

Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 88 | Issue 2

Article 1

Spring 2013

Twenty-First Century Tort Theories: The Internalist/Externalist Debate

Michael L. Rustad

Suffolk University Law School, mrustad@acad.suffolk.edu

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Torts Commons](#)

Recommended Citation

Rustad, Michael L. (2013) "Twenty-First Century Tort Theories: The Internalist/Externalist Debate," *Indiana Law Journal*: Vol. 88: Iss. 2, Article 1.

Available at: <http://www.repository.law.indiana.edu/ilj/vol88/iss2/1>

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Twenty-First-Century Tort Theories: The Internalist/Externalist Debate

MICHAEL L. RUSTAD*

INTRODUCTION	419
I. A SOCIOLOGICAL CRITIQUE OF ONE-DIMENSIONAL TORT LAW	426
A. CIVIL RECOURSE THEORY: A CRITICAL INTRODUCTION.....	426
B. SHRINKING TORT’S PUBLIC PURPOSES.....	426
II. IN DEFENSE OF CIVIL RECOURSE: GOLDBERG AND ZIPURSKY	433
A. GOLDBERG’S CORE CONCEPTS OF CIVIL RECOURSE THEORY	434
B. BENJAMIN ZIPURSKY: CIVIL RECOURSE APPLIED TO MODERN CASES.....	436
III. MEET THE CRITICS OF CIVIL RECOURSE THEORY	438
A. GUIDO CALABRESI’S CRITIQUE OF CIVIL RECOURSE’S REDUCTIONISM...	438
B. RICHARD POSNER’S CRITIQUE OF CIVIL RECOURSE THEORY.....	440
C. CIVIL RECOURSE THEORY MEETS CRITICAL FEMINIST THEORY.....	443
D. CHRISTOPHER ROBINETTE’S: TORTS’ TWO DISUPRAVERGENT ROADS	445

INTRODUCTION

Law professors in the 1950s and 1960s could easily teach torts using William Prosser’s “definitive” treatise, regularly reading the advance sheets, and give almost no thought to torts jurisprudence.¹ During Prosser’s day, torts were a sleepy “backwater”² where black letter law and practical principles dominated; it is not surprising that torts did not attract much attention from philosophers, sociologists, economists, or other theorists. In the 1920s and 1930s, judges began to adopt legal realism, deciding torts outside the doctrinal box by taking into account empirical evidence as well as nondeductive or nonanalogical policy arguments.³ As Benjamin

† Copyright © 2013 Michael L. Rustad.

* Thomas F. Lambert Jr. Professor of Law and Co-Director of the Intellectual Property Law Concentration, Suffolk University Law School; 2011 Chair of the Executive Committee of the American Association of Law Schools Section on Torts and Compensation Systems and organizer of the panel, “Twenty-First-Century Tort Theories: A New Audit.” Thanks to the research and editorial assistance of Alex Chiulli, Wystan Umland, and Colin Barrett. I would also like to thank my fellow presenters and contributors to this symposium, Martha Chamallas, Christopher Robinette, Judge Guido Calabresi, Judge Richard Posner, John Goldberg, and Ben Zipursky. Finally, I would like to thank Tom Koenig, Chrissy J. Knowles, Marshall S. Shapo, and Gabe Tenenbaum for their editorial suggestions for substantive changes as well as editorial assistance.

1. See Robert L. Rabin, *Law for Law’s Sake*, 105 YALE L.J. 2261, 2261 (1996) (book review).

2. Stephen D. Sugarman, *The Transformation of Tort Reform*, in ANDREW F. POPPER, MATERIALS ON TORT REFORM 40, 40 (2010).

3. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 546 (3d ed. 2005) (“The realists . . . doubted that judges could or should decide cases according to the dictates of legal logic. They had little or no tolerance of artifice, fictions, real and apparent irrationalities. Law was a working tool, an instrument of social policy; and it had to be *seen* in that light.”); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995); see, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (holding that Buick owed a duty of reasonable care to all foreseeable users irrespective of

Cardozo observed in his 1924 classic, *The Growth of the Law*, an “avalanche of decisions by tribunals great and small is producing a situation where citation of precedent is tending to count for less, and appeal to an informing principle is tending to count for more.”⁴

Some forty-six years later, in a 1970 *Stanford Law Review* article, Marshall Shapo wrote about the role of torts in advancing policy goals and countering abuses of power.⁵ His sibylline prediction was that “[t]he Torts of the future will stress to an even greater degree, in Dean Green’s felicitous phrase, that tort law is very much public law.”⁶ Shapo’s legal realist approach called for public-policy-based torts that would check the private party much like constitutional law cases of that era checked abuses of government power.⁷

Today, as John Witt observes, tort law attracts attention from the most talented legal academics and historians, and as a result has produced a “deluge of new work . . . wash[ing] against the formidable foundations of the field.”⁸ Civil recourse theory is an example of counter-hegemonic scholarship that challenges the dominant position of law and economics as well as other consequentialist approaches to tort law.⁹ Goldberg and Zipursky’s interpretation of tort law challenges the dominant assumptions of economists, legal realists, and socio-legal scholars who conceptualize torts as a way of shifting losses, deterring misconduct, and fulfilling other public purposes.¹⁰

Each year the current chair of the Section on Torts and Compensation Systems has the privilege of proposing the topic for the section’s panel at the annual meetings. I organized an authors-meet-critics American Association of Law Schools (AALS) Annual Meeting panel highlighting the work of John Goldberg and Benjamin Zipursky because they have established a controversial but

any privity of contract); see also Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1234 (1931) (presenting legal realism as a “movement in thought and work about law” within which certain points of departure are common); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 697 (1931) (discussing approach of legal realists as requiring “faithful adherence to the actualities of the legal order as the basis of a science of law”). See generally WILLIAM TWING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973) (describing the legal realism movement and the intellectual contributions of Karl Llewellyn to rules, skepticism, and other realist methods); Morton J. Horwitz, *Mark Tushnet*, *Legal Historian*, 90 GEO. L.J. 131, 131 (2001) (describing Yale Law School as a center of legal realism in the 1920s and 1930s).

4. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 5 (1924) (emphasis added).

5. Marshall S. Shapo, *Changing Frontiers in Torts: Vistas for the 70’s*, 22 STAN. L. REV. 330, 333–35 (1970).

6. *Id.* at 334–35.

7. *Id.* at 335.

8. John Fabian Witt, *Contingency, Immanence, and Inevitability in the Law of Accidents*, 1 J. TORT L., no. 1, 2007 at 1, 1.

9. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 514 (2003) (describing torts as a multi-paradigmatic field with five competing theories: compensation-deterrence, enterprise liability, economic deterrence, social justice, and individual justice, of which there are three subtypes, libertarian theory, reciprocity theory and corrective justice).

10. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1580 (2006) (contending tort law is “about arming victims with a legal power to pursue those who have wronged them”).

substantial beachhead in American tort jurisprudence with their theory of civil recourse.¹¹ This symposium issue of the *Indiana Law Journal* publishes the papers presented at the AALS's Section on Torts and Compensation Systems January 5, 2012 panel on "Twenty-First-Century Tort Theories." The distinguished group of judges and professors on the AALS panel examined the implications of viewing civil recourse's vision of tort law through the lenses of law and economics, critical feminism, and pluralism.

What is civil recourse? Civil recourse theory, which drinks deeply from the well of political theory and moral philosophy, attempts to organize all twenty-first-century tort law around the core concepts of private wrongs and accountability. Inspired by the bric-a-brac of Blackstone's private wrongs,¹² civil recourse's focus is about one-on-one relationships between an injured plaintiff and her right of recourse against an individual defendant.¹³ John Goldberg describes the torts paradigm that he developed with Benjamin Zipursky as based upon the principle that tort victims have a right of action against their injurer by pursuing recourse through an avenue supplied by the state:

By recognizing a legal right of action against a tortfeasor, our system respects the principle that the plaintiff is entitled to act against one who has legally wronged him or her. I call this the principle of civil

11. Jason M. Solomon, *Civil Recourse as Social Equality*, 39 FLA. ST. U. L. REV. 243, 243 (2011) ("In the past decade, civil recourse theory has emerged as an important new way of thinking about tort law as individual justice. Like corrective justice, civil recourse sees tort law as about deontological concepts such as right and wrong, in contrast to utilitarian accounts that focus on maximizing social welfare."); see also Larry Reibstein, *Rethinking Tort Law: Professor Benjamin Zipursky's Civil Recourse Theory Moves to a Leading Position in American Tort Theory*, FORDHAM LAW., Spring 2012, at 12, 15 ("Yale law professor Jules Coleman describes civil recourse theory as 'the most important intervention in contemporary theory of tort law' since corrective justice theory . . .").

12. John C.P. Goldberg, *Tort Law for Federalists (and the Rest of Us): Private Law in Disguise*, 28 HARV. J.L. & PUB. POL'Y 3, 10 (2004) [hereinafter Goldberg, *Tort Law*] ("To note but one such aspect, [the wrongs-based view's] roots can be traced back to the likes of William Blackstone and Adam Smith. If modern Federalists are seeking a conception of tort law consonant with some of the basic tenets of classical liberalism, then a wrongs-based view is for them." (footnote omitted)); see also Goldberg, *supra* note 9, at 516–19 (explaining Blackstone's impact on tort theory).

13. Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 12 (2002) ("During the eighteenth century, a major ideological conflict between forward-looking Jeremy Bentham and backward-looking Blackstone foreshadowed the coming struggle between legal formalism and realism that took shape in the early decades of the twentieth century. Bentham's utilitarian philosophy maintained that the law must be refashioned to 'maximize the greatest happiness of the greatest number.' Bentham targeted Blackstone's 'incrementalism, traditionalism and transcendentalism' as a 'barnacled, superstitious, reactionary [defense of the] status quo.' Richard Posner's *The Problems of Jurisprudence* supports the utilitarian philosophy of Jeremy Bentham against Blackstone's formulation. Judge Posner views Blackstone's jurisprudence as hampering wealth maximization by imbuing the common law with a 'transcendental aura' that was 'rooted in Saxon customary law.' Under Blackstone's formulation, judges did not create a legal regime that would best benefit society, but instead discovered divinely inspired "'oracles' of the law." (footnotes omitted)) (quoting RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 12–13 (1990)).

recourse. The legal principle that the victim of a tort has a right of action against the tortfeasor is an instance of this more general idea.¹⁴

In the past fifteen years, Goldberg and Zipursky have developed a unitary theory of tort law, joining its close relative, corrective justice,¹⁵ as the leading microlevel theories in today's legal academy. Civil recourse theory has spread like a prairie fire, capturing the imagination of a new generation of torts scholars.¹⁶ The allure of this elegant theory is partially based upon its bilateral view of tort law and its emphasis on moral philosophy where an individual seeks recourse against an injurer. To civil recourse theorists, the law of torts is a predominately private-law subject, stripping down tort's public-law functions of efficiency, loss allocation, deterrence, and social justice.¹⁷ Civil recourse theory is a rebuttal to courts that stretch tort principles on policy grounds or empirical evidence.

The tort-theory war between the civil recourse paradigm and externalist perspectives is the basic theme of this symposium issue.¹⁸ By arguing that the only

14. Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 735 (2003) (footnote omitted).

15. See Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 349, 352 (2002) ("For the defendant to be held liable, it is not enough that the defendant's negligent act resulted in harm to the plaintiff. The harm has to be to an interest that has the status of a right, and the defendant's action has to be wrongful with respect to that right.").

16. Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 500 (2011) (discussing appeal of civil recourse theory to younger tort scholars).

17. Goldberg and Zipursky admire Blackstone and wish to return torts to private wrongs:

When Sir William Blackstone wrote his *Commentaries on the Laws of England* (1765-68) ("*Commentaries*"), his formulation of "private wrongs" was designed for a legal system that provided compensation largely for intentional torts. At that time, tort law was largely a legal institution to adjudicate conflict between neighbors and landowners, and to mediate relations between employers and employees. Volume Three of Blackstone's *Commentaries* synthesized private wrongs before legal subjects were classified into "private and public spheres, and [the further division of private law] into the recognizable divisions of tort, contract, and property." Volume Three of *Commentaries* is a snapshot of eighteenth century English tort law prior to the development of the fault-based negligence paradigm. Tort law of that period preserved the King's peace and the domestic tranquility of the family and community by mediating conflict between neighbors over property and personal rights.

Rustad & Koenig, *supra* note 13, at 10 (footnotes omitted) (quoting R. Blake Brown, *Cecil A. Wright and the Foundations of Canadian Tort Law Scholarship*, 64 SASK. L. REV. 169, 174 (2001)).

18. In tort jurisprudence, the divide is between internalists who view torts as principally a private-law subject and externalists who emphasize tort's public policies such as deterrence, efficiency, social justice, and other macrolevel policies. Corrective justice and civil recourse theory are the leading internalist perspectives, whereas law and economics is the leading externalist perspective. Cf. M. Neil Browne, Terri J. Keeley & Wesley J. Hiers, *The Epistemological Role of Expert Witnesses and Toxic Torts*, 36 AM. BUS. L.J. 1, 49-50 (1998) ("This social dimension is important in at least two senses. First, with respect to the differing externalist and internalist perspectives on science, we accept the superiority of the former: science, whether natural or social and including both its practioners [sic] and

legitimate role of tort law is to empower victims to rectify civil wrongs against them, civil recourse theory offers a new moral theory of tort law. This internalist perspective challenges other twenty-first-century theories that embrace an external or instrumental view of tort law. Civil recourse theory explicitly rejects the law and economics approaches of Judges Calabresi and Posner,¹⁹ who argue that a central role of the law of torts is either “to promote efficient resource allocation” or to constitute a compensation system.²⁰ Goldberg and Zipursky argue that externalism, the dominant view in tort jurisprudence, is false, and they developed civil recourse theory as an internalist alternative.

When I first suggested the idea of a symposium on civil recourse to Professors Goldberg and Zipursky, they questioned whether the AALS torts panel would overlap too much with the Florida State University (FSU) Symposium on Civil Recourse Theory.²¹ When I studied the scholarly record of the speakers at FSU’s Symposium, I immediately noticed that the invitees were all members of the same broad theoretical family.²² The speaker list was a Who’s Who of famous legal scholars who disproportionately shared Goldberg and Zipursky’s individualized perspective on tort law.²³ The FSU Symposium speakers Jules Coleman, Arthur Ripstein, Ernest Weinrib, Stephen and Julian Darwall, Stephen Perry, all share Goldberg and Zipursky’s core assumption that torts are best viewed by focusing on the role of private rights of action. The FSU symposium participants debated the similarities and differences between corrective justice²⁴ and civil recourse, which

theorists, does not operate in a vacuum with its own internal logic but rather comes under the influence of social forces. Second, not only is ‘the social’ an external influence on scientific inquiry, it is immanent in the process itself, by which we mean that scientists are not disinterested agents but rather are immersed in a web of relations that play an important role in determining the character of truths that emerge from their interactions.” (footnotes omitted)).

19. Judge Guido Calabresi is the 2011 Prosser Award recipient and Judge Richard Posner is the recipient for 2012. The Prosser Award “honors those who have made an outstanding contribution to the world of tort law scholarship.” *Professor Jane Stapleton to Be Awarded William L. Prosser Award in Recognition of Her Scholarship on Torts and Products Liability*, UTLAW, THE MAGAZINE OF THE UNIV. OF TEX. SCH. OF LAW, <http://www.utexas.edu/law/magazine/2012/10/29/professor-jane-stapleton-to-be-awarded-william-l-prosser-award-in-recognition-of-her-scholarship-on-torts-and-product-liability/>. Stephen Sugarman described Judges Calabresi and Posner as “the most important tort scholars of the last third of the 20th century” because of their scholarship “about the safety-promoting potential of tort law, and economic models of tort law. Sugarman, *supra* note 2, at 41.

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

21. *Symposium on Civil Recourse Theory*, 39 FLA. ST. U. L. REV. 1 (2011), available at <http://www.law.fsu.edu/journals/lawreview/backissues/vol39/issue1.html>.

22. *See id.* “Zipursky argues that civil recourse is better able to interpret the rights and wrongs structure of tort law than corrective justice, although he acknowledges there is much common ground between these theories.” Rustad, *supra* note 16, at 468–69.

23. The FSU Symposium speakers, Jules Coleman, Arthur Ripstein, Emie Weinrib, Stephen and Julian Darwall, and Stephen Perry, are all inclined to approach tort law from a microperspective. *See, e.g.*, Stephen Darwall & Julian Darwall, *Civil Recourse as Mutual Accountability*, 39 FLA. ST. U. L. REV. 17 (2011); John Gardner, *Torts and Other Wrongs*, 39 FLA. ST. U. L. REV. 43 (2011); Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107 (2011).

24. *See generally* Jules L. Coleman, *Tort Liability and the Limits of Corrective Justice*,

constituted a discussion within the internal perspective.²⁵ The FSU speakers agree fundamentally that microlevel individualized justice, rather than law and economics, best describes tort law.²⁶

The goal of this symposium issue was to gather distinguished macrolevel theorists to evaluate the claims of civil recourse from external perspectives in an authors-meet-critics format. This AALS torts panel subjects the claims of civil recourse theory to hard-hitting critiques from the externalist perspectives of sociology, law and economics, critical theory, and pluralism. In his AALS panel presentation, John Goldberg makes the intrepid claim that civil recourse theory “does a better job than some other theories of making sense of tort law that we have.”²⁷ His audacious theory criticizes the bread-and-butter deterrence theorists, the California Supreme Court, and the reporters of the *Restatement (Third) of Torts* for their policy-directed instrumental approaches to duty in the negligence equation.²⁸ In his *Unloved* article, John Goldberg writes that courts and tort scholars need to refocus their lenses on individual cases:

I am suggesting that we must recapture the idea that tort cases are concerned with the focused task of identifying and remedying instances in which an actor has wronged another, as opposed to providing localized compensation or insurance schemes, regulating antisocial conduct for the good of society, or the like.²⁹

By taking shots at all of these influential tort theories, Goldberg and Zipursky have placed themselves in a position similar to Butch Cassidy and the Sundance Kid, who never met a bank that they did not like to rob. In the famous 1969 movie,

in IN HARM’S WAY: ESSAYS IN HONOR OF JOEL FEINBERG 139 (Jules L. Coleman & Allen Buchanan eds., 1994); Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. REV. 143 (1990).

25. See generally H.L.A. HART, *THE CONCEPT OF LAW* (1961) on the distinction between external and internal perspectives on a legal system. See Jane Stapleton, *Evaluating Goldberg and Zipursky’s Civil Recourse Theory*, 75 FORDHAM L. REV. 1529, 1556 (2006).

26. Just by way of example, University of Toronto Law Professor Arthur Ripstein contends that civil recourse cannot be separated from corrective justice theory:

Goldberg and Zipursky seek to separate civil recourse from corrective justice by showing that tort law, at least as it is found in the United States of America, does not work in the ways in which corrective justice theory says that it must. The strategy of separation, in turn, rests on a separation between wrongs and remedies, a separation between ideas of risk and ideas of ordinariness, a separation between abstract characterizations of rights and contingent social norms, and, finally, a separation between a wrong done against the plaintiff and her power to exact a remedy. I shall argue that none of these separations can be made.

Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 FLA. ST. U. L. REV. 163, 164 (2011).

27. John C.P. Goldberg, Address at the Association of American Law Schools Annual Meeting, Twenty-First Century Tort Theories: A New Audit of Civil Recourse Theory (Jan. 5, 2012) [hereinafter Goldberg Podcast], available at <http://lawprofessors.typepad.com/tortspof/2012/07/podcast-of-2012-aals-panel-on-civil-recourse-theory.html>.

28. *Id.*

29. John C.P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1519 (2002).

Butch Cassidy and the Sundance Kid, a relentless posse pursues Butch and Sundance after they robbed the Union Pacific railroad.³⁰ The outlaws used every technique to evade the posse, but the law officers just kept coming because the railroad had assembled a uniquely skilled group of law enforcement officers to track down the notorious outlaws.³¹ The tort-theory posse in this symposium issue consists of a carefully selected group of merciless hunters—Richard Posner and Guido Calabresi, two prominent federal judges, join with Martha Chamallas, a proponent of critical legal theory, and Chris Robinette, a pluralist theorist—who defend instrumentalism’s place in tort law.

In their respective contributions to this symposium, federal appeals court judges Calabresi and Posner do not find civil recourse particularly illuminating or helpful in describing the complexity of real life torts. Chamallas contends that civil recourse theory’s gallery of private wrongs is decidedly male in ethos, leaving out unrecognized wrongs suffered by women, minorities, and outsiders. Robinette argues that civil recourse theory’s account is incomplete as it fails to account for routinized litigation, such as automobile accident law, that accounts for so much of torts legal landscape.

After reviewing the symposium contributions of Calabresi, Posner, Chamallas, and Robinette, one might half expect John to turn to Ben and ask in the famous words of Butch Cassidy, “Who are those guys?” Alternatively, Ben might ask John, the Sundance Kid of tort theory, “How many are following us?” Goldberg would reply, “All of ’em.” To which Ben responds: “All of ’em? What’s the matter with those guys?”³² Some might see this symposium issue as a concerted effort to drive civil recourse theory off the cliff by the relentless pursuit of consequentialist-and instrumentally-inspired tort theorists. Nevertheless, the purpose of an external critique is to raise questions that any tort theory claiming to be unitary must confront such as: Where do private wrongs come from? How do torts evolve or devolve as society and technology change? Why do torts highlight some private wrongs but not others? How do class, race, gender, and power differentials determine what is and what is not included in this gallery of wrongs? If civil recourse theory explains all of tort law, what accounts for the crazy quilt of a fifty-one-jurisdiction tort law, tort reforms, social insurance, and economic analysis? What is the role of the judiciary in recognizing new torts, eliminating old immunities, or supplanting contributory negligence with comparative negligence?³³

30. BUTCH CASSIDY AND THE SUNDANCE KID (Twentieth Century Fox, Newman-Foreman Company & Campanile Productions 1969).

31. *See id.*

32. I adapt this from the final scene when a relentless posse in Bolivia is pursuing Butch and the Sundance Kid. *Butch Cassidy and the Sundance Kid* (1969)—*Memorable Quotes*, IMDB, <http://www.imdb.com/title/tt0064115/quotes>.

33. The issue of whether courts or the legislature should make tort law or reform it is an old question. *See, e.g.*, Leon Green, *The Thrust of Tort Law Part II: Judicial Law Making*, 64 W. VA. L. REV. 115, 125 (1962) (“[T]he surest means of rendering law unstable and unjust is the adherence to precedents which have died on the vine and it is as much the function of courts to remove them from the law as it is to make new precedents.”); Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962) (calling for a creative role of the judiciary in reforming tort law); Cornelius J. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963) (arguing that

Must judges adopt a Rip van Winkle philosophy of judicial stagnation or may they creatively eliminate archaic immunities and harsh doctrines in response to social and technological changes?³⁴ Is the final goal of tort law civil recourse or economic efficiency, reducing the sum of accident costs, social justice, efficiency, deterrence, or a multiplicity of conflicting factors? How well does tort law give recourse to women, minorities, workers, or other groups without powerful lobbies? The contributors to this symposium issue pose all of these questions and more. Civil recourse theory must tackle the reality that “the common law is always in the process of becoming. It will be motionless only when it ceases to exist.”³⁵

Even Goldberg and Zipursky’s critics acknowledge that civil recourse theory has elevated tort scholarship, but each external theorist writing in this symposium asks probing questions that demand answers. The articles from the AALS panel subject civil recourse to searing criticism, recalling the definition of a critic as a person who finds a great deal of bad in the best of things. Subjecting civil recourse theory to an external critique will spur the development of more refined twenty-first-century tort theories.

I. A SOCIOLOGICAL CRITIQUE OF ONE-DIMENSIONAL TORT LAW

A. *Civil Recourse Theory: A Critical Introduction*

Before introducing the founding fathers of civil recourse, the critics, and the symposium articles, I will exercise the prerogative of the organizer to sketch out my own brief critique of civil recourse theory.³⁶ No single twenty-first-century tort theory has a lock on all solutions, and, fortunately, we have other perspectives that capture tort law’s multiplicity of functions. The civil recourse theorists argue forcefully that torts is a law of private wrongs; a way of “providing victims with an avenue of civil recourse against those who have wrongfully injured them.”³⁷ Goldberg and Zipursky base tort liability only “on the commission of a wrong—a failure to act in accordance with a relational norm of right conduct—that in turn generates in a victim of the wrong a power to respond to the wrongdoer.”³⁸

B. *Shrinking Tort’s Public Purposes*

While Goldberg and Zipursky acknowledge that torts have a public dimension in setting standards of conduct and in judicial decision making based on public policy concerns, civil recourse theory minimizes the public functions of tort law.³⁹ In their

courts should reform torts in the face of legislative indifference).

34. I draw this question from Thomas F. Lambert, Jr., Editorial, *Reflections of an Optimist*, 21 NAACA L.J. 25, 27 (1958) (describing the “Rip van Winkle philosophy of judicial stagnation”).

35. *Id.*

36. See also Rustad, *supra* note 16.

37. John C.P. Goldberg, Lecture, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1252 (2008).

38. John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1150 (2007).

39. John Goldberg contends that tort law should not be an instrumentality for solving

book, they argue that it is misleading to even speak of the functions of tort law: “Tort is not a system for deterring antisocial conduct, or a system for providing funds to needy injury victims, or a system for achieving civil peace.”⁴⁰ Civil recourse theory views torts primarily as a private-law subject, which provides victims of a wrong with “an avenue of recourse.”⁴¹ The civil recourse theory of tort law, according to its founding fathers,

aims to make sense of the concepts and categories that lawyers, judges, and legislators deploy when dealing with the legal dimensions of certain kinds of interpersonal interactions. Broadly speaking, our inquiry has proceeded on the assumption that these concepts and categories hang together as a reasonably coherent set (although we would be willing to reject this assumption, should it become untenable).⁴²

Civil recourse would be greatly enriched if Goldberg and Zipursky would engage in sociological research by climbing down from the parapet of their ivory tower and begin investigating how courts, regulatory agencies, and alternative compensation plans address real world problems such as how the latent injury problem should be resolved in complex environmental and mass products liability actions. To date, civil recourse theory conceives of torts in a rarefied box that does not permit empirical studies of the law in action, but focuses largely on chestnuts or classic appellate cases. Their analysis is conceptually elegant but lacks the “smell of the streets.”⁴³ Goldberg and Zipursky seem to prefer the world of abstract rights and wrongs to the dust-bowl empiricism necessary to demystify the modern tort law in action.⁴⁴

the large-scale social and political problems it is being asked to solve (if only by default). The tort system, for example, is not a social insurance scheme, and if it is the case that a wealthy society ought to have such a scheme as a matter of justice, then we should adopt that scheme independently of the tort system.

Goldberg, *supra* note 29, at 1518 (footnotes omitted). He also thinks that too many courts deny liability as a matter of law in the name of “public policy.” *Id.* at 1518–19; *see also* Goldberg, *Tort Law*, *supra* note 12, at 10 (emphasizing torts’ private as opposed to public law purposes).

40. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 65 (2010).

41. *Id.*

42. John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Revisited*, 39 *FLA. ST. U. L. REV.* 341, 342 (2011).

43. I am grateful to Marshall Shapo for telling the story of how American reporters in Europe in the late thirties tried to capture the “smell of the streets.”

44.

Roscoe Pound’s 1910 essay, *Law in Books and Law in Action*, described how judicial law making in his day ‘expected to force the case into the four corners of the pigeon-hole the books have provided.’ The legal formalists of Pound’s day did not appreciate that law is situated within social bonds. What’s missing in civil recourse theory is an account of the complex social web shaping tort rights and remedies. Civil recourse theory has no explanation of who makes torts claims and the role of the contingency fee system in making civil recourse possible for most consumers.

Rustad, *supra* note 16, at 480 (footnotes omitted) (quoting Roscoe Pound, *Law in Books and*

Justice Benjamin Cardozo denounced such formalistic scholarship as “artificial, smelling a little of the [scholar’s] lamp.”⁴⁵ Civil recourse theory steadfastly avoids the empirical investigation championed by legal realism, preferring the ethereal world of the legal heavens to the disordered world of torts on the ground.⁴⁶ These theorists seem to prefer to retell long-standing tort stories about eighteenth-century concepts such as alienation of affection rather than addressing modern problems such as the gusher in the Gulf of Mexico or the September 11th Victim Compensation Fund. Proponents of this model rarely address state-of-the-art tort problems such as multiple causation, lost chance, climate change, cybercrime enablement, or emergent social problems created by modern technology.

The famous mathematician’s toast, “Here’s to pure mathematics—may it never be of any use to anybody,”⁴⁷ expresses civil recourse theorists’ zest for formalistic models. Nevertheless, civil recourse will be ultimately judged on whether it is useful to tort teachers, judges, and policy makers and less on its internal coherence. Civil recourse theory’s distinctive vocabulary is not yet widely employed by practitioners, tort participants, or jurists because it owes more to Sir William Blackstone than to legal realism.⁴⁸ Judge Posner, who prefers Bentham’s utilitarianism to Blackstone’s barnacle-ridden, private-wrongs theory, does not believe that civil recourse theory has the theoretical power to displace law and economics.⁴⁹ In Judge Posner’s article for this symposium issue, he provides

Law in Action, 44 AM. L. REV. 12, 20 (1910)).

45. BENJAMIN N. CARDOZO, *Law and Literature*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE 339, 348 (Margaret E. Hall ed., 1947).

46. Rustad, *supra* note 16, at 494–95 (2011) (“The civil recourse theories propose a tort law for the legal heavens rather than this world. They stand at legal heaven’s gate with their abstract and obscure conceptualism, fact-free and devoid of social context. The problem with their approach is that tort law is not normative like ethics; rather, tort law is more akin to a sociological reality. . . . Civil recourse, too, is separated from social context because their abstracted approach to tort law is separated from social context and the politics of the tort wars. . . . Tort law does not descend disembodied from the thin, rarefied air of the legal heavens. Roscoe Pound castigated the law professors of his time for acting like ‘legal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded.’” (footnotes omitted)) (quoting Roscoe Pound, *The Need of a Sociological Jurisprudence*, 31 ANN. REP. A.B.A. 911, 919 (1907)); see also Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935) (comparing legal formalism to a “heaven of legal concepts” where concepts descend from heavens rather than from society).

47. ARTHUR C. CLARKE, *The Pacifist*, in TALES FROM THE WHITE HART 64, 74 (1970).

48. See Goldberg, *Tort Law*, *supra* note 12, at 10 (“The wrongs-based view of tort law that I have sketched and invoked as a basis for bolstering the U.S. Supreme Court’s decision to intervene in *Campbell* contains various aspects that should appeal to members of the Federalist Society even apart from this view’s ability to explain why certain perceived excesses in the tort system ought to be reined in. To note but one such aspect, its roots can be traced back to the likes of William Blackstone and Adam Smith. If modern Federalists are seeking a conception of tort law consonant with some of the basic tenets of classical liberalism, then a wrongs-based view is for them.” (footnotes omitted)).

49. Rustad & Koenig, *supra* note 13, at 12 (“Richard Posner’s *The Problems of Jurisprudence* supports the utilitarian philosophy of Jeremy Bentham against Blackstone’s formulation. Judge Posner views Blackstone’s jurisprudence as hampering wealth maximization by imbuing the common law with a ‘transcendental aura’ that was ‘rooted in Saxon customary law.’” (citations omitted)).

empirical evidence that civil recourse theory has had no significant impact on judicial decision making, at least for its first fourteen years.⁵⁰

Civil recourse theory's influence in the torts academy is far greater than in judicial decision making and practice. The complexity of injury in the information-based economy has created new dilemmas that require a stretching of tort law principles. Tort theories must incorporate a theory of social change recognizing that the common law is not a stagnant pond, but a moving stream.⁵¹ Civil recourse theory is missing a dynamic account of where the doctrine came from and where it is likely to go in responding to emergent social problems. There is no account of how torts evolved from a writs-based private law system with actions for conspiracy, trespass on the case, and ancient familial torts—such as alienation of affection, criminal conversation, or seduction—to today's complex tort law, where systems of compensation are often a cultural mirror, reflecting societal conflict rather than consensus. Unitary tort theories must explain how tort law changes and what role judges versus the legislature should play in tort lawmaking. New torts have birthdays, and the bell tolls for old torts that are now consigned to the ashbin of legal history. After the Second World War, U.S. courts eliminated immunities that were roadblocks to civil recourse to accommodate and reflect social changes.⁵² Goldberg and Zipursky have no explanation of why civil recourse expands through extensions of the law of negligence or contracts because of judicial or legislative tort reforms. The progression of injury law over the past “two and one half millennia . . . has generated a broad and ever-developing framework of injury law,”⁵³ and the latest iteration is civil wrongs on the Internet.

Carl Sagan famously said, “[W]e live in a society exquisitely dependent on science and technology, in which hardly anyone knows anything about science and technology.”⁵⁴ Virtual torts—such as the invasion of privacy, defamation, Internet security, the conversion of domain names, or spam cybertrespass—have no room in Goldberg and Zipursky's gallery of wrongs.⁵⁵ Yet virtual injuries are gifts that keep on giving, impossible to entirely expunge once they go viral.⁵⁶ The test of civil

50. Table 1 in Judge Posner's article reveals only nineteen opinions where Goldberg and Zipursky's work on civil recourse is cited. Many of these judicial opinions cite their work on determining duty under civil recourse theory.

51. Goldberg and Zipursky acknowledge that “tort law has by no means been standing still over the centuries.” GOLDBERG & ZIPURSKY, *supra* note 40, at 25. Furthermore, they write that tort law has been shaped by “[t]echnological, economic and sociological changes.” *Id.* at 373. They do not say what they mean by these variables and how they account for emergence of new wrongs or withering away of old ones.

52. *See, e.g.*, *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957) (stripping the municipality of governmental immunity for neglect of prisoner who suffocated when his cell filled with smoke); *Brown v. City of Omaha*, 160 N.W.2d 805 (Neb. 1968) (holding governmental entities liable for negligence in case involving publicly owned vehicle). *See generally* Fleming James, Jr., *Inroads on Old Tort Concepts*, 14 NACCA L.J. 226 (1954).

53. MARSHALL S. SHAPO, *AN INJURY LAW CONSTITUTION* 22 (2012).

54. Thomas Goetz, *Life Hacker*, WIRED, June 2012, at 108, 112.

55. GOLDBERG & ZIPURSKY, *supra* note 40, at 372–74 (explaining how the Communications Decency Act blocks new forms of tort liability in cyberspace).

56. Professor Anita Bernstein has noted that torts on social network sites are particularly insidious because they “leverage trust and vouching,” lending credibility to anything posted in cyberspace. Anita Bernstein, *Real Remedies for Virtual Injuries*, 90 N.C. L. REV. 1457,

recourse's power is whether this theory can account for tort's complexity, not just intentional torts or trespass-based causes of action. In December 2012, an estimated 633 million websites were active in cyberspace.⁵⁷ More than two billion computers are connected to the Internet,⁵⁸ but the actual number is unknown and unknowable.

In the mid-twentieth century, courts forged new causes of action such as products liability, informed consent, the invasion of privacy, and premises liability.⁵⁹ In the new millennium, innovative cybertort rights and remedies are just beginning to evolve to address new forms of virtual injury.⁶⁰ The potential for Internet-related lawsuits in the blogosphere is staggering. Virtual torts—such as the invasion of privacy or defamation—are frequently difficult to expunge once they go viral.⁶¹ Social networks “leverage trust and vouching, [lending] credibility [to] hurtful materials posted.”⁶²

Plaintiffs in virtual injury cases will find that an injurious comment is difficult to expunge from the Internet, unlike a newspaper where a retraction and the passage of a few days may reduce the radius of the injury significantly. Even with the help of companies such as Reputation Defender that will attempt to expunge tortious postings, you cannot really “unring the bell” once information is posted, copied, and forwarded around the globe. Libelous content may be mirrored on other sites and preserved by the Wayback Machine that enables users to “[b]rowse through over 150 billion web pages archived from 1996 to a few months ago.”⁶³ To access past postings, the user of the “Wayback . . . type[s] in the web address of a site or page where [they] would like to start, and press[es] enter.”⁶⁴ Goldberg and Zipursky have created another type of “Wayback Machine,” taking tort law back to its eighteenth century roots as described in *Blackstone's Commentaries* (1765–68).

Nevertheless, a modern tort theory must also account for evolving cybertorts⁶⁵ in an increasingly cross-border legal environment, where tortfeasors can defame, invade privacy, and misappropriate trade secrets at the click of a mouse in hundreds of jurisdictions simultaneously.⁶⁶ Nevertheless, Internet-related torts also arise on

1460 (2012).

57. *December 2012 Web Server Survey*, NETCRAFT (Dec. 4, 2012), <http://news.netcraft.com/archives/2012/12/04/december-2012-web-server-survey.html>.

58. *World Internet Usage and Population Statistics*, INTERNET WORLD STATS (July 29, 2012), <http://www.internetworldstats.com/stats.htm>.

59. See Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1541 (1997) (explaining how new causes of action evolved).

60. See generally Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77 (2003).

61. What Cardozo wrote about defamation is especially true about the Internet: “Reputation . . . is a plant of tender growth, and its bloom, once lost, is not easily restored.” *People ex rel. Karlin v. Culkin*, 162 N.E. 487, 492 (1928) (Cardozo, J.).

62. Bernstein, *supra* note 56, at 1460.

63. *Wayback Machine*, INTERNET ARCHIVE, <http://archive.org/web/web.php>.

64. *Id.*

65. Virtual torts or cybertorts are civil actions to recover chiefly economic, reputational, or privacy-based damages arising from Internet communications such as email, blogs, or website postings.

66.

The history of tort law is a story of the common law evolving, as it is “not a closed system of static rules, immutable unless changed by legislation.” The earliest American exemplary damages punished conduct that violated local

Twitter, blogs, social media sites, e-mail transmissions, website postings, or software distribution, in contrast to traditional categories of injury such as automobile accidents, slip-and-fall mishaps, medical malpractice, or injuries due to dangerously defective products. The largest numbers of Internet tort cases have been publication torts filed by companies.⁶⁷ Internet tort cases have given rise to new questions of liability not addressed by civil recourse theory. For example, if an intruder or virus exploits a website, destroying or altering data belonging to third parties, does the company's failure to have a contingency plan make it liable? Civil recourse theorists do not explain why so few consumers seeking recovery for virtual injuries have been able to hold defendants accountable.

In 1995, Senator J. James Exon of Nebraska introduced the Communications Decency Act (CDA).⁶⁸ Under the CDA, Congress immunized the providers of interactive computer services for third-party content posted on their services to preserve the “vibrant and competitive free market” of ideas on the Internet.⁶⁹ The plain language of the CDA shields websites from information-based torts in the United States. Section 230 of the CDA precludes plaintiffs from making interactive computer service providers liable for the publication of information created by third parties.⁷⁰ Section 230 of the CDA provides, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider” and “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”⁷¹

norms, such as the debauchery of the plaintiff's daughter, destroying her “parental prospects.” During the pre-Civil War period, the tort remedy of punitive damages gave slave owners a remedy for tortuously harboring fleeing slaves. “By the end of the nineteenth century, . . . [tort remedies were] a means of social control against the reckless endangerment of the public by the proprietors of railroads, streetcars, coal mines, and other industrial enterprises.”

Tort law functions are continually evolving to address new social problems. Tort law's signature has been its ability to evolve and recognize new causes of action or simply to adapt old causes of action to new social problems. Specifically, tort law has for centuries evolved to solve public health hazards in each historic epoch. The period from the end of the Second World War until the early 1980s was the epoch of the consumer in American tort law. Lawrence Friedman describes how the old tort law served as “a law of limitation,” whereas twentieth-century courts and legislatures “limited or removed the obstacles that stood in the way of plaintiffs.” The real “tort reforms,” beginning in the middle of the twentieth century, remade tort law to be “more responsive to the claims of injured people.”

Rustad, *supra* note 16, at 478–79 (footnotes omitted).

67. See Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 351 (2005) (“Repeat players such as ISPs have no qualms about protecting their rights through Internet lawsuits over intellectual property, tort, and contract rights, all of which are primarily resolved in federal courts.”).

68. For a legislative history of the CDA, see generally Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51 (1996).

69. 47 U.S.C. § 230(b)(2), (c)(1) (2006).

70. *Id.* § 230.

71. *Id.* § 230(c)(1), (e)(3).

To fall within the protection of section 230 of the CDA, a website must show: “(1) [it is] a provider or user of an interactive computer service; (2) the cause of action treat[s] the defendant as a publisher or speaker of information; and (3) the information at issue [is] provided by another information content provider.”⁷² Since Congress enacted the CDA in 1996, federal courts have stretched section 230’s immunity for publisher liability to cover almost every conceivable tort.⁷³ Civil recourse theorists have nothing to say about cybertorts or section 230 of the CDA. Civil recourse does not explain why Internet service providers have what is, in effect, a complete immunity from liability for all conceivable torts or take a position as to whether Congress should revoke this broad immunity.⁷⁴ Civil recourse theory brings to mind the late Larry Ribstein’s description of the Langdellian case method, “Protected from the harsh winds of the markets, legal educators were free to develop a hothouse plant that bore little resemblance to anything that grew in the natural soil of law practice.”⁷⁵

Civil recourse theory is predicated upon a closed system of common-law precedent. In the social sciences, closed systems are the province of scientists who isolate a particular structure and its effects in order to perform experiments.⁷⁶ Open systems, in contrast are “systems of the real world where many structures operate and may cancel the effects of other structures.”⁷⁷ “Realists [have therefore] argue[d] that the social sciences [must] deal with similarly complex open systems and, therefore, prediction is an inappropriate and misleading objective.”⁷⁸ In comparison, legal academics trained in the social sciences are careful not to isolate their objects of study from their social context, arguing that vital insights about latent functions are lost when the phenomena are not viewed holistically. Civil recourse needs to deal with the ways that tort law changes to meet new challenges presented by social changes such as the rapid growth of globalization.⁷⁹

72. *Delfino v. Agilent Techs., Inc.*, 52 Cal. Rptr. 3d 376, 388 (Cal. Ct. App. 2006).

73. Rustad & Koenig, *supra* note 67, at 362.

74. Goldberg and Zipursky mention Internet torts briefly in their *Introduction to U.S. Law: Torts*, but they do not explain or even take a position on why plaintiffs injured by publication torts have no recourse due to section 230 of the CDA. GOLDBERG & ZIPURSKY, *supra* note 40, at 372–74. The question unanswered is why there is a civil-recourse-free zone for Internet-related torts. Goldberg and Zipursky do not say whether it is a good thing for Internet service providers to owe no duties for third party torts in cyberspace.

75. Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 IOWA L. REV. 1649, 1655 (2011).

76. THE CAMBRIDGE DICTIONARY OF SOCIOLOGY 499 (Bryan S. Turner ed., 2006).

77. *Id.* (“Realism became influential in the social sciences following Thomas Kuhn’s *Structure of Scientific Revolutions* (1962). Kuhn challenged the view that science proceeded in a linear and accumulative manner, arguing that there are fundamental changes in world-views and that different scientific paradigms are incommensurable.”) (emphasis omitted).

78. *Id.*

79. It is not enough to say that tort law’s gallery is inherited or that it is historically contingent or a product of history, sociology, and technology. What’s missing from civil recourse theory is a theory of how torts change and how tort law’s gallery is a product of conflict, rather than this approach’s engineered and artificial consensus.

II. IN DEFENSE OF CIVIL RECOURSE: GOLDBERG AND ZIPURSKY

Like Martin Luther who nailed ninety-five theses to the church door in 1517 in the Castle Church of Wittenberg, Germany, Goldberg and Zipursky are challenging the core orthodoxies that have dominated torts scholarship for the past half century.⁸⁰ Together they “have offered the idea of civil recourse and the ideas of relational, legal, injury-inclusive wrongs as unifying features of tort law and tort theory.”⁸¹ Their tort law is, at its core, a microlevel “law of wrongs and recourse.”⁸²

Like the religious sectarians, Goldberg and Zipursky seek to restore the original, unpolluted doctrine, observing that Torts is the only first-year law school subject that does not address a basic legal category.⁸³ No other first-year subject has to agonize over its fundamental nature. The law of contracts, for example, clearly addresses the category of “consensually defined duties.”⁸⁴

This symposium issue explores the long-term implications of reducing tort law’s multiplicity to the bilateral relations between the plaintiff and the defendant. Goldberg and Zipursky’s civil recourse theory will be critically assessed from the externalist perspectives of law and economics, critical feminism, and pluralism. Through challenging authors-meet-critics symposia such as this, models are further refined and elaborated. Their joint presentation at the AALS panel explained civil recourse theory’s core claims and applied their theory to three contemporary cases to illustrate its robustness in interpreting contemporary tort law. Goldberg describes duty-imposing rules as key to civil recourse because they grant individuals and entities the alarmingly simple right to an avenue of recourse for a wrong. Here, he acknowledges an intellectual debt to H.L.A. Hart in conceptualizing tort law as a power-conferring branch of the common law.⁸⁵ He notes that civil recourse theory

80. Blackstone’s private wrongs theory was the orthodoxy in eighteenth-century English law.

Under Blackstone’s formulation, judges did not create a legal regime that would best benefit society, but instead discovered divinely inspired “‘oracles’ of the law.” The role of the lawyer was to “translate the oracular discourse for the laity.”

Oliver Wendell Holmes Jr. attacked Blackstone’s notion of legal doctrine as divinely inspired, arguing that law was “the creation of distinctly earthbound political authorities—legislators and, at the time, especially judges.” Holmes castigated Blackstone’s formalistic model of the English common law for its lack of coherence and inability to evolve to meet new social challenges

Rustad & Koenig, *supra* note 13, at 12 (footnotes omitted) (with Holmes describing Blackstone’s private wrongs as a “ragbag of details”).

81. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 978 (2010).

82. *Id.* at 981.

83. *Id.* at 917–18.

84. *Id.* at 918–19.

85. H.L.A. Hart (1907–92) was a theorist in the formalistic jurisprudential tradition. H.L.A. Hart’s theory was that law

is not only composed of rules that impose duties as well as confer powers Hart claims that at the foundation of every legal system lies a social rule that sets out the criteria of legal validity. This master rule, which Hart calls ‘the rule of recognition,’ determines which power-conferring and duty-imposing rules are valid in the system.

must explain why certain persons and entities are immune from the power to seek recourse, even though they have done an injury that would otherwise be a tort.

A. Goldberg's Core Concepts of Civil Recourse Theory

In his part of the AALS panel presentation, John Goldberg outlined the concepts and methods of civil recourse and its main claims. In Goldberg's view, tort law is not a system of compensation but fundamentally about victim empowerment. This fundamental principle of having an avenue of recourse to redress private wrongs is as American as apple pie and the Fourth of July. Civil recourse theory is a distinctively American theory with its evocative principle of the empowerment of ordinary citizens to redress wrongs. Goldberg and Zipursky argue in their contributions to this symposium that torts are good for empowering victims to seek civil recourse for recognized civil wrongs through a venue supplied by the State. They also argue that tort law is not suitable for achieving public-law functions such as deterrence, efficiency, or loss allocation.

In their privatized vision of tort law, the State's role is confined to providing an avenue of recourse for the empowered plaintiff to obtain recourse if their claim fits within established categories. Fifty years ago, before the rise of law and economics and corrective justice, Tort teachers would not be asking the question: What is tort law? Office lawyers and judges might have denounced this topic as elevating the obvious to the esoteric. John Goldberg, in his AALS presentation, argued that civil recourse theory is composed of three levels: (1) rights of action, (2) wrongs, and (3) remedies. The first level of his civil recourse law is about arming people with a legal power to seek and obtain recourse. In the second level, Goldberg explains that this level has intuitive appeal because the word tort is synonymous with wrongs.⁸⁶ In Goldberg's view, tort law in the basic Hohfeldian sense is a power-conferring or victim-empowering branch of private law.⁸⁷

Goldberg argues that a tort must not only be a wrong, but a wrong defined by the law.⁸⁸ Civil recourse assumes that being a moral wrong is neither a necessary nor a sufficient condition for a tort; torts are not merely legal wrongs, but relational wrongs.⁸⁹ Goldberg makes the bold claim that civil recourse theory is better suited

SCOTT J. SHAPIRO, LEGALITY 80 (2011).

86. The earliest torts treatises described torts as private wrongs as well. *E.g.*, C.G. ADDISON, A TREATISE ON THE LAW OF TORTS OR WRONGS AND THEIR REMEDIES (William E. Gordon & Walter Hussey Griffith eds., 8th ed. 1906); FRANCIS HILLIARD, THE LAW OF REMEDIES FOR TORTS, OR PRIVATE WRONGS (1867).

87. Wesley Hohfeld, like civil recourse theory, focuses on two-person rights and duties. *See, e.g.*, Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

88. Here, civil recourse theory owes a deep intellectual debt to corrective justice. *See* Weinreb, *supra* note 15, at 352 ("For the defendant to be held liable, it is not enough that the defendant's negligent act resulted in harm to the plaintiff. The harm has to be to an interest that has the status of a right, and the defendant's action has to be wrongful with respect to that right.").

89. By way of example, Goldberg notes that some relational wrongs are no longer classified as tort, such as cheating on one's spouse. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 619 (2005).

to explain tort law than Posner, Rabin, the reporters for the *Restatement (Third)*, Calabresian law and economics, and corrective justice.⁹⁰

The founders of civil recourse theory say that their theory is not just an old brick fort, guarding the perimeter of private wrongs, but can account for the complexity of tort law. Their AALS presentation was a defense of civil recourse against the anonymous critic who called it the best tort theory ever devised—for the eighteenth century. Together their contributions to the symposium constitute a defense of civil recourse and its theoretical power to explain a trilogy of modern cases: *Lauer v. City of New York*,⁹¹ *Comer v. Murphy Oil USA, Inc.*,⁹² and *Desiano v. Warner-Lambert & Co.*⁹³ In *Lauer*, the question was whether the City of New York should be liable to the father of a three-year-old child for the negligent infliction of emotional distress.⁹⁴ The father's claim arose from a cascading series of problems arising out of the city medical examiner's erroneous autopsy report, which he failed to correct even after a subsequent investigation revealed that the child's death was from natural causes.⁹⁵

The New York City Police Department continued its investigation until a newspaper story exposed the facts of the case.⁹⁶ Only after the newspaper story did the medical examiner correct the autopsy findings, terminating the police investigation.⁹⁷ The New York Court of Appeals ruled that *Lauer* could not pursue a negligent infliction of emotional distress claim based upon the ministerial acts of the city's medical examiners because the city owed him no duty.⁹⁸ New York's highest court concluded that the court had the role of determining the orbit of the city's duty and that "[f]ixing the orbit of duty may be a difficult task. Despite often sympathetic facts in a particular case before them, courts must be mindful of the precedential, and consequential, future effects of their rulings, and 'limit the legal consequences of wrongs to a controllable degree.'"⁹⁹

Goldberg views *Lauer* as a poster child for why courts are mistaken to focus on macrolevel policy factors¹⁰⁰ such as the proliferation of defensive claims intended

90. Goldberg advocates stripping tort law of its tendencies to devise "ad hoc solutions to perceived social ills." Goldberg, *supra* note 29, at 1519. "Such microtort theories, spearheaded by the younger generation of torts scholars, are counter-hegemonic because they embrace an inwardly turned moral philosophy that rejects the logic of *Restatement* scholars who follow the tradition of Prosser, Green, and other compensation-deterrence scholars." Rustad, *supra* note 16, at 468 (emphasis in original).

91. 733 N.E.2d 184 (N.Y. 2000).

92. 585 F.3d 855 (5th Cir. 2009), *panel opinion vacated en banc*, 607 F.3d 1049 (5th Cir. 2010).

93. 467 F.3d 85 (2d Cir. 2006), *aff'd per curiam by an equally divided court sub nom. Warner-Lambert Co. v. Kent*, 552 U.S. 440 (2008).

94. *Lauer*, 733 N.E.2d at 186.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 188–89.

99. *Id.* at 187.

100. The court reasoned: "Time and again [the court has] required that the equation be balanced; that the damaged plaintiff be able to point the finger of responsibility at a defendant owing, not a general duty to society, but a specific duty to him." *Id.* at 187–88 (citations omitted) (internal quotation marks omitted).

to defeat a plaintiff's legitimate claim. Goldberg cites *Lauer* as a case where a worthy plaintiff would have recovered if the court had properly assessed duty through civil recourse theory. According to Goldberg, the court should have recognized that the victim of the medical examiner's negligence had an intuitively plausible claim, which should not have been so quickly dismissed on policy grounds.

B. Benjamin Zipursky: Civil Recourse Applied to Modern Cases

Benjamin Zipursky's AALS panel presentation was part two of the defense of civil recourse. Zipursky, who coined the term "civil recourse," describes this theory as nonteleological and not arising out of either corrective or distributive justice.¹⁰¹ Benjamin Zipursky posits that a touchstone of tort law lies in its substantive standing rules of an internalist perspective, focusing on the bilateral relationship between plaintiff and defendant.¹⁰² Substantive standing is integral to understanding the relational nature of private wrongs, and it "refers to the aspect of a plaintiff's injury being of a certain sort relative to the wrong. A substantive standing requirement is simply a rule that a plaintiff does not have a tort claim of a certain sort unless she has substantive standing (for that tort)."¹⁰³

Zipursky's presentation focused on two modern tort stories: *Comer v. Murphy Oil USA*¹⁰⁴ and *Desiano v. Warner-Lambert & Co.*¹⁰⁵ Zipursky tells *Comer*'s circuitous history, which came to an end when too many Fifth Circuit judges recused themselves.¹⁰⁶ *Comer* was a class action lawsuit filed by Mississippi residents against dozens of oil and coal companies, charging the defendants with contributing to global warming under tort theories of negligence, trespass, and public and private nuisance for damages from Hurricane Katrina.¹⁰⁷ The plaintiffs' complaint observed, "Hurricane Katrina spawned tornados, mesovortices, wind shear, a massive storm surge and related weather events which caused damage, death and injury to persons, homes, businesses and other property interests across

101. Zipursky, *supra* note 14, at 754.

102. Benjamin C. Zipursky, *Substantive Standing, Civil Recourse, and Corrective Justice*, 39 FLA. ST. U. L. REV. 299, 304 (2011).

103. *Id.*

104. 585 F.3d 855 (5th Cir. 2009), *panel opinion vacated en banc*, 607 F.3d 1049 (5th Cir. 2010).

105. 467 F.3d 85 (2d Cir. 2006), *aff'd per curiam by an equally divided court sub nom. Warner-Lambert Co. v. Kent*, 552 U.S. 440 (2008).

106. The circuitous history of *Comer* began with a dismissal of the plaintiffs' class action by the U.S. district court on political standing and justiciability grounds. *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 853 (S.D. Miss. 2012). Next, a panel of three Fifth Circuit judges reversed the district court in *Comer v. Murphy Oil USA, Inc.*, 585 F.3d 855, 879 (5th Cir. 2009), ruling that the plaintiffs could go forward under a public nuisance cause of action. The Fifth Circuit vacated the decision of the three-judge panel and granted a rehearing en banc. *Comer v. Murphy Oil USA, Inc.*, 598 F.3d 208, 210 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049, 1053–54 (5th Cir. 2010), *mandamus denied sub nom. In re Comer*, 131 S. Ct. 902 (2011).

107. Fourth Amended Class Action Complaint at 31–35, *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012) (No. 1:05-cv-00436-LTS-RHW).

the State of Mississippi.”¹⁰⁸ The plaintiffs stated that they were simply seeking redress for damages caused by the utilities, not asking the federal district court to regulate global warming or change national global warming policy.¹⁰⁹ The plaintiffs contended that the utilities’ “emissions have also substantially increased in frequency and intensity of storms known as hurricanes; effectively doubling the frequency of category four and five hurricanes over the past thirty years.”¹¹⁰

The United States District Court for the Southern District of Mississippi dismissed the plaintiffs’ class action based on the political question doctrine and the plaintiffs’ lack of standing.¹¹¹ Courts have been unreceptive to climate change cases, often dismissing these civil actions on political question or standing grounds.¹¹² Zipursky contends that an easy case like *Comer* should never have progressed as far as the Fifth Circuit. He doubts whether Holmes or Cardozo would have hesitated more than a few seconds before dismissing this action.¹¹³ Civil recourse theory, he contends, is not putting torts in a box nor does it deny that torts address an array of public policies.¹¹⁴ Nevertheless, he warns that torts should not be bent out of shape in order to address social problems such as those caused by Hurricane Katrina.¹¹⁵

The second part of Zipursky’s presentation praises *Desiano v. Warner-Lambert & Co.*,¹¹⁶ an opinion authored by Judge Calabresi, one of the symposium’s critics of civil recourse theory.¹¹⁷ In *Desiano*, Michigan consumers suffering from liver toxicity linked to a type-2 diabetes treatment called Rezulin filed a products liability case against the drug product’s maker.¹¹⁸ “The FDA originally approved Rezulin in 1997. After adverse liver-related effects were documented in patients taking Rezulin, [the pharmaceutical company] agreed to a series of label changes, which were authorized by the FDA on four occasions between November 1997 and June 1999.”¹¹⁹ A 1995 Michigan tort reform immunized drug makers from tort liability unless they committed a fraud on the FDA.¹²⁰

108. *Id.* at 22.

109. *Id.* at 17–18.

110. *Id.* at 20 (footnotes omitted).

111. *Comer*, 839 F. Supp. 2d at 853.

112. *See, e.g.*, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) (dismissing case filed by an Alaskan village against energy companies for coast erosion due to global warming); California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (dismissing public nuisance action on the grounds that it is a political question).

113. Benjamin C. Zipursky, Address at the Association of American Law Schools Annual Meeting, Twenty-First Century Tort Theories: A New Audit of Civil Recourse Theory (Jan. 5, 2012) [hereinafter Zipursky Podcast], available at <http://lawprofessors.typepad.com/tortspof/2012/07/podcast-of-2012-aals-panel-on-civil-recourse-theory.html>.

114. *Id.*

115. *Id.*

116. 467 F.3d 85 (2d Cir. 2006), *aff’d per curiam by an equally divided Court sub nom. Warner-Lambert Co. v. Kent*, 552 U.S. 440 (2008).

117. Zipursky Podcast, *supra* note 113.

118. *Warner-Lambert Co.*, 552 U.S. at 88.

119. *Id.*

120. *Id.* at 87–88.

The federal district court dismissed the plaintiffs' action on grounds of preemption, relying upon the U.S. Supreme Court case *Buckman*¹²¹ and the Sixth Circuit's decision in *Garcia*.¹²² On appeal, the Second Circuit reversed the district court by holding that *Buckman* does apply since Desiano's claims were not based on a fraud-on-the-FDA theory.¹²³ As in *Comer*, the U.S. Supreme Court could not decide the case on the merits because the recusal of a Justice produced a 4-4 split.¹²⁴ Professor Zipursky argues that civil recourse theory explains best why the Second Circuit correctly decided this case and that this theory is able to address the "brave new world of tort law."¹²⁵ The civil recourse theorists contend that their analysis of the modern torts cases is a superior theory to law and economics, corrective justice, and all other twenty-first-century torts jurisprudence. Few tort scholars will disagree with Professors Goldberg and Zipursky's claim that torts provide injured persons with an official avenue to redress their claims. The critics charge that civil recourse is not able to explain the complexity of twenty-first-century law.

III. MEET THE CRITICS OF CIVIL RECOURSE THEORY

A. Guido Calabresi's Critique of Civil Recourse's Reductionism

Judge Guido Calabresi, a founding father of the law and economics school of tort theory along with Richard A. Posner, was the first scholar to develop a framework for analyzing deterrence in achieving what he views as accident law's primary function of reducing the cost of accidents.¹²⁶ Judge Calabresi, the 2011 William Lloyd Prosser Award recipient, explores the implications of boiling down tort law's multiple functions into one thing: civil recourse.

Civil recourse, to put it bluntly, is a frontal attack on Judge Calabresi's theory of tort law as an economically based system of efficient compensation and deterrence. Professors Goldberg and Zipursky want to divert our gaze away from the costs and prevention of accidents and, instead, take a microlevel view of individualized justice as being a contest between the plaintiff and the defendant. In their 2010 *Texas Law Review* article, Goldberg and Zipursky blame the tort academy's obsession with accident law for the gravitational pull away from private wrongs

121. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 341 (2001) (holding that state law claims that authorized recovery against medical device and drug manufacturers, where regulatory approval was allegedly procured through "fraud on the FDA," were preempted).

122. *Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961, 965–66 (6th Cir. 2004).

123. *Desiano*, 467 F.3d at 98 (reasoning that Michigan's statutory exceptions were not preempted because, unlike in a stand-alone fraud-on-the-FDA claim, plaintiffs' claims were traditional tort claims not predicated upon fraud).

124. *See Warner-Lambert Co.*, 522 U.S. at 440–41.

125. Zipursky Podcast, *supra* note 113.

126. *See, e.g.*, GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 24–26 (1970) (acknowledging that justice is an important goal, but doubting whether one can say much about it independent of the other goals, except to acknowledge that it exists as an ultimate goal); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499 (1961).

and individual justice accounts.¹²⁷ The civil recourse founders contend that the fundamental dichotomy in American tort law is private wrongs versus the “allocation of accidentally caused losses.”¹²⁸

Judge Calabresi’s contribution to the symposium hones in on Professors Goldberg and Zipursky’s reductionism by highlighting the failure of the latter authors to explain why something becomes a tort in the first place. Judge Calabresi takes issue with Professor Goldberg’s critique of *Lauer v. City of New York*,¹²⁹ asserting that the tort lesson learned from this case is how little civil recourse has to do with the factors that determine duty, such as deterrence, loss spreading, and economic effects.

Judge Calabresi’s critique is that civil recourse does not deal adequately with how—and what makes—a thing or an act become a wrong. While the judge acknowledges that civil recourse theorists have an insight about what is missing in the discussion of justice—reduction of the sum of accident costs—this theory does not explain the many cases that broach the subject. His article addresses why civil recourse does not mesh well with the concepts and methods of products liability, and contends that the key question in product liability cases is not about a manufacturer reaching out and injuring an individual plaintiff. Rather, the core question ponders the level of risk that the defendant manufacturer and victim must bear. He also notes that civil recourse says nothing about how courts decide when it is the manufacturer or the victims who must bear the burden of a devastating products injury, at either the macro- or microlevel.

A serious shortcoming of civil recourse theorists, Judge Calabresi argues, is to view tort law as being detached from a larger system of liability law. He asks us to imagine the consequences if we abolished torts and adopted New Zealand’s compensation system where there is no private relation. He asks what would be lost, and whether other legal institutions could fulfill civil recourse.

Judge Calabresi questions whether civil recourse alone is enough to justify the whole structure of torts and argues that the fundamental problem with civil recourse is that it is reductionist.¹³⁰ Judge Calabresi’s teacher Fleming James described the heterogeneous mass of stuff that constituted tort law:

This heterogeneous law of torts did not grow up because it was inspired by any one integrating principle. Under the formulary system of the common law its growth was piecemeal and fragmented. The roots of some torts are lost in antiquity. Others are relatively modern. The result is a hodge-podge.

Yet ever since the law was liberated from the procedural shackles of the forms of action, there has been a strong school of thought which has sought to find, or to construct, a unifying principle which would give integrity to the whole law of torts. . . .

127. See Goldberg & Zipursky, *supra* note 81, at 929.

128. *Id.* at 919.

129. 733 N.E.2d 184 (N.Y. 2000).

130. See also Guido Calabresi, *The Complexity of Torts—The Case of Punitive Damages*, in *EXPLORING TORT LAW* 333, 333 (M. Stuart Madden ed., 2005) (arguing that reductionism is common in tort theory as well as the U.S. Supreme Court’s punitive damages jurisprudence that reduces this complex remedy to one thing: retributory justice).

.....
 The truth is there is no single integrating principle of tort liability save one so broad that it answers nothing, though it may suggest fruitful inquiries.¹³¹

Judge Calabresi observes that too many scholars move quickly to reduce the common law to a single dimension when tort law's strongest suit is that it does many things. His thesis is that civil recourse, like other twenty-first-century torts theories, is reductionist and offers no explanation about how or why something becomes a civil wrong. Professor Zipursky acknowledges the problem of circularity in his recent Florida State University symposium article:

The problem that arises, for civil recourse theory, is that a condition for the adequacy of the theory since the very beginning has been its capacity to provide a noncircular explanation of the substantive standing rule. For someone endeavoring, like Darwall, to structure an integrative theory of moral concepts, the circularity is not necessarily vicious. But given that a desideratum of . . . the legal problems with which I started was the capacity to generate a nonvacuous explanation, the circularity is vicious here.¹³²

Judge Calabresi agrees with civil recourse theorists in that tort law is not just about reducing the sum of accidents by acknowledging that any tort scholar who exclusively looks at accident law has no real understanding of torts. He also observes that the microlevel perspective of civil recourse is functionally equivalent to the role of an individual judge, in an individual case, determining whether a plaintiff has been injured in a way that requires the recourse. However, Judge Calabresi also believes that torts have a macrolevel that is concerned with reducing the sum of accident costs.

To Judge Calabresi, the fundamental question that any interpretative tort theory must answer is: Why is there a duty sometimes, and not at other times? He maintains that neither corrective justice theorists, nor the civil recourse theorists, have an adequate explanation of why something becomes a civil wrong. Judge Calabresi contends that what makes torts different is that the collectivity sets the price of recourse and that is what separates torts from other common law subjects.

B. Richard Posner's Critique of Civil Recourse Theory

This year's William Lloyd Prosser recipient is the Honorable Richard A. Posner, Judge on the United States Court of Appeals for the Seventh Circuit and Senior Lecturer of Torts at the University of Chicago Law School. Judge Posner, the author of more than forty books ranging from such topics as tort law, economics, and legal theory, is a major figure in the positive theory of legal efficiency of tort law.¹³³ Not since Holmes has there been a more prolific tort lawmaker; his

131. Fleming James, Jr., *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 *BUFF. L. REV.* 315, 315–16, 320 (1959) (footnotes omitted).

132. Zipursky, *supra* note 102, at 323.

133. Paul H. Rubin, *The Concise Encyclopedia of Economics: Law & Economics*,

opinions, widely reprinted in casebooks, shape the teaching of tort law. He is one of the most prolific explicators of American tort law as indicated by his 547 appellate opinions addressing some issue of tort litigation.¹³⁴ His influential judicial opinions and academic writing have reconceptualized the setting of the standard of care through the lens of economic considerations.¹³⁵ Judge Posner changed the path of American tort law with his insight that positive economics apply to all branches of law, far beyond tort law.¹³⁶ Judge Posner coauthored with Professor William Landes “the first book-length study of the economics of tort law.”¹³⁷ They describe the law of torts as “best explained as if the judges . . . were trying to promote efficient resource allocation.”¹³⁸ Judge Posner and Professor Landes’s view of the law of torts is that it induces optimal care to avert expected accident costs.¹³⁹ They contend that market forces cause private actors to make optimal decisions to protect safety and thus efficiency.¹⁴⁰

Civil recourse theorists reject the law and economics work of Judges Posner and Calabresi, both of whom believe that a central purpose of tort law is to place liability on the cheapest-cost avoider¹⁴¹ or “to promote efficient . . . allocation.”¹⁴² Professor Zipursky notes the philosophical division between these two legal giants:

LIBRARY OF ECON. & LIBERTY, <http://www.econlib.org/library/Enc/LawandEconomics.html> (“The positive theory of legal efficiency states that the common law (judge-made law, the main body of law in England and its former colonies, including the United States) is efficient, while the normative theory is that the law *should be* efficient. It is important that the two theories remain separate. Most economists accept both.” (emphasis in original)).

134. Judge Posner lists “575 tort opinions, in order of number of total citations (from largest number to smallest), including both judicial and nonjudicial (law review and book) citations.” Richard A. Posner, *Instrumental and Noninstrumental Theories of Tort Law*, 88 IND. L.J. 469, 487–519 (2013).

135. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972) (“If . . . the benefits in accident avoidance exceed the costs of prevention, society is better off if those costs are incurred and the accident averted, and so in this case the [injurer] is made liable, in the expectation that self-interest will lead it to adopt the precautions in order to avoid a greater cost in tort judgments.”); see also LANDES & POSNER, *supra* note 20, at 85 (reconceptualizing the famous Hand formula $B < PL$ (that is, the Burden must be less than the product of the loss and the probability of harm) as illustrating the efficiency of the common law).

136. See, e.g., LANDES & POSNER, *supra* note 20, at 68–70, 213–14; RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA’S SEX LAWS* (1996); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987); Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981); see also RICHARD A. POSNER, *TORT LAW: CASES AND ECONOMIC ANALYSIS* (1982); Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 99 (David G. Owen ed., 1995). See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007).

137. LANDES & POSNER, *supra* note 20, at vii.

138. *Id.* at 1.

139. *Id.* at 54–62.

140. William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 871–77 (1981).

141. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

142. LANDES & POSNER, *supra* note 20, at 1.

It goes like this: the major battle in tort theory in the last three decades of the Twentieth Century was a battle between two ideologically opposed forces within the theoretical school of law and economics. One side was represented by Richard Posner of the University of Chicago, which is famous for its right-leaning love of the free market. Posner's Hand-formula based tort theory takes negligence to be the fundamental principle of tort law, which has the effect of reducing the liabilities of commercial actors to the amount necessary for them to internalize the costs of their activities, at the same time diminishing the capacity of the state to use tort law as a means of income redistribution, and smoothing the way for more unfettered market activity. The other side was represented by Guido Calabresi of Yale Law School, bastion of Northeast liberal egalitarian thinking. Calabresi's cheapest-cost avoider based theory takes strict liability to be the fundamental principle of tort law, permitting decentralized and demoralized deterrence and seeing to it that sophisticated and wealthy market actors who are better situated than ordinary individuals to make risk-reducing and risk-spreading decisions will make such decisions via the de facto third-party insurance of strict liability in tort.¹⁴³

Law and economics is a macrolevel approach viewing tort rules as a subset of liability rules for allocating loss and minimizing accident costs. Judges Calabresi and Posner, two of the three "most influential legal thinkers in the field over the past forty years," are tackling civil recourse theory through the lens of macrolevel law and economics.¹⁴⁴ In his symposium piece, *Instrumental and Non-Instrumental Theories of Tort Law*, Judge Posner praises civil recourse theory for jettisoning the historical baggage of corrective justice. Judge Posner describes the mission of tort law as "minimizing the sum of accident and accident-avoidance costs (but also deterring intentional and reckless loss-inflicting acts)."¹⁴⁵ He states that the claim of civil recourse theory—that it is better than any other positive theory—is "demonstrably mistaken," citing two recent articles.¹⁴⁶

He takes issue with Professor Goldberg and Zipursky's characterization of one of his opinions, *Mathias v. Accor Economy Lodging, Inc.*,¹⁴⁷ and chides the professors, as well as the *Texas Law Review* cite checkers, for not correcting such a "garbled summary of the *Mathias* opinion."¹⁴⁸ He notes that his opinion does not say or imply that punitive damages are awarded only in order to induce suits to enforce modest claims or to encourage plaintiffs "to uncover hidden wrongs."¹⁴⁹ Judge Posner asserts that Professors Goldberg and Zipursky missed the central

143. Benjamin C. Zipursky, *Richard Epstein and the Cold War in Torts*, 3 J. TORT L. 1, 1 (2010) (footnote omitted).

144. *Id.*

145. Posner, *supra* note 134, at 470.

146. *Id.* (citing Christopher J. Robinette, *Why Civil Recourse Theory Is Incomplete*, 78 TENN. L. REV. 431 (2011); Rustad, *supra* note 16).

147. 347 F.3d 672 (7th Cir. 2003) (upholding a jury award of \$186,000 in punitive damages to motel guests bitten by bedbugs).

148. Posner, *supra* note 134, at 473 n.15 (criticizing Goldberg & Zipursky, *supra* note 81, at 961).

149. *Id.* at 471.

point of his decision: that the higher ratio punitive damages award was necessary “to provide an adequate remedy.”¹⁵⁰ He notes that even if the jury had approved a ratio of 145 to 1, as was struck down in *Campbell*, the award would have been an insufficiently large incentive to sue.¹⁵¹

Judge Posner questions whether civil recourse or any single theory could explain the complexity of tort law. He then posits the key question left unanswered by civil recourse theorists: “[S]upposing that tort law is dedicated to providing ‘some sort of redress’ for people injured by ‘wrongful’ conduct, where do we go to find out what is a ‘wrong?’”¹⁵² He charges that it is the failure of civil recourse theorists to answer this question that makes the theory “collaps[e] into tautology.”¹⁵³ Judge Posner, like Judge Calabresi, does not see how civil recourse theory determines what is a wrong or what is wrongful.

C. Civil Recourse Theory Meets Critical Feminist Theory

Tort law in its splendor is a complex “cultural mirror” that reflects societal disputes over such topics as personal honor, social class, race, gender relations, corporate power, environmental degradation, and many other macrosocietal issues.¹⁵⁴ In her presentation, Professor Martha Chamallas, the Robert J. Lynn Chair of Law at the Ohio State University Moritz College of Law, criticizes civil recourse theory from a critical feminist perspective.¹⁵⁵ Civil recourse theory is strangely silent about external variables of class, race, power, and gender relations that are central to Professor Chamallas’s scholarship. The detachment of civil recourse theory from social context reminds me of Garrison Keillor’s view of the *New York Times*: “It reads like it was edited by two elderly sociologists, one of whom has been dead for many years.”¹⁵⁶

Civil recourse theory fails to grapple with the growing body of empirical research showing that race and gender matter when it comes to tort damages.¹⁵⁷ In

150. *Id.* at 473.

151. *Id.*; see also *Campbell v. State Farm*, 538 U.S. 408 (2003) (striking down punitive damages award that was 145 times the compensatory damages in an insurance bad faith case).

152. Posner, *supra* note 134, at 473.

153. *Id.*

154. MARSHALL S. SHAPO, *TORT LAW AND CULTURE* (2003); see also THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* 12 (2001) (describing how tort law reflects social conditions); Marshall S. Shapo, *In the Looking Glass: What Torts Scholarship Can Teach Us About the American Experience*, 89 NW. U. L. REV. 1567 (1995).

155. Martha Chamallas, Address at the Association of American Law Schools Annual Meeting, *Twenty-First Century Tort Theories: A New Audit of Civil Recourse Theory* (Jan. 5, 2012) [hereinafter Chamallas Podcast], available at <http://lawprofessors.typepad.com/tortspof/2012/07/podcast-of-2012-aals-panel-on-civil-recourse-theory.html>. For an excellent introduction to critical feminist legal theory, see MARTHA CHAMALLAS, *AN INTRODUCTION TO FEMINIST LEGAL THEORY* (3rd ed. 2012) and MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (2010).

156. *Garrison Keillor Quotes*, THINKEXIST.COM, http://thinkexist.com/quotes/garrison_keillor/3.html.

157. See, e.g., Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435 (2005); Lucinda M.

stark contrast to the logical model of civil recourse, tort law is messy because it is always in a constant state of flux, and it reflects an infinite stream of unsettled and conflicting issues. At its eidetic core, the Goldberg and Zipursky project is to reduce the complex, unsettled torts landscape to a single, internally consistent dimension.¹⁵⁸ If we repress torts' embattled public functions by blowing out lamps such as social control, deterrence, efficiency, and social justice, we risk repeating the past errors of formalists. Philosopher Stephen Toulmin believes that the misplaced search for certainty is a "perennial disease of modern thought."¹⁵⁹ Justice Holmes, too, concluded that the search for certainty in the common law was a folly. In *The Path of the Law*, he wrote, "certainty . . . is illusion, and repose is not the destiny of man."¹⁶⁰ Civil recourse theory seeks to interpret and explain the tort litigation process of naming, blaming, and claiming.

Professor Chamallas's article begins with praise for Professors Goldberg and Zipursky and states what she admires about civil recourse.¹⁶¹ She observes that civil recourse has recently given torts a stature that it would not otherwise have.¹⁶² In their Oxford University treatise, Goldberg and Zipursky present their image of torts as a gallery of wrongs—subsequently presenting civil recourse theory in an elegant way.¹⁶³ While each room in their torts gallery is exquisitely appointed, there is no room for unrealized wrongs, or for serious recurring injuries not recognized as torts. Professor Chamallas observes—and the civil recourse theorists do not—that these injuries tend to be reproductive injuries, prenatal injuries, spousal abuse, and injuries disproportionately suffered by women.¹⁶⁴

Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847 (1997); Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1 (1995).

158. See Rustad, *supra* note 16, at 434–39.

These individual-justice theorists are also disengaged from the political crucible of torts where the entrenched special interests are blatantly political and self interested. John C.P. Goldberg and Benjamin C. Zipursky, the founding fathers of civil recourse, steer free of the disorderly social context world, turning instead to the self-contained sphere of moral philosophy.

Id. at 439 (footnote omitted).

159. Stephen Toulmin stated,

I'm consciously associating myself with John Dewey, who also, in the late 1920s, picked on the quest for certainty as a perennial disease of modern thought, although he never sat down and thought enough from a historical point of view about why this quest for certainty had the kinds of attractions it had in the first half of the seventeenth century and provided the kind of mold or template on which modern science, modern politics, modern philosophy were shaped.

Sheldon Hackney, *A Conversation with Stephen Toulmin*, HUMANITIES, Apr./Mar. 1997, at 4.

160. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

161. Martha Chamallas, *Beneath the Surface of Civil Recourse Theory*, 88 IND. L.J. 527, 527 (2013).

162. *Id.*

163. GOLDBERG & ZIPURSKY, *supra* note 40, at 27–45 (discussing tort law's "gallery of wrongs").

164. See Chamallas, *supra* note 161, at 531. Chamallas's indictment of civil recourse applies equally well to other torts scholarship. See, e.g., Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 52

Professor Chamallas characterizes Goldberg and Zipursky as this generation's grand theorists. In her view, Professors Goldberg and Zipursky's work comes out of classical legal theory that describes and interprets the inner logic of tort law without much interest in the messy world of race, class, or gender. The central image of this theory is the empowerment of the tort victim who responds to injury by vindicating his rights. She describes civil recourse as a masculine theory: attractive to tort scholars who prefer elegant theories and assuming away the complex cultural interactions, inequities, and socio-legal feedback loops that exist in the real world. The masculine voice of the theory compounded with active and muscular images, such as "vindicating," "redressing," or "retaliating against wrongs" ignore the insights of feminist scholars. Her work draws heavily from legal realism and views tort law as a public response to a victim's injury. To Professor Chamallas, it is tort law that provides the response—not the victim. In contrast, the state withers away, providing only the forum or venue for private disputes in civil recourse theory. Professor Chamallas describes civil recourse as a theory where the heavy lifting is done by the private sector, not by public law.

Goldberg and Zipursky draw upon the *locus classicus* of the legal process school when they stress how the judge must follow the law, not become a knight-errant, doing what she perceives to be just.¹⁶⁵ The duo's slashing polemics posit a closed system, while Professor Chamallas favors an evolving and open-ended approach to tort law.

In their recent book, *The Measure of Injury*,¹⁶⁶ Martha Chamallas and Jennifer Wiggins demonstrate the importance of race and gender in understanding the tort landscape. Their book shows that from the Jim Crow South to the September 11th Victim Compensation Fund, race and gender matter; women and minorities have been under-compensated in tort law and these traditional biases continue to infect American tort law. Goldberg and Zipursky's internal bilateral theory does not discuss such patterns of disparate recovery by females and persons of color. In the rarefied world of legal philosophy, the public and cultural dimensions of tort law are not central or even peripheral.

D. Christopher Robinette's: *Torts' Two Divergent Roads*

In the late 1950s, Fleming James, summarizing empirical research on accident law, stated, "Only insurance companies and large corporate self-insurers pay anything to speak of in the way of tort damages and settlements. . . . In short, the individuals whose personal fault constitutes the legal basis of liability do not pay

(1989). Traditional tort law has been openly patriarchal. See Ronald K.L. Collins, *Language, History and The Legal Process: A Profile of the "Reasonable Man,"* 8 RUTGERS CAMDEN L.J. 311, 312 (1977).

165. BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 159 (1994) ("Hart and Sacks contend that such rationality, restraint, and fairness could be achieved through the appropriate 'black letter' distribution of institutional power and the adherence to evenhanded procedure coupled with the inculcation of jurists into a proper culture. . . . By seeking systematic constraint and procedural fairness, the Process School seeks to depoliticize law as much as feasible while permitting law to reflect organic changes in social policy.").

166. CHAMALLAS & WRIGGINS, *supra* note 155.

for the accidents they negligently cause.”¹⁶⁷ Robinette’s article updates Fleming James’s portrait of tort law for the twenty-first century in highlighting routinization, insurance, and alternative compensation systems, which are topics given short shrift by civil recourse theorists. He is the author of many books and articles on tort law and tort theory,¹⁶⁸ which focus on the role of insurers and ask how civil recourse can claim to unify the law when civil recourse theorists do not account for the routinization of tort law. Professor Robinette expresses agreement with Professors Goldberg and Zipursky’s affirmative claim that tort is about wrongs, but contends that their exclusion of instrumentalist factors such as compensation, deterrence, and administrative efficiency is erroneous.¹⁶⁹ Professor Robinette argues that all “major tort reforms over the last century—workers’ compensation, no-fault automobile reform, products liability, and ‘modern’ reforms—were based in instrumentalism. Moreover, when the reforms are viewed chronologically, a pattern develops: In each successive reform, instrumentalism made increasing inroads into tort.”¹⁷⁰ The question he asks is, as pondered also by singer Peggy Lee, “is that all there is”¹⁷¹—to tort law? Professor Robinette contrasts the wrongs-oriented tort law of civil recourse with the empirical evidence of the routinization of claims, especially in automobile accident law.¹⁷²

Professor Robinette’s insight is that tort theory requires both a microscope and a macroscope; he views the micro- and macrotheorists as complementary approaches, both being necessary for comprehensive torts jurisprudence.¹⁷³ Economists tell us that tort law promotes efficiency by giving people incentives to take account of costs they impose on others, whereas philosophers champion corrective justice as a method of advancing moral behavior by requiring wrongdoers to repair the wrongful losses they cause. On the one hand, there are the micro theories of corrective justice and civil recourse. On the other, there are the macro approaches of compensation and deterrence, social justice,¹⁷⁴ and empirically oriented law and

167. James, *supra* note 131, at 330 (emphasis omitted).

168. He is the co-author (with Jeffrey O’Connell) of the book *A RECIPE FOR BALANCED TORT REFORM* (2008) and is the editor of *6 APPLEMAN ON INSURANCE: AUTOMOBILE INSURANCE* (2011).

169. Christopher J. Robinette, *Two Roads Diverge for Civil Recourse Theory*, 88 *IND. L.J.* 543, 543 (2013).

170. Christopher J. Robinette, *Why Civil Recourse Theory Is Incomplete*, 78 *TENN. L. REV.* 431, 433 (2011).

171. PEGGY LEE, *Is That All There Is?*, *ON IS THAT ALL THERE IS?* (Capitol Records 1969).

172. See Robinette, *supra* note 169, at 550–66.

173. Christopher J. Robinette, *Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine*, 43 *BRANDEIS L.J.* 369, 369–70 (2005); Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 *GEO. MASON L. REV.* 329, 347 (2007); Robinette, *supra* note 170.

174.

Social justice theorists conceive of tort as a device for rectifying imbalances in political power. . . . Moneyed interests, particularly corporations, block or distort legislation and capture regulatory agencies designed to monitor and control them. As a result, these interests are able to pursue the self-interest of their executives and shareholders at the expense of the general public by

society theories. Robinette sees much to commend both the internal view of the theories of corrective justice and civil recourse to supplement, but not supplant, the external view of the compensation and deterrence theorists.¹⁷⁵ Robinette concedes that deontic wrongs are fundamental to tort law, but argues that it is an incomplete account because it leaves out critical functions such as compensation, risk allocation, and deterrence.¹⁷⁶ His pluralistic theory is reminiscent of another great theorist, George Wilhelm Hegel. Hegel's *Phenomenology* was predicated upon a triad of thesis, antithesis, and synthesis.¹⁷⁷ Theses, and antitheses, appear to be separate but actually exist in a dialectical relationship leading toward a new synthesis.¹⁷⁸ Tort law's internal and external dimensions may similarly exist in a complex relationship. Civil recourse theory is radically incomplete, needing to consider the underlying dynamic between multiple tort principles.

producing dangerous products and hiding critical information about their dangerousness. . . .

By arming citizens with the power to sue corporations for misconduct outside of the legislative and regulatory process, tort corrects for this imbalance of power. In particular, it permits independent judges and especially juries to hold corporate America and other powerful actors accountable. . . . Likewise, product liability suits restrain pharmaceutical companies from profiteering on dangerous and ineffective drugs. The social justice conception of tort is most closely associated in practice with Ralph Nader. Scholars who have developed this conception further include Richard Abel, Anita Bernstein, Carl Bogus, Thomas Koenig, and Michael Rustad.

Goldberg, *supra* note 9, at 560. The social justice school, as its name suggests, treats torts as a form of social control. It seeks to control corporate misconduct by generating penalties that send a message of deterrence to corporate America. In tort, the citizen can both vindicate his or her own claim to rights against the powerful and act as a private attorney general policing the conduct of these actors. *See* Koenig & Rustad, *supra* note 157. “[S]ocial justice theory emphasizes the pivotal role played by damage awards—particularly punitive damage awards—in restraining self-interested corporate conduct. Only punitive damages, social justice theory supposes, can establish that ‘tort does not pay’ by hitting the rich and powerful in the bank account.” Goldberg, *supra* note 9, at 561.

175. *See* Robinette, *supra* note 169, at 564–66.

176. *See id.*

177. “This triadic movement is based on the thought of nineteenth-century philosopher G.W.F. Hegel (1770–1831). Hegel’s dialectic includes *thesis*, *antithesis*, and *synthesis*” JAMES H. HARRIS, PREACHING LIBERATION 99 (emphasis added) (discussing G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT (1807)); *see also* HOWARD P. KAINZ, HEGEL’S PHILOSOPHY OF RIGHT, WITH MARX’S COMMENTARY: A HANDBOOK FOR STUDENTS 7 (1974).

178. HOWARD P. KAINZ, HEGEL’S PHENOMENOLOGY OF SPIRIT: NOT MISSING THE TREES FOR THE FOREST 79 (2008).