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# Torts as Public Wrongs

Michael L. Rustad\*

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*An adequate tort law remains crucial to providing 'for' the people. Tort law is our primary fallback method of empowering ordinary people to remedy injustices to themselves through their courts.*

Judge Jack Weinstein<sup>1</sup>

## I. INTRODUCTION

As we reflect on whether the world needs American-style tort law (or whether it ever did), it is important to acknowledge that tort scholars are not of the same opinion about how torts should be defined, much less what functions they should fulfill. We all know, of course, what a tort is. Or so we think. The answer to the question is less straightforward than in other substantive fields.<sup>2</sup> Torts are a difficult branch of private law to pin down

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1. Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 243 (2008).

2. See H.L.A. HART, *THE CONCEPT OF LAW* 1 (1961) ("No vast literature is dedicated to answering the questions 'What is chemistry?' or 'What is medicine?' as it is to the question, 'What is law?'").

because the borderline between crimes and torts merges with the remedy of punitive damages (“crimtorts”).<sup>3</sup> The same act may constitute a crime as well as a tort, and the two branches of law share a common vocabulary with their use of the terms assault, battery, conversion, and trespass.<sup>4</sup> After a criminal prosecution, even in the event of an acquittal as in the infamous O.J. Simpson case, a plaintiff may file a private tort action seeking punitive damages. A criminal statute may be used in a negligence-based action to establish the duty of care and breach of duty, but a plaintiff must still establish a causal connection between the violation of the statute and damages.<sup>5</sup>

Similarly, the boundary between *ex contractu* and *delicts* (“contorts”) is imprecise, and torts frequently arise out of contracts in fields such as medical malpractice, employment termination, or the bad faith settlement of insurance claims.<sup>6</sup> William Prosser pointed to the definitional problem with torts in the first sentence of *Prosser and Keeton on the Law of Torts*: “A really satisfactory definition of a tort is yet to be found.”<sup>7</sup> Torts scholarship is “assaulted from any number of directions” by antagonistic perspectives.<sup>8</sup> The law of torts is a multi-paradigmatic field with most scholars fitting into

3. See generally Thomas Koenig & Michael Rustad, “Crimtorts” as Corporate Just Deserts, 31 U. MICH J.L. REFORM 289, 293–94 (1998).

4. “There are many wrongs that constitute both a public and private wrong, though the relative importance of the two wrongs is not of so much consequence.” 1 EDGAR B. KINKEAD, COMMENTARIES ON THE LAW OF TORTS: A PHILOSOPHICAL DISCUSSION OF THE GENERAL PRINCIPLES UNDERLYING CIVIL WRONGS EX DELICTO 12 (1903).

5. A criminal statute standard serves as a surrogate for the standard of care if the plaintiff was a member of the class of persons the statute was designed to protect who suffered the type of harm that the statute was designed to prevent.

6. GRANT GILMORE, THE DEATH OF CONTRACT (1974) (describing how contracts are being swallowed in a sea of torts in diverse subfields); see, e.g., *Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141, 145 (Cal. 1979) (torts arising out of insurance contracts in emergence of bad faith insurance actions). See generally Thomas C. Galligan, Jr., *Contortions Along the Boundary Between Contracts and Torts*, 69 TUL. L. REV. 457, 481 (1994) (contending that contorts arise where the contract is adhesive and the stronger party exploits its superior bargaining power). Sir Arthur Underhill’s 1881 torts treatise describes the divide between contract law and tort law in England. At common law there are “the two classes of wrongs *ex contracta*, and wrongs *ex delicto*; the former being such as arise out of the violation of private contracts; the latter, commonly called torts, spring from infractions of the great social obligation, by which each member of the state is bound.” ARTHUR UNDERHILL ASSISTED BY CLAUDE C.M. PLUMPTRE, PRINCIPLES OF THE LAW OF TORTS; OR, WRONGS INDEPENDENT OF CONTRACT 4 (1st American ed. From the 2d English ed., Albany, William Gould & Son 1881) (1873).

7. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 1 (5th ed. 1984); see also JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 3 (2004) (“The Latin root of ‘tort’ refers to conduct that is twisted (i.e., lacking in rectitude) while also twisting (i.e., interfering with the rights of others).”).

8. Robert L. Rabin, *Law for Law’s Sake*, 105 YALE L.J. 2261, 2261 (1996).

two competing camps. The emphasis is either on “morality or corrective justice” or on “social utility or policy.”<sup>9</sup>

The tort torch has been passed to a new cool coterie of law professors who eschew torts politics and prefer retreating to moral philosophy<sup>10</sup> These individual-justice theorists are also disengaged from the political crucible of torts where the entrenched special interests are blatantly political and self-interested.<sup>11</sup> 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.<sup>12</sup> These

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9. DAN B. DOBBS, *THE LAW OF TORTS* 12 (2000).

10. “While cool people have existed for ages, they weren’t called ‘cool’ until the 1950s . . . but undoubtedly were referred to in countless other ways . . . except, only partially could a single word describe it. Until the 1950s, no English word has ever existed which could grasp this demeanor in its entirety.” A.O. Kime, *The Concept of Cool*, MATRIX OF MNEMOSYNE (1st ed. Apr. 2007) <http://www.matrixbookstore.biz/freedom3.htm>. I do not mean that civil recourse theorists, such as Goldberg and Zipursky, are nonchalant, and I am not referring to their demeanor or their personalities. Rather, I am thinking of their tort law perspective as in control and moored to its historical foundations rooted in eighteenth-century English law. Goldberg and Zipursky separate themselves from the Great Society liberals of the 1960s by adopting the label of “liberal egalitarianism” as is clear from the following passage from their 2005 Calabresi Symposium piece:

For many, the 1960s were a time for personal experimentation and the pursuit of strongly egalitarian notions of social and political justice. In such a climate, there was little reason to find value in a part of the law so intently focused on what must have seemed to be hidebound notions of obligation and duty. Since that time, social and political conservatives have seized on the inattentiveness of liberal egalitarians to notions of responsibility and private right as a ground for rejecting liberal politics altogether. We accept the premise of the conservatives’ critique, but not its conclusion. The dissociation in the 1960s and 70s of egalitarian liberalism from notions of responsibility and redress, though understandable, was hardly inevitable. Nor is it a necessary feature of egalitarian liberal thought. Rather, it was a historical contingency; an avoidable and, in retrospect, costly accident of the Great Society. Liberal egalitarians can embrace a law of responsibilities and redress without sacrificing their commitment to reform and social and political justice.

John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 407–08 (2005) (arguing for their theory of civil recourse). *But see* 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 for Federalists*] (“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.”).

11. “Their theory identifies the central feature of tort law as the state’s provision of a right to recourse to those who have been the victims of a legal wrong.” Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1775 (2009).

12. It is not surprising that the majority of aficionados of civil recourse theory are young white males teaching in law schools. *See, e.g.*, Robert F. Blomquist, *Re-Enchanting Torts*, 56 S.C. L. REV. 481, 484 (2005) (noting that “Goldberg’s article creates an irresistible challenge accepted in this Article . . . to pick up the gauntlet and join him in an effort to defend and to re-enchant this beloved subject”); Solomon, *supra* note 11 (providing a normative account for civil recourse theory); *see also* Jason M. Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1749 (2007) [hereinafter Solomon, *Judging Plaintiffs*].

civil recourse theorists argue with force and eloquence that the aim of torts centers on the idea “that an act is right or wrong ‘in itself.’”<sup>13</sup>

This philosophy-driven approach is the “new cool” because of its detachment from the worlds of gender, race, inequality, loss-allocation and other relational social facts.<sup>14</sup> These “social facts” cannot be ignored because they have an independent power “apart from individual representations.”<sup>15</sup> The law of torts is embedded in a complex web of obligations, duties, norms and customs that are external to individual wrongs.<sup>16</sup> Civil recourse’s focus is on one-on-one private wrongs rather than collective injuries such as the recent BP oil spill or the recent Toyota runaway car cases.<sup>17</sup> To the synoptic recourse theorists, tort law is a civilized alternative to revenge for individual plaintiffs and serves no broader societal purpose such as deterrence, loss-allocation or social control.<sup>18</sup> To rescue torts, they say, torts must be re-conceptualized as individual justice derived “from the fact that the plaintiff has been wronged by the defendant.”<sup>19</sup> These theorists are too far removed from tort law in action to participate in the politicized tort reform debates where one side denounces torts as a venal institution that is destroying American competitiveness through “jackpot justice.”<sup>20</sup>

John Goldberg, a leading civil recourse representative, boldly asserts

13. Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 N.W. U. L. REV. 1765, 1775 (2009).

14. KENNETH L. MORRISON, MARX, DURKHEIM, WEBER: FORMATIONS OF MODERN SOCIAL THOUGHT 195 (2d ed. 2006).

15. *Id.*

16. *Id.* at 195–96.

17. John C.P. Goldberg and Benjamin C. Zipursky are the best-known representatives of the rights-oriented tort law that focuses on the relations between the plaintiff and the defendant as opposed to focusing on the public or social interests of tort law. See, e.g., Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 735 (2003) [hereinafter Zipursky, *Civil Recourse*]; Benjamin C. Zipursky, *Introduction*, 75 FORDHAM L. REV. 1143 (2006); 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 (2005) [hereinafter Goldberg, *Constitutional Status of Tort*]. The civil recourse theory is gaining new followers. See, e.g., Solomon, *Judging Plaintiffs*, *supra* note 12, at 1752 (adopting theory of civil recourse and contending that this theory can be unified by adopting a principle of self-help).

18. See Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1198 (1931) (regarding punitive damages as the functional equivalent of an “orderly, legal retaliation . . . to be preferred to a private vengeance, which will disturb the peace of the community”).

19. John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA L. REV. 1625, 1645 (2002).

20. See F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 538 (2006) (noting the reform movement will continue despite its doctrinal problems because of its self-interest in defense and its protectors).

that tort reformers will stop trying to kill off tort law if it can be returned to its eighteenth century Blackstonian roots as centered on private wrongs instead of torts serving greater societal functions, such as policing habitual corporate wrongdoers.<sup>21</sup> He argues that tort reformers as well as the teachers of tort law will love this subject once more if courts stop trying to use torts to solve America's social problems.<sup>22</sup> Goldberg classifies my scholarship (with Thomas Koenig's) as emblematic of the misuses or abuses of tort law as social engineering:

If, for Koenig and Rustad, the great thing about tort is that it permits judges and juries to adopt the role of unappointed corporate ombudsmen, for Posner the great thing about tort is that it permits judges to act as roving efficiency commissioners charged with the task of identifying and achieving the cost-efficient mix of precaution and injury. In fact, one of the great ironies of Koenig and Rustad's "defense" of tort law is that it plays directly into the hands of the tort reformers whose cause they seek to defeat. Victor Schwartz, a lawyer at the forefront of the modern movement to kill, or at least substantially curtail, tort—a movement with very different aspirations than the kill-tort movement of the early twentieth century—is only too delighted to argue about the worth of tort as an instrument for social engineering. If that is all it is good for, then it is hard to gainsay his point that democratically elected legislatures and expert regulators should be permitted to reengineer the world to make it safer for corporate America.<sup>23</sup>

My view is that tort law vindicates public wrongs and often serves as a consumer watchdog because popularly elected legislatures and expert regulators too often fail to protect us.<sup>24</sup> Scaling back the rights and remedies provided in tort would be, in effect, a form of deferential behavior to the "tort deformers" like Victor Schwartz who seek to dismantle tort law's

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21. Sir William Blackstone's *Commentaries* were written in the 1760s during the last days of the feudalistic writ system. A writ was a legal process commanding the arrest of a person or seizure of his property.

This element of damages seems to have been the chief invigorating force between the origin and development of trespass, and also the main cause of that remarkable development of writs and the forms of action which took place in the thirteenth century and included much else in addition to trespass.

George E. Woodbine, *The Origins of the Action of Trespass*, 33 YALE L. J. 799, 802 (1924).

22. John C.P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1518–19 (2002).

23. *Id.* at 1512–13.

24. Cf. Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1 (1995) (arguing that tort reform restrictions of punitive and noneconomic damages in the areas of products liability and medical malpractice have a disparate impact on women).

public functions.<sup>25</sup> In a world where corporations sometimes dominate legislatures and regulatory agencies, tort law maintains some independence, and its importance as an arena addressing corporate misbehavior should be permitted to evolve.<sup>26</sup>

This Article is a rejoinder to the civil recourse theorist's claim that tort law will be better served by retreating to the philosopher's prefecture of private wrongs. A subsidiary goal of this Article is to refute John Goldberg's claim that my sociologically-inspired theory of torts as public wrongs serves the interests of tort reformers rather than American consumers. In a nutshell, civil recourse theory is "tort reform in disguise," not the concept of torts as fulfilling wide-ranging purposes such as the social control of corporations. If judges adopt civil recourse theory, they will be less inclined to recognize new causes of action and plaintiff classes deferring instead to legislatures. Tort law is the multi-tasker of the common law and does far more than redress private wrongs.

Tort law not only redresses private wrongs, it also advances general deterrence through social control. The contemporary Toyota sudden acceleration claims and the BP oil spill are example of how tort law tackles collective injuries impacting the consuming public, the environment, and communities. While it is unclear what role tort law will ultimately play in redressing these collective injury cases, social interests will be relevant. This Article, which makes the case that tort law can and should redress public wrongs, unfolds in six parts. Part II introduces the idea of the teleological telescope and the deontological microscope illustrating their operation in sociological theory.<sup>27</sup>

In this part of the Article, I explain how the grand theories of classical

25. Tom Lambert, my late torts teacher, often used the term "deformer" to refer to the self-described tort reformers. See Michael L. Rustad, *Foreword to the Thomas F. Lambert, Jr., Symposium Issue on Sophisticated New Tort Theories*, 5 J. HIGH TECH. L. 1, 2 (2005) ("Tom Lambert wrote extensively about the groundless attacks on America's tort system, arguing that the 'tort deformers' routinely constructed an artificial civil justice crisis to mislead the public. Professor Lambert's mission was to counter the full-scale, wide ranging attack on consumer rights.")

26. The Chicago School of Economics posited "*the capture theory of regulation*. In this model, firms (or others) capture the regulatory process because each firm potentially bears a high cost if regulation constrains its behavior . . . ." STEVEN C. HACKETT, ENVIRONMENTAL AND NATURAL RESOURCES ECONOMICS: THEORY, POLICY, AND THE SUSTAINABLE SOCIETY 206 (M.E. Sharpe, 3d ed. 2006) (explaining how firms capture the regulatory process and discussing political economy of lobbying for favorable regulation).

27. "The classical distinctions are between: (1) teleological ethics in which consequences of the act determine its worth or correctness, and (2) deontological ethics in which formal rules determine correctness of the act." Victor R. Baker, *Environmental Restoration: Challenges for the New Millennium: Science, Engineering, and the Perception of Environmental Restoration* 42 ARIZ. L. REV. 287, 293 (2000) (emphasis added).



sociology were telescopic, but some modern theorists miniaturized their perspective to focus on the individual and the small group. Part III describes how modern tort theory has divided into competing camps based upon whether legal academics use a macroscopic or a microscopic approach. The basic distinction is that tort scholars use either a functional telescope (to study public wrongs) contextually or the philosopher's microscope to understand individual cases and controversies in an abstract way.<sup>28</sup> The division between macrotort and microtort theories is the functional equivalent of how these approaches play out in classical and contemporary sociological theory.<sup>29</sup> Torts have a micro aspect applicable to the pressing facts of the individual case and the relationships between the parties, but they also have macro features such as general deterrence and social control that fill in the interstices between criminal and civil law and to resonate our collective beliefs.<sup>30</sup>

Part IV comments on civil recourse theory's obscurantism and its lack of fit with the empirical reality of modern tort law's complexity. In this part of the Article, I discuss civil recourse theorist's misguided attempt to reduce the multiplicity of American tort law to one single "true" quintessence. To me, it seems that the main problem with this pure theory of tort law is its separation from social context such as gender, race, social class, power, and social change.<sup>31</sup> What is important to note here is that torts often redress public wrongs, beyond the interests of the immediate parties.<sup>32</sup>

Part V gives my pluralistic account of torts as public wrongs. While the manifest function of tort law is civil recourse or compensation, its latent function is vindicating public wrongs.<sup>33</sup> The latent function—the hidden face—of tort law is its public policy role addressing corporate misconduct from the bottom up rather than through a top-down government monolith.<sup>34</sup> The key institution is the plaintiff in the role of private attorney general who seeks civil recourse but also fulfills a broader purpose of identifying and punishing reckless corporate defendants who had previously evaded the attention of the public authorities.<sup>35</sup>

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28. See *infra* Part III.

29. See *infra* Part III. Economics, too, has macro and micro approaches, as does political science and philosophy, but these comparisons are beyond the scope of this Article.

30. See *infra* Part III.

31. Twenty-five years ago, James Boyle commented on how torts teachers too often excluded social context, bypassing variables such as class, power and stratification. Today the younger generation seems even more preoccupied with abstract cases "not fleshed out by all the examples, hypotheticals, phenomenologies, and other little stories that . . . are the most important part of . . . legal education." James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003, 1005 (1985).

32. See *infra* Part IV.

33. See *infra* Part V.

34. See *infra* Part V.

35. See *infra* Part V.

Part VI applies my sociological theory of public wrongs to the widespread problems created by dangerously defective software. The tort law lag in addressing defective software demonstrates the need to permit tort law to evolve to address social problems.<sup>36</sup> Hence, the focus is how “we the people” need brawny tort remedies to address social problems in the information-based economy.<sup>37</sup>

## II. THE TELESCOPE & THE MICROSCOPE IN THE SOCIOLOGY OF LAW

### A. Tort Macrotheories: Law and Society

#### 1. Sociological Theory’s Macroscopic

“Macrosociology is the study of total societies, [and] their major subunits” as well as their “emergent properties.”<sup>38</sup> The macro approach in sociology posits that society is “not reducible to the attributes of individual members.”<sup>39</sup> The founding fathers of sociology—Max Weber, Emile Durkheim, and Karl Marx—placed their emphasis on how laws interrelate with broader societal purposes.<sup>40</sup> Max Weber, in his *Protestant Ethic and the Spirit of Capitalism*,<sup>41</sup> for example, studied society comparatively and historically, highlighting convergences and divergences among societies using cross-sectional methodologies. His *Economy and Society* explains how the division between public and private law evolved in different

36. See *infra* Part VI.

37. See *infra* Part VI.

38. Edward W. Lehman, *Sociological Theory and Social Policy*, in *POLICY RESEARCH 10* (Amitai Etzioni ed., 1978) (emphasis omitted).

39. *Id.*

40. Deborah Ballam draws upon classical sociology in her account of tort law as a cultural reflector:

Tort law, perhaps more than any other area of modern U.S. law, is the magic mirror reflecting the ways changes in society lead to changes in the law. From the late nineteenth to the late-twentieth century, U.S. culture underwent a dramatic transformation in attitude toward the individual’s role in society. A belief in rugged individualism, laissez-faire in contractual relations, and survival of the fittest dominated late-nineteenth century thought. By the late-twentieth century, this dominant philosophy had been replaced, in large part, by recognition of the “complex interdependence” between individuals and between individuals and societal institutions.

Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 656–57 (2000).

41. See MAX WEBER THE PROTESTANT ETHIC AND THE “SPIRIT” OF CAPITALISM AND OTHER WRITINGS (Peter Baehr & Gordon C. Wells, trans., 2002).

societies over time.<sup>42</sup> Weber's "ideal type"<sup>43</sup> of public law is the regulation of state-oriented actions. In contrast, conduct regulated by private law is not classified as state-oriented.<sup>44</sup> He found that torts were far more detailed and procedural in common law systems than under the civil law, a distinction that is still present in the twenty-first century.<sup>45</sup> Weber, who taught commercial law at the University of Berlin, posited that torts were more detailed and developed in common law systems because of *stare decisis* as well as specialized rules of evidence not found in civil code jurisdictions.<sup>46</sup> Weber's studies of legal rationality demonstrated how bureaucratic formalism adumbrated legal conservatism.<sup>47</sup> He was the first to critique the "professional ideology" of legalism and to show how it conflicted with democracy.<sup>48</sup>

Emile Durkheim (1857–1917) was a French sociologist whose *De La Division Du Travail Social (The Division of Labor in Society)*, advanced a functional theory of the evolution of modern legal systems.<sup>49</sup> Durkheim's perspective was that crimes not only affected the individual but also contravened the collective conscious or community (societal) norms.<sup>50</sup> Whether the problems were the division of labor, criminal behavior, or suicide, he found social solidarity to be a key underlying factor. For Durkheim, the division of labor determined in large part the nature of other

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42. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIOLOGY* (Guenther Roth & Claus Wittich, ed. 1978) [hereinafter WEBER, *ECONOMY AND SOCIETY*].

43. See Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 603 n.42 (1999). Mr. Bodansky notes: "The concepts of 'authority' and 'legitimacy' are what Max Weber called 'ideal types,' abstractions that represent one component of reality." *Id.* (citing H. H. Gerth & C. Wright Mills, *Introduction to FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 59 (H. H. Gerth & C. Wright Mills eds., 1946)).

44. WEBER, *ECONOMY & SOCIETY*, *supra* note 42, at 641.

45. *Id.* at 896.

46. *Id.*

47. See JUDITH SHKLAR, *LEGALISM: LAW, MORAL, AND POLITICAL TRIALS* 15 (1986) (arguing that Weber had a dynamic theory that reacted to the "intensification and rigidity of the legalism he saw around him").

48. *Id.* at 18.

49. Michael L. Rustad, *Private Enforcement of Cybercrime on the Electronic Frontier*, 11 S. CAL. INTERDISC. L.J. 63, 69 (2001).

Durkheim "argued that the division of labor produced anomie: "In effect, when competition places isolated and estranged individuals, in opposition, it can only separate them more." During the transition to an industrial society, anomic breakdowns occur. In the developed industrial society, the division of labor would evolve into a new source of social cohesion. Durkheim argued that crime in an industrial society is linked to the division of labor where the remedies are expanded to include restitution, as well as repression.

*Id.*

50. See generally *id.* ("Durkheim theorized that 'disruptions presumably reduce the individuals' sense of belongingness, resulting in anomie at a personal level.' He blamed anomie on the disintegration of social norms that occurs due to changes in social institutions caused by transformation of the economic base.").

social institutions including the law. His thesis was that as society becomes more complex and differentiated, the law swings from repressive to restitutive law.<sup>51</sup> Durkheim's 1897 empirical study, entitled *Suicide*,<sup>52</sup> explained that people were more likely to take their own life if they were socially isolated. Durkheim's empirical study diminished, if not entirely refuted, widely-believed explanations for the incidence of suicide such as climatic, geographic, national character, or internal psychological differences.<sup>53</sup>

Through a comparative analysis of government data from Bavaria, Burgundy, and Prussia, Durkheim was able to show a relationship between suicide rates and social integration.<sup>54</sup> Sociological and demographic variables such as age, gender, marital status, religious membership, and family ties insulated the individual from the psychic pain that leads to suicide.<sup>55</sup> Durkheim focused on the form of suicide he called anomic suicide.<sup>56</sup> Anomic suicide is associated with social stressors such as

51. See Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1461 n.321 (1993) ("Emile Durkheim's observation [was] that as society becomes more complex, it shifts from punitive to restitutive law.") (citing EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 49–69 (George Simpson trans., The Free Press 1947) (1893)).

52. See generally ÉMILE DURKHEIM, *SUICIDE: A STUDY IN SOCIOLOGY* (John A. Spaulding & George Simpson, trans., The Free Press of Glencoe, 1951) (1897).

53. Ed Rubin notes how Durkheim eliminated "'extra-social factors' that cause suicide, such as psychopathology and heredity," but focused instead on the social correlates of suicide. Edward Rubin, *Assisted Suicide, Morality, and Law: Why Prohibiting Assisted Suicide Violates the Establishment Clause*, 64 VAND. L. REV. 763, 769 (2010). Summarizing the effect of these social causes, [Durkheim] states:

[I]ndividual peculiarities could not explain the social suicide-rate; for the latter varies in considerable proportions, whereas the different combinations of circumstances which constitute the immediate antecedents of individual cases of suicide retain approximately the same relative frequency. They are therefore not the determining causes of the act which they precede . . . .

*Id.* (quoting DURKHEIM, *supra* note 52 at 261).

54. DURKHEIM, *supra* note 52, at 153. Durkheim also uncovered differences in suicide rates comparing Protestant and Catholics in Swiss cantons and German regions. *Id.* at 88. Catholics had fewer suicides than Protestants controlling for other variables. "Switzerland is, on this score, particularly instructive. There we find cantons of all religions and of all nationalities, and we know that the inclination to commit suicide varies according to religious persuasion and national origin." ÉMILE DURKHEIM, *ON INSTITUTIONAL ANALYSIS* 241 (Mark Traugott ed., trans., 1978).

55. See generally RAYMOND ARON, *MONTESQUIEU, COMTE, MARX, DE TOCQUEVILLE. SOCIOLOGISTS AND THE REVOLUTION OF 1848*, at 32 (Transaction Publishers 2009) (1967).

56. See Rustad, *supra* note 49, at 69.

Durkheim described crime as a dysfunctional consequence of the deregulation of norms or a state of anomie. Anomie, or normlessness, was likely to be the greatest when societies were undergoing social and technological change. Durkheim theorized that "disruptions presumably reduce the individuals' sense of belongingness, resulting in anomie at a personal level." He blamed anomie on the disintegration of social norms that occurs due to changes in social institutions caused by transformation of the economic

migration or other dislocation that separate individuals from their traditional social bonds.<sup>57</sup> Durkheim's concept of anomie developed the thesis that social attachments were critically important to understanding social problems such as suicide and criminal behavior:

In Durkheim's 1897 work, *Suicide*, he argues that inactive or disrupted group life creates "unregulated individuals with 'insatiable appetites' and 'fevered imaginations.'" Durkheim was the first to explain suicide as a sociological phenomenon. In his classic *The Division of Labor in Society*, he contended that societies may be broadly classified into two types, mechanical solidarity and organic solidarity. Mechanical solidarity is the division of labor common in pre-industrial societies with homogenous dwelling in small villages.

In contrast, organic solidarity is the division of labor common in industrialized or urban societies with a well-defined manufacturing base. In the mechanical solidarity of pre-industrial societies, criminal law punishes offenses against the "collective conscience." Durkheim defined the collective conscience as "[t]he totality of beliefs and sentiments common to average citizens of the same society [that] form a determinate system which has its own life." The collective sentiments to which crime corresponds, therefore, must singularize themselves from others by some distinctive property—they must have a certain average intensity. Not only are these sentiments engraved on all consciences, but they are strongly engraved. Because crime offends the collective conscience, an infraction attacks the entire social fabric. In Durkheim's words, "Everybody is attacked; consequently everybody opposes the attack."<sup>58</sup>

Karl Marx's *Das Kapital* (Capital) was a macrosociological study of how economics shapes social institutions and, ultimately, social reality. Marx stood the German philosopher Georg Hegel's concept of dialectics "on its head" in his concept of dialectical materialism to analyze capitalism.<sup>59</sup>

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base.

*Id.* (quoting Mark Abrahamson, *Sudden Wealth, Gratification and Attainment: Durkheim's Anomie of Affluence Reconsidered*, 45 AM. SOC. REV. 49, 49 (1980)).

57. See DURKHEIM, *supra* note 52, at 252.

58. Rustad, *supra* note 49 at 67–68 (alteration in the original) (citation omitted) (arguing that criminal law lags behind information-based and other technologies).

59. KARL MARX & FREDERICK ENGELS, MANIFESTO OF THE COMMUNIST PARTY 49 (Cosimo Classics 2009) (1848).

The modern bourgeois society that has sprouted from the ruins of feudal society has not done away with class antagonisms. It has but established new classes, new conditions of oppression, new forms of struggle in place of the old ones.

Marx looked upon the basic economic structure as containing its own opposition, “the seeds of its own destruction.”<sup>60</sup> He argued that the character of economic organization (base) was the independent variable shaping culture as well as social institutions such as the legal system (superstructure).<sup>61</sup> Marx was impressed with capitalism’s dynamic ability to both preserve and defend itself (through the accumulation of capital, wage labor, and the role of the state in protecting the capitalist assets) and influence society and social change.<sup>62</sup> Law protected the capitalist order through both the physical force exercised by its enforcement mechanisms and the ideological hegemony that arose from defining the legal order as synonymous with justice.

Karl Marx visualized law in terms of the interlocking relationship between society’s base (economic structure) and superstructure (culture and other social institutions including law). He argued that the law as well as other superstructural institutions

will always reflect and promote the cultural values of the more powerful economic classes in that society and furthermore that any work of art or other cultural product is largely a product of the creator’s economic class, or more specifically, his or her specific relationship to the means of production.<sup>63</sup>

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Our epoch, the epoch of the bourgeoisie, possesses, however, this distinctive feature: it has simplified the class antagonisms. Society as a whole is more and more splitting up into two great hostile camps, into two great classes, directly facing each other: Bourgeoisie and Proletariat.

*Id.* at 40–41.

60. *See id.*

Conservation of the old modes of production in unaltered form, was, on the contrary, the first condition of existence for all earlier industrial classes. Constant revolutionising of production, uninterrupted disturbance of all social conditions, everlasting uncertainty and agitation distinguish the bourgeois epoch from all earlier ones. All fixed, fast-frozen relations, with their train of ancient and venerable prejudices and opinions, are swept away, all new-formed ones become antiquated before they can ossify. All that is solid melts into air, all that is holy is profaned, and man is at last compelled to face with sober senses, his real conditions of life, and his relations with his kind.

*Id.* at 44.

61. In *Manifesto of the Communist Party*, Marx and Engels wrote: “The proletariat is without property . . . . Law, morality, religion are to him so many bourgeoisie prejudices, behind which lurk in ambush just as many bourgeois interests.” *Id.* at 56.

62. KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* 554 (Fredrick Engels ed., Samuel Moor & Edward Aveling trans., Charles H. Kerr & Co. 1906) (1867).

63. Clair Wright, *Reconciling Cultural Diversity and Free Trade in the Digital Age: A Cultural Analysis of the International Trade in Content Items*, 41 AKRON L. REV. 399, 449 n.229 (2008).

Marx would likely have regarded harsh, regressive doctrines denying recovery to injured workers or consumers in the nineteenth century as reflecting the interests of the ruling class, particularly the owners of the means of production.<sup>64</sup> Given his theory, Marx would also likely have acknowledged the potential of law to emancipate and serve the underprivileged in certain circumstances.<sup>65</sup> Law is both a means of oppression and a means of resistance. These seemingly opposing sides of the law—as a source of comfort for the privileged and as a means of agitation for the oppressed—are bound together in a significant and interesting way.

Macrosociologists, whether liberals like Weber and Durkheim or radicals like Marx, found law reflected societal variables, such as social stratification, class, power, and social change.<sup>66</sup> In my torts scholarship, I tend to use a sociological telescope to gain insight into how tort lawsuits advance public as well as private purposes.<sup>67</sup> This structural or functional

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64. See Jude P. Dougherty, The Brendan Brown Lecture: *Accountability without Causality: Tort Litigation Reaches Fairy Tale Levels*, 41 CATH. U.L. REV. 1, 4 (1991) (“Marx was convinced that the bourgeois law of his day was the product of a capitalist ruling class, a class which created the law to sustain its mode of economic organization. Marx’s critique focused on nineteenth century tort law, which he thought tempered entrepreneurial risk with a doctrine that places the risk of accidents and product defects on the user.”).

65. E.P. Thompson, the late English historian, conducted a study of the Black Act, a statute enacted by the Hanoverian Whig Parliament in 1723. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT 258–69* (Penguin Books 1990) (1975) (studying the 1723 Black Act and revolt of citizens of Hampshire and Berkshire against the creation of scores of new capital offenses relating to traditional land-uses such as deer hunting and wood gathering). The manifest function of the statute was to protect the privacy of the landed gentry by brining in the death penalty for nearly every imaginable rural offense against property that had not been a serious offenses before—such as deer-stealing, cattle-maiming, arson, the cutting of trees, and sending threatening letters—reveals that the rule of law is but another name for the rule of class. *Id.* In other words, the architects of law had everything to gain from it and, it follows that those who were oppressed by the law would have lost nothing by its absence. *Id.* Thompson, however, arrives at another conclusion in his discussion of the rule of law at the end of his book. *Id.* The rule of law is also a utopian possibility. *Id.* The theme of Thompson’s work is that law does not function merely as a form of domination. *Id.* He also acknowledges that there is a moment of opposition or negation within it which is significant, and which the forces of emancipation must recognize, respect, and use. *Id.*

66. See Hugh Baxter, *Habermas’s Discourse Theory of Law and Democracy*, 50 BUFF. L. REV. 205, 263–64 (2002) (describing how structural-functionalists view social institutions in tandem). “[M]odern societies are differentiated into a plurality of functional subsystems, such as the economy, politics, law, and science, each of which is a self-producing and self-reproducing network of communication.” *Id.*

67. See, e.g., Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes With Empirical Data*, 78 IOWA L. REV. 1, 6 (1992) [hereinafter Rustad, *In Defense of Punitive Damages*] (describing an empirical study of a quarter century of punitive damages in product liability); Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15 (1998) [hereinafter Rustad, *Unraveling Punitive Damages*] (providing secondary analysis of all extant empirical studies of punitive damages); Michael L. Rustad, *The Negligent Enablement of Trade Secret Misappropriation*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 455 (2006) [hereinafter Rustad, *Negligent Enablement*] (studying a decade of Economic Espionage Act prosecutions and trade secret misappropriation); Michael L. Rustad, *Heart of Stone: What is Revealed About the Attitude of Compassionate Conservatives Towards Nursing Home*

approach draws, in large part, upon classical sociologists who examined how law, policy, and society interrelated. The insight of these functionalists is that society is “not reducible to the attributes of individual members.”<sup>68</sup> Macrosociologists do not look at aesthetics or morals as “levers of transformation” but instead focus on social structure and power relations.<sup>69</sup>

## 2. Microsociology’s Studies of Face-to-Face Interaction

Macro tort theorists, like their sociologist counterparts, tend to look at the big picture of the complex interrelationships among law, policy, and society.<sup>70</sup> What then is microsociology? While macrosociologists examine the total society and its emergent properties, microtheorists give emphasis to studies of small groups or social psychology.<sup>71</sup> These theorists conduct field and empirical studies of individuals’ face-to-face interaction in small groups.<sup>72</sup> The masters of classical sociological thought were comparativists, as opposed to the microtheorists who pioneered social psychology, symbolic interactionism, ethnomethodology and the dramaturgical approach.<sup>73</sup> The significant microsociology theories include social psychology, symbolic interactionism, and the dramaturgical approach.<sup>74</sup> In his well-regarded

*Practices, Tort Reform, and Noneconomic Damages*, 35 N.M. L. REV. 337 (2005) [hereinafter Rustad, *Hart of Stone*] (conducting an empirical study of nursing home negligence cases); Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDIS. L.J. 77 (2004) (conducting an empirical study of cybertort cases).

68. Lehman, *supra* note 38, at 10.

69. *Id.* at 13.

70. In economics, there is also a divide between macro and micro approaches. However, micro and macrotheorists are not like the competing monistic theories as in tort law. Rather, the macro and micro approaches are complimentary.

71. Lehman, *supra* note 38, at 10.

72. *Id.*

73. Social psychology focuses on “the effects of social and cognitive processes on the way individuals perceive, influence, and relate to others.” ELIOT R. SMITH & DIANE M. MACKIE, *SOCIAL PSYCHOLOGY* 3 (2000). Symbolic interactionism focuses on shared meaning for individuals while dramaturgy examines the social construction of reality and meaning in everyday life. *See, e.g.*, ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

74. Symbolic interactionism, developed by sociologists such as George Herbert Mead, W.I. Thomas, Louis Wirth, Robert Redfield, Charles Horton Cooley, and Herbert Blumer, emphasizes the research methodology of participant observation in contrast to the telescopic social surveys of the classical theorists. Herbert Blumer, the most famous symbolic interactionist, describes this perspective as focusing on how individuals act toward things based upon the meaning ascribed to them. HERBERT BLUMER, *SYMBOLIC INTERACTIONISM: PERSPECTIVE AND METHOD* 2 (University of California Press 1969). A second postulate is that the meaning ascribed to objects arises out of social interaction. *Id.* Finally, these meanings are shaped and reshaped by interpretation processes. *Id.* The Society for the Study of Symbolic Interaction “organiz[es] scholars interested in qualitative, especially interactionist, research.” University of California Press, <http://ucpressjournals.com/>



microsociological studies, Thomas Scheff, for example, viewed the social psychology of the emotional/relational world as the most basic unit of sociological analysis.<sup>75</sup>

### III. THE MACROTORT & MICROTORT THEORIES APPLIED TO TORT JURISPRUDENCE

Macro tort theorists, like their sociologist counterparts, tend to look at the big picture of law, policy, and society. American tort theory in the new millennium has no single organizing principle and is a “battleground of social theory.”<sup>76</sup> The micro tort emphasis is rights-based (deontological) rather than goals-based (teleological).<sup>77</sup> Classical torts scholars, as we shall see, also employ the goal-based teleological approach, as opposed to the deontological micro theories that focus on one case at a time.<sup>78</sup>

#### A. Torts’ Teleological Telescope

*Modification implies growth. It is the life of the law.*

Louis D. Brandeis.<sup>79</sup>

From the late nineteenth century through the twentieth century, macro tort theories have had the upper hand in American law schools.<sup>80</sup> The work of Oliver Wendell Holmes Jr. indicates that he was the first macro tort theorist to break from the pre-modern private wrongs paradigm. Holmes’s grand theory was better suited to understanding the collectivization of

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journalSoc.asp?j=si. Erving Goffman developed the dramaturgical theory in his 1959 book, *The Presentation of Self in Everyday Life*. For Goffman, like Shakespeare, “All the World’s a Stage.” See GOFFMAN, *supra* note 73, at 17–25. He compares the front stage (scripted performances) with the back stage (what is concealed from the public). See *id.* Goffman examines how occupations like waitressing, sex workers, and other interactions have a front and backstage. See *id.*; see also ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1986) (studying how mental patients, drug addicts, deformed persons and others with “spoiled identity” manage their everyday interactions).

75. See generally THOMAS J. SCHEFF, *MICROSOCIOLOGY: DISCOURSE, EMOTION AND SOCIAL STRUCTURE* (1994).

76. William Prosser’s insight was that tort law by its very nature was “a battleground of social theory.” PROSSER AND KEETON ON THE LAW OF TORTS § 3 (W. Page Keeton, ed., 5th ed. 1984).

77. “The basic difference between teleology and deontology hearkens back to the ancient questions of Socrates: ‘What is the good?’ and ‘What is justice?’ In distinguishing the two, the good relates to states of being. Normatively, a person or a society is to *be* good. Justice relates to actions.” Bailey Kuklin, *The Morality of Evolutionarily Self-Interested Rescues*, 40 ARIZ. ST. L.J. 453, 476 (2008).

78. See *infra* Part III.A.

79. *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 236 (1924) (Brandeis, J., dissenting).

80. See John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003) (providing a historical account of why macro theories predominated in American tort law from Holmes’s time to the present).

“injuries to persons or property by railroads, factories, and the like.”<sup>81</sup> In *The Path of the Law*, Holmes describes torts of the late nineteenth century as broader in scope than the “isolated, ungeneralized wrongs” such as assaults and slanders of an earlier era.<sup>82</sup>

Individual tort cases provided a powerful check against defendants that risked public safety. The earliest reported American case in which punitive damages were awarded was *Fleet & Semple v. Hollenkemp*.<sup>83</sup> In *Fleet*, the Kentucky Supreme Court upheld exemplary damages against a pharmacist who breached his duty to protect the public by mistakenly mixing a poison into a prescription.<sup>84</sup> The customer became violently ill after ingesting the poisonous drug. The jury awarded the plaintiff \$1,141.75—an amount that far exceeded the plaintiff’s medical expenses.<sup>85</sup> The Kentucky Supreme Court upheld the exemplary award ruling that the jury could consider circumstances of aggravation or extenuation.<sup>86</sup>

By the middle of the nineteenth century, courts began to explicitly address tort law’s public purposes in cases where common carriers recklessly endangered public safety. For example, in *Wardrobe v. California Stage Co.*,<sup>87</sup> the California Supreme Court reversed an exemplary damages award to a traveler injured when a top-heavy stagecoach overloaded with passengers overturned.<sup>88</sup> The trial court instructed the jury to impose damages to prevent future “recklessness in the conduct of stages to the great peril of passengers.”<sup>89</sup> The California Supreme Court found the plaintiff’s action should work to recover damages for his individual injury “and not as a public prosecutor to vindicate the wrongs of the community.”<sup>90</sup> The court thus refused to allow the plaintiff to recover damages “laid for the

81. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897). For example, courts increasingly imposed punitive damages against railroads for a variety of malicious actions, including: “wrongfully ejecting passengers; carrying passengers past their stations; accosting patrons in insulting fashions; failing to stop when signaled; failing to care for known sick; refusing to carry the blind; allowing insults and fights; willful delaying of passengers; and obstructing the tracks.” Alfred G. Nichols, Jr., *Comment, Punitive Damages in Mississippi—A Brief Survey*, 37 MISS. L.J. 131, 138 n.39 (1965). For an extensive discussion of punitive damages awards against railroads see *Smith v. Wade*, 461 U.S. 30, 57–84 (1983) (Rehnquist, J. dissenting).

82. Holmes, *supra* note 81, at 467.

83. 52 Ky. (13 B. Mon.) 219 (1852).

84. *Id.*

85. *Id.*

86. *Id.* at 180.

87. 7 Cal. 118 (1857).

88. *Id.* at 120.

89. *Id.*

90. *Id.*

benefit of the public.”<sup>91</sup>

The *California Stage Co.* case is emblematic of torts that involve a risk to the public greater than the harm done to an individual plaintiff. Collective torts caused by common carriers or industrial enterprises are qualitatively different from traditional one-on-one tort law because collective torts often arise because companies decided to chance it, endangering the larger community.<sup>92</sup> By the late 1800s, railroads had become common defendants in tort lawsuits where there were larger issues such as public safety and abuse of power, in addition to the private wrong done to an individual plaintiff.<sup>93</sup> During this same period, frequent railroad derailments, steamboat fires, and streetcar accidents led to “the frightful destruction of life, and limbs and property” and called for stricter tort remedies to protect American workers and consumers.<sup>94</sup> Holmes proposed a fault-based torts paradigm that displaced the archaic and unworkable writ system.

In Holmes’s view, negligence generally governed the “great mass” of ordinary cases arising from such conventional prosaic activities as riding horses, using fireplaces, maintaining common fences, or lifting a stick to part fighting dogs. This estimate was empirical, not normative.<sup>95</sup>

Decades before Holmes became a justice of The Massachusetts Supreme Judicial Court (“SJC”), that court had already begun reshaping American

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91. *Id.*

92. The *California Stage Co.* itself is a prime example of a case where public safety and not just the injuries of one individual plaintiff were at issue.

93. Michael L. Rustad, *Happy No More: Federalism Derailed by the Court That Would be King*, 64 MD. L. REV. 461, 487–88 (2005) (discussing punitive damages awards against the railroad in the late nineteenth century); see, e.g., *Louisville & Nashville R.R. Co. v. Eaden*, 93 S.W. 7, 7 (Ky. 1906) (describing how a railroad fireman “recklessly, negligently, and wantonly” threw a shovelful of burning cinders, embers, and ashes into [the plaintiff’s] face, inflicting upon her serious burns and permanent injury to her eyesight, from which she has suffered great injury and damage, and for which she prayed a judgment in the sum of \$ 5,000”); *Sioux City & P. R.R. v. Stout*, 84 U.S. 657 (1873); *Keffe v. Milwaukee St. P. R.R. Co.*, 21 Minn. 207 (1875) (permitting young children to recover for injuries sustained on railroad turntables despite the general rule that no duty of care was owed to a trespasser); *San Antonio & A.P. R.R. Co. v. Skidmore*, 65 S.W. 215 (Tex. 1901) (upholding a \$ 1,000 verdict in favor of an eleven-year-old girl crippled by an accident caused by playing on an railroad turntable that was attractive to children).

By the late nineteenth and early twentieth century, the focus of punitive damages had shifted from individual wrongs to wrongs ‘committed by corporate agents typically involving defective operations or gross carelessness in the production of goods or services.’ Corporate wrongdoers such as common carriers had the potential of causing potential injury to large numbers of the general public. High-handed or arrogant corporate policies by common carriers also became the basis for punitive damages by the first part of the nineteenth century:

Rustad, *supra*, at 487–88.

94. Rustad, *supra* note 93, at 490 (quoting *Frink & Co. v. Coe*, 4 Greene 555, 559 (Iowa 1854).

95. DAVID ROSENBERG, *THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY* 127 (1995).

tort law to fit a fault-based model. Lemuel Shaw, who became Chief Justice of the SJC in 1830, authored the landmark decision of *Brown v. Kendall*, which marks the birth of the negligence paradigm.<sup>96</sup> A trial in the Massachusetts Court of Common Pleas established the basic facts in this famous case, which has been known as the “fighting dogs” case by generations of American law students.<sup>97</sup> Two dogs were fighting in the presence of their masters, and the accident occurred when one dog owner began beating the dogs with a four-foot stick “in order to separate them.”<sup>98</sup> The Massachusetts appeals court recounted the facts in the first American negligence case:

The plaintiff was looking on, at the distance of about a rod, and that he advanced a step or two towards the dogs. In their struggle, the dogs approached the place where the plaintiff was standing. The defendant retreated backwards from before the dogs, striking them as he retreated; and as he approached the plaintiff, with his back towards him, in raising his stick over his shoulder, in order to strike the dogs, he accidentally hit the plaintiff in the eye, inflicting upon him a severe injury.<sup>99</sup>

After the dogfight case, negligence swept the nation, and the fault standard expanded to fit railroad accidents, stagecoach rollovers, and industrial accidents.

While this was the first judicial acknowledgment of the fault principle, negligence did not evolve into full-blown accident law until decades later. The very definition of negligence involves balancing larger concerns than those of the immediate parties. The torts of the local community were also transformed as the economy industrialized in the late nineteenth century and early twentieth century:

Negligence or accident law expanded rapidly in the 1850s to protect the public against behavior like recklessly constructing an unsafe bridge or failing to maintain a railway trestle, and mass disasters such as the Triangle Shirt Waist Factory fire. The

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96. *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850).

97. My late torts teacher, Tom Lambert, often remarked that all torts had a birthday. A good case could be made that the birth of negligence was in October of 1850 when the Massachusetts Supreme Judicial Court handed down *Brown v. Kendall*.

98. *Kendall*, 60 Mass. (6 Cush.) at 292–93 (recounting prior proceedings and facts established in the court of pleas).

99. *Id.*

development of negligence freed courts from the shackles of the writ system and permitted courts to begin balancing utilities against risks. Negligence, by its very nature, involves judgments that weigh the social benefit of activities against the risks of harm to the public. In *Thane v. Scranton Traction Co.*, the Pennsylvania Supreme Court noted an important social benefit of industrial development: ‘Rapidity of transit is no longer a mere convenience to the traveler. It has become a matter of vital interest to the general business of the community.’ The same technology that benefited the public, however, endangered the entire community when not carefully managed. Fires, explosions, shipwrecks and other mass disasters on a scale that was unknown in Blackstone’s day resulted from the negligent use of the dangerous instrumentalities necessary for an industrial economy.<sup>100</sup>

Holmes’s conception of negligence transformed tort law by substituting objective standards for “subjective inquiries.” These “compensation or deterrence approaches” to tort law highlighted regulation and social engineering rather than moral rights:

In retrospect, it is apparent that compensation-deterrence theory is heavily reliant on the moral-, law- and concept-skepticism that was very much in vogue among American legal scholars in the first half of the Twentieth Century. While it would take us far afield to assess the validity of these skeptical theories, one can at least respond by noting that what may have seemed in 1890 or 1930 to be compelling proofs of the emptiness of moral and legal concepts are not widely regarded as carrying much weight today. At a minimum, one can safely assert that compensation-deterrence theorists have not done the philosophical work necessary to obtain “summary judgment” against accounts of tort law that invoke those concepts.<sup>101</sup>

Under Goldberg’s narrative, Blackstone’s formulation of torts was part of the conventional wisdom until Holmes reconfigured tort law around accident law.<sup>102</sup> Holmes, Bohlen, Green, and other grand tort theorists “adapt[ed] Blackstone’s law of private redress to the wrongs perpetrated by railroad owners, automobile drivers, and product manufacturers.”<sup>103</sup>

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100. 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, 27 (2002) (citations omitted).

101. Goldberg, *supra* note 80, at 533.

102. Goldberg, *Unloved: Tort in the Modern Legal Academy*, *supra* note 22 at 1505–06.

103. *Id.* at 1506.

Torts took on new functions and, in John Goldberg's view, performed them badly:

Even as Holmes was developing his theory of tort, tort law was being called upon to do something it had never been asked to do before: handle a major economic, social and political problem, namely the phenomenon of mechanized accidents, particularly workplace accidents. In the eyes of many, tort failed this test quite miserably. Too many businesses employed shamelessly unsafe practices; too many maimed workers were left without redress; too many widows and orphans were left without support. At best, tort had proved itself unable to cope with the problems posed by a central feature of the industrial world. At worst, it was—as Charles Gregory and Morton Horwitz would later suggest—a mere handmaiden of capital.<sup>104</sup>

Goldberg's tort story, like all narratives, is oversimplified. He traces the emergence “of an extended community of professional tort scholars” beginning in the 1930s,<sup>105</sup> but this group was prefigured by Holmes's torts scholarship.<sup>106</sup> The compensation-deterrence theory of these legal realists became the hegemonic torts theory from the mid-twentieth century to the present.<sup>107</sup> Goldberg identifies two strands of tort theory in this community of tort scholars that “drank deeply of the progressive critique of tort.”<sup>108</sup>

Leon Green was the first torts scholar to emphasize the importance of judicial decision-makers considering social factors beyond the immediate plaintiff and defendant and the “raw facts of a case.”<sup>109</sup> Green authored a casebook in 1931 that “consider[ed] tort law ‘functionally’ so as to underscore its implications for public policy.”<sup>110</sup> He characterized tort law as “public law in disguise” because of its emphasis on larger societal interests “outside and beyond the interests of the immediate parties to the litigation.”<sup>111</sup> Green's theory of tort law was multi-dimensional in that there were contextual aspects to every tort case based upon “public policy, social

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104. *Id.* at 1506–07.

105. *Id.* at 1509.

106. See *supra* notes 81–82, 95, 102–03 and accompanying text.

107. See *Id.*

108. *Id.* Fleming James and Albert Ehrenzweig represent the first strand, advocating the replacement of accident law with comprehensive social compensation. *Id.*

109. See Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1, 1 (1959).

110. G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 77 (2007).

111. See Green, *supra* note 109, at 2.

welfare, law making, or judicial legislation.”<sup>112</sup> Prosser, too, viewed the law of torts as societal not just between the litigants:

Perhaps more than any other branch of the law, the law of torts is a battleground of social theory. Its primary purpose, of course, is to make a fair adjustment of the conflicting claims of the litigating parties. But the last half century has brought an increasing realization of the fact that the interests of society in general may be involved in disputes in which the parties are private litigants. The notion of public policy involved in private cases is not by any means new to tort law, and doubtless has been with us ever since the troops of the sovereign first intervened in a brawl to keep the peace; but it is only in recent decades that it has played a predominant part.<sup>113</sup>

William Prosser and Leon Green represented the “second line of torts scholarship.”<sup>114</sup> Under their influence, tort law evolved to address new dangers from toxic exposure, environmental pollution, dangerously defective products, and other corporate misbehavior.<sup>115</sup> Macrotheory was necessary to interpret the problem of collective injuries that were qualitatively different from the largely intentional torts or *delicts* of eighteenth-century England and pre-industrial America.<sup>116</sup>

During the post-New Deal era, tort scholars became less interested with “cases or controversies” and more interested in larger public policies. However, a tort theory that collectivizes injuries in products liability, toxic torts, and many other substantive areas is antithetical to the monistic concept of “private wrongs,” and Goldberg disparaged the “new negligence” that encourages “judges, juries, and law professors with a mandate to undertake de novo ‘social engineering.’”<sup>117</sup> Civil recourse theorists conceptualize tort law as “private law in disguise,”<sup>118</sup> emphasizing the bipolar relations between the parties rather than torts as public wrongs.<sup>119</sup> In his piece for the *Federalist Society Symposium on Law and Public Policy*, Goldberg stated:

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112. *Id.*

113. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 3 (3d ed. 1964).

114. Goldberg, *Unloved: Tort in the Modern Legal Academy*, *supra* note 22 at 1509.

115. See Michael L. Rustad, *Happy No More*, *supra* note 93, at 493.

116. See John T. Nockleby & Shannon Curreri, Comment, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 *LOY. L.A. L. REV.* 1021, 1038–39 (2005) (“As the society has become increasingly complex, and the harms a single producer or segment of the economy could create ever more dramatic, the challenges for a civil justice system justified by an ideology of individualistic dispute-resolution have been profound.”).

117. Goldberg, *Unloved: Tort in the Modern Legal Academy*, *supra* note 22, at 1511.

118. Goldberg, *Tort Law for Federalists*, *supra* note 10, at 16.

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

Dean Leon Green once famously described tort law as public law in disguise. Today, about a half-century later, the disguise has been dropped: every year in classrooms around the country, law students are taught that tort law is public law because it has to be. . . . To gain a genuinely realistic sense of what tort law actually does, what it can do, and what it ought to do, we must dispense with the notion that tort law ought to be public regulatory law because that is the only thing that it can be. It is time to recognize that tort law, as it functions today, is private law in disguise.<sup>120</sup>

Torts macrotheorists examine questions of law and society more broadly than moral philosophers, such as corrective justice or civil recourse theorists, whose center of attention is the individual plaintiff and the individual defendant.<sup>121</sup> Goldberg contends that the compensation-deterrence theorists displaced private redress based upon notions of private wrongs:

Compensation-deterrence theory accepts as its premise that tort suits probably once did fit the traditional account . . . . In the typical action, plaintiff *P* complained that defendant *D* had violated a right of his conferred by some relatively uncontroversial moral norm or tenet (for example, the norm against intentionally and unjustifiably striking another), which norm had been incorporated into the formal law through the old common law writs such as the writ of trespass. If *P* could make out such a claim, he could then expect satisfaction from *D* in the form of a compensatory payment. Thus, premodern tort law was characterized by the adjudication of private disputes by judges and juries who, through the formalities of the legal system, employed ordinary moral principles to determine whether a given defendant had violated the plaintiff's rights and therefore became obligated, as a matter of justice, to provide redress in compensation for the violation.<sup>122</sup>

The macrotheory assumption is that tort suits are no longer viewed as individual "cases and controversies" but as "occasions for judges and juries to regulate behavior on a forward-looking basis."<sup>123</sup> Compensation-

120. Goldberg, *Tort Law for Federalists*, *supra* note 10, at 15–16.

121. Jane Stapleton makes the point that tort's legal duties do not "track moral duty, a point illustrated by the absence of a duty to attempt an easy rescue of a helpless stranger." Jane Stapleton, *Evaluating Goldberg and Zipursky's Civil Recourse Theory*, 75 *FORDHAM L. REV.* 1529, 1556 (2006).

122. Goldberg, *supra* note 80, at 522–23.

123. *Id.* at 524.



deterrence theorists swung tort law from “private to ‘public’ law, whereby it functioned to achieve collective, not corrective justice.”<sup>124</sup> The paramount purpose of the macrotheorists was deterrence-compensation: “deterrence of antisocial conduct and compensation for those who have been injured.”<sup>125</sup>

### B. *Modern Tort Macrotheories: Law & Economics*

John Goldberg maintains that “economic deterrence” evolved as one of the five dominant theories of twentieth-century torts jurisprudence.<sup>126</sup> This theory has its genesis in 1970s scholarship, when torts teachers in elite law schools began teaching how tort law advances collective goals, such as specific and general deterrence and allocative efficiency.<sup>127</sup> Law and economics torts scholars are concerned with big issues such as “allocative efficiency, externalities, or the economic welfare of society.”<sup>128</sup> In other words, the study of law and economics is interested in macro tort concerns such as reducing the cost of accidents, reallocating loss to wrongdoers, general deterrence, and rules that reflect efficiency.<sup>129</sup> This economics paradigm of tort law consists of a number of competing subtheories, including the positivistic and normative approaches to tort law. Positivistic economics is a macro tort theory that asks judges to formulate tort rules that will reduce social problems such as the rate and severity of automobile accidents.<sup>130</sup> Positivists describe the parameters of tort law in practice. In contrast, normativists are utopian in the sense that they prescribe what tort law should be assuming ideal circumstances.<sup>131</sup>

William M. Landes, an economist, and Richard A. Posner, a lawyer, are the founders of the positivist school, which believes that the preeminent purpose of tort law is to assume judge-made case law was devised to

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124. *Id.*

125. *Id.* at 525.

126. *Id.* at 514.

127. More than thirty years hence, a macro view of torts persists. See, e.g., Guido Calabresi, *The Complexity of Torts: The Case of Punitive Damages*, in *EXPLORING TORT LAW* 333, 334 (M. Stuart Madden ed., 2005) [hereinafter Calabresi, *Complexity of Torts*] (“Too often, those who view tort law in a ‘goal oriented’ way move quickly to a single, simple goal—whether it be economic efficiency, furthering loss spreading, or anything else—and having examined tort doctrines and cases on that basis, are properly attacked for being reductionist.”).

128. See Thomas C. Galligan, Jr. et al., *Tort Law: Cases, Perspectives, & Problems* 4 (Santa Clara Univ. Sch. of Law, Working Paper No. 07-29, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=997177](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=997177).

129. See *id.* at 7. Law and economics approaches to tort law are diverse and scholars are divided into camps that emphasize choice theory, game theory, positive economics or normative economics. *Id.* (noting that the two most important forms for the study of tort law “are *positive* (descriptive or ‘what is’) economics or *normative* (prescriptive or ‘what should be’) economics”).

130. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 11, 13, 19 (1987).

131. See also STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 206 (1987)

promote efficiency as an overarching societal goal. Judge Posner argues that a “positivist might think it perfectly all right for judges to legislate, at least within the bounds fixed by the nature of the judicial office . . . .”<sup>132</sup> Positivists express the law as it is, while normative law and economics scholars prescribe what the law should be. The focal point of both prescriptive law and the economics scholars is describing economic efficiency as tort law’s goal, “without necessarily arguing that efficiency *should* be the goal of the legal system.”<sup>133</sup> Posner emphasizes the role of deterrence and contends that punitive damages must be increased where the probability of detection and punishment is low.<sup>134</sup>

Judge Guido Calabresi, who is a Second Circuit U.S. Court of Appeals judge and former dean of Yale Law School, is the emblematic normative scholar, as evidenced by his global proposals to reduce the costs of accidents and his emphasis on general and specific deterrence as tort’s primary tools for social change.<sup>135</sup> In his 1970 book, *The Cost of Accidents*, Calabresi drew the classic distinction between specific deterrence, which makes the wrongdoer pay the price of wrongdoing, and the larger social sanction of general deterrence, which vindicates the harm to society.<sup>136</sup> He contends that the overarching goal of tort law is to control the costs of accidents rather than to eliminate them.<sup>137</sup>

Judge Calabresi argued that accident law is about resolving the social problem of carnage on the nation’s highways by minimizing the costs in the most efficient and optimum way.<sup>138</sup> He applies a cost-benefit analysis to reach his hypothesis that primary accident losses may be reduced where primary accident costs exceed prevention costs.<sup>139</sup> The overarching emphasis of law and economics is on loss-spreading arrangements devised to reduce secondary losses.<sup>140</sup>

Calabresi’s 1961 article in the *Yale Law Journal* examined macrotheoretical questions about how society should deal with the problem

132. RICHARD A. POSNER, *LAW AND LEGAL THEORY IN ENGLAND AND AMERICA* 11 (1997).

133. FRANK H. STEPHEN, *THE ECONOMICS OF THE LAW* 129 (1988).

134. *See, e.g., Mathias v. Accor Econ. Lodging Inc.*, 347 F.3d 672, 676–77 (7th Cir. 2003) (upholding high ratio award against hotel that covered up bedbug problem reasoning that such an award was justified because it was an incentive for plaintiffs to sue where the probability of detection was low and the probability was high that the hotel’s wrongdoing would go unpunished).

135. *See* GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 184 (1970).

136. *Id.* at 68–69.

137. *Id.* at 68.

138. *Id.* at 26.

139. *Id.*

140. *Id.* at 39–40.

of risk distribution.<sup>141</sup> Calabresi is a functionalist who systematically identifies the goals and sub-goals of tort law in reducing and administering accidents.<sup>142</sup> Both positivism and normative approaches are instrumental theories that conceptualize the injury problem from a societal perspective, as opposed to the microtheorists who confine their analysis to individual cases. Moreover, law and economics scholars' focus on goals and sub-goals of the tort system marginalizes the requirement of individual causation that has long been part of tort law.<sup>143</sup>

Despite sharing assumptions about "causal connection" in mass torts, the sub-schools of law and economics have different takes on the politics of torts law. Normative law and economics asks whether the tort system is better able to allocate resources than alternative compensations systems, regulation, or taxation.<sup>144</sup> Judge Calabresi's opinion in *Ciraolo v. City of New York*<sup>145</sup> demonstrates that he is a functionalist who sees tort remedies fulfilling multiple societal functions. In addition, Calabresi describes how the remedy of punitive damages advances the goal of "socially compensatory damages" by forcing defendants to bear the true costs of their conduct on society in addition to the harm done to the individual.<sup>146</sup> Punitive damages enforce social norms through the general deterrence that results from the litigation launched by private attorneys general.<sup>147</sup> Finally, this remedy fulfills a multiplier function to achieve its manifest functions of punishment and deterrence:

Since thieves will not always be caught, they must be penalized by more than the cost of the items stolen on the occasions on which they *are* caught. This 'multiplier' is essential to render theft unprofitable and properly deter it. . . . [S]cholars have recognized that punitive damages can serve the same function in tort law.<sup>148</sup>

Strict products liability is a subfield of tort law that developed in the 1970s under the influence of such law and economics founders as Calabresi and Posner.<sup>149</sup> Products liability resonates with law and economics scholars

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141. Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

142. See CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS*, *supra* note 135, at 24.

143. See DONALD G. GIFFORD, *SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION* 57 (2010).

144. See STEPHEN, *supra* note 133, at 133.

145. 216 F.3d 236 (2d Cir. 2000).

146. *Id.* at 245.

147. Calabresi, *Complexity of Torts*, *supra* note, at 127.

148. *Ciraolo*, 216 F.3d at 244.

149. California Supreme Court Justice Roger Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Traynor, J., concurring) (Cal. 1944), was the first articulation of

because of its emphasis on risk spreading and collective goals such as the minimization of the costs of defective products. Calabresi's concept of the "least cost avoider" was key to the risk-utility theory in defective design cases in products liability.<sup>150</sup> Products liability ensures "that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."<sup>151</sup>

### C. Sociologically Oriented Macrotort Theories

#### 1. Social Justice Theory

John Goldberg's survey of twentieth century tort schools of thought considers my view of torts to fit squarely within the bounds of what he defines as social justice theory.<sup>152</sup> In my opinion, my empirically-based scholarship better fits under Roscoe Pound's model of sociological jurisprudence because of my emphasis on law's instrumental function of social control.<sup>153</sup> In Pound's view, as well as mine, torts are

the theory of strict products liability. See Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965). Justice Traynor wrote:

As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks.

*Escola*, 150 P.2d at 443 (Traynor, J., concurring). Traynor's rationale for products liability uses reasoning functionally equivalent to the least cost avoider.

150. See, e.g., Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972) ("The question for the court reduces to a search for the cheapest cost avoider."); *Id.* at 1060 n.19 ("The cheapest cost avoider has been . . . defined as the party 'an arbitrary initial bearer of accident costs would (in the absence of transaction and information costs) find it most worthwhile to "bribe" in order to obtain that modification of behavior which would lessen accident costs most.'").

151. *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 525 (5th Cir. 1984) (quoting *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113, 120 (Miss. 1966)) (discussing policy objectives of strict liability in reallocating the cost of injury to the responsible manufacturer).

152. Goldberg, *supra* note 80, at 560.

153. Social justice has become a watchword for radical politics recently after TV and radio commentator Glenn Beck "suggested any church promoting 'social justice' or 'economic justice' merely was using code words for Nazism and communism." Hanna Siegel, *Christians Rip Glenn Beck Over 'Social Justice' Slam*, ABC NEWS (March 12, 2010), <http://abcnews.go.com/WN/glenn-beck-social-justice-christians-rage-back-nazism/story?id=10085008>. Beck thundered in a recent program:

instrumentalities to vindicate public wrongs and hold corporate wrongdoers accountable.<sup>154</sup> But, as I shall demonstrate in Part V of this Article, tort law also protects corporations' intangible assets, as well as consumers' health and safety, especially in an information-based economy predicated upon intellectual property assets.

Goldberg and the other civil recourse theorists disagree with using the tort system as a vehicle for effecting social control or resolving social problems. Goldberg describes what he views as the perils of enabling judges to construct solutions to social problems outside of the legislative and regulatory process, writing:

Social justice theorists conceive of tort as a device for rectifying imbalances in political power. Specifically, they posit that tort corrects for pathologies of interest-group politics. 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 general the public by 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. Thus, negligence actions by gunshot victims, and public nuisance actions by cities that bear the cost of treating those victims, make up for the absence of effective gun control. 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

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"I beg you look for the words social justice or economic justice on your church Web site," he said. "If you find it, run as fast as you can. Social justice and economic justice, they are code words. . . . Am I advising people to leave their church? Yes! If they're going to Jeremiah Wright's church, yes!"

*Id.* Social justice is an indeterminate term that has different meanings during different historical periods. The image of social justice has been distorted to imply that social justice theorists are demagogues interested in redistributing wealth through tort law versus having respect for the legislature and regulatory agencies. However, social justice also encompasses restorative, communal, democratic participation, racial and gender equity, and human rights. Today, it is associated with progressive legal scholars. But in 1934, a right-wing Catholic priest, Charles Coughlin, founded the National Union for Social Justice, which was active until 1942. *The Press: Crackdown on Coughlin*, TIME MAGAZINE (Apr. 27, 1942) available at <http://www.time.com/time/magazine/article/0,9171,795777,00.html>. Father Coughlin used the term "Social Justice" as the title of his anti-New Deal publications in the 1930s and 1940s. *Id.*

154. See *infra* notes 554–77 (describing Pound's vision of tort law as social control).

developed this conception further include Richard Abel, Anita Bernstein, Carl Bogus, Thomas Koenig, and Michael Rustad.<sup>155</sup>

Tort law enables plaintiffs to obtain civil recourse, but it also involves larger public policies, which Leon Green described as the interests of “we the people.”<sup>156</sup> Stephen Sugarman notes that civil recourse tort scholarship is conservative in its emphasis “on individual responsibility for wrongdoing.”<sup>157</sup> What is distinctive about social justice in tort law is that it aims “to employ tort law progressively, with an ambition to be sensitive to the demands of equality and the interests of disadvantaged groups in society.”<sup>158</sup> What is essential, then, to understand with respect to social justice is its tendency to equate tort law with serving a public purpose beyond those of the immediate parties to the lawsuit.

To achieve these aims, the “social justice” school calls for private attorneys general to file lawsuits that uncover smoking gun evidence of corporate misconduct.<sup>159</sup> Social justice theorists believe that only punitive damages can establish that “‘tort does not pay’ by hitting the rich and powerful in the bank account.”<sup>160</sup> Judge Jack Weinstein’s account of tort law is close to the “social justice” narrative:

It is an individual compensation scheme for the injured that also serves society as a method for deterring unsocial conduct. Being largely judge-made in origin, it can be molded by the courts as well as legislators to meet new situations.

....

And Koenig and Rustad express the concept this way:

The power of the law of torts lies in its ability to adapt to changing social conditions. In the eighteenth century, torts compensated individuals injured by their neighbors. In contrast, in the 1970s and 1980s, mass tort law litigation evolved to compensate the victims of occupational exposure to

155. Goldberg, *supra* note 80, at 560.

156. Green, *supra* note 109, at 2.

157. Stephen D. Sugarman, *Personal Injury and Social Policy—Institutional and Ideological Alternatives*, in *TORTS TOMORROW: A TRIBUTE TO JOHN FLEMING* 290, 294 (Nicholas J. Mullany & Allen M. Linden eds., 1998).

158. MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 191 n.2 (2010) (quoting TSACHI KEREN-PAZ, *TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE* 2 (2007)).

159. *See* Goldberg, *supra* note 80, at 561.

160. *Id.*

toxic substances. . . .

The inherent flexibility of tort law allows it to mediate social inequities as they arise. Just as tort law protected less powerful individuals against King George III's agents or from the excesses of abusive employees of the railroads, torts continue to evolve to meet the challenges of the new millennium.<sup>161</sup>

In his *Torts: Unloved* piece, Goldberg places my scholarship within the Prosser-Green tradition of applying a public policy analysis:

For a contemporary example, consider the argument of Professors Koenig and Rustad in a recent book, somewhat ironically entitled *In Defense of Tort Law*. Tort law, they note, is nominally a system for providing redress to those injured by the wrongs of others. But that is not the basis on which it is to be defended. Rather, it is to be defended for its "latent" public policy function, namely, "furthering the cause of social justice" by uncovering and punishing corporate misconduct. In short, tort law is embraced not for what it is, but for what it empowers judges and juries and right-thinking legal policy analysts to do.<sup>162</sup>

Goldberg ultimately declares that social justice scholars are mistaken about what tort law is supposed to do.<sup>163</sup> Evidently, imbuing tort law with a public purpose not only plays into the hands of tort reformers but also places judges in the role of legislators, according to Goldberg.<sup>164</sup>

## 2. Other Sociological Theories

American tort law "has been affected by the social identity of the parties and cultural views on gender and race."<sup>165</sup> Progressive scholars influenced by social science and those critical, for example, of race and gender issues believe that tort law can and should further objectives such as social justice, gender equality, and racial equality, among other important goals.<sup>166</sup> Each of these sociologically-based theories also

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161. Weinstein, *supra* note 1 at 167–68 (quoting THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 67 (2001)).

162. See Goldberg, *supra* note 80, at 1511 (footnotes omitted) (quoting KOENIG & RUSTAD, *supra* note 161, at 2).

163. See Goldberg, *supra* note 80, at 562.

164. See *id.* at 560; see also *supra* note 155 and accompanying text (quoting Goldberg on the subject).

165. CHAMALLAS & WRIGGINS, *supra* note 158, at 1.

166. See *infra* note 353 and accompanying text for a summary of scholarly work regarding race, class, gender, and other power differentials in the tort law context.

examines tort law in a social context interrelating the law, power, and society.<sup>167</sup>

#### *D. Tort's Deontological Microscope*

The micro and macro approaches to tort law are comparable respectively to the dichotomy between rights-oriented theorists and the utilitarians in American philosophy. Michael Sandel asks whether justice should be founded on utility—as prefigured in the work of Jeremy Bentham or John Stuart Mill—or a respect for individual rights—in the tradition of Immanuel Kant, later represented by the work of John Rawls.<sup>168</sup> Torts, too, has its functional counterpart to microtheories in its emphasis on moral philosophy. The paramount distinction between microtorts and macrotorts is a dispute about tort law's proper sphere of application. The focal points for tort macrotheorists include societal purposes such as deterrence, loss allocation, or social justice.<sup>169</sup> In contrast, microtheorists utilize the microscope to investigate corrective justice (or civil recourse) between the individual plaintiff and the defendant.<sup>170</sup>

##### 1. Corrective Justice: Righting Wrongs

Corrective justice is the oldest and best-known microtort theory; it brings together the bipolar relations between the injured plaintiff and the plaintiff's state-sanctioned right to require the defendant to right the wrong.<sup>171</sup> Under this monistic theory, one party wrongfully injuring another disturbs the equilibrium.<sup>172</sup> The equilibrium that the defendant must restore is monetary compensation, which is the functional equivalent of rectification or restorative justice. Important also to the theory of corrective justice is the concept that:

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

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167. See *infra* note 352 and accompanying text for a list of work some work based on such theories.

168. John Rawls, *Political Liberalism*, in JUSTICE: A READER 343, 359 (Michael J. Sandel ed., 2007).

169. See *supra* text accompanying notes 128-29.

170. See *infra* text accompanying notes 171-72.

171. See Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621, 623-24 (2002).

172. Zipursky, *Civil Recourse*, *supra* note 17, at 695. Corrective justice restores equilibrium by righting wrongs. *Id.*



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.<sup>173</sup>

Corrective justice is an ideal fit with eighteenth century *Gemeinschaft* society, where torts were primarily about discrete wrongs committed by neighbors or members of the local community. This microtort theory emphasizes political morality and focuses on the individual plaintiff and the defendant's obligation to right a wrong; it is unconcerned with systemic goals such as allocative efficiency or general deterrence.<sup>174</sup> Corrective justice is perhaps the best example of microtort theory because it reflects "a deontological, rather than a utilitarian, set of values."<sup>175</sup> However, the moral philosopher's microscope focuses on righting wrongs in individual cases, giving short shrift to tort law's larger social functions.<sup>176</sup>

## 2. Civil Recourse's Rhetoric of Rights & Wrongs

Civil recourse theory, the most prominent brand of microtheory, shares common ground with corrective justice in its position "that an act is right or wrong 'in itself.'"<sup>177</sup> In short, corrective justice theorists favor downsizing tort law from a tool for redressing public wrongs to one which can only redress private wrongs.<sup>178</sup>

To understand the development of civil recourse theory, three important factors must be remembered. First, civil recourse theory has close ties to corrective justice in its emphasis on the bilateral relationship between plaintiff and defendant.<sup>179</sup> Benjamin Zipursky, who coined the term "civil recourse," explains that the state's role in offering a means of redress separates civil recourse from corrective justice:

I offer an account that is entirely nonteleological and which does not depend upon notions of distributive or corrective justice. The principles embedded in tort law nevertheless constitute a fundamental aspect of liberal individualism. The principle of civil

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173. Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 352 (2002).

174. See, e.g., Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 428 (1992) (describing corrective justice as a "moral ideal").

175. Zipursky, *Civil Recourse*, *supra* note 17, at 699–700.

176. See *supra* notes 17–19 and accompanying text.

177. Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329, 347 (2007); see *supra* text accompanying note 13 (discussing civil recourse theorists' assertion that tort law is based on the concept that acts have a moral character of their own).

178. Goldberg, *supra* note 22, at 1518 (stating that "tort law is not well-suited to solve the large-scale social and political problems it is being asked to solve . . .").

179. See Zipursky, *Civil Recourse*, *supra* note 17, at 695 (explaining that corrective justice has no theory for the role of the state); see also Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 6 (1998) [hereinafter Zipursky, *Rights, Wrongs, and Recourse*] (introducing these concepts in his theory of civil recourse).

recourse is simply that an individual who has been legally wronged is entitled to some avenue of recourse against the one who wronged her. Like other fundamental features of liberal individualism, the principle of civil recourse constrains and conditions the state's subjection of individuals to a system of rules, and its occupation of a monopoly of force. The state is obligated to permit and empower those who have been legally wronged to act, civilly, against those who have wronged them.<sup>180</sup>

To Zipursky, the defendant's duty to right a wrong depends upon "whether the plaintiff is genuinely entitled to an avenue of recourse—to an action—against the defendant."<sup>181</sup> The second factor is that the state sanctions civil recourse, and it is a constitutional right of the plaintiff to seek redress.<sup>182</sup> Thirdly, Zipursky draws upon Benjamin Cardozo's concept of duty as a limiter in developing his theory that "substantive standing" is a predicate for all tort actions, writing:

The facts of *Palsgraf* may be peculiar, but its core principle is pervasive: For all torts, courts reject a plaintiff's claim when the defendant's conduct, even if a wrong to a third party, was not a wrong to the plaintiff herself. For example, an injured plaintiff can win in fraud only if she was defrauded, in defamation only if she was defamed, in trespass only if her land rights were violated, and so on. Courts reach these results even where the defendant acted tortiously, the plaintiff suffered a real injury, and the plaintiff's injury was reasonably foreseeable. The legal rule upon which these cases rely is that which our scholarly tradition treats so ambivalently in *Palsgraf*: A plaintiff cannot win unless the defendant's conduct was a wrong relative to her, i.e., unless her right was violated. I shall call this principle the "substantive standing" rule and shall show that it is a fundamental feature of tort law.<sup>183</sup>

Civil recourse theorists view the "substantive standing" doctrine as a concept that separates them in the legal academy from the corrective justice and the law and economics advocates.<sup>184</sup> Civil recourse focuses on "the

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180. Zipursky, *Civil Recourse*, *supra* note 17, at 754.

181. *Id.* at 739.

182. See Goldberg, *supra* note 80, at 524, 529.

183. Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 179, at 3–4.

184. *Id.* at 4.

right of action” that is “publicly respected.”<sup>185</sup> Under this view, the role of the state is to help private individuals redress private wrongs.<sup>186</sup> Civil recourse theory stands on the shoulders of corrective justice but departs from it in its emphasis on the role of the state in providing a dispute resolution mechanism for aggrieved plaintiffs.<sup>187</sup> The difference between civil recourse theory and corrective justice is the role of the state in recognizing an individual’s right of action.<sup>188</sup> Goldberg and Zipursky describe civil recourse as superior to instrumentalist compensation or deterrence theories:

We have elsewhere described this idea as a “principle of civil recourse”: the principle that an individual who has been wronged is entitled to an avenue of recourse against the wrongdoer. Our point here is not that such a principle is demanded by principles of justice, or even morally sound, but that it is the animating idea behind our system of tort law. Similarly, with regard to the first idea, our point is not that individuals do have a variety of moral obligations to treat others in various ways, but that the law entrenches the notion of obligations to treat others in various ways.

Our account of internal deterrence fits nicely within this framework (although it does not require adoption of this framework). The first point of recognizing relational legal obligations is that the obligees more often than not live up to these obligations, and therefore the individual and social benefits of having the pertinent course of conduct followed are in part owed to the existence of the legal obligations.<sup>189</sup>

It is also crucial to take into account that civil recourse theory is a single-minded microtheory which has a central focus is on moral philosophy and reacts against sociological jurisprudence.<sup>190</sup> Goldberg contends that tort

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185. Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 *FORDHAM L. REV.* 649, 662 (1998).

186. See Goldberg, *Constitutional Status of Tort*, *supra* note 17, at 529.

187. Solomon, *supra* note 13, at 1776 (“First, they argue that the theory of corrective justice inaccurately indicates that there is a ‘duty of repair.’ Rather, they say, there is no affirmative duty to pay anything in the absence of a lawsuit. If the lawsuit is successful, there is a liability, not an affirmative duty. Second, corrective justice theory does not account for countless tort cases where wrongs by defendants do not lead to liability. These cases, Zipursky argues, are explained by a series of ‘substantive standing requirements’ that specify when certain classes of victims can successfully sue particular defendants. Finally, recourse theory criticizes corrective justice for treating compensatory ‘make-whole damages’ as the only and essential remedy in torts, thus conflating the issues of tort liability and remedy.” (footnotes omitted)).

188. Zipursky, *Civil Recourse*, *supra* note 17, at 755.

189. John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 *MD. L. REV.* 364, 402-03 (2005) (arguing for the authors’ theory of civil recourse).

190. It is not surprising that Zipursky often uses Justice Cardozo’s famous cases such as *Palsgraf* and *MacPherson* as examples of civil recourse. John Goldberg, too, admires Cardozo’s conceptual pragmatism. Twenty years ago, before he developed the civil recourse theory with Zipursky,

law has been transformed ““from private to “public law,” whereby it function[s] to achieve collective, not corrective, justice.””<sup>191</sup> Chamallas and Wriggins describe Goldberg’s stance as critical of the *Restatement*-type scholars who have helped transform torts “from private to ‘public law,’” noting that Goldberg disapproves of the *Restatement* vision of tort law, which places paramount importance on advancing two objectives: the ““deterrence of antisocial conduct and compensation for those who have been injured.””<sup>192</sup> Civil recourse theory asserts that tort law has been diverted from private wrongs “to be just another way . . . government regulates conduct for the public good.”<sup>193</sup> Professor Goldberg criticizes social engineering through tort law and contends that it “is not defensible as public regulatory law.”<sup>194</sup> He states that tort law is a poor mechanism for advancing social justice as “a form of disaster relief for injury victims because of its high transaction costs.”<sup>195</sup> Goldberg argues, along with many other younger scholars, that “tort law is not well-suited to solve the large-scale social and political problems it is being asked to solve (if only by default).”<sup>196</sup> Goldberg cautions judges against social engineering but acknowledges that torts must evolve:

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Goldberg wrote of Cardozo’s sensitivity to evolving social norms in his judicial method: “The unity of Cardozo’s philosophy of common law lies in his understanding of social life. His view of the common law’s purpose, its illnesses, and their cures, flows from the belief that society is an evolving, pluralistic community.” John C.P. Goldberg, *Community and the Common Law Judge: Reconstructing Cardozo’s Theoretical Writings*, 65 N.Y.U. L. Rev. 1324, 1372 (1990) (explaining Cardozo’s sociological approach to judicial method). Nevertheless, civil recourse theorists have jettisoned Cardozo’s sociological approach in favor of the abstracted methods of analytical and moral philosophy.

Two decades ago, Goldberg expressed his admiration for Cardozo but commented on the inadequacy of his sociological method. Goldberg chastises sociological jurisprudence in the following passage:

The radicalism of the method of sociology is that it dispenses with the indirection that is at the heart of a precedent-based system of law. It asks judges momentarily to forget the shackles of accumulated precedent and address directly the usefulness of the rule. It thus adopts a perspective from “outside” the common law by asking a particular doctrine to justify itself, given that “[t]he final cause of law is the welfare of society.”

*Id.* at 1359.

191. CHAMALLAS & WRIGGINS, *supra* note 158, at 17 (quoting Goldberg).

192. *Id.* (again, quoting Goldberg).

193. Goldberg, *Constitutional Status of Tort*, *supra* note 17, at 583. Goldberg goes on assert: “Whether couched in terms of James-Traynor loss-spreading, Prosserian utilitarian balancing, or Calabresi-Posner efficient deterrence, tort law has, since the late 1930s, been widely understood by academics to be just another way in which government regulates conduct for the public good.” *Id.* (describing how diverse tort scholars have diverted the path of tort law to serve as an instrumental tool of regulation).

194. Goldberg, *Tort Law for Federalists*, *supra* note 10, at 4.

195. *Id.*

196. Goldberg, *supra* note 22, at 1518.

By this I do not mean to say that tort ought not to address contemporary problems—it does and it should. Rather, 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.<sup>197</sup>

Civil recourse is a reaction against courts serving a quasi-regulatory role. In their recent *Texas Law Review* article, Goldberg and Zipursky clarify their position on public wrongs, acknowledging that torts do play delimited public roles under their theory.<sup>198</sup> They acknowledge that torts serve a purpose in setting norms in the larger society.<sup>199</sup> They also state that tort law “can advance or interfere with the operation of other public institutions.”<sup>200</sup> However, the thrust of civil recourse theory is a call for torts to be reborn as private law and for torts to retreat from its public law role. Goldberg insists that we “need to ask less, yet expect more, of tort.”<sup>201</sup> He chides judges that enable juries to do equity or “deny liability as a matter of law in the name of ‘public policy.’”<sup>202</sup>

Goldberg advocates stripping tort law of its tendencies to devise “ad hoc solutions to perceived social ills.”<sup>203</sup> 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.<sup>204</sup> At a time when torts scholarship has increased significantly, there has been a curious contraction of tort law’s sphere of application and an impoverishment of its content. Civil recourse is a microtort theory that stands in sharp contrast to macrotort theories such as those inspired by law and economics or sociologically.<sup>205</sup> 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

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197. *Id.* at 1519.

198. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918 (2010).

199. *Id.*

200. *Id.*

201. Goldberg, *supra* note 22, at 1519.

202. *Id.* at 1518.

203. *Id.* at 1519.

204. See CHAMALLAS & WRIGGINS, *supra* note 158, at 17 (describing Goldberg’s account of how the *Restatement*-scholars view the project as neutral but in fact are serving compensation-deterrence and other quasi-regulatory functions).

205. Goldberg and Zipursky contend that it is a mistake to conceive of torts “for the allocation of accidentally caused losses.” Goldberg & Zipursky, *supra* note 198, at 919.

common ground between these theories.<sup>206</sup> Franz Werro contends that the law of torts should not serve a social insurance function, arguing that the social insurance “objective would be better served if the tort system was coupled and complemented by a basic social insurance coverage for all accidents.”<sup>207</sup> Goldberg gives us no reform proposal but only states in passing that such a mechanism should replace tort law’s public law role.<sup>208</sup>

#### IV. TEN THINGS I HATE ABOUT CIVIL RECOURSE THEORY<sup>209</sup>

##### A. *Civil Recourse Is an Overly Individualistic Theory of Justice*

Turning now to evaluation, I shall start by making an obvious point: civil recourse theory does not accurately describe tort law’s complex mosaic. The drumbeat of civil recourse theory is the right of a particular plaintiff to seek civil recourse from a defendant that caused his harm. Pound noted how Puritans in America viewed man:

[As a] free moral agent, with power to choose what he would do and a responsibility coincident with that power. He put individual conscience and individual judgment in the first place. . . . Hence law was a device to secure liberty, . . . and its sole basis was the free agreement of the individual to be bound by it. . . . The history of juristic thought tells us nothing unless we know the social forces that lay behind it. . . .

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. . . . Let us look the facts of human conduct in the face. Let us look to economics and sociology and philosophy, and cease to assume that jurisprudence is self-sufficient.<sup>210</sup>

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206. See Zipursky, *Civil Recourse*, *supra* note 17, at 697–98.

207. Franz Werro, *Tort Law at the Beginning of the New Millennium: A Tribute to John G. Fleming’s Legacy*, 49 AM. J. COMP. L. 147, 149 (2001).

208. More recently, however, Goldberg has favored more extensive first-party insurance as opposed to social compensation. See John C.P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1240 (2008).

209. I must explain that I do not literally “hate” civil recourse theorists, but certain things that I have enumerated irritate me greatly. Obviously, the subtitle is inspired by the movie *Ten Things I Hate about You*. Not to belabor this explanation, but I have enjoyed working with John Goldberg on the Torts and Compensation Systems Committee of the Association of the American Law Schools (AALS) for a number of years. I have participated in a number of symposiums with both Professors Goldberg and Zipursky and enjoy their company very much.

210. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 32–33, 35–36 (1910).

This juristic theory strips tort law of its multiple layers of social meaning and attempts to reduce it to a single eidetic essence of civil recourse. Goldberg's approach to tort law reminds us that we are not all realists.<sup>211</sup> His theory is a return to formalism instead of a functional approach to what purposes torts fulfill.

My former teacher, the late Abram Chayes, observed, "[T]he dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies."<sup>212</sup> He noted that nineteenth-century adjudication "assumed that the major social and economic arrangements would result from the activities of autonomous individuals."<sup>213</sup> Chayes described the folly of microtheory in constitutional law with its sanctification of a focus on plaintiff and defendant, limiting courts to the task of clarifying "the law to guide future private actions."<sup>214</sup> He was writing his essay at a time when the popular wisdom was that litigation was a "private contest between private parties with only minimal judicial intrusion."<sup>215</sup>

And so it is with tort law. Judge Jack Weinstein describes mass torts cases as being "akin to public litigations" comparable to the kind of institutional change supervised by courts in protecting constitutional rights.<sup>216</sup> Mass torts are similar to public law litigation in that they both "implicate serious political and sociological issues . . . and both affect larger communities than those encompassed by the litigants before the court."<sup>217</sup> The partnership between state attorneys general and trial lawyers in suing the tobacco companies and lead pigment industries are emblematic of tort law's evolving function as a public health prescription.

Civil recourse theory is an abstract theory that says torts are largely about individual plaintiffs and defendants. The unique feature of civil recourse is that the state provides a grievance mechanism "to those who have been the victims of a legal wrong."<sup>218</sup> This principle is unobjectionable for all torts scholars. How trivial and obvious!<sup>219</sup> First-year torts teachers

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211. The civil recourse theorists need to follow Pound's dictum that we resolve the conflict between the law in books and the law in action. He writes: "Let us not become legal monks. Let us not allow our legal texts to acquire sanctity and go the way of all sacred writings. For the written word remains, but man changes." *Id.* at 36.

212. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

213. *Id.* at 1285.

214. *Id.*

215. *Id.* at 1288.

216. JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 41 (1995).

217. *Id.*

218. Jason M. Solomon, *supra* note 13, 1775.

219. For instance, Goldberg and Zipursky write:

would surely feel that they knew that already, and there was no need to take up a lot of law review space elaborating on something we all know.<sup>220</sup> A growing body of empirical research on our civil litigation system demonstrates that torts are situated in a complex legal landscape. More than half of all torts lawsuits filed in the seventy-five largest U.S. counties were individuals suing individuals.<sup>221</sup> Most of these lawsuits arose out of motor vehicle accidents, the leading category of personal injury cases.<sup>222</sup> “[T]he ‘legal delinquency’ in a negligence case is [mere] carelessness or the failure to exercise reasonable care” and it often affects strangers.<sup>223</sup>

It does not take more than a momentary reflection to recognize that civil recourse is not an accurate interpretation of modern tort law. Apart from its monistic nature, which is itself a major problem, civil recourse does not

Individuals who are able to prove that someone has treated them in a manner that the legal system counts as a relational, injurious wrong shall have the authority to hold the wrongdoer accountable to him. This commitment is not founded, in the first instance, on instrumental concerns but on political and moral ones. Part of the state’s treating individuals with respect and respecting their equality with others consists of its being committed to empowering them to act against others who have wronged them.

Goldberg & Zipursky, *supra* note 198, at 974. Jane Stapleton notes that “[I]t is trite law that a plaintiff cannot simply piggyback on another’s claim. . . . If when Goldberg and Zipursky assert that their ‘conception of duty is relational’ they are simply stating this trite point, that would be fine.” Jane Stapleton, *Evaluating Goldberg & Zipursky’s Civil Recourse Theory*, 75 *FORDHAM L. REV.* 1529, 1545 (2006) (quoting John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 *U. PA. L. REV.* 1733, 1828 (1998) [hereinafter Goldberg & Zipursky, *Moral of MacPherson*]).

220. Goldberg and Zipursky’s rebuttal to this point is that civil recourse is a significant advance in torts jurisprudence:

Is this just a fancy way of referring to compensation, to a day-in-court ideal, or to vengeance? We think not. A notion of recourse or redress is complementary to the notion of responsibility in several important respects. First, if obligations and responsibilities provide a sort of social “glue,” bonding citizens to one another and permitting mutual reliance, the idea of civil redress does the opposite. It permits individuals to be independent in two critical ways. It permits private individuals to be independent of other private individuals’ assertions of power and will over them, because it empowers them to respond when they have been wronged, injured, or unjustifiably disappointed. It also permits individuals to be, to some extent, independent of the government. Although the existence of a private right of action relies upon the state’s willingness to play its role, the state is not in the driver’s seat. The individual need not wait around until the state decides to intervene. A right of action means a right to use the courts to proceed against a private party for a remedy. It is, in significant part, a power to redress a wrong done to one.

Goldberg & Zipursky, *supra* note 189, at 406.

221. Thomas H. Cohen, *Civil Justice Survey of State Courts: Tort Trials and Verdicts in Large Counties, 2001*, BUREAU OF JUST. STAT. BULL. (Department of Justice, Washington D.C.) Nov. 2004, at 1.

222. *Id.* at 3.

223. Rustad & Koenig, *supra* note 100, at 27 (quoting *Louisville & Nashville R.R. Co. v. Eader*, 93 S.W. 7, 7 (Ky. 1906).



address the importance of tort law in punishing and deterring economic espionage and other public wrongs threatening our information-based economy. Business torts, such as misappropriation, protect the public interest as well as the owners of intangible business assets.<sup>224</sup> In short, civil recourse theory does not address the mosaic of American tort law. In the twenty-first century, torts are four-cornered, serving multiple social functions between (1) businesses (B2B), (2) businesses and consumers (C2B), (3) governments and businesses (G2B),<sup>225</sup> and (4) consumers versus other consumers (C2C). Civil recourse theorists do not provide concrete cases involving organizations seeking redress for injuries. The hidden face of tort law is the expansion of B2B lawsuits that serve the business world.<sup>226</sup> In my survey of punitive damages studies, I found that the number and size of awards in B2B litigation had skyrocketed in the 1980s and 1990s.<sup>227</sup> The tort reform proposals have ignored this face of tort expansion, targeting lawsuits against hospitals and doctors,<sup>228</sup> products liability actions,<sup>229</sup> employment discrimination,<sup>230</sup> and other collective injury cases.

Reformers target punitive damages awards in products liability and medical malpractice cases; punitive damages in either are rare. In contrast, punitive damages are awarded in a third of all business or contract cases.<sup>231</sup> Cook County courts in Illinois and San Francisco County courts in California awarded more than nineteen times more punitive awards in business contracts or torts cases than in product liability actions.<sup>232</sup> The challenge for torts theorists is to develop an interpretative account that explains differences between sectors such as B2B and B2C and why tort reform targets consumers rather than businesses. What is missing in the civil recourse theory is any recognition that businesses, as well as

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224. See Andrew Beckerman-Rodau, *Trade Secrets—The New Risks to Trade Secrets Posed by Computerization*, 28 RUTGERS COMPUTER & TECH. L.J. 227, 228 (2002) (explaining how most business assets in the past were durable goods but today they are intellectual property assets protected as trade secrets).

225. Federal courts have exclusive subject matter jurisdiction over tort claims against the federal government. 28 U.S.C. § 1346(b)(1) (2006). After the Second World War, Congress enacted the Federal Tort Claims Act (FTCA). *Smith v. United States*, 507 U.S. 197, 207 (1992) (Stevens, J., dissenting). The FTCA waives the sovereign's immunity from negligence actions, but not from liability founded in strict liability or a number of intentional torts. 28 U.S.C. § 1346(b)(1). In addition, plaintiffs must first exhaust remedies before appropriate federal agencies, prior to filing claims against the government. 28 U.S.C. §2675 (2006).

226. See Rustad, *Unraveling Punitive Damages*, *supra* note 67, at 37.

227. *Id.*

228. See Nockleby & Curreri, *supra* note 116, at 1059–63.

229. See *Id.* at 1055–58.

230. See *Id.* at 1063–66 (noting how the tort system was a primary tool for “[f]ighting and remedying discrimination based on race, sex, age, religion, national origin, and eventually disability . . .”).

231. Rustad, *supra* note 67, at 37–38 (citation omitted).

232. *Id.* at 38 (citation omitted).

individuals, use torts to vindicate their interests. A more comprehensive interpretative theory of tort law must address how torts are needed to protect the business community, intellectual property, and software licensing transactions. In the new millennium, torts will play an increased role in protecting the crown jewels of the information society, as discussed in Part V of this Article.

*B. Civil Recourse Theory Is Tort Reform in Disguise*

*Existing rules and principles can give us our present location, our bearings, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow. It must have a principle of growth.*

Benjamin Cardozo<sup>233</sup>

Civil recourse theorists say that they do not oppose tort law evolving to meet new challenges, but their overly doctrinal approach serves the interest of tort reformers.<sup>234</sup> They favor judicial restraint, contending that they are following the tradition of “Cardozoan pragmatic conceptualism.”<sup>235</sup> They maintain that pragmatic conceptualism is a way to update Blackstonian private wrongs to a modern context while fencing out instrumentalism from tort law.<sup>236</sup> What is crucial about civil recourse is to adopt a conceptual approach to tort law versus the instrumentalist view that has dominated tort law since Holmes’s time.<sup>237</sup> On the surface, Goldberg and Zipursky weigh

233. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 19-20 (1973).

234. F. Patrick Hubbard lists a few examples of creative continuity in tort law, where the courts took the lead in changing tort law in a progressive direction:

- (1) adoption of negligence as the basic standard for imposing tort liability on persons whose actions injure others;
- (2) expansion of the role of negligence by abolishing privity limitations on products liability claims;
- (3) abolition of sovereign, charitable, and parental immunities;
- (4) extension of right to recover for mental distress to persons in the “zone of danger,” to certain bystanders, and to victims of “outrage;”
- (5) abolition of category system of entrants for determining liability for injuries on premises; and
- (6) replacement of the doctrine of “contributory negligence,” which totally barred an at-fault plaintiff from recovery, with comparative fault, which allows an at-fault plaintiff to recover some of his loss from the at-fault defendant.

Hubbard, *supra* note 20, at 465 (citations omitted).

235. Goldberg & Zipursky, *supra* note 19, at 1627-28.

236. *See id.* at 1627 n. 4.

237. *See id.* at 1627.

in against “the removal or limitation of tort claims” because it abridges the citizens’ right of recourse.<sup>238</sup> To their credit, recourse theorists do not support caps on damages but acknowledge the right of both legislatures and judges to block what they regard as questionable claims, such those for unrealized injuries or nominal damages.<sup>239</sup> Nevertheless, their idea of an adequate award is more restrictive than is widely accepted in tort litigation.<sup>240</sup> Rather, they adopt Blackstone’s model of private wrongs that calls for “an award that reflects the wrong done to the victim by the injurer,” rather than the “full-compensation, make-whole model of today.”<sup>241</sup> It is unclear how judges will evaluate the wrong and whether that includes hedonic damages to compensate the plaintiff for the lost ability “to engage in and experience the ordinary value of life that he was experiencing prior to the injury.”<sup>242</sup> It is also unclear whether civil recourse theory’s commoditization of the “wrong done” includes indeterminate dignitary and noneconomic damages, which are often the target of tort reformers.<sup>243</sup>

Civil recourse is also tort reform in disguise because it discourages judges from employing policy arguments in recognizing new causes of action or classes of plaintiffs or engaging in *ex post facto* social engineering.<sup>244</sup> Goldberg and Zipursky concede that tort law sends signals

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238. See Goldberg & Zipursky, *supra* note 198, at 981.

239. See *id.* (“If tort law is for the recourse of wrongs, then it will be important to know whether its definitions of legal wrongs are plausible, and if it is providing meaningful recourse to victims of such wrongs. Where necessary to ward off suits that allege nominal wrongs and injuries that seem unlikely actually to be wrongs and injuries, there is room for judges and legislatures to block or raise barriers to suit.”). During the twenty-year period between 1980 and 2000, thirty-two states have passed limits on the recovery of punitive damages, thirty-five states have imposed joint and several liability limitations, and thirteen have limited potential recoveries for pain and suffering. THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 64 (2001). By 2006, twenty-five states had already capped civil recourse by placing caps on noneconomic damages in medical malpractice actions. Michael L. Rustad, *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 ELDER L.J. 331, 334 (2006).

240. See John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 436 (2006).

241. *Id.* at 443 (noting that the relational idea of civil recourse is in contrast to the “make-whole” notion).

242. *Mercado v. Ahmed*, 974 F.2d 863, 869 (7th Cir. 1992).

243. Civil recourse theorists provide little guidance on how juries will determine the wrong. The present practice is for juries to award special damages such as medical expenses, lost earnings, and more subjective noneconomic damages for pain and suffer. See generally Ellen S. Pryor, *Rehabilitating Tort Compensation*, 91 GEO L.J. 659, 660 (2003).

244. Civil recourse theory contends that judges should abandon policy considerations in favor of the formalistic concept of duty. Goldberg and Zipursky write:

Finally, as a prescriptive theory of negligence, the instrumentalist model leaves a great deal to be desired. In the first place, because ordinary morality employs notions of duty, the model has generated legal conclusions that seem ridiculous, or at least overly demanding and inappropriate. Moreover, by abandoning the psychologically rich notion of duty in favor of a policy- and sanction-driven account, the Holmes-Prosser conception of negligence has undercut the motivation for complying with the law that is built into the concept of duty itself. Both the judges who make the law, and the corporate and

as to social norms, and common law judges appropriately consider public policy issues in deciding cases.<sup>245</sup> Moreover, they note that tort law can “advance or interfere with the operation of other public institutions.”<sup>246</sup> But they take a strong stand against torts having a public purpose in filling regulatory fissures and fulfilling other public purposes.<sup>247</sup> Civil recourse is tort reform by stealth in its overly restrictive view of the role of societal change in bringing about changes in tort law.<sup>248</sup> Jane Stapleton notes that civil recourse theory would limit tort law by discriminating against classes of plaintiffs based upon their relational guidelines.<sup>249</sup> Stapleton writes that civil recourse will render “a group of ‘second-class citizens’ who, though they were directly physically injured by the negligent act of the defendant, are not entitled to petition the law to sanction the careless party.”<sup>250</sup>

In recent years, tort law has evolved to bridge the gap left by criminal law and regulators for victims’ reproductive injuries and injuries from lead paint exposure, defective automobiles, toxic torts, and clergy’s sexual abuse.<sup>251</sup> Civil recourse theorists sometimes claim boldly that it is up to the legislature, not courts, to create new classes of plaintiffs or causes of action.<sup>252</sup> They are naysayers when it comes to the judiciary recognizing new rights and responsibilities:

Those with an irreversible hostility to the common law’s capacity for growth insist that it is a closed system of rules, immutable until changed by legislation. This arid philosophy would sign the death warrant of the common law and require that it remain frozen in its Plantagenet molds. This nay-saying approach which would deny to our judges and courts any role of responsibility in the

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individual decision-makers governed by it, having been told for most of this century that tort law is about policy, not duty, now tend to regard tort law as a cost of doing business rather than a collection of obligatory norms.

Goldberg & Zipursky, *The Moral of MacPherson*, *supra* note 219, at 1742.

245. See Goldberg, *Unloved: Tort in the Modern Legal Academy*, *supra* note 22, at 1518.

246. Goldberg & Zipursky, *supra* note 198, at 918.

247. Goldberg & Zipursky, *Moral of MacPherson*, *supra* note 219, at 1736–37.

248. See Stapleton, *supra* note 121, at 1558.

249. See *id.* at 1531.

250. *Id.* (explaining how the relational breach and substantive standing ideas of Goldberg and Zipursky divests some plaintiffs of civil redress for their claim and shields defendants from liability).

251. Michael L. Rustad & Thomas H. Koenig, *Reconceptualizing State AG Parens Patriae as Crim torts*, Suffolk University Law School Research Paper No. 10-43 at 4–5 (Sept. 7, 2010), available at <http://ssrn.com/abstract=1673529>; see also Koenig & Rustad, *supra* note 3, at 293–94.

252. See Thomas F. Lambert Jr., *The Common Law is Never Finished (Comparative Negligence on the March)*, 32 ATL L.J. 741 (1968) (explaining that “it follows that nothing should ever be done for the first time”).

endless task of accommodating change to continuity recalls the celebration of standing pat in Cambridge Professor Cornford's little classic *Microcosmographia Academica*, in which basic arguments for judicial inertia are advanced, the principle of the opening wedge and the principle of the dangerous precedent.<sup>253</sup>

Full of critiques of modern tort law and nostalgic for John Locke and William Blackstone, judges following civil recourse will be more likely to defer to legislatures instead of finding creative continuity in tort law in the grand tradition of Benjamin Cardozo, Roger Traynor, or Jack Weinstein.<sup>254</sup> If we follow civil recourse's logic, we would have no market share, lost chance, or risk contribution theories to address problems of causation.

Goldberg's approach is critical of law shedding doctrine such as "limited duty rules, immunities, and categorical bans on recovery for emotional and economic harm."<sup>255</sup> Notice that these rules are conservative and check plaintiffs' recovery especially in collective injury cases. Indeed, in their recent *Texas Law Review* piece, Goldberg and Zipursky nod in approval to the Michigan Supreme Court's decision not to recognize loss of chance in medical malpractice.<sup>256</sup>

John Goldberg argues that courts should stop viewing torts as a branch of public law, serving quasi-regulatory functions or solving social problems.<sup>257</sup> Instead, recourse scholars propose to strike society from the torts equation, contending that its public law purposes must be "cabin'd,

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253. *Id.*

254. Goldberg denies that civil recourse theory will prevent judges from redressing "new wrongs or new iterations of old wrongs in light of changes in other areas of law, as well as economic, technological, demographic, and sociological changes." Goldberg, *Tort Law for Federalists*, *supra* note 10, at 14. Goldberg tried to have it both ways. He insists that torts should be stripped of its public regulatory role, but acknowledges that tort law should evolve to meet changing conditions. Nevertheless, if civil recourse strips judges of their power to use torts as public regulation, it is unclear how new torts will be born. The birthday of a new tort is often based on important social policy. Tort law divorced from public policy is like Hamlet without the Prince of Denmark. Let it also be remembered the common law is not immutable. Goldberg also forgets that *stare decisis* is driven by public policy as Frankfurter reminds us: "We recognize that *stare decisis* embodies an important social policy . . . . But *stare decisis* is a principle of policy and not a mechanical formula." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Sociological accounts of changes in tort law do not come from the legal heavens but from changes in the political economy. Courts did not recognize privacy-based torts until the development of new technologies and other changes in the society. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) (arguing that courts should recognize a new tort to redress widespread abuses in the field of journalism).

255. CHAMALLAS & WRIGGINS, *supra* note 158, at 18.

256. Goldberg & Zipursky, *supra* note 198, at 982 ("For example, the enactment by the Michigan legislature of a bar to claims for 'loss-of-a-chance,' whether wise or unwise from a policy perspective, was probably justified given the dubiousness of the idea that a lost chance for health is really an injury.").

257. Goldberg, *Unloved: Tort in the Modern Legal Academy*, *supra* note 22, at 1517-18.

cribb'd and confined."<sup>258</sup> If civil recourse were adopted, the judicial role in torts case would be narrower, and creative continuity would be displaced by "a notion of judicial restraint."<sup>259</sup>

Civil recourse theorists urge courts to ignore unrealized wrongs until they "ripened into an injury."<sup>260</sup> They prefer that judges not create new tort duties, rights, and remedies, but defer to legislatures and expert regulators.<sup>261</sup> Under civil recourse's substantive standing doctrine, a defendant can create risks with impunity, so long as there is not an immediate injury.<sup>262</sup> "A defendant may act in a manner that risks an injury, or even in a manner that almost surely will bring about an injury, but that does not mean that the injury will actually occur."<sup>263</sup> This restrictive view means that civil recourse theorists are unlikely to endorse liability theories arising in the modern world, such as the negligent enablement of computer crime caused by lax computer security or defects in computer programs. Civil recourse theory is again "tort reform in disguise" because it asks judges to "just say no" to creating new plaintiffs and classes of plaintiffs.<sup>264</sup> The frontiers of

258. WILLIAM SHAKESPEARE, *THE TRAGEDY OF MACBETH* act 3, sc. 4 (George Smith, ed., J.M. Dent & Co. 1902). My torts professor, Tom Lambert, was fond of this quote from William Shakespeare's *Macbeth* where Macbeth states:

Then comes my fit again: I had else been perfect,  
Whole as the marble, founded as the rock,  
As broad and general as the casing air:  
But now I am cabin'd, cribb'd, confined, bound in  
To saucy doubts and fears. But Banquo's safe?

259. Goldberg, *Tort Law for Federalists*, *supra* note 10, 14–15.

260. Goldberg & Zipursky, *supra* note 19, at 1639; see John C.P. Goldberg, *What Clients Are Owed: Cautionary Observations on Lawyers and Loss of a Chance*, 52 *EMORY L.J.* 1201, 1203 (2003) (expressing reasons not to expand the doctrine of loss-of-chance cases to legal malpractice).

261. Goldberg & Zipursky, *Moral of MacPherson*, *supra* note 219, at 1740.

"According to Prosser, judges are to set the limits of negligence liability by making all-things-considered decisions as to whether it would be good or bad for society to permit such liability. Yet our understanding of the relative strengths and weaknesses of political institutions often leads to the conclusion that the legislative and executive branches are more capable, or at least more appropriate, institutions for making such decisions."

*Id.*

262. "Professor Zipursky connects *Palsgraf* to a broader "proper plaintiff" requirement that operates throughout tort law and suggests, *contra* Weinrib, that this facet of tort is captured better by a theory of civil recourse than corrective justice." Goldberg, *supra* note 80, at 572 n.269 (explaining Zipursky's substantive standing theory of civil recourse).

263. Goldberg & Zipursky, *supra* note 19, at 1639.

264. Civil recourse theorists are conservative, pragmatic conceptualists, unlike other academics that propose the expansion of tort law. Goldberg's reluctance to expand the "loss-of-a-chance" to contorts, such as legal malpractice, is a perfect example. He writes:

Instead of having to prove that the doctor's neglect of duty more likely than not was a but-for cause of the plaintiff's injury, the loss-of-a-chance plaintiff only has to prove that the malpractice made it somewhat more likely that she would be injured. Several

accountability depend upon judicial receptivity to compensation for life's troubles that do not fit into traditional injury categories. American tort law must continue to evolve to address the complexities of modern injury such as multiple causation, latent injury, the inchoate plaintiff, and the indeterminate defendant. Pragmatists recognize, however, that new torts cannot be born unless plaintiffs' counsel creatively "frames" them in terms of well-established victim classes.<sup>265</sup>

Justice Oliver Wendell Holmes Jr. described how the common law must resist stasis: "In moving waters there is life and health; in stagnant pools, decay, and death."<sup>266</sup> Torts are always in the process of becoming, often lagging behind changes in society and technology. In other words, as Holmes suggests they must, torts are evolving as a moving stream, not a stagnant pond. In the *Path of the Law*, Holmes's central point was that certainty or repose in the common law was not achievable.<sup>267</sup> Nevertheless, how does tort law evolve if it is in a full retreat from social engineering?<sup>268</sup> Civil recourse theory has no sustained theory about how the law changes because their focus is not on law, policy, and society.<sup>269</sup>

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

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prominent commentators have recently called for application of loss of a chance to legal malpractice, primarily out of concern over the difficulty a legal malpractice plaintiff faces in proving that, but for her lawyer's carelessness, she probably would have prevailed in the matter in which she was being represented. This Essay attempts to explain why, despite the intuitive appeal of loss of a chance doctrine on grounds of both fairness and deterrence, courts ought to be wary about transplanting it from the fringes of medical malpractice into the law of legal malpractice.

Goldberg, *supra* note 260, at 1201.

265. Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1541-1545 (explaining how new tort actions such as the invasion of privacy, the intentional infliction of emotional distress, wrongful termination, and product liability were recognized because they fit within established doctrine).

266. Michael Rustad, *The Jurisprudence of Hope: Preserving Humanism in Tort Law*, 28 SUFFOLK U. L. REV. 1099, 1105 (1994) (quoting Justice Oliver Wendell Holmes Jr.).

267. Holmes, *supra* note 81, at 466 ("[C]ertainty generally is illusion and repose is not the destiny of man.").

268. *See id.* at 466-67. Civil recourse theory does not have a theory of social change except to say that the judges should replace policy with inward-turned duties. Structural-functionalists explain that there is often a cultural lag; one institution does not keep up with technological changes. *See generally* Rustad & Koeing, *supra* note 67, at 77-78 (discussing same). During the age of the automobile, the tort law lagged behind other social developments. *Id.* at 78. Today, tort law is lagging behind developments in the information-based economy whose base is predicated upon intellectual property as opposed to durable goods. *Id.* at 78, 95.

269. The rise of strict products liability is emblematic of the modern expansion of plaintiffs' rights in tort law. Justice Roger Traynor's concurring opinion in *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944), was the first judicial recognition of strict products liability, *see id.* at 461, 150 P.2d at 440 (Traynor, J., concurring). *See also* RESTATEMENT (SECOND) OF TORTS § 402A (1965) (adopting Traynor's theory of strict liability, became accepted law in the majority of jurisdictions within a decade and a half).

legislation.<sup>270</sup> The earliest American exemplary damages punished conduct that violated local norms, such as the debauchery of the plaintiff's daughter, destroying her "parental prospects."<sup>271</sup> During the pre-Civil War period, the tort remedy of punitive damages gave slave owners a remedy for tortiously harboring fleeing slaves.<sup>272</sup> "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."<sup>273</sup>

Tort law functions are continually evolving to address new social problems.<sup>274</sup> 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.<sup>275</sup> 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."<sup>276</sup> 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."<sup>277</sup>

In the new millennium, collective injuries are not only probabilistic but they are often unrealized.<sup>278</sup> Indeed, "[t]he predominant injury in a cybertort case will be a financial loss, dignitary injury, or invasion of privacy,"<sup>279</sup> and there will often be an issue of whether the injury is realized. If a hacker steals your identity, your credit card, or bank account numbers for thousands of customers, there is an issue of whether any one plaintiff can prove

270. Thomas F. Lambert Jr., *Principles, Persuasions, and Primrose Propaganda*, 19 NACCA L. U. J. 25 (May 1957).

271. See *Stout v. Prall*, 1 N.J.L. 79, 79 (1791).

272. See, e.g., *Oliver v. Kauffman*, 18 F. Cas. 657 (E.D. Pa. 1850) (reporting case where slave owner sued the defendants for tortiously harboring twelve slaves and helping the slaves escape to the free state of Pennsylvania).

273. Rustad, *supra* note 93, at 485 (discussing punitive damages awards against the railroad in the late nineteenth century).

274. See *infra* notes 277, 286 and accompanying text.

275. See *id.*

276. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* 349 (2002).

277. *Id.* at 350.

278. See, e.g., *Metro North Commuter RR. v. Buckley*, 521 U.S. 424, 444 (1997) (holding that, despite the railroad's clear negligence, the railroad workers exposed to asbestos dust over a long period of time had no claim for damages since no injury had yet appeared).

279. Michael L. Rustad & Thomas H. Koenig, *The Tort of Negligent Enablement of Cybercrime*, 20 BERKELEY TECH. L.J. 1553, 1603 (2005).



damages absent proof that the private information has been used or abused. Moreover, if issuers absorbed all of the financial losses that resulted from fraudulent credit card transactions, a defendant may argue that no injury has been realized. A dynamic law of torts finds remedies to redress the wrongs created by hackers that have not yet materialized into a financial injury.<sup>280</sup> These anticipated loss cases are comparable to claims for an enhanced risk of developing a future disease, where the injury has not yet manifested.<sup>281</sup>

### C. *Civil Recourse Is Devoid of Data*

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."<sup>282</sup> The legal formalists of Pound's day did not appreciate that law is situated within social bonds.<sup>283</sup> 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.<sup>284</sup> Civil recourse does not account for major "players in the tort system—the plaintiff's lawyer, the defense lawyer, and the insurance company and its adjusters."<sup>285</sup> Nor is there any reference to empirical data on the actual

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280. Bernstein, *supra* note 265, at 1539–41 (explaining how new torts are born to confront new social problems).

281. Civil recourse theorists impose a monistic order on tort law that is inconsistent with tort's complexity as recognized in Cardozo's works. Dan Simon characterizes Cardozo's account of judging as recognizing gaps and indeterminacies, describing Cardozo's judicial realization that decisions are "not readily deduced from an orderly conceptual system of precepts." Dan Simon, *The Double-Consciousness of Judging: The Problematic Legacy of Cardozo*, 79 OR. L. REV. 1033, 1043 (2000). Simon writes of Cardozo's judicial philosophy:

"The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively." The tasks the judge faces are complex, difficult, and replete with clashes between seemingly irreconcilable opposites; he explained: "[D]eep beneath the surface of the legal system, hidden in the structure of the constituent atoms, are these attractions and repulsions, uniting and dis severing as in one unending paradox." Everything is "penetrated with casuistry and dialectics."

*Id.* (quoting BENJAMIN N. CARDOZO, *The Nature of the Judicial Process*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 114 (Margaret E. Hall ed., 1947); BENJAMIN N. CARDOZO, *The Paradoxes of Legal Science*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 255, 226 (Margaret E. Hall ed., 1947)).

282. Pound, *supra* note 210, at 20.

283. "Law has always been and no doubt will always continue to be, 'in a process of becoming.' It must be 'as variable as man himself.' . . . 'Law would be neglecting one of its more important functions if it ceased to meet the demands of this ceaseless evolution.'" *Id.* at 22.

284. John Goldberg explains that citizens have a theoretical right to seek recourse, but does not explain why seeking civil recourse is less popular in recent years. See Goldberg, *Constitutional Status of Tort*, *supra* note 17, 524 (2005) (asserting that civil recourse is part of the "basic structure of our government" and that "all American citizens have a right to a body of law for the redress of private wrongs").

285. Ellen Pryor, *Noneconomic Damages, Suffering, and the Role of the Plaintiff's Lawyer*, 55

growth, size, ratio, plaintiff-defendant characteristics, factual foundation, or other qualities of how plaintiffs actually recover civil recourse. A living tort law, like the living Constitution, “evolves, changes over time, and adapts to new circumstances.”<sup>286</sup>

Moreover, the lack of empirical grounding is an issue that gnaws at the fabric of civil recourse theory. In their dozens of articles on civil recourse, Goldberg and Zipursky rarely refer to the cumulative and reliable body of empirical torts scholarship. They do not account for the numerous hurdles that prevent actual plaintiffs from receiving civil recourse. How many civil wrongs are there out there and how often do injured plaintiffs file claims over them?<sup>287</sup> The problem lies not so much in the theoretical availability of civil recourse as in the real world difficulty of finding an attorney willing to try the case, winning over a jury, and collecting the award in the post-settlement period.<sup>288</sup> The right to pursue civil recourse is not the same thing as actually receiving an adequate award.<sup>289</sup>

Recourse theorists’ lack of actual real world application is a grave silence that grows increasingly hard to justify in the face of a growing body of empirical research on how America’s civil justice system functions. The theory of civil recourse is based upon cultural nostalgia rather than empirical data. Only one personal injury victim in ten pursues a tort liability claim, and only ten percent of those claimants receive compensation from the tort

DEPAUL L. REV. 563, 563 (2006).

286. Civil recourse theorists share common ground with constitutional law originalists in positing one theory for all time. In his recent book, *The Living Constitution*, David A. Strauss argues that originalism is appealing to many because of its greater certainty. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 29–31 (2010) (explaining that “there is something natural about originalism”). Civil recourse acknowledges that law changes but has no theory of why it changes because of its myopic focus on the bipolar relationship between plaintiff and defendant. In the ethereal world of civil recourse, there is no need to refer to empirical research or trends in tort law.

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The tort system plays a relatively limited role in compensating for accidental injury in the United States. Because tort law focuses on wrongdoing, the system does not generally provide compensation where the injurer was not a wrongdoer. In addition, the system does not provide compensation where a wrongdoer has no insurance or no personal assets to pay compensation, or where the amount of loss is too small to be worth the cost of litigation. Even where a wrongdoer has assets or insurance, the tort system will not provide recovery for injury unless the victim brings a claim.

Hubbard, *supra* note 20, at 441. Civil recourse theory has no systematic account of all of the hurdles that a potential civil recourse claimant must clear before they can use the state-sanctioned grievance mechanism of the tort system. Because civil recourse theorists do not address social class, wealth, or poverty, they do not explain the difficulties of seeking civil recourse against the empty-pocketed defendant who has no insurance coverage. Civil recourse theorists do not even speculate on the ratio of private wrongs to claims.

288. See *supra* note 287.

289. See *supra* note 287.

system.<sup>290</sup> Also, given that the state provides injured plaintiffs with a mechanism to obtain civil recourse, these theorists do not explain why tort cases have been declining dramatically in federal and state courts in recent years.<sup>291</sup> Civil recourse theory does not explain how collectability enters into the civil recourse puzzle or why so many plaintiffs fail to exercise their right to redress.<sup>292</sup>

The tort caseload in federal courts has been in sharp decline since the mid-1980s.<sup>293</sup> “The percentage of tort cases concluded by trial” in federal district courts “declined from 10% in the early 1970s to 2% in 2003.”<sup>294</sup> “The number of tort trials concluded in U.S. district courts declined by nearly 80 percent—from 3,600 trials in 1985 to fewer than 800 trials in 2003 . . . .”<sup>295</sup> Empirical studies of tort law also demonstrate a decrease in jury trials in state courts.<sup>296</sup> Civil recourse theory has no explanation for why fewer plaintiffs are “righting their wrongs” in court. Finally, civil recourse theory does not explain why tort plays an expansive role in the United States and is relatively undeveloped in many civil code countries.<sup>297</sup>

Suppose the *zeitgeist* of American culture changed dramatically and Congress did follow Goldberg’s suggestion that we displace tort law with social insurance and expert regulators.<sup>298</sup> Americans show no enthusiasm for this functional equivalent of tort law, and neither does John Goldberg. It is an old debater’s trick to raise the possibility of a radically utopian solution to confuse your opponents by “making the perfect the enemy of the good.” If social compensation was magically adopted in the United States, what

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290. DEBORAH R. HENSLER, ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 120 (1991), available at <http://www.rand.org/pubs/reports/2006/R3999.pdf>.

291. See Press Release, U.S. Dep’t of Justice, No. of Fed. Tort Trials Fell by Almost 80 Percent from 1985 Through 2003 (Aug. 17, 2005), <http://www.ojp.usdoj.gov/archives/pressreleases/2005/ftv03pr.htm>.

292. Gerhard Wagner, *Tort Liability and Insurance: Comparative Report and Final Conclusions*, in 16 TORT LAW AND LIABILITY INSURANCE 309, 334 (Gerhard Wagner ed., 2005) (explaining how the history of torts from Roman times to the present oscillates between the compensation and deterrence functions).

293. See Press Release, U.S. Dep’t of Justice, *supra* note 291.

294. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *General Civil (Tort, Contract, and Real Property) Trials* (Oct. 25, 2010), <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=2231>.

295. Press Release, U.S. Dep’t of Justice, *supra* note 291.

296. Thomas H. Cohen, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Tort Trials and Verdicts in Large Counties, 2001*, at 1 (Nov. 2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ttvlc01.pdf>.

297. See David Corbe-Chalon and Martin A. Rogoff, *Tort Reform a La Francaise: Jurisprudential and Policy Perspectives on Damages for Bodily Injury in France*, 13 COLUM. J. EUR. L. 231,235 (2007) (arguing that France and other civil code members of the European Union insure risks whereas American prefer the tort system and decisions by private sector actors); see also Michael Wallace Gordon, *Mexican Law: A treatise for Legal Practitioners and International Investors*, 32 U. MIAMI INTER-AM. L. REV. 361, 364 (2001) (reviewing JORGE A. VARGAS, MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS (1998)) (describing the Mexican law of torts as sketchy and undeveloped).

298. See *supra* notes 206–07, 261 and accompanying text.

would be missing? Tort law would surely have a significantly diminished role, as evidenced below.<sup>299</sup>

The system in Sweden is instructive. If comprehensive social insurance were adopted in the United States, tort law would have a significantly diminished role covering foreigners and others not under the U.S. monolith.<sup>300</sup> In Sweden, claimants look to insurance first and to torts second.<sup>301</sup> Additionally, in Sweden, the tort system serves as a backup for those few individuals, such as foreigners, not covered by the nation's social security compensation agency, also called the *Forsakringskassan*.<sup>302</sup>

Under a social compensation scheme, fault would be irrelevant in a system where the compensation role of the tort system is largely displaced by a monolithic government agency.<sup>303</sup> Personal responsibility is a major concern of American-style negligence, and this norm meshes well with American cultural values. In Sweden, tortfeasors need not even reimburse the state's social security treasury where they at fault.<sup>304</sup> Victims receive eighty percent of their earnings.<sup>305</sup> Conversely, in a social compensation system, the role of comparative fault or assumption of risk is non-existent. In fact, social compensation is not interested in the causal connection between what the tortfeasor did and fault allocation.<sup>306</sup> Therefore, social compensation has no place for non-economic damages or punitive damages.<sup>307</sup> Civil recourse does not explain why social insurance schemes have not gained traction in American society. The picture that they paint of civil litigation is based upon featured cases and hypotheticals, as opposed to the law in action.

#### D. Civil Recourse Has a Naïve View of How Legislatures and Regulators Work

The civil recourse theory has a narrow focus on the wronged individual and entitles the claimant "to an avenue of recourse against the

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299. See *infra* note 300 and accompanying text.

300. See generally 3 EUROPEAN CTR. OF TORT & INS. LAW, THE IMPACT OF SOCIAL SECURITY LAW ON TORT LAW (Ulrich Magnus ed., 2003).

301. Wagner, *supra* note 292, at 340 (noting how tort victims look to insurance first and that tort is but a handmaiden to social compensation).

302. *Id.* at 183.

303. *Id.* at 182.

304. *Id.*

305. *Id.* at 183.

306. *Id.* at 182.

307. *Id.*

wrongdoer.”<sup>308</sup> John Goldberg contends that judges and juries have been armed “with power largely unbounded by legal or institutional constraints.”<sup>309</sup> According to civil recourse theorists, the principal function of the judge in tort cases is to enable civil recourse by serving as an umpire in the proceedings between the plaintiff and the defendant.<sup>310</sup>

The conventional regulation of tobacco, the use of which is the leading preventable cause of death in the United States, was thwarted for decades by the tobacco industry.<sup>311</sup> When it became apparent that Congress and state legislatures lacked the political will to regulate this product, the victims turned to the tort system.<sup>312</sup> Tort law not only bridges a regulatory gap,<sup>313</sup> but it also bridges the hiatus left by criminal law that lags well behind technological and social changes, such as Internet-related wrongdoing.<sup>314</sup> The engine of discovery is often superior to legislative committee meetings in uncovering smoking gun evidence of corporate wrongdoing.<sup>315</sup>

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308. Goldberg & Zipursky, *supra* note 10, at 402–03.

309. Goldberg, *supra* note 22 at 1512.

310. His proposal is a full retreat from tort law serving a public purpose and reminds me of Tom Lambert’s critique of judges who sanctified binding precedent: “The paralyzing doubts of judges as to whether stare decisis prevents them from correcting past mistakes fogs the judicial windshield, thick as mashed potatoes. Our judges should not sit like figures on a silver coin, ever looking backward. No rule is settled until it is settled right.”

Thomas F. Lambert, Jr., Editorial, *Reflections of an Optimist*, 21 NACCA L.J. 25, 26 (1958).

311. E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, [http://www.lexis.com/research/buttonTFLink?\\_m=f22e73bd819b666ba3c4f4bc44fd4587&\\_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2008%20U.%20III.%20L.%20Rev.%201225%5d%5d%3e%3c%2fcite%3e&\\_butType=3&\\_butStat=2&\\_butNum=318&\\_butInline=1&\\_butInfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b8%20Stan.%20L.%20%26%20Pol%27y%20Rev%2063%2cat%2069%5d%5d%3e%3c%2fcite%3e&\\_fmtstr=VKWIC&docnum=2&\\_startdoc=1&wchp=dGLbVzz-zSkAb&\\_md5=8e903bfbfd00113cb233de03f307626c](http://www.lexis.com/research/buttonTFLink?_m=f22e73bd819b666ba3c4f4bc44fd4587&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2008%20U.%20III.%20L.%20Rev.%201225%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=318&_butInline=1&_butInfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b8%20Stan.%20L.%20%26%20Pol%27y%20Rev%2063%2cat%2069%5d%5d%3e%3c%2fcite%3e&_fmtstr=VKWIC&docnum=2&_startdoc=1&wchp=dGLbVzz-zSkAb&_md5=8e903bfbfd00113cb233de03f307626c).

312. “Thus, the failure of conventional forms of legislative and administrative regulation of tobacco products and the recent shift in the landscape of tobacco litigation” led to “tobacco product liability litigation.” *Id.* at 63 (arguing that tobacco products enjoyed a limited immunity for many decades because of administrative and legislative failure to enact effective tobacco control legislation).

313. Rustad & Koenig, *supra* note 100, at 96. The “agency capture” hypothesis contends that regulators have too close ties with industry discouraging pro-active enforcement. Under this theory, expert regulators lose their will to do their job because they wish to protect their future prospects working in the industry. Even if expert regulators do their job professionally, they often lack the resources to protect the public. Just by way of example, the Consumer Product Safety Commission does not have either the financial or human resources to protect us from defective products from China and other countries. Private attorneys general are necessary to place sufficient pressure on corporations tempted to trade safety for profits.

314. Rustad, *supra* note 49, at 86, 96–99 (arguing that criminal law lags behind information-based and other technologies).

315. Litigators, not regulators, uncovered: “1) new evidence garnered from internal documents and former tobacco industry researchers and executives concerning tobacco industry knowledge of the addictive and pharmacologic properties of nicotine; 2) industry attempts to hide this knowledge; [and] 3) industry efforts to manipulate nicotine levels so as to addict smokers.” Kelder & Daynard, *supra* note 311, at 64.

Goldberg contends that naïve social justice theorists are wrong to encourage judges to use tort law for social engineering.<sup>316</sup> His theory is that judicial timidity is needed to restore tort to its rightful place.<sup>317</sup> These civil recourse scholars do not see themselves as tort reformers but as tort restorers.<sup>318</sup> Civil recourse scholars are armchair philosophers who do not give any practical guidance on how judges should decide cases where there are conflicting public policies at stake. Goldberg contends that courts should stop trying to use tort law to solve social problems and let legislatures and expert regulatory agencies perform that role.<sup>319</sup> Nevertheless, courts are often in a better position to make social policy because they are “populist and deliberative, whereas legislatures tend to be captured by special interests, secretive, hasty, and unwilling or unable to offer reasons for their actions.”<sup>320</sup> The National Highway Traffic Safety Administration (NHTSA), the so-called watchdog for automobile safety, has been slow to respond to the Toyota sudden acceleration cases.<sup>321</sup> The April 2010 mine disaster is a case study of the failure of expert regulators in protecting American workers:

316. See generally Goldberg, *Constitutional Status of Tort*, *supra* note 17.

317. See *id.* at 530 (explaining that tort law is “best understood as a law of redress” and providing “a set of guidelines for judicial review that will permit courts to assess more intelligently the constitutionality of particular tort reforms”).

318. Civil recourse theory’s return to Blackstone brings to mind Roscoe Pound’s critique of legal scholars of his day that retreated from sociology to juristic principles from the past. “‘All sciences,’ wrote Ulrich Zásius in 1520, ‘have put off their dirty clothes, only jurisprudence remains in her rags.’ . . . In other words, law has always been dominated by ideas of the past long after they have ceased to be vital in other departments of learning.” Pound, *supra* note 210, at 25.

319. See Goldberg, *supra* note 22, at 1518. Despite Goldberg’s views, democratically elected legislatures are subject to being captured by special interests such as the habitual corporate wrongdoers lobby. See generally Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673 (1996) (describing the corporate campaign to restrict rights of women, blue collar workers and consumers in proposals to limit punitive and non-economic damages).

320. Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 533 (1999).

321. Joan Claybrook, former NHTSA administrator, testified recently:

As the press revealed several months ago, a large number of former NHTSA officials, including Administrators, the top presidential appointee, deputy administrators, general counsels, and chiefs of the enforcement, rulemaking and research divisions, as well as technical staff have left NHTSA over the years to be employed by vehicle and equipment manufacturers as consultants, lobbyists, attorneys or on staff. Obviously this is a real problem and needs to be addressed.

*The Proposed Motor Vehicle Safety Act: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce*, 111th Cong. 11 (2010) (statement of Joan Claybrook, President Emeritus, Public Citizen Former Administrator, The National Highway Traffic Safety Administration) [hereinafter *Motor Vehicle Safety Act Hearings*].

Then in early April a horrible coal mine explosion at the Massey Energy Upper Big Branch coal mine in Montcoal, West Virginia killed 29 miners. This mine had been cited just weeks before the disaster for numerous safety violations, including problems in ventilating the mine and failure to prevent a buildup of deadly methane gas. . . . According to the Washington Post, “More than 200 former Congressional staff members, federal regulators and lawmakers are employed by the mining industry as lobbyists, consultants, or senior executives, including dozens who work for coal companies with the worst safety records in the nation.” Regulation of mining operations and enforcement of violations has been weak for years.<sup>322</sup>

Civil recourse theory’s dogmatic assumption that courts must defer to democratically-elected legislatures and expert regulations denies the politics of torts inherent in judicial decision making.<sup>323</sup> As Alexis de Tocqueville observed, “[t]here is hardly a political question in the United States, which does not sooner or later turn into a judicial one.”<sup>324</sup> Roscoe Pound noted that courts in the western states in the late nineteenth century were able to use judicial-lawmaking to determine competing water rights.<sup>325</sup> At the same time, courts were remiss in developing corporate law that would hold corporate enterprises liable for breaching their fiduciary duty and ensuring against mismanagement.<sup>326</sup> Pound also criticized courts for doing too little to improve civil procedure.<sup>327</sup> In his day as in ours, courts and judicial decisions are first responders to emergent social problems. Courts and tort law are in a better position than rigid government bureaucracies to deal with the demands of an evolving society.<sup>328</sup> Think of how the “oil industry lobbyists secured very low limits on company liability (economic liability is capped at \$75 million)” in the BP oil spill.<sup>329</sup>

Civil recourse theorists subordinate the concept of separation of powers

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322. *Id.* at 2.

323. See generally Goldberg, *Constitutional Status of Tort*, *supra* note 17.

324. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 248 (J.P. Mayer & Max Lerner eds., Harper & Row 1966) (1838).

325. See Pound, *supra* note 210, at 23.

326. See *id.* at 23.

327. *Id.*

328.

It is the glory of the common law that it is not a rigid, immutable code. On the contrary, it is a vital, living force that endows with the breath of life a body of practical principles governing human rights and duties. These rules are subject to gradual modification and continuous adjustment to changing social and economic conditions and shifting needs of society. This characteristic is the life blood of the common law.

Caporaletti v. A-F Corp., 137 F. Supp. 14, 16 (D.D.C. 1956), *rev'd on other grounds*, 240 F.2d 53 (D.C. Cir. 1957).

329. Claybrook, *supra* note 321, at 2.

in their concern that judges stay out of the realm of public policy.<sup>330</sup> In the seamy world of PACs and heavy corporate lobbying, legislatures—especially Congress—too often act for the good of campaign contributors, not the public. The tobacco industry serves as a case study of both the regulatory failure at every level and the legislative support of the industry.<sup>331</sup> Every time Big Tobacco got in any kind of trouble with regulatory agencies, like the Federal Trade Commission or the Federal Communications Commission, their lobbyists went to Congress to bail them out.<sup>332</sup> “The tobacco industry’s influence over federal and state legislators makes it enormously difficult, if not impossible, for effective tobacco control legislation to be passed at the federal or state level.”<sup>333</sup>

The tobacco industry is not the only industry that is shielded from regulatory accountability. Defendants in other mass torts cases such as asbestos, DES, lead paint, ultra-absorbent tampons, Bendectin, and breast implant failed to produce private information at the request of regulatory

330. Judge Jack Weinstein contends that judges owe a duty to society to respond to difficult and sometimes intractable social problems:

Ours is a dynamic society sociologically, economically, and technically. To remain significant, the courts must exercise power to modify the law to deal with changes in our real world. That the courts’ role should be subsidiary to that of the legislatures at the federal and state levels does not excuse judges ignoring our obligations to all the people within our sphere of influence.

Weinstein, *supra* note 1, at 231.

331. As has recently been noted:

During this time [the 1950s and 1960s], the tobacco industry needed no allies to achieve its objectives for several reasons. First, the industry could directly protect itself from emerging threats because its power to block change at the federal level was pervasive. Members from tobacco-producing states chaired one-third of House committees and nearly one-quarter of Senate committees in the early 1960s.

Bruce Yandle et. al., *Bootleggers, Baptists, & Televangelists: Regulating Tobacco by Litigation*, 2008 U. ILL. L. REV. 1225, 1246–47 (2008) (footnotes omitted).

332.

The FTC and FCC actions in the 1960s and 1970s, for example, along with the three waves of suits against the tobacco industry from the 1950s forward, caused the industry to perpetually fend off attack with the main weapons they had: Congress, big law firms, and secrecy. Each of these weapons showed holes and grew less powerful with time, as regulation-by-litigation came to the fore.

*Id.* at 1242 n.63. In the 1990s, the tobacco industry was able to beat back the FDA’s efforts to regulate tobacco.

“After . . . [an attempt to regulate tar content], cigarettes mostly avoided additional federal regulatory oversight until the 1990s, when the FDA attempted to assert regulatory authority. A significant reason was the tobacco industry’s continued sway in Congress, particularly in the Senate.” *Id.* at 1254 (footnote omitted).

333. Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL’Y REV., Winter 1997, at 63.



agencies.<sup>334</sup> The notion that legislatures will act for the public good is a naïve, grade-school civics statement that bears little semblance to reality. Class action litigation against the tobacco industry was going well until Congress got hold of it and became the chief arbiter of the first, failed settlement.<sup>335</sup>

Additionally, the recent Supreme Court decision removing corporate spending limits in campaigns is liable to exacerbate the undue influence corporations already have on legislatures.<sup>336</sup> Goldberg contends that tort law is “not well equipped to provide public safety regulation because of, among other things, judges’ and jurors’ lack of agenda control, their limited access to information, and their relative lack of expertise and accountability.”<sup>337</sup> I would agree that any one case or controversy would have a limited scope compared to a bill being debated by Congress. In Congress, however, there are no rules of evidence. Additionally, there is no requirement that legislators have a perfect voting record (whereas a judge cannot skip out on a case without grounds for recusal), and there is no appeals process except for the President’s signature.

From reading the work of these social recourse theorists, one would think that we were living in some halcyon era of legislative politics where legislators worked tirelessly for the public good rather than toiling on behalf of their campaign contributors. By virtue of the contingency fee system, torts are the only area of our civil justice system open to everyone, regardless of their ability to pay for a lawyer’s services.

We have a federal government with limited powers for a reason.<sup>338</sup> However, civil recourse theorists would replace the public policy role of tort law with more regulation. For example, Goldberg proposed replacing the public policy role of tort law with comprehensive social insurance.<sup>339</sup> Tort law may be unpopular at this point in time with the American public thanks to the tort reformers’ well-funded campaign against it, but raising taxes to fund a Swedish-style insurance scheme would be far more unpopular. In any case, I suspect a monolithic compensation system would fail to provide

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334. Wendy Wagner, *Stubborn Information Problems & The Regulatory Benefits of Gun Litigation*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 271, 276 (Timothy D. Lytton ed., 2005).

335. See Richard A. Daynard & Graham E. Kelder, Jr., *The Many Virtues of Tobacco Litigation*, *TRIAL*, Nov. 1998, at 34.

336. See, e.g., *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010) (holding that the ban on corporate-funded independent expenditures, which was ultimately struck down, could not be found inapplicable to a film, which was an electioneering communication that was equivalent to express advocacy).

337. Goldberg, *Tort Law for Federalists*, *supra* note 10, at 4.

338. See, e.g., *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 382–83 (Ct. App. 1981) (noting how punitive damages bridges the gap in protecting consumers when government safety regulations have failed to do so).

339. See Goldberg, *supra* note 23, at 1518.

sufficient deterrence and would be unlikely to serve as an effective grievance mechanism for injured plaintiffs. A comprehensive public welfare system replacing tort law would clash with embedded American cultural views about personal and corporate responsibility. Still, in more recent pieces, Goldberg calls for a wider application of first party insurance to pick up the slack.<sup>340</sup>

Courts are in a better position to make social policy because they are “populist and deliberative, whereas legislatures tend to be captured by special interests, secretive, hasty, and unwilling or unable to offer reasons for their actions.”<sup>341</sup> Leon Green argued that “we the people” are a party to every lawsuit and that “environmental facts” could “outweigh the transactional facts in litigation . . . .”<sup>342</sup> We the people have benefited from tort lawsuits that have made us collectively safer.

Goldberg explains that one reason why tort law is under attack is that it tries too much to serve as a grievance mechanism against corporate abuses.<sup>343</sup> Goldberg contends that tort law will be loved once more if it stops trying to solve social problems and returns to its pre-World War II role of adjudicating disputes between individuals. Goldberg’s theory is that if we adopt his approach utilizing civil recourse theory, the tort reformers will agree to cease-fire. Of course, then the tort reformers would have nothing to object to because a downsized civil justice system could not perform its social control function. Tort theory refashioned into civil recourse is less likely to threaten corporate wrongdoers because of its focus on individual justice and its caution about recognizing new rights and remedies as new social problems emerge.<sup>344</sup> His argument reminds me of the animal world where the first line of defense for some species is to make themselves less detectable.<sup>345</sup> If tort law was divested of its public and social policy

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340. Goldberg, *supra* note 208, at 1240.

341. Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 533 (1999).

342. Green, *supra* note 109, at 2.

343. Goldberg, *supra* note 22, at 1517–18.

344. Goldberg would dispute my contention that civil recourse would discourage new causes of action. Goldberg, *supra* note 208, at 1241–46 (adopting use of pragmatic conceptualism). My argument, however, is that the theory of private wrongs is conservative and disapproves of forming new tort theories and causes of action. If judges were to adopt civil recourse theory, they would defer to legislatures *ex ante* approaches to regulation versus the court’s *ex post facto* approach that has been dominant throughout the last century and a half. It is difficult to picture the tort landscape where courts are not proactive in forging solutions to emergent problems.

345. Such a natural defense mechanism to protect against predators is described as follows: Often the first line of defense is to avoid being detected by the predator. One way to do this is to minimize noise production and any visual cues that the predator might use to locate the prey. Frogs and crickets usually stop singing as another creature approaches.

functions, it would be of little interest to tort reformers, but to argue that this is permissible because citizens can seek recourse in the democratically elected legislature is unrealistic. Judge Weinstein also disagrees with civil recourse theorists' downsizing of the judicial role:

Ours is a dynamic society sociologically, economically, and technically. To remain significant, the courts must exercise power to modify the law to deal with changes in our real world. That the courts' role should be subsidiary to that of the legislatures at the federal and state levels does not excuse judges ignoring our obligations to all the people within our sphere of influence.<sup>346</sup>

#### E. *Civil Recourse Theory Is Not a Living Tort Law*

Civil recourse theory is focused on the tort law-in-the-books not the law in action.<sup>347</sup> Progressive race and gender theorists explain how principles that first evolved in employment law have been imported into tort law to produce a "more egalitarian body of cases."<sup>348</sup> A number of prominent mass torts cases have redressed gender-linked injuries:

Historically, the private attorney general has played a socially beneficial role in mass products liability actions involving dangerously defective products. The Dalkon Shield intrauterine device, for example, caused an epidemic of infections, septic abortions, infertility, and death in many women. After lawsuits by private litigants, A.H. Robins finally agreed to remove the devices from the market and pay the medical costs of removal. It took the chastening message of products liability litigation to remove this hazardous product from the marketplace. The private attorney general's role in ensuring public safety is also demonstrated by the litigation involving the oral contraceptive Ortho-Novum 1/80. Women who sustained life-threatening injuries sued the manufacturer, and, subsequently, the manufacturer lowered estrogen levels in the contraceptive, thus protecting the consuming public.<sup>349</sup>

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The resulting silence makes it more difficult for the predator to find them. Other prey has evolved camouflage coloration that blends into the background making it difficult for visual predators to find them.

Mark A. Davis, *Predation and Defense*, BIOLOGY REFERENCE (Oct. 15, 2010, 10:12 AM), <http://www.biologyreference.com/Po-Re/Predation-and-Defense.html>.

346. Weinstein, *supra* note 1, at 231.

347. See generally Pound, *supra* note 210 (explaining the distinction between law in the books and law in action).

348. *Id.*

349. Rustad, *Heart of Stone*, *supra* note 67, at 366–67 (citations omitted).

Martha Chamallas and Jennifer Wriggins describe their feminist theory as a “critical” approach to tort law but also note that it is classifiable as “a progressive approach to tort law.”<sup>350</sup> They note that “John Goldberg excluded feminist theories altogether from his taxonomy of tort theories, choosing not to include feminist torts scholarship within his category of ‘social justice’ theories.”<sup>351</sup> Goldberg’s survey of tort theories gives short shrift to critical feminism, critical race theory, LatCrit Theory, and other sociologically tuned in approaches.<sup>352</sup>

A growing literature demonstrates the importance of gender and race context in the torts equation.<sup>353</sup> Just by way of example, racial-context cases

350. CHAMALLAS & WRIGGINS, *supra* note 158, at 191 n.3 (“Although we describe our approach as a ‘critical’ approach to tort law, it might just as easily be classified as a progressive approach to tort law, thereby aligning us with such scholars as Michael Rustad, Tscachi Keren-Paz and Richard Abel”). See generally Tsachi Keren-Paz, *Egalitarianism as Justification: Why and How Should Egalitarian Considerations Reshape the Standard of Care in Negligence Law?* 4 THEORETICAL INQUIRIES IN LAW 275, 275-76 (2003) (noting how tort law follows redistributive goals and results).

351. CHAMALLAS & WRIGGINS, *supra* note 158, at 191 n.4.

352. See generally THOMAS C. GALLIGAN, JR. ET AL., TORT LAW: CASES, PERSPECTIVES & PROBLEMS (4th ed. 2007) (explaining six different approaches to tort law).

353. While the importance of race and gender is clear, doctrinally limited civil recourse theorists completely ignore how race, class, gender, and power differentials impact tort law rights and remedies. See, e.g., Leslie Bender, *A Lawyer’s Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993); Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1 (1990); Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435 (2005); Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115 (2007); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998); Martha Chamallas, *Unpacking Emotional Distress: Sexual Exploitation, Reproductive Harm, and Fundamental Rights*, 44 WAKE FOREST L. REV. 1109 (2009); Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fear: A History*, 88 MICH. L. REV. 814 (1990); Lucinda M. Finley, *A Break in the Silence: Including Women’s Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989); Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847 (1997); Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004); Mary Kate Kearney, *Breaking the Silence: Tort Liability for Failing to Protect Children from Abuse*, 42 BUFF. L. REV. 405 (1994); Margo Schlanger, *Injured Women Before Common Law Courts: 1860-1930*, 21 HARV. WOMEN’S L. J. 79, 105-06 (1998); Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865-2007*, 27 REV. LITIG. 37 (2007); Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121 (2001); Jennifer Wriggins, *Genetics, IQ, Determinism, and Torts: The example of Discovery in Lead Exposure Litigation*, 77 B.U. L. REV. 1025 (1997); Jennifer B. Wriggins, *Torts, Race, and the Value of Injury, 1900-1949*, 49 HOWARD L.J. 99 (2005); Koenig & Rustad, *supra* note 24; see also Frank McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761 (1996); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741 (1994); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990), and Camille A. Nelson, *Considering Tortious Racism*, 9 DEPAUL J. HEALTH CARE L. 905 (2005). See generally CHAMALLAS & WRIGGINS, *supra* note 158 (tracing the role of race and gender in the history of

like lead paint poisoning and negligent sterilization cases “demonstrate the multiple ways in which race is constructed and racial meanings are produced in tort litigation.”<sup>354</sup> Similarly, the negligent infliction of emotional distress and bystander claims are relational loss cases intricately tied to gender relations and bias.<sup>355</sup> Asbestos and workplace injury cases are generally “His Torts,” whereas wrongful birth, reproductive injuries, and nursing home cases are emblematic of “Her Torts.”<sup>356</sup>

Like John Rawls’s veil of ignorance, civil recourse is acontextual, ahistorical, and disconnected with the sociology of tort law.<sup>357</sup> Jane Stapleton criticizes Goldberg and Zipursky for unnecessarily creating an awkward and incoherent theory predicated upon “untethered moralism.”<sup>358</sup> Her critique is that “civil recourse theory . . . is overblown in its claims, awkward and inconvenient in application, and internally incoherent in its account of the ‘guidance’ it claims that the law of torts sends out.”<sup>359</sup> In her view, “[t]here is no such thing as ‘the genuine structure of tort law.’”<sup>360</sup> Felix Cohen, a prominent legal realist, castigated the legal formalists of his day as operating in the celestial sphere of the legal heavens.<sup>361</sup>

In response, civil recourse theorists would maintain that they are not deriving tort duties from abstract moral philosophy but from timeless principles of tort law.<sup>362</sup> As a young law professor, Roscoe Pound castigated the law professors of his day for their dry as dust overly abstract approach to teaching law and scholarship. The implicit approach of the civil recourse theorists is to desiccate torts by eliminating social context. Just by way of

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American tort rights and remedies from the nineteenth century to the present).

354. CHAMALLAS & WRIGGINS, *supra* note 158, at 29.

355. *Id.* at 103.

356. Koenig & Rustad, *supra* note 24, at 6 (reporting findings from an empirical study of gender-linked injuries in medical malpractice and products liability).

357. Jennifer Wriggins describes the “accontextual approach” in American tort scholarship and legal education. See Jennifer B. Wriggins, *Toward a Feminist Revision of Torts*, 13 AM. U.J. GENDER SOC. POL’Y & L. 139, 143 (2005).

358. Stapleton, *supra* note 219, at 1562.

359. *Id.*

360. *Id.*

361. See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935) (comparing legal formalism to “legal heaven” where concepts descend from *heavens* rather than from society).

362. See Goldberg & Zipursky, *Moral of MacPherson*, *supra* note 219, at 1847.

A relational conception of the duty of due care should now be recognized as an option in negligence theory. Its deployment does not require abstract moral philosophy, but simply careful interpretation of the concepts of duty already present in the tort law. Unlike constitutional law, we need not be defensive about text because the relevant authority is the entire common law of negligence, which abounds with moral notions of duty. Nor should separation of powers or federalist concerns precipitate hesitation: the contours of tort law are traditionally the domain of the judiciary. For all of these reasons, the authority of courts to engage in deontological reasoning in tort law leaves an open field.

*Id.*

example, torts are gender-linked and the nature of tort injury cannot be understood without taking this variable into account.<sup>363</sup> A growing body of critical feminist scholarship demonstrates that gender makes a difference in tort adjudication.<sup>364</sup> Ellen Bublick's empirical work on how sexual assault victims use tort remedies is a perfect example. She uses data to demonstrate that changes in gender-roles and sex-related norms reflect women's "greater economic and political power."<sup>365</sup> She explains the increase in tort actions to redress sexual assault is a reflection of the victims' greater willingness to testify against their attackers as well as greater social support networks for women.<sup>366</sup>

Jennifer Wriggins uses domestic assault cases in first year torts class to explain the importance of gender role de-differentiation in understanding this important field of tort litigation.<sup>367</sup> Lucinda Finley's empirical study of noneconomic damages concluded: "Women tort victims, the elderly, particularly elderly women, as well as children who suffer the ultimate injury of death" are disparately impacted by caps on pain and suffering or noneconomic damages.<sup>368</sup>

Race, class, and power differentials are important variables determining the result in intentional infliction of emotional distress cases such as *Gomez v. Hug*.<sup>369</sup> In *Gomez*, a racist county commissioner hurled racist epithets at Silvino Gomez while he was employed at a county fairground.<sup>370</sup> The outrage in that case was a product of both racial bias and work place bullying coupled with disparities in power between employer and employee.<sup>371</sup> In *Fisher v. Carrousel Motor Hotel*, a motel owner was found

363. Koenig and I used empirical data to demonstrate the incidence and type of injuries that are gendered. As a result, tort reforms of noneconomic damages, for example, are gender injustice in disguise. See generally Koenig & Rustad, *supra* note 24.

364. See CHAMALLAS & WRIGGINS, *supra* note 158, for an excellent summary of research on the impact of race and gender on American tort law.

365. Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms, and Constituencies*, 59 SMU L. REV. 55, 62 (2006).

366. *Id.*

367. Jennifer B. Wriggins, *Domestic Violence in the First-Year Torts Curriculum*, 54 J. LEGAL EDUC. 511, 19 (2004).

368. Lucinda M. Finley, *supra* note 353, at 1280; see also KOENIG & RUSTAD, *supra* note 239, at 111 (noting that caps on noneconomic damages disproportionately impact women especially in birth injury cases).

369. *Gomez v. Hug*, 645 P.2d 916 (Kan. Ct. App. 1982).

370. *Id.*

371. The tort of intentional infliction of emotional distress was first developed in Justice Roger Traynor's landmark opinion in *State Rubbish Collectors Ass'n. v. Siliznoff*, 240 P.2d 282 (Cal. 1952). In the *Siliznoff* case, an association of rubbish collectors threatened to beat up the plaintiff and destroy his truck unless he acceded in their demand for union dues. *Id.* at 284. This new tort

liable for battery when a manager intentionally snatched a plate from an African American scientist attending a conference luncheon.<sup>372</sup> The plaintiff was an African American and the defendant a white restaurant.<sup>373</sup> Here, the intersecting variables of race, class, and education must be considered in determining the offensiveness of what happened. Nevertheless, Chamallas and Wriggins contend that courts often set the tort standard too high in racial harassment cases.<sup>374</sup> In one federal appeals court they cited, the plaintiff “was compared to slaves and to monkeys; her hair was mocked as ‘nappy’ and as resembling that of a cat or a dog.”<sup>375</sup> What is missing in civil recourse is any discussion of racial context, power differentials, and social context.

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. Judith Shklar criticized legal philosophers that focus on legalism that is isolated “completely from the social context within which it exists.”<sup>376</sup> She writes about how formalists seek to separate the law from the non-law saying: “Law is endowed with its own discrete, integral history, its own ‘science,’ and its own values, which are all treated as a single ‘block’ sealed off from general social history, from general social theory, from politics, and from morality.”<sup>377</sup> 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. Shklar contends that it is a mistake to fence off legalism from the rest of society.<sup>378</sup> Tort law does not descend disembodied from the thin, rarefied air of the legal heavens.<sup>379</sup> Roscoe Pound castigated the law professor of his time for

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redresses abuses of power where the defendant’s conduct is outrageous in deviating from community mores or norms. *Id.* at 285. “Before the infliction tort was created judges stretched the torts of battery, assault, and trespass to provide redress for outrageous conduct that inflicted severe mental anguish.” Mark P. Gergen, *The Jury’s Role in Deciding Normative Issues in the American Common Law*, 68 *FORDHAM L. REV.* 407, 440 (1999). The tort of outrage is emblematic of the role that gender, race, class, power, and other social variables play in tort decisions. See generally Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 *COLUM. L. REV.* 42 (1982) (discussing social context of intentional infliction of emotional distress cases).

372. *Fisher v. Carrousel Motor Hotel*, 424 S.W.2d 627, 631 (Tex. 1967).

373. *Id.* at 628–29.

374. See CHAMALLAS & WRIGGINS, *supra* note 158, at 79.

375. *Id.* (discussing *Walker v. Thompson*, 214 F.3d 615 (5th Cir. 2000)).

376. JUDITH N. SHKLAR, *LEGALISM: LAW, MORAL, AND POLITICAL TRIALS* 2 (1986).

377. *Id.*

378. *Id.* at 3.

379. See Cohen, *supra* note 361, at 809. Felix Cohen, who viewed legal formalism as transcendental nonsense, coined the concept of the legal heavens. He satirized the failure of formalists to consider social context and history:

acting like “legal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded.”<sup>380</sup> Civil recourse theory then is tort jurisprudence’s equivalent of constitutional law’s faint-hearted originalism in its belief that the meaning can be determined by retreating to Blackstone’s private wrongs.<sup>381</sup>

#### F. Civil Recourse’s Theory of Torts in a Bubble

Civil recourse approaches tort law from an “internal point of view” as opposed to the traditional account that torts deter, allocate losses, and serve to supplement public regulation.<sup>382</sup> Civil recourse theory is ahistorical and presupposes some sort of timeless essence of private wrongs that remains unchanged in the new millennium. Civil recourse theory’s myopic focus on individuals is inward turned neglects social interests. The problem is that these born-again Blackstonians are miniaturizing rights and remedies without acknowledging that torts are not just between the plaintiff and the defendant.<sup>383</sup>

I have a long history of seeing tort law through *Seinfeld*-colored glasses. In this case, the Bubble Boy episode comes to mind.<sup>384</sup> The Bubble Boy, you will recall, lived a sad life in germ-free incubator called “The Bubble.” Donald was the Bubble Boy’s name and he had a rather nasty personality that we do not need to deal with here. The pertinent point was that his living

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Some fifty years ago, a great German jurist had a curious dream. He dreamed that he died and was taken to a special heaven reserved for the theoreticians of the law. In this heaven one met, face to face the many concepts of jurisprudence in their absolute purity, freed from all entangling alliances with human life . . . . How much of contemporary legal thought moves in the pure ether of [the] heaven of legal concepts?

*Id.*

380. Ned Hamilton & Mattias Jarren, *Introduction to ROSCOE POUND, THE SPIRIT OF THE COMMON LAW* xxxi (Transactions Books 1998) (1906) (quoting Roscoe Pound’s famous 1907 address critiquing legal education).

381. See *supra* note 286 (discussing originalism).

382. See, e.g., Goldberg & Zipursky, *supra* note 113; see also Benjamin C. Zipursky, *The Internal Point of View in Law and Ethics: Introduction*, 75 *FORDHAM L. REV.* 1143, 1145 (2006) (describing “Hart and Holmes as a prism through which to look at the relations between law and ethics”); Goldberg & Zipursky, *supra* note 189, at 365 n.2 (“More generally, we have supposed that the first step—but not the last—in analyzing tort law is to understand it from the ‘inside,’ rather than by means of a reductively instrumental account that, on each occasion calling for the application of tort law, asks what result will serve some policy goal or goals, such as deterrence and compensation.”).

383. My discussion of tort law miniaturism has a parallel concept in sociology’s microtheories. See John F. Stolte et al., *Sociological Miniaturism: Seeing the Big Through the Small in Social Psychology*, 27 *ANN. REV. SOC.* 387 (2001).

384. *The Bubble Boy*, *Seinfeld* Scripts (Oct. 20, 2010 5:30 PM), <http://www.seinfeldscripts.com/TheBubbleBoy.htm>.



space was a germ-free incubator. Of course, there is a sense in which every case is a world unto itself. Nevertheless, neither cases nor their impact can be quarantined in a “germ-free incubator.” All deontological theories are in a bubble, and the civil recourse is sequestered from society.

*G. The Joy of (Tort) Sects: Torts Must be Born Again*

The term “fundamentalist tort theory” refers to the tendency of tort scholars to be true believers of a single account of tort law predicated upon a single variable.<sup>385</sup> Tim Kaye compares tort law camps to battling sects of some “fundamentalist religion, in which theorists flaunt their piety by providing an ever-purer statement of the faith.”<sup>386</sup> Corrective justice, for example, has a monistic focus upon the specific litigant who needs to be made whole again.<sup>387</sup> In contrast, law and economics macrotheory focuses on loss allocation and distribution,<sup>388</sup> recasting torts into a single doctrinal mold. Tort fundamentalism, like religious fundamentalism, places the highest value on doctrinal conformity.<sup>389</sup> Monists teach that tort law must strictly adhere to a set of basic doctrinal principles that are almost religious in nature.<sup>390</sup> Such proselytizers have turned tort law into competing sects each with a “with-me-or-against-me” view that is the functional equivalent of “fundamentalist piety.”<sup>391</sup> Civil recourse theory is a counter-hegemonic reaction to the tort law taught in American classrooms for many decades and

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385. See Green, *supra* note 109, at 266.

Leon Green commented on tort theorists who elevated fundamentalist doctrines in his day: [Tort law doctrine] can be stretched or contracted to meet the needs of the moment and is always colored by the desires of the user. Doctrine for doctrine’s sake may become an obsession with lawyers as it does with preachers and politicians. It feed on itself; hardens into clichés and blocks the arteries of thought.

*Id.*

386. Tim Kaye, *Rights Gone Wrong: The Failure of Fundamentalist Tort Theory*, 79 MISS. L.J. 931, 933 (2010).

387. Coleman, *supra* note 174, at 429–30.

388. See *supra* text accompanying notes 128–29.

389. See Scott Bidstrup, *Why the ‘Fundamentalist’ Approach to Religion Must be Wrong* (October 14, 2010 5:00 PM), <http://www.bidstrup.com/religion.htm> (“Fundamentalism isn’t restricted to Christianity or Islam, the two major religions on which it has had its greatest impact, but it is found in every major religion, ranging from Judaism, to Hinduism, to Sufism, to Buddhism, to even Zoroastrianism.”).

390. Kaye, *supra* note 386, at 933.

Indeed, rather than shedding new light on the law of torts, all these “with-me-or-against-me” approaches have one unappealing feature in common: they paint a picture of the law which is simply unrecognizable to the non-believer. Herein lies the problem. Instead of aiding the explanation or evaluation of the law of torts, statements of tort law theory are becoming more like affirmations of fundamentalist religion, in which theorists flaunt their piety by providing an ever-purer statement of the faith. Yet, as always, fundamentalist piety appeals only to fundamentalists.

*Id.* at 933.

391. *Id.*

maintains that “relational wrongs is the linchpin of a theory of tort law that makes better sense of tort doctrine and better captures what that body of law promises to deliver as one among many departments of the law.”<sup>392</sup> These recourse sectarians believe that tort law should be restored to its Blackstonian ideal of redressing private wrongs and jettison instrumental purposes such as deterrence or advancing social, racial, or gender justice.<sup>393</sup> Civil recourse sectarians, like those following corrective justice, emphasize the idea “that an act is right or wrong ‘in itself.’”<sup>394</sup> Goldberg charges that courts, too, have incorporated too much public policy in their unprincipled decisions: “Many judges seem to view tort cases as presenting a simple, non-law-governed choice: permit the jury to do ‘flabby equit[y],’ or deny liability as a matter of law in the name of ‘public policy.’”<sup>395</sup>

Just as Martin Luther led a revolt against the Catholic Church in sixteenth century Germany, civil recourse theories are leading an apostate revolt against traditional tort law.<sup>396</sup> Goldberg and Zipursky, the founding fathers of civil recourse, would downsize torts from serving broader societal functions to the micro point of view that focuses on the bipolar relationship between the injured plaintiff and the defendant who perpetrated the wrong.<sup>397</sup> They call for re-conceptualizing tort law from a public law to a

392. John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1014 (2006).

393. *Id.* at 1013–14.

For present purposes, it will suffice to say that the idea of torts as private or relational wrongs has a long lineage in Anglo-American law, tracing back through the likes of Cardozo to eighteenth-century American commentators like Dane, Greenleaf, and Swift to the work of Austin, Blackstone, and Locke. Conceptualizing torts as being built on relational duties also enables us not only to make sense of otherwise puzzling individual tort doctrines like reliance, but captures what is distinctive about tort law as a body of law . . . .”

*Id.*

394. Robinette, *supra* note 177, at 347.

395. Goldberg, *Unloved: Tort in the Modern Legal Academy*, *supra* note 22, at 1518.

396. See Goldberg & Zipursky, *The Moral of MacPherson*, *supra* note 219, at 1812.

The hostility towards duty in modern torts scholarship can now be seen for what it is: an undefended commitment to empiricist and utilitarian philosophies, masquerading as a conceptually necessary axiom. By demonstrating this much, we hope to have created a willingness on the part of the reader to entertain the possibility of a non-reductive conception of duty. Our remaining task is to start to make the positive case for retention of such a concept as part of the tort of negligence.

*Id.*

397. Civil recourse theorists gloss over the complexity of tort law and our compensations systems described by F. Patrick Hubbard:

[T]here are four potential bearers of the costs involved: the victim, the injurer, a third party like a private insurer, or the public through a social welfare scheme. If the costs are left on victims, they are poorer; if costs are shifted, victims are richer while injurers, third parties, or the public are poorer. In the tort system, the decision tends to be limited to

law of private wrongs:

Afraid since Holmes's time of the sanctimonious sound of "wrongs," and confronted with modern accident epidemics, scholars have convinced themselves that the subject of Torts is really about accidentally caused losses, not wrongs, and that the central task of tort law is to reallocate such losses in the most justifiable manner. Included among them are economists like Calabresi and Posner, corrective-justice theorists like Coleman, and mainstream doctrinal scholars like Prosser and the Reporters for the forthcoming Restatement (Third) of Torts. Without wrongs at the center, however, all of these theories are doomed to fail. Numerous, deeply rooted features of the structure of Anglo-American tort law, as we have shown, render loss-based theories incapable of capturing this body of law. In contrast, a civil-recourse theory that predicates rights of action on wrongs, not losses, comfortably shows how tort law hangs together.<sup>398</sup>

Nearly fifty years ago, Leon Green described the danger of funneling tort law through a single doctrinal perspective, but maintained that "[t]his does not call . . . for the flight from doctrine to the heaven of policy making."<sup>399</sup> The problem with civil recourse theory is that torts are more than one thing. Torts are not just about the individual plaintiff and defendant, but involve other societal interests. Fundamentalism in tort law, like religious fundamentalism, is dogmatic in believing that it has the one true way of seeing tort law. Goldberg and Zipursky write in their latest article that they seek to "put us back on track, not just pedagogically but theoretically."<sup>400</sup> Just as religious fundamentalists believe there is one true path, these tort sectarians ask us to accept as an article of faith that torts are about private wrong and serve no overarching public purposes.

#### *H. Civil Recourse Is Value-Free and Apolitical*

The civil recourse concern that judges not inject public policy and equitable considerations into their decision-making goes against the grain of tort law in action. Can judges decide tort cases in a value-free judicial chamber hermetically sealed from the unseemly world of politics? Civil

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whether the loss will be borne by the victim or the injurer. Third parties like liability insurers may ultimately bear the cost, but the initial judicial allocation will not usually involve the third party.

Hubbard, *supra* note 20, at 445.

398. Goldberg & Zipursky, *supra* note 198, at 986.

399. Green, *supra* note 109, at 269.

400. Goldberg & Zipursky, *supra* note 198, at 986.

recourse theorists would answer this question “yes.” Chamallas and Wriggins comment on Goldberg’s attempt to separate the prescriptive aspects of tort law from the interpretative.<sup>401</sup> They argue that this is a false dichotomy given that it is impossible to free interpretation and description from values.<sup>402</sup> Civil recourse theorists criticize torts scholars who view torts as a political struggle involving class, power, and social change.

John Goldberg suggests that a better and more accurate title for my book with Thomas Koenig, *In Defense of Tort Law*, is “*The Political Usefulness of Tort Law*.”<sup>403</sup> This clever and admittedly hilarious suggestion reminds me of the debate over whether sociology should be value neutral when I was a Ph.D student in the late 1970s and early 1980s. Sociologist Alvin Gouldner was the leading spokesperson for the view that value-free sociology was not possible or desirable. Gouldner castigated sociologists who attempted to “escape from the world”<sup>404</sup> by divorcing social science from political and economic realities. Gouldner argued that the ambitious sociologists of his day served the governing class by pursuing value-neutrality<sup>405</sup> in a manner that was “useful to those young, or not so young men, who live off sociology rather than for it . . . .”<sup>406</sup> He charged that the value-free doctrine was “a contemporary version of the most ancient sophistry.”<sup>407</sup> Too many young sociologists had an idealized image of themselves as working in an antiseptic world of value neutrality divorced from social reality. Allen Hutchinson, a Canadian torts scholar, echoes this argument, reasoning that value neutrality is impossible in tort law because it is not possible to “discard our ideological presuppositions and achieve some ahistorical or universal standpoint.”<sup>408</sup>

The question remains, can judges decide torts cases in a value-free judicial chamber hermetically sealed from the seamy world of politics? John Rawls employed the legal fiction of “the veil of ignorance” to refer to judicial decision making without bias.<sup>409</sup> Judith Shklar contends that the

401. CHAMALLAS & WRIGGINS, *supra* note 158, at 18.

402. *Id.* (“We do not believe that such a strict separation of interpretation and prescription is possible. For critical scholars like ourselves, the interpretative/prescriptive dichotomy is inherently unstable, primarily because we believe that the human process of ‘interpreting’ and ‘describing’ the law cannot free itself from normative considerations of what ought to be.”).

403. Goldberg, *Unloved: Tort in the Modern Legal Academy*, *supra* note 22, at 1511 n.41.

404. Alvin W. Gouldner, *Anti-Minotaur: The Myth of a Value-Free Sociology*, 9 SOC. PROB. 199, 203–04 (1962).

405. *Id.* at 204.

406. *Id.*

407. *Id.*

408. Allan C. Hutchinson, *Beyond No-Fault*, 73 CALIF. L. REV. 755, 755–56 (1985).

409. See JOHN RAWLS, A THEORY OF JUSTICE 136 (1971).

fundamentalist belief that law can be separated from politics is ideological though it is masquerading as value-free.<sup>410</sup> She sees this search for value neutrality as what prevents legal thinkers from apprehending “both the strengths and weaknesses of law and legal procedures in a complex social world.”<sup>411</sup> This search for law separate from society is also a search for certainty in an uncertain world.<sup>412</sup>

Civil recourse theorists’ call is for torts to return to an earlier era when judges supposedly decided cases in an apolitical, objective, and non-ideological way. Goldberg’s *Torts: Unloved* article asks torts scholars and courts to refocus on individual cases and controversies rather than viewing tort law as an instrument for social justice:

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. Relatedly, we will have to recapture a sense of tort as a body of law, rather than as an occasion for doing whatever seems right or practical at the time. Perhaps then tort could regain our love, or at least a grudging recognition of its worth.<sup>413</sup>

Moral philosophy is attractive on the surface because it is a retreat from the nitty-gritty world of tort reform politics but, in reality, ignoring the role of power inequities in U.S. society does not make it either value-free or apolitical. Civil recourse theory makes for elegant abstract argument, but it is woefully divorced from the reality of legislative politics.

Civil recourse theorists seem to yearn for a simpler world where moral philosophy fits one-on-one injuries and the political and social perspectives fall by the wayside. The private wrong created when a neighbor sues the wife or daughter of another fits well within models favored by younger tort scholars such as retributive justice or civil recourse. Moreover, in the form of a curious turn of phrase, Goldberg’s assertion that we “need to ask less, yet expect more, of tort” is a call for a simpler society where tort conflicts are mediated between neighbors in the local community.<sup>414</sup> He calls for us “to wean ourselves from the habit of treating tort as a means of devising ad

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410. JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 89–90 (1986).

411. *Id.* at 8 (discussing the straightjacket of legalism in the bench and bar).

412. Shklar describes how legalists attempt to cabin the complexity of human relationships into “the form of claims and counterclaims under established rules, and the belief that the rules are ‘there.’” *Id.* at 10.

413. Goldberg, *supra* note 22, at 1519.

414. *Id.*

hoc solutions to perceived social ills.”<sup>415</sup>

Civil recourse theorists’ downsizing of American tort law brings to mind the work of the German sociologist Ferdinand Tönnies. Tönnies developed a grand theory of modernity that focused on the ideal types of *Gemeinschaft* and *Gesellschaft*.<sup>416</sup> Tönnies described how societies evolved from *Gemeinschaft*, where culture was based upon traditional bonds of family and community, to *Gesellschaft*, where the social bonds were impersonal and specialized.<sup>417</sup> Mathieu Deflem describes Tönnies’ 1887 book as an explanation of the evolution from ancient to modern society:

Suggesting a transformation from *Gemeinschaft* to *Gesellschaft*, Tönnies argues that societies of the earlier form are organized around family, village, and town. The economy is largely agricultural and political life is local. *Gesellschaft* societies, on the other hand, are organized at the larger levels of metropolis and nation-state, while the economic system is based on trade and modern industry. Extending his sociological perspective to include a social psychology, Tönnies conceived of social formations as expressions of the human will. He argued human volition to be either of the type of essential-will (*Wesenwille*), dominant in *Gemeinschaft*, or arbitrary-will (*Kürwille*), which characterizes *Gesellschaft*. Essential-will is defined as the human will that readily springs forth from a person’s temper and character. The development of essential-will into arbitrary-will allows actors to choose among various means to fulfill certain ends. The crucial characteristic of arbitrary-will is the capacity to distinguish means from ends and to choose the most efficient means for any given end.<sup>418</sup>

Goldberg’s dwarfing of tort law returns us full circle to the tort law of the *Gemeinschaft* society of the eighteenth century.<sup>419</sup> During this time, as

415. *Id.* (emphasis added).

416. See Mathieu Deflem, *Tönnies, Ferdinand (1855–1936)*, in ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY (Edward Craig ed., 2001), available at <http://www.cas.sc.edu/socy/faculty/deflem/zToennies.html>.

417. See *id.*

418. *Id.*

419. I borrow this phrase from William F. Warde who charged that microsociologists were “dwarfing” sociology in the 1960s. William F. Warde, *American Sociology: An Article Review of Two Recent Studies of Modern Sociology: What is Sociology? by Alex Inkeles, and The New Sociology edited by Irving Louis Horowitz*, 26 INT’L SOCIALIST REV. 71 (1965) (book review), available at <http://www.marxists.org/archive/novack/1965/03/sociology.htm>.

now public wrongs involved breaches or violations of duties ““which affect the whole community.””<sup>420</sup> Tort law also mediated and moderated conflict in *Gemeinschaft* society. Civil recourse theorists demonstrate their conservative politics in their admiration of Sir William Blackstone who surveyed torts in Volume three of his famous *Commentaries*.<sup>421</sup> Civil recourse theorists apparently believe that tort law can be renewed if we will turn back the clock to an earlier era of private wrongs.<sup>422</sup> Macrotort scholars diverted from Blackstone’s private wrongs view of tort law as the United States industrialized and modernized:

In sum, the material, political, and intellectual circumstances in which tort law operated changed significantly in the late Nineteenth and early Twentieth Centuries. The traditional account—under which tort law was understood as a set of rules and concepts, grounded in ordinary morality, for resolving disputes over alleged wrongs committed by *A* against *B*—was no longer obviously in tune with modern realities or political and intellectual sensibilities. Indeed, many would soon conclude that if tort law was to be explained or defended, it would have to be on new grounds. This would be the dominant project of American tort theory in the first seventy years of the Twentieth Century.<sup>423</sup>

Blackstone wrote his *Commentaries* on the English common law during a period of great transformation as the writ system was breaking down.<sup>424</sup>

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420. Goldberg, *supra* note 240, at 439 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*2).  
421.

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.”

Rustad & Koenig, *supra* note 100, at 12 (footnotes omitted) (quoting RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 12 (1990)).

422. Civil recourse theory’s endorsement of Blackstone stands in stark contrast to instrumentalists who revile him. As we wrote in our Brooklyn Law Review piece:

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.” . . .

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 . . .

*Id.* at 12 (footnotes omitted) (quoting POSNER, *supra* note 421, at 1, 2–13).

423. Goldberg, *supra* note 80, at 521.

424. As Justice Cardozo wrote in the famous contract case of *Wood v. Duff-Gordon*, 118 N.E.

Writs were formal legal documents issued by the court that called for the seizure of persons or property.<sup>425</sup>

“This element of damages seems to have been the chief invigorating force behind the origin and development of trespass, and also the main cause of that remarkable development of writs and the forms of action which took place in the thirteenth century and included much else in addition to trespass.”<sup>426</sup>

Civil recourse theory seems to fit perfectly with eighteenth century private wrongs system where the chief disputes involved intentional tort actions between neighbors in the local community.

However, if, in the eighteenth century, an obstruction blocked the public highway it was a common nuisance.<sup>427</sup> Eighteenth-century English tort law operated in a *Gemeinschaft*-type society where the economy was agricultural with a homogenous sense of community and outlook. The tort law of that period was largely about intentional torts, not negligence.<sup>428</sup> Volume three of Blackstone’s *Commentaries*, entitled “Private Wrongs,” was the equivalent of *Prosser on Torts* for eighteenth-century England.<sup>429</sup> In Blackstone’s day, torts were not just between the plaintiff and the defendant; they also served public purposes by preserving the family and local community:

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.<sup>430</sup>

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214, 214 (1917): “The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal.”

425. The writ system was a straitjacket that made it difficult for torts to evolve. At early common law, under the writ system, a plaintiff would have no recovery unless her injury fit within the confines of an “existing and recognized writ.” WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 19 (1971); see also Rustad & Koenig, *supra* note 100, at 9 (noting that writs were fee-based and favored the wealthy and powerful).

426. Woodbine, *supra* note 22, at 802.

427. *Id.*

428. See *supra* note 97 and accompanying text (placing the birth of negligence liability in the mid-nineteenth century).

429. 3 BLACKSTONE, *supra* note 420.

430. Rustad & Koenig, *supra* note 100, at 10.



Blackstone did not use the word torts, but rather “private wrongs,” which comprised only “a small piece of what he took to be the gorgeous mosaic of the liberal state’s complex system of law.”<sup>431</sup> Goldberg asks us to return to downsized tort law where the dispute is about the plaintiff and the defendant rather than telescopic issues that occupy the legal academy today.<sup>432</sup> Blackstone’s account of eighteenth-century English torts demonstrated that although verdicts for injuries were private wrongs they were hardly value-free since they reflected the biases of a patriarchal society.<sup>433</sup> Protecting the integrity of the patriarchal family and the community was an urgent problem for eighteenth-century torts.<sup>434</sup> Males received civil redress “for the mortification they suffered when defendants seduced their female servants, debauched their daughters, or formed illicit sexual attachments with their wives.”<sup>435</sup> The torts system of the mid-1700s did not redress the injury to the wife brutalized by an abduction, seduction, or sexual assault.<sup>436</sup> The Blackstonian period of tort law evidences “gender-linked limitations on recovery.”<sup>437</sup>

Eighteenth and early nineteenth century court dockets included actions for seduction, abduction, criminal conversation, and alienation of affections.<sup>438</sup> Familial torts vindicated the right of the male head of

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431. Goldberg, *supra* note 22, at 1504.

432. *See id.* at 1519. Goldberg suggests “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.” *Id.*

433.

Some legal historians contend that Blackstone’s principal ideological motive was to defend the rights and privileges of the English elite. These theorists characterize Blackstone as “the supreme apologist for the English political hierarchy and for the distribution of wealth and power that existed in England in the mid-eighteenth century.” In contrast, the libertarian torts scholar Richard Epstein praises Blackstone’s absolutist vision of property rights as establishing important bedrock principles that have a continuing vitality.”

Rustad & Koenig, *supra* note 100, at 11 (footnotes omitted).

434. *See id.* at 19.

435. KOENIG & RUSTAD, *supra* note 239, at 106.

436. *See id.* (“[T]orts committed against females were classified as affronts to the family as a social institution, and therefore awards were given to the male as the head of the household.”); *see also* Townsend v. Townsend, 708 S.W.2d 646, 647 (Mo. 1986) (“By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.” (quoting 1 BLACKSTONE, *supra* note 420, at \*442)).

437. CHAMALLAS & WRIGGINS, *supra* note 158, at 3.

438. Such torts were seen as crimes against the community.

The French sociologist, Emile Durkheim, defined collective conscience as the “totality of beliefs and sentiments common to the average members of a society.” In pre-industrial societies, crimes and quasi-criminal conduct can be seen as a violation of the collective conscience. Punitive damages in early America were reflective and supportive of the collective conscience of the day . . . .

Rustad, *supra* note 93, at 485 (footnotes omitted) (quoting DURKHEIM, *supra* note 51, at 38–39).

household rather than the women and children who were the victims of trespass.<sup>439</sup> Eighteenth century tort law upheld the edifice of the patriarchal family structure where women were classified as chattel.<sup>440</sup> Therefore, injuries to wives and children were considered an interference with the husband's personal property.<sup>441</sup> Husbands had personal property actions against other men that trespassed upon their conjugal or parental property by engaging in illicit sexual relations.<sup>442</sup> By the middle of the twentieth century, tort actions for seduction, criminal conversation, alienation of affections and defilement were dead or dying.<sup>443</sup> However, Blackstone's private wrongs model to enjoy hegemony from the 1760s to the middle of the nineteenth century.<sup>444</sup>

The civil recourse theories portray Blackstone's "gorgeous mosaic" without acknowledging its patriarchal assumptions that reflected wider societal values.<sup>445</sup> Eighteenth-century tort law upheld the edifice of the patriarchic family structure where women were classified as chattel.<sup>446</sup> Blackstone's discussion of private wrongs against the family is particularly telling of the fact that his conceptual lens is clouded by then prevailing norms:

We may observe, that in these relative injuries, notice is only taken of the wrong done to the superior of the parties related by the breach and dissolution of either the relation, itself, or, at least, the advantages accruing there from; while the loss of the inferior, by such injuries, is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care,

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439. See Rustad & Koenig, *supra* note 100, at 19.

At common law, women were classified as personal property of the male head of household. Tort law provided remedies for theft of property, including a cause of action for abduction. Abduction was the taking of a man's wife by fraud, persuasion or open violence—a tort that reflected the status of women as chattels. Husbands could recover damages from another man who "persuade[d] or entice[d] his] wife to live separate from him without a sufficient cause." A husband could receive damages for the defendant having taken his wife, but could not repossess his spouse without her consent.

Rustad & Koenig, *supra* note 100, at 20; see also KEETON ET AL., *supra* note 7, at 901–02.

440. Rustad & Koenig, *supra* note 100, at 19 ("Eighteenth century tort law reflected the patriarchal family values of an era in which males were absolute rulers of the intimate environment. Men enjoyed extensive rights over their chattels, which included wives, children and servants.")

441. See Koenig & Rustad, *supra* note 239, at 105 (discussing injuries to wives).

442. See *id.*

443. *Id.* at 109.

444. Goldberg, *supra* note 22, at 1505.

445. See *id.* at 1504.

446. See Rustad & Koenig, *supra* note 100, at 19.

or assistance of the superior, as the superior is held to have in those of the inferior: and, therefore, the inferior, can suffer no loss or injury. The wife cannot recover damages . . . for she hath no separate interest in anything, during her coverture.<sup>447</sup>

The familial torts of Blackstone's day reflected a patriarchal society where the husband's role as household head was paramount.<sup>448</sup> Under Blackstone's model, husbands could be injured in three ways: if another man abducted his wife, had "criminal conversation" with his wife, or beat his wife.<sup>449</sup> The actual victim, the wife, could seek no such redress.<sup>450</sup> Blackstone's *Commentaries* is not only a grand theory of the then known private wrongs, but it is also a wider ideological project justifying the values and the power structure of English society.<sup>451</sup>

### I. *Civil Recourse Theory Is Reductive*

In his *American Mercury* magazine, H.L. Mencken ridiculed the smugness of 1920s Protestant sects. When asked why he stayed in America given its smug fundamentalism, Mencken reportedly responded: "Why do people visit zoos?"<sup>452</sup> Christopher Robinette describes the tort menagerie as consisting of diverse species, but most theories are broadly classifiable as hedgehogs and foxes.<sup>453</sup> Hedgehogs are torts scholars who view the world monistically, whereas foxes are pluralistic in their outlook.<sup>454</sup> Steven Smith described the tendency of modern legal academics to engage in reductive thinking:

[T]he institutions of law perform multiple functions and that the law, in performing its different functions, must work in different ways. That proposition seems so obvious, and so singularly unexciting . . . . However obvious, the law's functional multiplicity, as well as the jurisprudential implications of that multiplicity, are regularly overlooked. Because lawyers, judges, and even (or especially) legal scholars often seem afflicted with a compelling

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447. 3 BLACKSTONE, *supra* note 420, at \*142–43.

448. Prentice L. White, *Stopping the Chronic Batterer Through Legislation: Will it Work This Time?*, 31 PEPP. L. REV. 709, 714–17 (2004) (contending that Blackstone formulated a theory of the husband as disciplinarian in a patriarchal family structure).

449. *Id.* at \*138–39.

450. *See id.* at \*143.

451. Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 561 n.54 (1997) (describing Blackstone's ideological project).

452. *See* 2 PAUL S. BOYER ET AL., *THE ENDURING VISION: A HISTORY OF THE AMERICAN PEOPLE SINCE 1865*, at 546 (concise 6th ed. 2010).

453. *See* Christopher J. Robinette, *supra* note 177, at 332

454. *See id.*

need to reduce law to a unitary image or theory, legal theory—and law—suffer.<sup>455</sup>

Reductionism is the tendency of theorists to boil the complexity of tort law into one thing, whether it is corrective justice, civil recourse, or allocative efficiency.<sup>456</sup> The problem with this approach is that torts performs multiple functions and has no single organizing principle. As Justice William O. Douglas reminds us: “The law is not a series of calculating machines where definitions and answers come tumbling out when the right levers are pushed.”<sup>457</sup> Civil recourse’s monism makes it a theory that excludes gender, race, power, social change, and social context in general.<sup>458</sup> Jane Stapleton compares the complex mosaic of tort law to a very “distinctive sculptured garden that is being built up by usually incremental contributions from generations of cases.”<sup>459</sup> She notes that civil recourse theory has attempted to reduce tort law “to a unitary idea,” when what is needed is a “nuanced plural account.”<sup>460</sup>

#### J. Civil Recourse Theory Fails to Explain Jurisdictional Differences

One last point needs to be made about civil recourse theory’s monism. Tort law is more complex and heterogeneous than civil recourse theorists would acknowledge.<sup>461</sup> Civil recourse theorists generally use featured cases

455. Steven D. Smith, *Reductionism in Legal Thought*, 91 COLUM. L. REV. 68, 68 (1991).

456. *Id.* at 84 (“[A] reductionist depiction of law, regardless of which form the particular reductionism takes, will distort legal understanding by presenting one perspective as if it were the whole picture.”). Jane Stapleton criticizes civil recourse theory’s reductionism as well as unnecessarily obscure vocabulary. Stapleton, *supra* note 121, at 1560 (“We can see what is distinctive about a tree, but we cannot reduce this to a unitary notion. Indeed, why would we want to do so?”).

457. William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC’Y 104, 105 (1948).

458. See Goldberg, *supra* note 208, at 1252. John Goldberg acknowledges that civil recourse is monistic in his Monsanto lecture at Valparaiso Law School:

So the civil recourse account excludes things from the domain of tort. In that sense, at least, it is monistic rather than pluralistic. Yet at the same time it is capacious. Because it frames the enterprise in terms of defining wrongs and empowering victims to respond to wrongs, rather than as an enterprise that seeks to achieve a collective goal such as deterrence or loss-spreading, it is not embarrassed by features that other theories are forced to regard as facially dysfunctional.

*Id.*

459. Stapleton, *supra* note 121, at 1560–61.

460. *Id.* at 1561.

461. I am indebted to Tim Kaye who pointed out the deficiencies of contemporary tort theories in accounting for jurisdictional differences. See generally Kaye, *supra* note 386 (examining rights-based and economics-based tort law theories). A monistic theory such as civil recourse does not

without fleshing out or explaining jurisdictional differences. Just by way of example, New York has never recognized the tort of wrongful discharge but it has enacted a number of whistleblower statutes.<sup>462</sup> In many other states, a discharged whistleblower may file tort claims.<sup>463</sup> New York, along with a number of Southern states, “refused to recognize any exceptions to employment-at-will, concluding that the meaning of ‘contrary to public policy’ was simply ‘too nebulous’ to justify the judicial creation of a new tort.”<sup>464</sup> Thirteen other states did not wait for their legislatures to carve out a public policy tort.<sup>465</sup> The joy of torts can be experienced in our federalist system because states have the ability to serve as local laboratories of social experimentation.<sup>466</sup>

Civil recourse theory ignores the empirical reality of tort law’s diverse local traditions, which do not fit well with its paradigm. For example, civil recourse theory holds that punitive damages reflect “a judgment about the [individual] plaintiff’s right to be punitive.”<sup>467</sup> The empirical reality of punitive damages is that it is a multidimensional remedy that performs manifold functions.<sup>468</sup> A multidimensional theory of tort law acknowledges that functions performed by the civil justice system change, are abandoned, or are replaceable by other social institutions.<sup>469</sup> The problem with a monistic theory is that it cannot account for the diversity of state approaches to punitive damages and the way states serve as laboratories for tort experiments.<sup>470</sup> Monistic theories, such as civil recourse theory, do not account for the complexity of tort law and indigenous jurisdictional differences.<sup>471</sup>

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explain why there are variations in important tort rights and remedies such as punitive damages, non-economic damages, joint and several liability, lost chance recovery, premises liability, comparative negligence, and the like. See Rustad & Koenig, *supra* note 100, at 9 (noting that writs were fee-based and favored the wealthy and powerful).

462. Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 115 (2000).

463. *Id.* at 123.

464. Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 661 (2000).

465. *Id.* at 661–62.

466. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

467. Benjamin Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 167–68 (2005) (articulating civil recourse approach to punitive damages).

468. Calabresi, *supra* note 127, at 337–46 (describing five functions beyond compensating a particular plaintiff, including the enforcement of social norms through the attorney general, the multiplier, the “tragic choice” function, recovery of generally unrecoverable compensatory damages, and righting private wrongs).

469. *Id.* at 349.

470. See *supra* note 466 and accompanying text.

471. See, e.g., Michael L. Rustad, *The Closing of Punitive Damages’ Iron Cage*, 38 LOY. L.A. L.

Punitive damages as private retribution meshes well with a prehistoric tort law where the focal point is private wrongs. However, this limited viewpoint of tort law slights more than 250 years of court decisions establishing the critical functions of punishment and deterrence.<sup>472</sup> The U.S. Supreme Court has noted how “[p]unitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”<sup>473</sup> However, this well-established function of general deterrence is not acknowledged by civil recourse’s view of punitive damages as vindicating private wrongs.<sup>474</sup>

Specific deterrence sends a message to the individual defendant that a tort does not pay. However, general deterrence for defendants exists in the larger industry outside the bubble of the specific lawsuit.<sup>475</sup>

Zipursky describes tort law’s function as giving the injured plaintiff an avenue to be vindictive or punitive as a matter of civil recourse.<sup>476</sup> Sebok views punitive damages as a remedy chiefly about “private redress.”<sup>477</sup> He writes that: “The wrong of violating a private right shows contempt for the relational duties owed between the wrongdoer and the victim.”<sup>478</sup> He describes punitive damages as serving as a means of “private retribution.”<sup>479</sup> Therefore, civil recourse theorists deny the historically-based character of punitive damages as a method of societal punishment and general deterrence.<sup>480</sup> Their restricted interpretation impedes tort law from functioning as a free market, low cost alternative to heavy, expensive regulation and bureaucracy.

Many, but not all, states use the term “punitive damages.” The terms “vindictive,” “exemplary,” or “smart money” are used in different

REV. 1297, 1299–1300 (2005) (noting “significant variation among the states in the availability of punitive damages” with a handful of states not recognizing them, capping them, or allocating a portion to a state fund).

472. See *infra* notes 473–74 and accompanying text.

473. *Philip Morris U.S.A. v. Williams*, 549 U.S. 346, 352 (2007) (citations omitted).

474. See *supra* note 467 and accompanying text.

475. See Anthony J. Sebok, *Punitive Damages in the United States*, in 25 PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 155, 179–80 (Helmut Koziol & Vanessa Wilcox eds., 2009) (explaining that most states award punitive damages to extend the deterrent effects beyond the conduct of the initial wrongdoer to the public at large).

476. Zipursky, *supra* note 467, at 152–53 (“It is the state’s permission and empowerment of a plaintiff to be vindictive, and to be punitive, albeit in a well-circumscribed and civil way. This is the civil aspect of punitive damages.”).

477. See Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 957 (2007).

478. *Id.* at 1028.

479. *Id.* at 1025.

480. See *supra* notes 468–71, 473 and accompanying text.

jurisdictions.<sup>481</sup> Oregon describes this remedy as a “legal spanking” administered to bad actors that violate important societal norms.<sup>482</sup> Five states—Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington—do not recognize the remedy of punitive damages at all.<sup>483</sup>

The states are almost unanimous in recognizing the twin purposes of punitive damages: punishment and deterrence.<sup>484</sup> Nevertheless, Michigan does not recognize deterrence and punishment, limiting exemplary damages to compensation for injured feelings.<sup>485</sup>

The Michigan Supreme Court described the extra compensatory role of exemplary damages in assuaging the plaintiff’s injured feelings in a case arising out of a libelous newspaper story entitled, “How a Sneak Made Love.”<sup>486</sup> Connecticut imposes punitive damages to pay a plaintiff’s litigation expenses.<sup>487</sup> Anthony Sebok conceptualizes punitive damages as “state-sanctioned revenge.”<sup>488</sup> For example, courts evaluating punitive damages in product liability cases consider the existence and magnitude of the danger to the public and what the manufacturer did to discover and

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481. See Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 517 (1957) (describing the diverse vocabulary for civil punishment in the tort system).

482. Rustad, *supra* note 471, at 1303–04.

483. *Id.* at 1304. In Louisiana, a plaintiff may not recover punitive damages unless such damages are expressly provided for in the state’s civil code. See *Young v. Ford Motor Co.*, 595 So. 2d 1123, 1131 n.13 (La. 1992). Massachusetts, for example, does not recognize punitive damages, absent statutory authorization, but permits increasing compensatory damages to punish the defendant. *Smith v. Holcomb*, 99 Mass. 552, 553 (1868). In *Panas v. Harakis*, 529 A.2d 976 (N.H. 1987), the New Hampshire Supreme Court explained that “when the act involved is wanton, malicious, or oppressive, the compensatory damages awarded may reflect the aggravating circumstances.” *Id.* at 987 (quoting *Vratsenes v. N.H. Auto, Inc.*, 289 A.2d 66, 68 (N.H. 1972)).

484. See *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 107 (1893) (describing punitive damages functions as punishment and deterrence); *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 343 (Ohio 1994) (“The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct.”); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1318 (1993) (“The punishment and deterrence functions are the most frequently cited rationales for the remedy of punitive damages.”).

485. Punitive damages in Michigan fulfill a broader compensatory function. See, e.g., *Peisner v. Detroit Free Press, Inc.*, 364 N.W.2d 600, 606 (Mich. 1984) (discussing availability of punitive damages in Michigan in context of defamation suit); *Jackovich v. Gen. Adjustment Bureau, Inc.*, 326 N.W.2d 458, 464 (Mich. Ct. App. 1982) (holding that punitive damages are to compensate plaintiff for humiliation and indignity suffered resulting from defendant’s tort); see also Rustad, *supra* note 471, at 1342.

486. *Scripps v. Reilly*, 38 Mich. 10, 23 (1878).

487. Connecticut limits awards of punitive damages to full compensation for litigation expenses less taxable costs. See, e.g., *Gagne v. Town of Enfield*, 734 F.2d 902, 904 (2d Cir. 1984) (explaining Connecticut law on punitive damages); *Bates v. McKeon*, 650 F. Supp. 476, 481 (D. Conn. 1986) (permitting police officer to collect punitive damages to compensate for litigation expenses in aggravated assault action); *Vandersluis v. Weil*, 407 A.2d 982, 986 (Conn. 1978) (explaining that punitive damages recovery is limited to litigation costs of action being tried and does not include expenses of former trial); *Collens v. New Canaan Water Co.*, 234 A.2d 825, 831–32 (Conn. 1967) (maintaining that punitive damages award is purely compensatory).

488. Sebok, *supra* note 477, at 961.

reduce the danger.<sup>489</sup> A strong torts system makes it less likely that companies will trade profits for safety and take unnecessary risks endangering the environment. Therefore, a strong torts system functions as general deterrence for defendants in the larger industry, those outside the lawsuit bubble.<sup>490</sup>

Similarly, jurisdictional differences can be found with respect to other important tort doctrines such as joint and several liability,<sup>491</sup> contributory or comparative negligence,<sup>492</sup> non-economic damages,<sup>493</sup> tort defenses,<sup>494</sup> and views of legal causation.<sup>495</sup> In states with a weak attorneys general or public law, torts may be more expansive than in states with strong public regulations. Indeed, it is hypothesized that tort law has much less of a role to play in countries with comprehensive social insurance.<sup>496</sup> In the future, the global, cross-border legal environment will need to be addressed by torts

489. David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1369 (1976).

490. See *supra* note 475 and accompanying text.

491.

At early common law, joint tort liability was a narrow doctrine that “referred to vicarious liability for concerted action.” The rationale for doing away with joint liability is the assumption that the defendants should not pay more than the percentage of fault attributable to them. Corporations oppose joint and several liability because it makes a co-defendant responsible for paying an entire award if the other party is bankrupt or otherwise insolvent. In jurisdictions where there is only several liability, the defendant pays only her share of the claim and there is no need for contribution. However, joint and several liability gives a co-defendant who is paying more than her fair share, the possibility of contribution or indemnity.

Thirty-five states limited joint and several liability as the result of tort reform.

Rustad & Koenig, *supra* note 100, at 69–70 (footnotes omitted) (quoting PROSSER, *supra* note 113, at § 3).

492. Comparative negligence jurisdictions vary depending on whether they are “modified” or “pure” regimes. In a modified system, negligent plaintiffs may recover provided their negligence is neither equal to, but not greater than that of the defendant. See 65A C.J.S. *Negligence* § 327 (2010). In a pure comparative negligence regime, the plaintiff’s recovery is diminished by the degree of negligence, even if it is greater than or equal to that of the defendant. § 325. In a modified comparative negligence jurisdiction following the fifty-fifty rule, a plaintiff may not recover if his fault was fifty percent or more in contributing to his injury. See § 327.

493. See generally Rustad, *Heart of Stone*, *supra* note 67, at 370 (“Yet a growing number of states already cap noneconomic damages at a fixed ceiling. Texas caps noneconomic damages at \$250,000, while Mississippi caps them at \$500,000.”).

494. See, e.g., Ellen M. Bublick, *Comparative Fault to the Limits*, 56 VAND. L. REV. 977, 993 (2003).

495. Thomas C. Galligan, *U.S. Supreme Court Tort Reform: Limiting Power to Articulate and Develop Tort Law—Defamation, Preemption and Punitive Damages* 74 U. CIN. L. REV. 1189, 1199 (2006); see, e.g., *Wal-Mart Stores, Inc.*, 752 So.2d 762 (La. 1999) (summarizing jurisdictional differences for duty/risk liability for third-party acts).

496. See generally David Corbe-Chalon & Martin A. Rogoff, *supra* note 297, at 235 (arguing that civil code systems prefer comprehensive social insurance to private tort law).



theorists. A functional approach to tort law is non-reductive, but this creates its own problems of accounting for its complexity.<sup>497</sup> Functionalists do not conceptualize law as existing in a “vacuum or as a self-contained and self-concerned system.”<sup>498</sup> The latest Supreme Court decisions have moved toward the civil recourse theory of torts. In *Philip Morris USA v. Williams*, the Supreme Court miniaturized the remedy when it held that a defendant must not be punished for harm to third parties or other bad acts.<sup>499</sup> The *Williams* Court further held that “the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties, . . . those who are, essentially, strangers to the litigation.”<sup>500</sup> In so holding, the Court tacitly assumed that Philip Morris reached out and harmed Jesse Williams, an individual smoker.<sup>501</sup> While the Court still celebrates the historic functions of punishment and deterrence, its reasoning in *Williams* is very similar to what the civil recourse theorists propose.<sup>502</sup> Indeed, the Court held that punishment is solely between the plaintiff and the defendant.<sup>503</sup> In making this assertion, the Court adopted unrealistic assumptions about how mass torts work in the real world.<sup>504</sup>

## V. TORT LAW AS PUBLIC WRONGS: LIVING WITH MULTIPLICITY

Journalist Mika Brzezinski describes the multitasking nature of working mothers in her new book *All Things at Once*.<sup>505</sup> It would be unrealistic to

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497. “The difficulty in framing any concept of ‘law,’” Karl Llewellyn wrote, “is that there are so many things to be included, and the things to be included are so unbelievably different from each other.” This difficulty is a perpetual source of frustration for lawyers and scholars who crave a cleaner image or a tidier theory of law—hence the allure of reductionism.

Steven D. Smith, *supra* note 455, at 109 (footnote omitted) (quoting Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 431 (1930)).

498. Calabresi, *supra* note 127, at 333.

499. *Philip Morris USA v. Williams*, 549 U.S. 346, 357 (2007) (“Due Process Clause prohibits a State’s inflicting punishment for harm caused strangers to the litigation.”).

500. *Id.* at 353.

501. *Williams* held that a jury may not impose punitive damages to punish a defendant for “harm caused strangers to the litigation.” *Id.* at 357. But the Court acknowledged that “harm to others shows more reprehensible conduct.” *Id.* at 355.

502. All eight cases that the U.S. Supreme Court has decided in its punitive damages jurisprudence “dealt with corporate punishment for group injuries that have a social impact beyond the immediate victim.” Michael L. Rustad, *The Supreme Court and Me: Trapped in Time with Punitive Damages*, 17 WIDENER L.J. 783, 804 (2008) (footnote omitted) (summarizing the U.S. Supreme Court’s punitive damages jurisprudence from 1989 to 2008).

503. *See id.* at 357.

504. For one thing, it will be difficult to construct jury instructions that advise the jury that they may not punish a defendant for harm caused to strangers, but that the “harm to others” is emblematic of more reprehensible conduct.

505. MIKA BRZEZINSKY WITH DANIEL PAISNER, *ALL THINGS AT ONCE* 4 (2009) (describing the balancing of marriage, family and a career).

imagine a contemporary American woman who could do only one thing. Tort law is also a “cultural reflector” of the complexities of American society in the new millennium.<sup>506</sup> Tort law and its remedy of punitive damages functions on many levels and performs a multitasking role.<sup>507</sup> Judge Allen Linden describes tort law as multifunctional working as “a compensator, a deterrer, an educator, a psychological therapist, an economic regulator, an ombudsperson, and an instrument for empowering the injured . . . .”<sup>508</sup> That is the beauty of American tort law and there is no point in miniaturizing it to serve the single function of redressing civil recourse function.<sup>509</sup> I argue that tort law has multiple functions, while civil recourse theorists would collapse tort law’s multiplicity into a single thing: civil redress.<sup>510</sup> This part of the Article examines these multiple functions.

#### A. Torts Right Private Wrongs

Judge Calabresi notes that “America is a rights-based society” and this cultural value creates a “desire to make others ‘pay’ for the wrongs they have done us.”<sup>511</sup> Justice Allen Linden was the first to conceptualize tort law as an ombudsman that gives plaintiffs a public voice in “condemnation of the activity that produced their suffering.”<sup>512</sup> Nevertheless, the other face of tort law is no less significant. Plaintiffs filing tort lawsuits serve a broader purpose in uncovering and punishing corporate wrongdoing. Civil recourse theorists are tort hedgehogs in arguing that this subject is only about one thing: civil redress.<sup>513</sup> Nevertheless, civil redress can accomplish

506. MARSHALL S. SHAPO, *TORT LAW AND CULTURE* 6 (2003).

507. Guido Calabresi contends that tort law has “long been characterized by complexity of functions, goals, and methods of achieving these. That is true of notions like causation, duty, punitive damages, and *respondeat superior* to name but a few.” Calabresi, *supra* note 127, at 350 (2005).

508. Allen M. Linden, *Viva Torts!*, 5 J. HIGH TECH L. 139, 142 (2005).

509. Stapleton, *supra* note 121, at 1557.

510. “Multiplicity in law is merely one instance of the more general phenomenon of multiplicity in life; for that reason, it presents problems with which we are all familiar and with which we have learned, to one degree or another, to cope.” Smith, *supra* note 455, at 87.

511. Calabresi, *supra* note 127, at 345.

512. Linden, *supra* note 508, at 144. See generally Allen Linden, *Tort Law as Ombudsman*, 51 CAN. BAR REV. 55 (1973).

513. See *supra* notes 453–54 and accompanying text. Judge Calabresi comments on the U.S. Supreme Court’s tendency to view multiple damages as one thing. He contends that punitive damages in tort law play multiple roles including the enforcement of social norms through private attorneys general. Calabresi, *supra* note 127, at 333, 337. Judge Calabresi takes issues with law and economics proponents who reduce complex tort rights and remedies to economic efficiency. *Id.* at 334.

more than one thing. Tort foxes would acknowledge this because they find a place for both microtort and macro-tort functions.<sup>514</sup>

### B. Torts Safeguard Intellectual Property Infrastructure

*The shift to an information-based economy is built upon “information (financial services, accounting, software, science) and cultural (films, music) production, and the manipulation of symbols (from making sneakers to branding them and manufacturing the cultural significance of the Swoosh).”*

Yochai Benkler<sup>515</sup>

Hidden from the history of tort law is the reality that intellectual property infringement claims were classified as “particular torts.”<sup>516</sup> Patent and copyright have long been regarded as creatures of federal statute, but infringement was historically considered to be a tort.<sup>517</sup> For instance, the infringement of a patent was classifiable as a tort—namely, trespass on the case.<sup>518</sup> In England, owners of trademarks employed the common law action of deceit as the sole remedy for infringement.<sup>519</sup>

Plaintiffs in trademark infringement cases often sought equitable remedies to redress “the fraud upon the public”<sup>520</sup> during the formative era of U.S. tort law, and such infringement actions were recognized as torts in acknowledgment of the principle that no wrong should be without a remedy.<sup>521</sup>

Today, patent and copyright laws are governed entirely by comprehensive federal statutes with no residual role for tort law. However, business torts are still important to vindicate intellectual property interests such as the right of publicity, unfair competition in trademark law, and the misappropriation of trade secrets.<sup>522</sup> What is different about intellectual property infringement is that it not only harms the property owner but the

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514. See *supra* notes 453–54 and accompanying text.

515. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 3 (2006).

516. UNDERHILL, *supra* note 6, at 612 (discussing particular torts in the section entitled “Of Infringements of Trade-Marks and Patent and Copyright?”).

517. *Id.* at 638.

518. *Id.* at 652–53 (explaining patent infringement as a wrongful action classified as trespass on the case).

519. FRANK I. SCHECHTER *THE HISTORICAL FOUNDATIONS OF LAW RELATING TO TRADE-MARKS* 141, 143 (The Law Book Exchange, 2008) (1925) (“[T]he law was definitely settled that the proper common law action form trade-mark infringement is an action in deceit.”).

520. *Id.* at 144 (stating that not only does trademark piracy injure the owner of the mark but commits a “fraud upon the public and upon the true owner of the trademark”).

521. UNDERHILL, *supra* note 6, at 652.

522. See discussion *infra* Part V.B.1–2.

public as well who may be misled by predatory or unfair business practices.<sup>523</sup>

As noted in my critique of civil recourse, that theory does not account for the complexity of tort law.<sup>524</sup> Civil recourse theory does not acknowledge that intellectual property torts protect the public as well as private infringement actions.<sup>525</sup> Intellectual property constitutes the crown jewels of our information-based economy as infrastructure is based upon software and intangible assets rather than durable goods.<sup>526</sup> Therefore, business torts play an increasingly important role in protecting these intangible assets. Moreover, the tort of misappropriation is increasingly vital to national security as tort actions supplement weak federal and state statutes addressing economic espionage.<sup>527</sup> The next subsection examines the roots of the tort of unfair competition, which developed to protect business interests, not the interest of David in a David versus Goliath scenario.

### 1. Trademark Infringement as Unfair Competition

At common law, the trademark was a “symbol by which a man causes his goods or wares to be identified . . . .”<sup>528</sup> Trademark infringement was purely a business tort prior to Congress passing the Lanham Act in 1946.<sup>529</sup> At common law, the tort of trademark infringement vindicated public wrongs as well as civil recourse to the trademark owner: “The doctrine of the protection of trade-marks does not depend entirely upon invasion of individual rights, but upon the broad principles of protecting the public from deceit.”<sup>530</sup> Trademark law has long been regarded as a business tort of unfair competition including claims for palming off and deceit on the

523. See *infra* text accompanying notes 530–33.

524. See discussion *supra* Part IV.

525. See discussion *supra* Part IV.A.

526. See *supra* Beckerman-Rodau, note 224, at 228; *supra* notes 224, 268 and accompanying text.

527. See Rustad, *Negligent Enablement*, *supra* note 67, at 458 (arguing that Congress should amend the Economic Espionage Act to arm trade-secret owners with tort remedies to pursue those who misappropriate trade secret across national borders); see also Susan W. Brenner & Anthony C. Crescenzi, *State-Sponsored Crime: The Futility of the Economic Espionage Act*, 28 HOUS. J. INT’L L. 389 (2006) (describing the Economic Espionage Act as a failed strategy to control cross-border trade secret theft).

528. UNDERHILL, *supra* note 6, at 618.

529. 15 U.S.C. §§ 1114, 1125 (2006), *invalidated in part by* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

530. UNDERHILL, *supra* note 6, at 616.

public.<sup>531</sup> Palming off occurred when a defendant used symbols substantially similar to that of the trademark owner.<sup>532</sup> Misstatements in advertisements and palming off were regarded as frauds against the consuming public.<sup>533</sup> In the late nineteenth century, merchants were liable for misrepresentations about the curative power of elixirs and other products if the merchants transgressed business norms of fair dealing.<sup>534</sup> The gist of these unfair competition actions is the wrong done to the public.<sup>535</sup>

In these cases, the courts were unclear whether the legally protectable interest was the right of the trademark owner in property or in preventing fraudulent misrepresentation.<sup>536</sup> At common law, a plaintiff had an action for the tort of misappropriation of a trade secret for “improperly disclosing or using a trade secret in violation of a contractual agreement entered into between that party and the trade secret owner.”<sup>537</sup>

In the new millennium, intellectual property claims are largely governed by statutory remedies. However, trademark infringement continues to be classified as unfair competition, a business tort vindicated by state common law and federal statutory remedies.

## 2. The Tort of Trade Secret Misappropriation

The origin of trade secret law is murkier than trademarks or other branches of intellectual property. Trade secrets are neither patentable nor subject to copyright because these forms of intellectual property mandate disclosure. The *First Restatement of Torts*, published in 1939, was the first attempt to bring order to the confusing business tort of misappropriation.<sup>538</sup> Today, the *First Restatement of Torts* section 757, still followed by important states such as Massachusetts and New York, reads:

One who discloses or uses another’s trade secret, without a privilege to do so, is liable to the other if . . . (c) he learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by improper means or that the third

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531. FRANCIS M. BURDICK, *THE LAW OF TORTS: A CONCISE TREATISE ON THE CIVIL LIABILITY AT COMMON LAW AND UNDER MODERN STATUTES FOR ACTIONABLE WRONGS TO PERSON AND PROPERTY* 443–48 (3d ed. rev. & enlarged 1913) (describing unfair trademark competition as an infringement of the plaintiff’s property interest).

532. Brett Thomas Reynolds, Comment, *Appellate Review of Lanham Act Violations: Is Likelihood of Confusion a Question of Law or Fact?*, 38 SW. L.J. 743, 743 n.8 (1984).

533. Burdick, *supra* note 531, at 443, 448.

534. *Id.* at 448 & n.17.

535. SCHECHTER *supra* note 519, at 144 (describing how trademark infringement actions were a “fraud upon the public” as well as an action against the true owner of the mark).

536. UNDERHILL, *supra* note 6, at 621–23.

537. Beckerman-Rodau, *supra* note 224, at 230–31.

538. RESTATEMENT OF TORTS § 757 (1939).

person's disclosure of it was otherwise a breach of his duty to the other . . . .<sup>539</sup>

The *First Restatement* provides the following factors in determining what information is protected as a trade secret:

An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.<sup>540</sup>

The *Restatement (Third) of Unfair Competition* defines trade secrets broadly to include "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others."<sup>541</sup> Neither the *Restatement (Second)* nor the latest *Restatement (Third) of Torts* addresses trade secrets. Massachusetts, New York, and Texas continue to follow the *First Restatement of Torts* approach to trade secrets.<sup>542</sup> The American Law Institute approved the *Restatement (Third) of Unfair Competition*, which incorporates the ideas of the *First Restatement*.

"Trade secret" under the Uniform Trade Secrets Act means:

information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:

1. [d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
2. [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>543</sup>

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539. *Id.*

540. RESTATEMENT § 757 cmt. b.

541. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995).

542. Michael Risch, *Why do We Have Trade Secrets?*, 11 MARQ. INTELL. PROP. L. REV. 1, n.63 (2007).

543. *E.g.*, VA. CODE ANN. § 59.1-336 (West, Westlaw through 2010 Sess.).

Forty-three states and the District of Columbia have adopted the Uniform Trade Secrets Act (UTSA), which preempts common law principles.<sup>544</sup> The UTSA draws upon torts concepts in its distillation of trade secrets rights and remedies.<sup>545</sup> UTSA, in many respects, conceptualizes trade secret misappropriation as a tort since misappropriation often flows out of breach of contract or confidential relations.

The UTSA defines the tort of misappropriation as the use of improper means such as misrepresentation or breach of a duty to maintain secrecy.<sup>546</sup> A trade secret owner has the right to control use, access, and to take measures to prevent disclosure, however, the UTSA requires that information that is the subject of a trade secret be protected by means that are “reasonable under the circumstances to maintain its secrecy.”<sup>547</sup>

The U.S. Supreme Court in *Kewanee Oil Co. v. Bicron Corp.*, explained that trade secret misappropriation actions have a societal function in advancing the “commercial ethics and the encouragement of invention.”<sup>548</sup> Trade secret law adumbrates the principle of “good faith and honest, fair dealing, [which] is the very life and spirit of the commercial world.”<sup>549</sup> Thus, the tort of misappropriation of trade secrets protects the marketplace, which is a larger interest than mere civil recourse.

The expansion of regulatory litigation employing the tort of misappropriation is necessary to teach foreign governments as well as domestic spies that torts do not pay.<sup>550</sup> Business torts must evolve to protect intellectual property assets.<sup>551</sup> Businesses are finding it more difficult to protect their intangible assets because of the cross-border, seamless Internet

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544. Legal Info. Inst., Cornell Univ. Law Sch., *Uniform Business and Financial Laws Locator* (April 2003), <http://www.law.cornell.edu/uniform/vol7.html#trdsec>.

545.

The Uniform Act codifies the basic principles of common law trade secret protection, preserving its essential distinctions from patent law. Under both the Act and common law principles, for example, more than one person can be entitled to trade secret protection with respect to the same information, and analysis involving the “reverse engineering” of a lawfully obtained product in order to discover a trade secret is permissible.

Nat’l Conference of Comm’rs on Unif. State Laws, *Prefatory Note to the Uniform Trade Secrets Act with 1985 Amendments*, (Aug. 1985), at 2, available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/utsa85.pdf>.

546. See UNIF. TRADE SECRETS ACT § 1(1) (amended 1985).

547. See *id.* § 1(4)(ii).

548. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974).

549. *Id.* at 481–82.

550. See Rustad, *Negligent Enablement*, *supra* note 67, at 460–61.

551. As the Supreme Court of Maine put it: “[T]he criminal system cannot always adequately fulfill its role as an enforcer of society’s rules. . . .” *Tuttle v. Raymond*, 494 A.2d 1353, 1358 (Me. 1985) (quoting Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 658) (acknowledging the role that tort law plays as a gap-filler, especially via the remedy of punitive damages in constraining corporate wrongdoing).

and ease with which intellectual property assets may be converted to digital data and disseminated around the world for almost zero cost.<sup>552</sup> Corporate and industrial espionage is one of the greatest threats to U.S. competitiveness in a networked world where a company's trade secrets can disappear with a click of the mouse. A robust regime of private enforcement is needed to supplement the criminal law and to protect American competitiveness. Civil recourse theory is unconcerned with the public purpose served by business torts in protecting intellectual property and the information infrastructure of the new economy.

### C. Torts as Social Control

*Law must be stable and yet it cannot stand still.*<sup>553</sup>

#### Roscoe Pound

Twenty years ago, I had the pleasure of spending a week studying alone in Roscoe Pound's personal library then housed at the Roscoe Pound Foundation in D.C.<sup>554</sup> I was most impressed by Pound's eclectic reading interests in the field of sociology. His library was a treasure trove of classic works of the founding fathers of sociology such as Weber, Marx, and Durkheim, all in untranslated editions and often interlined in Pound's handwriting. In Pound's collection of sociological works, there were copies of works by sociologists Albion Small, William Ogburn, George Gurvitsch, and Gabriel Tarde. Roscoe Pound first alluded to his theory of law as social control in his 1910 essay, *Law in Books and Law in Action*.<sup>555</sup> In this essay, he described how the legal formalists of his day were creating a gulf between social justice and legal justice.<sup>556</sup> He coined the term "sociological

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552. Beckerman-Rodau, *supra* note 224, at 228–29 (discussing the importance of intellectual property assets and how they can be easily distributed around the world in the networked economy, wired networks, email, and other computerization risks).

553. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1930).

554. Pound's complete library was then housed in the Roscoe Pound Foundation in Washington, D.C., which was located in the same building as the Association of Trial Lawyers. For an excellent account of Pound's connection to the personal injury bar, see Joseph A. Page, *Roscoe Pound, Melvin Belli, and the Personal-Injury Bar: The Tale of an Odd Coupling*, 26 T.M. COOLEY L. REV. 637 (2009), examining relationship between Pound and NACCA, which was the predecessor to ATLA and now to the American Association of Justice. In the late 1980s and 1990s, the Roscoe Pound Foundation's library was located in the same building that housed ATLA. See, e.g., Michael L. Rustad, *supra* note 471, at 1299.

555. Pound, *supra* note 210.

556. *Id.* at 30 ("When in a period of collectivist thinking and social legislation courts and lawyers assume that the only permissible way of thinking or of law-making is limited and defined by



jurisprudence” in 1911 and preferred it to August Comte’s sociology which he dubbed that “philologically unhappy name.”<sup>557</sup> His sociological jurisprudence was shaped in large part by the structural-functionalism of classic sociologists discussed in Part I.<sup>558</sup> His sociological school was a pragmatic reaction to nineteenth century neo-Kantian formalism that was then the “dominant analytical and historical jurisprudence.”<sup>559</sup> His functional approach was in sharp contrast to the “teleological school” that sought “a proper answer to the problem of the validity of law” and “stresses that law is intimately related to justice.”<sup>560</sup>

Pound’s sociological approach was a response to the then hegemonic view of law as “authoritative precepts.”<sup>561</sup> Pound regarded jurisprudence as part of the social sciences as opposed to analytical jurists’ view of law as precepts.<sup>562</sup> The most significant attribute of the sociological school was its emphasis “upon the social purposes which the law (in all of its three senses) subserves rather than upon sanctions.”<sup>563</sup> In Pound’s sociological of jurisprudence, “legal institutions and doctrines and precepts” were functional “as a matter of means only.”<sup>564</sup>

He contended that the common law served a larger purpose as an instrumentality of social control.<sup>565</sup> He wrote that tort law reflected a “social interest in the general security.”<sup>566</sup> He also contended that, “except in certain cases based on public policy’ the [tort] law of today makes liability dependent upon fault.”<sup>567</sup> In fact, Pound viewed the entire common law as an instrumentality of social control.<sup>568</sup> During the first half of the twentieth century, he sketched out a macrosociological theory that had profound

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individualism of the old type, when, while men are seeking to promote the ends of society through social control, jurists lay it down that the only method of human discipline is ‘to leave each man to work out in freedom his own happiness or misery,’ conflict is inevitable. With jurisprudence once more in the rags of a past century, while kindred sciences [(such as sociology)] have been reclathed, we may be sure that law in the books will often tend to be very different from the law in action.”)

557. 1 ROSCOE POUND, *JURISPRUDENCE* 297 (1959).

558. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 *HARV. L. REV.* 489 (1912); see also Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 *GREEN BAG* 607 (1907).

559. POUND, *supra* note 557, at 294.

560. *Id.* at 297.

561. *Id.* at 291 (arguing that “sociological jurists regard the working of the law (that is, of the legal order, of the body of authoritative guides to decision, and of the judicial and administrative process) rather than the abstract content of the authoritative precepts”).

562. *Id.* at 292.

563. *Id.* at 293.

564. *Id.*

565. ROSCOE POUND, *SOCIAL CONTROL THROUGH LAW* (Archon 1968) (1942) [hereinafter POUND, *SOCIAL CONTROL*]; Roscoe Pound, *The Theory of Judicial Decision*, 36 *HARV. L. REV.* 940, 954–58 (1923).

566. See Roscoe Pound, *A Survey of Social Interests*, 57 *HARV. L. REV.* 1, 5 (1943).

567. *Id.* (quoting James Barr Ames, *Law and Morals*, 22 *HARV. L. REV.* 97, 99 (1908)).

568. POUND, *SOCIAL CONTROL*, *supra* note 565.

implications for courts that conceived of torts as an instrument of social control. Pound's grand theory invited courts to consider the social interest when evaluating and weighing competing interests:

Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands, either through securing them directly and immediately, or through securing certain individual interests, or through delimitations or compromises of individual interests, so as to give effect to the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of interests as a whole.<sup>569</sup>

The arguments of Pound go to the heart of my critique of the civil recourse school. The great value of torts lies in its ability to evolve to meet the emergent harms of each era.

Roscoe Pound broke with the legal realists by the 1930s.<sup>570</sup> His theory of social control drew upon Holmes' instrumentally inspired theories of deterrence and compensation. Pound also drew extensively upon Rudolph von Jhering's taxonomy, which recognized three protectable interests in the law: public, social, and private.<sup>571</sup> Jhering contended that the common law advanced "moral and social interests of mankind."<sup>572</sup> Roscoe Pound described tort law as weighing individual interests to arrive at decisions advancing social interests. He called this process of adjusting conflicting interests "social engineering."<sup>573</sup> He argued that the common law consisted "of adjustments or compromises of conflicting individual interests," classified as social interests, "under the name of public policy, to determine

569. Pound, *supra* note 566, at 39.

570. Legal realists argue that the focus of legal analysis must be on empirical behavioral studies, not on abstract doctrine. See Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236-38 (1931) (presenting legal realism as "movement in thought and work about law" within which certain points of departure are common); see also 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").

571. Pound, *supra* note 566, at 1. See generally WOLFGANG GASTON FRIEDMANN, *LEGAL THEORY* 366 (1966) (describing Pound's classical formulation and advocacy for law as social engineering).

572. HUGH CHISHOLM, *THE ENCYCLOPEDIA BRITANNICA* 413 (1911), available at [http://encyclopedia.jrank.org/JEE\\_JUN/JHERING\\_RUDOLF\\_VON\\_1818\\_1892\\_.html](http://encyclopedia.jrank.org/JEE_JUN/JHERING_RUDOLF_VON_1818_1892_.html). Rudolph von Jhering was a German legal academic who lived between 1818 and 1892. *Id.* His work was counterhegemonic to Savigny's jurisprudence in its argument that jurisprudence should "adapt[ed] the old to new exigencies." *Id.*

573. See Pound, *supra* note 566, at 4.

the limits of a reasonable adjustment.”<sup>574</sup> Pound believed that “Public Policy . . . is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good . . . .”<sup>575</sup>

Pound’s sociological jurisprudence prefigured Prosser and Green advancing their consciously instrumental view of the common law. Dean Pound wrote about the new thinking which rejected considering jurisprudence an exercise in “adjusting the exercise of free wills to one of satisfying wants.”<sup>576</sup> He also contended that the common law involves “a weighing or balancing of the various interests which overlap or come in conflict and a rational reconciling or adjustment.”<sup>577</sup> Therefore, Pound had a macro approach in that he argued tort law was a form of social control that “channeled people into orderly behavior.”<sup>578</sup>

In American society, it is up to tort to serve as “the default *regulator of safety and economic power*.”<sup>579</sup> Regulatory torts mobilize private claimants “to identify and deal with problems that have not been adequately addressed by other institutions.”<sup>580</sup> As Judge Jack Weinstein notes, the law of torts serves as a “bottom-up” alternative to “the top-down bureaucratic method operating through administrative agencies (such as most states’ workers’ compensation schemes) . . . .”<sup>581</sup> Beginning in the 1960s, common law torts served the quasi-regulatory and public law function of resolving social problems where regulators or the criminal law failed.<sup>582</sup> Judge Weinstein’s

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574. *Id.* at 4 (“The body of the common law is made up of adjustments or compromises of conflicting individual interests in which we turn to some social interest, frequently under the name of public policy, to determine the limits of a reasonable adjustment.”).

575. *Id.* at 4 n.8 (quoting Egerton v. Lord Brownlow, [1853] 10 Eng. Rep. 359 (Q.B.) 438).

576. *Id.* at 1.

577. *Id.* at 4.

578. Matthias Gross, *Introduction to EDWARD ALSWORTH ROSS, SOCIAL CONTROL: A SURVEY OF THE FOUNDATIONS OF ORDER* xiii (Transactional Books, 2009) (1901).

579. Nockleby & Curreri, *supra* note 116 at 1036–37 (“[T]ort law establishes the background operating rules under which the social and economic system operates”).

580. Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 198 (1987).

581. Weinstein, *supra* note 1, at 167.

582. Just by way of example, the four-decade long record of the Consumer Product Safety Commission reflects a history of poor funding and failed objectives. Section 15(b) of the Consumer Product Safety Act requires that businesses report to the U.S. Consumer Product Safety Commission (CPSC) all instances in which the businesses obtain information that “reasonably supports the conclusion” that their products fail to comply with safety rules, contain defects that may “create a substantial product hazard,” or create “an unreasonable risk of serious injury or death.” Consumer Product Safety Act § 15(b), 15 U.S.C. § 2064(b) (2006). Section 37 of the Consumer Product Safety Improvements Act of 1990 requires businesses to report to the CPSC if a “particular model of a consumer product is the subject of at least 3 civil actions . . . for death or grievous bodily injury” within a 24-month period. Consumer Product Safety Improvements Act of 1990 § 37(a), 15 U.S.C. § 2084(a) (2006). In my empirical study of CPSC penalties, I found that the agency had a weak record of enforcement. Product manufacturers were sanctioned for their failure to meet reporting requirements. “The sum total of all CPSC penalties assessed in 1990 approximates the median

four decades on the bench signifies how creative courts filled the regulatory gap in developing solutions to collective injury problems:

In cases such as *Agent Orange*, *DES*, asbestos, pharmaceutical, civil rights, school segregation, prison, cigarette, gun, social security, family abuse and other mass actions that I have had, the intersection of substance and procedure is critical. Procedure profoundly affects rights-in-fact, particularly those of our less well-situated Americans. Sometimes special problems, such as drug and family abuse, require a new form of integrated courts that combine civil, criminal, social services, and mediation practice, but that does not justify closing traditional courts of general jurisdiction.

In current litigations in our rapidly changing technological, sociological, and political world, what is required—in the absence of specific legislation—is a firm, yet sensitive, control of lawyers by the judiciary. Supervision by the courts when ethical issues arise, such as a fair division of group settlements among clients—and control to make sure that wider populations and classes are not adversely affected, are essential.<sup>583</sup>

Many of the high profile tort cases of the past few decades fit into the rubric of collective injury with complex causation and indeterminate

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punitive award obtained by plaintiffs in one study of product liability cases.” Rustad & Koenig, *supra* note 484, at 1325 n. 282 (reporting study of two decades of CPSC lax enforcement and comparing it to giving a single Fortune 500 company a parking ticket). See also Robert S. Adler, *From “Model Agency” to Basket Case—Can the Consumer Product Safety Commission be Redeemed?*, 41 ADMIN. L. REV. 61, 70 (1989) (discussing the weak record of CPSC in adopting safety standards for consumer products). In recent years, the CPSC has been a lapdog not a consumer watchdog. For instance, it failed to protect Americans from the epidemic of dangerously defective products from China and other importing countries with less developed safety standards. In his recent book, *Import Safety*, Cary Coglianese explains that the import safety problem cannot be resolved without ratcheting up deterrence:

If products entering the domestic marketplace from foreign countries are harder to regulate through traditional means, will consumer safety risks increase in an era of global trade? It seems likely they will. If foreign firms are harder to regulate, then the law’s deterrent effect will presumably also be diminished for such firms, making safety problems more likely at the margin. With trillions of dollars worth of goods crossing international borders each year, even a slight reduction in deterrence could lead to hundreds, if not thousands, of additional injuries or fatalities annually. If nothing changes, the recent spate of import safety crises—from lead-painted toys to melamine in milk—could mark just the beginning of a dangerous trend.

CARY COGLIANESE, *Preface* to *IMPORT SAFETY: REGULATORY GOVERNANCE IN THE GLOBAL ECONOMY* vi, vii (Cary Caglienese, Adam M. Finkel, & David Zaring eds., 2010).

583. Weinstein, *supra* note 1, at 114.

plaintiffs or defendants.<sup>584</sup> Agent Orange, the Dalkon Shield, Copper-7 IUD, toxic shock syndrome, tobacco, lead, and asbestos cases are examples of how injuries were collectivized in the torts system.<sup>585</sup> In these cases, corporate defendants did not have a bipolar relationship with individual plaintiffs.<sup>586</sup> In fact, the causal connection is probabilistic and statistical rather than clearly between a particular injurer and victim.<sup>587</sup>

Judge Weinstein would agree that the state has a duty to provide a law for the redress of private wrongs, but he takes a broader view of tort law than John Goldberg, his former clerk, does.<sup>588</sup> Weinstein contends that judges “must take account of changing winds and tides” in society, technology, and the economy.<sup>589</sup> However, he disagrees with Goldberg’s “somewhat broader view of legislative power to provide equivalent administrative substitutes for tort remedies, *if they are effectively administered* to provide appropriate compensation to the aggrieved.”<sup>590</sup> In a panel presentation to the Federalist Society, Goldberg took a strong stand against torts as redressing public wrongs:

The question posed for this panel reads as follows: Should tort law be a form of public regulatory law? My answer is no. What I mean by that will become clearer in a moment, but let me offer an immediate set of qualifications. I do not mean to dispute that there are certain respects in which tort law is public. For one thing it is law, provided by government—no service, no sheriff, no tort law. For another, its operation can have widespread effects—a tort suit

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584. See, e.g., *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 452 (Wis. 1980) (noting that punitive damages are particularly useful in situations where large numbers of individuals have been slightly or moderately injured by defective product).

585. See, e.g., Weinstein, *supra* note 1, at 114.

586. See, e.g., *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1181–82 (Or. 2006) (“Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect—and for two or more decades absolutely knew—that the scheme was damaging the health of a very large group of Oregonians—the smoking public—and was killing a number of that group”).

587. One of the difficulties in characterizing Goldberg and Zipursky’s civil recourse theory as being purely a model of private wrongs is that they concede that civil recourse may have wider purposes. Goldberg & Zipursky, *supra* note 189, at 406–07 (arguing for their theory of civil recourse). For examples, in their Calabresi symposium piece, they acknowledge that civil recourse has the societal effect of lowering the expense of governmental enforcement:

For one thing, it reduces the role that government must take. Whether this is a diminution in tertiary costs is debatable; our point is that there may be social and political benefits to reducing the reliance upon government. As political thinkers from Blackstone to Nader have recognized, there are also political benefits to the existence of separate repositories of power for holding tortfeasors accountable.

*Id.*

588. Weinstein, *supra* note 1, at 169.

589. *Id.* at 231.

590. *Id.* at 169.

can change how cars are designed and how health care is delivered, for example. Finally, through its day-to-day operation, tort law undoubtedly promotes public objectives including deterrence of risky or otherwise undesirable conduct, maintenance of social cohesion, vindication of individual rights, affirmation of the equality of persons under law, and reinforcement of the ideal of limited government.<sup>591</sup>

The U.S. Supreme Court in *Wyeth v. Levine* recognized that state tort law and regulation has long supplemented, but not supplanted the federal regulation of medical products and pharmaceuticals.<sup>592</sup> Tort law, is indeed, even more effective than criminal law in modifying behavior because it does not require that defendants receive advance warning that some specific conduct is punishable by punitive damages. This greater flexibility gives tort law a considerable advantage over criminal law in controlling socially harmful conduct on the borderline between civil and criminal law.

#### D. Crimtorts to Vindicate Public Wrongs

Crimtorts is a concept I coined and developed with Tom Koenig to describe the expanding middle ground between criminal law and tort law.<sup>593</sup> Crimtorts describes this middle ground as emblematic of the synergistic combination of public and private law purposes.<sup>594</sup> The concept of crimtorts bridges the gap between the sociological and legal approaches to tort law.<sup>595</sup> Crimtorts describes how private litigants serve the public good when they

591. Goldberg, *supra* note 10, at 3 (footnote omitted).

592. *Wyeth v. Levine*, 129 S. Ct. 1187, 1202–03; *see also* Rachel v. Rose, *U.S. Consumer Protection: Striking a Balance Between the FDA Approval Process and State Tort Law Claims Through the Medical Device Safety Act of 2009*, 43 HEALTH LAW'S WKLY 1, 1 (Oct. 30, 2009), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1011&context=rachel\\_rose](http://works.bepress.com/cgi/viewcontent.cgi?article=1011&context=rachel_rose) (noting how Congress and the Court recognize the need for tort law to supplement public regulation for FDA governed products and drugs).

593. I coined the term “crimtorts” as a portmanteau in my 1986 Harvard University Law School LL.M thesis entitled *The Social Functions of Punitive Damages and the Rules of Evidence*. Professor Koenig and I developed the concept further in our 1998 article entitled “*Crimtorts*” as *Corporate Just Deserts*, explaining that, “crimtorts are an explicit recognition that the criminal law principles of punishment and deterrence have been assimilated into tort remedies.” *Supra* note 3, at 294; *see also* Thomas H. Koenig, *Crimtorts: A Cure for Hardening of the Categories*, 17 WIDENER L.J. 733, 735 (2008) (reviewing the origins of the crimtorts concept).

594. Just as Grant Gilmore described “contorts” that lie on the borderline between contract and tort law, we developed the concept of “crimtort” to identify the expanding common ground between torts and crimes.

595. Thomas Koenig, *supra* note 593, at 735–36.

“expose and financially punish entities that commit torts causing ‘group injuries,’ that are not rectified on the criminal side of the docket.”<sup>596</sup> In *Mathias v. Accor Economy Lodging, Inc.*, Judge Posner noted that the “function of punitive-damages awards is to relieve the pressures on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes.”<sup>597</sup>

Tort law’s signature has been its flexibility in enabling consumers to uncover developing dangers or risks affecting them and others in society.<sup>598</sup> Nursing home negligence cases, for example, show the role of torts in filling the regulatory gap created by too few resources devoted to enforcing federal safety standards:

Public regulation has proved insufficient to combat the problems in our nursing homes. States differ in the effectiveness with which they enforce Medicare and Medicaid nursing home regulations. . . . Although every jurisdiction has a reporting requirement for elder abuse, the regulation of the reporting is not consistent and there is widespread underreporting of elder abuse despite criminal penalties for omissions.

Moreover, inspectors are often too lenient when it comes to protecting our most vulnerable elderly citizens. The Center for Medicare and Medicaid Services has expressed concerns that inspector leniency leads to substandard facilities and patient care. For example, . . . eighty-six percent of Texas nursing homes have substantial deficiencies in safety, causing potential or actual harm to nursing home residents. Nearly forty percent of the nursing home violations in Texas facilities cause actual harm to patients or place them at risk of imminent death or serious injury. Further, ninety-four percent of Texas nursing homes failed to comply with Health and Human Services’ minimum staffing levels. While Texas is just an example of substandard living conditions in nursing homes, the record of failure in nursing home compliance is a serious issue in most states. Something needs to be done to ensure that safety standards—governmental standards as well as societal standards—are met. Often regulation by litigation, in the

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596. *Id.* at 736–37.

597. *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 674, 678 (7th Cir. 2003) (upholding high ratio punitive damages where the defendant concealed the infestation of bedbugs, hotel knew of the endemic bedbug problem prior to the guests’ complaints, and where the failure to warn guests amounted to fraud or even battery).

598. Constantly evolving health care technologies requires a tort law that keeps pace. See generally Nicolas P. Terry, *When the ‘Machine That Goes ‘Ping’ Causes Harm: Default Torts Roles and Technologically-Mediated Health Care Injuries*, 46 ST. LOUIS U. L.J. 37 (2002) (developing the case for a flexible and progressive tort law that keeps pace with changes in the health care industry).

form of nursing home lawsuits, can provide a remedy for the problem.<sup>599</sup>

In many nursing home cases, the elderly residents suffered catastrophic injury that was the functional equivalent of manslaughter.<sup>600</sup> Crim torts describes conduct between crime and tort that threatens the public safety as in nursing home neglect cases, and has “considerable promise” so long as it can avoid “oversimplified instrumentalism and . . . an excessive demand for doctrinal purity and insulation.”<sup>601</sup> Injured consumers and their lawyers serve as early responders by uncovering “smoking gun” evidence of corporate abuses. The concept of private lawsuits involving both civil recourse and public interest is nothing new, as illustrated by civil and criminal penalties of the Racketeer Influenced and Corrupt Organizations Act (RICO), federal securities laws, antitrust law, and much of environmental law. This theme of private litigants uncovering misconduct involving and thereby benefiting the larger society is also found in civil forfeiture litigation, civil rights cases, and whistleblower actions.

Jerome Frank, a prominent legal realist, developed the concept of the private attorney general in his Second Circuit opinion in *Associated Industries of New York State v. Ickes*.<sup>602</sup> Torts scholars that emphasize the

599. Rustad, *Heart of Stone*, *supra* note 67, at 63 (footnotes omitted).

600. *See, e.g., id.* at 367.

There are many reported instances of private attorneys general suing nursing homes, resulting in an increase in the homes' overall living conditions. In *Estate of Beale v. Beechnut Manor Living Center*, a Texas jury awarded one million dollars to an elderly nursing home resident's estate when the resident slipped, fell, and drowned in a bathtub. The decedent, who had Alzheimer's, was left unattended in the bathtub. Water flowed over the edge of the tub for fifteen minutes before the staff discovered the elderly patient drowning. After the litigation, the defendant nursing home installed safety strips in bathtubs throughout its facility. The publicity from the case also led to the enactment of an elder abuse statute benefiting all Florida nursing home residents. Similarly, in *Davis v. Fairburn Health Care Center*, a seventy-year-old male stroke victim died because of severe bowel impaction that resulted in toxic shock. His death was due to excessive, preventable danger brought on by the nursing home's failure to follow stated protocol for discovering and preventing impaction. In the wake of this case, the nursing home instituted new protocol to prevent fecal impaction. As in *Beale*, the private attorney general's suit resulted in increased safety in the nursing home: after the *Davis* verdict, the nursing home administrators, as well as the chief nurse, were terminated and new staff training programs were implemented.

*Id.* (footnotes omitted).

601. Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 732 (2008).

602. 134 F.2d 694, 704 (2d Cir. 1943) *vacated by* 320 U.S. 707 (per curiam) (describing how Congress authorized a “non-official person to institute a proceeding involving . . . a controversy, even if the sole purpose is to vindicate the public interest” and stating that “[s]uch persons, so authorized, are, so to speak, private Attorney[s] General[.]”).



role of the private attorney general are not liberal, but conservative. As Stephen Sugarman notes, this brand of tort scholarship is conservative in its emphasis “on individual responsibility for wrong-doing.”<sup>603</sup> He expresses the torts narrative of David and Goliath or that of the “private attorneys general . . . able to expose corporate wrongdoing that government regulators have ignored” as a conservative ideology, not liberal politics.<sup>604</sup> The Fifth Circuit pointed to the private attorney general role of plaintiffs in asbestos cases where they uncovered the industry’s concealment of the risk of unprotected exposure to that deadly product.<sup>605</sup>

Goldberg, however, argues that “contrary to compensation-and-deterrence theory, the tort system is *not* best understood as arming victims with the power to sue *in order to serve public goals*.”<sup>606</sup> He seems to suggest that private attorneys general are comparable to the bounty hunters of the wild west or in today’s terms, “Dog the Bounty Hunter.” Bounty hunting, however, is a well-established American institution and punitive damages are a potential “bounty” for the successful plaintiff.<sup>607</sup> Private attorneys general, winnowed through the contingency fee system, also serve the state by bringing assumedly meritorious claims, which prevents a fiscal crisis due to court congestion.<sup>608</sup>

Private attorneys general serve the public interest by uncovering and punishing dangerous products and practices while pursuing individual justice for their clients.<sup>609</sup> Nursing home neglect cases again provide an example, this time of the plaintiff’s role as private attorney general:

Plaintiffs who bring nursing home lawsuits can similarly be dubbed private attorneys general because they sue not only for individual compensation, but also for the safety of other residents. Suing for

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603. Sugarman, *supra* note 157, at 294.

604. *Id.* at 297.

605. *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 403 (5th Cir. 1986) (“Punitive damages reward individuals who serve as ‘private attorneys general’ in bringing wrongdoers to account” (quoting *Standard Life Ins. Co. of Ind. v. Veal*, 354 So.2d 239, 247 (Miss. 1977)).

606. John C.P. Goldberg, *What Are We Reforming? Tort Theory’s Place in Debates Over Malpractice Reform*, 59 VAND. L. REV. 1075, 1077–78 (2006).

607. Hubbard, *supra* note 20, at 453 (“Plaintiffs in tort litigation are generally represented by attorneys paid on the basis of a contingency fee in the range of 30–40% of recovery, which provides an incentive for the plaintiff’s attorney to maximize the amount of compensation per unit of his input. This incentive scheme operates differently with different segments of the plaintiffs’ bar.” (footnotes omitted)).

608. *Id.* at 453 (“The contingency fee system forces plaintiffs’ attorneys to act as gatekeepers who only take cases likely to generate a return greater than their investment. In ordinary cases, lawyers may reject as many as nine out of ten potential cases. In complex expensive matters, like medical malpractice, the rates of rejection are likely to be much higher.”).

609. Calabresi compares the use of private attorneys general to enforce societal norms to the private claimants receiving “treble damages in RICO or antitrust cases” focusing on conduct that “is criminal or semicriminal.” Calabresi, *supra* note 121, at 337.

safety is especially necessary to help regulate the nursing home industry, whose practices routinely violate state and federal safety standards. The private attorney general's role is critical in uncovering and correcting neglect, abuse, and mistreatment in nursing homes where the residents do not have a voice. As in the field of products liability, the private attorney general's role of enforcement in the nursing home arena is a market-based solution for the serious social problems of neglect and abuse.<sup>610</sup>

The efficiency of the private attorney general institution with American tort law was epitomized by the first successful asbestos case.<sup>611</sup> In my opinion, it was the plaintiffs with their attorneys, not regulators, who served as whistle blowers, uncovering smoking gun evidence that asbestos manufacturers deliberately concealed the danger of asbestos dust in order to protect the industry's profits. Edward Rubin described the remedy of punitive damages as a "runcible" tool that performs multiple tasks including encouraging private lawsuits, which result in enforcement of the law:

This device, which is called a civil suit, gives an injured party the right to sue the wrongdoer in an amount equal to the amount of its loss. It thus deters the wrongdoer, compensates the victim, and induces private law enforcement, all as part of a single legal mechanism. Like Edward Lear's runcible spoon, a utensil with a bowl for scooping and three tines for stabbing, it accomplishes several purposes with a single device.<sup>612</sup>

Thus, plaintiffs and their attorneys act as private attorneys general serve as consumer watchdogs where government watchdogs lack the resources, if not the will, to carry out their role.<sup>613</sup> The role of torts in addressing social problems is more akin to traditional American values than liberalism.<sup>614</sup> The

610. Rustad, *Heart of Stone*, *supra* note 67, at 366–67.

611. *See generally* Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1083 (5th Cir. 1973) (noting first official claim for compensation associated with asbestos occurred as early as 1927).

612. Edward L. Rubin, *Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law*, 1998 WIS. L. REV. 131, 151.

613. Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 384–85 (1988) ("Diminished resources have been allocated to governmental enforcement of the laws that typically have spurred class action litigation—most notably antitrust, civil rights, and securities.")

614. Goldberg notes that social justice theorists are instrumentalists in their view of the "evolving and open-ended nature of tort causes of action, a quality that permits tort plaintiffs to bring to light, and seek remedies for, new forms of domination and exploitation as they emerge." Goldberg, *supra* note 80, at 561.

role of tort law in uncovering social problems undetected by regulators is reminiscent of the distinctly American brand of critical journalism:

[J]ournalists, like Lincoln Steffins, “publicized the problems social workers faced and illuminated the business and political conditions that made social work important in the modern city.” In literature, Upton Sinclair’s *The Jungle* “investigates[d] conditions in [Chicago’s] stockyards.” The outrage generated by Sinclair’s novel facilitated the passage of federal reform legislation aimed at providing consumers with pure foods and drugs. Reform in the Progressive sense was to intervene, whether privately or publicly, in economic and social affairs to rid society of social problems.<sup>615</sup>

Tim Lytton’s book, *Bishops Accountable*, is a case study of how torts addressed the organizational roots of evil in the widespread problem of sexual abuse perpetrated by clergy.<sup>616</sup> He demonstrates how tort lawyers, using the engine of discovery, uncovered the role of the Catholic Church’s hierarchy in covering up systemic sexual abuse of children.<sup>617</sup> Indeed, it was tort lawyers, not public prosecutors, who brought the Catholic Church’s massive cover-up to light.<sup>618</sup>

The sexual abuse cases filed against Catholic priests are emblematic of tort’s policymaking role.<sup>619</sup> Tort law is not always about David versus Goliath or about plaintiffs taking on large organizations such as the Catholic Church. Nevertheless, tort cases are often about more than the interests of the immediate parties. Goldberg is especially critical of the way the private attorney general’s role is overly romanticized.<sup>620</sup> In his *Twentieth Century Tort Theories* piece, Goldberg critiques the “social justice” approach for its bias favoring consumer interests and its narrow-minded narrative that torts is largely about “David versus Goliath” struggles between consumers and corporate wrongdoers:

Prescriptively, social justice theory presupposes a particular conception of the political process as skewed consistently against consumer and toward corporate interests. To the extent that picture

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615. Rustad, *supra* note 319, at 725–26 (footnotes omitted). At the state level, corporate lobbyists have convinced the majority of states to adopt one or more limitations on the remedy of punitive damages. See Rustad, *In Defense of Punitive Damages*, *supra* note 67, at 6 (documenting the success of tort reformers at the state level).

616. See generally TIMOTHY D. LYTTON, *HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE* (2008).

617. *Id.* at 137 (describing how tort lawyers uncovered the Church’s pattern of concealing information about abuse).

618. See *id.* at 81 (discussing the role of tort lawyers in framing the issue as institutional failure).

619. *Id.* at 190–94.

620. Goldberg, *supra* note 22, at 1511 n.41.

is not borne out in individual instances of regulated conduct, the theory gains no purchase. The theory can also mislead in suggesting that all or most tort litigation takes the form of David-and-Goliath litigation of the sort depicted in films such as *Erin Brockovich* and *A Civil Action*. In fact, suits against particular industries, such as asbestos and tobacco, even if initially brought by small, entrepreneurial lawyers, can come to be managed as a retail business by well-financed and well-organized plaintiffs' firms that, through organizations such as the Association of Trial Lawyers of America, have political clout of their own. Whether this is a desirable state of affairs or not, it is incumbent on social justice theory to acknowledge that the legislative and litigation playing fields are sometimes more level than its proponents suggest.<sup>621</sup>

Goldberg, however, exaggerates the power of the trial attorneys and overestimates their organizational skills. Further, empirical research would uncover, for example, an asymmetrical power relationship between Philip Morris and trial lawyers, in the tobacco company's favor.<sup>622</sup>

#### 1. Mr. Toyoda & Donald: Private vs. Public Wrongs

Assume Donald, our bubble boy, has his antiseptic world burst asunder by a runaway Toyota. If Donald filed a product liability lawsuit against Toyota, it does not just concern civil redress between Donald and Akio Toyoda and his Japanese company. Neither individual cases nor their societal impact can be placed in a bubble. Professor Goldberg and like-minded civil recourse theorists see torts as relational between the plaintiff and the defendant, and they see government's central role as providing a mechanism for redressing private wrongs.<sup>623</sup> Now extreme ideas like civil

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621. Goldberg, *supra* note 80, at 562.

622. In my twenty years of interviewing trial lawyers for my empirical studies of the civil justice, I came across very few responding attorneys who had ever worked with the Association of Trial Lawyers of America (ATLA) or the Association of Justice. Even if they had worked with the Association of Justice, it is doubtful whether they match up in financial power with the U.S. Chamber of Commerce or the tort reform alliances that Victor Schwartz represents. *See supra* text accompanying note 23 (discussing Victor Schwarz). If the Association of Justice was as powerful as Goldberg believes, they would have been able to stop tort reform in the states. However, all but a handful of states have placed new limitations on punitive damages in the past twenty-five years.

623. At the *Pepperdine Law Review* Symposium, John Goldberg cited a *Seinfeld* episode challenging my thesis that tort law should redress public wrongs as well as private wrongs. He noted that my view of tort law as regulation was comparable to the episode where Kramer joined the "adopt a highway" program but went beyond the scope of the program by widening lanes. He reasoned that just as Kramer had no authority to widen the lanes, courts have no legitimate authority

recourse, of course, have no immediate role to play in explaining collective injury cases such as the Toyota sudden acceleration cases.

The automobile, more than any other technological development is emblematic of the collective nature of injury that separates modern tort law from prehistoric private wrongs. In *MacPherson v. Buick Motor Co.* Judge Cardozo galvanized the field of automobile liability as well as product liability in rejecting the harsh doctrine of privity reasoning that the law must evolve to meet changing social conditions:

Yet the defendant [Buick] would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent conclusion. Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today.<sup>624</sup>

Cardozo was the first jurist to permit a consumer to recover for injuries caused by a defective automobile in the absence of privity, reasoning that “[i]f [the manufacturer] is negligent, where danger is to be foreseen, a liability will follow.”<sup>625</sup> Forty-four years later, another creative judge, John Francis of the New Jersey Supreme Court, updated tort duties to accommodate modern marketing methods in refusing to enforce privity

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to use tort law for wider purposes thereby usurping the legislative role or regulatory agencies. My answer is that courts have no choice but to respond to social problems because they are on the front line. What would we give up if we were to adopt civil recourse? Suppose civil recourse was the hegemonic theory from the onset. There are many tort causes of action that would not be recognized, namely negligence (ninety percent of tort law), the intentional infliction of emotional distress, the invasion of privacy, strict products liability, strict liability for ultra-hazardous activities, premises liability, environmental torts, clerical malpractice, and recovery for prenatal or preconception injuries. See, e.g., *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850) (acknowledging negligence theory). These causes of action were all the product of the creative continuity of judges who did not wait for the legislature or expert regulators to resolve social problems. Nor would the theory of causation include approaches such as alternative liability, enterprise liability, lost chance, the substantial factor test or market share liability. Courts, not legislatures or regulators developed all of these tort doctrines. If torts followed civil recourse theory, we may still have rules such as charitable immunity, family immunity, and employer immunity in the form of the fellow servant rule. Even if state or federal legislatures were inclined to sit down in a seminar and try to anticipate and legislate about every problem that might come up, that would be a tremendously expensive undertaking. Courts have the advantage of amicus briefs where they can hear from stakeholders when considering changes in the tort law. Conservative as well as liberal think tanks may present their competing points of view in these briefs. Courts also have the inherent authority to appoint their own experts or require the parties to brief unresolved issues. Judicial authority to respond to social problems is not some recent invention of the common law; it is the common law. Civil recourse theory’s utopian political view of legislatures is inconsistent with the law in action. See Hubbard, *supra* note 20, at 461 (“Like the rational model, the political model is subject to criticism, primarily concerning the extent to which the legislature is democratic in the sense that it properly represents the views of the electorate. Given practices like campaign contributions, lobbying, mass advertising campaigns, ‘safe’ districts, and low attention and voting rates on the part of voters, there is good reason to question the democratic nature of a decision about tort reform.”).

624. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (1916).

625. *Id.* at 1053.

requirements in law of warranties under the Uniform Sales Act that prefigured UCC Article 2.<sup>626</sup> It is clear then that the history of automobile safety is the product of trial lawyers, not government regulators.

In the 1960s and 1970s, courts recognized that automobile manufacturers had a duty to make automobiles that were “crashworthy.”<sup>627</sup> The first one hundred-million dollar punitive damages award arose out of a defective design claim in the Ford Pinto case.<sup>628</sup> In fact, the jurisprudence of strict liability was in large part a judicial solution to the problem of reallocating the cost of accidents caused by defective automobiles. Toyota’s recent sudden acceleration problems raise the question of who is in the better position to identify wrongdoing and to protect the public interest. If Toyota has knowingly sacrificed consumer safety to enhance their bottom line, it will be punished to deter others from sacrificing profits for safety. If it turns out the runaway car problem is due to driver errors, Toyota will be vindicated. Toyota has a legal duty to recall or retrofit cars because they have a monopoly of knowledge on a profile of developing danger.<sup>629</sup>

Trial lawyers are attempting to depose Toyota’s top employees to determine what they know about the runaway car problem and when they learned about it.<sup>630</sup> In this case, then, trial lawyers are using discovery to benefit society by revealing evidence of corporate abuses.<sup>631</sup> If plaintiffs’ attorneys can prove through discovery that “Toyota knew about its safety and quality issues well in advance of making them public,” the auto giant will face massive numbers of product liability cases and the possibility of punitive damages.<sup>632</sup>

626. See *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 99–100 (N.J. 1960) (finding no contractual privity for breach of warranty in accident arising out of a malfunctioning automobile steering system).

627. See generally Barry Levanstam & Daryl J. Lapp, *Plaintiff’s Burden of Proving Enhanced Injury in Crashworthiness Cases: A Clash Worthy of Analysis*, 38 DEPAUL L. REV. 55 (1988).

628. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 358 (Ct. App. 1981) (remitting the \$125 million punitive damages to \$3.5 million).

629. See generally RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIAB. § 11 (1998) (providing that sellers or distributors are subject to liability if they fail to act as a reasonable person in recalling their product); cf. *Reed v. Ford Motor Co.*, 679 F. Supp. 873, 878–80 (S.D. Ind. 1988) (ruling that because the automobile was defective at the time of sale the fact of a recall is relevant to the remedy of punitive damages or tolling the statute of limitations).

630. Lara Misjak, *No Depositions in Toyota Case*, FLINT JOURNAL, Mar. 11, 2010, at 1, available at LexisNexis.

631. Wendy Wagner cites scores of other mass torts where regulators failed to obtain “stubborn information” withheld by corporate wrongdoers. It took trial lawyers, armed with discovery, to uncover profiles of wrongdoing. Wendy Wagner, *supra* note 334, at 276.

632. Aaron Bragman, *Estimated Cost of Class-Action Toyota Lawsuits May Top U.S. \$3 Bil.*, GLOBAL INSIGHT (March 10, 2010), [http://www.lexisnexis.com/lawschool/research/default.aspx?ORIGINATION\\_CODE=00092&signoff=off](http://www.lexisnexis.com/lawschool/research/default.aspx?ORIGINATION_CODE=00092&signoff=off).

Product liability is also well suited to address cases where defective software causes personal injury or collateral property damage:

The paradigmatic products-liability action is one where a product reasonably certain to place life and limb in peril, distributed without reinspection, causes bodily injury. The manufacturer is liable whether or not it is negligent because public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.<sup>633</sup>

Civil recourse theorists ask us to view collective injury problems one case at a time without appreciating the larger societal function of general deterrence.<sup>634</sup> They would not emphasize the deterrent role of tort law but rather see each product liability case as an opportunity for injured motorists to be punitive or get even with a Japanese corporation. While the issue between the automobile manufacturer and an injured consumer in the recent Toyota “sudden acceleration” cases will involve civil recourse, the story will not simply end there. Tort law is between not only the plaintiff and the defendant, but also relates to the public’s interest by alerting consumers and regulatory agencies to problems.

The Toyota runaway-car problem is the latest in a long list of high profile societal danger cases where tort lawyers, not government regulators, uncovered dangerously defective products.<sup>635</sup> The hazards posed by American Motor’s CJ-7 Jeeps, sudden acceleration in General Motors’ vehicles, and the notorious Ford Pinto’s exploding gas tanks have been uncovered by discovery not government regulators.<sup>636</sup> In addition to providing redress to victims of corporate abuses private redress, tort law has acted to make America safer:

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633. *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 866–67 (1985) (citations and internal quotation marks omitted) (articulating an economic loss rule that precluded tort recovery where the injury suffered was the failure of a steam turbine to function without collateral personal or property damages).

634. Goldberg questions “whether litigation through the tort system, which by its nature is adversarial, confrontational, and public, is always or even typically the most effective means of persuading corporate actors to adopt safer business practices.” Goldberg, *supra* note 80, 563 (footnotes omitted).

635. Since the 1960s, injured plaintiffs, not regulators, have served as private attorneys general in helping to bring about changes in safer automobile design involving gas tanks, side impact design, seat belts, roof crush, tires, electronic stability control, door latches, illusory park, air bags, power window, and seats. See AMERICAN ASS’N FOR JUSTICE, *DRIVEN TO SAFETY: HOW LITIGATION SPURRED AUTO SAFETY INNOVATIONS* 3–9 (2010), available at [http://www.justice.org/cps/rde/xbcr/justice/Driven\\_to\\_Safety.pdf](http://www.justice.org/cps/rde/xbcr/justice/Driven_to_Safety.pdf).

636. MEGHAN MULLIGAN & EMILY GOTTLIEB, *LIFESAVERS: CJ & D’S GUIDE TO LAWSUITS THAT PROTECT US ALL* (2001), available at <http://www.centerjd.org/archives/studies/Lifesavers.pdf>.

Flammable children's pajamas, backyard water slides, and "Saturday Night Special" handguns are among the products taken off the market after juries awarded significant damages. Similarly, warning labels on charcoal bags and tampon packages, redesigned infant cribs and jeeps, and revised policies on emitting toxic chemicals and staffing pediatric units at hospitals—changes, which have saved lives—are directly attributable to civil verdicts.<sup>637</sup>

A decade ago, when *In Defense of Tort Law* was being written, the dangerous synergy of the Ford Explorer and Firestone Tires was in the headlines.<sup>638</sup> The National Highway Traffic Administration (NHTSA) took action only after trial lawyers used the engine of discovery to uncover the deadly profile of danger.<sup>639</sup> Private attorneys general, not government regulators, were the first to find proof that "Firestone tires mounted on Ford Explorers caused hundreds of rollover accidents due to tread separation."<sup>640</sup> It was the trial attorneys who uncovered a smoking gun document, proving that Firestone had silently recalled this particular brand of tires in other countries without informing NHTSA of the known dangers.<sup>641</sup> Stephen Lubet observes that trial lawyers, who were driven by their profit motive, were the first to break through the corporate wall of silence:

So how did the whole story finally come out, with Ford and Firestone in deep denial and the NHTSA overwhelmed and short-staffed? The answer is that a group of personal injury lawyers began filing lawsuits—and eventually succeeded in bringing the problem tires to public attention. Of course, they didn't do it out of altruism or public spiritedness, but they did have all the right incentives necessary to blow the whistle on a hazardous situation. A single automobile fatality is nothing more than a statistic to a corporate troubleshooter or a government bureaucrat. But to a lawyer, it's a case—maybe even a big one. So the lawyer has ample reason to investigate each accident, and to search out causes that might make the potential verdict bigger (or easier to get).<sup>642</sup>

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637. EMILY GOTTLIEB, CORPORATE LAWBREAKING AND CIVIL JUSTICE: THE LAST LINE OF DEFENSE I (2009), available at [http://www.centerjd.org/archives/studies/CorpCrimeWhiteP\\_F.pdf](http://www.centerjd.org/archives/studies/CorpCrimeWhiteP_F.pdf).

638. KOENIG & RUSTAD, *supra* note 239, at 5.

639. *See id.*

640. *Id.*

641. *Id.*

642. Stephen Lubet, *In the Firestone Case, the Trial Lawyers Are the Real Heroes*, THE SAN DIEGO UNION-TRIBUNE, Oct. 11, 2000, at B-11, available at LexisNexis.



The Firestone-Ford Explorer cases are emblematic of how the tort serves a larger purpose beyond the bipolar relationship between the plaintiff and the defendant. Torts send a signal of general deterrence that “tort does not pay.”<sup>643</sup> Judge James V. Selna, whose federal district courthouse is not far from the Pepperdine School of Law campus, will try many of the actual Toyota cases. The U.S. Judicial Panel on Multidistrict Litigation has appointed him to hear the approximately 100 federal suits filed against Toyota around the country. The plaintiffs contend that Toyotas equipped with an electronic throttle system or ETCS “have a dangerous propensity to suddenly accelerate without driver input and against the intentions of the driver.”<sup>644</sup> In the Toyota class action litigation, the compensation awarded to individual plaintiffs is an important issue but the public nature of these cases cannot be denied. However, civil recourse theorists would deny it. Specific deterrence sends a message targeted to the individual defendant that includes the sting of shilling or the dollop of the dollar.<sup>645</sup> However, there is a general deterrence for defendants in the larger automotive industry, those outside the lawsuit bubble. John Goldberg’s view of punitive damages is that they redress wrongs solely between the plaintiff and the defendant as explained in his talk to the Federalist Society:

I want to suggest that *Campbell* [*State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2003)] provides a clear example of the sort of slippage that legal academics have promoted and that has led us into a bind in our thinking about punitive damages and other subjects within torts. Many Federalist Society members will be unsympathetic with Professor Bogus’s claim that large punitive awards are desirable from a regulatory perspective. But he is right about one thing, and the Supreme Court agrees with him in this particular instance: corporations and individuals commit egregious wrongs that permit a certain kind of punitive response via the legal system. Where he goes astray, in my view, is in thinking—as the Supreme Court does—about the justification in terms of the state’s regulatory objectives. What is at stake in *Campbell* is not Utah’s interests in obtaining retribution on behalf of its citizens or in deterring sharp business practices, but the Campbells’ interest in vindicating their rights not to be mistreated in the way that they were. Thus, the proper question for the jury was not: How much

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643. *Rookes v. Barnard*, [1964] A.C. 1129 (H.L.) 1127 (appeal taken from Eng.).

644. Thom Weidlich & Margaret Cronin Fisk, *Toyota Speed-Up Suits Say Problem Goes Deeper Than Gas Pedal*, BLOOMBERG.COM (Jan. 29, 2010), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a3IC3yJN3xC4>.

645. See Rustad, *supra* note 25, at 7–8 (noting Thomas Lambert’s reference to “the sting of the chastising shilling” to illustrate punitive damages’ deterrent function) (quoting THOMAS F. LAMBERT, JR., *THE CASE FOR PUNITIVE DAMAGES: A NEW AUDIT* (1988)).

money may be extracted from State Farm in order to vindicate the laws of Utah or to promote better insurance-company behavior in Utah? Instead, the question should have been: How much money will it take to make things right for the Campbells, not just in the sense of compensating them for their losses, but in the sense of providing them with *satisfaction*—a remedy adequate to acknowledge and avenge State Farm’s predatory conduct towards them?<sup>646</sup>

Civil recourse theory’s narrow conception of punitive damages as solely between the parties is inconsistent with the punitive damages mosaic developed in two centuries of jurisprudence. Judge Calabresi criticized the U.S. Supreme Court’s recent decisions regarding punitive damages because they failed to take into account that the remedy is multidimensional and fulfills multiple functions.<sup>647</sup> Punitive damages will likely be an issue in the future as they fulfill both punishment and deterrence functions in California and the forty-four other jurisdictions that recognize this common law remedy. Tort law and punitive damages provide largely monetary redress for individual plaintiffs, but it also fulfill the larger societal functions of protecting Americans who buy automobiles from foreign manufacturers. The Toyota cases reflect the collective nature of tort injury because tort law is not only about the individual victim of a runaway Toyota and the auto giant, but it involves larger societal interests as well.<sup>648</sup>

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646. Goldberg, *Tort Law for Federalists*, *supra* note 10, at 7.

647. Calabresi, *The Complexity of Torts*, *supra* note 127, at 333.

648. Goldberg acknowledges that tort law may play a role in improving safety. However, he argues that I, along with other like minded, social justice theorists, “arguably have not paid sufficient attention to the potentially regressive features of tort liability. Insofar as liability translates into products rendered more expensive by safety features or the cost of liability insurance, tort will tend to have a greater adverse effect on lower-income consumers than on their wealthier counterparts.” Goldberg, *supra* note 80, at 563. The history of automobile litigation has resulted in more expenses for the automobile industry. It is true that “brakeless cars” are cheaper than cars with electronic stability control. The automobile liability cases illustrate how regulation not litigation resulted in safety improvements. *See, e.g.*, *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) (recognizing a duty of automobile cars to design cars that are crashworthy); *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Ct. App. 1981) (uncovering problems of placement of exploding fuel tanks in rear-end collisions); *see also* AMERICAN ASS’N FOR JUSTICE, *supra* note 635 (documenting automobile design improvements brought about by product liability lawsuits for safer gas tanks, side impact design, seat belts, roof crush, tires, electronic stability control, door latches, illusory park, air bags, power window, and seats).

## 2. BP & Me

The British Petroleum (BP) oil spill occurred after an explosion and fire aboard Transocean's Deepwater Horizon drilling rig on April 20, 2010.<sup>649</sup> A geyser of 210,000 gallons of oil flowed into the Gulf of Mexico creating the world's worst environmental disaster.<sup>650</sup> The Interior Department's Mineral Management Service, the supposed regulator of oil drilling, was more a lap dog than an industry watchdog.<sup>651</sup> What is clear already is that economic damages from this disaster are hundreds of times greater than the \$75 million liability cap set by the 1990 Oil Pollution Act.<sup>652</sup> The damages will also exceed the additional \$1 billion covered by provided the Oil Spill Liability Trust Fund.<sup>653</sup>

The capping of justice by limiting BP's damages encouraged BP's fearless exploration that led to this environmental disaster. The problem with caps on liability is that they greatly decrease the deterrent power of tort remedies by making total liability predictable. The issue of caps on damages not only affects an individual plaintiff's ability to recover punitive damages, but also sends a signal to potential defendants who are considering whether they will chance it.

This is not the first time that BP's decisions have endangered the public,

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649. *Motor Vehicle Safety Act Hearings*, *supra* note 321.

Then on April 20, a British Petroleum (BP) oil rig exploded in the Gulf of Mexico, off shore from New Orleans and its fragile wetlands, marshes and estuaries. Eleven workers were killed, others injured, fire ensued, the rig collapsed, and oil started leaking at 40,000 gallons a day. It is now estimated by the Coast Guard to be a raging torrent of oil pouring out of the drilled hole a mile deep in the water at a rate of more than 200,000 gallons a day and BP cannot stop it. The blowout preventer designed to seal the well was activated by workers but did not work nor did the failsafe switch. The huge oil slick will exceed the spill of the Exxon Valdez oil tanker in Alaska. It threatens wildlife all along the Gulf Coast, where some 30 percent of U.S. fish and shell fish are harvested. The rest of the nation will feel the impact of higher prices for these products. But thousands of workers and small business owners along the Coast are now being shutdown, who knows for how long, because their products are awash in oil. The Coast Guard is responsible for supervising the clean up but regulation of oil drilling by the Interior Department is minimal as the Wall Street Journal recently reported. Also, in federal legislation passed after the Exxon Valdez debacle, oil industry lobbyists secured very low limits on company liability (economic liability is capped at \$75 million).

*Id.*

650. The flow rate from the ruptured well [is] as much as four or five times BP's estimate of 5,000 barrels (210,000[0] gallons/795,000 liters) a day." *BP Makes Progress in Plugging Leak as Obama Halts Drilling*, MONEYNEWS.COM (May 27, 2010, 9:47 AM), <http://www.moneynews.com/Headline/US-Gulf-Oil-Spill/2010/05/27/id/360302>.

651. Dana Milbank, *New Plan: Stuff Some Bad Apples in the Well*, WASH. POST, May 26, 2010, at A02.

652. See LOREN C. STEFFY, *DROWNING IN OIL: PB AND THE RECKLESS PURSUIT OF PROFIT* 251 (2011).

653. See, U.S. DEPARTMENT OF HOMELAND SECURITY & UNITED STATES COAST GUARD, *REPORT ON IMPLEMENTATION OF THE OIL POLLUTION ACT OF 1990*, at 6 (2004), available at [http://www.uscg.mil/npfc/docs/PDFs/Reports/osltf\\_report.pdf](http://www.uscg.mil/npfc/docs/PDFs/Reports/osltf_report.pdf).

taking a “death inviting risk assessment.”<sup>654</sup> On March 23, 2005, an explosion at BP’s Texas City refinery started a fire that caused the death of fifteen workers, and injured 180 others:

Local officials at the BP Texas City refinery repeatedly had been rebuffed in their appeals for upgraded machinery and safety equipment. On March 23, 2005, aging equipment and poor safety precautions led to an explosion that killed fifteen workers and injured more than 200.

OSHA fined the company \$21.3 million, the largest penalty of its kind ever levied. Why? Instead of putting excess cash into requested maintenance and safety, BP executives had ordered the company to “bank the savings.” BP had led the industry in the number of refinery deaths from 1995 to 2005, and over that entire decade, there was a fire a week at the Texas City plant.<sup>655</sup>

In the aftermath of the current, unprecedented oil spill, states are beginning to study whether the disaster has a causal connection to “respiratory and skin irritation problems in Louisiana and Alabama.”<sup>656</sup> Residents of the Gulf Coast and first responders will have a difficult time proving individual causation for indirect injuries resulting from toxics released by the spill and used in the clean up. First responders will need to demonstrate a causal connection between their repeated and chronic exposure and the manifestation of cancer and other diseases decades after the spill. What is clear is that miles of shorelines, wetlands, and estuaries will be polluted or destroyed.<sup>657</sup> It is unknown and unknowable how much the oil spill is ultimately going to cause in terms of total economic damages. The spill is devastating the ecosystem, and has caused catastrophic losses in at least five states.<sup>658</sup> Civil recourse theory’s emphasis on one-on-one torts does not fit the collectivization of injury reflected in the BP oil spill.<sup>659</sup> The

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654. Marc R. Stanley, *Risk and Responsibility in the Twenty-First Century: When Bad Companies Happen to Good People*, 56 *DRAKE L. REV.* 517, 522 (2008).

655. *Id.*

656. CNN Wire Staff, *BP Given Until Friday to Provide Backup Plans for Oil Recovery*, CNN, June 9 2010, <http://www.cnn.com/2010/US/06/09/gulf.oil.spill/index.html>.

657. See WETLAND WIKI, [http://wetlandresearch.com/wiki/index.php?title=2010\\_BP\\_Oil\\_Spill\\_%26\\_Wetlands](http://wetlandresearch.com/wiki/index.php?title=2010_BP_Oil_Spill_%26_Wetlands).

658. See Jeffery Kofman, *Three Gallons of Oily Water Collected Today, as Oil Hits Louisiana’s Lake Pontchartrain: Crude Continues to Flow from BP’s Well, as Oil Hits All Five Gulf Coast States*, ABC NEWS, July 6, 2010, <http://abcnews.go.com/WN/bp-oil-spill-oil-hits-gulf-coast-states/story?id=11099441&tkw=&qtshow=WN>.

659. Civil recourse is not of practical utility in mass torts cases such as those handled by Judge

BP oil spill is a modern example of how many mass torts, products liability, and toxic torts tend to result in collective injury. This massive oil spill is an illustration of the need for tort remedies that are not just about a particular plaintiff and defendant. The immediate explosion ended eleven lives, but the mammoth spill has affected the larger public. This includes the hotel or resort operators and their employees who suffer economic loss from lost reservations.

Civil recourse and corrective justice theorists “appear to leave victims of diseases resulting from exposure to harmful products without a remedy.”<sup>660</sup> The BP oil spill is a modern example of how many mass torts, products liability, and toxic torts tend to collective injury. It is not between each angler or tour operator or fisherman or hotel worker or beach dweller and BP. Larger societal issues will play a central role in setting the level of punitive damages to achieve the purposes of specific deterrence (BP and codefendants before the court) and general deterrence (other potential defendants). The late John Fleming said it best when he described tort law as alleviating “the plight of the injured,” but also advancing “the cause of social justice.”<sup>661</sup> Mass products liability cases, environmental torts, abnormally dangerous activities, premises liability, and medical liability cases have public, social, and private interests. The BP spill will undoubtedly raise broader issues than only the “the individual interests of plaintiff and defendant.”<sup>662</sup>

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Jack Weinstein in his Brooklyn federal district courtroom. See, e.g., *In re Breast Implant Cases*, 942 F. Supp. 958 (S.D.N.Y. 1996); *In re E. and S. Dist. Asbestos Litig.*, 772 F. Supp. 1380 (S.D.N.Y. 1991), *aff'd in part, rev'd in part, sub-nom. In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831 (2d Cir. 1992); see generally, Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 960–66 (2001) (discussing mass torts decided in his court over the past few decades).

660. GIFFORD, *supra* note 143, at 58.

661. JOHN G. FLEMING, *AN INTRODUCTION TO THE LAW OF TORTS* 1 (1967).

662. Pound, *supra* note 566, at 19 (arguing that courts need to consider the social interest).

## VI. THE FUTURE OF TORTS IN THE INFORMATION AGE

*But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.*

Thomas Jefferson<sup>663</sup>

America is rapidly shifting its economic base from the production of durable goods to software engineering and other types of information production. Software malfunctions may have latent defects that prove deadly. What will be the path of public tort law in the new millennium and will it continue to evolve? In 1970, a young law professor dissented from scholars such as Robert Keeton and Jeffrey O'Connell, who called for downsizing tort law. He proposed "New Torts" that are concerned with "remedies against the abuse of power—political, economic, intellectual as well as physical."<sup>664</sup> That young professor was Marshall Shapo, who was a conferee at the Pepperdine University School of Law's torts symposium. Professor Shapo's clarion call for tort law to counter corporate abuses was a lone voice of dissent against premature obituaries for tort law.

His 1970 *Stanford Law Review* essay was a retort to a 1969 American Association of Law School panel where leading torts scholars "toyed with the theme that 'torts are dead.'"<sup>665</sup> Shapo, then only in his fourth year of teaching law, proposed "New Torts" to confront "problems created by the abuse of power."<sup>666</sup> He predicted "[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."<sup>667</sup> He called for public policy-based torts that would check the private party much like constitutional law cases of that era

663. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) (quotation on the Jefferson Memorial, panel four), available at [http://www.monticello.org/site/jefferson/quotations-jefferson-memorial#Panel\\_Four.html](http://www.monticello.org/site/jefferson/quotations-jefferson-memorial#Panel_Four.html).

664. Marshall S. Shapo, *Changing Frontiers in Torts: Vistas for the 70's*, 22 STAN L. REV. 330, 333 (1969-70).

665. *Id.* at 332.

666. *Id.* at 334.

667. *Id.* at 334-35.

checked abuses of government power.<sup>668</sup>

Now, fast forward to the new century three decades later. Although tort scholars had predicted that tort law was “doomed to die,” as it was displaced by a social insurance scheme,<sup>669</sup> social insurance coverage has not gained traction in American society because it is at odds with America’s individualistic ethic.

Shapo was writing only a month after Ralph Nader appeared on the cover of *Time Magazine* in December of 1969. His book, *Unsafe at Any Speed*, was a systematic call to investigate the way Detroit built automobiles.<sup>670</sup> Nader wrote of abuses of corporate power in the automobile industry: “A great problem of contemporary life is to control the power of economic interests which ignore the harmful effects of their applied science and technology . . . .”<sup>671</sup> Just as in Nader’s day, the Toyota runaway car incidents implicate broader social interests greater “than the individual interests of plaintiff and defendant.”<sup>672</sup>

#### A. New Technology Torts

Justice Linden’s clarion call is for a tort law of the new millennium to “empower the injured . . . who are hurt in the multifarious activities of modern society.”<sup>673</sup> He acknowledges that if social compensation were to expand, tort would contract. However, Justice Linden predicted that it is more likely that social insurance will shrink, creating an even greater role for tort law in the new century.<sup>674</sup> The takeoff point for software occurred in December of 1968, six months before Neal Armstrong walked on the Moon. In December of 1968, IBM made the monumental decision to unbundle software.<sup>675</sup> “The software industry of the 1950s and 1960s did not price software separately.”<sup>676</sup> Computer vendors included software as an incidental part of a sale or lease of mainframe computers.<sup>677</sup> The software industry did

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668. *Id.*

669. 3 EUROPEAN CTR. OF TOR & INS. LAW, *supra* note 300, at 1.

670. RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE (1965) at x, 22.

671. *Id.* at ix.

672. The concept of social interests is drawn from Roscoe Pound. See Pound, *supra* note 566, at 19.

673. The Honourable Allen M. Linden, *Torts Tomorrow-Empowering the Injured*, in TORTS TOMORROW: A TRIBUTE TO JOHN FLEMING 321, 321–22 (Nicholas J. Mullany & Allen M. Linden eds., 1998).

674. *Id.* at 322.

675. Martin Campbell-Kelly, *Development and Structure of the International Software Industry, 1950-1990*, at 74, <http://www.dcs.warwick.ac.uk/~mck/Personal/SoftIndy.pdf>.

676. Michael J. Madison, *Reconstructing the Software License*, 35 LOY. U. CHI. L.J. 275, 310–11 (2003).

677. *Id.*

not advance until the computer industry re-conceptualized software as a product separately commodified from the computer system.<sup>678</sup> IBM made the monumental decision in December 1968 to unbundle software from hardware, which was likely a response to pending antitrust litigation.<sup>679</sup> Shortly after IBM's decision to separately market and license software, the industry reached its takeoff point. The software industry transformed in the early 1970s as licensing and leasing displaced sales.<sup>680</sup>

At the time Marshall Shapo published his prescient essay calling for "New Torts," the software industry was just beginning to ramp up on both coasts. During the 1970s, software companies developed a technology corridor along Route 128 in Massachusetts that rivaled the West Coast for leadership in the computer industry.<sup>681</sup> For example, Massachusetts software companies offered generous compensation to candidates with a background in computer software design and engineering.<sup>682</sup> Route 128 companies developed as the supernovas of the East Coast software industry while the Silicon Valley on the San Francisco peninsula of California was

678. *See id.* at 311.

679. Katharine Davis Fishman cites a March 1969 internal memorandum that explicitly states that IBM's decision to unbundle was the result of pending litigation. KATHARINE DAVIS FISHMAN, *THE COMPUTER ESTABLISHMENT* (1981). Professor Madison argues "IBM's unbundling decision was made in anticipation of the Justice Department's" antitrust lawsuit and that IBM's licensing strategy was an attempt to respond to charges of "IBM's alleged anticompetitive marketing practices, not at nurturing protection for computer software as an independent economic sector." Madison, *supra* note 676, at 311–12.

680. Madison, *supra* note 676, at 311.

681. *See* Roger Voyer, *Knowledge-Based Industrial Clustering: International Comparisons*, in *Economics of Science, Technology and Innovation: Local and Regional Systems of Innovation* 81, 88–89 (John de la Mothe & Gilles Paquet eds., 1998) ("Route 128 emerged as the result of industrial restructuring in the 1970s and 1980s. . . . [B]etween 1975 and 1980, 225,000 new manufacturing jobs were created, mostly in high-technology industries. Most of the new firms located along Highway 128, the suburban beltway of Boston. . . . The core of Greater Boston's new industrial development [was] the computer industry, which had its start in 1950s with the establishment of firms such as Digital Equipment Corporation." (footnote omitted)).

682. Ken Olsen founded Digital Equipment Corporation (DEC) in 1957.

Digital is best known for introducing the minicomputer to the information processing industry, a development that altered the way potential customers perceived the computer. In addition to being more accessible to non-specialists than traditional mainframes, the minicomputer was smaller, faster, and less expensive. In defining the needs of a new generation of computer users, Digital set the stage for the development . . . .

Digital Equipment Corporation, *Company History*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/DIGITAL-EQUIPMENT-CORPORATION-Company-History.html> (last visited Nov. 10, 2010). DEC sought computer technicians to build software solutions for its PDP-1 released in 1961. *Company: Digital Equipment Corporation (DEC)*, COMPUTER HISTORY MUSEUM, <http://www.computerhistory.org/brochures/companies.php?alpha=d-f&company=com42b9d67d9c350> (last visited Nov. 10, 2009). DEC's PDP-10 was an innovative PC designed for time-sharing and scientific computing. *Id.*



the birthplace of Sun Microsystems, Cisco Systems, the Apple Computer, and Yahoo!, just to name a few household names.<sup>683</sup> Professor Nancy Leveson, an MIT Aeronautics and Astronautics professor, states:

At the same time that computers are becoming indispensable in controlling complex engineered systems, quality and confidence issues are increasing in importance. We are hearing more and more failures due to computers: Software errors have resulted in loss of life, destruction of property, failure of businesses, and environmental harm. Computers now have the potential for destabilizing our financial system.<sup>684</sup>

Software malfunctions may have latent defects that prove deadly. Philip Dick's 1953 short story, *The Colony*, takes place on the distant Planet Blue, a setting that appears to be ideal for colonization because of its idyllic climate and no snakes or other predators.<sup>685</sup> Nevertheless, the predators masquerade as everyday objects.<sup>686</sup> A scientist was nearly strangled by his microscope.<sup>687</sup> A second traveler narrowly escaped from a deadly encounter with his bath towel that violently wrapped around him in an attempt to strangle him. Deadly organisms disguised as familiar objects eventually kill all of the space travelers off. Similarly, Stephen King's 1983 novel, *Christine*, features a 1958 Plymouth Fury possessed by supernatural forces and is set in the mythical town of Libertyville. Christine the runaway car commits a series of murders and each time is able to repair itself leaving no paint chips as evidence.<sup>688</sup> Defectively designed software, like *Christine*, the killer car, or the everyday objects turned deadly in *The Colony*, can also have hidden dangers.<sup>689</sup> Thus, these literary works provide the backdrop for actual software malfunctions that prove to be fatal. In one high profile case, a New York City hospital did

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683. See Chart: *The SV150 Companies for 2009*, SILICONVALLEY.COM (Apr. 17, 2010, 4:00 PM), [http://www.siliconvalley.com/companies/ci\\_14902728?sourcepkg&nlick\\_check=1](http://www.siliconvalley.com/companies/ci_14902728?sourcepkg&nlick_check=1).

684. NANCY LEVESON, SOFTWARE AND SYSTEM SAFETY RESEARCH GROUP: A WHITE PAPER, <http://sunnyday.miot.edu/white-paper.html> (last visited Dec. 24, 2010).

685. Philip K. Dick, *Colony*, in THE BEST OF PHILIP K. DICK 127-28 (1977).

686. *Id.* at 128.

687. "The scientist was studying life forms from The Colony when the" two eyepieces of the microscope had twisted suddenly around his windpipe and were trying to strangle him." *Id.*

688. "In the 1983 Stephen King horror novel 'Christine,' a car with supernatural powers drives around by itself and murders people." Drew Winter, *Sudden Acceleration Decelerating*, WARD'S AUTO WORLD (Apr. 1, 2010, 12:00 PM), [http://wardsautoworld.com/ar/auto\\_sudden\\_acceleration\\_decelerating/](http://wardsautoworld.com/ar/auto_sudden_acceleration_decelerating/).

689. "But the technology introduces its own risks: it has created new avenues for error in software and operation, and those mistakes can be more difficult to detect. As a result, a single error that becomes embedded in a treatment plan can be repeated in multiple radiation sessions." Walt Bogdanich, *As Technology Surges, Radiation Safeguards Lag*, N.Y. TIMES, Jan. 26, 2010, <http://www.nytimes.com/2010/01/27/us/27radiation.html>.

not detect a computer software malfunction causing a patient to suffer an excruciating death from excessive radiation:

As Scott Jerome-Parks lay dying, he clung to this wish: that his fatal radiation overdose—which left him deaf, struggling to see, unable to swallow, burned, with his teeth falling out, with ulcers in his mouth and throat, nauseated, in severe pain and finally unable to breathe—be studied and talked about publicly so that others might not have to live his nightmare.<sup>690</sup>

This patient's death was the direct result of excessive preventable software errors. In this case, it was St. Vincent Hospital's failure "to detect a computer error that directed a linear accelerator to blast his brain stem and neck with errant beams of radiation. Not once, but on three consecutive days."<sup>691</sup> A young breast cancer patient was administered excessive radiation in a Brooklyn Hospital on the same day that public authorities warned hospitals about administering excessive radiation:

But on the day of the warning, at the State University of New York Downstate Medical Center in Brooklyn, a 32-year-old breast cancer patient named Alexandra Jn-Charles absorbed the first of 27 days of radiation overdoses, each three times the prescribed amount. A linear accelerator with a missing filter would burn a hole in her chest, leaving a gaping wound so painful that this mother of two young children considered suicide. Ms. Jn-Charles and Mr. Jerome-Parks died a month apart. Both experienced the wonders and the brutality of radiation. It helped diagnose and treat their disease. It also inflicted unspeakable pain.<sup>692</sup>

The Food and Drug Administration studied 1,000 cases of errors in radiation therapy and found most incidents were attributable to linear accelerators.<sup>693</sup> The *New York Times* reported how flaws in computer software epidemics were causing an epidemic of radiation therapy injuries and deaths.<sup>694</sup> Software problems were the most "common cause for the

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690. Walt Bogdanich, *Radiation Offers New Cures, and Ways to do Harm*, N.Y. Times, Jan. 23, 2010, [http://www.nytimes.com/2010/01/24/health/24radiation.html?\\_r=1](http://www.nytimes.com/2010/01/24/health/24radiation.html?_r=1).

691. *Id.*

692. *Id.*

693. Walt Bogdanich, *F.D.A. Toughens Process for Radiation Equipment*, N.Y. TIMES, Apr. 8, 2010, <http://www.nytimes.com/2010/04/09/health/policy/09radiation.html?ref=radiationboom>.

694. *Id.*

errors.”<sup>695</sup> The patients injured or killed by defective software could directly file products liability actions and perhaps medical malpractice actions if their physician violated a standard of care.

Hospitals seeking indemnification from software engineers who designed defective computer software will not be able to assert an action for computer malpractice. To date, no plaintiff has filed a lawsuit against the computer software engineers or the software designers who wrote the dangerously defective program. No U.S. court has ever recognized the concept of computer malpractice analogous to that imposed on doctors, lawyers, accountants, and other established professionals.<sup>696</sup> Most software makers disclaim all implied warranties and limit remedies.<sup>697</sup> A former Microsoft lawyer contends that vendors disclaim these warranties because the “repercussions are unknown.”<sup>698</sup> Software makers disclaim performance warranties such as merchantability and fitness for a particular purpose because of uncertainty as to what these warranties mean as to software:

First, the doctrine of implied warranty of merchantability requires that goods must “pass without objection in the trade”; however, all programs are subject to criticism in the computer trade press. Second, the court would have to determine the standard to which the software would be compared. However, the dynamic nature of the software industry makes such a comparison difficult. Furthermore, such comparison would be difficult because computer software is generally perceived as a collection of unique ideas.<sup>699</sup>

Every car has dozens of computers on board that control brakes, throttles and other functions. On August 28, 2009, a Toyota Lexus driven by an off-duty California Highway patrolman “careened through a fence, rolled over and burst into flames,” killing all four occupants.<sup>700</sup> Shortly

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695. *Id.*

696. The first court to refuse to consider and reject a plaintiff’s theory of computer malpractice was *Chatlos Systems, Inc. v. National Cash Register, Corp.*, 497 F. Supp. 738 (D.N.J. 1979) (rejecting new tort of “computer malpractice” for those who render computer seals and service), *aff’d in part*, 635 F.3d 1081 (3d Cir. 1980); *see also* *Analysts Int’l Corp. v. Recycled Paper Prods., Inc.*, No. 85-C8637, 1987 U.S. Dist. LEXIS 5611 at \*16–17 (N.D. Ill. 1987) (stating that Illinois does not recognize the tort of computer malpractice for computer software systems designers, marketers, and installers); *Invacare Corp. v. Sperry Corp.*, 612 F. Supp. 448, 453–54 (N.D. Ohio 1984) (refusing to recognize business negligence in a computer-related setting as computer malpractice).

697. Robert W. Gomulkiewicz, *The Implied Warranty of Merchantability in Software Contracts: A Warranty No One Dares to Give and How to Change That*, 16 J. MARSHALL J. COMPUTER & INFO L. 393, 393 (1997).

698. *Id.* at 393.

699. Abstract, *The Implied Warranty of Merchantability in Software Contracts: A Warranty No One Dares to Give and How to Change That*, THE JOHN MARSHALL JOURNAL OF COMPUTER & INFO. LAW, <http://www.jcil.org/journal/articles/243.html> (last visited Dec. 26, 2010).

700. Bill Vlasic, *Toyota’s Slow Awakening to a Deadly Problem*, N.Y. TIMES, Jan. 31, 2010,

before the fatal crash, the state trooper told a 911 dispatcher that his Lexus lost its brakes and that the accelerator was stuck on full throttle.<sup>701</sup> The *L.A. Times* reported that over sixty drivers complained of sudden acceleration problems after their automobiles had been recalled and apparently fixed by Toyota.<sup>702</sup>

Tort law's signature has been its flexibility in enabling consumers to uncover developing dangers or risks affecting them and others in society. Injured consumers and their lawyers serve as early responders uncovering smoking gun evidence of corporate abuses.<sup>703</sup> The concept of private lawsuits involving civil recourse and public interest is nothing new; as illustrated by civil and criminal RICO, the federal securities laws, the antitrust law, and much of environmental law. This theme of private litigants uncovering misconduct involving and benefiting the larger society is also found in civil forfeiture litigation, civil rights case, and whistleblower actions. The Toyota runaway car problem is the latest in a long line of high profile societal danger cases where government regulators have failed to protect the public.<sup>704</sup> If the recourse theorists manage to downsize tort law, courts will be constrained with recognizing new causes of action or categories of plaintiffs to address the social problems created by defective software. The software industry is evolving rapidly and so must new torts such as negligent enablement, computer products liability, and computer malpractice.

### B. Computer Malpractice

Courts have uniformly rejected the theory of computer malpractice but most decisions were handed down in the 1980s and 1990s during the early years of the software industry. For instance, in *Hospital Computer Systems, Inc. v. Staten Island Hospital*, a software developer filed an action against the hospital for its failure to pay for computer services.<sup>705</sup> The hospital counterclaimed charging that the plaintiff's technical staff committed

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[http://www.nytimes.com/2010/02/01/business/01toyota.html?\\_r=1](http://www.nytimes.com/2010/02/01/business/01toyota.html?_r=1).

701. *Id.*

702. Ken Bensinger & Ralph Vartabedian, *More Owners of Toyota Vehicles Say Recall Repairs Aren't Working*, L.A. TIMES, Mar. 5, 2010, <http://articles.latimes.com/2010/mar/05/business/la-fi-toyota-complaints5-2010mar05>.

703. See *supra* note 315 and accompanying text.

704. See *supra* notes 582–83 and accompanying text.

705. See *Hosp. Computer Sys., Inc. v. Staten Island Hosp.*, 788 F. Supp. 1351, 1356 (D.N.J. 1982).

computer malpractice.<sup>706</sup> The court rejected this claim ruling that the plaintiff could not establish that computer consultants were professionals.<sup>707</sup>

The courts have all said no to recognizing a new tort of computer malpractice and the result is that software makers disclaim all liability and limit their warranties and enjoy a lawsuit immunity zone. Tort law is often the first responder that alerts the public about excessive preventable dangers in defective products, reckless business practices, and toxic hazards.<sup>708</sup> News of the Toyota sudden acceleration cases is the latest chapter in how tort law has served all Americans. To quote the great political philosopher Yogi Berra: “It’s *déjà vu* all over again.”<sup>709</sup> Neither Congress nor state legislatures have addressed the problem of bad software with comprehensive regulation that oversees the software industry. It will be up to courts to recognize new causes of action for computer malpractice, the negligent enablement of cybercrime, or other causes of action to address injuries of the information age. Courts have yet to recognize a tort duty of care holding software developers responsible for producing software that has excessive preventable risks that it will be exploited by hackers or cybercriminals.

The bad software problem is a byproduct of the software industry’s virtual immunity from tort liability. Immunity breeds irresponsibility and tort law requires accountability. The software industry’s approach has been rushing to market and reallocating the costs of making their products safe to the consumer and other end users. The FDA has been slow to address the problem of computer malfunctions in radiation therapy.<sup>710</sup> As health care costs veer out of control, hospitals need a tort remedy against the software engineers or vendors that supplied the malfunctioning software. Hospitals seeking indemnification from software engineers who designed defective computer software will not be able to assert an action for computer malpractice.<sup>711</sup>

In response, to the acceleration issues with Toyota vehicles, federal regulators asked Toyota to consider installing software to prevent cars from racing out of control.<sup>712</sup> The U.S. Department of Transportation is proposing a \$16.4 million fine against Toyota for “knowingly hid[ing]” safety problem from the National Highway Traffic Safety Administration (NHTSA).<sup>713</sup> The “runaway car” problems in Toyota Priuses and other

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706. *See id.* at 1360–61.

707. *Id.* at 1361.

708. *Supra* note 636 and accompanying text.

709. Debra A. Estock, *Baseball Hall of Famers: Yogi Berra* 5 (2003).

710. *See Bogdanich, supra* note 693, and accompanying text.

711. *See supra* note 696 and accompanying text.

712. *See Ken Bensinger & Ralph Vartabedian, Toyota Was Asked in 2007 to Consider Installing Software to Prevent Sudden Acceleration*, L.A. TIMES, Mar. 14, 2010, <http://articles.latimes.com/2010/mar/14/business/la-fi-toyota-brake14-2010mar14>.

713. Josh Mitchell & Kate Limbaugh, *Toyota Faces \$16.4 Million U.S. Fine*, WALL ST. J., Apr. 6,

models may ultimately be traced to defective software design.<sup>714</sup> The American Law Institute's Principles of the Law of Software Contracts impose a duty on the part of software makers to disclose known defects in code to the customers and this duty cannot be disclaimed.<sup>715</sup> This broad-based standard is a modest first step to developing new tort theories to protect our information-based infrastructure.

## VI. CONCLUSION: DON'T STOP THINKING ABOUT TOMORROW

For twenty-five years, I have defended our American common law of torts on many grounds against constant attacks and calls for "reform." I have not defended tort law because it is politically useful in any sense, or in the interests of social justice, or in my own interests. In a nutshell, my defense of our common law of torts is based on how it functions as a flexible, free-market based, and cost-effective alternative to a burdensome and expensive European-style regulation scheme, social insurance scheme, or a combination of the two, that would seek to redress harm, protect us from harm, or both. Moreover, I am highly skeptical that any bureaucratic construct could function as quickly and effectively as trial attorneys driven by the profit motive to alert the public to danger and to protect them from harm.

While I see the beauty of tort law as a consumer watchdog, younger tort scholars like John Goldberg see the beast. Goldberg's vision of tort law does not include celebrating trial attorneys as canaries in the coal mine, or any other big picture, public oriented features. Tort law's expanded role in modern society has made it way too subject to criticism. To save it, we need to return to an older format—à la Blackstone's concept of private wrongs. The problem is that format, however suitable for a *Gemeinschaft* society, pre-industrial revolution, is totally inadequate for the kinds of multifaceted problems that arise in our *Gesellschaft* era. Tort law may be unpopular with the American public now thanks to the tort reformers' well-funded campaign against it, but raising taxes to fund a Swedish-style insurance scheme would be far more unpopular. In any case, I suspect a monolithic compensation system would fail in regard to deterrence and as a grievance mechanism for injured plaintiffs.

While I agree with the civil recourse theorists that tort law should

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2010, at B1, available at Factiva, Doc. No. J000000020100406e6460001c.

714. See generally Holman W. Jenkins, *Toyota and the Curse of Software*, WALL ST. J., Feb. 5, 2010, at A19, available at Factiva, Doc. No. J000000020100205e62500017.

715. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS §3.05 (Proposed Final Draft 2009).

redress private wrongs; torts is more complex than the notion of civil recourse. The manifest function of tort law may be the equivalent of civil recourse, but its latent functions are just as important.<sup>716</sup> Our honoree, Justice Allen Linden, calls for a tort law for the new millennium to “empower the injured . . . who are hurt in the multifarious activities of modern society.”<sup>717</sup> In the recent Toyota “sudden acceleration” cases, which may be software-related, the issue between the car manufacturer and an injured consumer will involve civil or private recourse, but that is not the end of the story. Trial lawyers are using the engine of discovery to unearth issues of safety and quality and also to uncover a wider pattern of corporate wrongdoing.<sup>718</sup> In other words, tort law is between the plaintiff and the defendant, but it also serves the public interest by alerting consumers and regulatory agencies to problems. If the civil recourse theorists have their way, courts will be hesitant to look at the big picture and recognize new causes of action for new types of injuries. In our information-based society, new dangers include dangerously defective software, online stalking, the misappropriation of trade secrets, and economic espionage. Cybertorts and software-related injuries require creative problem solving from our courts. Whether the consumer watchdog function of American tort law is beautiful or beastly depends upon your worldview. My worldview is forward-looking and that of the younger scholars seems to be backwards looking.

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716. I draw upon sociologist Robert Merton’s distinction between manifest (on the surface) and latent functions (backstage or beneath the surface). See ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* (1957). The manifest functions of tort law are what courts discuss in their opinions in contrast to latent social functions.

717. Linden, *supra* note 673, at 321–22.

718. See *supra* note 315 and accompanying text.