered CT scans, and had a neuropsychological–philosophical theory of personal action. But even that might not be enough. We can set the tort bar wherever we want, but we need to understand that the costs of bar changing will not only be a loss of corrective justice and utility maximization; it may encourage self-deception, conceptual confusion, and legal chaos.

This might appear a great deal of legal apparatus to make a few points about the difficulty in understanding what is often the black box of human action. However, the battleground of tort, or put differently, the arena where social

[11] The fallacy of unwarranted inferential probability of the kind found in *Tellabs* is discussed throughout Ludwig Wittgenstein, Remarks on the Foundations of Mathematics (1967).

[12] *Tellabs*, 127 S.Ct. at 2513.

conflict is resolved, often centers on intention. Determinism is largely ignored, as is necessity, but the requirements of proof of greater deliberation often lets loss stand where it falls. Lacking training in logic, psychology, medicine, neural science, anthropology, social theory, or much else that might provide a key to ascertaining intent with real precision, conceptual mumbo-jumbo dressed up as statutory fine-tuning, or common law exegesis passes for wisdom.

The issue of identity is more complex. It arises at a number of levels, mainly through intent. What kind of thing exactly is the legislature, the Constitution, a corporation or a statutory code? We give these things human qualities – intent, knowledge, foresight, bias, purpose, unity – even though we know such attribution to be metaphorical at best, more likely simply false. But the problem resides even with the clearly human. Are people like billiard balls, distinct and distinguishable, a known or at least knowable quality? It might seem so, but problems abound, beginning with initial definitions, which prove impossible. If a person is the sum of his physical body, mental qualities, memories, history, talents, appetites, beliefs, emotions, training, and experiences, is he the same person when one or more of these are removed? Suppose he loses an arm, causing some loss or alternative in every one of these categories. If he is the same, then our definition drawn from the list is wrong. If he is not, that might be relevant to an action for assault against him based on a punch he threw from the now missing arm. Otherwise, we would not be holding accountable the same person, but a different one.

Even if individual identity could be readily specified, we are essentially social, influenced by our neighbors, raised in and judged as members of larger groups. The activities that give rise to lawsuits with increasing frequency are the result of social activities, including almost all of the commercial claims, including antitrust, securities fraud, tortious interference, and copyright and patent infringement. They require a backdrop of a modern civil society, but that society is unfocused, changing, and adrift. Even if we could identify each actor and keep him sober, sane, consistent, thoughtful, informed, and prudent, we could hardly be sure of specifying his identity within the evolving social network and conditions where he resides.

We are left then to find justice in a shifting context where moral satisfaction is often inscrutable, while how to find and measure prosperity remains uncertain. The collision of goals and even worlds occurs nevertheless, seen at least as an unrest in claims of rights, more usually as the precursor to self-help and violence. The legal system is left to adjudicate the rights, acting as the local bazaar for pricing them. It is the dynamic of law that the battles are typically fought one duel at a time.[13] Tort litigation is, at times, rightfully criticized as

[13] Class actions constitute a minimal, if highly politicized, exception. They resolve, at once, a large number of disputes that are, at least in theory, similarly situated. "Similarity" at best means legal similarity. Though there are multiple resolutions at one fell swoop, the number of controversies are, by definition, extremely narrowly drawn.

making policy one victim at a time to the detriment of larger interests not involved in the process.[14] Given less play is the correspondent benefit of not sweeping others into the litigation fury, upping the stakes, increasing the scope of conflict, and keeping a small dispute small.[15] The sparse role of any general operating principle is akin to the sparse role the master observer of wars gives to general officers. Consider for a moment Tolstoy's view of the tide of battles:

> The progress of humanity, arising from an innumerable multitude of individual wills, is continuous in its motion. . . . For the investigation of the laws of history, we must completely change the subject of observations, must let kings and ministers and generals alone, and study the homogeneous, infinitesimal elements by which masses are led. No one can say how far it has been given to man to advance in that direction in understanding of the laws of history. But it is obvious that only in that direction lies any possibility of discovering historical laws; and that the human intellect has hitherto not devoted to that method of research one millionth part of the energy that historians have put into the description of the doing of various kings, ministers, and generals, and the exposition of their own views on those doings. . . . Persons who are accustomed to suppose that plans of campaigns and of battles are made by generals in the same way as any of us sitting over a map in our study make plans of how we would have acted in such and such a position, will be perplexed by questions why Kutuzov, if he had to retreat, did not take this or that course, why he did not take

[14] Volunteers from the outside, officious or otherwise, stray into the scene from time to time. One typical sighting involves the *amicus curiae* brief, filed by anyone claiming an interest of any kind. In that judges are elected, normal lobbying might be thought to arise with interest group filings. That said, the interference is, at most, tepid. A typical rule without standards before an elected court is California Rule of Court 8.520(f) (2007).

[15] The problems caused by joining a dispute are general. Building alliances and righting wrongs are fine goals, but they are loaded with potentially tragic consequences. The paradigm of taking sides leading to catastrophic results is World War I. Germany joined Austria in a local dispute with Serbia, Russia joined the Serbs, the Ottomans joined the Germans, the French joined the Russians, and so on. The original dispute, at least at the state level, was a wrongful death tort matter concerning whether Serbia aided the assassin in the shooting of Archduke Ferdinand of Austria. The primary criminal case would be against the assassin, with an attendant wrongful death case against him and against the gun club that trained and possibly armed him, today a RICO count against the Black Hand society to which he belonged and served, and possibly a claim of vicarious liability against a Serbian government that (arguably) tolerated all of this. It has been said about the leadership of Europe before the war that "All these involved reproaches to the statesmen for deficiencies in their stature. But the basic reproach must be the failure of imagination; the statesmen were thinking of the defense of visible interests that seemed vital; they failed to discern that invisible and much larger interests were involved in their decisions. There were, in Russia, those who foresaw a threat to the regime in the war, but the defense of the regime seemed to Sazonov and the Emperor Nicholas to demand not peace but prestige. No one, let it be said again, realized that the war they were consciously risking would be the first World War." Laurence Lafore, The Long Fuse: An Interpretation of the Origins of World War I 267 (2nd ed. 1971). Certainly a failure of a private law methodology and a forum to resolve these disputes was equally responsible.

> up a position before Fili, why he did not at once retreat to the Kaluga road, leaving Moscow, and so on. Persons accustomed to think in this way forget, or do not know, the inevitable conditions which always limit the action of any commander-in-chief. The action of a commander-in-chief in the field has no sort of resemblance to the action we imagine to ourselves, sitting at our ease in our study, going over some campaign on the map with a certain given number of soldiers on each side, in a certain known locality, starting our plans from a certain moment. The general is never in the position of the *beginning* of any event, from which we always contemplate the event. The general is always in the middle of the changing series of events, so that he is never at any moment in a position to deliberate on the bearings of the event that is taking place. Imperceptibly, moment by moment, an event takes shape in all its bearings, and at every moment in that uninterrupted, consecutive shaping of events the commander-in-chief is in the centre of a most complex play of intrigues, of cares, of dependence and of power, of projects, counsels, threats, and conceptions, with one thing depending on another, and is under the continual necessity of answering the immense number of mutually contradictory inquiries addressed to him.[16]

For Tolstoy, historical action is far from random, but nevertheless almost impossible to predict because of the number of local and individual factors whose complex interactions lead to results surprising at the time, only later seen as virtually inevitable. Intention is personal, its consequences local. Moreover, existing law and new disputes are framed and reframed in the context of the evolving legal language. When the truth within and regard for language is degraded, the enterprise suffers. In fact, the case can be made that if individual soldiers' actions have determined the outcome of battles, the language of individual litigators and judges has determined the shape of law, even its scope and reality. As Scruton has pointed out, "Social reality is malleable. How it is depends upon how it is perceived; and how it is perceived depends upon how it is described. Hence language is an important instrument in modern politics, and many of the political conflicts in our time are conflicts over words."[17] So with tort law.

If the action is primarily local, the set of claims, rights, and defenses are valued by our changing beliefs, attitudes, and politics. We once allowed a jilted fiancée, dismissed for another, to bring suit for the alienation of affections, but not by a female slave forced to share the affections of her master. Once actionable outrages – truthfully being labeled a bastard or adulterer or committing minor trespasses to land – now puzzle us as to what generated that outrage. Take the minor defamation of an obvious satire through a published letter describing the Swiss-French thinker Rousseau. It appeared to be signed by Frederic the Great, but that was clearly false and generally known to be so. It suggested

[16] Leo Tolstoy, War and Peace, Part Ten (Constance Garnett, trans., 1928; orig. pub., 1869).
[17] Roger Scruton, A Political Philosophy 161 (2006).

that Rousseau – a reckless, imprudent philosopher almost completely lacking common sense – could, in fact, make strides to increase his thoughtfulness, prudence, and common sense. Rousseau responded with despondency and outrage and considered every remedy possible.[18] Now we find small satire a diversion, not an outrage. In fact, the *YouTube* case may come to be seen as a relic of a time when copyright, ownership, privacy, and slander still mattered in public discourse, before the Internet largely rendered it inoperative. That is not now the case, but if our attitudes toward owning and taking change, so will the tort law in place to enforce it. That change is already predicted:

> Our attitudes about "authorship," too, are undergoing a radical change as a result of today's democratized Internet culture. In a world in which audience and author are increasingly indistinguishable, and where authenticity is almost impossible to verify, the idea of original authorship and intellectual property has been seriously compromised. Who "owns" the content created by the fictional movie characters on MySpace? Who "owns" the content created by an anonymous hive of Wikipedia editors? Who "owns" the content posted by bloggers, whether it originates from corporate spin doctors or from articles in the *New York Times*? This nebulous definition of ownership, compounded by the ease in which we can now cut and paste other people's work to make it appear as if it's ours, has resulted in a troubling new permissiveness about intellectual property.[19]

More commonly, wrongs in areas that never existed, including the Internet, have taken the place of insults that once led to suits, defamation, and war. The overall tradeoff is on the growth side, with new torts cluttering the legal landscape. As noticed by Cardozo, "Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well being of the Nation. What is critical or urgent changes with the time."[20] The result is that the legal landscape flourished, moving from sparse to lush.

Let us complete the billiards analogy. Particular balls, encountering the complexities of disparate and unequal standing based on being lit, allied with one lit or remaining dark and, further, facing changing location issues because of multiple tables, begin developing a primitive ability to communicate. This development proves wildly disruptive, leading to coalition formation, table

[18] The reaction of Jean-Jacques Rousseau to the letter secretly written by Horace Walpole, but which he first attributed to Voltaire, then David Hume, is described in David Edmonds and John Eidinow, Rousseau's Dog: Two Great Thinkers at War in the Age of Enlightenment (2006).

[19] Andrew Keen, The Cult of the Amateur: How Today's Internet is Killing Our Culture 23 (2007). Whether Keen's alarm eventually proves him to be Chicken Little or Paul Revere, the fact is that a widespread complacency toward particular acts makes suit over their being committed problematic.

[20] *Helvering, Commissioner of the Internal Revenue, et al. v. Davis*, 301 U.S. 619, 641 (1937).

jumping, and interference with lighting activities. The lighting leaders, unsettled by the disruption, notice that their lights also act as sound sensors.[21] They become table monitors, taking steps to control the emerging talk.

The level of complexity on the table has leapt dramatically, but the problem is still young. Take simple conversations generally. Keeping them private has always been of concern, as we see when reading of the conspiracy to assassinate Julius Caesar or examining the origins of the term "eavesdropping." The mechanics of privacy were simple then, and the legal principles simpler. Now consider conversations today, as seen in the *Hepting v. AT&T* case.[22] There, a class of plaintiffs claimed to be victims of a constitutional tort, one based on violations of First Amendment protection of speech and Fourth Amendment protection from unwarranted searches. Neither Amendment mentions tort or private actions. Both were once applied only to federal government action and later extended, more or less, to apply to actions of the fifty states. AT&T is not the government.

The tort claim amounts to this. The National Security Agency (NSA) has conducted a wide-ranging surveillance program authorized by the President and the Attorney General, but not by any court, and not subject to judicial review or approval. To aid the surveillance effort, AT&T has allegedly provided the government with direct and immediate access to telephone and Internet records, typically through its own, proprietary database system, Daytona, whose

> speed and powerful query language allow users to quickly and easily search the entire contents of a database to find records that match simple or complex search parameters. For example, a Daytona user can query the Hawkeye database for all calls made to a particular country from a specific area code during a specific month and receive information about all such calls in about one minute. Daytona is also used to manage AT&T Corp.'s huge network-security database, known as Aurora, which has been used to store Internet traffic data since approximately 2003 . . . AT&T Corp. has provided the government with access to the contents of the Hawkeye, Aurora and/or other databases that it manages using Daytona.[23]

Added to this is the fact that AT&T may have violated less exotic tort law. The United States Code provides that anyone subject to direct or indirect electronic

[21] It would probably be more realistic, if that is a concept plausible with a fantasy, to think of balls communicating not through talk, but as did early humans, through movement, gesture and dance. See William H. McNeill, Keeping Together in Time: Dance and Drill in Human History (1995).

[22] Filed as *Hepting, et al. v. AT&T Corp., et al*, No. C-06–672-VRW (N.D. Cal. 2006). On appeal as #06–17–17132 to the Ninth Circuit Court of Appeals.

[23] *Hepting* Complaint, paragraphs 58, 59, 61.

surveillance has the right to sue whoever conducted that surveillance, and to receive the greater of $100 per day or $1,000, plus punitive damages.[24]

AT&T, following the directives of the United States government, or at least the NSA, is placed in a more difficult position than Yahoo dealing with China. Yahoo arrives as a volunteer, AT&T a conscript. AT&T must choose between obedience to a nominally war-time government and loyalty to constitutional and statutory law. Tort has been criticized as overly intrusive, but that is putting effect before cause. Social reality dictates how conflicts arise and spread. People are upset about others reading their e-mail, not because it can lead to imprisonment and torture of individuals like Mr. Xiaoning, but in and of itself, without further consequence. Battlefield war becomes tort war, as the action in understanding an enemy moves to decoding the chit-chat of the citizenry.

However, the legal system, both in tort and its offspring, contract, resolves all, but only, the conflicts brought to it. Even so, it does this despite being lean on the tools sufficient to find necessary facts, short on foresight to ascertain the reach of a decision's implications and without a social consensus as to purposes or goals.

At the outset, we need to consider two different types of decision making systems. In the first, decisions are withheld until a threshold of proof provides sufficient confidence that there is a reasonable basis to decide. Consider medicine. There may be so little information about a new syndrome or disease that treatment or therapy recommendations would be ludicrous, perhaps harmful. Thus, none are made. In the second system, decisions are made based on what is known, even if that is little and known to be little. If only five percent of what is relevant is known, and one side possesses three percent of that knowledge, the other two percent, the first side wins.

The first is the threshold method, the second the best evidence method. The best evidence method is largely irrational. If you and I were dropped into the Amazon rainforest and the first animals you saw were three monkeys and the first I saw were two crocodiles, neither of us should be sanguine that the next ninety-five animals would include more monkeys than crocodiles, or an additional sighting of either one. That said, it is, in fact, the method of the legal system, and of much of human action. We go with what we know.

We then have a system of disputed purpose, limited methodologies, a problematic decision-making process, and fluctuating and uncertain notions of intention and identity. Yet the legal marketplace remains as the one place to decide. If a drug generally beneficial has occasional catastrophic consequences poorly communicated to users who generally ignore communicated risks, should the small group who suffers the rare adverse effect have the right to sue the drug maker? It is easy to make direct arguments not only on each side, but cogent arguments concerning consequences affecting a number of

[24] See 50 U.S.C. §1808 *et seq.*, as well as 18 U.S.C. §2511.

sides. If the risk remains where it falls, we have a small group of victims bearing the entire cost to the benefit of free riders. The profitability from the sale would then exclude the cost of drug failures on the one hand, while ruling out of court routine matters of breaches of duty to foreseeable product users on the other.

Liability imposed on drug makers has the ready potential to discourage the manufacturer of other drugs, whereas the failure to hold such companies accountable has the potential to create a growing class of victims of new drugs with undiscouraged and undeterred adverse side effects. The pull of various victims claiming rights potentially seems to clash with efficiency and with the interests of other victims. Whether there is a clash, in fact, is hardly ever ascertained. That is, if drug makers are driven by profits, and there are significant but noncrippling diminishing of profits due to tort litigation, will tempering profits cause anyone to quit the drug business? Perhaps at the margins, with vaccines, it might. Perhaps, given a clear profit motivation, it never will, with the vaccine model only being one of the overly draconian remedies in an already unprofitable market.

Is this how the tort system sorts and sifts ambiguous and controversial rights? Does it do a good job? The combined answer, at least when considering the method of solving questions of judging rights, measuring costs, even running a society, is that the job done is mediocre. Consider knowledge. A majority of Americans today disbelieve the explanation of biological evolution, yet the entire logic of many drugs and most vaccines is rooted in the fundamentals of evolution. Environmental obstacles are overcome by random if opportunistic change at the cellular level. To combat infectious disease, drug manufacturers take note of the changes of pathogens that evolve according to basic principles of biochemistry and biophysics and that require commensurate changes in vaccines and antibiotics. The legal system is not based on democracy or meritocracy – here meaning electoral vote or through the process of peer-reviewed decisions in journals, academies, and grant-giving entities – but on an amateur and individual model. Consider a product liability, medical malpractice, or patent infringement case where the composition, originality, and effectiveness of a particular drug is in question. Then, even if the decision makers are ignorant, contemptuous, and rejecting of evolution theory, they may be called upon to assess the issues of how we develop antibodies, how mutant germs affect users, how research by pharmaceutical companies is conducted and succeeds, and where the needs of the disease community lie. Ultimately, the fact finder must solve the conflicts among all of these. That process is profoundly disabled if it is premised on ignorance or flawed knowledge. This problem is general and universal, because we are typically required, and have been since our preneolithic origins, to act despite being short on information, methodology, foresight, and experience.

There may not appear much comfort in a system whose primary claim is that it does what nothing else will, even if it does it badly. However, it is

clearly much better than that, and at least in one way, very good: achieving peace. We see the degree of success the system enjoys in taming wrongs and excesses through administered resolution most clearly on a daily basis when it disappears. When we look to societies, such as post-Mao China or post-Soviet Russia, where copyright, nuisance, and product liability laws are absent, and counterfeit DVDs, adulterated food, and rampant pollution are uncontrolled, we can feel ready nostalgia for tort law's absence. The system does not leave loss where it falls, but instead requires focused argument and a reception to evidence. The influence of money, political processes, corruption, and lies are possible but are filtered out more fully than elsewhere in the political process or the economic system. Both force and forcing retreat if not disappear.

The goal is to achieve peace. Litigating is better than fighting. The tort system receives insufficient credit for proving that every day. Much of the system's energy lies with the determined ire of the self-identifying victims. Assessing the energy of those claims forms a basis for achieving peace. Again, Cardozo, in *MacPherson*,[25] recognized that the havoc of the impending automobile age would be tamed by expanding the reach of product liability rules. Statutory protection for childhood vaccine makers from lawsuits pulls from the fray sympathetic victims and necessary sellers. The grand desire for human rights finds its daily resolution in individual tort rights and, treated with specific attention, they are resolved better than we might think, even given the obvious advantages of a neutral forum and rules, nonparochial and universal. The burden of understanding each case, providing modest justice to each victim, and protecting each defendant is an unreasonably high one. The criticism will always be loud. We should do better, much better. That said, we design or run the system to end conflicts and, both in looking to achieve social peace and in actually achieving it, we need to remember that flawed tort wars are better than bloody real ones and legal tumult a small price for private and ultimately public peace.

[25] 217 N.Y. 382 (1916).

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