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Ten Half-Truths About Tort Law

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Lecture

TEN HALF-TRUTHS ABOUT TORT LAW

John C. P. Goldberg[†]

INTRODUCTION

John Kenneth Galbraith coined the phrase “the conventional wisdom” to refer to a collection of ideas that members of a group find “acceptable.”¹ Acceptability, he observed, rests on a variety of considerations other than veracity, which means conventional wisdom can be wrong. Sometimes it is dead wrong. Other times it blurs truth and falsity. In the latter case, it might be said to contain *half-truths*.

Because professors are in the business of critical inquiry, one might think that they are less reliant on mere conventional wisdom, but this supposition is false. Conventional wisdom plays as much of a role in academia as in other walks of life. The concern of this Article is to explore conventional wisdom among torts professors, and perhaps law professors more generally. Specifically, it identifies ten half-truths embedded in standard academic depictions of tort. Because each distorts as much as or more than it enlightens, each must be discarded. The point of this exercise is conceptual and pragmatic. The immediate goal is to clarify; the further hope is that clarification might lead to better judgments about how to adjudicate tort cases, how to undertake legislative reform of tort law, and how to teach torts.

Two initial disclaimers are in order. First, although lawyers often talk about half-truths in connection with efforts to deceive—for example,

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¹ JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 8 (40th Anniv. ed. 1998) (1958). Galbraith was particularly concerned to establish that changes in economic circumstances could turn conventional economic wisdom on its head. *Id.* at 6-17.

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one can commit fraud by deliberately revealing only partial information—no such connotation is meant here. Conventional wisdom is the product of accretion, not a scheme to mislead. Second, my focus is on a set of conceptual, historical, and theoretical claims about tort rather than on empirical claims.² With the modern tort reform movement now thirty years old, various assertions have been made about tort law's effects on insurance rates, the correspondence between a suit's merits and its outcome, the real rate of compensation enjoyed by plaintiffs' attorneys, et cetera. Claims about these subjects surely contain their share of half-truths, but they are not my concern here.

THE TEN HALF-TRUTHS

- I. Tort is a Miscellaneous Category.
- II. Tort Law is 150 Years Old, Give or Take.
- III. Tort Law is Accident Law.
- IV. The Life of Tort Law Has Been Experience, Not Logic.
- V. Tort Theories are Either Unified or Pluralist.
- VI. Tort Damages Aim to Make the Plaintiff Whole.
- VII. Tort Liability Exists on a Spectrum from Strict Liability to Intent.
- VIII. Settlement and Insurance Have Rendered Tort Law Obsolete.
- IX. Tort Law is Common Law.
- X. Torts is a Class, Not a Subject.

I. *Tort is a Miscellaneous Category*

It is frequently observed that the words "tort" and "torts" resist simple definition. Illustrative is the Prosser treatise, which greeted two generations of law students with a depressing litany of failed efforts to define the subject.³ The Prosser casebook offers only slightly more solace. It explains that "[a] tort is a civil wrong, other than a breach of contract, for which the law provides a remedy."⁴ A hundred years ago, Wigmore sniffed at this definition: "As if a man were to define

² This is not to say that conceptual questions, much less historical questions, should or can be resolved without consulting relevant data. Nor does it deny that empirical questions raise conceptual issues.

³ WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 1 (1st ed. 1941). Each of the four editions of the treatise published in Prosser's lifetime begins with this sentence.

⁴ VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE & SCHWARTZ'S TORTS: CASES AND MATERIALS 1 (11th ed. 2005).

Chemistry by pointing out that it is not Physics nor Mathematics!"⁵ Wigmore's opprobrium extended to the word "torts" itself. "Never," he exclaimed, "did a Name so obstruct a true understanding of the Thing."⁶ On the optimistic premise that a better name would enable scholars to do better, he sought to "proscribe, expel and banish" the word from legal parlance.⁷

Other scholars have been more modest in their definitional aspirations. The word "torts," they seem to have supposed, *deserves* a sketchy definition because what is being described is not what Wigmore imagined to be a "thing," but a loose assemblage of things invoked in a wide array of circumstances for various purposes. Something like this seems to be the sentiment behind another of Prosser's many quotable quips, this one offered in the course of a book review dismissing the idea that law can be captured in a theory – "I never have seen any reason," he said, "why law should make any more sense than the rest of life."⁸

Let us grant that it is difficult to reduce the concept of tort to a handy definition. What should we make of this difficulty? Some seem to suppose that it warrants a particular inference about the subject. On this view, the fact that tort law is not readily defined, except perhaps in terms of what it is not, signals that tort is to law as leftovers are to Thanksgiving Dinner. The idea (to continue in a culinary vein) is that tort resists definition because it is a "dog's breakfast"⁹ or a crazy stew.¹⁰

The inference from tort's lack of a simple and lucid definition to the conclusion that tort is a miscellaneous category is what renders our first half-truth half false. It is true that the concept of tort does not yield itself to a simple-yet-illuminating definition. The falsity resides in supposing that this fact supports a cautionary or negative conclusion about the category's intelligibility or integrity.

⁵ 1 JOHN HENRY WIGMORE, *SELECT CASES ON THE LAW OF TORTS* vii (1912).

⁶ *Id.*

⁷ *Id.* Wigmore's highly unpromising suggestion was that "torts" should be called "General Rights." *Id.*

⁸ William L. Prosser, *My Philosophy of Law*, 27 *CORNELL L.Q.* 292, 294 (1942).

⁹ Thanks to my former colleague, Dean David Partlett, for introducing me to this lovely bit of commonwealth slang. He in turn credits Brian Simpson with bringing this phrase to bear on tort law. David F. Partlett, *Tort Liability and the American Way: Reflections on Liability for Emotional Distress*, 45 *AM. J. COMP. L.* 171, 193, n.104 (1997) (citing A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* 325 (1975)).

¹⁰ Michael D. Green, *Apportionment, Victim Reliance, and Fraud: A Comment*, 48 *ARIZ. L. REV.* 1027, 1043-44 (2006) (arguing that tort law is like a wacky soup).

Compare tort law with criminal law. The word “crime” and the phrase “criminal law” operate much like the word “tort” and the phrase “tort law.” Both sets of terms denote a particular field or department. Indeed, both label a field that proscribes as wrongful certain forms of conduct and that authorizes certain responses to violations of those proscriptions. If one is going to fret about the integrity of a category that encompasses the wrongs of defamation, false imprisonment, interference with contract, nuisance, negligence, and products liability, one presumably will also want to fret about the integrity of a category that encompasses the wrongs of arson, attempted murder, incest, possession of controlled substances, tax fraud, and treason. If anything, the realm of criminal law seems more sprawling and less unitary than that of tort. And yet there is little evidence that criminal law scholars worry that the absence of a crisp definition of crime renders their field residual or suspect. Presumably criminal law experts worry about the borders of the field—for example, the points at which nominally civil proceedings become criminal and nominally criminal offenses become regulatory. But do they worry whether their field is “really” a field? My sense is that they do not. And the same, I suspect, is equally true for scholars in other fields that are not susceptible to simple definition, such as constitutional or administrative law.

Law students and law professors no more need to remark on, worry over, or apologize for the absence of a handy definition of tort than they should remark on, worry over, or apologize for the absence of a handy definition of crime or constitution. Like these other legal concepts, tort is complex, such that one should not expect that its substance can be easily conveyed in a phrase or sentence. Moreover, any useful description of tort inevitably will invoke other legal concepts, such as duty and injury and, yes, contract and crime. This is just to say that concepts are not monads, but nodes within a web of interconnected ideas. One cannot really understand what the word “tort” means until one has some understanding of its constituent parts and its place within the broader legal system. Anyway, one can in fact come up with an *account* of tort that provides tort law a place of its own within our legal system. I will try to deliver on this claim below.¹¹

¹¹ The following might suffice as a definition, though, like any definition of a complex idea, it is hopelessly cumbersome, not very informative, and will not make much sense to one who does not already know some law. A tort is:

1. a breach of a legal duty not to inflict injury on any of a class of persons,
2. which duty enjoins compliance with a standard of right conduct toward class members, and

II. Tort Law is 150 Years Old, Give or Take

The second half-truth about tort that infects conventional academic wisdom, like the first, bespeaks a certain depreciation of the subject. It is the claim that tort law was a late arrival on the American legal scene. Here is G. Edward White writing on this point:

The emergence of Torts as an independent branch of law came strikingly late in American legal history. . . . Torts was not considered a discrete branch of law until the late nineteenth century. The first American treatise on Torts appeared in 1859; Torts was first taught as a separate law school subject in 1870; the first Torts casebook was published in 1874.¹²

And here is Lawrence Friedman writing about the fundamental discontinuity between precursors to modern tort law and modern tort law itself.

Existing tort law was simply not designed to deal with collisions, derailments, exploding boilers, and similar calamities. . . . Because the job was new, the resulting law was new. There was some continuity in phrasing,

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3. which breach generates in an injured class member a presumptive entitlement to legal recourse against the breaching party for the injuring.

Even this "tortured" definition is partial because it does not cover the various affirmative obligations recognized in tort law. For completeness' sake, then, one ought to indicate that a tort can also take the following form:

1. a breach of a legal duty to take action to protect from injury any of a class of persons,
2. which duty enjoins compliance with a standard of right conduct toward class members, and
3. which breach occurs in a situation in which a class member stands to benefit from the action, and
4. which breach generates in the class member a presumptive entitlement to legal recourse against the breaching party for the denial.

Tort law, in turn, is the collection of rules and principles that determines what duties of non-injury (and assistance) are owed by whom to whom, what counts as an actionable breach of such duties, and what sort of recourse, on what terms, is in principle available to victims of such wrongs.

¹² G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 3 (exp. ed. 2003).

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but this was in a way misleading. Tort law was new law in the nineteenth century.¹³

Let us start with the truth in each of these passages. As White notes, the words “tort” and “torts” were not commonly used by jurists as the name for a discrete department of Anglo-American law until the mid-to-late-1800s, the time at which the first analytical torts treatises were published.¹⁴ As Tom Grey and others have observed, a now-famous piece of evidence attesting to the absence of the word “tort” in its modern usage is Holmes’s snide 1871 dismissal of Addison’s treatise on the ground that torts “is not a proper subject for a law book.”¹⁵ The irony is that Holmes would two years later publish an article titled “The Theory of Torts.”¹⁶

What, then, does one establish by virtue of recognizing the relatively late adoption by jurists of the word “torts” as a name for a legal category? Historians are prone to equate the new use of the term “torts” with the first attempts by lawyers and scholars to treat personal injury law as a unified, substantive body of law. Of course, injury victims had for centuries been recovering damages on claims for battery, malpractice, and the like. But (the argument goes), nobody had yet conceptualized these discrete actions as forming a coherent category of substantive law. Instead, the organization—such as it was—had been provided by the two “tort” writs: the writs of trespass and trespass on the case. With the introduction of the term “torts” by Addison, Hilliard, Holmes, and other nineteenth-century writers, one witnesses the commencement of efforts to treat this motley collection as a unified field.

We can begin to see what is wrong with this historical thesis by considering an issue of taxonomy from the field of paleontology. “Brontosaurus” was (and for some of us still is) the name of a species of long-necked, plant-eating dinosaur of the Jurassic Period. However, in

¹³ LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 223 (3d ed. 2005).

¹⁴ The early years of the eighteenth century saw the publication of a volume titled: THE LAW OF ACTION ON THE CASE FOR TORTS AND WRONGS; BEING A METHODICAL COLLECTION OF ALL THE CASES CONCERNING SUCH ACTIONS (1720) (printed by Eliz. Nutt & R. Gosling (assigns of Edw. Sayer, esq.) for R. Gosling). It summarizes without any real analysis decisions concerning actions brought under the writ of trespass on the case for trover, conversion, malicious prosecution, nuisance, and deceit, as well as against common carriers and innkeepers. John Baker notes two legal indices from the mid-1600s that already were “classifying ‘tort’ in the modern sense....” J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 402, n.6 (4th ed. 2002).

¹⁵ Thomas Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1232 (2001).

¹⁶ *Id.*

1974, scientists decided that, under the relevant taxonomic rules, the creature ought to be referred to by the name "Apatosaurus."¹⁷ Here is how one author describes this development: "Although everyone has heard of *Brontosaurus*, it never actually existed!"¹⁸ This bit of (deliberate) overstatement captures something of the elision in historical treatments such as White's and Friedman's. To say that Apatosaurus was not recognized until 1974 as a name for the creature previously known as Brontosaurus presumably is *not* to say that, prior to 1974, the creature never existed. Prior to 1974, one may safely assume, is the *only* time at which it existed.

Of course, for the analogy to take hold, "tort" would have to have been known to earlier generations of lawyers under a different name. In fact, there were several, including: "delict," "trespass," "civil wrong," "injury," and "private wrong." It may be (as I discuss below) that these older terms carried a broader connotation than our word "tort," in that each encompassed not only the terrain covered by that word, but also what is today the domain of contracts. Nonetheless, the point stands. For centuries, Anglo-American lawyers have operated with an idea of "tort" that ascribes a consistent form, content, and function to the recognition of actions such as those for assault, battery, deceit, and defamation.

According to Bruce Frier, ancient Roman lawyers used the concept of delict to refer to something resembling what today counts as a tort, i.e., "a misdeed prosecuted through a private lawsuit by the offended individual and punished by a monetary penalty that the defendant must pay to the plaintiff."¹⁹ More to the point, the term "trespass" dates back to medieval England, when it served not only as the name of a particular writ in the Chancellor's arsenal, but more generally to a transgression by one person against another.²⁰ "Civil wrongs" is a phrase used in

¹⁷ The rule is that the name given to the creature when it is first discovered is the name that controls. The first skeletons that were said to attest to the existence of a separate species called Brontosaurus turned out upon examination to be skeletons of a creature that had already been discovered and named Apatosaurus. The point of drawing an analogy to the naming conventions in paleontology is not to suggest that there are comparable conventions for naming departments of law. It is instead to illustrate the obvious point that nominal changes may sometimes merely be nominal.

¹⁸ DAVID NORMAN, *A TO Z OF DINOSAURS* 68 (1993).

¹⁹ BRUCE W. FRIER, *A CASEBOOK ON THE ROMAN LAW OF DELICT* 1 (1989).

²⁰ S.F.C. MILSOM, *STUDIES IN THE HISTORY OF THE COMMON LAW* 1-2 (1985) (noting that thirteenth century English royal judges used the term "trespass" to refer to an array of legally cognizable transgressions against one person by another). According to Milsom, it was only the much later insistence of eighteenth century judges on the need to capture

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Matthew Hale's early treatise, *Analysis of the Law*, which was published posthumously in 1713, but written in the mid-to-late 1600s. Hale is at pains to contrast these sorts of wrongs—"wherein at the Suit or Prosecution of the Party injur'd, he has *Reparation* or *Right* done"—with criminal wrongs prosecuted by the Crown.²¹ "Injury" is used by John Locke in the *Second Treatise of Government*. Locke's work, like Hale's, draws a sharp contrast between conduct that is wrongful in the particular sense of being an offense against everyone that is punishable by all and conduct that is wrongful in the sense of being an "injury"—a victimization of a particular person for which reparation may be sought only by or on behalf of the victim.²² Finally, "private wrongs" is from Blackstone and the many nineteenth-century American commentators who followed his lead. Blackstone, too, sharply distinguished public wrongs (roughly, what we call crimes) from private wrongs, a category that is made up primarily of what we today call torts.²³

In short, close analogues of our concept of "tort" probably predate Anglo-American law, and have in any event been embedded within it at least since the 1300s. Needless to say, the operation of the "tort law" of Ancient Rome, like the tort law of 1300, 1500, and 1700 England, differed dramatically from the operation of our tort law, but none was so far removed from ours as to fail to qualify as an instantiation of the same kind of law. "Delict," "trespass," "civil wrong," "injury," "private wrong," and "tort" each refers to a set of obligations, owed to certain others, to refrain from acting wrongfully and injuriously toward those others, the breach of which entitles the victim to pursue a claim against the wrongdoer, the immediate point of which is to provide the victim recourse against the wrongdoer.

The historical continuity on display here goes deeper than the recognition of a body of law concerned with duties, injuries, and recourse. For that law has also been consistently described in terms that

conceptually a clean distinction between actions brought under the writ of trespass and those brought under the writ of trespass on the case that the term "trespass" "became disabled from doing its original work; and 'tort' was recruited in its place." *Id.* at 157. However, Milsom also notes that "[t]he noun [tort] and its adverb, *atort*, in Latin *injuria* and *injuste*, appear in the claims and defences [sic] of every kind of action from the time of our oldest formularies . . ." *Id.*

²¹ MATTHEW HALE, *THE ANALYSIS OF THE LAW* 113 (1713).

²² John Locke, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* 265, 273 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

²³ WILLIAM BLACKSTONE, 1 *COMMENTARIES* *118 (1765) (equating private wrongs with civil injuries); WILLIAM BLACKSTONE, 3 *COMMENTARIES* *1-3 (1768) [hereinafter 3 BLACKSTONE].

attribute to it a content that, while fluid, has displayed significant stability. The medieval notion of trespass, no less than Blackstone's category of private wrongs, prominently included a still-familiar litany of wrongs involving encroachments on others' persons, property, and liberty. Indeed, the old actions under the writs of trespass and "case" for assault, battery, defamation, false imprisonment, malpractice, nuisance, and trespass to land are perfectly recognizable in name and substance.²⁴ The same goes for still-familiar defenses, such as consent and self-defense. (Hence the continued use of Latin maxims such as *volenti non fit injuria*.)

Furthermore, the recognition of this class of legal wrongs has always been linked to particular institutions and characteristic remedies. In the normal situation, the victim of a tort was and is expected to turn to the courts, who are in turn (subject to jurisdictional rules, etc.) required to hear the claim. The courts, on this view, are set up to fulfill one of government's most basic obligations, to provide law that sets standards of right and wrong conduct, and that gives victims of wrongs access to forms of redress in light of government's denial to them of a right of self-help. And once in court, the complainant is required to make out his claim by offering proofs to judge and jury. If successful, he is entitled to certain forms of relief, most commonly money damages.

Finally, at both a conceptual level and a very practical level, the efforts of Anglo-American lawyers and jurists to articulate a law of torts has been part and parcel of a longstanding effort to distinguish tort and crime. Interestingly, this effort began long before the invention of the modern procedural mechanism that most clearly distinguishes the two, namely, the emergence of the professional public prosecutor.²⁵ Two examples will illustrate the point. Both are drawn from the early 1600s, and both involve (to different degrees) the famous statesman and jurist Sir Edward Coke.

The heated seventeenth-century debates over the breadth of the royal prerogative raised a number of questions about the monarch's

²⁴ Of course the content of tort law has hardly remained static over the course of many centuries and across commonwealth and U.S. jurisdictions. Older causes of action (e.g., "criminal conversation") are now obsolete. Others (e.g., invasion of privacy) have emerged. The content given by judges to long-recognized torts has changed over time, as evidenced most obviously by the expansion of the reach of the negligence tort in the first three quarters of the twentieth century. Entirely new classes of claimants have been empowered to bring claims, most notably persons formerly treated as slaves, married women, and surviving family members of tort decedents.

²⁵ JOHN H. LANGBEIN, *THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL* 11-12 (2003).

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proper role in the dispensation of justice. At the time, of course, there was no third branch. Judges, like sheriffs, were executive branch officials, terminable at the will of the Crown. Nonetheless, some argued for a degree of judicial independence. Coke, for example, apparently had the temerity to suggest to James I that his majesty lacked the authority to pull a pending civil dispute from the courts in order to resolve it himself.²⁶ More to the present point, he and his fellow common law theorists insisted that the king's prerogative powers—which uncontroversially included the power to grant individuals *ad hoc* exemptions from regulatory laws, as well as to pardon defendants from criminal punishments—did not include the power to dispense with a judgment of liability in a civil case heard in the common law courts.²⁷ A civil action such as a trespass action was brought at the discretion of the victim, not the king, for the purpose of vindicating the victim's interests, not the public's. Precisely because it was in these senses a tort action and not a criminal action, the king had no authority to interfere. We can leave aside the question of whether the common lawyers were right about the existence of this limit on royal authority. The point is that absent a tort/crime distinction the claim would have made no sense.

Now consider a leading criminal libel case, prosecuted in Star Chamber in the early years of the seventeenth century by the ubiquitous Coke, here in his capacity as Attorney General.²⁸ By this time, the common law courts had recognized civil actions for defamation via the writ of trespass on the case. Indeed, the "action on the case for words" had well-defined contours, two of which are noteworthy. First, the action could not be brought for the defamation of a person already dead. This rule was an instantiation of the more general common law maxim holding that the death of a tort victim barred any action for the tort.²⁹ The second was that a defendant could avoid liability by proving the

²⁶ Or so the legend goes. See EDWARD COKE, 1 THE SELECTED WRITINGS OF SIR EDWARD COKE 481 (Steve Sheppard ed., 2003) (1656).

²⁷ John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 539-41 (2005).

²⁸ Attorney General v. Pickering, (1606) Eng. Rep. 250 (Star Chamber). That Coke was quite eager to ensure that Pickering—a prominent Puritan and the alleged author of the poem, was punished severely for his "seditious" act should prevent us from mistaking Coke for a modern day civil libertarian. *Id.* Pickering was convicted, pilloried, imprisoned, and fined, although his prison term was later curtailed and the fine voided. *Id.*; see generally Alastair Bellamy, *A Poem on the Archbishop's Hearse: Puritanism, Libel and Sedition after the Hampton Court Conference*, 34 J. BRIT. STUD. 137 (1995).

²⁹ See A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 562-63 (1975) (noting the applicability of the maxim to actions for trespass as early as the late 1400s).

truth of the defamatory words. Airing the truth, in other words, was deemed an adequate justification for damaging or destroying someone's reputation.³⁰

In the aforementioned criminal prosecution, the defendant was alleged to have attached a derogatory poem to the casket of the late Archbishop Whitgift. In his defense, the accused argued that he could not be prosecuted because Whitgift was dead at the time of the alleged libel, and that the libel was in any event true. Star Chamber rejected both arguments for being out of place in the criminal context. Even though libels of the dead did not generate civil actions, they could still be punished as crimes in the name of preserving the peace.³¹ Likewise, according to the judges, the state had an interest in punishing even true libels if only to steer future libel victims—including victims of true libels—toward reliance on the civil and criminal justice systems and away from retaliatory self-help.³²

As these two examples attest, even in 1600 judges and lawyers understood that a body of law devoted to the redress of personal wrongs—breaches of duties of non-injury owed to others—existed apart from the law of crimes.³³ The attention devoted to the divide, both at the level of theory and practice, falsifies the suggestion that tort law was born circa 1850.

An obvious question now poses itself. Why, in the face of this well-known historical record, would prominent historians mis-date tort's birth? Here is one possible answer. Although the tort-crime divide is centuries old, another distinction that is for us highly salient—that

³⁰ R.H. HELMHOLZ, *SELECTED CASES ON DEFAMATION TO 1600*, cvii (1985).

³¹ *Id.* at 251.

³² *Id.*; see also 3 BLACKSTONE, *supra* note 23, at 123. One hundred fifty years later, Blackstone, with typical pith, explained the different significance of truth for civil and criminal libel actions. *Id.* Where a person suffers harm because of the publication of a true defamation and sues the publisher for damages, he explains, it is a case of *damnum absque injuria*—a harm of sorts, but without anything that can count as a mistreating of the victim. *Id.* at 125. By contrast, where libel is prosecuted as a crime, it is not pursued as a private wrong, but instead as a public offense that, because of its general tendency to induce retaliatory responses, can be punished “whether the matter contained be true or false.” *Id.* at 125-26.

³³ The background distinction between crime and tort was likewise necessary to make sense of the availability of the contributory negligence defense only in the latter, not the former. See *Smith v. Smith*, 19 Mass. 621, 624 (1824) (where plaintiff's horse was injured in a collision caused both by plaintiff's careless driving and defendant's wrongful placement of an obstacle in the road, the defendant is not answerable to the plaintiff in tort even though he might be “amenable to the public in indictment”).

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between tort and contract—was less noticeable from within the writ system. Traditionally, actions for breach of contract were housed under the writ of trespass on the case. As such, they were lumped together with “tort” actions. A contracting party’s duty to perform, just like a surgeon’s duty of care, was said to derive from an *assumpsit* or undertaking by one to another. Even though “contract” actions were emerging around 1600 as creatures subject to special rules of their own,³⁴ the idea of a relatively complete and freestanding body of contract law only ripened at the turn of the nineteenth century.³⁵ At that time, one starts to see Anglo-American treatises that analyze contract law by name, and that identify contracts as a distinctive field dealing with obligations deriving from agreements or promises.³⁶ The rise to greater prominence of contract as a field in its own right, along with the mid-century demise of the writ system, left jurists searching for a new label for the subset of “private wrongs” that stood apart from claims sounding in contract. Among the various possibilities, “torts” is the label that stuck.³⁷

Still, to observe that, in the late 1700s and early 1800s, “contracts” was cordoned off for separate treatment is by no means to suggest that the law governing the remaining members of that class—torts—was for the first time being recognized as part of a larger category. Quite the opposite, this account supposes that torts already were recognized as part of the broad-but-coherent category of private wrongs. Thus, while it is true that one can point to the nineteenth-century adoption of “torts” as signifying a change in how lawyers were carving up the law, the change it signifies cannot be understood as consisting of the initial effort to bring under a general description a previously disparate or miscellaneous array of topics.

It is probably also the case that the historians are making a different sort of claim than they appear to be. Their point, really, is not that tort law had no existence prior to 1850. Instead, it is that the tort law that did exist prior to 1850 was so different in substance or in practice from modern tort law that it is not accurate or helpful to think of modern tort as continuous with its previous incarnations. The plausibility of this

³⁴ BAKER, *supra* note 14, at 347, 350-51, 401.

³⁵ This point is famously evidenced by Blackstone’s relative inattention to contract.

³⁶ See, e.g., 1 SAMUEL COMYN, A TREATISE OF THE LAW RELATIVE TO CONTRACTS AND AGREEMENT NOT UNDER SEAL (1809); JOHN JOSEPH POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS (1790).

³⁷ Of course, even if we suppose that there is something to the speculative story just offered, it hardly excuses historians for mistaking a simple re-labeling for the invention of a new legal creature.

reconstruction is attested to not only by the Friedman passage quoted above, but also by John Witt's recent claim that assertions as to tort's continuous existence rest on a methodologically suspect commitment to "internalist" legal history.³⁸ Internalist legal history, on his description, is bad history because it is content to make assertions based on an examination of judicial opinions and legal treatises, without taking due account of the "realities" of legal practice, as well as the larger political, social, and economic settings in which legal systems operate. In this context, the idea is that only impoverished internalist history permits one to miss the obvious fact that the continuities described above are insignificant.

If this is the idea behind the claim that there was no tort law prior to 1850, it is an odd one. If the question at hand concerns tort law's historical pedigree, how can it be a mistake to look for answers in texts crafted by lawyers and legal scholars? Surely it tells us *something* of importance that, when lawyers and judges wrote and talked about the law—authoritatively, in the case of judges—they divided the world of legal wrongs into civil wrongs (trespasses, injuries, private wrongs) and criminal wrongs (pleas of the crown, felonies, misdemeanors, etc.).

To make this seemingly banal point is *not* to deny that these writings, taken alone, will give us an incomplete and idealized picture of the operation of the older iterations of tort law. Presumably they overstate significantly the integrity or reliability of the processes for adjudicating wrongs, as well as the availability of judicial relief to certain classes of victims such as impecunious or low-status victims. It might even be the case that these materials so distort the realities of the situation that we can look back and say of earlier iterations of tort law that they failed miserably in delivering the thing described in law books. Even if all of this were true—and the latter is a big "if"—would it be right to assert that there was no law of tort?

Imagine a participant in, or observer of, the English legal system circa 1700. Now suppose he were to offer the following observations about the operation of that system:

According to learned treatises and judicial opinions,
there is a part of English law that purports to identify
duties not to injure that individuals owe to one another.

³⁸ See John Fabian Witt, *Contingency, Immanence, and Inevitability in the Law of Accidents*, 2 J. TORT L. 15 (2007), available at <http://www.bepress.com/jtl/vol1/iss2/art1>.

It further purports to deem as “wrongs” breaches of those duties. And it purports to empower a victim of such a wrong to invoke the judicial system to obtain redress from the wrongdoer. These descriptions of our law seem to have some basis in reality. For we can observe instances in which persons have obtained court orders requiring another to pay money on the ground that the other has wronged and injured the person who obtains the favorable judgment.

Yet practice belies the claims of the writers—law in action does not resemble law on the books. Duties and breaches are inconsistently defined. Victims of conduct that rather clearly fit the definition of wrongful conduct routinely find themselves unable to avail themselves of the courts. Those that do make it to court find that the procedures at work there are stacked against them, such that they rarely prevail. And the lucky ones who do prevail seem to be among the least deserving of victory.

For present purposes, what is most interesting about this imagined critique is what it presupposes—namely, the existence of English tort law. However devastating, the critique is *imminent*, not external or purely prescriptive; it condemns domestic law on its own terms. It does not say: “We can imagine a system, quite different from our own, in which the law defines wrongs and permits victims to obtain redress from wrongdoers. We should strive to adopt that ideal.” It says instead: “Our legal system is subject to serious criticism for realizing only sporadically and selectively principles to which it is already committed.” Standard legal materials extant in 1700 would have permitted just this sort of criticism. In this sense, to say that there was no tort law prior to 1850 is to offer hyperbole, not history.

III. *Tort Law is Accident Law*

I have suggested that some historians’ dating of tort law’s birth in the mid-nineteenth century is best read as a hyperbolic critique of the operational failings of older English tort law. However, some historians who make this claim may have a different and more theoretical point in mind. It might be stated as follows:

With the emergence in the late 1800s of tort as the name for a legal category, what we are seeing is not the application of new label to a longstanding feature of the legal system. Rather, the use of this label signals scholars' recognition of the need for a new conceptual framework to organize our thoughts about certain social phenomena. Specifically, by substituting "torts" for "civil injuries" or "private wrongs," late nineteenth-century scholars indicated their awareness that the law was ceasing to treat injury-generating conduct as an occasion for determining who wronged whom. Modern law instead had begun to ask the very different question of how the costs generated by injury-producing events ought to be allocated by government in order that it might achieve one or another public policy goal, such as deterring risky conduct or providing those who have suffered losses some measure of relief.

Neither the timing nor the substance of this paradigm-shift was coincidental. For the shift happened just as the *accident*—the workplace mishap, the road collision—was supplanting the assault, the battery, and the defamation as the characteristic instance of one person injuring another. Moreover, because the accidental injurings associated with the industrial age were occurring with unprecedented frequency relative to other forms of injurings, jurists and policymakers for the first time came to think of injuries as a systemic social and political problem rather than a private matter between injurer and victim. In sum, the human toll of the industrial revolution prompted citizens, lawyers, and politicians to cease to view injurious interactions in terms of the moralistic category of private wrongs and instead to see them as a public health problem—the problem of accidents.³⁹

To appreciate what is sound and what is mistaken in this envisioned claim, one has to pry apart two different versions of it. The first maintains that the adoption of "tort" as the label for a department of law was part of a re-conceptualization of the character and purpose of civil litigation brought by injury victims against alleged injurers. The notion

³⁹ JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 7 (2004) (offering a version of this claim).

is that, with the rise to prominence of the industrial accident, this litigation was being conducted on new and different terms, such that what looked by all appearances to be adjudications of claims of wrongdoing actually was not.

A second and distinct claim is that the era of industrial accidents demonstrated decisively the shortcomings of a legal system that responded to accidental injurings exclusively through contracts and torts—i.e., only by means of *ex ante* individual agreements about workplace safety conditions and/or after-the-fact adjudications as to whether a given injury victim could identify a wrongdoer responsible for the injury. On this rendition of the argument, the late nineteenth century accident “epidemic” prompted the realization that modern government needed to approach accidents as a different sort of problem and to develop new institutions for dealing with the problem on these new terms. In particular, a need arose for schemes that would be more effective than contract and tort in encouraging a reduction of the incidents of accidents and in promptly getting relief into the hands of accident victims and their dependents.

With respect to the first variant on the claim under consideration, it will be helpful to ponder the sort of evidence that would suffice to establish that the arrival of torts as a category in the 1860s, ‘70s, and ‘80s signaled a shift from the conception of tort as a law of wrongs and redress to a conception of tort as law for deterring accidents or for providing relief to those harmed by certain activities. Clearly it is not enough to observe that the first torts treatise was published in 1859. Instead one would have to offer additional evidence suggesting that the arrival of the modern use of the term “torts” was accompanied by the abandonment of the 500-year-old practice of inviting and adjudicating claims by injury victims against wrongdoers allegedly responsible for those injuries in favor of a new scheme of accident prevention or relief provision. Given that the shift in usage left intact all the traditional apparatus of tort law—including the concepts used by lawyers and judges to argue about the proper resolution of tort claims—the case for continuity seems vastly stronger than the case for discontinuity. Indeed, even those supposedly fomenting the revolution appear not to have been aware of (or were busily disguising) the massive changes that they were

wreaking. Are we to believe that Hilliard was acting cluelessly or slyly when he titled his 1859 treatise “The Law of Torts or Private Wrongs”?⁴⁰

It is also important to appreciate that the claim being offered is as much theoretical or conceptual as it is empirical. For this reason, it will not be enough to demonstrate that the number of accidental injuries skyrocketed in the second half of the nineteenth century, nor that the records of this time show a significant increase in accident-related litigation, as opposed to litigation over wrongs such as battery and defamation. The reason is almost too obvious to state. Accidents often involve wrongful conduct. Thus, even if injuries arising out of accidents came to dominate plaintiffs’ lawyers’ portfolios and court dockets, it hardly follows that the adoption of the modern category of “tort” signaled the emergence of a de-moralized accident law divorced from traditional notions of torts as breaches of obligations of right conduct causing injury to another. To commit negligence is to act wrongfully toward another.⁴¹

Proponents of the claim under consideration may wish to invoke Holmes to rebut this last point. The invocation is fitting, for it was Holmes who initially fashioned an influential version of this sort of claim. At least in his early writings, he argued that the law of the modern liberal state was shedding its moralistic past in the name of a scheme of regulation focused on the prevention of harms (criminal law) and the localized redistribution of losses (tort law).⁴² Exhibit Number One in support of his claim was judicial endorsement of the “objective” reasonable person test for negligence over a subjective and therefore moralistic test. Exhibit Number Two was the emergence of a liability-rule conception of the civil side of law in place of a genuinely duty-based, guidance-rule conception.

Unfortunately for the accidents-in-place-of-wrongs thesis, the invocation of Holmes in this context is more telling than helpful. As was noted above, Holmes quite explicitly presented his views as a particular *theory* of tort. In other words, in this context, he *cannot* be invoked

⁴⁰ *Id.* at 7. John Witt notices but dismisses this aspect of continuity. *Id.* The rather obvious linkage of “torts” to Blackstone’s category of “Private Wrongs” is hardly less explicit in the title of Addison’s 1860 treatise. See C.G. ADDISON, WRONGS AND THEIR REMEDIES: BEING A TREATISE ON THE LAW OF TORTS (1860).

⁴¹ See Jules L. Coleman, *The Costs of The Costs of Accidents*, 64 MD. L. REV. 337, 341-42 (2005) (observing that Judge Calabresi’s famous book helped to set the terms of modern theoretical debates about tort law by conceiving of the subject as being about costs and accidents rather than wrongs).

⁴² OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 79 (Little, Brown & Co. 1945) (1881).

merely for the fact that he happened to make these assertions in the late 1800s, but rather must be invoked for the truth of the matters he asserts. And one hardly need regard Holmes as having captured the truth about torts. In fact, there is no reason to infer from the objectivity of the reasonable person standard that it cannot be functioning as a standard of right conduct. Accordingly, departures from that standard can readily be deemed wrongs in a genuine, non-trivial sense.⁴³ Likewise, there is no reason to infer from the fact that the standard remedy in tort cases is an award of compensatory damages that tort law is a law of loss-shifting, as opposed to a law that sets norms of conduct and makes available damages to victims as a way of enabling them to obtain satisfaction from the tortfeasor.⁴⁴

In sum, the centrality of accidents to late nineteenth-century tort law does not of itself suggest that tort at that time underwent a fundamental change of character. To substantiate such a claim would also require a showing that scholars like Holmes were or are correct in asserting the extremely ambitious claim that, despite the fact that the practice of tort law continued on very much the same terms as it had before, tort was quietly, nearly secretly, transforming itself into a law of loss-allocation or deterrence. The alternative hypothesis, that tort law continued to function as a law of wrongs and redress, and in that capacity invited victims of accidents to press claims of wrongdoing against injurers, is vastly more credible.

To say that tort law remained a law of private wrongs notwithstanding the emergence of the accident as the characteristic turn-of-the-twentieth-century tort is not to defend the proposition that accidents can only be regarded as, or are best regarded as, occasions for inquiries into wrongdoing. Accidents clearly can be viewed through other lenses. Most obviously, they can be treated as undesirable events that ought to be deterred or that ought to give rise to relief payments to their victims. And with this "concession" we turn briefly to the second variation on the half-true claim that tort law is accident law.

Suppose that the rising tide of accidents in the late nineteenth century revealed serious limitations in the abilities of certain forms of law and government to deter accidents and provide relief to victims. And suppose that, in the same period, jurists and policymakers noticed

⁴³ John C. P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1143-64 (2007).

⁴⁴ John C. P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law From the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1586-90 (2006).

these lacunae and thus began designing new laws and institutions – such as workers’ compensation schemes – that promised greater deterrence and swifter, more reliable relief than could be provided by a regime that sought only to deal with accidents and their aftermaths through contract and tort. So far so good.⁴⁵ Now comes the problematic part of the claim, namely, the assertion that it took the late nineteenth-century accident epidemic finally to expose tort law for the second-best or nth-best system of accident prevention and relief dispensation that it “really is.” The claim here is that once jurists and policymakers were finally pushed to envision and develop alternatives to tort, they soon realized that the tools they had been using for handling the social problem of injuries were horribly crude and inefficacious. On this view, tort was the horse-drawn carriage, modern regulation and insurance the motor car.

The recitation of this argument perhaps has already revealed its flaw. The key elision is contained in the idea of tort law revealing itself to be inept accident law. The argument works only if one starts with the thought that tort was all along operating as a law of deterrence and disaster relief. Only this assumption makes tort law play the role of the horse-drawn carriage. And yet it is not merely contestable, but false. If instead modern tort law is understood as operating roughly on the same terms as its historical antecedents, then the appropriate way to characterize the imagined turn-of-the-century revelation is as follows: the accident epidemic prompted the realization that the branch of the law devoted to the enterprise of redressing wrongs will not always or even usually be as efficacious as certain alternatives in reducing the number of accidents or in reliably getting prompt relief to accident victims. In other words, what we have come to understand is not that tort law is crummy accident law, but that law can address injury-producing events in multiple ways. It can approach them as occasions to inquire whether a wrong has been committed by the injurer against the victim, as occasions for the provision of localized disaster relief, and as

⁴⁵ It is worth pointing out separately the mistake contained in the notion that jurists writing before the late nineteenth century failed to appreciate that tort law has social and political dimensions, and instead only involved the state attending to a purely private matter between defendant and plaintiff. Hale and Locke, for example, understood law for the redress of “injuries” as something that was owed to subjects by their government by virtue of its having substantially limited resort to self-help remedies. One very practical point of providing this sort of law was to ward off duels, clan violence, and other disturbances of “the king’s peace.” Thus, in their eyes, tort law was “private” in the sense of existing to permit victims to set things right with wrongdoers, but “public” in thereby satisfying an obligation owed by government to citizens, by contributing to civil order, and by bolstering the law’s claim to legitimacy.

occasions for taking measures to prevent them from happening in the future.

Some will take the view that either of the latter pair of perspectives on how to deal with accidents is obviously more appropriate than the former. But this is a very different claim from the one with which we started. The notion is not that tort law *just is* accident law. Quite the opposite, the notion is that tort law is defective because it is *not* accident law, at least not in the relevant sense. I for one see no reason to suppose that the choice between accident regulation and tort is a no-brainer. In many situations, there will be no need for a choice—we can permit regulation, insurance, and tort to operate simultaneously. Hence, the traditional notion that negligence and product liability actions can co-exist with legislative and regulatory safety measures, as well as first-party insurance coverage for expenses related to accidents.⁴⁶ In other situations, we may decide that what we really want is a law of wrongs and not a law of deterrence and relief. Presumably this judgment is being made whenever we see courts and legislators declining to impose liability on the ground of the absence of wrongdoing, even though the imposition of liability might add a measure of deterrence and would deliver a certain amount of victim relief. To take a simple example, the law does not hold doctors strictly liable for injuries caused to patients during treatment in part because in this domain we think that the objectives of deterrence and compensation ought to take a backseat to, or ought to be pursued apart from, an inquiry into whether the doctor may be held responsible for wrongfully injuring the patient.

* * *

By way of summarizing the initial triumvirate of half-truths about tort law, I will offer a parting shot. If there is an idea or concept that can truly be described as a late arrival on our legal scene, it is not the idea of torts or of tort law. Instead, it is the idea that torts and tort law are relative newcomers to our legal scene. This bit of intellectual history, I would suggest, emerged as an outgrowth in the field of legal history of New Deal and post-New Deal academic campaigns to discredit tort law as a child born under the regressive star of Mr. Herbert Spencer, or to attain for tort law (and hence torts professors) the loftier status of being a “public law” subject. In aid of this effort, scholars came up with a story

⁴⁶ The traditional rule has been that applicable safety legislation and regulations set floors, not ceilings, for purposes of determining whether a defendant has acted tortiously. DAN B. DOBBS, *THE LAW OF TORTS* § 224, at 572-74 (2001) (compliance with statute may be evidence of due care but does not entail that due care has been taken).

in which a brand new field—the law of accidents—emerged in the late nineteenth century under the heading of “torts.” This claim is fundamentally a claim of interpretive legal theory, not an empirical or historical claim. As such, it is not merely contestable, nor even half-true. It is simply false.

IV. The Life of Tort Law Has Been Experience, Not Logic

Mike Green has recently suggested that scholars who attempt to impose a general description on tort law are guilty of subscribing to intelligent design theory.⁴⁷ In a similar vein, John Witt has lamented the extent to which some torts scholars have failed to appreciate the “contingency” of tort law and have supposed instead that it has unfolded in accordance with an imminent Hegelian historical logic.⁴⁸ (Perhaps we should pity the poor soul charged with both of these sins.) Each critique supposes that there is an important truth to be drawn from attending to the fact that tort law is a historically contingent practice that has been carried forth by innumerable participants and observers harboring different ideas of what they were doing, are doing, or should be doing. The truth is, they say, that tort will not yield to efforts to cram it into the confines of a theory. Nor will attention to doctrine reveal a deep inner logic. Tort law is asked to do too many things in too many situations involving too many actors to be orderly. It is, as Holmes suggested about law generally, a creature not of logic but experience.

I have elsewhere noted that there is something odd about legal academics who pride themselves on their pragmatism invoking as True with a capital ‘T’ a mantra written 125 years ago.⁴⁹ (Apparently we ought to be pragmatic about revising all of our beliefs in light of experience except for our jurisprudential beliefs.) Here, I want to make a different point, which is that one can readily acknowledge the senses in which tort law is a historically-based, contingent, multifarious, bottom-up practice while still maintaining that it is something in particular, not nothing or everything. One need not subscribe to an “intelligent design” theory of tort, nor a Hegelian history of tort, to have a theory of tort. The life of the law of tort, like the life of the law generally, has been logic and experience.

⁴⁷ Green, *supra* note 10, at 1042.

⁴⁸ WITT, *supra* note 38, at 6.

⁴⁹ John C. P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1475 (1998) (reviewing ANDREW L. KAUFMAN, CARDOZO (1998)).

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To my knowledge, no one—not even Blackstone at his most Panglossian—has ever suggested that tort law was among the things brought into being by the God of Genesis.⁵⁰ Likewise, I am unaware of an instance of a scholar who has posited that the emergence of Anglo-American tort law represents the unfolding of the World Spirit in human history. I have yet even to locate a writer who is willing to defend the claim that the writs of trespass and case were invented as part of an effort by thirteenth- and fourteenth-century English monarchs to realize Aristotle's teachings on corrective justice. Instead, it seems, they were hoping to consolidate central secular governmental control over an unruly society in part by shifting certain dispute-resolution processes to their judges and away from baronial or ecclesiastical courts. (Note that this hard-headed, "realist" explanation for the emergence of tort law would seem to demonstrate that it mattered to medieval elites that they be given a legal mechanism for responding to mistreatment at the hands of others.) So let us put to rest as a strawperson the theorist who posits that the substance and shape of tort law reflect its careful crafting at the hands of God, *Geist*, or Edward I.

By the same token, it would be goofy to deny or diminish all the ways in which tort law has evolved in response to historical conditions and influences, and at the hands of people, notable and invisible, with very different ideas about what they were doing or should be doing. The relevant list of changes in law and its political, economic, and cultural contest is barely worth mentioning. We may safely assume that modern U.S. libel law, with its massive favoring of speech over reputation, would be unrecognizable to Coke, prosecutor of Pickering.⁵¹ We can likewise assume that Blackstone would be shocked at the sight of our contingent fee system, the wide availability of liability insurance, and the degree to which persons other than propertied white gentlemen now have access to tort. And we can bet that Chief Baron Abinger would find alarming Judge Traynor's views on the ability of civilization

⁵⁰ Goldberg, *supra* note 27, at 532-33 (noting that common lawyers' accounts of English law tended to emphasize its uniqueness rather than treating it as an expression of universal, natural law). And yet tort law can trace its origins to biblical and even pre-biblical times. WILLIAM A. MILLER, *AN EYE FOR AN EYE* (2006) (providing historical, linguistic, and literary evidence suggesting that the demand of victims for "satisfaction" from those who have mistreated them has been central to Western notions of justice for a very long time).

⁵¹ Here we need recall only the famous case of William Prynne, the outspoken Puritan lawyer, who in the mid-1630s was disbarred, disfigured, and branded for publishing *Histriomastix*, a tome that, in decrying the licentiousness of theater, condemned actresses as prostitutes. Therein was found by the Star Chamber a seditious libel against Charles I, a fan of theater, as well as his aspiring-actress Queen.

to withstand the recognition of personal injury claims by product users against manufacturers.⁵² In 1750 and 1850, probably no one was thinking about tort law as a Jamesian scheme of insurance, or as a Calabresian scheme of efficient deterrence. (Some, however, were already thinking of tort as a Naderite device for taking on the powerful.)⁵³ And, yes, the Industrial Revolution, the spread of democracy, the Great Depression, the rise of the administrative state, and immeasurable advances in technology have transformed the environment in which tort law operates. Finally, it is worth pausing to recognize some of the could-have-beens that were not. Had one or another of several nineteenth-century models of insurance or disaster relief taken hold as a general model for handling injuries and their attendant losses, negligence law might never have evolved as it has.⁵⁴ Perhaps also if twentieth century American politics had revolved to a lesser extent around anxiety over communism and socialism, we might now have the sort of welfare state that would render us much less reliant on tort.

All true. But so what? Remember the issue at hand is this: Can one assign a general description to tort law even granted that it has had innumerable authors, and is the product of the myriad contingencies of history? Yes. Tort identifies duties of non-injuriousness owed by some (or all) to others. These duties are of a special sort, in that they are imposed by law rather than generated by an agreement (even though some of these duties are only imposed once an agreement has been reached). And they are understood to be duties of right conduct, in the sense that breaches of them generally stand to earn the breaching party criticism for acting without sufficient regard for the interests of others. Because the duties in question are relational, those who are not beneficiaries of the duty breached have no standing to complain of the breach. Moreover, because tort duties are relational duties of non-injury,

⁵² See *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402 (Ex. Ch.) (opinion of Abinger, C.B.) (emphasizing the “absurd and outrageous consequences” that would result from letting persons not in privity with a product manufacturer sue for injuries caused by a defect in the product).

⁵³ *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489, 498-99 (K.B.) (opinion of Pratt, C.J.) (suggesting that even apart from ensuring that a victim’s injury is fully redressed, an award of punitive damages is sometimes warranted to deter and express condemnation of abusive actions).

⁵⁴ WITT, *supra* note 39, at 9-10 (noting the array of schemes considered and deployed in the late nineteenth and early twentieth centuries to deal with injuries arising out of industrial accidents); Michelle Landis Dauber, *The Sympathetic State*, 23 L. & HIST. REV. 387, 396-407 (2005) (discussing nineteenth-century federal relief programs enacted for the benefit of victims of floods, droughts, famines and other disasters).

their breach characteristically gives rise not to an enforcement action by government, but a private right of action, exercisable by the victim or her representative. Because tort duties are duties of non-injuriousness, persons who have not suffered the right sort of adverse effect because of a breach have no grounds to sue for the breach. And so on.

But what of all the changes and discontinuities? Have they not mattered? Of course they have. Tort has been supplanted in some areas, bolstered in others. Even within its shifting domain, the content of its duties has changed markedly. An industrialized society with massive wealth and working insurance markets permits forms of liability that members of a less-developed, less wealthy society perhaps could not imagine. Even as these sorts of developments have caused tort law to loom larger, others have diminished its role. The slow death of robust notions of honor have not only killed off the duel, but made a serious dent in defamation law as well. All of which is to say that tort has a different shape than it once did, and is in different respects more or less important than it once was. But to say this is still to operate with a conception of tort.

Scholars like Witt and Green seem puzzled as to how a practice that has been carried out through the uncoordinated acts of thousands of actors across centuries can hang together over time, especially given that the proper characterization of the practice is itself a subject of contention among those working within and standing outside of it. Their puzzlement is puzzling. Perhaps, in an academic world in which law professors perceive their job merely to be that of deconstructing the topics they teach, it is easy to forget that legal training—whether in the form of apprenticeships or formal education—exists in large part to maintain continuity. As successive generations have entered into the practice, they have been provided with an account of what tort law is, where it has come from, and where it is going. They read judicial decisions that are either themselves part of tort law's history, or that reference and build on that history. Persons with such training overwhelmingly are the persons who administer the tort system. Norms of precedential reasoning invite present-day lawyers, judges, and legislatures to connect what they are doing to what has been done. Persons affected by the operation of tort law come to have expectations that the system will continue to operate roughly on the terms on which it has operated. Entire industries and professions are built on the same sort of assumptions. (Which is why insurers that provide profitable lines of liability insurance do not want to see tort law killed off.)

Nothing in the foregoing remarks denies the inevitability of disagreement and change, each of which can take and has taken radical forms. Euphemisms aside, legal training is not brainwashing. To learn the law is to be prompted to think about ways in which it might be reconceived. Familiarity with extant practices can easily breed contempt. Entrepreneurs operating from in and outside of the system will seek to revise it for a variety of grubby and high-minded reasons. All of this just goes to explain why it is that tort law, like any other formalized social practice, carries on even as it is the subject of dispute and revision. In this, it is no different from practices ranging from liberal democratic government (born sometime in the late 1600s or early 1700s) to monogamous marriage (which is much older).

Likewise, the fact that participants within the practice have different conceptions of what they are doing is hardly grounds for supposing that there is no practice of which to speak. True, there must be some degree of overlap in how people involved in something are thinking about it for that something to be a something. But the necessary quantum of like-mindedness need not be all that substantial. One expects that there is quite a bit of divergence in self-conceptions among those involved in professional baseball. Some treat it as just a game. Others see it as a hallowed pastime. Others approach it as a business, pure and simple, or as a branch of the entertainment industry. Some believe its rules are in need of drastic overhaul, such that the game should be played quite differently than it is now. Purists think that even the smallest change would be disastrous. None of this renders mysterious the continued existence of professional baseball as an identifiable phenomenon.

One final note on contingency. If tort is not foreordained or inevitable—if it really is contingent—it follows that tort law must be mortal. And indeed it is. Although intellectuals are probably on average too quick to predict the demise of various practices they tend to find mysterious (e.g., organized religion), it states a truism to observe that practices come and go. So we may safely assume that tort law can wither away or be killed off. How might that happen? Any number of ways. A legislature or set of legislatures might replace it with some combination of *ex ante* safety regulation and *ex post* safety nets. A more sinister legislature or set of legislatures might succeed in simply getting rid of it without offering anything in its place. More subtly, changes in legal practice and legal training might, justifiably or unjustifiably, erode the practice. Suppose we re-organized our system of legal education so that every student is trained to approach tort law from a Calabresian perspective. Suppose further that everyone who occupies positions as

judges and legislators rigidly adheres to the new orthodoxy. As judicial decisions and legislation increasingly pushed “tort” law in a Calabresian direction—for example, by commanding defendants to pay money to persons who are neither injured nor even before the court in order to incentivize future actors to develop or take certain safety precautions—then the thing nominally called tort law (if it were still called that) might at some point cease to be tort law in anything but name.

So there is a way in which tort law is fragile. Its continued existence depends on, among other things, how lawyers are educated and how they approach their jobs. This is why it is worth the time of academics and others to fight about how rightly to characterize the practice. It is also why judges inclined toward innovation have a responsibility at least to consider whether, in a given instance, they are pushing tort law so far from standard understandings of it as to bring their decisions into question. Of course they may decide that the gains from innovation are worth the cost. What they should not do, however, is delude themselves or others into thinking that they are just applying the law. Finally, tort law’s fragility will depend on the extent to which it remains connected to other practices and values that continue to matter to us. For example, to the extent our social, economic, and political practices were to move in a more collectivist direction, such that it mattered less to us that an individual be “rewarded” for what she has accomplished in her endeavors, then tort law—which aims to empower victims to hold individuals to account for injurious things they have done to others—may increasingly seem out of place; the sort of practice that we ought to kill off or let die.

V. *Tort Theories are Either Unified or Pluralist*

Tort theories are sometimes divided by observers into “unified,” “high,” “grand,” or “top-down” theories, on the one hand, and “pluralist” or “mixed” theories on the other.⁵⁵ While not without some

⁵⁵ There is an asymmetry here, in that the terminology I have deployed is used primarily by those on the pluralist side of the divide, hence terms such as “top-down” and “high” are almost always terms of opprobrium. See, e.g., Green, *supra* note 10, at 1043 (casting aspersions on “top-down” theory); Jane Stapleton, *Evaluating Goldberg and Zipursky’s Civil Recourse Theory*, 75 *FORDHAM L. REV.* 1529, 1537 (2006) (expressing skepticism toward “high” tort theory). Scholars who see themselves as offering theories of torts that are more or less unitary tend to simply identify them as theories without attaching adjectives identifying the type of theory on offer. See, e.g., Richard Posner, *A Theory of Negligence*, 1 *J.*

basis, this dichotomy is in important respects unhelpful. Theories of tort can be and are unified and pluralistic *in different ways, at different levels*. Standard invocations of adjectives such as those just mentioned, by failing to acknowledge how a theory might simultaneously be monistic and catholic, leave us with unhelpful academic debates and an impoverished sense of the possibilities for theoretical discourse about torts.

When adjectives like “top-down” are used to describe a tort theory, they often are referring to what might be better described as “relentlessly single-minded” theory. Perhaps the best example of a relentlessly single-minded theory is Posner’s efficient deterrence theory, or at least a certain iteration of it.⁵⁶ This theory is not merely content to posit that tort law has a single function—that of forcing actors to internalize costs so that they take all efficient precautions and no inefficient precautions against generating externalities. It further claims that each component of the apparatus of tort law is or once was beautifully adapted to serve this function. Thus, the rise to dominance of negligence as the tort governing accidentally caused injuries, the definition of “breach” in terms of the Hand Formula, and the recognition of defenses such as contributory negligence are all said to have been forged through a litigation process that systematically weeds out rules and concepts that are inefficient. Further still, the claim is that tort law is *experienced* by participants and observers as a law of efficient deterrence. So, when members of society cast their opprobrious gaze at a doctor who has carelessly left a sponge inside a surgical patient, their ire owes not to his inattentiveness or incompetence as such, but to his wastefulness. (“It would have been so much cheaper for all of us if he had taken an additional precaution!”)

For their part, adjectives like “pluralist” and “mixed” tend to be employed to identify tort theories that cast tort law as a multi-purpose tool; one that permits government to complete two or more of its appointed tasks in a single blow. Thus, a pluralist theory might say that the purposes of tort law are to deter risky conduct and compensate the injured. A more pluralistic pluralist might add that tort also functions to

LEGAL STUD. 29 (1972); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003).

⁵⁶ The claims of this paragraph, including the concluding bit of sarcasm, are cribbed from an earlier work. John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 553-58 (2003). For incisive methodological critiques of economic analyses of tort law, see JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 16-24 (2001); Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 474-80 (2000).

“correct” for the inequitable post-tort state of affairs by restoring the proper balance between defendant and plaintiff.⁵⁷ In contrast to the hard-headedness of relentlessly single-minded theories, pluralist theories are offered in the spirit of reasonable accommodation. The notion behind them is that there is no reason to fight about tort, at a theoretical level. We can “all just get along” by recognizing that tort law does many different things.

According to the terms of this debate—terms largely set by the pluralists—the foregoing account provides us with the full menu of theoretical choices. Either one must be the “hedgehog” who says that tort law is in all respects about one thing and only one thing, or one must be the “fox” who says that tort law is and does many things.⁵⁸ But if this really were the extent of our menu then we would want to look for a new place to dine. For it leaves us to choose between compulsive myopia, on the one hand, and amiable incoherence on the other.

Relentlessly single-minded theories are daft. This much is evidenced by the gymnastics that are needed to lend them even superficial plausibility. For example, to believe the full-blown efficiency account one has to believe, among other things, that the civil litigation process operates as does natural selection (it does not), that the negligence idea of breach or carelessness really is captured by the Hand Formula (it is not), that all the various “reactive attitudes” associated with judgments about responsibility and wrongdoing boil down to a single idea—displeasure over waste (they do not), and that one can expect judges to be inclined to set for themselves the task of fashioning legal rules that maximize the economic pie because the latter is an uncontroversial, consensus good (it is not).⁵⁹ A theory this full of “stretches” is a theory that is not working.

Viewed in contrast to relentlessly single-minded theories, mixed theories seem no less irresistible than cuddly puppies. Surely the

⁵⁷ For the articulation of mixed theories of tort, see IZHAK ENGLARD, *THE PHILOSOPHY OF TORT LAW* (1992); Bruce Chapman, *Pluralism in Tort and Accident Law*, in *PHILOSOPHY AND THE LAW OF TORTS* 250 (Gerald J. Postema ed., 2001); Christopher Robinette, *Torts Rationales: Pluralism, and Isaiah Berlin*, 14 *GEO. MASON L. REV.* 329 (2007); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 *TEX. L. REV.* 1801 (1997).

⁵⁸ Robinette, *supra* note 57, at 329, n.1 (invoking usage from ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY* 3 (1953)).

⁵⁹ See Goldberg, *supra* note 56, at 553-58; see also Benjamin C. Zipursky, *Sleight of Hand*, 48 *WM. & MARY L. REV.* 1999 (2007) (noting various ways in which the Hand Formula fails to capture the tort concept of carelessness).

inclination to attend to and appreciate—rather than define away—the complexities of tort law is sound. Yet there is a problem nonetheless. It resides not in the underlying anti-reductionist instinct, but in the ways in which that instinct gets played out. Puppies grow into dogs, and some dogs are . . . well . . . dogs.

As I have just noted, the standard way to be pluralistic about tort law is to assign tort law various different “purposes,” such as deterrence and compensation. The journey to this sort of position typically works backward from remedy to theory. The remedy most closely associated with tort law is, of course, the damages payment. The question then asked is: What agendas can government advance by ordering this sort of payment? Here we are led to the ideas of deterrence, compensation, and restoration. The payment might signal to the defendant or others that sanctions await those who engage in certain conduct, at least if the conduct has certain effects on others. The victim’s losses can be spread so that the victim herself feels the losses less acutely. The payment might permit the restoration of a pre-existing equilibrium as between the defendant and the plaintiff.

Its familiarity notwithstanding, problems abound in permitting the pluralist’s healthful anti-reductionist instinct to play out by means of this sort of exercise in reverse engineering. Most obviously, we are left to puzzle over how exactly the accommodation among tort’s multiple purposes is to take place. If tort law is a device for deterring undesirable conduct, spreading losses, and restoring the disturbed equilibrium, which of these should it do, and on what occasions? The answer cannot be “all three all the time,” because the pursuit of one interferes with the achievement of others. Deterrence might require us to award damages even where no losses are in need of spreading. Concern to spread losses may likewise justify ordering payment where there is no deterrence to be had. If payment is really going to count as corrective justice, we will need a genuine victim with a claim. Yet giving only genuine victims claims cuts against the goal of deterrence. And so on.

There is a deeper problem still. The pluralist’s reverse-engineered account, no less than a relentlessly single-minded account, is too thoroughgoing in its instrumentalism. On both kinds of account, there is no space or distance between what tort law exists to do and what it is. The point here need not be cast as a general philosophical claim about the inherent insatiability of purpose-based or functional accounts of

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law.⁶⁰ Rather it can simply stand as an observation about how analysis of tort law in fact tends to be conducted from within pluralist theories. Here is a simple example. Suppose we start with the idea that the purpose of fraud law is, consonant with the purpose of torts generally, to deter deceptive acts, compensate victims of deception, and permit the restoration of an equilibrium between injurer and victim.⁶¹ We now encounter the feature of fraud law which says that fraud plaintiffs must demonstrate actual reliance on the defrauder's misrepresentation in order to recover. This bit of doctrine will strike us as an oddity, for it is counter-productive relative to the above-positing purposes, at least as compared with the alternative of simply requiring the plaintiff to prove that the defendant's misrepresentation in some way caused her harm (regardless of whether the causal mechanism involved her being deceived). For example, suppose *A* intentionally deceives testator *T* into changing his will, such that intended beneficiary *B* is cut out of the will. *B* has been injured by *A*'s misrepresentations, yet has not relied on them. If tort law is to serve its purposes, we must read "reliance" to mean "causation," for only by doing so can we permit *B* to obtain justice and compensation while also sending the appropriate signal to the likes of *A*.

And, of course, the foregoing point generalizes out to the causation requirement itself. Thus, a relentlessly single-minded theorist such as Posner is prone at times to say that the tort concept of causation means whatever it needs to mean for the law to deter efficiently.⁶² Pluralists are no different. We find a given class of negligence claimants facing difficulties in proving that they have actually suffered losses because of the carelessness of a defendant or set of defendants. If we insist on making them prove causation, none will recover. If none recover, there will be no deterrence, compensation, or equilibrium-restoration. So we cannot insist on it. We should instead allow claims for "loss of a chance."⁶³ And the list goes on.⁶⁴

⁶⁰ See ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

⁶¹ John C. P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1001-02 (2006) (noting awkwardness of the reliance element on standard accounts).

⁶² WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 228-29 (1987).

⁶³ John C. P. Goldberg, *What Clients Are Owed: Cautionary Observations on Lawyers and Loss of a Chance*, 52 EMORY L.J. 1201, 1202-05 (2003).

⁶⁴ If the purpose of tort is to deter, but victims with valid claims tend not to sue, then those who do sue should be awarded punitive damages. If tort is about compensating for harm done, then perhaps the quantum of punitive damages should reflect the amount of

To be sure, there are pluralists who at least profess to be less than purely instrumental. Or, to put the point slightly differently, some allow that tort law recognizes certain side-constraints in its pursuit of goals such as deterrence, compensation, and/or corrective justice. For example, they might say that the pursuit of these goals should be constrained by the interest in not having clogged courts or in avoiding the imposition of “disproportionate” liability on defendants. But the recognition of these constraints is *ad hoc*, given the instrumentalism of pluralist theories. It would be one thing—itsself possibly dubious—to say, in a manner akin to the rule-utilitarian, that the recognition of these constraints is itself in the service of deterrence, compensation, and corrective justice. But that is not the claim being made. For example, the constraint against imposing disproportionate liability is *antithetical* to deterrence, compensation, and corrective justice. So then we are left with the idea that the purpose of tort law is to deter, compensate, and correct, but only within the constraints set by administrability and proportionality. One can doubt whether this picture is really very accurate.⁶⁵ Regardless, this sort of maneuver is analogous to—and therefore as suspect as—the maneuver routinely employed by proponents of thin models of individual behavior who proceed to lard those models with extra assumptions to salvage them. Humans, it is said, are relentlessly goal-oriented maximizers. What about all the non-maximizing behavior we see? It turns out that a good reputation is needed to maximize utility in the long run, so humans strategically refrain from maximizing in the short run to avoid negative reputational effects. By the time these sorts of theoretical patches are in place, one can fairly wonder what necessitated them in the first place. A plausible answer is: It was a mistake to begin with a counter-intuitively thin picture of human behavior (or tort law).⁶⁶

Fortunately, we can leave aside the debate between single-minded and pluralistic instrumentalists. For it is entirely possible to develop a tort theory that is monistic in some ways, pluralistic in others, and even pluralistic in not embracing raw instrumentalism (the thing that

harm in the world brought about by the defendant’s conduct. If tort is about restoring the pre-tort equilibrium, there probably should be no punitive damages.

⁶⁵ To state the obvious, the rules for awarding damages in tort cases quite obviously permit the imposition of liability out of proportion to the wrongfulness of a defendant’s conduct. This does not necessarily render tort law an arbitrary or unjust practice. See Goldberg & Zipursky, *supra* note 43, at 1140-43. However, it does seem to undermine attempts to capture tort law as a scheme that aims to deter and compensate without imposing disproportionate liability.

⁶⁶ DON HERZOG, CUNNING 33 (2006).

pluralists are most reluctant to be pluralistic about). In short, one can quite readily maintain that tort law is a practice or institution that admits of a unitary description and that the thing being described is complex and requires an appreciation of its many different facets. Rather than saddle someone else's theory with this description, I will focus here on the "civil recourse" theory of tort that Professor Zipursky and I have fashioned.

The civil recourse account of tort is simultaneously limiting and capacious. It is limiting in insisting that tort law is something, not nothing or everything. The basic idea is that tort has certain central features—private rights of action, substantive requirements (e.g., proof of injury and breach of a duty owed to the victim), characteristic procedures (court-supervised resolution), etc.—that, taken together, reveal a consistent concern to enable persons who have been victimized in certain ways to respond to that victimization by obtaining a certain kind of satisfaction, through law, as against the wrongdoer. On this description, there is a purpose to tort law: that of providing victims with an avenue of civil recourse against those who have wrongfully injured them. This purpose distinguishes tort law from criminal law and regulatory law. Moreover, this description excludes certain forms of liability that others maintain belong within the domain of tort law. Imagine a judge who justifies holding a given defendant liable to a given plaintiff *solely* on the ground that the defendant is the superior cost-spreader, conceding that the defendant really has done nothing wrong. That imposition of liability, even if nominally within the confines of a "tort" suit is not, on our account, a genuine imposition of tort liability.⁶⁷

So the civil recourse account excludes things from the domain of tort. In that sense, at least, it is monistic rather than pluralistic. Yet at the same time it is capacious. Because it frames the enterprise in terms of defining wrongs and empowering victims to respond to wrongs, rather than as an enterprise that seeks to achieve a collective goal such as deterrence or loss-spreading, it is not embarrassed by features that other theories are forced to regard as facially dysfunctional. A fraud victim must prove actual reliance because one is only the victim of the wrong of fraud if one is actually deceived.⁶⁸ A patient or client suing for medical or legal malpractice must prove causation because a person is not the

⁶⁷ Of course if this sort of thing happened all the time under the name of tort, then one would have a more difficult time defending the claim that tort is really all about wrongs and redress. The fact that it might happen occasionally, however, just reflects the fact that any general description of a phenomenon is not going to capture every instantiation of it.

⁶⁸ Goldberg, Sebok & Zipursky, *supra* note 61, at 1004-06.

victim of the wrong of malpractice unless it is the case that the physician's or attorney's carelessness injured her.⁶⁹

Moreover, the theory is capable of recognizing that wrongful conduct and injuries take a variety of forms rather than a single, canonical form. Batteries involve wrongs of a very different sort than acts of negligence and intentional interferences with contracts. The theory also permits us to identify various goods that might come from having a law for the redress of wrongs without thereby endorsing the proposition that tort simply is a tool for achieving those goods. For example, tort law in its operation will sometimes induce people to refrain from acting wrongfully and injuriously toward others, sometimes help people bear losses they sustain, sometimes reinforce norms of political equality, and sometimes enhance the legitimacy of our legal system. (At other times it will do none of these things, and might even work against them.) Yet none of these are rightly described as "purposes" of the tort system. Tort exists to set standards for what will count as a wrongful injuring of another, such that the other will have the ability to respond to the injuring through law.

The account of tort law as a law of wrongs also avoids relentless single-mindedness in another way. It does not entail that, in the course of adjudicating particular cases, judges must rely on pristinely deontological reasoning. To say that a tort is a wrong, and that tort law is a law of wrongs, is not to envision judges as finger-wagging scolds. The articulation of existing legal wrongs, and the recognition of new legal wrongs, can turn on a variety of considerations. For example, in deciding in the course of a negligence suit whether to recognize the existence of a duty of care not previously recognized, a court may worry about whether the duty will be very onerous, or will generate difficult-to-adjudicate claims. To allow this much is simply to acknowledge that practical reasoning about obligations will, and should, involve a back-and-forth between principle and consequence, a point acknowledged even by the judgmental Cardozo. In *Ultramares v. Touche Ross*, he faced the question of whether under New York law accountants owe a broad duty to take care against causing foreseeable economic loss to others.⁷⁰ His opinion for the court declined to recognize such a broad duty, in part on the following grounds:

⁶⁹ Goldberg, *supra* note 63, at 1205-07 (noting centrality of causation to claims for legal malpractice).

⁷⁰ 174 N.E. 441 (N.Y. 1931).

If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.⁷¹

The point of this passage is *not* to suggest that the question of whether a duty was owed to the plaintiff *just is* the question of whether it would be socially useful to subject accountants to more liability. Nor is the idea that questions of duty boil down to questions about whether liability will generate too many adverse effects on the putative duty-holder or on society at large. Instead, the idea is that an assessment of the probable consequences for the persons who would be charged with the duty is relevant to the question of whether to recognize the obligation. To say the same thing, one of the reasons that judges might invoke as a ground for not deeming negligent accounting to be an actionable wrong with respect to persons not in privity with the accountant is that, to treat it as a wrong to such persons would be to recognize a duty that would be very onerous, or a very difficult one with which to comply.

I will conclude this section by observing an ironic feature of standard pluralist criticisms of “grand” theories as intellectually immodest. The irony is that pluralist theories are vastly less modest than many of their supposedly grander counterparts. If tort is conceptualized as a tool for deterring anti-social conduct and spreading losses and achieving corrective justice, then it is a tool that judges will have many, many occasions to wield—occasions extending well beyond those in which a victim might plausibly have a claim to seek satisfaction against a wrongdoer for a wrong done to her. Thus, it is hardly an accident that we see supposedly modest pluralists ready to treat the mere fact of a public health problem, whether it is drunk-driving, gun violence, or obesity, as sufficient grounds for imposing tort liability. The tort system, on this view, is one in which litigants, judges, and juries are empowered to act as ombudsmen—roving commissioners for the public good. Of course particular ombudsmen may choose to refrain from addressing a given problem. But the decision not to intervene is entirely a matter of self-restraint. Taken on their own terms, pluralist theories are

⁷¹ *Id.* at 444.

profoundly *immodest* in their conception of the place of tort law in our legal and political system.⁷²

VI. Tort Damages Aim to Make the Plaintiff Whole

It is standard today for tort to be distinguished from contract in part by reference to the different default damages rules said to characterize each domain. The characteristic (though not exclusive) contract remedy is “expectation” damages: the amount of money that will put the non-breaching party in the position she would have occupied had the contract been performed. By contrast, the measure of tort damages is said to be that which restores the *status quo ante*.⁷³ The latter idea is in turn commonly captured in the phrase “make-whole damages.” The notion is that the successful tort plaintiff is entitled to receive a payment reflecting the value of the losses that she experienced because of the tort. While there is a good deal of truth here—successful tort plaintiffs in principle often stand to recover damages equal to their losses—the drawing of a conceptual linkage between tort and making whole is fraught with mischief.

One problem with the linkage is that it invites the kind of reverse engineering I described above, whereby one reasons backward from remedy to right. Holmes’s account of tort law is illustrative of this error. In his mind, the only “real” (observable, tangible) difference between tort and criminal law is that the latter issues sanctions in the form of imprisonment and death whereas the former provides primarily for money damages. From this, he reasoned to the idea that the purpose of tort law is to set the conditions under which one person will be forced to “indemnify” another for his losses.⁷⁴ Tort damages, in other words, demonstrated that tort law is a scheme of localized distributive justice—law by which the state orders the transfer of assets from *A* to *B* on the

⁷² The existence of serious social problems involving personal injuries will and should invite litigants and judges to pose and address the question of whether these problems are constituted in part by persons wrongfully injuring others. In this modest sense, tort law ought to be responsive to, and evolve in light of, emerging issues of public policy. The immodesty of pluralism resides in the idea that is always a sufficient ground for imposing tort liability that liability might contribute to ameliorating such problems, regardless of whether one can find a plausible basis for identifying within these problems the commission of wrongs.

⁷³ This is one way in which to interpret the famous “hairy hand” decision. *Hawkins v. McGee*, 146 A. 641 (N.H. 1929).

⁷⁴ HOLMES, *supra* note 42, at 79.

ground that *A*, having had the opportunity to foresee and avoid causing *B*'s loss, nonetheless caused it. In their own very different ways, theorists as diverse as Calabresi and Coleman also begin with the idea of the victim's loss and its transfer to another, then tell very different stories about what might explain or justify such a transfer.

The problem with all of these accounts is that the remedial tail is wagging the substantive dog.⁷⁵ That tort suits (usually) end in a damages payment certainly tells us something about the kind of law that it is—it is law by which some sort of amends is made by one to another. But it does not tell us that tort law ought to be defined as law that specifies when *B* may be ordered to pick up *A*'s losses. That courts today and in the past have identified various other remedies to which successful tort plaintiffs were or are entitled, whether in the form of the right to inflict punishment or the right to obtain an injunction or punitive damages, only confirms that making the plaintiff whole does not somehow capture the essence of the enterprise.

Indeed, as I have argued elsewhere,⁷⁶ there is historical evidence suggesting that the equation of tort damages with make-whole damages was part and parcel of mid- and late-nineteenth century theoreticians' partisan efforts to re-conceptualize tort as a law of loss-shifting or loss-allocation rather than a law for the redress of wrongs. Before then, one finds courts and prominent commentators treating the idea of "make-whole" damages not as essential or basic to tort, but as a special application of a broader rule of "fair" compensation that governed all "personal" actions (whether sounding in "tort" or "contract") that were prosecuted under the writs of trespass and trespass on the case. The rule of fair compensation states that the successful plaintiff is entitled to damages in an amount that is fair or reasonable in light of the plaintiff's "injury," where "injury" was not equated with losses, but instead referred more broadly to the defendant's wronging and harming of the plaintiff. In claims for personal injury, the supposition was that jurors had to be left with broad discretion to determine what would constitute a fair award simply because an injury of this sort was not readily valued. About the most that could be said was that fairness was tied to the nature of the mistreatment suffered by the victim at the hands of the wrongdoer. Herein one perhaps finds the original notion of punitive or

⁷⁵ Zipursky, *supra* note 55, at 748-49.

⁷⁶ John C. P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435 (2004). The arguments in the remainder of this section are drawn from this prior publication.

exemplary damages. The idea was *not* that victims of egregious wrongs were entitled to a separate increment of damages beyond the baseline of make-whole damages. Rather, it was that victims of certain grave forms of mistreatment were entitled, as a matter of fairness, to greater overall damages than other victims.

Yet even within a regime in which fair compensation rather than full compensation was the metric for damages, there was room for the idea of making whole. Specifically, the make-whole measure appears to have functioned as a rule-of-thumb measure of fairness in cases dealing with losses of property. These sorts of cases invited the application of this more specific rule for at least two reasons. First, property loss often came about as a result of relatively less culpable forms of misconduct. Second, losses of property, unlike personal injuries, were as a class presumed to be much more susceptible to quantification. Thus, for a standard-issue trespass to property, perpetrated without malice, fairness presumptively entitled the plaintiff to damages equal to the diminution in the value of the land caused by the trespass. However, fairness might warrant a larger award for a more culpable trespass.

That suits for relatively less culpable wrongs with respect to property interests were the original home for the idea of make-whole compensation is further attested to by instances in which nineteenth-century courts, in a manner contrary to modern usage, invoked the concept of making whole to describe the proper rule of damages for *contract* claims. Thus spoke the Pennsylvania Supreme Court in 1855: “When suit is brought on a contract and in affirmance of it, the verdict should make the plaintiff whole; that is, put him in as good a condition as if the contract had been performed.”⁷⁷ The make-whole measure of damages was seen to fit contract claims precisely because they were conceptualized as claims to vindicate (inchoate) property rights, and because the notion of contract “breach” was not linked conceptually to the idea of highly culpable conduct. (Then, as now, contract breach was not thought of in terms of a notion of fault; non-performance constituted breach unless “excused” on grounds having little or nothing to do with

⁷⁷ *Wilkinson v. Ferree*, 24 Pa. 190 (1855); *see also Moline Scale Co. v. Beed*, 3 N.W. 96, 98 (Iowa 1879) (“What the law aims to do, in case of a breach of contract, is to make the parties whole by awarding damages equal to the injury.”); *Erie Ry. Co. v. I. J. Lockwood & Son*, 28 Ohio St. 358, 370 (Ohio 1876) (“The actual loss for a breach of this contract, the natural and proximate consequences of the act, excluding speculative profits, and remote or indirect losses, is the proper rule of damages. That sum which will make the party whole is the proper measure.”).

the diligence of the party charged with performance.)⁷⁸ Thus, in the typical case, fairness to the successful contract plaintiff consisted of his “property” being restored, where the property in question was the performance to which he was entitled under the agreement.

Today, of course, courts and jurists are apt to describe tort damages in terms of the concept of making whole. Yet the fair compensation idea still figures in practice. Jury instructions in personal injury cases usually reference the idea of a “fair and reasonable” award, though they also commingle that idea with the distinct idea of fully compensating the victim for her losses.⁷⁹ More saliently, tort claimants alleging egregious wrongs remain eligible to ask for greater than make-whole damages in the form of punitive damages. Making-whole, one might say, is today regarded as the rule of thumb for all tort cases, not just tort cases involving property damage.⁸⁰ That the rule of thumb at present tends to take on the appearance of a hard-and-fast rule is a reflection perhaps of the desire of modern judges to exercise greater control over jurors by giving them less room to define “fairness,” as well as a greater willingness both in and outside the law to regard intangible losses as quantifiable. Regardless, it is important not to mistake a particular instantiation of an idea for the idea itself. Even if it is the case that lawmakers have decided to treat the make-whole measure as the definition of fairness when it comes to tort compensation, the underlying idea remains that the tort plaintiff is entitled to fair or reasonable compensation—redress that is appropriate, given the wrong done to her.

⁷⁸ See generally Curtis Bridgeman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 FORDHAM L. REV. 3013 (2007) (discussing non-fault basis of contract breach).

⁷⁹ See, e.g., N.J. CIV. CHARGES 6:11.

⁸⁰ One wonders if the make-whole idea gains a certain amount of unjustified leverage from an ambiguity in the idea of “getting even.” Tort claims have always been about enabling a victim to “get even” with the tortfeasor who wronged him. MILLER, *supra* note 50, at 24-27. And the notion of getting even is tied to the idea that there are applicable metrics for determining what it will take for there to be “evenness,” as opposed to the victim being short-changed, on the one hand, or getting more by way of redress than he ought to get, on the other. *Id.* at 1-16. The idea of damages equal to one’s losses is certainly one such metric. Yet, despite the seemingly intuitive link between the notion of getting even and the idea of receiving full compensation—a measure of damages that might be described as getting the victim back to even—full compensation is hardly the only or even the most plausible instantiation of the more general idea of getting even. Even today it is commonplace to recognize that one might get even with one’s wrongdoer by, say, humiliating or hurting him.

VII. Tort Liability Exists on a Spectrum from Strict Liability to Intent

First-year law students are routinely taught that tort contains “standards of liability” that can be ordered roughly in the manner of the Model Penal Code’s ordering of criminal mental states. Intentional torts are said to reside at the highly culpable end of the spectrum, strict liability torts are at the nonculpable end, with negligence in the middle. There is something to this arrangement. Again, we are dealing with half-truths. But it is at the same time very misleading.

The idea of arranging tort causes of action along a liability-standard spectrum genuinely is a novelty relative to the history of tort. It emerged only in the late-1800s as a byproduct of efforts by courts to recast the distinction between suits brought under the writ of trespass and those brought under the writ of trespass on the case. In the 1830s, the English courts modified what had once served as the formal dividing line between the two writs, namely, the distinction between directly and indirectly caused harms. After the modification, trespass continued to be available for all directly caused harms, whether caused accidentally or intentionally. But “case” was made available for all claims arising out of accidents, whether caused directly or indirectly.⁸¹ As a result, the case writ was rendered the *de facto* home of tort claims for injuries caused carelessly (or without fault). And, although the writ of trespass was in principle still available for claims of accidentally-but-directly caused injury, the claims that ended up being brought under it tended to consist of claims for assault, battery, false imprisonment, and trespass to land and chattels. Thus did the writ of trespass—which for centuries had served as the vehicle for complaining about any forcible wrong, intentional or otherwise—quietly morph into the category that is today referred to as “intentional” torts.⁸²

Given that the category of intentional torts emerged not out of scholarly efforts to organize tort causes of action around *mens rea* standards, but instead as a residue of the collapse of the direct-indirect distinction, it should hardly be surprising to discover that the distinction between intentional and unintentional torts does not neatly track a distinction between more and less culpable forms of wrongdoing. Instead, the line has ended up being drawn between wrongs that, by definition, cannot be perpetrated without purposefulness or knowledge

⁸¹ M.J. Prichard, *Trespass, Case and the Rule in Williams v. Holland*, 1964 CAMBRIDGE L.J. 234, 251 (1964).

⁸² See PROSSER, *supra* note 3, § 7 at 38.

of certain sorts, and wrongs that are *capable* of being committed without any such purpose or knowledge. To see this difference, consider the tort of trespass to land. By definition, this legal wrong involves an intentional touching of land. As such, it cannot be committed completely inadvertently. One has to act for the purpose of making contact (or in the knowledge that one will make contact) with a particular piece of earth or a particular structure. Thus, trespass to land belongs in the family of intentional torts. Now imagine a drunk driver who falls asleep at the wheel, veers off the road, and crashes through a fence on private property. The driver cannot have committed the tort of trespass to land, for he never set out to touch the land in question and did not know he was going to touch it. Rather, the driver has acted carelessly (or maybe recklessly) with respect to the risk of causing property damage. Notice that, notwithstanding its purpose or knowledge component, trespass can be committed in ways less culpable than many instances of negligence. This is because trespasses, even though in one sense purposeful, can in another sense be committed without fault. To take a familiar example: If one builds a fence on land that is in fact owned by another, one commits a trespass to land even if one could not have known of the fact of ownership.⁸³ In other words, trespass to land is a purpose-based tort with a strict liability component. As such it can cover conduct that is not particularly culpable. Indeed, most would deem the fence-builder substantially less culpable than the drunk driver. And this is one reason why it is false to suppose that the writ of trespass, recast in the mid-nineteenth century as the category of intentional torts, was meant to be, or should now be understood to be, a category of more culpable wrongs.

None of the foregoing denies that the presence of intent to cause a certain kind of consequence can be grounds to adjudge conduct more culpable. Other things equal, an unjustified purposeful killing is more wrongful than an inadvertent killing. But this sort of culpable intent is not exclusively the "intent" that is being referenced in the phrase "intentional torts." Moreover, even with respect to conduct that is particularly culpable because of an underlying intent to do harm, one can imagine unintentional injurings that are at least as culpable. Imagine a defendant accused of recklessly burning down a unit of low-income housing and thereby causing the death of several occupants. Would we not adjudge him more monstrous if, instead of confessing to an intention to harm occupants of the building, he were to assert truthfully that he never considered whether his actions might result in the death of

⁸³ Burns Philp Food, Inc. v. Cavalea Cont'l Freight, Inc., 135 F.3d 526, 529 (7th Cir. 1998).

occupants because he does not consider persons of modest means to count as human?

There is another problem with the idea of the liability spectrum. As the example of trespass to property attests, liability standards in tort, no less than in criminal law, are *relative to specific elements*. The contact component of trespass is governed by an intent standard. The interference-with-ownership component is governed by a strict liability standard. Battery law is similarly complex, as is demonstrated by the case of an intended touching that the batterer neither means to be offensive nor has reason to know is of a sort that society deems offensive. If in fact the touching is unacceptable according to social mores, and if the touching itself was intended, it is actionable.⁸⁴ Thus, there is a strict liability aspect to the “offensiveness” component of battery, though there is also an intentionality requirement. Likewise, at least in pre-*New York Times v. Sullivan* defamation law, the publication element probably carried with it an intent standard—one had to intend to communicate a statement containing words capable of defaming.⁸⁵ By contrast, the affirmative truth defense was governed by a strict liability standard. Hence liability could attach so long as a defendant intentionally or knowingly communicated the type of information that would harm another’s reputation, even if he had every reason to believe that it was true.

The framing of tort liability standards in terms of the troika of intent, negligence, and strict liability is also problematic because the identification of these three points on the line tends to overshadow other ways in which conduct can be wrongful. Negligence (in the sense of fault) itself is probably not a unitary concept. For example, certain actors subject to liability for negligence are held liable on terms that amount to a hybrid of negligence and strict liability. This category includes not only defendants who are subject to liability under *res ipsa* theories,⁸⁶ but also property owners who are held liable for failing to maintain their properties in a reasonably safe condition for those on the premises by permission. To the extent that “reasonably” modifies the condition of

⁸⁴ This is one lesson plausibly drawn from *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891). A schoolhouse kick, the court seems to say, is actionable if the touching is both intended and “unlawful” in the sense of not being permitted or tolerated given the norms of interaction applicable to the situation. *Id.* at 403-04. Whether the person doing the kicking was or should have been aware of the norms is beside the point. *Id.*

⁸⁵ *Burt v. Advertiser Newspaper Co.*, 28 N.E. 1 (Mass. 1891) (Holmes, J.).

⁸⁶ Suggested by JOHN C. P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 197 (2004) (Teacher’s Manual materials on *res ipsa*).

the land, rather than the care taken by the owner, it creates a standard of liability that is distinct from both negligence and strict liability.⁸⁷ Another example is provided by the common law doctrine of *negligence per se*. One reason why the doctrine is attractive to plaintiffs is that legislative and regulatory standards of conduct are sometimes more exacting than the standard of ordinary prudence, such that the substitution of the former for the latter will ward off what might otherwise be a jury verdict for the defendant on the ground that the defendant acted with sufficient prudence to satisfy the latter. Imagine a driver who, although she has a prescription for glasses to correct for a mild vision problem, decides to drive on a short daytime errand without her glasses. In the course of the drive, she strikes another driver's car, allegedly because of her less-than-stellar vision. A jury might well be prepared to find, and permitted to find, that the driver behaved under the circumstances with the prudence of an ordinary person. But, if by virtue of legislation the issuance of a license to the driver was conditioned on a requirement that she wear glasses whenever driving, the jury has no authority to grant a "dispensation" that frees the driver from the obligation to comply with the legislative directive.⁸⁸

Other torts, of course, base liability on different standards. Claims for intentional infliction of emotional distress are famously available for practical jokes and other actions that are undertaken with reckless disregard of the prospect of causing severe emotional distress to another.⁸⁹ Common carriers in many states were held, and in some states are still held, to a duty of extraordinary care rather than ordinary care. The differences between these standards are elusive, but they are hardly meaningless. A bus passenger alleges that he was caused to fall when the bus he was boarding began moving before he had ascended to the top of its steps. The transit authority argues, plausibly, that a bus driver of ordinary prudence will sometimes begin to drive even before passengers are settled. Yet, if the standard is extraordinary care, then there is a respectable argument for the plaintiff that the bus driver owed

⁸⁷ *Debus v. Grand Union Stores of Vt.*, 621 A.2d 1288, 1294 (Vt. 1993) (store owner's duty is one of "active care to make sure that its premises are in safe and suitable condition for its customers.").

⁸⁸ *Cf. Dalal v. City of New York*, 692 N.Y.S.2d 468 (App. Div. 1999) (reversing jury verdict for defendant on grounds that plaintiff was entitled to negligence per se instruction and that defendant would have to be found careless as a matter of law if the facts established a statutory violation).

⁸⁹ *164 Mulberry St. Corp. v. Columbia Univ.*, 771 N.Y.S.2d 16 (App. Div. 2004) (plaintiffs stated cognizable claims for intentional infliction of emotional distress by alleging that defendant's employee recklessly caused them severe emotional distress).

it to him to wait until he was at the top of the stairs or otherwise in a secure position before driving off.⁹⁰

Another kind of confusion results from the treatment of torts along the liability spectrum, a confusion that follows from the unilateral focus on the defendant that is invited by it. Torts are relational wrongs—wrongs as to members of particular classes of persons. Because torts are relational, a single act by the same person can constitute two different wrongs to two different people. Suppose, for example, *D* and *T* run into each other on a residential street. They get into a heated argument. *D* pulls out a gun and *T* runs away. *D* fires just over *T*'s head hoping “merely” to scare *T* and succeeds in doing so. Meanwhile, the bullet travels twenty yards further, clipping the trunk of a tree located in *P*'s yard, behind which *P* happens to be standing. Although *D* was entirely unaware of *P*'s presence, *P*, too, is frightened and indeed traumatized by the experience of nearly being shot. What is the correct description of *D*'s mental state for purposes of tort law? The answer is: It depends who is bringing the lawsuit. If it is *T* who is suing, he can sue successfully for assault because *D* acted for the purpose of scaring him. But if *P* has any claim, it will be for negligent infliction of emotional distress (“NIED”), though perhaps the claim will include a count for punitive damages based on reckless indifference. *D* never intended to shoot *P* and, we may assume, did not know that he was going to shoot *P*. But given the locus of the shooting, *D* was at least careless as to *P* and in acting thusly he physically endangered and traumatized *P*. Hence, in most jurisdictions, *P* has a valid “zone of danger” NIED claim against *D*, and for purposes of this claim, *D*'s conduct is correctly described as careless or reckless, not intentional, even though it was intentional as to someone else.⁹¹

⁹⁰ *Jones v. Port Auth.*, 583 A.2d 512 (Pa. Commw. Ct. 1990) (reversing defense verdict on ground that jury instruction was ambiguous as between the reasonable and extraordinary care standards).

⁹¹ Many courts would treat *P*'s claim as a “transferred intent” battery, but in my view the application of the fiction of transferred intent to a scenario such as this one is just a sloppy way of saying that a defendant's intentional acts toward a person or persons can also constitute recklessness or negligence toward others. Conduct can also be disjunctively intentional, i.e., intentional as to any of several possible victims. *See, e.g., Talmage v. Smith*, 59 N.W. 656 (Mich. 1894) (defendant liable for battery where he threw stick intending to hit any of three boys, one of whom was the plaintiff).

VIII. *Settlement and Insurance Have Rendered Tort Law Obsolete*

Today only a tiny proportion of tort suits are tried on the merits in front of a judge or jury. In almost every instance, the suit is dropped, dismissed, or settled. Particularly among lawyers who regularly interact with one another, a bureaucratic, claims-adjustment mindset sometimes prevails.⁹² So, too, for instances in which a given attorney or firm has a stable of similarly situated clients with comparable claims against one or a handful of defendants. Even non-class action litigation frequently takes an aggregate form, in that settlement amounts for individual cases that involve common facts tend to be calculated on a grid that values each claim relative to actual or desired payouts for other claims within the same cluster.⁹³ On the defense side, tort litigation is routinely handled by attorneys hired by insurers. And when settlement is reached, it is usually insurers who pay all (or almost all) of the award, not insured defendants. Indeed, Tom Baker has suggested that, in practice, liability insurance coverage will often operate as a *de facto* ceiling on tort damages.⁹⁴

Some argue that these features of modern tort litigation have rendered substantive tort law obsolete.⁹⁵ The notion is that, even if tort law on the books is about individual victims obtaining redress for wrongs done to them, tort law in action is claims-adjustment. Given the routinization and bureaucratization of processes for handling claims that were once more adjudicatory in nature and more individualized,⁹⁶ it is entirely appropriate to consider whether or to what extent the practice of tort law is becoming divorced from the idea of obtaining redress for wrongs done. Still, claims of obsolescence are greatly overstated.

Most obviously, tort claims are still processed in “the shadow of the law.”⁹⁷ Changes in substantive tort law that determine what counts as a cognizable injury and wrong therefore significantly shape the settlement

⁹² Tom Baker, *Blood Money, New Money and The Moral Economy of Tort Law in Action*, 35 L. & SOC'Y REV. 275 (2001).

⁹³ Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519 (2003).

⁹⁴ Tom Baker, *Liability Insurance as Tort Regulation: Six Ways That Liability Insurance Shapes Tort Law In Action*, 12 CONN. INS. L.J. 1, 6 (2006).

⁹⁵ John Fabian Witt & Sam Issacharoff, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1572-73 (2004).

⁹⁶ *Id.* at 1575-76 (describing modern settlement practices as a privatized variation on Weberian notions of routinization and bureaucratization).

⁹⁷ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE. L.J. 950 (1979).

environment. Here we must be careful to attend to dogs that do not bark.⁹⁸ Basic requirements of tort doctrine, including that the plaintiff must have suffered an injury, undoubtedly cut off significant swaths of litigation that might otherwise be initiated. Likewise, if tort law still operated under the privity rule of *Winterbottom v. Wright*, there would be vastly fewer occasions for plaintiffs' lawyers to press claims and for sellers' lawyers (and sellers' insurers' lawyers) to settle them. That repeat-player defendants spend a lot of time and money lobbying for favorable legislative tort reforms, and that they seek to establish immunity from tort liability through doctrines such as preemption, attests to this point.

Even when a claim is brought, if settlement occurs only after the rejection of defense motions for dismissal or summary judgment, tort law is obviously framing the negotiations in that particular case. Although this effect is felt by the parties regardless of whether the judicial denial is memorialized, the publication of an opinion obviously will affect the disposition of other cases. As for the aggregate nature of individual settlement agreements, it is worth noting that agreements are often reached only after a certain amount of individualized litigation has set the parameters of settlement. These test cases reveal patterns as to the strengths and weaknesses on issue of defect, causation, comparative fault, and so forth. In this sense, settlement grids will reflect to a significant extent the strengths and weaknesses of different claims.⁹⁹ Admittedly, however, a lot will depend on how the grids are drawn—i.e., what sort of distinctions they make among claimants and on what grounds. To the extent that grid values reflect tort-related variables—by awarding larger amounts to claimants injured by more culpable wrongdoing, who have more plausible claims of causation, and/or who have suffered more serious injuries, while awarding lower amounts where there is greater comparative fault—their use would seem to pose fewer potential problems.¹⁰⁰

⁹⁸ Sir Arthur Conan Doyle, *Silver Blaze*, *THE COMPLETE SHERLOCK HOLMES* 335 (Doubleday 1930).

⁹⁹ See, e.g., Alex Berenson, *Analysts See Merck Victory in Vioxx Settlement*, *N.Y. TIMES*, Nov. 10, 2007, at A1 (noting that Vioxx settlements were shaped by the outcomes of several individual litigations). One concern raised by some courts, legislators, and commentators about class-certification decisions is that, if they are rendered prematurely, the pressure on the defendant(s) to settle will prevent the litigation of any test cases to determine how the claims being aggregated might actually fare under applicable tort law. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), cert. denied, 516 U.S. 867 (1995).

¹⁰⁰ The recently proposed Vioxx settlement adjusts awards by reference to factors such as these. Thus, it offers greater compensation to claimants based on factors such as severity of

The view under consideration is also mistaken in supposing that the actual holding of a jury trial is integral to tort law's operating as a law for redressing wrongs. The presence of "open courts" and related provisions in many state constitutions attest that tort law has indeed been built on the premise that governments will provide a forum in which victims can raise and pursue claims for wrongs that are, or should be, recognized by the law.¹⁰¹ Historically, these fora have been the courts, and there might be real worries about a system that transferred this job in a wholesale fashion to an executive-branch agency or legislature. There likewise might be concerns about a system of courts set up so as to rely exclusively on professional judges without leaving important potential roles for lay jurors. But these are not exactly the worries presented by the disappearance of the civil trial. Essential to the tort notion of redress is the idea of a victim being empowered by the law to demand an adjudication of her claim under rules of a certain sort. If such a demand eventually results in a negotiated settlement conducted on terms shaped by governing law, then government has done its job in this domain by giving the victim access to law that defines wrongs and provides redress for them.

Still one can identify a number of important questions that are being and should continue to be addressed in this area. Suppose it turns out to be the case that lawyers who recommend settlement to tort plaintiffs consistently do so irresponsibly (for example, only to maximize the profitability of their practices) and thereby deprive clients of opportunities for more substantial and meaningful redress. Then there would be reason to suppose that the dominance of settlement as the mode for resolving tort claims is threatening the point of having tort law.¹⁰² It seems unlikely we have arrived at such a point, at least as a global matter, though particular representations have surely taken this form. Relatedly, one might worry that a plaintiff's lawyers' settlement advice will not always be as sensitive as it should be to the fact that some clients do not want simply to maximize their recoveries, but instead are

injury and age at time of injury (which is relevant to future economic loss), as well as whether the claimant was injured before or after Merck learned the results of studies evidencing Vioxx's risks, or before or after the introduction of new labels with additional warnings as to those risks. See http://www.merck.com/newsroom/vioxx/pdf/Exh_3_2_1.pdf (setting out determinants for claimants' recoveries under the settlement) (last visited Mar. 25, 2008).

¹⁰¹ JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 1 (4th ed. 2006).

¹⁰² See, e.g., Baker, *supra* note 92, at 282-83 (suggesting the possibility that plaintiff's lawyers sometimes push aggressively for settlements at or under policy limits for self-serving rather than client-regarding reasons).

willing to trade off wealth for a degree of process that leaves them feeling as if their claims have been taken seriously.¹⁰³ Legislators, judges, bar associations, and scholars will do well to investigate further these sorts of questions and take cognizance of findings suggesting that claimants (or certain classes of claimants) are being shortchanged by modern litigation practices. But to notice shortcomings in the system that leave it operating some distance away from how it ideally ought to operate is hardly to conclude that tort law is obsolete.

In gauging the virtues and vices of settlement-oriented tort litigation, it will also be important to appreciate the ways in which judgments about the sufficiency of different processes for handling tort claims are, and should be, sensitive to the substance of the claim being processed. For claims arising out of minor delicts and involving modest harms—probably the bulk of tort claims—quick settlement with relatively modest process might well count as meaningful satisfaction or redress for victims. Imagine a simple car crash involving inadvertently bad driving and only minor injuries (or property losses without personal injuries). Given what might be modest culpability, as well as the small stakes, a quick settlement for some amount within insurance policy limits may be entirely satisfying to all sides. By contrast, when the wrongdoing is more serious, such a settlement is likely to be less satisfactory and perhaps for that reason less probable.¹⁰⁴

Again, it is certainly worth worrying about whether plaintiffs' attorneys are cowing clients into low-ball settlements or too aggressively dampening their clients' desires for redress out of self-interest rather than a sense of what is in the client's best interest. By the same token, potentially serious issues arise when an attorney representing numerous individual clients settles their claims by reference to an implicit or explicit grid. The point is that the modern settlement-intensive regime of tort litigation, by giving a less prominent role to courtroom proceedings and a more prominent role to out-of-court negotiations, often at the prompting of judges anxious to clear their dockets, requires for its proper operation, among other things, careful attention to issues of professional responsibility. And as both Richard Nagareda and John Witt have in different ways rightly emphasized, within a litigation system that relies more heavily on the professionalism of lawyers, tort law will only operate tolerably well with more aggressive policing of

¹⁰³ E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of their Experiences in the Civil Justice System*, 24 L. & SOC'Y REV. 953 (1990).

¹⁰⁴ See Baker, *supra* note 92, at 281-301.

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attorney litigation practices by bench and bar, and/or the introduction of new forms of inter-attorney competition.¹⁰⁵ Again, however, there is no reason to conclude that modern practices prevent tort law from functioning as a law of wrongs and redress.

What of liability insurance's significance for modern tort law? Here one must appreciate that insurance is a multi-faceted phenomenon.¹⁰⁶ Obviously it can operate to blunt the extent to which wrongdoers are required to answer for their wrongs. However, even an insured tortfeasor will sometimes have to pay out of its own pocket (as is the case when a plaintiff obtains an award of punitive damages or for compensatory damages over coverage limits). Covered claims can also generate a secondary form of answerability insofar as the insured faces claims for indemnity or premium increases. In any event, the presence of liability insurance also makes redress available to many victims of wrongs who would otherwise have none at all. In this respect, the legalization of liability insurance—along with the legalization of contingent fees and the recognition of wrongful death claims—has been central to the democratization of tort law.¹⁰⁷ Liability insurance also helps lend moral and political legitimacy to tort law by taking away some of the harshness that would otherwise threaten to make it too disruptive of business and life plans.¹⁰⁸ Politically, at least, there is a potential trade-off between holding individual wrongdoers responsible and rendering the system so onerous as to invite serious cutbacks. Insurance makes that trade-off less stark.

It is also worth noting in this context the sense in which liability insurance indirectly instantiates a notion of responsibility to others that is central to tort law. The presence of working liability insurance markets for a given sort of activity or enterprise generates what might be termed a second-order responsibility—a responsibility to take steps to be in a position to pay one's tort debts, should one incur them. If one is going to drive, or operate a certain kind of business, the responsible thing to do is to obtain coverage, such that one will be in a position to

¹⁰⁵ RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 236-68 (2007); John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 282-90 (2007).

¹⁰⁶ TOM BAKER, *Risk, Insurance and the Social Construction of Responsibility*, in *EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY* 33 (Tom Baker & Jonathan Simon eds., 2002).

¹⁰⁷ Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231 (1998).

¹⁰⁸ Tom Baker, *Liability Insurance, Moral Luck and Auto Accidents*, 9 THEORETICAL INQUIRIES L. 164 (2008).

make amends to a person who is wronged by virtue of one engaging in those activities. Conversely, a failure to obtain available insurance in amounts appropriate to one's undertakings and wherewithal is a form of irresponsibility. This helps to explain why tort plaintiffs and their lawyers will sometimes take a more aggressive and vindictive approach to defendants who fail to insure themselves to an appropriate extent.¹⁰⁹ To purchase liability insurance is to acknowledge, at a basic level, one's tort duties.

I noted above Tom Baker's observation that liability policy limits tend to function as de facto damage caps. The extent to which this phenomenon is regarded as a problem is obviously linked to one's conception of what constitutes adequate tort redress. Insofar as lawyers are weaned from treating as natural or inevitable the association of tort redress with make-whole compensation,¹¹⁰ then settlements based on coverage limits that fall short of that particular mark need not always or even typically be regarded by litigants or observers as instances in which tort has failed to deliver redress.

The preceding paragraphs have identified various features of the litigation process that counsel against a rush to embrace claims as to tort law's obsolescence. Yet, even taken together, these tell only half the story. For tort law is not just about litigation. As a law of wrongs it also sets standards of proper conduct. Tort law, in other words, has a guidance function and it often performs this function independently of whether litigation arises.¹¹¹ In many situations, actors adjust their behavior to conform to norms embedded in tort law. Individuals sometimes police themselves. Most drivers, for example, monitor their own driving for safety, though they often fail to do so or do so poorly. If only to ward off potential liability, employers adopt training programs that aim to shape employee behavior in accordance with tort rules and standards, as well as statutory and administrative regulations. For example, restaurant owners now routinely train employees who serve alcohol to patrons, partly out of concern for liability under Dram Shop laws.¹¹² Similarly,

¹⁰⁹ See *supra* text accompanying note 94.

¹¹⁰ 4 FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* § 25.1, at 494 (2d ed. 1986) (noting tendency of lawyers to treat this correspondence as "natural").

¹¹¹ John C. P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 406-07 (2005).

¹¹² The demand for training created by government requirements or desire to avoid liability is evidenced by the emergence of companies that train alcohol servers. See, e.g., TIPS, *Leading the Way in Responsible Alcohol Service Training for over 20 Years...*, <http://www.gettips.com> (last visited Feb. 18, 2008).

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compliance officers provide employees with training on how to avoid (and respond to) workplace discrimination and invasions of privacy. Tort also gives guidance through lawyers acting in counseling roles. Even in an era in which the law is stacked against defamation plaintiffs, media outlets still have attorneys review publications for potentially defamatory content. Product manufacturers likewise worry over what sort of warnings they need to issue in connection with the sale of their products, and to whom. Hospital physicians routinely consult with staff attorneys on issues such as patient consent. Insurers can play a comparable role by their use of experience-rating, and even by directly overseeing insureds' efforts to comply with safety regulations and tort obligations.¹¹³

In sum, even if the manner in which tort claims are pressed and resolved has moved significantly toward the settlement model, there is no reason to suppose that the rise to preeminence of this model, in and of itself, signals the death of tort law. Settlements are heavily shaped by tort law and, when conducted on the right sort of terms, can constitute meaningful redress. Regardless, tort operates independently of the litigation process by setting rules and standards of conduct that individuals and entities frequently observe.

IX. Tort Law Is Common Law

English tort law was first developed in the common law courts. American tort law, too, has been and is common law in at least two respects. First, the sources of tort law's rules and standards are preeminently judicial. In most American jurisdictions, the tort of negligence exists not by virtue of statute, but because of its recognition in judicial opinions. Second, courts still bear primary responsibility for developing and applying tort law, and they tend to do so using the techniques and norms associated with the idea of common law reasoning, an idea that encompasses not only reasoning from precedent, but the conception that a judge's task in a tort case is that of articulating, refining, and developing norms of right conduct that track to some degree ordinary ("common") judgments about responsibility. Yet, for all this, the seemingly innocuous claim that tort law is common law often disserves the cause of clarity.

¹¹³ Baker, *supra* note 106, at 42-43.

At the most basic level, the point to be made is the obvious one that statutes figure in tort law in all sorts of ways. Indeed, it is difficult to think of an aspect of tort law that has not been touched by statutory law. Here is but a sampling. Statutes such as “anti-heart balm” statutes have eliminated entire causes of action.¹¹⁴ Others, including privacy statutes, have created statutory torts.¹¹⁵ Statutes have provided new defenses (e.g., the shopkeeper’s privilege as a defense against mistaken confinements) and eliminated defenses (e.g., comparative fault statutes that eliminate implied assumption of risk and contributory negligence).¹¹⁶ Statutes have enhanced damages (e.g., double or treble damages provisions) or diminished them (e.g., caps), and have changed the terms on which liability is apportioned (e.g., laws abolishing or circumscribing the application of joint and several liability).¹¹⁷ Statutes have set standards of conduct that are incorporated into common law torts (e.g., negligence per se; regulatory compliance defenses).¹¹⁸ As evidenced most clearly by Wrongful Death Acts, statutes have sometimes conferred “standing” on new classes of claimants suing derivatively for wrongs to others. Statutes also set limits on when a tort claim can be brought, and even what sort of agreement an attorney and a client can enter into.¹¹⁹ Statutes can provide tort replacement schemes, as do worker’s compensation and no-fault insurance laws. Statutes have given the Supreme Court—which since 1938 has enjoyed no formal jurisdiction over substantive tort law—occasions to influence the development of tort law. Such has been the case, for example, with the Court’s decisions concerning the scope of negligence liability under

¹¹⁴ See, e.g., *Mussivand v. David*, 544 N.E.2d 265, 274 (Ohio 1989) (discussing Ohio’s anti-heart balm act).

¹¹⁵ See, e.g., N.Y. CIV. RIGHTS LAW §§ 50-51 (West 2008).

¹¹⁶ See, e.g., *Grant v. Stop-N-Go Market of Texas, Inc.*, 994 S.W.2d 867, 872-73 (Tex. Ct. App. 1999) (discussing Texas’s shopkeeper’s privilege statute).

¹¹⁷ See, e.g., COLO. REV. STAT. ANN. §13-21-111.5 (West 2008) (barring joint and several liability for injury claims except for injuries caused by joint tortfeasors); N.J. STAT. ANN. § 2A:15-5.3 (West 2000) (tort defendant may not be held jointly and severally liable unless at least 60 percent responsible for plaintiff’s injuries).

¹¹⁸ See, e.g., *Martin v. Herzog*, 126 N.E. 814, 815 (N.Y. 1920) (discussing negligence per se); N.D. CENT. CODE § 32-03.2-11(6) (2008) (proof of compliance with relevant regulations bars plaintiff from seeking punitive damages).

¹¹⁹ See, e.g., *Caves v. Yarbrough*, 2007 WL 3197504, at *3-7 (Miss. 2007) (applying one-year limit on certain claims against governmental entities); *Newton v. Cox*, 878 S.W.2d 105, 108-09 (Tenn. 1994), *cert. denied*, 513 U.S. 869 (1994) (upholding a cap on contingent fees in medical malpractice actions).

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FELA.¹²⁰ The same can be said of its construal of the Federal Rules of Evidence in the *Daubert* and *Kumho Tire* opinions.¹²¹

This last observation leads naturally into a distinct but related point, which is that state tort law has also been shaped by forms of law other than statutes. Most visibly, the First Amendment to the U.S. Constitution has, in the hands of the modern Supreme Court, provided grounds for drastically limiting the reach of defamation law.¹²² The Fourteenth Amendment has similarly been invoked to set limits on punitive damage awards.¹²³ Cutting in the other direction, state constitutional provisions have sometimes been interpreted by high courts as requiring states to make tort law available on certain terms, such that efforts to cut it back are deemed unconstitutional.¹²⁴ Federal common law, including most obviously the law of admiralty, has figured prominently in the development of tort law. Admiralty law not only brought us *Kinsman*¹²⁵ and *Carroll Towing*,¹²⁶ it also has had a lot to say on issues such as comparative fault.¹²⁷ And regulatory law increasingly has taken on an important role, particularly as a source for rules that are said to preempt state tort law causes of action.

There is a third and perhaps subtler point that should be made under the present heading. In our post-New Deal, post-Great Society era, to say that tort law is common law is all but to include the modifier "mere." The phrase "mere common law" carries with it several connotations. It conveys the sense that this body of law is sufficiently hidebound so as to be likely not to mesh well with modern concerns and values. It also invokes the Hobbesian and Benthamite idea that accretive, judge-centric lawmaking is vastly inferior to forward-looking and systematic lawmaking by legislative or executive branch officials.

¹²⁰ *Norfolk & W. Ry. v. Ayers*, 538 U.S. 135, 141 (2003) (FELA plaintiff may recover for fear of disease parasitic on exposure to asbestos that has caused asbestosis); *Metro-N. Commuter R. Co. v. Buckley*, 521 U.S. 424, 438-44 (1997) (FELA plaintiff may not recover for fear of disease absent physical injury but might recover structured payments to cover cost of medical monitoring); *Consol. R. Corp. v. Gottshall*, 512 U.S. 532, 556 (1994) (FELA plaintiff may recover for negligent infliction of emotional distress if plaintiff experienced distress by virtue of being placed in imminent physical danger).

¹²¹ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

¹²² *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹²³ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

¹²⁴ *See, e.g., Ferdon v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440, 468 (Wis. 2005) (striking down as unconstitutional a cap on medical malpractice damages).

¹²⁵ *Petition of Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964).

¹²⁶ *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

¹²⁷ *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

And it suggests that tort law, as common law, occupies the lowest rung of legal authority, such that it is eligible for revision more or less at whim.

None of these connotations are devoid of truth. Tort law is in some ways individualistic, though hardly libertarian. It is about holding individuals and entities answerable to others for wrongs done to them, and hence it concerns the conditions under which, and the terms by which, an actor can be held accountable to another. As such, it is generally not set up to handle social problems on a systemic basis, though it can at times contribute to the control or management of such problems.¹²⁸ Tort law is accretive, and judges as a rule are operating at the edges of their offices when they treat tort cases as loci for genuinely radical law revision or *de novo* lawmaking. But it should go without saying that the line between an effort at progressive common law development and radical law reform is an elusive one.¹²⁹ (Much the same holds for the question of when courts may legitimately take an aggressive stance in the absence of, and/or to provoke, legislative treatment of a particular issue.)¹³⁰ Finally, legislatures do indeed enjoy vast discretion to reform tort law, although perhaps not the *carte blanche* that some courts and commentators seem to suppose.¹³¹

For all the foregoing reasons, and notwithstanding its pedigree, the notion that tort law is (mere) common law is productive of more misunderstanding than clarity. It is therefore best cast aside.

X. *Torts Is a Class, Not a Subject*

The last of the ten half-truths will return our attention to several of its predecessors. Happily, it can therefore be addressed with relative concision. The idea expressed in this half-truth is really just an extension of the idea that tort is a hodgepodge, or a primitive scheme for dealing with the problem of accidents. Oddly, though, when it comes to the teaching of torts, these embarrassing features often are treated as virtues.

¹²⁸ Goldberg & Zipursky, *supra* note 43, at 1165-73.

¹²⁹ Compare *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944) (Traynor, J. concurring), and *MacPherson v. Buick*, 111 N.E. 1050 (N.Y. 1915) (Cardozo, J.), with *In re Simon II Litigation*, 211 F.R.D. 86 (E.D.N.Y. 2002) (Weinstein, J.), *rev'd* 407 F.3d 125 (2d Cir. 2005).

¹³⁰ *McIntyre v. Balentine*, 833 S.W.2d 52, 56 (Tenn. 1992) (adopting comparative fault in absence of legislative action).

¹³¹ Goldberg, *supra* note 27, at 611-22.

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A cynic might suppose that law professors who find value in teaching a torts class are just making the best of the bad hand that Langdell dealt them. But my surmise is that many professors see the alleged formlessness of tort law as a pedagogic virtue. For this feature is what renders a class in torts the perfect vehicle for introducing 1Ls to the promise and pitfalls of judicial policymaking. Appellate decisions in tort cases present in tidy, digestible packages a steady diet of practical problems that expose students to the “truth” that, at least in high courts, the law consists of open-field running and social engineering.

According to this view, the beginning of wisdom rests in the recognition that judges’ purported accounts of their decisions—their legal analysis—is not doing much work. The law runs out long before the point at which it can provide the justification for a decision and, indeed, doesn’t even frame a set of bounded questions on which only certain types of considerations will bear. With the patina of doctrine wiped away, students can begin to gauge what it is that judges do—or at least what certain kinds of intelligent high court judges do, which is to make open-ended policy decisions on various and sundry policy grounds. A products liability case presents a concrete situation in which judges get to consider, for example, whether consumers should be left to make decisions about their safety or whether the law should provide them with after-the-fact health and disability insurance. A “social host liability” suit is an occasion for judges to decide what, if anything, they want to do about the problem of drunk driving. A punitive damages case empowers judges to determine whether they want the tort system to function as a check on captured regulators, or a corrective for the problem of under-litigation.

Depending on the professor’s perspective, she might applaud these efforts as thoughtful attempts at pragmatic policymaking, or sound applications of the principles of microeconomics. Alternatively, she might condemn them as ill-informed, counterproductive, or illegitimate; as evidencing the propriety of leaving policy to legislatures or experts. Regardless, the value of torts as a first-year class remains constant. Students are presented with a series of memorable vignettes through which they are initiated into the art of policymaking. This is the sense in which “Torts” is a class but not a subject. After all, judicial social engineering is (on this view) equally the hallmark of any domain in which judges are primarily responsible for resolving disputes.

At this point in the analysis, it won’t be difficult for the reader to anticipate the general tenor of my response. Of course tort cases do arise

out of and can be read to implicate policy problems of the sort described above. But it hardly follows that a 1L torts class is really or ought to be a class in adjudicative policymaking. Torts—“civil wrongs”—is a subject. And it is one rich and relevant enough to sustain in-depth treatment along many dimensions, only one of which concerns whether and how judges make or should make public policy.

At the broadest level, to grasp the idea of a tort is to have a sense of how tort and crime relate to one another—how a scheme that arms victims with private rights of action against wrongdoers overlaps with, yet differs fundamentally from, a scheme of government prosecution and punishment for a related-yet-distinct set of wrongs. Likewise, it is to appreciate that a system that deals with injurious behaviors *qua* civil wrongs overlaps with, yet differs fundamentally from, other ways in which modern law and the modern administrative state might approach such conduct, including *ex ante* safety regulation and *ex post* compensation schemes. Relatedly, it is to understand something of the litigation processes through which claims for redress are processed, and how judges’ views about the operation of those processes have in turn fed into their efforts to shape the law.

Tort students also should be introduced to the historical continuities and discontinuities that mark the subject. They should learn of tort law’s longstanding place in Anglo-American law, as well as its rise to greater prominence in a modern world of contingent fees, Wrongful Death Acts, and liability insurance. They should know about some of the old torts that have died and the new ones that have emerged. They should appreciate how statutes, judicial decisions, Restatements, and even law journal articles have helped to shape the torts landscape by, for example, identifying new classes of cognizable harms and new classes of eligible claimants, and by synthesizing or extending case law.

Most fundamentally, students in a torts class need to learn the content of the relevant substantive law. They need to know that concepts like “intent” beg for further specification (intent to touch? to offend? to harm?). They need to appreciate the difference between knowing that one’s conduct *will* cause harm to another, and knowing that it *creates a risk* of such harm. They need to see (as was noted above) that the different elements of the different torts can have different “mens rea” requirements. They must come to understand what it means for something to be the cause of something else. And yes, they even need to know what it means for something to be a proximate cause—an idea that is not nearly so esoteric or open-ended as it is often made out to be.

The point of exposing students to the richness and diversity of the law of torts is not to play games for the sake of playing games, nor to learn lawyer-speak as a condition of admission to a guild. Nor is it to dwell in the manner of an antiquarian on a subject rendered irrelevant by the rise of the administrative state. It is instead to appreciate the richness and subtlety with which this body of law has come to articulate the responsibilities that we owe to one another. It is also to appreciate that, among the many, many things that modern law does, still one of the most basic is to set standards as to how we must conduct ourselves in light of the interests of others, and to define the ways in which we are answerable to others when we do not live up to those standards.

CONCLUSION: TEN TRUTHS (?) ABOUT TORT LAW

Having focused thus far on identifying and debunking a set of familiar yet problematic claims, I will conclude by offering in their place ten propositions of my own. Whatever deficiencies reside within them—and surely there are many—they will, in my judgment, serve us better than the ten half-truths of tort law with which we started.

- I. Tort is a Law for the Redress of Wrongs.
- II. By Various Names, “Torts” Has for Centuries Been Recognized as a Discrete Branch of Anglo-American Law.
- III. Tort’s Domain is Wrongs, Not Accidents, though Accidents Often Involve Wrongs.
- IV. Tort Law Is Contingent, Complex and Coherent.
- V. Tort Theories Can Be Unitary and Anti-Reductionist.
- VI. Tort Damages Provide Victims with Recourse in the Form of Fair Compensation.
- VII. The Liability Standards of Tort Do Not Form a Simple Spectrum.
- VIII. Modern Settlement and Insurance Practices Enable the Operation of Tort Law, though They Can Also Compromise It.
- IX. Tort Law Is Common Law, Regulatory Law, Statutory Law, and Constitutional Law.
- X. “Torts” Is a Subject, and the Subject is not Judicial Policymaking.