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Monsanto Lecture

COURTS AND TORTS: "PUBLIC POLICY" WITHOUT PUBLIC POLITICS?

HANS A. LINDE*

I. INTRODUCTION

The invitation to consider the "deep theory" of tort law¹ has brought you a series whose lecturers have made tort theory their life work. As one who came to a common law court from a public law background, I do not intend to poach on the tort scholars' domain. My topic is the use of policy in defining tort liability.

In other common law fields like contracts or property, public policies have been widely codified or assigned to direct public regulation, as in labor law and land use law. But American legal theory and practice alike are fixated on courts, starting from a definition of law as whatever judges decide. One fine intellectual history of American tort law has no index entry for statutes or for legislatures.² Tort law remains the largest domain within the state courts' power to change. Courts have devised torts to bring change even to such contractual or property relationships as insurance, employment, and residential tenancies.

Changing the law sounds like legislating, for which we elect someone else. Judges publicly disclaim that they legislate, not mendaciously but because

* Judge, Oregon Supreme Court, 1977-90. This article is a revised version of the eighth Monsanto Lecture presented on November 4, 1993, at Valparaiso University School of Law. I am grateful for earlier opportunities to discuss the themes of this lecture with faculty and students at the Franklin Pierce Law Center and at Hofstra University School of Law.

1. George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1 (1987).
2. G. EDWARD WHITE, *TORT LAW IN AMERICA* (1980).

generally they believe in the principle, and for most occasions a longer explanation is too complex. And legislators indeed make much law concerning liability for injuries. Legislatures, not courts, replaced common law tort rules with workers' compensation laws, made governments liable for tort damages, enacted and later repealed automobile guest statutes, required insurance to cover most traffic injuries, and adopted most comparative fault laws. Statutes created claims for consumers against unlawful trade practices and for workers against discrimination or sexual harassment. Nonetheless, lawyers look to courts as the source of changing tort policies, seeing legislatures either as a fall-back option or as unprincipled political intruders, and theorists celebrate those courts that rise to the challenge.

Three arguments are made for courts to make tort policy. One is that, as a matter of theory, no court can avoid it. The second is that courts do it better. And, third, courts made the law what it is, and if they do not remake it, no one else will. The axiom that courts make law has been American orthodoxy for a century.

The mantra of state courts has been Holmes's observations, before he became a judge, that the "life of the law has not been logic [but] experience," and that law is shaped by "intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men."³ Holmes, who cared about theory, hardly meant this description to invite illogical opinions, and he confined judicial lawmaking to "molecular motions."⁴ Judicial style matters. Cardozo was not self-deluding or dishonest when, like common law judges in other countries, he took pains to explain the Buick Motor Company's liability to Mr. MacPherson as evolving from accepted principles rather than as created from scratch by the court.⁵ Legal realism, however, pushed beyond describing reality to prescribe a juristic style. Opinions should be "candid." Any rule of law is a policy; therefore, it should be based on policy reasons. And therefore, in turn, the court should justify a rule by its societal effects. Those are two *non*

3. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

4. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Holmes called theory the most important part of the dogma of the law, Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897), a quotation that is less likely to be found in judicial opinions. The duality of Holmes's views of positivism and instrumental reasoning in a single lecture has been described as "contradictory" and "a startling reversal of positions." Joan I. Schwarz, *Oliver Wendell Holmes's "The Path of the Law": Conflicting Views of the Legal World*, 29 AM. J. LEG. HIST. 235, 247 (1985).

Cardozo similarly said that courts make law only within the confines of "gaps" and "open spaces in the law." BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113 (1921). Neither Holmes nor Cardozo can be cited to support deliberate, large-scale reversals of doctrine in the name of public policy.

5. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

sequiturs, but they appeal to people who prefer pragmatic reasons.⁶ To question the policy style became tantamount to heresy.

The new model had consequences for judges and for others concerned with lawmaking. Claims to judicial independence and job security rest on a distinction between adjudication and political lawmaking. An explicitly policy-based style of opinion invites dispute over ends and means. It is not easily squared with the classic model of impartial, non-political adjudication. We shall examine how it may be attempted.

The arrival of judges who grew up with legal realism aided the rapid changes that began in the 1960s. Reviewing torts opinions for the decade after 1958, Professor (now Judge) Robert Keeton hailed their embrace of "candid, openly acknowledged, abrupt change."⁷ Professor John Fleming depicted an "explosion of tort law" breaking down barriers of noncompensable injuries, contributory negligence, immunity for favored defendants, and defensive formulas like duty of care and proximate cause.⁸ Lecturing here in 1988, Professor Robert Rabin spoke of "a time of great turbulence" and "tremendous stress" in the tort system.⁹ These developments favored plaintiffs and exposed defendants to new costs, but the changes were not all of a kind. Some, like dismantling charitable, governmental, and intrafamily immunities, invented no new doctrines but only put the formerly favored defendants under the same tort law as everyone else.¹⁰ Concerns about *stare decisis* aside, the results could be defended as logical and principled apart from one's sympathy for injured persons. Many such issues also presented courts with a simple, one-time choice, for or against, yes or no.

Other changes were legally more complex, economically more far-reaching, or both. A court undertaking to adopt comparative fault faced a choice among formulas, complicated by incommensurable types of fault and by allocating liability among multiple present and absent defendants, though this did not deter

6. See ROBERT S. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982); see also Robert S. Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common Law Justification*, 63 CORNELL L. REV. 707 (1978) (comparing goal and rightness reasons).

7. ROBERT E. KEETON, *VENTURING TO DO JUSTICE* (1969). Keeton favored such candid judicial activism. See Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962).

8. JOHN G. FLEMING, *THE AMERICAN TORT PROCESS* (1988).

9. Robert Rabin, *Tort Law in Transition: Tracing the Patterns of Sociolegal Change*, 23 VAL. U. L. REV. 1 (1988).

10. See, e.g., Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 606, 683 (1992) (mid-century courts perceived immunities and other defenses against negligence liability as obsolete).

some courts.¹¹ The period's most celebrated innovation, products liability, proved anything but simple.

Our topic, however, is not judge-made change but judicial reasons: how courts explain tort doctrines as public policy; and my modest heresy is that an opinion should not invoke public policy unless it can cite a source for it.

II.

Even a nonutilitarian law is a public policy, though its purpose is only to meet demand for a law, which explains biennial lists of new criminal penalties.¹² By the policy style, however, I mean opinions that choose a basis for decision not because it is fair, or old, or logically consistent, but on grounds that it will effectively serve a social end that is more valuable or important than some other end. Legal theorists distinguish between reasons of principle and of policy, as do political speech writers.¹³ A principle, says Dean Calabresi, is viewed as right; policy is what is useful.¹⁴

The policy style claims more than it delivers. Compressed in the phrase "cost-benefit analysis," policy reasoning demands knowledge of the present situation, identifying goals and values, setting priorities among them, determining whether a proposed policy will promote the preferred goals, with what likelihood of success, with what side effects, and, of course, at what cost compared to alternative solutions.¹⁵ The diagnosis and the predicted effects of

11. See, e.g., *Li v. Yellow Cab Co.*, 532 P.2d 804 (1975); *id.* at 1226 (Clark, J., dissenting).

12. Legislators prefer to justify penalties as deterrents, as judges justify punitive damages. Both apparently sense risks in using the power of the state simply to vent public indignation, though the demand is politically unstoppable.

13. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22 (1977).

14. GUIDO CALABRESI, *THE COMMON LAW IN AN AGE OF STATUTES* 292 n.1 (1982).

15. Congress and Presidents have devised elaborate mechanism for evaluating proposed or ongoing policies, e.g., requirements of environmental impact statements and "regulatory impact analysis," and the creation of an Office of Technology Assessment.

Common law courts are confined to damage actions; they cannot compel people to carry insurance nor levy a tax in order to create a fund for compensating injured persons. The scope of judicial review of jury verdicts prevents appellate courts from stating a rule in exact numbers, such as a schedule of damages for various bodily injuries. Where tort cases are tried without juries, some common law courts have tried to impose numerical ceilings on damages, see, e.g., the Supreme Court of Canada, *Andrews v. Grand & Toy Alberta Ltd.*, 2 S.C.R. 229 (Can. 1978) (awarding \$100,000 damages for pain and suffering for young men with quadriplegic injury), *but cf.* *Bush v. Air Canada*, 87 D.L.R.4th 248 (N.S. 1992) (increasing the ceiling at least for inflation); see also Supreme Court of Ireland, *Sinnott v. Quinnsworth*, [1984] ILRM 523 (deciding that general damages for turning "an active, healthy young man . . . into a helpless, dependent, paralyzed being" should not exceed 150,000 pounds). Significantly, this decision was based not on public policy but on the court's view of corrective justice: tort judgments should not yield an income disproportionate to the "ordinary living standards in the country [and] the income level of even the most comfortable and

proposed action depend on facts; the value judgments ranking goals and priorities, allocating gains and losses, are deeply political. Either or both of these elements often baffle serious policymakers. They have procedural implications. In judicial opinions, however, policy elements appear as "intuitions" if not "prejudices," to use Holmes's words.

What qualifies as an explanation? Take a simple example. The so-called fireman's rule denies public safety officers a negligence claim against persons who create the danger that injures them. At one time courts could say that such officers voluntarily confronted and therefore assumed the risks intrinsic to their jobs. When a legislature repeals assumption of risk, this logically should end the rule. Instead, courts have looked for reasons to keep it.¹⁶ These are commonly listed as "policy arguments," sometimes preceded by the Holmes mantra.¹⁷ An opinion will observe that firefighters and police officers are employed, trained, and paid by taxpayers for the benefit of society as well as for the people who require their presence, usually because of negligence. It is in the nature of their job to confront negligently created emergencies on behalf of the public.¹⁸ They are covered by workers' compensation, which places the costs of injuries on the public rather than on the negligent individual.

After these recitals, the opinion announces a public policy that firefighters and police officers "must be precluded from recovering damages from the very situations that create the need for their services."¹⁹ Why? It "offends public policy to say that a citizen invites private liability merely because he happens to create a need for those public services,"²⁰ and "[to] allow actions by policemen and firemen against negligent taxpayers would subject them to multiple penalties for the protection."²¹ The sole policy reason proves to be to protect negligent taxpayers against liability to firefighters—though apparently not against liability to less exposed public employees. This is a policy that the officers' political superiors might enact or bargain for in some communities and not in others, if

best of in our community," or any use that the disabled person could make of the money. *Id.* at 532.

16. One court held that repeal of assumption of risk ended the fireman's rule. *Christensen v. Murphy*, 678 P.2d 1210 (Or. 1984).

17. *See, e.g., Winn v. Frasher*, 777 P.2d 722, 725 (Idaho 1989); *Kreski v. Modern Wholesale Elec. Supply*, 415 N.W.2d 178 (Mich. 1987) (quoting other courts).

18. To avoid recognizing this as an application of assumption of risk, California courts use the conclusory disguise that the negligent landowner owes the firefighter "no duty." *See Donohue v. San Francisco Hous. Auth.*, 20 Cal. Rptr. 2d 148, 150 (1993). *But see Thompson v. Weaver*, 560 P.2d 620, 623 (Or. 1977) (holding that the statute "cannot be circumvented by restating as an absence of duty what was previously implied assumption of the risk").

19. *Santangelo v. New York*, 521 N.E. 2d 770, 771 (N.Y. 1988).

20. *Pottebaum v. Hinds*, 347 N.W.2d 642, 645 (Iowa 1984).

21. *Steelman v. Lind*, 634 P.2d 666, 667 (Nev. 1981).

the court did not impose a statewide immunity. But what makes it common law? The fireman's rule shows an old judicial intuition dressed up in new policy jargon.

A common weakness of judicial policy reasoning is to confuse different types of reasons. Just as the logic of the law was Coke's "artificial reason,"²² the "experience" that was to replace logic as the life of the law is mostly the experience of lawyers. Judges mainly are drawn from lawyers who have come to see social relations as objects of litigation. Opinions about intrafamily torts mix speculations about family harmony with arguments about liability insurance and the risks of collusion and perjury.²³ Opinions about liability to children for disabling their mother mix questions about the economic measure of a child's loss with concerns about multiple claims and added litigation.²⁴ Some of the reasons are about substantive rights, others are about courts, and they cannot be added, subtracted, or compared with each other. Of course, insurance companies may persuade legislators to deny injured children a right to compensation because insured parents may be too ready to admit negligence, but is that acceptable reasoning for a judicial conclusion? The policy mode tempts courts to inject their own institutional concerns when they define the mutual rights and duties that people have outside courts.²⁵

One can multiply examples. How courts reach their conclusions about tort liability for firefighters, or among family members, or for harm to one person caused by injury to another have only local importance to each state. We reach a different order of magnitude with the evolution of products liability, the most famous paradigm of court-made tort policy. Moreover, how a court begins a new line of development affects where its successors can take that line. How does the policy style differ from other reasons for a decision?

Justice Traynor built his tort theory of strict products liability on repeated assertions of public policy in an individual opinion that blended fairness to victims with utilitarian gains in product safety and loss spreading. If we compare judicial and legislative lawmaking, Traynor's marshalling of policy

22. For Sir Edward Coke's response to the royal but lay reason of James I, see CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE* 304-05 (1957).

23. See, e.g., *Moulton v. Moulton*, 309 A.2d 224 (Me. 1973); *Briere v. Briere*, 224 A.2d 588 (N.H. 1966).

24. See, e.g., *Hoffman v. Dautel*, 368 P.2d 57 (Kan. 1962), *Russell v. Salem Transportation Co.*, 295 A.2d 862 (N.J. 1972), *Lee v. Colorado Dept. of Health*, 718 P.2d 221 (Colo. 1986).

25. *Contra* *Norwest v. Presbyterian Community Hosp.*, 652 P.2d 318, 323 (Or. 1982) ("Courts exist to serve whatever rights people have . . . it is not for courts to weigh or balance their own institutional concerns against the merits of such a right.").

arguments in *Escola*²⁶ resembled a speech on introduction of a bill more than a committee report. It epitomizes the uses of concurring opinions. When he had a majority after nineteen years—not an unusual time for major legislation—there was no need to commit his colleagues to everything in that speech. In *Greenman*²⁷ his theory had not even been argued, let alone its factual assumptions.²⁸ Traynor's opinion for the court did not refer to influencing manufacturers' conduct or to any other public policy. He explained only: "The purpose of such liability is to insure that the costs or injuries resulting from defective products are borne by manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." That this was the right allocation of loss the court left to intuitive agreement.

This is common in self-styled policy opinions, and for good reason. A recital of social conditions does not make a policy. The facts do not speak for themselves; only a chosen value leads from facts to a policy. In a systematic search for policy reasons in thousands of appellate opinions between 1983 and 1990, Professor James A. Henderson found that "fairness" or "rightness" norms—against disappointing a product user's expectations or profiting from a bystander's injury—were most powerful, and "efficiency norms" such as promoting safer products or saving the costs of litigation were least powerful, despite the opposite emphasis in professional literature.²⁹ But it is easier to treat the value premise as self-evident than to find a source for it. "The policy basis for strict liability," one case explains, "is to assure that a consumer recovers in the case of a defective product."³⁰ Strict liability is the law because without it injured plaintiffs would lose. Traynor merely said it more elegantly.

26. "Even if there is not negligence . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944). "The cost of an injury . . . may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." *Id.* at 441. "It is to the public interest to discourage that marketing of products having defects that are a menace to the public." *Id.* "[P]ublic policy requires that the buyer be insured at the seller's expense against injury." *Id.* at 442. "The consumer no longer has means and skill enough to investigate for himself the soundness of a product . . . and his erstwhile vigilance has been lulled by . . . advertising and marketing devices such as trademarks." *Id.* at 443.

27. *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1963). Placing liability in torts avoided a statutory requirement of notifying a seller of an alleged breach of warranty. *Id.* at 900.

28. Note, *Manufacturers' Warranties and the Sales Act*, 15 STAN. L. REV. 381, 388 n.27 (1963).

29. James A. Henderson, Jr., *Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions*, 59 GEO. WASH. L. REV. 1570 (1991).

30. *Id.*

Henderson recognizes that ostensible policy reasons in an opinion may play no real part in the decision; but, he says, reciting reasons that did not persuade judges who join in the opinion would imply "a conspiracy to dissemble in order to deny judicial candor."³¹ The truth may be less harsh.

Appellate courts decide collegially but assign opinions to individual judges, usually after the outcome is known. When judges agree with the general legal thrust of a draft opinion, they may leave the choice of the policy style and its factual assumptions to the author. Use of the editorial "we" has now become so habitual that the older style of setting out the law is hardly remembered. Law clerks routinely draft opinions asserting what "we" believe, but "we" should not be taken literally. Opinions for the court cannot be expected to include all the diverging beliefs, sympathies, and habits of thought that motivate its individual members and that are implied by a demand for "candor." The point of naming a single author is to let others join an opinion if they agree with its general conclusions, though they would write differently. The practice avoids having each judge give a personal opinion, in the English style, or publishing only formal, institutional judgments, but it must be understood to free judges from having either to agree with or argue about every social or philosophical statement in the signed opinion. The parties and the public care about outcomes; only specialists study explanations. What mainly triggers questions and corrections among judges are statements about the concrete case and about existing statutes and caselaw, mistakes that may compel a rehearing. New formulations are scrutinized and tightened with an eye toward their use and misuse by lawyers.

The policy assumptions of past decisions often look baseless, even naive, in retrospect, though they were confidently asserted at the time. Holmes's point was not that the judges' "intuitions" or "prejudices" were correct but that there were "share[d] with their fellow-men."³² Judges act on their own beliefs about trials, witnesses, jurors, common business practices, and sometimes about the human and social pathologies that land people in criminal or family courts. In tort opinions, homilies about society or human nature often pass as the author's personal style. Many simply paraphrase other opinions without independent inquiry, much like the introductory recitals in legislation that are copied from place to place.³³ If a colleague questions how the court knows some social premise, it is easier to omit that premise than to debate its truth or relevance.

31. *Id.*

32. HOLMES, *supra* note 3, at 1.

33. See generally THOMAS B. MARVELL, *APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM* (1978); see also Gail S. Perry & Gary B. Melton, *Precedential Value of Judicial Notice of Social Factors: Parham as an Example*, 22 J. FAM. L. 633 (1984).

What one removes from the court's opinion can contribute as much as what one adds. Most opinions that recite social facts would stand without them. If a judge's assent to a proposed opinion really depends on the truth of some general assertion, appellate judges are less inclined to fight over opposing versions of facts outside the record than to reformulate the opinion in nonfactual terms, or to require case-by-case factfinding.

Value premises asserted for a legal rule, on the other hand, can have consequences. Loss-spreading and deterrence as policy reasons for products liability made easier California's next step to dispense with proof that a particular defendant's product in fact caused the plaintiff's injury when such proof was unavailable, and to make producers bear the loss in proportion to their shares in the market.³⁴ Casting loose from a coherent tort theory, the court later exempted pharmaceutical companies (the same producers involved in the market-share decision) so as not to burden the introduction of new medicines, inviting the question whether other products might be exempted on a similar showing.³⁵ Courts like Oregon's, on the other hand, had rejected loss-spreading and based tort liability on marketing a product that a reasonable producer would not sell if it had knowledge of its harmful character, in effect holding a seller to knowledge of what it sells.³⁶ Having derived products liability from tort concepts instead of social insurance or economic incentives, the Oregon court declined to substitute market share for proof tracing the injury to the defendant.³⁷

The question of factual predicates for judge-made rules has had expert attention. Professor Maurice Rosenberg asked whether "Anything Legislatures Can Do, Courts Can Do Better?" if courts had better access to empirical and "scientific" information that litigants do not provide.³⁸ Judge Keeton devoted

34. *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980). The original rationale of *Sindell* was that deterrence as well as compensation would be undermined if all manufacturers of an untraced product escaped liability, *see* Schwartz, *supra* note 10, at 618, but the price in litigation costs have proved too high. *Id.* at 688.

35. *Brown v. Superior Court*, 751 P.2d 470 (Cal. 1988). After *Brown* adopted comment *k* to *Restatement (Second) of Torts* § 402A, an intermediate court in 1992 extended the same categorical exemption to all implanted medical devices. *Hufft v. Horowitz*, 5 Cal. Rptr. 2d. 377 (Cal. Ct. App. 1992).

36. *Phillips v. Kimwood Machine Co.*, 525 P.2d 1033 (Or. 1974).

37. *Senn v. Merrell-Dow Pharmaceuticals*, 751 P.2d 215 (Or. 1988).

38. Courts need "some new institutional apparatus . . . to provide the courts with new resources to cope with their novel and immense needs for data the litigants do not furnish. When a judicial decision turns, not on reconstruction the probabilities as to past events but on projecting the social impact of competing rules that are within the courts' power to choose the judges should not be required to continue to operate by hunch or happenstance." Maurice Rosenberg, *Anything Legislatures Can Do, Courts Can Do Better?*, 62 A.B.A. J. 587, 590 (1976). Professor Kenneth Culp Davis suggested a "research service" specifically for the United States Supreme Court, and

an extensive lecture to showing that courts can decide all factual premises except "adjudicative facts," and that all facts that concern more than the individual dispute are nonadjudicative, such as the predicted effects of a legal rule, which Keeton calls "premise facts."³⁹ Moreover, the court need not follow the rules governing judicial notice, even though the premise facts "typically are in sharp dispute."⁴⁰ Judge Henry Friendly, on the other hand, criticized the use of social data or expertise on appeal that had not first been offered at trial where they could be subjected to cross-examination or rebuttal. If an administrative agency relied on similar materials without allowing a fair opportunity to criticize or controvert them, Friendly said, "reversal would have come swiftly and inexorably."⁴¹

I bow to the experts on federal procedure, though in some states, at least, withdrawing sharply disputed and decisive facts from juries would raise constitutional problems. The greater dilemma lies in resting an important legal rule governing many parties for a long term on facts found in a single lawsuit. To avoid chaining the future to the record made by the parties and the trial judge's findings, Keeton's analysis lets the appellate court reach a different conclusion on the evidence or consider additional information.⁴² Yet once a court has based a rule on the disputed "premise facts," later litigants may not disprove the supposed facts.⁴³

This result not only seems unfair, it could produce seriously mistaken policies if the first court was persuaded of the wrong "premise facts." But one must distinguish whether facts matter from how those facts are determined.

there are other ideas for "science panels" to aid courts. Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 7 (1988), Peggy C. Davis, "There is a book out . . .": *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987).

Most such suggestions are aimed at the federal courts, as if those courts were the primary source of civil law. Does every state court need a similar resource? Or are state judges and litigants expected to accept conclusions produced by national "social impact studies"? Are federal judges expected to do so when predicting a state's probable legal rule?

39. Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 11 (1988). Keeton extends this to issues such as what was "knowable" about a product when it was made, citing *In re Asbestos Litigation*, 829 F.2d 1233, 1246 (3d Cir. 1987). Keeton, *supra*, at 19. He conceded that a quotation from Holmes, that a court "may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law," citing *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548 (1924), may be an overstatement. Keeton, *supra*, at 21-22.

40. Keeton, *supra* note 39, at 30.

41. Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 36 (1978). The same view appears in PAUL FREUND, *THE SUPREME COURT OF THE UNITED STATES* 151 (1961).

42. Keeton, *supra* note 39, at 24 (citing *Massachusetts Med. Soc'y v. Dukakis*, 815 F.2d 790 (1st Cir. 1987)).

43. *Id.* at 28.

Both are familiar problems under the Supreme Court's formulas for deciding the validity of laws upon disputed social facts ranging from segregated education to abortion.⁴⁴ Scholars are torn between loving and hating the use of their disciplines in appellate policy judgments, believing that judges should take history and social science seriously but scorning "law office history" and sociological propositions in judicial opinions. In one telling example, Chief Justice Burger dealt with the power of parents to commit children to mental hospitals by reciting untested assumptions about families, physicians, and state mental hospitals,⁴⁵ assumptions that were criticized as unfounded.⁴⁶ Later courts had to face the question how far to allow parties in other cases to litigate the facts recited in Burger's opinion, or whether to disregard the factual discussion as dicta.⁴⁷ Yet critics of unfounded social assertions also object when opinions "camouflage" their "true bases" by formal legal analysis.⁴⁸ The crucial distinction between these cases and tort law, however, is that in constitutional cases someone else has made a law.⁴⁹

Factual premises beg for factual disputes. How does segregation by race affect school children? Does the exclusion of illegally seized evidence deter police officers? Does pornography encourage sexual aggression? Does capital punishment deter criminals? Such questions can provide research grants for a generation of behavioral scientists, once Supreme Court opinions imply that the answers matter. Social scientists in turn will agree only on truisms, or when the social implications of an opposite view are beyond the academic pale.⁵⁰ But should the answers matter? Brandeis's famous brief was written to show that a legislative policy was defensible against constitutional attack, a task not

44. Professor Rosenberg quoted an exchange between Justices Hugo Black and Potter Stewart about the basis of a defendant's privilege against adverse spousal testimony, which Black rested on maintaining the marriage, while Stewart wanted evidence of experience in 19 states that had changed the privilege. *Hawkins v. United States*, 358 U.S. 74 (1958). Because Black purported to state a historic view, not its realism, the real issue would be whether social change alters the rule. Rosenberg himself believed that the spousal privilege rests on "[i]mmeasurable value choices rather than on its effect upon marital bliss." Rosenberg, *supra* note 38, at 588-89.

45. *Parham v. J.R.*, 442 U.S. 584 (1979).

46. *Perry & Melton*, *supra* note 33, at 634-35.

47. *Id.* (reviewing the treatment of the factual predicates of the Burger opinion in subsequent cases).

48. See generally JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW* (2d ed. 1990).

49. Even when there is no express enactment, a decision on constitutional grounds implicitly assumes that some rule of law otherwise authorizes or permits the challenged act; but courts often overlook this step and decide on constitutional grounds even when the court itself can shape the legal rule.

50. MONAHAN & WALKER, *supra* note 48, at 93, 100.

comparable to arguing what the law should be.⁵¹ Social assertions are weaker than legal principles, what Judge Friendly called “jural postulates,”⁵² as grounds for judges to override lawmakers.

The Fifth Circuit divided, *en banc*, when one district court found Mississippi’s asserted interest in “safeguarding the health, safety and general welfare of its citizens” sufficient to sustain a ban against liquor advertising (though the state allowed counties to be either “dry” or “wet”), while another district court found that the ban did not advance that interest.⁵³ Certainty about such facts, if they really matter, should be more important when a litigant asks a court to overturn the enactment of legitimate lawmakers than it is when a court merely formulates a common law rule that lawmakers can change. If a rule actually depends on facts, it must provide for showing those facts at a given time and place.⁵⁴ A ban on liquor advertising could be important in one community and baseless in another. But few rules actually depend on facts. In the Fifth Circuit Judge Reavley characterized the opposing district court findings as “legislative facts” on which expert testimony should not bind the appellate court; after a polite nod toward social science, he then declared that “other unscientific values, interests and beliefs are transcendent.”⁵⁵

If a rule applies indefinitely and everywhere, it does not depend on the actual presence or absence of “legislative facts.” The term describes procedural differences in agency rulemaking and in trials and appeals, not differences between facts; the same data may be “adjudicative” in one context and “legislative” in another. Recitals of legislative facts relate to facts as astrology relates to astronomy; they are neither necessary nor sufficient conditions for action. Kepler’s corrections of Ptolemy did not make horoscopes a good source of policy. Conversely, facts can prove a doctrine wrong only if the doctrine depends on factual assumptions. The policy style favors justifying a rule by social facts, but losers have no reason to accept a court’s *ex cathedra* version of the universe as authoritative, unlike the analyses of law that are understood to be the court’s job. At best the policy style may trigger subsequent empirical studies of the court’s factual assumptions, such as the impact of strict liability

51. See Rosenberg, *supra* note 38, at 589. Rosenberg quoted Brandeis’s view that “[c]ourts are ill-equipped to make the investigations [into] circumstances under which news gathered by a private agency should be deemed affected with a public interest.” *I.N.S. v. A.P.*, 248 U.S. 215 (1918) (Brandeis, J., dissenting).

52. Friendly, *supra* note 41, at 21-23.

53. *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983) (*en banc*).

54. Compare *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (small Washington city could copy “legislative” findings of Detroit ordinance concerning adverse effects of “adult” businesses without investigating conditions in Renton) with *City of Portland v. Tidyman*, 759 P.2d 242 (Or. 1989) (adverse effects must be shown at the disputed location).

55. *Dunagin*, 718 F.2d at 748-49 n.8.

on product development or insurance rates. But the results of the studies are more likely addressed to legislative action than to rearguing a doctrine that a court can reaffirm on another premise, or on *stare decisis*.

When instead of a rule a court formulates a list of factors for future evaluation, it declares that facts matter. An example is strict liability for activities that are deemed "abnormally dangerous" by the magnitude and likelihood of their potential harm and other circumstances that are less readily quantified.⁵⁶ Parties must have a chance to litigate such facts, yet some courts want to decide the facts as "policy" or even as a "question of law."⁵⁷ Calling them "legislative facts" is only another way to shift factual issues from juries to judges at trial and on appeal. The question remains whether one decision that, for instance, aerial spraying of a particular herbicide is abnormally dangerous settles that issue for the product's other users or leaves new parties free to offer evidence in the next case. If the factors must be met in the case, they are adjudicative facts, but if the first decision settles the applicable rule, the reality of the predicated facts is as immaterial as in any absolute rule.

Because a court adjudicates, its explanations must meet higher standards of cogency and accuracy than a legislature's. To explain a legal rule by facts implies that the facts need to be true or the rule must be reconsidered. Statutes may rest on uncertain knowledge and erroneous predictions. Brandeis and his fellow progressives argued for the greater ability of legislatures to study the facts in depth, but that is not the decisive difference. As Cornelius Peck and Maurice Rosenberg pointed out, courts have the same access to official and academic studies.⁵⁸ Traynor spoke rather wistfully of the legislature's ability to consider a problem as a whole rather than episodically like a court.⁵⁹ But again, cautious legislators as well as courts lean toward narrowly focused

56. RESTATEMENT (SECOND) OF TORTS § 520 (1965): In determining whether an activity is abnormally dangerous, the following factors are to be considered: (a) whether activity involves a high degree of risk of some harm to the person, land, or chattels of others; (b) whether the gravity of the harm which may result from it is likely to be great; (c) whether the risk cannot be eliminated by the exercise of reasonable care; (d) whether the activity is not a matter of common usage; (e) whether the activity is inappropriate to the place where it is carried on; and (f) the value of the activity to the community.

57. See, e.g., *Langan v. Valicopters, Inc.*, 567 P.2d 218 (Wash. 1977) (spraying crops with pesticides); *Siegler v. Kuhlman*, 502 P.2d 1181 (Wash. 1972) (hauling gasoline on highways); Justice Rosellini, concurring in *Siegler, id.* at 1187-88, relied on statutes for support of the determination. Some cases have rejected the *Restatement's* approach of basing rulings of law on factual "factors." See, e.g., *Yukon Equipment v. Fireman's Fund Ins. Co.*, 585 P.2d 1206 (Alaska 1978) (storage of explosives invariably subject to strict liability, citing many cases).

58. Cornelius J. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963); see also Rosenberg, *supra* note 38.

59. Roger J. Traynor, *Comment on the Courts and Lawmaking*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 48-51 (Monrad G. Paulsen ed., 1959) [hereinafter LEGAL INSTITUTIONS].

enactments rather than comprehensive formulations. Nor is policy-making a competition; countless judges on and off the bench have asked legislatures to solve pressing problems.⁶⁰ The decisive difference between the two forms of lawmaking is that legislation is legitimately political and judging is not.

III.

So why do not judges wait for legislatures to bring law in line with social expectations?

The answer is that American private law is uniquely resistant to systematic lawmaking. Federalism assigns private law to more than fifty sets of legislatures and courts, subject to preemption by federal law. Even greater consequences flow from the separation of powers. Judges who speak about leaving an issue to legislation in the United States and in parliamentary countries mean very different things.

Parliamentary governments in common law as well as in civil law systems assume that their responsibilities include private law. Commonwealth countries enacted numerous tort statutes in the years after World War II. In contrast, systematic lawmaking has no home in our constitutional structure. Civil law is not normally seen as a function of governing. Governors do not inherit an ongoing agenda of law reform or an executive department or staff prepared to pursue it. Attorneys General deal with private law mainly in representing the government. In the states that have permanent law revision commissions, notably New York and California, their work is not the measure of any cabinet officer's success or failure. Nor is the fate of draft laws prepared by the commissioners on uniform state laws.

When an issue of civil law rises to political attention, it often is given to a special commission designed to reflect both expertise and affected interests. This also occurs in parliamentary systems.⁶¹ The difference is what happens after the commission's report. Once the executive adopts a proposal as part of

60. Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963); Charles D. Breitel, *The Courts and Lawmaking*, in LEGAL INSTITUTIONS, *supra* note 59, at 1.

61. Parliamentary party government, too, cannot always count on its strongest supporters. Reportedly, Australian labor unions opposed Labor Party proposals for certain no-fault compensation plans because union representatives, working with law firms, can obtain cumulative benefit for comparatively minor injuries under union contracts, workers' compensation laws, and tort law. Jeffrey O'Connell & David Partlett, *An America's Cup for Tort Reform? Australia and America Compared*, 21 U. MICH. J.L. REF. 443, 461 (1988). Law reform in Australia is described in John Goldring, *Reforming Australian Products Liability Law—Processes and Problems of Law Reform*, 1 BOND L. REV. 193 (1989).

its program, one or more ministers are present in the parliament to push it to enactment. The government usually can muster a parliamentary majority, if it chooses to press the issue. Failure to win enactment is a political defeat for the government, or at least for the responsible minister. Other proposals without the government's support have little chance to become law.⁶²

American legislatures on their own have no taste for systematic lawmaking, except upon prior agreement of all affected interests. Law reform has no constituency, only laws do. Private law is made piecemeal, often in reaction to a court decision, and rarely over determined protests.⁶³ Any legislator may take the lead for someone's proposal, but its fate will be decided in legislative committees rather than by a ministry; and far more bills are killed by inaction than by adverse votes.⁶⁴ The resentment of people who lose from a change may well exceed the gratitude of those who gain from it, while doing nothing merely leaves the familiar status quo.⁶⁵ Without prior trade-offs between gainers and losers, legislators rarely undertake to change civil law in the name of public policy unless they perceive a crisis; and they may not see a crisis when established rules like charitable immunity or contributory negligence deny compensation to random plaintiffs, rather than to a known class like industrial workers.

62. "Statute-making in England is done by Parliament . . . but these legislative powers are in practice almost completely controlled by the executive," though complex or controversial measures need to wait their turn for time on the government's parliamentary agenda. A single member can introduce a bill a symbolic gesture, but without government consent such a bill is not even debated. PATRICK S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 300-02 (1987).

The executive's control of a majority may differ among parliaments, but they share the principle of ministerial leadership in the legislature. For an older report on consultation and ministerial clearance in parliamentary systems, see INTERPARLIAMENTARY UNION, *PARLIAMENTS* 151-53 (1961).

63. Laws designed to facilitate financial transactions, such as probate codes or corporation codes, generally are worked out by professional groups from national models before reaching the legislature.

64. ATIYAH & SUMMERS, *supra* note 62, at 313. The authors suggest that the British would think this committee power an unacceptable interference with majoritarian decision-making. Dean Calabresi recognizes that the practice saves legislatures from having to vote against "absurd or noxious" but superficially popular measures. CALABRESI, *supra* note 14, at 71.

Another consequence of the different systems is that legislative committees may accept obscure or ambiguous amendments in pursuit of compromise, ATIYAH & SUMMERS, *supra* note 62, at 319, while strong party government need not obfuscate or evade issues by "passing the buck" to the courts. *Id.* at 305. Without prior trade-offs between gainers and losers, legislators are reluctant to impose a new law in the name of public policy.

65. In an unusual variation on the theme, the Oregon legislature froze products liability law by adopting *Restatement (Second) of Torts* § 402A as statutory law, because each of the opposing interests feared possible judicial or legislative gains by the other. See Dominick Vetri, *Legislative Codification of Strict Products Liability in Oregon*, 59 OR. L. REV. 363 (1981).

Judges may think, and say, that a longstanding doctrine needs change, but often their predecessors have held that change must come from the legislature. What then? Sometimes courts overrule this institutional holding along with the substantive doctrine, reciting that we made the rule, we can make another.⁶⁶ The mere assertion of the court's power, however, does not explain the change. Any court may reexamine the premises of existing doctrine, wherever that inquiry may lead. But some courts disavow the earlier decision to wait for lawmakers to make public policy only in order to announce a policy of their own.⁶⁷ That course is openly political.

Paradoxically, governments have wider opportunities to obtain and consider factual predicates for policy choices, but they are not obliged to make fact-based and rationally efficient policies. Courts are supposed to decide rationally, not politically, yet they do not have the machinery for policy analysis that is available to governments. Nor does an action for damages permit the slow process, often extending through many legislative sessions, that allows everyone affected by a policy to learn about a proposal, to involve sympathetic legislators, to build coalitions, and to work out compromises.⁶⁸

When a legislature does enact a significant change in civil liability, this unmistakably is a political decision. It is so understood by groups whose interests are affected by the change, by government agencies that consult with them in preparing a proposal, and by legislators. As a political compromise, tort legislation may not follow any consistent theory, which may be the reason why the theorists of the economic school, as much as intellectual historians,

66. Decisions replacing the defense of contributory negligence with comparative negligence (or threatening to do so if legislatures failed to act) are a well-known illustration. Cases and academic commentary are cited in WILLIAM L. PROSSER ET AL., *TORTS, CASES AND MATERIALS* 570-77 (8th ed. 1988).

67. See, e.g., *Alvis v. Ribar*, 421 N.E.2d 886 (Ill. 1981) (overruling *Maki v. Frelk*, 239 N.E.2d 445 (Ill. 1968)), *Hungerford v. Portland Sanitarium & Benevolent Ass'n*, 384 P.2d 1009 (Or. 1963) (overruling *Landgraver v. Emanuel Lutheran*, 280 P.2d 301 (Or. 1955)).

68. One commentator has stated:

A court must dispose of the case before it and having done so loses authority to act further until another germane case presents itself; a legislature can disregard the instance which excited its initial attention and can establish its own agenda for the problem type.

A court must tender its result and rationale as an accomplished fact, receiving commentary after the event; a legislature can present its result and rationale in proposal form for consideration and modification before official enactment.

Geoffrey C. Hazard, Jr., *Law Reforming in the Anti-Poverty Effort*, 37 U. CHI. L. REV. 242, 249 (1970). An intermediate model is found in administrative rulemaking, which ordinarily requires an opportunity to comment on a proposed rule, and often some showing of a factual predicate for the rule.

exclude statutes when celebrating the efficiency of tort law.⁶⁹ Can a court make the same change in liability without acting as an equally political body? Even English judges now concede that they sometimes must make law, but as one observer puts it, how can judges take account of policy factors if the judges are not to be political? "Since value choices underlie nearly all policy choices, and since selection of values is the essence of political controversy," Professor Patrick Atiyah wrote, "it is hard to avoid the conclusion that all policymaking is a political activity."⁷⁰

This conundrum has often troubled judges. A generation ago, New York's Judge Charles Breitel described how legislative policymaking differs from judicial decisions: The legislature "is a political engine, and the supreme instrument for the making and expression of public policy."⁷¹ It can choose when to take up a problem and when to put it off. It need not give reasoned elaborations: "There may be political defense of action taken, or there may be silence."⁷² Legislators are not meant to be detached or disinterested; they are elected as advocates for causes and policies, and they as well as their constituents may press for those causes by any lawful means. "The quintessence of the legislative process in a democratic culture is its political character and motivation," Breitel said;⁷³ it had primacy as a source of law and policy.⁷⁴ Yet Breitel also hailed the view that judges and advocates should give deliberate and systematic rather than only implicit or intuitive weight to social and economic arguments, despite the danger that this would make politicians of judges. "It has not so eventuated," he concluded in 1958.⁷⁵

69. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987).

70. Patrick S. Atiyah, *Judicial-Legislative Relations in England*, in *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 129, 136 (Robert A. Katzmann ed., 1988). Atiyah notes that the ease with which the government can obtain legislative changes affects the English judges' view of their lawmaking role. *Id.* at 135.

71. Breitel, *supra* note 60, at 7 (citing Roscoe Pound, *Common Law and Legislation*, 21 *HARV. L. REV.* 383, 406 (1908)).

72. *Id.* at 8. Breitel did not refer to constitutional challenges, in which courts sometimes look for facts considered by the legislature.

73. *Id.* at 37. The "political character" includes compromise or worse. See, e.g., Joseph Sanders & Craig Joyce, "Off to the Races:" *The 1980s Tort Crisis and the Law Reform Process*, 27 *HOUS. L. REV.* 207 (1990), Schwartz, *supra* note 10, at 682 n.434 (describing a California law negotiated by "trial lawyers and the tort reform lobby"). In California and other Western states, tort politics includes direct legislation by initiative measures; in 1993 a defense-sponsored initiative to limit contingency fees was withdrawn to allow more time for negotiating a legislative compromise after the California Trial Lawyers Association threatened a television counterattack on two major insurance companies. Tom Dressler, *Fee Limit Initiative Is Killed*, *SAN FRAN. DAILY J.*, Nov. 24, 1993, at 1.

74. Breitel, *supra* note 60, at 38-39.

75. *Id.* at 39-40.

Times have changed. "The issue of tort reform has descended from Ivory Towers to populist politics," began one article in 1988. "A few years ago no one could have predicted that 'tort reform' would become political argot and a stirring election slogan."⁷⁶ Stirring or not, the issue rose as high as presidential politics. When products liability and medical malpractice laws failed to pass in Congress, President Bush made attacks on these torts a prominent part of his reelection campaign, asserting that his opponent was backed by "practically every trial lawyer who ever wore a tasseled loafer."⁷⁷

Of course, "tort reform" already was a major political issue in the states, pitting lawyers against physicians and other occupational groups. "Public policy" left the obscurity of judicial incantations and entered the public arena. By 1991, every state had taken some form of legislative action in response to the medical profession's fear of malpractice liability.⁷⁸ But long before now, the politics of tort law focused on judges as much as on legislators and governors. Where judges are elected, candidates must look for financial and other support from people who know and care what judges do.⁷⁹ Second only to the one-

76. O'Connell & Partlett, *supra* note 61, at 443.

77. *George Bush: Join Me in our Crusade to . . . to Win Peace*, THE OREGONIAN (Portland), Aug. 21, 1992, at A17. In accepting renomination, Bush said:

Sharp lawyers are running wild. Doctors are afraid to practice medicine. And some moms and pops won't even coach Little League anymore. We must sue each other less and care for each other more. I am fighting to reform our legal system, to put an end to crazy law suits. And if it means climbing into the ring with the trial lawyers, well, let me just say, Round One starts tonight.

After all, my opponent's campaign is being backed by practically every trial lawyer who ever wore a tasseled loafer. He's not in the ring with them, he is in the tank.

Id.

In an earlier written campaign statement, Bush had listed the legal system first among five targets of proposed reforms. *George Bush: My Aim is Simple*, THE SUNDAY OREGONIAN (Portland), May 10, 1992, at B1.

78. W. John Thomas, *The Medical Malpractice 'Crisis': A Critical Examination of a Public Debate*, 65 TEMP. L.Q. 459, 469 (1992). The two professions are divided on tort reform, the American Medical Association attacking tort litigation of malpractice claims and the American Bar Association defending it as "a vital and responsive" system providing "a grassroots response" to injuries. *Id.* at 466 n.33.

79. Judicial campaign costs are high and rising rapidly, especially in statewide elections. *See, e.g.*, Stuart Banner, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449 (1988). Should judges, unlike legislators, be disqualified from cases involving campaign contributors? *See* Mark A. Grannis, Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising From Judicial Campaign Contributions from Lawyers*, 86 U. MICH. L. REV. 382 (1987); Bradley A. Siciliano, Note, *Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety*, 20 HOFSTRA L. REV. 217 (1991). In 1973, Judge Breitel reported spending \$440,000 in a contest for Chief Judge of the New York Court of Appeals, but campaign expenditures in large states now run into millions of dollars. Banner, *supra*, at 454-55. According to Justice Neely, the

sided political salience of criminal law, the opposing groups in tort law are most likely to care and to support one or another candidate, for gubernatorial appointments as well as for direct elections, and with greater financial stakes.⁸⁰

Judges and theorists in the 1960s may have believed that courts could make high-minded public policy by a disinterested weighing of social and economic facts, as Judge Breitel said, but by the 1970s the affected groups drew the practical lesson of treating judges like other political lawmakers.⁸¹ Elected judges who embrace the policy style, and candidates aspiring to replace them, in turn cannot maintain a passive stance toward the contending positions or stick to pious generalities.⁸² If judges proclaim themselves policymakers, they will be expected to defend the policies they have espoused or will espouse on the court. They may make overruling or defending a recent decision, much like legislative policies, an issue in campaign statements and debates. It is only a short step for judges to issue press releases and appear on news programs and talk shows like other policymakers, to collect and answer editorials and letters on contentious issues, and to tailor their opinions in anticipation of the next election.⁸³ Why should advocates not use popular opinion and political

West Virginia court would have disqualified a Texas judge from a trial in which one lawyer had contributed \$10,000 to the judge's campaign. RICHARD NEELY, *THE PRODUCTS LIABILITY MESS* 63 (1988).

80. "[P]articular types of lawyers stand to gain from the election of particular types of judges." Banner, *supra* note 79, at 458. Reports on contested judicial election campaigns are episodic rather than systematic. Campaign practices in Texas judicial elections have earned national attention. See Donald W. Jackson & James W. Riddlesperger, Jr., *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 *JUDICATURE* 184 (1991), Orrin W. Johnson & Laura Johnson Urbis, *Judicial Selection in Texas: A Gathering Storm?*, 23 *TEX. TECH. L. REV.* 525, 551 n.148 (1992) (discussing campaign contributions by plaintiffs' lawyers and defense-oriented interests): "While businesses, insurance companies, labor, and other monied interests once poured money into executive and legislative campaigns, their spending focus as shifted to judicial campaigns as the public's perception is that the court has become more result oriented." *Id.* at 549.

81. The ideological campaigns of President Nixon and his successors to capture the Supreme Court in effect legitimated this attitude for voters as well as for governors, candidates, and party leaders in California, New York, and North Carolina. See Hans A. Linde, *The Judge as Political Candidate*, 40 *CLEV. ST. L. REV.* 1 (1992).

82. Canon 7(B)(1)(c) of the MODEL CODE OF JUDICIAL CONDUCT provides that a judge or candidate should not "make pledges or promises of conduct in office other than the faithful, impartial, and diligent performance of the duties of the office [or] announce his views on disputed legal or political issues." PATRICK M. MCFADDEN, *ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS* 189 (1991).

83. Comparing legislatures and courts 24 years ago, Professor Hazard assumed that judges could not do this; judges "can speak *ex cathedra* only through written opinions No press conferences, no committee hearings, no stump speeches, no Face the Nation." Hazard, *supra* note 68, at 250. The distinction between *ex cathedra* and *post hoc* explanations by judges is less observed in the age of televised courts. On the relation between the policy style, judicial elections, and the precarious status of traditional constraints on judicial expression of policy views, see Linde,

consequences as arguments to the court as they would to other lawmakers? If appellate judges formulate law by debating policy premises, why should they not do so in open meetings, as other policymaking bodies must do? The questions suggest how far the model of the policy style takes us from the classic model of adjudication.

The spread of tort statutes redirects some political attention from the courts to legislatures. But the statutes began a round of challenges under the state constitutions, which many state courts again decide by balancing policy arguments.⁸⁴ Despite Judge Breitel's optimism, the policy style makes judges hard to distinguish from politicians.

IV.

Original policy opinions are the minority; more prefer to cite the opinions of others, even for policy. The mystery of turning policy into law has occurred elsewhere, in another court, or in scholarly forums like the American Law Institute. But those alchemists, too, find it hard to make policy without politics.

The A.L.I. was founded in 1923 by academics, practitioners, and judges in response to two distinct desires. Some saw a need to bring clarity and order to the perceived confusion of caselaw, while others sought to make law more progressive. The umbrella of "law improvement" covers both aims but cannot disguise their difference. To the systematizers, clarity did not imply change; the reformers saw reexamination as an instrument of progress.⁸⁵

The two objectives could, of course, be pursued by different paths. The Institute's first and best known project was to restate common law in coherent

supra note 81.

84. See generally David Schuman, *The Right to a Remedy*, 65 TEMP. L.Q. 1197 (1992). Recent cases include *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992), *Branningan v. Usitalo*, 587 A.2d 1232 (N.H. 1991).

85. The reformist impetus is sometimes attributed to Roscoe Pound's 1906 speech on "The Causes of Popular Dissatisfaction with the Administration of Justice," 29 A.B.A. REP. 395 (1906). The Institute's Certificate of Incorporation bowed toward all its antecedents, stating that its objects were "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 L. & HIST. REV. 55 (1990), stresses the role of the "progressive pragmatists," *id.* at 84, and criticizes earlier accounts that present the Institute as a bastion of conservative formalists, *id.* at 88 n.4.

Professor Herbert Wechsler, upon retiring as the Institute's longtime director, reviewed the efforts to bridge the objectives of the "traditionalists" and the leaders of the "reformation." Herbert Wechsler, Speech at 61st Annual A.L.I. Meeting (May 15-18, 1984), in 1984 A.L.I. PROC. 47, 50-51 [hereinafter Wechsler Speech].

and consistent terms. The format chosen for the Restatements resembled a code of black letter text accompanied by commentary, illustrations, and reporters' notes, in the hope that courts would turn to them as authority; and they widely achieved that goal.⁸⁶ In statutory fields, the A.L.I. developed the Model Codes of Evidence and of Criminal Procedure and the Model Penal Code, and collaborated with the Uniform Law commissioners on the Uniform Commercial Code. Designed for legislative enactment, these could propose explicit innovations and departures from existing law, including policy choices between alternative texts.⁸⁷ But a rigid distinction is too simple. The progressive goal of "reforming" court-made law in the course of "restating" it had support, though not consensus.⁸⁸ On the other hand, the classic common law subjects of 1923 now are shot through with statutes that courts cannot reform.

This history did not prevent the Restatements from formulating common law rules in new terms or from choosing minority over majority views. But the Restatement format as a means of law reform faces problems when it combines policy arguments with declarative black letter text that purports to state the law. In making statutes, battles are fought and compromises are negotiated over the operative words that will be law, not over the findings and policy declarations with which drafters dress up their bills. Legislators will vote for or against the bill without having to believe in those premises. Votes alone decide. Lacking legislative power, Restatements aim to be authoritative as statements of judge-made law. Black-letter texts are not authoritative if they depend upon the reader's agreement with factual and normative assertions in the commentary.

Yet there is a generational change in style. The first *Restatement of Torts* in 1935 was presented as a "careful analysis" based on existing caselaw in order to "promote certainty and clarity" in what could then be called "the general common law of the United States."⁸⁹ It did not undertake policy justifications. Thirty-one years later, the chief reporter of the second *Restatement*, the policy-minded William Prosser, only reported in introducing section 402A what "the justification for strict [products] liability has been said to be," without asking for agreement or disagreement.⁹⁰ A court-made rule may be law even if one questions the court's ostensible reasons, else there would be little law. But

86. In announcing the commencement of a third *Restatement of Torts*, the A.L.I.'s president noted that of a total 114,451 appellate-court citations of all *Restatements* by March 1, 1991, 45,954 (about 40%) had been to the *Restatements of Torts*. 14 A.L.I. REP. 1 (Oct. 1991).

87. A.L.I.'s role in legislation was a strong interest of its most recent president, Roswell B. Perkins. See 2 A.L.I. REP. 2 (July 1979).

88. See Hull, *supra* note 85, at 81-85.

89. RESTATEMENT (FIRST) OF TORTS at viii-ix. This was three years before *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (holding that federal courts must apply tort law of individual states rather than a "general common law").

90. RESTATEMENT (SECOND) OF TORTS § 402A, cmt. c (1965).

some drafts of the third *Restatement* give policy rationales such prominence that they may appear as the views of the American Law Institute. Most of the A.L.I.'s 2500 members have only episodic knowledge of the disputed assumptions of tort policy, though they have personal convictions and preferences about the tort system.

The Institute has approached issues of legal policy by other means than Restatements and model statutes. The Corporate Governance Project of the 1980s was entitled a "Statement of Principles," asserting in black letter text not what the law is but what law and good practice should be. That did not keep members from fighting for adherence to every detail of the latest caselaw. The Complex Litigation Project, completed in 1993, addressed consolidation of tort trials involving many victims, often in many states. The report suggested that if Congress would not enact substantive law, it might prescribe choice of law rules for such trials.⁹¹ The draft rules faced opposition on grounds that they could compel use of pro-defendant state statutes and prevent courts from choosing the law leading to their preferred outcome—that it would equate "successfully lobbied" ad hoc statutes with the "wisdom of . . . Cardozo, Schaefer, and Traynor."⁹² One may doubt that Congress will be more inclined to enact obscure but controversial conflicts doctrines than substantive standards of liability.

Most relevant for today's topic is the 1991 report entitled *Enterprise Responsibility for Personal Injury*. The A.L.I. undertook this project in 1986 in response to what was variously called either a tort crisis or an insurance crisis. As first conceived by Professor Richard B. Stewart, an administrative law expert, the project aimed to integrate tort law with regulatory and social insurance approaches to "Compensation and Liability for Product and Process

91. AMERICAN LAW INSTITUTE, *COMPLEX LITIGATION PROJECT 375* (1993) (proposed draft).

92. *See id.* (letter from Professor Frederick K. Juenger to members of the A.L.I. Council (Dec. 4, 1992)).

A skirmish in this corner of the battlefield disputes whether choice-of-law rules are likely to favor injured consumers over product manufacturers. Compare Michael W. McConnell, *A Choice-of-Law Approach to Product Liability Reform*, in *NEW DIRECTIONS IN LIABILITY LAW 90* (Walter Olson ed., 1988) ("yes") with Bruce L. Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 *GEO. L.J.* 617 (1992) ("no"). *See also* David E. Seidelson, *The Choice-of-Law Process in Products-Liability Actions*, 26 *DUQ. L. REV.* 559 (1988). According to West Virginia's Justice Richard Neely, "between the fireside equities and Pandora's box, . . . the calculations differ dramatically when both the fireside equities and Pandora's box are within one state, as opposed to situations where the fireside equities are at home but Pandora's box will be opened in another state half a continent away." NEELY, *supra* note 79, at 66.

Injuries."⁹³ After he left for another assignment, the authors abandoned any appraisal of where and how to assign those policy choices: "The fundamental dilemma we face is that even if there were an intellectual consensus . . . , our pluralist system of government does not have a centralized vantage point from which such institutional allocation of responsibilities could be made."⁹⁴ The study appeared in the form of some thirty chapters reflecting the work of fourteen scholars, many of whom had previously published their views.⁹⁵ But the A.L.I.'s professors, judges, and practitioners had little comment on the chapters discussing public policy in the form of safety regulation and social insurance programs. Critics zeroed in on proposed changes in noneconomic and punitive tort damages, payments from collateral sources, and the effect of compliance with safety regulations, and charged that the A.L.I. was taking sides in the political battles over "tort reform" that pitted the plaintiffs' bar against manufacturers, doctors, and insurance companies in the state legislatures.⁹⁶

Some members thought that this report was to initiate further action by the Institute, while others fought to prevent any association of the A.L.I.'s prestige with the report's suggestions. In the end, the Institute's leaders took pains to title the Study as a "Report to the Institute" rather than a "Report of the Institute," and no votes were taken on its substance either by the A.L.I. Council or by the annual meeting.⁹⁷ Instead, the leaders coupled the publication of the

93. Richard B. Stewart, *The Roles of Liability and Regulation in Controlling Enterprise Risks* (unpublished memorandum for Consultants and Advisers on Compensation and Liability for Product and Process Injuries), June 10, 1987. See also Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184 (1987).

94. 2 AMERICAN LAW INSTITUTE, REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 582 (1991) (ch. 19, "Postscript") [hereinafter 2 ENTERPRISE RESPONSIBILITY].

95. 1 AMERICAN LAW INSTITUTE, REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: THE INSTITUTIONAL FRAMEWORK 105 (1991) (ch. 3, "No-Fault Workers' Compensation") [hereinafter 1 ENTERPRISE RESPONSIBILITY]; *id.* at 181 (ch. 6, "Social Insurance Alternatives"); *id.* at 233 (ch. 8, "Regulation"), 2 ENTERPRISE RESPONSIBILITY, *supra* note 94, at 441, 555 (ch. 14, "Administrative Compensation Schemes" and ch. 18, "Filling Compensation Gaps with Social Insurance").

96. AMERICAN LAW INSTITUTE, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, Unedited Transcript of Discussion of Reporters' Study at 1991 Annual Meeting, May 13-14, 1991. Academic criticism appears at 61, 43 (Marshall S. Shapo), 66-67, 112, 36, (Douglas Laycock), 103-107, 19 (Richard W. Wright), 122 (Steven R. Smith), 123 (Harvey L. Zuckman), 5, 64, 119 (Walter H. Beckham), 78 (D. Michael Risinger); defenses of various recommendations at 92 (Paul C. Weiler), 95-97, 20 (Kenneth S. Abraham), 109, 11-12 (Alan Schwartz), 102-103 (Robert L. Rabin), 23 (Jerry J. Phillips); trial lawyers comments at 70-71 (Bill Wagner), 86, 132-133, 74 (Robert L. Habush), 119-120 (Robert L. Parks), 25 (Jerry Richard Palmer); judges, 67 (Charles M. Leibson), 49-50 (Gerald T. Wetherington).

97. Geoffrey C. Hazard, Jr., *Foreword* to 1 ENTERPRISE RESPONSIBILITY, *supra* note 95, at xi: "Th[is] Study . . . has been prepared for discussion at the Institute's 1991 Annual Meeting in the form of a Report to the Institute rather than a Report of the Institute." The Chief Reporter, Paul C. Weiler, wrote: "It has been evident . . . that the objective of our study was quite different from

study with the announcement of a new *Restatement (Third) of Torts*, beginning with products liability law, thus returning from the storms of explicit, multi-dimensional policy analysis to the comforts of policymaking by appellate dialogue.⁹⁸

If there are any areas of uncontroversial law reform for undisputed goals, tort law and corporate governance are not among them. My own view is that the A.L.I. should not avoid controversial topics of legal policy, even if it could. But policymaking must be prepared to face politics. The corporate governance project met useful criticism but also an unprecedented barrage of nonspontaneous letters and other lobbying by corporate officers and their law firms, as well as campaigns to recommend more corporate lawyers for membership.⁹⁹ The enterprise liability report drew attacks from plaintiffs' lawyers who felt excluded or ignored by scholarly and professional elitists and spoke darkly of the project's corporate funding.¹⁰⁰ Their feelings were exacerbated when the *Wall Street Journal* reported publication of the study as a "boost to business lobbyists" and as a potential "roadmap" for legislatures.¹⁰¹

the aim of the earlier American Law Institute Restatements of Torts." Paul C. Weiler, *Preface of 1 ENTERPRISE RESPONSIBILITY*, *supra* note 95, at xvii.

98. The A.L.I. Council's announcement "commended" the Reporters' Study as a "comprehensive, systematic, and scholarly analysis" without "expressing any view about the merits of [its] specific proposals," observed that many of these proposals would require legislation, and concluded that the analysis relating to products liability would "be considered" in proceeding with the new Restatement of that field. 14 A.L.I. REP. 1 (Oct. 1991).

99. One dismayed member later wrote that he thought he had joined a group of principled people who would act on their best individual judgments. "I did not understand the Institute to be an analog of a legislative body, in which members represented constituencies, and espoused the causes of particular groups outside the Institute." He reported an effort "to recruit members of the Institute to create what amounts to a clique in opposition to the Corporate Governance Project."

Professor Wechsler described the attempt of the Business Roundtable to influence the Corporate Governance project as "the nadir of my long experience" and "a frontal attack on the integrity and objectivity of our Institute." Wechsler Speech, *supra* note 85, at 57.

100. In an extensive letter to members of the A.L.I. Council in 1992, one practitioner observed that the report emphasized economic considerations and that it adopted the British skepticism toward the ability of juries in civil cases to carry out cost benefit analysis, and he noted that foundations associated with industrial and insurance companies had supported the study with sums ranging from \$5000 to \$375,000. After quoting law professors and practitioners who had voiced similar criticism and warnings that the report jeopardized A.L.I.'s reputation for objectivity (which were voiced again at the 1993 annual meeting), the letter expressed fear that the proposed *Restatement (Third) of Products Liability* might revert from protecting "injured parties' rights" and return to the "19th century protectionism." Letter from John Vargo to Members of the A.L.I. Council (Mar. 2, 1992). Vargo's letter was seconded by letters from tort professors Arthur Best, Thomas G. Field, Jr., Stephen C. Hicks, Eileen Kaufman, and Frank J. Vandall.

101. Amy D. Marcus, *Limits on Personal-Injury Suits Urged*, WALL ST. J., Apr. 23, 1991, at B1. One opponent described publication of the study as a "naked attempt to thrust 'tort reform,' A.L.I. style, before the media, lawmakers, and lay public" before A.L.I. had debated the study or its future, and expressed satisfaction at "downgrading" the title of the document. Letter from Robert

If the third *Restatement* asserts policies that are not attributed to legislatures or courts, it may attract similar political criticism. A 1992 article by a retired federal judge mounted a full-scale attack on the "elitist, privately controlled" A.L.I. and its "tremendous, unfettered, unaccountable power," the power in effect to legislate and change the common law without trusting "the collective wisdom of the 'common' people" to reform the law by legislation enacted by their "duly elected federal and state representatives."¹⁰² For the A.L.I. as for courts, the issue becomes the body's right to make value choices for the polity, not its expertise.

V.

If a court may not cite unofficial writings and the court's social priorities as "public policy," what is the alternative? Must judges who disclaim the policy style delude themselves and the public? Not necessarily, in my view.

The alternative is simple in principle, when considered as a judicial style rather than as a magic source of certainty. The principle is that when a court explains a decision by public policy, the court must identify some public source for that policy, rather than assert a preferred policy of its own making. But the principle has consequences beyond style.

The tort of wrongful discharge offers examples. Employers generally may terminate a worker's employment at will unless they have agreed to other terms. Courts found some discharges to be against "public policy," for instance when an employee was absent for jury duty or refused to commit an unlawful act,¹⁰³ and most courts allowed actions to be brought in tort rather than contract. The broad label "public policy" led to tort claims when a discharge was unfair or unreasonable by decent employment relation standards and made liability unpredictable. Reviewing the caselaw in 1992, the California Supreme Court found a wide range of formulas and acknowledged that the court itself had failed to analyze "public policy," once describing it as the principle that "no citizen

L. Habush to Members of the Consultative Committee (Apr. 26, 1991).

102. Paul A. Simmons, *Government by an Unaccountable Private Non Profit Corporation*, 10 N.Y.L. SCH. J. HUM. RIGHTS 67, 67 (1992). Appendices list the A.L.I.'s officers and council members, their law schools, their home states, and, for the practitioners, the size of their law firms. *Id.* at 98-105.

103. Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983); Ellen Rust Peirce et al., *Employee Termination at Will: A Principled Approach*, 28 VILL. L. REV. 1 (1982).

can lawfully do what has a tendency to be injurious to the public good"¹⁰⁴ The court now recited that judges should venture into policy only "with great care and deference to the judgment of the legislative branch, 'lest they mistake their own predilections for public policy'"¹⁰⁵ To avoid these pitfalls, the new opinion confined the sources of public policy to statutes or constitutional provisions, though—no doubt mindful of its frequent invocations of "policy"—the court pointedly underlined "*in wrongful discharge actions*."¹⁰⁶ Other courts include administrative rules and other public acts in such cases.¹⁰⁷

The New York Court of Appeals, which does not recognize the tort at all, would not help discharged employees who told their superiors about financial irregularities, even by an implied contract term of good faith and fair dealing: "Such a significant change in our law is best left to the Legislature."¹⁰⁸ The New York legislature had confined job protection to employees who blew the whistle on risks to public safety or health. What if a lawyer lost his job for insisting that the law firm disclose a colleague's ethical violations to the disciplinary authorities, as required by DR 1-103(A)? Need you ask? The court's problem was not how to decide but how to explain. Its answer was that lawyers are intrinsically different from financial managers or anyone else. Lawyers' adherence to professional standards is implied in their employment. But it is implied only for lawyers (unlike, say, accountants or nurses), according to New York's court, and only the "unique" duty to report violations.¹⁰⁹

Does singling out the duty to report wrongdoing for holding a law firm liable to an employee square with the statute protecting only employees who report risks to health or safety? How far may a court draw policy inferences when a statute itself does not apply? As Justice Peters of Connecticut once phrased it, statutes have boundaries, and the question is when to apply the

104. *Gantt v. Sentry Ins.*, 824 P.2d 680, 687 (Cal. 1992) (quoting *Safeway Stores, Inc. v. Retail Clerks Int'l Ass'n*, 261 P.2d 721, 726 (Cal. 1953)). *Gantt's* retrenchment of the tort was foreshadowed in *Foley v. Interactive Data Corp.*, 254 Cal. Rptr. 211 (Cal. 1988), over dissents by three judges reciting and defending the California court's prior practice of devising torts for policy goals.

105. *Gantt*, 824 P.2d at 687 (quoting *Hentzel v. Singer Co.*, 188 Cal. Rptr. 159, 163 (Cal. Ct. App. 1982)).

106. *Id.* A federal court found a Pennsylvania public policy against discharge in an employee's constitutional freedom of political expression. *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983).

107. Impermissible grounds for discharge can also be found in judicial decisions defining an employer's common law duties toward others, for instance to refrain from fraud, defamation, or breach of trust, as distinct from cases expanding the wrongful discharge tort itself in the name of "public policy." See *id.* at 685.

108. *Murphy v. American Home Prods. Corp.*, 448 N.E.2d 86, 89 (N.Y. 1983).

109. *Wieder v. Skala*, 593 N.Y.S.2d 752 (N.Y. 1992).

statute as a matter of common law beyond its designated boundaries.¹¹⁰ Advocates on or before the court have a choice of metaphors, as usual. A statute is a signpost to a way that leads beyond the immediate destination; or, for the opposing side, the statute is a fence that separates what it claims from all that it excludes.

The problem is acute when the legislature considers the disputed policy and does not enact it, or enacts it only in part.¹¹¹ Is a partial law a decision to move forward or a decision to stop short, to fill a glass halfway or to leave it half empty? Judge Breitel maintained, and Professor Henry Hart denied, that defeat of a proposed law can count as political policymaking.¹¹² Hart's position was too extreme; in the *Steel Seizure* case, for instance, refusal to authorize plant seizures in national emergencies persuaded several justices.¹¹³ No simple formula can substitute for seeking the political meaning of a legislative decision. And neither Breitel nor Hart went so far as the courts that cite legislative refusal to make a change as an affirmative reason why the court should make it.

One more variation comes from Montana, whose Supreme Court had allowed tort claims for wrongful discharge from employment at will. In 1989, the Montana legislature sharply limited such claims. This left little doubt about the state's public policy. But the state court then divided on the validity of the statute, with a dissent calling the decision to let the legislature limit this policy-based tort possibly "the blackest judicial day in the history of the state."¹¹⁴

110. Ellen A. Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. PITT. L. REV. 995, 1005 (1982).

111. A court "must be concerned with the inferences to be drawn from recent legislative refusal to act on a statute requiring all discharges to be 'for cause' or from recent legislative enactment of a statute forbidding discharge of an employee in the limited case of his testimony, under subpoena, as a witness in a criminal case." Peters, *supra* note 110, at 997.

112. Breitel, *supra* note 60; Hart, *Comments on Courts and Lawmaking*, in LEGAL INSTITUTIONS, *supra* note 59, at 40, 45.

Courts have reversed long-standing statutory interpretations even when legislators considered and declined to enact proposals to make the same change. *See, e.g.*, *Myrick v. James*, 444 A.2d 987 (Me. 1982) (reversing prior interpretation of "accrual" in statute of limitation after legislature failed to enact a proposed "discovery rule"). Despite somewhat extravagant rhetoric about "just principles of law in the existing social environment," *id.* at 992, and "recognition of the ethical values, the social mores, or any popular consensus," *id.* at 998, the Maine court more narrowly characterized the issue as "a technical legal procedure" in which "the term 'accrual' is regarded as an 'obscure . . . legislative phraseology'" whose meaning and application is peculiarly within judicial competence. *Id.* at 990. But the rationale hardly disguised the political setting of the legislative defeat of the discovery rule for medical malpractice.

113. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

114. *Meech v. Hillhaven West, Inc.*, 776 P.2d 488, 507 (Mont. 1989) (Sheehy, J., dissenting).

Indeed, tort statutes often shift the policy battle to the constitutional level, where some state courts, copying formulas from the Supreme Court, demand even more "legislative facts" and reweigh the interests for themselves under state constitutional guarantees.¹¹⁵ Most of these cases concern procedural obstacles and caps on damages or attorney fees rather than standards of liability. Nonetheless, when a statute fails judicial review, it becomes awkward to base a court-made rule on "public policy" after the court has thwarted the legislature's choice of a different policy.¹¹⁶ On controversial issues, politically enacted policies now undermine assertions of a common law of torts.¹¹⁷

The search for extrinsic public policy has a distinguished pedigree. When the Supreme Court in 1971 held, contrary to an old precedent, that maritime law provides damages for wrongful death caused by unseaworthiness, Justice Harlan, who cared about judicial craftsmanship, did not say that his predecessors had been wrong in 1886.¹¹⁸ He did not claim an improved vision of justice or a change in public opinion, nor did he present a heavily footnoted description of changed conditions in maritime work. Instead, he held that the maritime law was altered by the enactment of wrongful death laws in every state, and by Congress with respect to railroad employees and persons on the high seas. Though no statute covered the case at issue, this wide legislative policy toward wrongful death had the weight to change judge-made law. Harlan quoted Justice Holmes (the same Holmes who is commonly cited as favoring freewheeling judicial policymaking), who objected in a 1924 dissent that courts "were too slow to recognize that statutes even when in terms covering only particular cases

115. The main constitutional sources are state guarantees of civil remedies, equality, and jury trials. For the politics of tort remedies in one state's constitutional convention, see Roger C. Henderson, *Tort Reform, Separation of Powers, and the Arizona Constitutional Convention of 1910*, 35 ARIZ. L. REV. 535 (1993). See also OR. CONST. art. VII (Amended), sec. 3; Hall S. Lusk, *Forty-five Years of Article VII, Section 3, Constitution of Oregon*, 35 OR. L. REV. 1 (1955); Thomas H. Tongue, *In Defense of Juries as Exclusive Judges of the Facts: An Answer to the Proposal for the Repeal of Article VII, Section 3, Constitution of Oregon*, 35 OR. L. REV. 143 (1955).

116. After the Montana Supreme Court allowed tort claims for wrongful discharge, the legislature sharply limited such claims, denying compensatory and punitive damages for noneconomic harms such as pain and suffering, emotional distress, and other common law remedies, leaving no doubt of the state's public policy. Nevertheless, when the Montana Supreme Court sustained the statute, a dissent called the decision to let the legislature limit this policy-based tort the court's "blackest judicial day." *Meech*, 776 P.2d at 507.

117. In one political compromise, the opposing groups on Oregon, each nervous about further judicial development of products liability law, agreed to enact § 402A of the *Restatement (Second) of Torts*, complete with comments *a* through *m*, but not *n*. See Vetri, *supra* note 65. It will be interesting to see if a future Oregon court maintains that the statute anticipated future judicial evolution of products liability doctrine.

118. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

may imply a policy different from that of the common law."¹¹⁹ Traynor, too, thought that "courts have not begun to utilize all the latent energy in statutes to generate new laws," to use statutes as starting points for judge-made rules, citing similar expressions by Justices Harlan Fiske Stone and Illinois's Walter Schaefer.¹²⁰

The principle opens many questions. One problem is the level of generality, familiar from debates over constitutional principles. Can a court cumulate some measures to promote foreign trade and other measures to reduce regulatory costs into a general public policy of "competitiveness"? What was actual public policy toward holding charitable institutions liable for negligence? Public policy provided tax exemptions for them and deductions for their donors because they performed social services that otherwise would fall on public agencies. In return, persons who availed themselves of these free or subsidized services might have to take their chances. Legislatures declined to end the immunity.¹²¹ If courts were to end it in the name of "policy" rather than "principle," Harlan's technique perhaps might discern an extrinsic change in policy in statutes ending the tort immunity of the public institutions for which charities had been surrogates.

Is the search for a policy toward the harmful conduct or for a policy toward civil liability for the harm? The distinction can be decisive. Where negligence provides familiar liability, courts see breach of safety rules as failures of due care. Yet courts resist any implication that meticulous compliance with enacted safety rules satisfies the community's standard of due care. Do enacted safety rules, however, imply that compliance shields one from legal penalties, including punitive damages?¹²² Judges often are uneasy about recognizing civil liability when a law prohibits harmful conduct, such as child abandonment¹²³

119. Harlan quoted Justice Holmes, the same Holmes who is commonly miscited as favoring freewheeling judge-made policies, objecting in a 1924 dissent that courts "have been too slow to recognize that statutes even when in terms covering only particular cases may imply a policy different from that of the common law." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1971) (quoting Holmes from *Panama R. Co. v. Rock*, 266 U.S. 209, 216 (1924) (Holmes, J., dissenting)).

120. Traynor, *supra* note 59, at 59. See also *Shackil v. Lederle Laboratories*, 530 A.2d 1287, 1305-08 (N.J. Super. Ct. 1987) (Stern, J.A.D., concurring). Canadian cases in point are discussed in Lewis N. Klar, *Developments in Tort Law: The 1980-81 Term*, 3 SUP. CT. L. REV. 385 (1982), J.F. Burrows, *The Interrelation Between Common Law and Statutes*, 1976 OTAGO L. REV. 583.

121. Breitell, *supra* note 60 (citing the judicial abandonment of charitable immunities as a response to action legislative inaction). See, e.g., *Hungerford v. Portland Sanitarium & Benevolent Ass'n*, 384 P.2d 1009 (Or. 1963).

122. See 2 ENTERPRISE RESPONSIBILITY, *supra* note 94, at 83, 110 (recommending the defense).

123. See *Burnette v. Wahl*, 588 P.2d 1105 (Or. 1978).

or constitutional violations,¹²⁴ that fall outside familiar tort actions and formulations like "negligence *per se*."

Increasingly, publicly enacted policies now impinge on old pieties about a common law of torts, to the point where many tort rules are not common to the states nor share common principles with other torts. The Maine legislature, like Oregon's, enacted the products liability formula of the second *Restatement* as a statute.¹²⁵ Could either state's court now follow a new *Restatement* formulation of "common law"? In wrongful discharge cases, the courts turned to extrinsic sources that said nothing on the issue of employment. The inquiry is not what a law means but how its policy collaterally alters relations to which it is not addressed. Other instances are found in tort cases of the kind discussed earlier. To decide on liability to a child for disabling a parent, the Massachusetts court sought the implications of related laws, not its own balance of substantive and institutional concerns.¹²⁶ To decide whether spraying of pesticides or field burning were abnormally dangerous, the Oregon court examined the public regulation of these activities rather than conducting a non-jury debate of disputable "legislative facts."¹²⁷

Sometimes the ostensible statutory policy is a thin cover. The New York Court of Appeals was reluctant to adopt the market share liability of *Sindell* when consumers could not identify the source of an injurious product, but the court thought that for the victims of DES (diethylstilbestrol) "the ends of justice" and "the expectations of a modern society" demanded judicial action.¹²⁸ It found a legislative policy specifically for DES victims in a statute extending the period within which they could bring such tort actions. "All legal

124. See JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES § 7.02, 7.07 (1992).

125. See Survey, *Tort Law Developments*, 30 ME. L. REV. 99, 111 (1978); cf. Vetri, *supra* note 65. See also IND. CODE § 33-1-1.5-1 (codifying products liability law). Cf. V.I. CODE ANN. tit. 1, § 4, which enacts the A.L.I.'s restatements as the common law of the Virgin Islands. See Dunn v. Hovic, 1 F.3d 1371 (3d Cir. 1993).

126. Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690 (Mass. 1980); see also Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318, 320 (Or. 1982).

127. Koos v. Roth, 652 P.2d 1255 (Or. 1982); Bella v. Aurora Air, Inc., 566 P.2d 489 (Or. 1977). Cf. T & E Industries, Inc. v. Safety Light Co., 546 A.2d 570, 576 (N.J. Super. Ct. 1988) (citing federal statutes and regulations to show that uranium tailings are hazardous toxic waste and New Jersey statute for a "public policy" of strict liability).

Outside tort law, courts borrowed the Uniform Commercial Code standard for unenforceable liquidated damage clauses in contracts not governed by the Code, see *Illingsworth v. Bushong*, 688 P.2d 379 (Or. 1983) (overruling inconsistent cases), and refer to statutes of limitation as a presumptive standard for laches. See *Oregon State Bar v. Wright*, 785 P.2d 340 (Ore. 1990); *Villarreal v. Glacken*, 492 A.2d 328 (Ct. Spec. App. Md. 1985); *Curbelo v. Matson Navigation Co.*, 194 Cal.App.2d 305 (1961); *Cote v. Cote*, 54 A.2d 360 (N.H. 1947).

128. *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1075 (N.Y. 1989).

rules are policy based," the Court stated rather sententiously in 1991.¹²⁹ But the same policy toward DES turned out not to support liability to the second generation of children affected by the drug.¹³⁰

Whose public policies count? Justice Harlan found that changes in state tort law could change federal maritime law. State courts often follow policies first adopted by another state court. Should they also look beyond their own state to consider national policies? The California Supreme Court did so in holding a warning in English on nonprescription drugs sold to Spanish-speaking consumers adequate as a matter of law, thus denying the usual jury trial on that question.¹³¹ Citing federal regulations governing warnings on nonprescription drugs and state laws specifying transactions requiring the use of languages other than English, the court stated that there is "room in tort law for a defense of statutory compliance," that "legislative and administrative bodies are particularly well suited" to setting language requirements, and that "lacking the procedure and the resources to conduct the relevant inquiries . . . the prudent course is to adopt for tort purposes the existing legislative and administrative standard of care on this issue."¹³² But the compliance issue rarely escapes confusion with federal preemption.¹³³ Preemption leaves the state no choice, but our question is whether a state court should count national concerns in defining the state's own public policy. American federalism is built on recognition that this is an unlikely way to make national policy.¹³⁴ And do sources of "public policy" include government studies, commission recommendations, and legislative reports, either state or federal, that have not passed the hurdles of political lawmaking? Given these questions, it is not surprising that judges usually look for policy sources only in actual statutes. Until a legislature expressly deals with liability, courts and advocates choose between two approaches to a new problem. One approach is to apply the classic variables of tort law: the nature of the plaintiff's injury; the quality of the defendant's conduct, state of mind, and obligations arising from a particular relationship; and the link between the conduct and the injury. The alternative, judges are led to think, is to be the

129. *Enright v. Eli Lilly & Co.*, 570 N.E.2d 198, 204 (N.Y. 1991).

130. *Id.*

131. *Ramirez v. Plough, Inc.*, 6 Cal. 4th 539, 863 P.2d 167 (Cal. 1993).

132. *Ramirez*, 6 Cal. 4th at 550, 553. The court quoted an early Traynor opinion for the use of regulatory standards to fix an "unformulated standard of reasonable conduct." *Clinkscales v. Carver*, 22 Cal. 2d 72, 75 (1943).

133. A characteristic example is the role of compliance with federal safety regulation in design defect cases. See 2 ENTERPRISE RESPONSIBILITY, *supra* note 94, at 83 (ch. 3, "Regulatory Compliance"); *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, 1332 (Or. 1978) (Linde, J., concurring).

134. For one state judge's perspective, see NEELY, *supra* note 79. Codifying choice of law rules is resisted in part to protect tort rules favoring local plaintiffs over distant manufacturers. See *supra* note 91 and accompanying text.

primary policymakers in private law, and to shape liability by their own explicit assumptions about social facts and consequences. The significance of enacted policies for some even if not all parts of the tort calculus is often overlooked.

VI.

To summarize: A rule of law is a policy, however it is explained. It does not follow that a court should explain the rule in policy terms. What justifies a law has been debated between the champions of Aristotelian and Kantian theories of justice and various utilitarians in this lecture series and elsewhere.¹³⁵ But a judge must be able to agree that a rule is law within having to defend the objectives of its policy or its efficacy. Legislators changing a judge-made rule should not have to overcome the court's policy arguments, nor should their new rule be marked at birth as a defeat for the court or as contrary to sound "public policy" as declared by the court.

The demand for institutional "candor" in a collegial opinion is misplaced. Candor about motivation must be personal, not collective. Justice Blackmun's personal statements about abortion or the death penalty, or Justice Rehnquist's on flag burning could not speak for the Supreme Court as an institution.¹³⁶ If taken seriously, the demand for candor would cast doubt on every opinion for an appellate court, and greater doubt on "realistic" than on formal opinions; for it is less realistic to think that all members of the court actually share a basis for confidence in the empirical assumptions and predictions asserted in a policy opinion than that they all have agreed on a chain of analysis that supports the stated holding.

Public policy explains a decision if the decision in fact is plausibly derived from a public policy. But the explanation must identify a public source of policy outside the court itself, if the decision is to be judicial rather than legislative. A court may determine some facts as well or better than legislators, but it cannot derive a public policy from a recital of facts. In public

135. Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989). The philosophical issues were discussed in Symposium, *Corrective Justice and Formalism: The Care One Owes One's Neighbor*, 77 IOWA L. REV. 403 (1992). One way in which either philosophical or economic tort theorists may deal with statutory recovery for specific injuries, which legislators may enact as "corrective," as "distributive," or as purely political measures, is simply to define such positive laws as creating "torts" if they fit the theorist's chosen criterion; if not, they are something other than torts.

136. *Collins v. Collins*, 114 S. Ct. 1127, 1128-38 (1994) (Blackmun, J., dissenting); *Webster v. Reproductive Health Services*, 492 U.S. 490, 537-60 (1989) (Blackmun, J., concurring in part, dissenting in part); *Texas v. Johnson*, 491 U.S. 397, 421 (1989) (Rehnquist, C.J., dissenting); see Robert F. Nagel, *Political Pressure and Judging in Constitutional Cases*, 61 U. COL. L. REV. 685 (1990).

policymaking, the controversial element is who gains and who loses, which is why policymakers strive to show that everyone gains. Costs and benefits are an intensely political issue when governments make policy by allocating tax burdens and funds for social programs, and they are equally political when governments instead mandate which private sources must assume these burdens in the form of compulsory insurance programs and which sectors are exempted from those burdens. When there is agreement on policy goals and the remaining issues really are factual, legislatures know how to delegate those issues to agencies or to case-by-case adjudication.

The search for extrinsic public policy has enough permutations to defy a court's consistent use over time and enough interpretive space to reach the judges' preferred results. What, then, is the point of the principle? Does it go beyond style?

The point is not merely to shield the courts from the political costs of proclaiming themselves as policymakers. Citing extrinsic policies rather than their own will not shield judges from criticism and opposition, though it redirects the terms of debate. The principle that public policy needs an identifiable public source matters in practice.

An advocate who asserts that "public policy" demands a particular rule must be prepared to answer the question "why?" When a court demands a source it asserts and maintains the political responsibility of lawmakers for public policy, whether or not the particular decision gets it right. It pushes courts and counsel beyond facile rhetoric into the complexities of real public policy. The search exposes the limits within which courts, lacking the tools of regulation and inspection, of taxation and subsidies, and of direct social services, can tackle large-scale problems of health care for injured persons, of income replacement, of safe housing and products and medical practices, of insurance, of employment, and of economic efficiency with state-by-state formulas for individual damage actions.¹³⁷ It may make judges more tolerant, if not respectful, of the imperfect products of political policymakers. Consistently followed, it might even push lawyers to insist on a responsible home for systematic lawmaking.

More likely, lawyers and judges will join with scholarly experts to reject this heresy against the orthodox reliance on courts as the forum for making and changing policies toward civil liability. Policy should be made by professionals like us, not politicians. The academic enthusiasm when judges expanded tort

137. "[Courts] can enlarge eligibility at the margin of benefit schemes created by the legislature . . . but they cannot create the schemes in the first place. . . . A court does not have a Ways and Means Committee." Hazard, *supra* note 68, at 249.

law in the name of policy is muted, however, when judge-made policy confines tort law. The asymmetry may be justified by the burden placed on tort law in a country that provides spotty medical and income support and leaves injured persons to obtain most essential goods and services in the private market. One can ascribe the mid-twentieth century judicial expansion of liability for personal injuries to the political imbalance between well-organized, institutional defense interests and the random victims of unforeseen injuries in the American legislative process. Courts in effect shifted the burden of obtaining legislative action.¹³⁸ But I have seen little academic criticism when courts thereafter struck down this legislative policymaking.

The principle that courts must cite a source for public policy does not favor one side over the other. The principle inhibits courts from announcing radical changes in the name of public policy when there has been no visible change in any extrinsic policy, particularly when the legislature has refused to make a change, but it also calls for considering the effect of new legislation on existing law even when the legislation says nothing about civil liability. The principle opens as many doors as it closes. To some, the complexity and indeterminacy of the search only confirms their view that public policy is alien to the common law's task of corrective justice. If so, they may and will pursue that task without mentioning "public policy." There are other ways to write briefs and opinions. But when a court does choose to base a decision on public policy, the court must plausibly identify a public source of that policy, not invent it.

"Most urgently needed," Justice Ginsburg recently told the Senate Judiciary Committee, "is a clear recognition by all branches of government that in a representative democracy important policy questions should be confronted, debated and resolved by elected officials."¹³⁹ Many issues of tort liability

138. Who has the burden to obtain legislation is often decisive. When the California court scaled back its tort of "bad faith" discharge as a matter for legislation, Justice Broussard protested:

Only after completely rewriting California law on the subject do the majority leave the matter to the Legislature. But two things have changed. First, the Legislature will face a problem—the inadequacy of damages in actions for bad faith discharge—which did not exist before. Second, the burden of seeking legislative change, which was previously on employers and insurers, two well-organized and financed groups, is now on the unorganized worker.

Foley v. Interactive Data Corp., 254 Cal. Rptr. 211, 250 (Cal. 1988) (Broussard, J., dissenting).

139. Laurie Asseo, *High Court Nominee Reports Not Worth*, THE OREGONIAN (Portland), July 7, 1993, at A8.

To quote Herbert Wechsler once more:

[C]onfronting issues at the legislative level does not imply by any means attempting to resolve all problems by a legislative mandate. . . . When law is viewed in [a legislative] perspective, it is natural to pose, as basic issues, questions as to what it is desirable to attempt to settle by a legislative rule of greater or of lesser specificity; what must be left to standards that will gain their largest content in the course of their

indeed are being so debated and occasionally resolved, though in piecemeal fashion. The question is not whether private law is better made by courts or by legislators. Recent theory and practice both have encouraged the view that legislatures are only political markets for private interests, and lawyers are professionally biased to prefer courts as primary policymakers and legislators as a second appeal for the losing side. But judges gain nothing for the law by entering the marketplace for policymakers.

Style shapes how a court functions as well as how it is perceived. The decisive difference, to repeat, is that legislation is legitimately political and judging is not. Unless a court can attribute public policy to a politically accountable source, it must resolve novel issues of liability within a matrix of statutes and tort principles without claiming public policy for its own decision. Only this preserves the distinction between the adjudicative and the legislative function.

interpretation and their application; what should be committed to the outright discretion of the courts or other organs of administration; and what should be left to private ordering

Wechsler Speech, *supra* note 85, at 54-55.

