

Buffalo Law Review

Volume 64
Number 1 *Symposium: Opportunities for Law's
Intellectual History*

Article 10

1-1-2016

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Recommended Citation

John H. Schlegel, *On Absences as Material for Intellectual Historical Study*, 64 Buff. L. Rev. 141 (2016).
Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol64/iss1/10>

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On Absences as Material for Intellectual Historical Study

JOHN HENRY SCHLEGEL†

Among the many things that disciplines do, two of the more important are to both make knowledge possible and make knowledge impossible. Such is what any combination of subject matter and methodology does. It acts as a designation of value—this stuff is a subject for legitimate study/this is an appropriate method—and valuelessness—this stuff is not a subject for legitimate study/this method is inappropriate. Beyond the frontier of an accepted subject matter/methodology in any discipline there is a big sign—“Beware. Here be dragons and sea monsters, unicorns and mermaids.”

For historians, von Ranke’s crucial statement of historical objective, loosely translated as the search for “what [essentially] happened,”¹ has the obvious, but seldom-emphasized property that, if there is no evidence that something happened, then history, properly so-called, must remain mute. This implied negative makes some sense of the “tree falls in a forest and no one hears” variety. Still, the

† UB Distinguished Professor and Floyd H. and Hilda L. Hurst Faculty Scholar, State University of New York at Buffalo, School of Law. Parts of this Paper go back to discussions with my now retired colleague Jan Lindgren from when we were teaching torts and contracts separately together thirty-five years ago. Over time Guyora, Fred, Errol, Phil, Bert, and Jim offered helpful comments, as did participants in the Baldy Center’s seminar series on Institutionalism in 2003–04. A long letter from Mark Fenster came at a crucial time and so made a big difference, as did a suggestion that he made for shortening the Piece. It was a good thing that I agreed to write and speak on the intellectual history of legal doctrine at the “seminar for adults” that has resulted in the papers in this Symposium. It provided an occasion for me to turn what were unbaked ideas into at least half-baked ones.

1. Leopold von Ranke, *Preface: Histories of Romance and Germanic Peoples*, in *THE VARIETIES OF HISTORY: FROM VOLTAIRE TO THE PRESENT* 54, 57 (Fritz Stern ed., trans., 1956) (“wie es eigentlich gewesen”).

efforts of historians to get around such an implied negative have always amazed me.²

There is, however, a regular downside to von Ranke's stricture—the notable tendency to “find an archive,” or in intellectual history “find an author,” and then figure out what might be said about some topic from that archive or author or both. I understand this downside. My *Realism* book began with the fortuity of finding an interesting archive, and not even the one I was looking for. And my current book-length project began when a colleague got tired of my regularly telling her that she misunderstood the history of the Post-World War II American economy, and so she challenged me to write my story up. The resulting project began when I recognized that I had to read a great deal of stuff in order to be sure I had my story about Buffalo straight. The relevant books and materials are still the core of my project over fifteen years later.

Still, the limits in our disciplinary norms, limits that I fight all the time, make it difficult to talk about absences, things that didn't happen. When historians do talk about absences, the talk usually consists of so-called counterfactual history, the exploration of “what ifs,” either a species of wishful thinking or an assertion that what actually happened was for the best since what didn't happen would have been far worse. In contrast, for intellectual historians, there might be a substantive reason for paying attention to absences. Examination of circumstances where something rather obvious was overlooked, where the disciplinary blinders of value and valuelessness seem to have been effective, might help us understand a good deal about disciplinary intellectual life.³ I wish to examine a rather large absence in legal scholarship for just such purpose.

2. If I remember correctly, the first such effort I encountered was in a book by Thomas Haskell where he cleverly got around the absence of a crucial letter by reverse engineering it from the reply. See THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE* 149-52 (1977).

3. Charles Barzun brought to my attention the following explanation about the importance of absences, and from an unexpected source:

For if it should turn out that some of [an idea's] implications were not recognized, this may become a highly important, though negative,

“Everybody knows,” as Leonard Cohen says,⁴ that the slow adoption of code pleading, and so the demise of the writ system, brought the restructuring of the corpus of Anglo-American law into the now common categories of contract/tort/property that dominates our legal world, a regime whose roots in the world of writs can be teased out by knowledgeable people. Somewhat less than everybody knows that the “one civil action” provision of the Federal Rules had a similar effect, more summary than causative, on the equally ancient division between cases at law and those in equity. Nobody (but old—in both senses—teachers of Contracts and Sales) knows that in the late Seventies and Eighties contract and tort, respectively seen as claims for breach of warranty and claims based on strict liability, came close to fusing as Grant Gilmore had ruefully predicted,⁵ before the distinction between economic damages and damages from personal injury proved to be sufficient to avoid such an outcome.⁶ How was it that the recognition of the existence of one civil action failed to generate a single form of claim for civil liability, and so the general category of civil obligation?

The absence of academic discussion of such a possibility is well worth noting, if only because one could have teased

historical fact. Negative facts are of much more significance for the intellectual historian than is usually appreciated. The things that a writer, given his premises, might be expected to say, but doesn't say—the consequences which legitimately and fairly evidently follow from his theses, but which he never sees, or persistently refuses to draw—these may be even more noteworthy than the things he does say or the consequences he does deduce. For they may throw light upon peculiarities of his mind, especially upon his biases and the non-rational elements in his thinking—may disclose to the historian specific points at which intellectual processes have been checked, or diverted, or perverted, by emotive factors. Negative facts of this kind are thus indicia of positive but unexplicit or subconscious facts.

Arthur O. Lovejoy, *The Meaning of Romanticism for the Historian of Ideas*, 2 J. HIST. IDEAS 257, 264-65 (1941).

4. LEONARD COHEN & SHARON ROBINSON, *Everybody Knows, on I'M YOUR MAN* (Columbia Records 1988).

5. See GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

6. See *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965); *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 489 A.2d 660 (N.J. 1985).

such a law of civil obligation out of the available materials. Seen from a certain altitude, my favorite way of seeing law, it would have been rather easy. Consider the following.

Contemporary tort law *a la* Prosser⁷ is usually conceptualized as a pleading consisting of the following elements:

duty + breach of duty + cause + injury + damage = \$

Hanging around outside this well-ordered parade come several, largely self-contained little problems—strict liability, products liability, proximate cause, assumption of risk, contributory versus comparative negligence. In contrast, contracts, thanks to Corbin,⁸ is a lot messier, but can still be conceptualized, as if by Williston,⁹ into a pleading consisting of the following elements:

offer + acceptance + consideration + cause + breach + injury + damage = \$

Again, hanging around the edge are several little problems—promissory estoppel, mistake, impossibility, *Hadley v. Baxendale*,¹⁰ parole evidence, statute of frauds, duress, and illegality.

Set out in this fashion, the obvious overlaps between two areas, injury and damage, are either trivial—everyone knows injury is a formal, empty category—or superficial—tort damages are expansive, but contract damages are limited and arguably tied directly to the particular theory of damages, expectancy, reliance, or restitution appropriate to the breach. Thus, tort and contract could be seen as separate. Yet, if one escapes from Corbin's reformulation of Williston and looks not at what the law professors say, but at how the litigation lawyers use tort and contract doctrine, a quite different picture appears.

Starting first with torts, the central question for a litigation lawyer is not where Prosser's formulation starts—duty. Duty is assumed. Rather, it is breach of duty (and of

7. See WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* (4th ed. 1971).

8. See ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS* (1952).

9. See SAMUEL WILLISTON, *THE LAW OF CONTRACTS* (1924).

10. (1854) 156 Eng. Rep. 149.

course damages/my fee) that makes the tort lawyer's nose twitch. So, it is standard of care and the difficulty of proof of its violation that is central to the practice of tort law. Is one faced with negligence or some variety of strict liability? Is proof easy or hard given the money at stake? In addition to this bifurcated question there is but one other for the litigation lawyer, and that one not often—cause in fact. Did the defendant's action that violated the applicable standard of care actually cause the injury complained of? What is left beyond these questions, whether or not analytically or procedurally a matter for the plaintiff or defendant, is a collection of rocks that the defendant can throw at the plaintiff's case. These rocks are of two kinds. First, "You did it"—contributory negligence, assumption of risk and one branch of proximate cause. And second, "Not me"—no duty or the other branch of proximate cause.

All of contracts can fit into this mold as well. Here again, the central question for a contract litigator is not where Williston starts—formation.¹¹ Formation—offer, acceptance, and consideration—like duty, is assumed. Rather, it is the question of the performance promised as against that delivered (and of course damages/my fee) that is central to the practice of contract law. This is what on the rarest of occasions makes the contract lawyer's nose twitch. Dig through the cases on questions of warranty and performance and, on reflection, reasonableness pops up all over. These questions are at bottom matters of breach of duty, which, it should be noted, subsume, and are subsumed by, concerns about construction/interpretation, also classic matters of reasonableness. So, it is standard of care and the difficulty of

11. Fred Konefsky reminds me of Christopher Columbus Langdell's retreat, seemingly in horror, from his experience in legal practice where trial lawyers told stories designed to demonstrate the reasonableness of behavior and then argued, based on legal principle, into a world where the rules of contracts were designed to order, and so define, reasonableness. See BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C. C. LANGDELL, 1826–1906*, at 42–83, 87–94 (2009). However, Langdell always spoke about having based his work on principles, a tie to his past. See *id.* It is modestly ironic that what he seems to have done by basing his rules on principle is only to hide the reasonableness, not replace it, never having understood the deep tie between law based on principle and the reasonableness of conduct.

proof of its violation that is central to litigation in contract law, just as in torts.

Even the question of causation, which accountably, but nevertheless weirdly, appears as a limitation on damages—the rule in *Hadley v. Baxendale*, or at least its first branch, occasionally appears, as in the practiced version of tort law. Again, what is left of contracts doctrine is a pile of rocks that the defendant can throw at the plaintiff's case. These parallel those in torts only in part because here the basic defendant's strategy is "Not me," covering all of formation law and third party beneficiaries (a parallel to duty), the second branch of *Hadley v. Baxendale* (a parallel to proximate cause), and mistake/impossibility, even parole evidence. It is only in duress and illegality that anything approximating "You did it" will arise.

Thus, from my certain altitude there is not very much difference between a tort claim and a contract claim. In tort, an action that meets the appropriate standard of care causing injury that can be compensated in damages yields money. Whatever the law books say, "duty" is not part of the plaintiff's case, but rather its absence is a defense, and for all of the palaver about negligence versus strict liability, standard of care boils down to reasonable under the circumstances. In contracts, an action that does not meet the terms of the contract causing injury that can be compensated in damages yields money. Whatever the law books say, offer/acceptance/consideration are not a part of the plaintiff's case but rather their absence is a defense, and for all the palaver about contract construction and performance, they boil down to reasonable under the circumstances.

Seen in this way, aspects of traditional understanding in both fields that have always seemed alike, but yet unrelated, come clear. Reasonableness is central to both bodies of law, though in traditional contracts doctrine, centered in formation and damages, that concept seems out of place. But, with standard of care at the center of discussion, the anomaly is lessened, for reasonableness, which is at the heart of both construction and performance, is likewise at the heart of negligence. Once so identified, the common tie to reasonableness makes it easier to see how both areas of law are appeals to culturally bound understandings of

appropriateness on the part of both the advocate and the decision-maker.

Similarly, the sense that both fields, what I have dubbed the rock-throwing defenses, are uncomfortable appendages to the main trunk of doctrine, appendages that need somehow to be better attached, is both confirmed and oddly made irrelevant. These rocks don't fit with the main trunk of doctrine because they are not meant to fit. They are simply "No's" and there are basically only two ways one can say "No" to a claim—point the finger back at the plaintiff or point it somewhere else.

How far can one push this fundamental unity between contract and tort is an interesting question, one that I wish to explore first, by looking at the law of corporations, and then, that of property. Corporations doctrine is a mess of statute and common law.¹² No one would suggest that it has a unified structure of pleading. The statutory formalities of formation, the powers of shareholders, directors, and officers; the mechanics of acting through voting; and the limits on each are often quite detailed. In contrast, the great common law duties of care in the exercise of one's office and loyalty to the corporation (now possibly supplemented by that of candor toward shareholders!) that have long bound officers and directors float majestically outside the statutory edifice. The common, lawyerly understanding of the field asserts that the state corporation acts are enabling legislation that creates boundaries within which economic actors may make agreements. This understanding pushes the common law duties to one side and emphasizes the notion that the job of the corporate lawyer is that of producing a world of paper that takes advantage of the possibilities created under this enabling legislation.

Such a picture of corporate law makes perfect sense until one notices that all of the statutory powers seem to have inherent in them a silent qualification—but not too much,¹³

12. A classic rendering of this mess is ROBERT CHARLES CLARK, *CORPORATE LAW* (1986). For a clearer understanding of what is going on in the doctrine, see DAVID A. WESTBROOK, *BETWEEN CITIZEN AND STATE: AN INTRODUCTION TO THE CORPORATION* (2007).

13. In my Chicago childhood, when speaking about the limits on graft and corruption, this principle was rendered as "up to the wrist, but not to the elbow."

rendered in the more formal language of the law professor—form versus substance. There seems to be an implicit limit to the substantive harm that may be done to others through the formal exercise of most statutory powers, whether the matter is one of salary or dividends, voting rights or quorums. One may not use the corporate form to bring about outrageous results, though this is not the outrageousness of the tort's reasonable person, but rather that of the reasonable man (and I use that term intentionally—it is a male standard of conduct) in the counting house, warehouse, or corporate headquarters, but not in the back alley or on the Clapham omnibus. This is the same standard that can be inferred from the case law on the great common law duties. The statutory rules and the common law duties are thus but different species of the common law's expansive genus called "reasonableness," embedded deeply cultural understandings of reasonable or appropriate behavior seen at a time and place by people of a given social class and caste.

Interestingly, one can even identify the equivalent of the pile of rocks given to the defendant in torts and contracts cases. The endless silliness about the business judgment rule—conflict of interest, outside opinions, consideration of alternatives—and about the derivative actions—demand, refusal, independent committee—provides the classic basis for the corporate defendant to say "No!" in a circumstance where it is hard to point the finger elsewhere.

If the doctrine of corporations is seen in this way, the role of writing—of statute and contract, certificate and by-laws—and, to an even greater extent, of corporate counseling, takes on a different complexion. The work of the corporate lawyer is that of keeping the litigation lawyer's nose out of the business of business. As part of getting the paper in order, ritual incantations are used in the hope of keeping judicial or, even worse, citizen second-guessing under the guise of reasonableness away from the concerns of corporate actors as much as possible, a possibility based on the hope that specific risks can be allocated to individual actors, but more general risks have to be left to questions of reasonableness.¹⁴ The

14. Phil Halpern regularly and correctly reiterates this point. Unfortunately the ubiquity of the Material Adverse Change clause in all serious contracts

rubric is one of privateness, of attempting to keep the State out of commercial affairs, but the reality is one of keeping the larger community's inchoate understanding of appropriate behavior at bay.

Property law is no less chaotic than corporate law, probably even more so, since the corporations course and so corporations doctrine, is more integrated, less a series of discrete topics, than the property course.¹⁵ That course is a mess, for it is hard to tell what holds together nuisance, adverse possession, easements, zoning, eminent domain, estates in land, co-tenancies and landlord and tenant problems, other than buckram.¹⁶ For present purposes, however, the course can be split into three pieces.

First, nuisance, adverse possession, easements, and co-tenancies are all quite directly about interpreting the informal interactions of people in the light of a common understanding of what this behavior means. The law of zoning, on the other hand, seems at first blush to be a matter of administrative procedure, backed as always by constitutional notions of due process, the taking of property, and the obligation to pay just compensation. Zoning practice, however, tends to focus on common understandings of appropriate behavior, that is, the interests of adjacent and nearby landowners. Such concerns seem remarkably similar to those relevant to the notion of when justifiable regulation slides into an inappropriate taking, a deeply fact specific

undermines the lawyer's intentions for it clearly covers both party specific and economy general risks.

15. There has been no truly comprehensive book on property since JOHN CHIPMAN GRAY, *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY* (1888) (six volumes, one each for all six semesters of the then required Property course at the Harvard Law School.) What has happened to such an edifice is that the subject has fissured into numerous topics, and so courses, including sales, secured transactions, estates and trusts, zoning, real estate transactions, and mortgages.

16. Property is the only topic I discuss in this Paper that I do not know from teaching, but rather only from listening to colleagues and practicing lawyers. I know nothing about conveyancing law or the law of mortgages because I have never heard someone else talking about either topic. Thus, I have ignored both, though I would be surprised whether including them would force me to change my conclusions. I ignore eminent domain because I have it on good authority that the "public use" doctrine, the root of the subject, has become an empty placeholder for whatever the State wishes to do.

matter of common understanding of appropriate behavior in the context of market values. And the notion of what process is due is nothing but a discussion of appropriate bureaucratic behavior. Takings is little else, though admixed with market driven understandings of what it might be profitable to do with property.

Estates-in-land is another matter altogether, if for no other reason than that it introduces the concept of time, futurity, as central to law. Much of the law of future interests can be reduced to "magic words." Say these words in your instrument and a particular result will follow; use other words and there will be no telling what will happen. Still, the most dogged defender of the formalisms of estates will concede that from time to time the courts "get it wrong." The magic words are used and unfortunately the proper results do not follow. I would argue that these wrong decisions could be seen to be times when the "equities" press most strongly, again a matter of appropriate behavior.

The law of landlord and tenant, historically a branch of estates in land, seems to be settling somewhere in between the area of estates proper and nuisance, adverse possession and easements. Consumer leases seem to show some movement towards relying on common understandings of appropriate behavior, while commercial leases, because of their length and the care with which they are often drafted, seem to be closer to a magic words approach, though, given the lack of agreed magic words, certain similarities to questions of construction in contracts, and so to measures of appropriate understanding, can be seen to operate. Once this simplification is made, the role of the property lawyer in practice becomes clearer. Those lawyers also attempt to use the magic of words to keep the litigation lawyer's nose out of the business of property owners, to keep the inchoate notions of appropriate behavior alive in the community away from the disposition of capital.

By thus simplifying these various, seemingly separate hunks of the property course, one might suggest that the central question in modern property law may not be the identification of estates, but the reasonableness of any use or disposition of property. Placing this understanding of property with what seems correct about contracts, torts, and

corporations, one might formulate a theory of civil liability based, not on rules, but on reasonableness, a culturally determinate, class and caste informed, understanding of what behavior is appropriate, normal even, in a given situation. Thus, the general form for pleading what might be seen as a true action for the violation of a civil obligation would be:

unreasonable action + cause + injury + damage = \$

Under such a conception of civil liability, property law is like corporate law is like contract law is like tort law. Why is such an understanding absent from the writings of legal scholars?

Before returning to this, my initial question about absences, it is important to notice that a somewhat similar simplification of doctrine, again from my aerial viewpoint, can be had in areas of public law. Consider civil procedure, the course that most first year law students quickly learn to hate. The first topic is constitutional—personal jurisdiction, where the rule is that in order to exercise jurisdiction over a defendant that person, place, or thing must have “minimum contacts” with the forum. The second is less freighted, though not one twit clearer, Rule 12(b)(6) of the Federal Rules of Civil Procedure—motion to dismiss, where the rule is, in text at least, that dismissal is appropriate in circumstances when the plaintiff has “fail[ed] to state a claim upon which relief can be granted.”¹⁷ And the third is Rule 56—motion for summary judgment, where the rule is that for such a motion to be granted there must be no material issue of fact and the moving party must be entitled to judgment as a matter of law.¹⁸

All three topics drive law students crazy. Minimum contacts is the easiest for them because seemingly it can be turned into a counting game. When it becomes clear that some contacts count more than others, students tend to take more seriously the sign, “Abandon hope all ye who enter here.” Failure to state a claim is difficult because first semester, first year students know no law and couldn’t identify the elements of a cause of action if their lives

17. FED. R. CIV. P. 12(b)(6).

18. FED. R. CIV. P. 56.

depended on it. When they finally understand that, despite the fact that the rule says that the facts pled are to be taken as true, the plausibility of the pled facts seems to be of some importance, they know that they have reached some deep circle of Hell. So, by the time they get to summary judgment and are asked to identify the elements of a claim and then which, if any, of these elements is contested, they are sufficiently dispirited that they usually miss the clue in the word "material." All three rules suppress the notion of reasonableness that hides under each.

For a modest contrast, consider administrative law, another of the courses I have tried to help students learn. I took the class from ("with" is inappropriate here) Kenneth Culp Davis¹⁹ who devised a grand structure for administrative law that was designed as an antidote to the much narrower focus to the course championed by one-time Buffalo Law School Professor and Dean, Louis L. Jaffe—judicial review of administrative action.²⁰ After trying to teach administrative law, I came to see that Davis' understanding of the course was much more sensible than Jaffe's, but that the latter's obsession with judicial review was more interesting. Indeed, judicial review has generated mountains of scholarship plumbing the *Chevron* test²¹ and its progeny. Why this topic is so central to Jaffe's view of administrative law escapes me. Anyone who pays attention to administration generally knows that far more important is the lobbying that goes on both in legislatures when regulatory legislation is being considered and in agencies and legislatures when regulations are being written and applied/enforced. Perhaps what my colleague David Engel says about Alternative Dispute Resolution, "[l]aw is the alternative dispute resolution mechanism," is also the case in administrative law. Judicial review is the "alternate administrative norm shaping mechanism."

When one looks at the literature on judicial review, two topics get paired together: statutory intent and statutory

19. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE (1958).

20. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

21. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council Inc.*, 467 U.S. 837 (1984).

construction. Both are enormously complex, full of the rules and counter-rules some of which Llewellyn once attempted to catalog.²² Yet, stepping back, it is hard not once again to see reasonableness rear its simple-minded head. This is especially so because the answer to any question about why judicial review is so important is usually something about the rule of law, another very vexed topic. After one digests with the odd fact that it was Friedrich A. von Hayek who attempted to stuff the protection of “property” into this otherwise procedural protection,²³ and then spends enough time in the rule of law literature, that literature is easily summarized as requiring “reasonable administrative regularity.”

To summarize, it seems, to me at least, that we have not just one civil action, but one civil claim that unites tort and contract, crucial parts of corporations, and property. The concept that underpins this claim also is central to both civil procedure and administrative law. So, it is here that the question of developing an historical understanding of an absence begins to bite. Surely there ought to be some talk of an Anglo-American law of “civil obligation.”

Now I do not call attention to this absence because I am so damn bright. I’m not. There are all sorts of scholars who know more about torts, contracts, corporations, property, civil procedure, and administrative law than I do. I just see law differently, to steal from a bad restaurant commercial. Reasonableness seems to be a central part of what is a question of the local understanding of appropriate behavior, maybe not as local as 106th Street rather than 116th Street, but still more local than the United States. Why do intellectuals, that is what most law professors claim to be, hide the one thing that might bring some modest sense of order, both within and across doctrinal fields, to what is usually seen as a long train with cars that have funny names painted on them?

22. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950).

23. See FRIEDRICH A. VON HAYEK, *THE POLITICAL IDEAL OF THE RULE OF LAW* 46-60 (1955).

I think that intellectual historians are the right people to tackle this question, for I suspect that it is the law professor's understanding of legal theory as normative, and so rule obsessed, that bears much of the blame. If one understood why legal theory is normative, not descriptive, then one might be near to knowing why civil obligation, seen as an inquiry into reasonable behavior, is not central to our understanding of civil law. I would argue this way.

It is not precisely true that no legal intellectual has seen the absence of a notion of civil obligation in Anglo-American law. In *The Death of Contract*, Grant Gilmore predicted the eventual fusion of contract and tort into a general theory of civil obligation.²⁴ He was wrong. But, returning to the history of products liability law, one of his central bits of evidence, is a good place to start an inquiry into this absence. Remember what happened: a distinction between economic damages and damages from personal injury, the former, based on breach of warranty, anchored liability in contract, and the latter, based on strict products liability, anchored liability in tort, saved the day. The separateness of these two fields of law—an area of free agreement and an area of socially imposed obligation, whatever the reality of either freedom or social imposition—was preserved.

Given how essentially identical were the questions asked in both warranty and strict liability—did the product not turn out to be what it was alleged to be and so cause injury to someone—the differences in the answers given, differences that are far deeper (or is it wider?) than the obvious divergences exposed by the law of damages alone, suggests that something else has to be going on. For instance, tort not only offers greater damages, but also a wider notion of responsibility. Such a wider notion is inconsistent with an understanding that the productive individual is the motor of success in the property based, capitalist economy. Broad protection might be offered to the economically active person because the ability to continue to put property or self at risk in a world of contracting where few prisoners are taken, and so damages are limited, is central to the individual's role in economy.

24. GILMORE, *supra* note 5, at 87.

The foregoing words might suggest the role ideology could have in determining the answers given. However, I wish to avoid the reflexive slippage into the “I” word, once bandied about recklessly, for I do not think that such a multifarious concept is needed to explain the absence I have identified. In this country at least, there are multiple overlapping, though neither nested nor exclusive, cultures demarcated by variables such as age, class, ethnicity, occupation, religious affiliation, and distance from varying streams of media. Individuals may participate in several of these cultures at the same time. Each can be described as a set of practices that instantiate, and so follow more or less from enacted and/or un-enacted understandings of appropriate behavior on the part of participants in that culture. “Behavior” is the key word, for here the behavior of lawyers is suggestive.

What property lawyers seem to be doing in their written exercises is just what corporate lawyers are attempting to do in theirs, and I might add, contract drafters in theirs. All three are just sub-species of the transactional lawyer that dominates the contemporary large law firm. Such lawyers endlessly disparage as wasteful the activities of the litigation lawyers who make up the other part of such firms and who repay the favor by disparaging the bad drafting of transactional lawyers. The work of the transactional lawyer is designed to avoid the disruptive possibilities that the litigation lawyer brings. All transactional lawyers work in the hope of keeping litigators unemployed, for it is the litigation lawyer whose stock in trade is the question of the reasonableness of conduct that is common across fields of tort, contract, corporations, property, civil procedure, and administrative law.

Understandings of reasonableness abroad in the land can render insecure the desires of the capitalists whose transactions are alleged to make an economy run. This is why, if sued, capitalists want the litigation quickly resolved, a want that explains the peculiar dynamic of big corporate litigation—motion to dismiss/motion for summary judgment, denial, settlement. Thus, the most interesting future interests or commercial lease cases are those where words do not work their magic, just as the most interesting contracts cases are where the written disclaimers don’t work or the

corporations cases where the merger agreement comes undone. Such cases allow a modest peek at what a less specialized community might see as inappropriate behavior, effectively the world of the tort lawyer with whom I began this now long excursus.

I doubt that it is incidental that, as indicated above, the areas where the litigation lawyer's understanding of law and the understandings of other participants most diverge are areas where commerce/ownership is most deeply implicated. The creative destruction of capitalism is not a pretty sight. As Bert Westbrook has tried to explain in *City of Gold*,²⁵ one does not have to be a socialist to recognize that, while we may have little choice but to live in our economy, that does not mean that doing so is a comforting activity. The space between choice and comfort is where ideology as justification, as explanation of the naturalness of an unpleasant set of circumstances, might help soothe the way, at least for citizens confronted daily with that unavoidable, but unpleasant, reality. It is one thing to feel qualms about the society in which one lives and quite another to look at that society with a jaundiced eye. The panoply of doctrine that is the law professor's daily grist may be easier to live with than the daily reminder that the values of our commercial society are in some sense unappealing, such as might come from having to face the repetitive explication of "unreasonable action" as the centerpiece of one's teaching, writing, or practice life. An emphasis on law reform, the modest improvement of small pieces of law that can be argued to be somehow "wrong," that is at the center of legal scholarship and bar association activity, may embody a similar animation.

Here the opacity of the teaching of the rules of civil procedure, based as it is on the verbal understandings of the drafters and the practicing bar as well, adds weight to the ideological argument. That the litigation lawyers, the purveyors of reasonableness who emphasize the importance of telling a good story, a classic measure of the situatedness of the trier of fact, whether judge or jury, attempt to hide

25. See DAVID A. WESTBROOK, *CITY OF GOLD: AN APOLOGY FOR GLOBAL CAPITALISM IN A TIME OF DISCONTENT* (2004).

reasonableness in their own book of rules with the thin tissue of the distinction between questions of law and those of fact is nothing short of astonishing.²⁶ These rules, directed as they are at both judges and other attorneys, are a monument to wishful thinking of the “do what I say, but not what I do” variety. But, such thinking makes perfect sense if one’s worry is that a less specialized community might see as inappropriate behavior what good lawyers do every day in the course of litigation.

Another aspect of the denial of the ubiquity of reasonableness, of tort, that would be made obvious were there a single action for redress of civil obligation, is the bourgeoisie’s nightmares that fuel the rule of law. The protection of property at the heart of all dynastic novels is also at the heart of all commercial life and the lives of all of us in a society that values, indeed is founded on, commercial life. Not surprisingly, the fear that the State, or someone else using the apparatus of the State, will take away that which has been wrestled as one’s portion of the social wealth is at the center of all bourgeois life, regardless of the nominal social class of individuals in such a society. Consequently, the notion of the rule of the law (and not of The Prince or the State or the community at large) is, along with locks and fences, cops and life insurance, one of the ways of stilling that fear. A highly articulated system of rules, however dubiously efficacious, is more comforting, more damping of the fear of things that go, not “bump,” but “what was yours is now mine” in the night, than staring in the face a rule system that goes straight to “unreasonable action” and its companion understanding of the legal process—“reasonable regularity.” After all, it is property that pays for the institution that is law.

As noted above, to speak of the fear of possible action that might be taken by some governmental body to wrestle away one’s wealth is to talk of administrative law. The endless fear of administrative arbitrariness on the part of business interests is one of the great wonders of American life. It is

26. For my money, the best example of this activity is the New York Civil Practice Law and Rules, a code of such complexity that it requires a full semester course to master it well enough, not to practice, but to pass the New York Bar Exam, though only after having taken a bar review course too.

ironic in the extreme that a group which regularly hires lawyers to negotiate reasonable legislation, then, if the legislation is not to their liking, use the same lawyers to negotiate reasonable regulations, and only later uses some other lawyers to negotiate reasonable results in individual instances of administrative enforcement of the rules, can still be afraid of arbitrary action on the part of administrators and so seriously argue that such action would undermine the rule of law, when all of the group's previous actions have been directed toward avoiding the effect of any possible rule. And yet it is real. It is the language of judicial review. If this language were otherwise taught or spoken, if it were phrased in terms of reasonable administrative regularity, it would protect neither the administrators nor the administratees from what the more general community might see as less than appropriate behavior.

So, where are we then with the exploration of possible reasons for the absence of a recognition of a unified law of civil obligation? A good argument can be made that the late nineteenth century crystallization of two bodies of law, tort and contract, even as reconstructed in the aftermath of Legal Realism, obscures, intentionally perhaps, a fundamental unity at the levels of both concept and practice. That argument can be extended into fields such as corporations, property, civil procedure, and administrative law. Yet the proposition that law is centered, not on all of its exponentially expanding base of rules, but on the redress of damage from behavior seen to be unreasonable in a culturally determinate, class and caste informed, understanding of appropriate and normal in a given situation, is seemingly unthinkable by legal intellectuals who are part of the disciplinarily focused life that is the study of law.

This absence screams "Pay attention!" That this scream goes unheard should not, however, be taken to be an example of *La Trahison des Clercs*,²⁷ or of *des Avocates*, but rather as a recognition that law's job is not clarity of understanding, much less normative perfection. Law gets modest jobs done, hopefully done well, in a world that hardly is, and probably never will be, representative of humans' highest aspirations

27. See JULIEN BENDA, *THE TREASON OF THE INTELLECTUALS* (Richard Aldington trans., 1928).

for the common good. It is a world not just of callous economic destruction, but also of human cussedness. For workers in that world to meet the standard of “hopefully well done” they need the sense that there are boundaries to their tasks, that they need not face “the cosmic good” alone. For this reason, lawyers strongly identify with their field of specialization and its “own” set of rules. Not surprisingly, they see their specialty as giving them honor, and so status, within the profession. Seen this way, my story about this absence is thus not one about duplicity, much less “false consciousness.” It is a story about how otherwise life could not be comfortably lived. Or maybe not.²⁸ But, at the least, these or some other set of reasons offered to explain this absence might help us better understand what we mean when we tell tales about the intellectual history of law.

28. Mark Fenster, for example, sees the private law subjects as unified by the protection and distribution of property. I could easily agree, but would note that reasonableness also raises its ugly head under this understanding.

