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**Tort Theory and Restatements: Of  
Immanence and Lizard Lips**

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*Yeah, when I was a little kid, see, I never liked to eat  
And Mama'd put things on my plate and I'd dump 'em on her feet  
But then one day she made this soup, I ate it all in bed  
I asked her what she put in it, and, well, this is what she said:*

*Oh, chicken lips and lizard hips and alligator eyes  
And monkey legs and buzzard eggs and salamander thighs  
Well, rabbit ears and camel rears and tasty toenail pies  
Stir 'em all together and it's Mama's soup surprise<sup>1</sup>*

**Abstract:** This Essay gingerly enters the tort theory “wars” that torts scholars have been debating for many decades. Is the essence of tort law instrumentalism in some form, including most notably in providing appropriate incentives to minimize the costs of accidents, as Guido Calabresi normatively proposed and William Landes and Richard Posner descriptively claimed? Or, on the other hand, is tort law simply about the injurer and victim and the just manner for allocating the victim’s loss—blind to any collateral consequences?

We address these debates from our perspective as Restatement Reporters, honing in on the question of what role tort theory plays in our work. Our answer is virtually none. There are two independent and sufficient reasons for this conclusion. First, we are deeply skeptical that there is an immanent meta-theory that explains tort law or guides its development. Instead, we think tort law is a hodgepodge, influenced by public policy, culture, administrative concerns, evidentiary lacunae, technological developments, and random events. These eclectic and shifting forces influence what tort law is and how it evolves with the felt needs of any given era. Tort law, in short, is built from the bottom up, not the top down and is far too messy to be the product of intelligent design. Beyond that,

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<sup>1</sup> BRUCE SPRINGSTEEN, *Chicken Lips and Lizard Hips*, on FOR OUR CHILDREN (Walt Disney Records 1991).

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even if there were such a force at tort law's heart, that force would still have little influence on our work. The doctrinal level at which Restatements operate and the case law that fuels the production of Restatements—ground level law—is a disjunction from theory, which operates at 30,000 feet. This disjunction means that the latter is of little assistance when it comes to addressing the quotidian matters important to tort law and Restatements. Whether tort law is entirely instrumental or solely about corrective justice cannot answer the question of whether parents should have immunity from tort suits by their children. The answer to that question must be found in the case law, not in Kant.

**Keywords:** tort theory, restatements, tort law, ALI, corrective justice, instrumentalism

## 1 Introduction

Our charge is to discuss the role of tort theory in Restatements of the Law. Between us, we have worked for over 20 years as Reporters on the Restatement (Third) of Torts, and we have considerable additional experience serving as Advisers for other pieces of the Third Restatement project. After all those years, and after carefully considering the matter, our bottom line response to the question —“What's the role of tort theory in our work?”—is: Not much. Maybe nothing at all.

That woeful conclusion, we suggest, is important in its own right. Further, we submit, it offers broader insight into the relative utility of tort theory, when it comes to theory's ability to explain—or even illuminate—the law's evolution and contemporary operation. In the pages that follow, we elaborate on what we see as the chasm between theory, on the one hand, and doctrine and practice, on the other—and we also offer our perspective on what it is that actually, descriptively, *explains* tort law, as it exists today.<sup>2</sup>

Here, we argue that, like “Mama's soup surprise,” quoted in the above Bruce Springsteen children's song, tort law reflects—and it is derived from—a range of disparate influences.<sup>3</sup> Tort law has bubbled along, fortuitously and incrementally, with a pinch of this and a dash of that. Furthermore, today's “tort soup” is the product, not of some published recipe or coherent design. Rather, it has been concocted, in different kitchens, over time and across space, based on what's in season and on hand. The main ingredients, we believe, include the promotion of sound public policy (though what that means is itself contested and varies over time), alongside insurance availability, an abiding concern with on-the-ground

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<sup>2</sup> As the text makes clear, our focus is on descriptive accounts of tort law, not normative ones.

<sup>3</sup> In so arguing, we are in broad agreement with the conclusions John Fabian Witt draws in the masterful *Contingency, Immanence, and Inevitability in the Law of Accidents*, 1 J. TORT L. 1 (2007).

administrability, and a commendable adaptability, including a willingness to shift in response to changing times, evolving circumstances, and technological developments. Meanwhile, this tort soup, we believe, has been flavored with a large dollop of political compromise, a shake of fortuity, and dashes of random occurrences.

Before we jump in, however, we offer first a caveat and then two preliminary definitions. First, the caveat: Neither one of us is—or purports to be—a tort theorist. Instead, our primary preoccupations are: (1) tort doctrine, including its coherence or, far too frequently, its lack of coherence, and the extent to which doctrine meets, or fails to meet, current societal needs; (2) the “system” that addresses accidental injury—including how tort law *actually* operates on the ground, how well the law serves (or disserves) poor and middle-income Americans, and how the tort reform movement, which has swept the United States over the past 45 years, has affected the system’s operation and equity; (3) the many alternatives to tort that states and the federal government have adopted, including workers’ compensation laws, enacted in the early years of the last century, as well as more modern schemes, such as the 9/11 Victim Compensation Fund and the Vaccine Injury Compensation Program; and (4) the challenges posed by the modern development of toxic tort litigation and the concomitant need for scientific evidence. All of these areas have captivated us and drawn us to explore further. And, with no disrespect to tort theorists, we frankly find these questions more *interesting* and practically consequential than the questions that are debated by our more theory-minded friends.<sup>4</sup>

Second, we also clarify what we mean by tort “theory.” When we use that term, we mean general explanations of what tort law is about (descriptive) or should be about (normative). The most popular tort theories of the 21st century are corrective justice theory, civil recourse theory, and law and economics, although there are sometimes fights as to particulars, and each has generated offshoots by those holding modestly different views.<sup>5</sup> Such theories are set at a high level of

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4 A common question of theoretical debate, for example, is whether a “wrong” occurs upon completion of the act or not until the act actually inflicts harm. See, e.g., John F. K. Oberdiek, *The Wrong in Negligence*, 41 OXFORD J. LEGAL STUD. 1174 (2021) (entering into the fray to address whether a negligent act is “wrong” regardless of whether it subsequently causes injury). We do not find this discussion particularly engaging, particularly because it is “academic” in the purest sense, for, in tort law—regardless of whether the defendant’s act is a “wrong” or not—cognizable legal harm is a requisite for liability.

5 There are numerous others. The late James Henderson, for example, promoted the idea that process constraints—the difficulties courts face in adopting and implementing substantive rules—justify aspects of tort law that none of the prominent theories can adequately explain. See James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901 (1982). And, one of us has articulated what may be called an information-forcing theory of tort law, contending that tort law promotes safety, not only (and maybe not primarily) through the much-discussed path of cost

abstraction, although they may address doctrine for illustrative, straw person, or critical purposes. At bottom, however, doctrine isn't the point.

We contrast tort theory (the stuff of Kant, Aristotle, or Coase), with “policy,” which is considerably more specific, less abstract, and fits far more comfortably in judicial opinions. As we explain, *many* tort doctrines rest, or purport to rest, on public policy considerations; public policy, we suggest, is a key ingredient of past and contemporary tort doctrine. As a consequence, Torts Restatements—which capture and seek to distill tort doctrine—frequently, and inescapably, grapple with questions of public policy. But, we concede: The line between “policy” and “theory,” may sometimes blur, particularly when one discusses the straddler concepts of fairness, loss spreading, and optimal deterrence, as these ideas feature prominently in public policy arguments and *also* prevailing tort theories, including corrective justice and law-and-economics.

The remainder of this Essay unfolds as follows. For those unfamiliar with the American Law Institute (ALI) and its projects and processes, Part 2 offers a primer on what the ALI is, how Restatements originated, and what Restatements strive to be.

Then, Part 3—the heart of this Essay—elaborates on our own vision of tort law and its uneasy relationship to tort theory. This Part reviews many of the key ingredients, and also the various “spices,” that we believe combine to create tort law, as it exists today, contrary to theory essentialists. Part 3's core claim is that tort law—as it exists and has existed—is not scripted or planned. There is no coherent theory at tort law's core. To the contrary, our view, in line with John Fabian Witt's, is that tort law is haphazard and eclectic—“as messy, fragmented and time-bound as the collisions and accidents and human interactions out of which it arises.”<sup>6</sup>

Then, a final Part 4 assumes, for the sake of argument, that Part 3 gets it wrong; we assume, for Part 4's purposes, that, contrary to our own understanding and belief, there *is*, in fact, one glorious foundational principle that knits all of tort law together. We proceed in this Part to explain why, even if that were so, such a theory would *still* be of little or no value for the vast majority of issues that Restatement Reporters confront because theory tends to be pitched at the wrong level of abstraction. While theory tends to operate at 30,000 feet (and a *grand* theory, by

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internalization (as Richard Posner and Steven Shavell, among others, would suppose), but rather, through its informational effect. The idea is that plaintiffs' lawyers are well-equipped to connect dots, cultivate whistle-blowers, and pry incriminating information out of company vaults—and *this information* that tenacious plaintiffs' lawyers unearth is what's key, as it is vital to helping regulators regulate and also to ensuring that reputations reflect reality so reputational effects steer consumers to safer, not shoddier, goods. See Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 *STAN. L. REV.* 285, 350–62 (2021); Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, 53 *WAKE FOREST L. REV.* 293, 328–35 (2018) [hereinafter Engstrom, *When Cars Crash*].

<sup>6</sup> Witt, *supra* note 3, at 16.

definition, would have to be quite encompassing), as Reporters, our work is decidedly quotidian, operating at ground level.

## 2 The Origin, Purpose, and Characteristics of the ALI's Restatements of Law

### 2.1 Roots of Restatements

Restatements date back to August 29, 1906, when thirty-seven-year-old Roscoe Pound delivered a fiery speech entitled “The Causes of Popular Dissatisfaction with the Administration of Justice,” in Saint Paul, Minnesota, at the 29th annual meeting of the American Bar Association.<sup>7</sup> In his remarks, Pound castigated the common law system as “archaic” and the “procedure” as “behind the times.”<sup>8</sup> Further, he lamented that the decentralization of courts and limited weight of precedent had contributed to a “want of certainty” alongside abiding “confusion.”<sup>9</sup> This, he said, had turned advocacy into a “great game; a citation match between counsel, with a certainty that diligence can rake up a decision *somewhere* in support of any conceivable proposition.”<sup>10</sup>

Pound's speech electrified a number of attendees, especially those in the academy.<sup>11</sup> In short order, Pound's career took off (he was named Dean of Northwestern, before heading east to Harvard), while his ideas also gained currency. In particular, a blue-ribbon Committee, titled the *Committee on the Establishment of a Permanent Organization for the Improvement of the Law*, was formed to explore mechanisms for improvement.<sup>12</sup> In 1923, the Committee issued a Report that echoed—and greatly expanded upon—Pound's blistering critique. In particular, the Committee concluded that the “chief defects in American law are its

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<sup>7</sup> See Robert A. Stein, *Causes of Popular Dissatisfaction with the Administration of Justice in the Twenty-First Century*, 30 *HAMLIN L. REV.* 499, 499–500 (2007).

<sup>8</sup> Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 *AM. JUD. SOC'Y* 178, 183 (1937) (publishing Pound's 1906 address).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> As Professor John Wigmore, who was in attendance that day, later reminisced: “[A]t last the surgeon's skilled diagnosis had been made... the broad underlying causes of the ailments in our justice had been made clear to all.” John H. Wigmore, *Roscoe Pound's St. Paul Address of 1906*, 20 *J. AM. JUD. SOC'Y* 176, 177–78 (1937). “[W]e knew,” he continued, that “the truth was being unfolded to us.” *Id.* at 177. Others, especially those in the old guard, were less taken by Pound's remarks. *Id.*

<sup>12</sup> See *The Story of ALI*, A.L.I., <https://www.ali.org/about-ali/story-line/> (last visited Oct. 30, 2021).

uncertainty and its complexity,” and these defects, the Committee continued, “cause useless litigation, prevent resort to the courts to enforce just rights, make it often impossible to advise persons of their rights, and when litigation is begun, create delay and expense.”<sup>13</sup>

To address the law’s uncertainty and complexity, the Committee’s Report called for the creation of a new permanent organization to improve the law—the “American Law Institute”—and further explained that this new organization should exist, chiefly, to publish Restatements.<sup>14</sup> These Restatements would explain the law as written, while striving to “simplify unnecessary complexities” and also “promote those changes which will tend better to adapt the laws to the needs of life.”<sup>15</sup> The Committee explained that Restatements would be “at once analytical, critical and constructive.”<sup>16</sup> To do that, “where the law is uncertain or where differences in the law of different jurisdictions exist not due to differences in economic and social conditions,” Restatements should not merely trace those differences or flag the disagreement.<sup>17</sup> Rather, Restatements should take sides—to “make clear what is believed to be the *proper* rule of law.”<sup>18</sup> According to the Committee, Restatements, “if adequately done,” were poised to “do more to improve the law than any other thing the legal profession can undertake.”<sup>19</sup>

Within a year of the Report’s publication, the ALI was incorporated,<sup>20</sup> and the ALI’s mission, as stated in its Certificate of Incorporation, echoed the Committee Report:

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**13** *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, 1 A.L.I. PROC. 1, 6 (1923) [hereinafter *Committee Report*].

**14** Restatements, in the view of the Committee, “if adequately done, will do more to improve the law than any other thing the legal profession can undertake.” *Id.* at 18. These gains would be achieved, the Committee believed, by “produc[ing] agreement on the fundamental principles of the common law, giv[ing] precision to use of legal terms, and mak[ing] the law more uniform throughout the country.” *Id.* Indeed, for the Committee, the need to draft Restatements came first—and the Committee called for the creation of the ALI only after concluding that no then-existing organization was equipped to create and ratify Restatements. *Id.* at 29–42.

**15** *Id.*

**16** *Id.* at 14.

**17** *Id.* at 15.

**18** *Id.*

**19** *Id.* at 18.

**20** From its inception, the ALI was led by a “who’s who” of American law. See *The Story of ALI*, *supra* note 12 (explaining that early leaders included the then Chief Justice of the United States Supreme Court, a future Chief Justice, a former Secretary of State, two of the most prominent judges in American history (Learned Hand and Benjamin Cardozo), and a former United States President).

The particular business and objects of the society are educational, and are to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.<sup>21</sup>

Meanwhile, when one fast-forwards to the present day, the purpose of the ALI's Restatements is said to be much the same as the Committee, envisioned back in 1923. Writing in 2008, Director-emeritus, Lance Liebman, explained:

A Restatement is a positive statement of legal doctrine on a legal subject on which American law is made by common law judges rather than by elected legislatures or administrative agencies. It is thus both a synthesis of the law as stated in judicial opinions and an attempt to declare the correct rule of law and to recommend for the future doctrinal statements that will advance both the law's coherence and its consistency with good public policy.<sup>22</sup>

## 2.2 Additional Characteristics of Contemporary Restatements

The above descriptions are straightforward enough, but there are a number of further facts about Restatements that merit elaboration.

First, the audience for Restatements is composed largely of judges and lawyers. As judges face novel or difficult questions, and as lawyers construct various arguments, Restatements provide a clear statement of doctrine—not as a matter of *stare decisis* but as an influential source promulgated by a respected legal organization.

Second, as Liebman notes, Restatements are primarily drawn from law “as stated in judicial opinions.”<sup>23</sup> Judicial opinions have been—and continue to be—the anchor for any doctrinal position contained in a Restatement. This means that Restatement Reporters read thousands of cases, including all of the major cases from each state that bear on a black letter section. And, while it is true that Reporters sometimes consult other materials—such as treatises, law review articles, or even sources from psychology, sociology, history, philosophy, or economics—it is cases that provide the wheat that fuels the Restatements' mills.<sup>24</sup>

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<sup>21</sup> See *Certificate of Incorporation*, A.L.I., [https://www.ali.org/media/filer\\_public/10/62/106284da-ddfe-4ff4-a698-0a47f268ee4c/certificate-of-incorporation.pdf](https://www.ali.org/media/filer_public/10/62/106284da-ddfe-4ff4-a698-0a47f268ee4c/certificate-of-incorporation.pdf) (last visited Oct. 30, 2021).

<sup>22</sup> Lance Liebman, *The American Law Institute: A Model for the New Europe?*, in *MAKING EUROPEAN PRIVATE LAW* 209, 209 (Fabrizio Cafaggi & Horatia Muir-Watt eds., 2008).

<sup>23</sup> *Id.*

<sup>24</sup> The Committee recognized as much, writing in 1923: “[T]he work as a whole must actually be done and show on its face that it has been done with a thorough examination and careful

Indeed, this fact seriously complicated matters for Reporters charged with completing the Third Restatement's treatment of Intentional Torts. The problem was that, owing to the prevalence of liability insurance, which typically requires an "accident" to trigger coverage and contains exclusions for "expected or intended" harms, there are relatively few reported modern civil cases involving intentional misconduct.<sup>25</sup> (Unless the defendant is of substantial means, plaintiffs' lawyers strategically plead only negligence claims, so as to be able to tap into the defendant's liability insurance policy<sup>26</sup>—or, when an uninsured tortfeasor commits an intentional tort, plaintiffs' lawyers might set their sights on a negligent "secondary" defendant, as in, for example, *Tarasoff v. Regents of the University of California*.<sup>27</sup>) Plaintiffs' lawyers' end-run around asserting claims of intentionality has significantly reduced intentional torts' role in the contemporary litigation landscape—and it stymied the Reporters for the Intentional Torts Restatement, who often lacked contemporary appellate decisions from which to draw.<sup>28</sup>

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consideration of the present sources of the law. This means that the work should contain a complete citation of authorities, decisions, treatises and articles. The legal profession will never have confidence in the result unless those responsible for the work give this tangible proof of care and thereby also show that they know and have set forth any differences between the law expressed in the statement of principles and that found in the decisions of the courts in each State considered separately." *Committee Report, supra* note 13, at 21–22.

**25** See Erik S. Knutsen, *Fortuity Victims and the Compensation Gap: Re-Envisioning Liability Insurance Coverage for Intentional and Criminal Conduct*, 21 *CONN. INS. L.J.* 209, 209–10 (2015) (explaining that "tort lawsuits are rarely brought for [intentional] injuries"); Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 *CONN. INS. L.J.* 1, 8 (2005) (noting the "dearth of intentional bodily injury tort actions brought in the U.S."). In terms of case statistics, the most recent data comes from 1992 (nearly three decades ago). It reflects 10,879 intentional tort cases, disposed of in the courts of 45 large urban counties, a figure that's dwarfed, for example, by auto cases (227,515 cases) and premises liability cases (65,492 cases). NAT'L CTR. FOR STATE COURTS, *THE LANDSCAPE FOR CIVIL LITIGATION IN STATE COURTS* 6 (2015), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0020/13376/civiljusticereport-2015.pdf](https://www.ncsc.org/_data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf).

**26** See, e.g., *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993) (alleging that defendant, who secretly taped his sexual relations with plaintiff and then showed the tapes to others, had behaved negligently). For other examples, where intentional conduct is couched in terms of negligence, see Baker, *supra* note 25, at 8.

**27** 551 P.2d 334, 339 (Cal. 1976).

**28** Partly given this reality, that Restatement is littered with statements akin to the following: "Due to the paucity of case law on the [issue at hand], the Institute takes no position on the matter, leaving it to future development in case law." See, e.g., RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 5, cmt. j (AM. L. INST. Tent. Draft No. 4, 2019) ("[T]his Restatement takes no position on the burden of persuasion, because the case law is not decisive and plausible arguments exist on both sides of the question."); RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 111, cmt. e (AM. L. INST. Tent. Draft No. 1, 2015) ("This Restatement takes no position on the question of the burden of persuasion for categories of consent other than actual consent; the question is better left to judicial development.").



Third, Restatements are constructed largely of narrow provisions addressing a limited aspect of law rather than grand principles. In short, Restatements—or at least the Torts Restatements with which we are most familiar—are built brick-by-brick from the ground up, rather than from foundational principles on down.

An illustration of this reality is that, when the Institute was considering one early piece of its Third Restatement of Torts, some advocated a top-down project, and, in a partial concession to their sentiment, that project was initially titled “General Principles.” For a time, the project dealt with important—one might say, central—principles of tort law: duty, intent, and negligence.<sup>29</sup> But that project quickly turned to the bricks and mortar that *make up* tort law, including doctrines such as *res ipsa loquitur*, the rescue doctrine, and the liability standards that apply to children and those with mental deficiencies. The idea of generalizability, in other words, suffered a death by 1000 applications. And, begun in 1997, the project was ultimately renamed “Liability for Physical Harm,” as the ALI recognized (some might say capitulated to) the fact that tort law is made up of numerous modest doctrines that cannot be derived from any foundational principle or principles.<sup>30</sup>

Fourth, Restatements (much like courts) attempt to steer in the direction of sound public policy. For these purposes, “sound public policy” is a policy position

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Also instructive is the ALI’s experience with its Responsibility for Personal Injury (Enterprise Liability) project. Beginning in 1985, the ALI gathered some of the foremost academics in the fields of tort, administrative, insurance, and workers’ compensation law, and the Institute asked these experts to prepare a Restatement that would address accidental injuries. The Chief Reporter, Paul Weiler, described their work:

The first volume details the legal and social concerns that gave rise to the study in the mid-1980s, and distills contemporary scholarship dealing with how well various institutions—prominently, but not exclusively, tort litigation—have performed in addressing the human and economic problems created by personal injuries. The second volume undertakes an in-depth analysis of those facets of the tort system that have proved especially troublesome in recent years and presents the Reporters’ judgments about how the tort system should evolve in the future. An important theme in the second volume is the emphasis on the room that tort law should give to market competition, social insurance, and administrative regulation in order to enhance the capacity of these institutions to build a fairer, more sensible personal injury regime.

Paul Weiler, *Preface to AM. L. INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: REPORTER’S STUDY* (1991). The final product was a masterful academic exercise. But, as became plain, it had one fatal flaw: The project largely ignored existing case law. Recognizing this omission, the Institute hastily declared the project a “Reporters’ Study,” which meant that it was solely the voice of the Reporters with no imprimatur from the Institute.

<sup>29</sup> See Michael D. Green & Nora Freeman Engstrom, *Project Spotlight: Restatement of the Law Third, Torts: Concluding Provisions*, 41 ALI REPORTER No. 4, at 8–9 (Fall 2019).

<sup>30</sup> Later, when that project turned to stand-alone emotional harm, it was retitled once again to “Liability for Physical and Emotional Harm.” *Id.* at 8–9.

a judge or lawyer would consider appropriate as a ground to justify a particular legal ruling. Many such policy goals and arguments (including those that we catalog in the next Part) pop up frequently in tort opinions, and, largely as a consequence, policy arguments often appear in Restatements as well.

Fifth and finally, Torts Restatements, in particular, have had an impact in line with the 1923 Committee's lofty expectations. The 1923 Committee Report lamented that "Torts is a subject which has developed unsystematically and is therefore full of the evil of uncertainty."<sup>31</sup> Fast forward nearly a century, and we continue to believe that tort law has developed unsystematically (as we elaborate in Part 3 below). And we further concede that, in some pockets, uncertainty continues to reign, in a way the 1923 Committee would surely lament. But nevertheless, the Tort Restatements have succeeded across myriad dimensions. Courts have cited to the first and Second Torts Restatements more than 80,000 times (far more than courts have cited to any other ALI Restatement).<sup>32</sup> And, with some 200 citations to Torts Restatements,<sup>33</sup> the Supreme Court has described the Second Restatement as "the most widely accepted distillation of the common law of torts."<sup>34</sup>

### 3 Our View of Tort Law

We do not wish to take up arms in the "tort theory wars" in which proponents of one meta-theory of tort law insist that, as a descriptive matter, this or that theory captures contemporary tort law and then point out the inadequacies of rivals.<sup>35</sup> Nor

<sup>31</sup> *Committee Report*, *supra* note 13, at 45. Hardly, we can't resist editorializing, the product of some overarching principle.

<sup>32</sup> See Richard L. Revesz, *Completing the Restatement Third of Torts*, ALI ADVISER (Apr. 3, 2019), <https://thealiadviser.org/inside-the-ali-posts/completing-the-restatement-third-of-torts/> (offering the 80,000 figure while explaining that "Contracts Restatements, the runner-up, have somewhat less than 40,000 citations").

<sup>33</sup> An October 11, 2021 search of "adv: torts/5 restatement" in Westlaw's Supreme Court database yields 200 results.

<sup>34</sup> *Field v. Mans*, 516 U.S. 59, 70 (1995).

<sup>35</sup> As Gary Schwartz summed up these warring camps: "In short, corrective justice scholars display a lack of appreciation for the work of efficiency scholars, and the latter return the (dis) favor." Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1806 (1997); see also Jed Handelsman Shugerman, *A Watershed Moment: Reversals of Tort Theory in the Nineteenth Century*, 2 J. TORT L. 1, 6 (2008) (explaining the twists and turns in the use of moral or instrumental theories in the development of tort law and that the experience suggests that "tort law and judges' underlying theories for its rules—including its theories of corrective justice—are contingent upon events and context"). For a tough critique of law-and-economics theory, as lodged by civil recourse scholars, see, for example, JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* 108 (2020). For criticism of the view that civil

do we seek to debate which normative theory is *best* for guiding the direction in which tort law *should* go, in future years. Much ink has been devoted to both tasks, and we do not have anything useful—if there is such—to add to that literature.

Nevertheless, as a coda to our (just concluded) discussion of the role of Restatements—and as a prelude to the next Part, which contains our views about the role of theory in Restatements—we set forth our own conception of tort law. In so doing, we recognize that there are times when Reporters have modest discretion. For example, only a minority of courts have recognized a parental consortium claim.<sup>36</sup> But, there is a modest trend toward accepting such claims, there is a parallel trend to expand liability for other forms of stand-alone emotional distress, and a strong majority of courts have recognized *spousal* consortium claims.<sup>37</sup> Counting cases, should the Restatement side with the majority to reject parents' claims? Or should the Restatement reject the majority rule and endorse parental consortium, consistent with broader currents? A call must be made—and the ball is, at least initially, in the Reporter's court. A Reporter's views about tort law will influence, at the margin, some positions a Restatement takes. A Reporter with a full-fledged commitment to this or that tort theory will no doubt rely on that commitment in these rare discretionary pockets.<sup>38</sup>

The epigraph at the beginning of this article sums up our perspective on tort law. In our view, there is no God or Master Imminence who *designed* tort law, and there is no meta-theory that explains it.<sup>39</sup> Instead, similar to Witt's "contingency" account of tort law—the idea that accident law's invention and evolution was,

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recourse theory best reflects tort law, see Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433 (2011); Christopher J. Robinette, *Why Civil Recourse Theory Is Incomplete*, 78 TENN. L. REV. 431 (2011).

**36** See RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 48C & Reporters' Note to cmt. a (AM. L. INST., Council Draft No. 1, 2020).

**37** *Id.*

**38** Interestingly, we note that, with the exception of John Goldberg, and to a considerably lesser extent, Ken Simons, none of the Third Restatement of Torts Reporters are torts theorists.

**39** Arthur Ripstein is one such theorist who claims that "the unity of right and remedy is the key to understanding tort law" and that no one is in charge of their neighbor. ARTHUR RIPSTEIN, *THE SEARCH FOR A GRAND UNIFIED THEORY OF TORT LAW PRIVATE WRONGS* ix (2016). (For a cogent critique of that claim, see Scott Hershovitz, *The Search for A Grand Unified Theory of Tort Law Private Wrongs*, 130 HARV. L. REV. 942, 957 (2017)). Interestingly, Richard Posner is a tort theorist who initially started in the meta-theory camp but seems to have tempered that position with age and experience as a judge. In 1987, he and co-author William Landes wrote: "[T]he common law of torts is best explained as if the judges who created the law... were trying to promote efficient resource allocation." WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1 (1987). But, by 2013, Posner had seemingly changed his tune:

fittingly, *accidental* and “untethered to any deep logic or transhistorical coherence”—we believe that tort law developed and dynamically bubbles along much like Mama’s soup surprise.<sup>40</sup>

What does feature in the “soup” of modern tort law? Below, we do our best to answer that question. In Subpart 3.1, we highlight what we believe are tort’s main ingredients: (1) the promotion of sound public policy; (2) a marked adaptability, including a willingness to respond to shifting norms and changing circumstances; and (3) the growth and spread of insurance. Meanwhile, tort doctrine, we believe, has also been flavored with various “spices”: exogenous, idiosyncratic, often adventitious, forces, added over time. We do not purport to offer a full catalog of these, but in Subpart 3.2, address a few salient examples. These, for us, constitute compelling evidence negating the hypothesis that tort law is the product of intelligent design.

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American tort law is the joint product of the judges of the courts of 50 different states, of federal judges, of state legislatures, and of Congress, and it is a product that has been created over a period of hundreds of years (initially with a dominant English influence), with many of its doctrines preserved into modernity by reason of *stare decisis* even if they are not perfectly adapted to modern conditions.

Richard A. Posner, *Instrumental and Noninstrumental Theories of Tort Law*, 88 *IND. L.J.* 469, 473 (2013).

**40** Witt, *supra* note 3, at 4. For a further elaboration of the essential thesis, see JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKING MEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 210 (2004). Similar to Witt, Ken Abraham has observed: “Short-term developments in the tort system tend to be the result of local, sometimes idiosyncratic forces.” KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11*, at 12 (2008); *see also* John Murphy, *Contemporary Tort Theory and Tort Law’s Evolution*, 32 *CAN. J. L. & JURIS.* 412, 416–40 (identifying liability insurance, the rise of trade unions, social crises, prominent judges’ personal predilections, judicial arrogation of issues from the jury, and judges being influenced to adopt a scholarly work (though with “little evidence that those who have been most influential include the theorists”) as central to tort law’s evolution). Another leading tort law scholar, John Goldberg, acknowledges these contingencies but responds, “so what?” He insists that the question is whether there is a general description of tort law despite the “myriad contingencies of history” and believes there is. John C. P. Goldberg, *Ten Half-Truths About Tort Law*, 42 *VAL. U. L. REV.* 1221, 1242–43 (2008). We are baffled that there is such a theory, given the myriad ways in which tort law has evolved. We also can’t resist noting the thematic consistence of the contingency story of tort law with the work of the evolutionary biologist Stephen Jay Gould whose popular work highlighted the many random contingencies that affected the evolution of species. *See* STEPHEN JAY GOULD, *HEN’S TEETH AND HORSE’S TOES* (1983).

## 3.1 Main Ingredients

### 3.1.1 Public Policy

One key ingredient in tort “soup,” we believe, is the quest to promote sound public policy. An incomplete list of articulated public policies that supply the backbone for many a doctrine include the following (in no particular order):

- Promote fairness.<sup>41</sup>
- Apply a hard-and-fast rule, rather than a more flexible standard, in order to promote consistency, predictability, and administrability while also counteracting slippery slope concerns.<sup>42</sup>
- Apply a more general and flexible standard, in order to adapt to modest differences in facts, provide community judgments about those differences, and promote greater fairness.<sup>43</sup>
- Get reasonable compensation in the hands of needy victims, whether for basic humanitarian reasons or to promote loss spreading.<sup>44</sup>

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**41** For example, fairness helps to justify rules that ensure that the costs of an injury caused by the wrongful conduct of two parties is apportioned between them, not left for one or the other to bear single-handedly. Fairness also helps to justify respondeat superior. See *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 576 (Minn. 2008) (“Notions of public policy and fairness underlie respondeat superior.”).

**42** Examples abound. Thus, for instance, when cabining emotional distress claims and limiting those claims to spouses (rather than, say, intimates), the California Supreme Court leaned on a formal (married/not married) rule rather a context-specific, fact-dependent functional inquiry because the latter would “not provide a sufficiently definite and predictable test to allow for consistent application from case to case.” *Elden v. Sheldon*, 758 P.2d 582, 587 (Cal. 1988). In addition, states’ desire to promote administrability, predictability, and consistency has heavily influenced judicial action vis-a-vis landowner categories. In particular, states that have retained their rigid common-law classifications have done so, in large part, because they believe that categorical rules promote these objectives. See, e.g., *Heins v. Webster Cnty.*, 552 N.W.2d 51, 55–56 (Neb. 1996) (describing these policy debates). On the other hand, sometimes, courts expressly prefer more flexible standards.

**43** See, e.g., *Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934). For the many trade-offs between general and malleable standards and hard-and-fast rules, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

**44** Tort’s compensatory goal helps to justify respondeat superior, as employers tend to have deeper pockets than employees. See, e.g., *Lisa M. v. Henry Mayo Newhall Mem’l Hosp.*, 907 P.2d 358, 366 (Cal. 1995) (identifying “policy goals of the respondeat superior doctrine,” two of which are to “assur[e] compensation to victims, and spread[] the losses caused by an enterprise equitably”). The aim also justifies strict liability for products (such as it is). E.g., *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) (“The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a

- Promote family harmony.<sup>45</sup>
- Avoid “crushing” or “unbounded” liability.<sup>46</sup>
- Preserve individual liberty and autonomy.<sup>47</sup>
- Discourage/avoid payment for feigned, fraudulent, or manufactured claims.<sup>48</sup>
- Promote efficient deterrence/prevent future accidents.<sup>49</sup>

To be sure, when drawing the connection between tort law and public policy, there are caveats and limitations. First, some doctrines are supported (it is said) not only

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needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.”).

**45** The (now mostly defunct) doctrine of parental immunity, for example, rested, in part, on the notion that intrafamily suits would “disturb[]... domestic tranquility” and also “interfere[] with parental care, discipline, and control.” *Streenz v. Streenz*, 471 P.2d 282, 283 n.1 (Ariz. 1970) (citation omitted).

**46** Sometimes, courts are explicit in the promotion of this policy interest. *See, e.g., Elden*, 758 P.2d at 588 (drawing a firm line as to who can recover for bystander emotional distress claims, while reasoning: “It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one man were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as his friends.”); *Ward v. W. Jersey & Seashore R.R. Co.*, 47 A. 561, 562 (N.J. Sup. Ct. 1900) (refusing to recognize a pure emotional distress claim, because the claim’s recognition “would naturally result in a flood of litigation”), *overruled in part by Falzone v. Busch*, 214 A.2d 12 (N.J. 1965); *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 36 (N.Y. 1985) (affirming the dismissal of the plaintiff’s claim because “it is... the responsibility of courts, in fixing the orbit of duty, to limit the legal consequences of wrongs to a controllable degree and to protect against crushing exposure to liability”) (quotation marks and citations omitted). Sometimes, this interest operates—but below the surface.

**47** Arguably, liberty and autonomy interests animate U.S. courts’ resistance to the imposition of a general duty to rescue, even though such a duty exists in many other developed countries, albeit largely as a matter of criminal law. *See Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 358 (Tenn. 2008) (“Imposing a duty to act or to rescue strays dangerously into interference with individual liberty. By adhering to a no duty to act or to rescue rule, the courts are not rendering the common law amoral but instead are prioritizing liberty over altruism in circumstances where the defendant did not create the risk of harm.”). For further discussion, see JOEL FEINBERG, *HARM TO OTHERS* 129–30 (1984). Autonomy and liberty interests may also explain courts’ reluctance to impose liability on social hosts. *See, e.g., Burkhart v. Harrod*, 755 P.2d 759 (Wash. 1988).

**48** This interest pops up frequently, both when courts justify intrafamily immunities, *see, e.g., Streenz*, 471 P.2d at 283 n.1, and also when courts justify limits on “pure” emotional distress cases, *see, e.g., Ward*, 47 A. at 562.

**49** A desire to promote efficient deterrence undergirds many tort doctrines. *E.g., Escola*, 150 P.2d at 441 (Traynor, J., concurring) (discussing deterrence, in the context of product liability); *Hanks v. Powder Ridge Rest. Corp.*, 885 A.2d 734, 744 (Conn. 2005) (refusing to enforce an exculpatory agreement because the agreement, if enforced, would remove “an important incentive for ski areas to manage risk,” imperiling future skiers).

by the policy goals listed above but by others that are somewhat sui generis. An example is the firefighter's rule—a dusty common law doctrine that holds that, when firefighters (or, on occasion, other professional rescuers) are tortiously injured by the very peril they have been called to confront, they have no claim against the actor who negligently created that peril. That rule reportedly exists for reasons of public policy,<sup>50</sup> and, in particular, it is designed, among other things, to encourage those in need of rescue to summon assistance, without hesitation or fear of liability.<sup>51</sup> We know of no other tort doctrine that rests on that particular basis.

Second, when it comes to tort law and public policy, conventional wisdom looms large and empirical evidence linking means and ends is generally scant. Consider again the firefighter's rule. As just noted, many suggest that the rule is needed because, without it, tortfeasor-homeowners, in need of emergency assistance, would hesitate before summoning aid.<sup>52</sup> But really? Is there, in fact, a relationship between the firefighter's rule and individuals' propensity to seek emergency assistance?<sup>53</sup> An answer is probably knowable. (The rule has been abolished in some jurisdictions and retained in others, creating a natural experiment that could be explored with comparative state statistics on 911 call patterns and home fire losses.) Yet, as far as we know, here as elsewhere, no empirical researcher has taken the baton, consigning courts and commentators to rely on warring hunches about the doctrine's possible or probable effect.

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**50** *E.g.*, *England v. Tasker*, 529 A.2d 938, 941 (N.H. 1987) (explaining that the “fireman’s rule today rests in considerations of public policy”); *Hack v. Gillespie*, 658 N.E.2d 1046, 1049 (Ohio 1996) (explaining that “Ohio’s Fireman’s Rule is more properly grounded on policy considerations”).

**51** *E.g.*, *Sam v. Wesley*, 647 N.E.2d 382, 385 (Ind. Ct. App. 1995) (“The rule was designed to protect victims by encouraging them to seek emergency assistance without fear of subsequent tort liability.”); *Sallee v. GTE S., Inc.*, 839 S.W.2d 277, 279 (Ky. 1992) (“The purpose of the [rule] is to encourage owners and occupiers, and others similarly situated, in a situation where it is important to themselves and to the general public to call a public protection agency, and to do so free from any concern that by so doing they may encounter legal liability based on their negligence in creating the risk.”); *Baldonado v. El Paso Nat. Gas Co.*, 176 P.3d 277, 282 (N.M. 2007) (“A policy-based approach to the firefighter’s rule will encourage the public to ask for rescue. ...”).

**52** *See Sam*, 647 N.E.2d at 385; *Sallee*, 839 S.W.2d at 279; *Baldonado*, 176 P.3d at 282.

**53** Many are doubtful. *E.g.*, *Sepega v. DeLaura*, 167 A.3d 916, 929 (Conn. 2017) (“[I]n an emergency situation, it is unlikely any person would be hesitant to call for help because they are concerned about liability for potential injuries to public safety personnel.”); 5 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 27.14, at 294 (3d ed. 2008) (“As another reason for limiting liability, it has been suggested that landowners would be deterred from calling the police or firefighters if their tort liability were extended. But surely this suggestion has little weight. It is inconceivable that an occupier—even if he knew the extent of his legal duties in the case of a possible hypothetical injury—would be deterred in the ordinary situation.”); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 61, at 431 (5th ed. 1984) (“The argument sometimes offered, that tort liability might deter landowners from uttering such cries of distress, is surely preposterous rubbish.”).

Third, the same policy goals might be—and, indeed, have been—deployed at different times to support different, diametrically opposed, rules. Consider, for example, intrafamily immunities. Now out of vogue, these immunities used to bar children’s tort claims against parents in order to promote family harmony and unity.<sup>54</sup> But in recent decades (fueled largely by the spread of liability insurance, discussed below), courts have reversed course, and many now conclude that *permitting* such claims advances that same salutary objective.<sup>55</sup> The policy goal—promotion of familial unity—has remained constant, even while the ostensibly facilitative doctrine has flipped.<sup>56</sup>

Fourth and finally, *certain* policy aims, if not downright contradictory, inescapably tilt in opposite directions. Notice the preference of some courts for hard-and-fast rules and the countervailing preference of others for flexible, malleable standards. Likewise, as Bob Rabin has observed, the two most *prominent* policy goals that animate tort law—deterrence and compensation—if not polar opposites are certainly in “fundamental tension,” as a faithful application of Learned Hand’s negligence principle does not result in full, or even partial, compensation to all who are hurt.<sup>57</sup> And, when there is a tension, there’s little agreement about which policy ought to take precedence.

### 3.1.2 Adaptability

A second key ingredient is tort law’s flexibility and adaptability, or as Oliver Wendell Holmes put it, its reflection of the “felt necessities of the time.”<sup>58</sup> Part

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<sup>54</sup> See, e.g., *Streenz v. Streenz*, 471 P.2d 282, 283 (Ariz. 1970) (explaining that parental immunity was justified on the basis that tort suits initiated by children against parents would erode “harmony and tranquility of the family unit”).

<sup>55</sup> E.g., *Broadbent by Broadbent v. Broadbent*, 907 P.2d 43, 48 (Ariz. 1995).

<sup>56</sup> Alienation of affections, described in more detail below, follows this same script. During most of the last century, the tort was justified as “a useful means of preserving marriages and protecting families.” *Helsel v. Noellsch*, 107 S.W.3d 231, 232 (Mo. 2003). Now, however, there is a sense that it is otherwise, and the same courts that relied on that justification express skepticism that “suits for alienation of affection actually serve this purpose.” *Id.*; *accord O’Neil v. Schuckardt*, 733 P.2d 693, 698 (Idaho 1986) (“Never has there been any documentation that the existence of the action actually protects marriages. In fact, once suit has been brought, it notifies the public that the marriage is unstable, embarrasses the spouses and their children, and adds more tension to the family relationship.”); *Fundermann v. Mickelson*, 304 N.W.2d 790, 791 (Iowa 1981) (“Suits for alienation are useless as a means of preserving a family.”).

<sup>57</sup> Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 27 (1988).

<sup>58</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 77 (1881).



mirror, part microscope, tort law reflects—and sometimes magnifies—broader cultural currents, technological change, and societal trends.<sup>59</sup>

Reflecting this dynamic interaction, liability rules were narrowed during the latter half of the 19th century, by some accounts, in order to support the development of nascent industry.<sup>60</sup> Accordingly, by around 1900, our liability system was mostly characterized by “no-liability thinking,”<sup>61</sup> as a host of common law doctrines, including limited conceptions of duty (as seen, for example, in *Winterbottom v. Wright*<sup>62</sup>), crabbed conceptions of causation (epitomized in the “last wrongdoer rule”<sup>63</sup>), the expansive sweep of immunities, plus the so-called “unholy trinity” (the fellow-servant rule, assumption of risk, and contributory negligence), worked in tandem to cabin corporate liability.<sup>64</sup>

Yet, in time, all that gave way. As accident rates accelerated,<sup>65</sup> as the carnage these accidents engendered captured the public’s attention, and as the inadequacy of tort law became achingly clear,<sup>66</sup> Congress was moved to enact a federal statute—the Federal Employers’ Liability Act (FELA)—that furnished a more generous

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**59** As David Engel and Michael McCann have artfully put it: “As appellate court judges construct the common law of torts case by case, they use building blocks that they quarry from their social and cultural environment.” David M. Engel & Michael McCann, *Tort Law as Cultural Practice*, in *FAULT LINES: TORT LAW AS CULTURAL PRACTICE 2* (David M. Engel & Michael McCann eds., 2009); *see also id.* at 1 (“[T]ort law plays a role in constituting the very cultural fabric in which it is embedded.”).

**60** See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 351 (3d ed. 2005); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 368 (1951); Herbert Hovenkamp, *Pragmatic Realism and Proximate Cause in America*, 3 J. LEGAL HIST. 3, 5 (1982).

**61** Robert L. Rabin, *The Historical Development of the Fault Principle*, 15 GA. L. REV. 925, 928 (1981).

**62** (1842) 152 Eng. Rep. 402 (Exch.); 10 M.&W. 109.

**63** Pursuant to the last wrongdoer rule, “if after the defendant’s wrongful conduct there intervened the wrongful (culpable) act of a third person, the latter relieved the defendant from liability, and ‘the last human wrongdoer’ was solely responsible for the plaintiff’s harm.” Laurence H. Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121, 124 (1937). For more on the last wrongdoer rule, see Fleming James, Jr. & Roger F. Perry, *Legal Cause*, 60 YALE L.J. 761, 806–08 (1951).

**64** John Fabian Witt, Note, *The Transformation of Work and the Law of Workplace Accidents, 1842–1910*, 107 YALE L.J. 1467, 1467 (1998) (describing the doctrines—including the fellow servant rule, contributory negligence, and assumption of risk—that “posed a series of daunting obstacles for nineteenth-century workers seeking to recover for injuries suffered on the job”).

**65** For discussion of the era’s sky-high accident rates, see WITT, *supra* note 40, at 26–28.

**66** Central to this publication effort was Crystal Eastman’s classic study of industrial accident compensation. Eastman demonstrated that, of 222 breadwinners who died on the job during the 12-month period between 1906 and 1907, only 48 of the decedents’ families (just over 20 percent) recovered more than \$500, while 59 families (more than 25 percent) received nothing at all. CRYSTAL EASTMAN, *WORK-ACCIDENTS AND THE LAW* 120–21 (1910).

form of tort law to employees of interstate railroads.<sup>67</sup> States, too, got in the act, replacing tort law with workers' compensation, which offered certain, though limited, benefits to those who sustained employment-related injury.<sup>68</sup> And, tort—*itself*—at least modestly liberalized, as constricted duty rules expanded and other defenses, which had long insulated corporate actors, gradually relaxed.<sup>69</sup>

The consumer movement of the 1960s and 1970s left an even larger imprint. During this heady period, there was a surge of support for consumer, health, and environmental-protection legislation, as reflected in the fact that at least 25 such laws won congressional passage.<sup>70</sup> There was unprecedented attention to auto safety, as motor vehicle fatalities peaked, Ralph Nader's *Unsafe At Any Speed* sat atop bestseller lists, and the National Highway Traffic Safety Administration (NHTSA) was born.<sup>71</sup> And, led by the Warren Court in Washington, there was a broader sense that courts—and law—could produce real, tangible, progressive change.<sup>72</sup>

The tort system reflected and reinforced these broader societal sentiments. In particular, in a flurry of blockbuster decisions in the decade between 1960 and 1970—including *Henningsen v. Bloomfield Motors, Inc.* (1960), which restricted sellers' ability to employ disclaimers of liability; *Battalla v. State of New York*

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**67** Enacted in 1906, FELA modified (and expanded) tort law applicable to railroad workers. That FELA endures today is an historical anomaly in the face of widespread workers' compensation legislation, legislative ennui, and entrenched interest groups. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 184 (1985).

**68** ORIN KRAMER & RICHARD BRIFFAULT, *WORKERS' COMPENSATION: STRENGTHENING THE SOCIAL COMPACT* 14–15 (1991). By 1917, some 68 percent of the country's workforce was covered by the new laws. See WITT, *supra* note 40, at 11, 190.

**69** For a catalog of the many legislative enactments and common law developments that combined to liberalize the tort system during this period, see WITT, *supra* note 40, at 67–69.

**70** See Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise,"* 61 DEPAUL L. REV. 303, 311 (2012) (for the 25 laws); Robert L. Rabin, *Tort Law in Transition: Tracing the Patterns of Sociolegal Change*, 23 VAL. U. L. REV. 1, 13–14, 23–24 (1988) (explaining that, during the early 1970s, “[h]ealth and safety concerns had become paramount” and also that, during this period: “There came to be a radical loss of faith in the old view that personal injury was the result of isolated failures on the assembly line. In its stead, a heightened sensitivity arose to the latent risks in standardized products that appeared to be the ubiquitous consequence of technological and material progress.”).

**71** *Unsafe At Any Speed* graced the New York Times bestseller list from April 24 through July 17, 1966. See *Adult New York Times Best Seller Lists for 1966*, HAWES PUBLICATIONS, <http://www.hawes.com/1966/1966.htm> (last visited Nov. 6, 2021). For other attention to car crashes during this period, see Engstrom, *supra* note 70, at 311–12. For the birth of NHTSA, see Rabin, *supra* note 57, at 21.

**72** See Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 602–03, 609–11, 699 (1992) (drawing a link between the Warren Court and state courts' “continuous liability-rule innovations” during the same period).

(1961), which authorized a claim for pure emotional distress; *Greenman v. Yuba Power Products* (1963), which imposed strict liability on manufacturers for defective products; *Tunkl v. Regents of the University of California* (1963), which limited exculpatory agreements; *Darling v. Charleston Community Memorial Hospital* (1965), which abolished charitable immunity; *Dillon v. Legg* (1968), which authorized claims for bystander emotional distress; *Rowland v. Christian* (1968), which scrapped traditional premises liability categories; *Larsen v. General Motors Corp.* (1968), which created a new “crashworthiness” doctrine; and *Kline v. 1500 Massachusetts Avenue Apartment Corp.* (1970), which minted a new liability for landlords, vis-à-vis tenants—tort law significantly expanded, reflecting the pro-safety, pro-consumer, pro-accountability ethos of the day.<sup>73</sup> Then, over the past 40 years, tort law’s gradual restriction and retrenchment—including the Third Restatement’s essential rejection of strict liability for products—is also inseparable from broader currents.

Tort law’s treatment of various *groups* and *relationships* within society reflects the same essential dynamism. Consider alienation of affections. An intentional tort prototypically asserted against a spouse’s paramour, this tort has gone through three separate, discrete phases over the past 150 years. Each phase reflects, and is a product of, its time.<sup>74</sup>

Reflecting the skewed gender dynamics of the 19th century, the tort, first recognized in 1866, was “limited to the husband alone,”<sup>75</sup> rooted as it was in the antiquated “premise that the wife’s body belonged to the husband and anyone who trespassed upon the husband’s property by seducing his wife was liable for damages.”<sup>76</sup>

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**73** *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960); *Battalla v. State*, 176 N.E.2d 729 (N.Y. 1961); *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963); *Tunkl v. Regents of the Univ. of Cal.*, 383 P.2d 441, 447 (Cal. 1963); *Darling v. Charleston Cmty. Mem’l Hosp.*, 211 N.E.2d 253 (Ill. 1965); *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968); *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968); *Larsen v. Gen. Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970). For a further discussion of these and other contemporaneous “liability expanding changes in tort doctrine,” see Schwartz, *supra* note 72, at 605–08. See also John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1, 3, 44–45 (2003) (“[V]irtually everyone agrees that tort liability expanded dramatically after 1960 in fields such as products liability, medical malpractice, and landowner and occupier liability.”).

**74** See Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 379 (2008) (exploring “how changes in the cultural atmosphere in which a tort operates can fatally compromise a cause of action” and offering the demise of alienation of affections as an example).

**75** *Young v. Young*, 184 So. 187, 190 (Ala. 1938). For the tort’s 1866 invention, see KEETON ET AL., *supra* note 53, § 124, at 918.

**76** *Veeder v. Kennedy*, 589 N.W.2d 610, 614 (S.D. 1999); see also *Hoye v. Hoye*, 824 S.W.2d 422, 423 (Ky. 1992) (recognizing that the tort “has its origin in the antiquated premise that a wife is her

Then, in the early 20th century, the tort entered its second phase: symmetrical acceptance. In particular, alienation of affections evolved to allow a wife to recover against a third party for interference with the marital relationship, on the same basis and to the same extent as her husband.<sup>77</sup> In this version 2.0, the underlying interest protected also transformed. Rather than protecting the husband's interest in his wife as chattel or property, the tort "came to be seen as means to preserve marital harmony by deterring wrongful interference."<sup>78</sup> The change in doctrine, then, reflected both women's evolving (and commensurately more equal) place in society, as well as society's greater understanding of, and respect for, *human relationships* and the view—prominent now in numerous doctrines, including bystander emotional distress, wrongful death, and loss of consortium—that human relationships themselves are valuable and merit protection.<sup>79</sup>

Now, however, alienation of affections has entered a third phase: not symmetrical acceptance but rather, widespread repudiation. Today, the tort is seen as incompatible with contemporary notions of marriage and family because, as one leading treatise puts it, the cause of action is "thoroughly inimical to the freedom of all human beings to choose their associations and to choose to depart dangerous, stultifying, or deeply unhappy homes."<sup>80</sup> While marriage was once protected at

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husband's chattel"); *Helsel v. Noellsch*, 107 S.W.3d 231, 232 (Mo. 2003) (observing that the action was originally justified based on "the antiquated concept that husbands had a proprietary interest in the person and services of their wives"); Kay Kavanagh, Note, *Alienation of Affections and Criminal Conversation: Unholy Marriage in Need of Annulment*, 23 ARIZ. L. REV. 323, 327–30 (1981) (tracing the tort's asymmetric property-based origins). Notwithstanding the popular conception of "wives as property," a prominent legal historian has uncovered evidence that conception is inaccurate. See David J. Seipp, "Henry Rolle, *Un Abridgment des Plusieurs Cases*, Introduction and Tables," in Henry Rolle, *Un Abridgment des Plusieurs Cases* (explaining that while husbands exercised considerable control over the persons and land of their wives and owned the personal property possessed by their wives, they were not described as "property" or "chattels" in medieval English legal sources).

<sup>77</sup> KEETON ET AL., *supra* note 53, § 124, at 916; RESTATEMENT (SECOND) OF TORTS § 683 (AM. L. INST. 1977) ("One who purposely alienates one spouse's affections from the other spouse is subject to liability for the harm thus caused to any of the other spouse's legally protected marital interests.").

<sup>78</sup> *Hoye*, 824 S.W.2d at 424; see also *id.* at 425 ("Since the husband no longer owned his wife, courts justified the continued existence of this tort as a means to promote and maintain the marriage."); *Helsel*, 107 S.W.3d at 232 ("Modern courts came to justify suits for alienation of affection as a means of preserving marriage and the family."); accord KEETON ET AL., *supra* note 53, § 124, at 918 (recognizing that, in its second iteration, the tort of alienation of affections allowed suit against a third party who deprived one spouse of the other spouse's "love, society, companionship and comfort").

<sup>79</sup> KEETON ET AL., *supra* note 53, § 124, at 918.

<sup>80</sup> DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 40.1, at 1051 (2d ed. 2016); see also *Hanover v. Ruch*, 809 S.W.2d 893, 898 (Tenn. 1991) (noting that anti-heartbalm statutes recognize the "increased freedom of association between each spouse and the outside world").

nearly all cost, societal norms have shifted to protect *satisfying* marriages and spouses' overriding interest in personal fulfillment, happiness, and individual autonomy.<sup>81</sup> With that as the aim, the tort of alienation of affections appears antiquated, and alienation of affections 3.0 is characterized by abolition; the tort has now been abolished in at least 43 states.<sup>82</sup>

Yet another instance of tort adapting to exogenous change involved the rise of mass toxic tort litigation which occasioned courts' changing perception of statistical evidence.

Toxic tort litigation came to the fore in the latter half of the 20th century. Two of the early ones were: 1) thalidomide, the tragic teratogen that caused limb reduction birth defects in children who were exposed in utero;<sup>83</sup> and 2) MER/29, an anti-cholesterol drug that, one year after its introduction, accounted for 13 percent of all prescriptions.<sup>84</sup> These cases present a number of difficulties for the tort system, but the predominant one is cause in fact.<sup>85</sup> We simply don't understand well enough the mechanisms by which exogenous agents cause the diseases involved in these torts—such as cancer, neurological deficits, and birth defects—the way we do with broken limbs or the other injuries of sudden traumatic torts. Also complicating the inquiry is that, with a few exceptions, these often latent diseases have rival causes, including not only other environmental agents but also individual characteristics, especially genetics.<sup>86</sup>

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**81** The widespread acceptance of no-fault divorce similarly reflects this shifting sentiment. See generally Jana B. Singer, *The Privatization of Family Law*, 1992 Wis. L. Rev. 1443 (1992) (tracing family law's increased focus on individual privacy and decisional autonomy as reflected, inter alia, in the rapid rise of no-fault divorce).

**82** See *Coulson v. Steiner*, 390 P.3d 1139, 1142 (Alaska 2017) (recognizing that the tort is now recognized by “only a handful of states”); *Matthew v. Herman*, 56 V.I. 674, 682 (2012) (recognizing that the cause of action has “been abolished in the vast majority of American jurisdictions”); David M. Cotter, *The Well-Deserved Erosion of the Tort of Alienation of Affections and the Potential Liability of Nonresident Defendants*, 15 DIVORCE LITIG. 204, 204 (2003) (explaining that the tort has been repudiated by 43 states).

**83** For a full account of the thalidomide fiasco, see generally THE INSIGHT TEAM OF THE SUNDAY TIMES OF LONDON, *SUFFER THE CHILDREN: THE STORY OF THALIDOMIDE* (1979).

**84** For further discussion of MER/29, see MICHAEL D. GREEN, *BENEDICTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* 83–89 (1996).

**85** For a discussion of these challenges, see generally Robert L. Rabin, *Environmental Liability and the Tort System*, 24 HOUS. L. REV. 27 (1987).

**86** See Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 47 (2019) (discussing various causation challenges and observing that, “except on those rare occasions when exposure to a toxic agent manifests as a ‘signature disease’... we, as a society, lack the ability to trace a particular substance to a particular individual's illness or injury”).

Prior to the emergence of this new class of torts, courts were extremely skeptical of the use of statistical evidence as proof. Emblematic of this view is *Smith v. Rapid Transit, Inc.*<sup>87</sup> In *Smith*, the plaintiff was forced by a bus travelling in the opposite direction to veer to the right to avoid a collision, resulting in her hitting a parked car. But the plaintiff could not identify the owner of the bus. Instead, she attempted to prove it was the defendant's bus with evidence that the defendant was the only public transit company authorized to run buses in that location.

Unsatisfied, the trial judge directed a verdict for defendant on the ground that the plaintiff failed to introduce sufficient evidence that the defendant was the negligent party that caused her harm. Observing that a private or chartered bus might have been responsible for the accident, in a 1945 opinion, the Supreme Judicial Court of Massachusetts affirmed. The court explained:

It was said [previously] that it is “not enough that mathematically the chances somewhat favor a proposition to be proved; for example, the fact that colored automobiles made in the current year outnumber black ones would not warrant a finding that an undescribed automobile of the current year is colored and not black, nor would the fact that only a minority of men die of cancer warrant a finding that a particular man did not die of cancer.” The most that can be said of the evidence in the instant case is that perhaps the mathematical chances somewhat favor the proposition that a bus of the defendant caused the accident. This was not enough. A “proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.”<sup>88</sup>

Yet, by the 1980s, resistance had softened. A pivotal moment came in the *Agent Orange* litigation—a sprawling class action that confronted the question of whether exposure to Agent Orange, an herbicide widely employed by the United States military in Vietnam, caused a variety of diseases that afflicted returning soldiers. Seeking to untangle this thorny causal question, Judge Weinstein wrote extensively about then-available epidemiological studies, which employed data to develop statistical probabilities of causation.<sup>89</sup> And Judge Weinstein relied on

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<sup>87</sup> 58 N.E.2d 754 (Mass. 1945).

<sup>88</sup> *Id.* at 755 (quoting *Sargent v. Massachusetts Accident Co.*, 29 N.E.2d 825, 827 (Mass. 1940)). The *Smith* case and adaptations of it known as the “Blue Bus” hypothetical have been the subject of a fascinating academic discourse on proof and the role of probabilistic evidence. For a flavor of this rich literature, see generally Craig R. Callen, *Adjudication and the Appearance of Statistical Evidence*, 65 TUL. L. REV. 457 (1991); Daniel Shaviro, *Statistical-Probability Evidence and the Appearance of Justice*, 103 HARV. L. REV. 530 (1989); Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985); David Kaye, *Naked Statistical Evidence*, 89 YALE L.J. 601 (1980) (book review).

<sup>89</sup> *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 782–95 (E.D.N.Y. 1984), *aff’d*, 818 F.2d 145 (2d Cir. 1987).

those largely exonerative studies to conclude that the plaintiffs could not establish that Agent Orange caused their various ailments.<sup>90</sup> Now, following Judge Weinstein's lead, in virtually all toxic tort litigation, courts not only *permit* the use of statistical evidence, they *prefer* it, virtually unanimous in the view that epidemiology, when available, is the best evidence of causation in toxic tort cases.<sup>91</sup>

The upshot is that, over the past 50 years, courts' receptivity to statistical evidence to address the crucial matter of causation has shifted, nearly 180°. <sup>92</sup> Fueling this shift was the rise of mass toxic tort litigation, the lack of adequate mechanism evidence in those cases, and the difficulty that, often, there are other, non-tortious, explanations for the diseases that afflict plaintiffs.

There might be a broader plan to all of this. But when we assess the gradual expansion and then subsequent restriction of tort, or when we trace alienation of affections, in its initial asymmetric incarnation and then two subsequent iterations, or when we consider tort's initial mistrust of statistical evidence, following by its more recent embrace, what we see is a sharp lens reflecting and responding to broader societal currents. And, we see evolution at work.

### 3.1.3 Insurance

Next, as Ken Abraham has persuasively explained, no story of tort law's operation and evolution would be complete without robust reference to liability insurance.<sup>93</sup> First developed at the end of the 19th century, liability insurance has had a symbiotic relationship with tort since its inception, as tort law has fueled insurance's invention and proliferation, and, on the other side of the coin, numerous tort doctrines have been built specifically to maximize insurance coverage.

Examples of this synergistic relationship can be found *around* the tort law ecosystem, but for our purposes, we'll zero in on the auto realm, where at least

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**90** In particular, Judge Weinstein concluded: “[T]he evidence provided by the plaintiffs to date on general causality, while supportive of the desirability of further studies, lacks sufficient probative force... to permit a finding of general causality.” *Id.* at 782.

**91** See, e.g., *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 882 (10th Cir. 2005) (observing that “epidemiology is the best evidence of general causation”); *Donner v. Alcoa Inc.*, 2014 WL 12600281, at \*3 (W.D. Mo. 2014) (“Because it is a widely-accepted discipline, courts have stated that ‘epidemiology is the best evidence of general causation[.]’”) (quoting *Norris*, 397 F.3d at 882); *In re Zolof Prods. Liab. Litig.*, 176 F. Supp. 3d 483, 492 (E.D. Pa. 2016) (noting that “the Court’s rulings have followed the accepted principles that “epidemiology is the best evidence of general causation in a toxic tort case” and that “where epidemiology is available, it cannot be ignored”) (quoting *Norris*, 397 F.3d at 882), *aff’d*, 858 F.3d 787 (3d Cir. 2017).

**92** Technically, the studies are not admitted but are used to support the opinion testimony of an expert when there is a *Daubert* motion or when the expert testifies at trial.

**93** See generally ABRAHAM, *supra* note 40.



three tort law innovations all bend traditional doctrinal categories, seemingly to promote liability insurance availability.<sup>94</sup> First is negligent entrustment. Invented roughly a century ago, this cause of action paradigmatically arose when a vehicle's owner permitted an unlicensed, intoxicated, or otherwise unfit individual to drive the owner's car and an accident ensued, and it permitted the victim to reach back and hold the car owner liable for the driver's subsequent negligence.<sup>95</sup> Similar is the family purpose doctrine. Another common law invention, this doctrine held that one who owned a motor vehicle and who purchased it "for the pleasure of his family" was liable for injuries caused by any family member's negligent operation of the vehicle because the family member, in driving at all, was fulfilling the owner's ambition.<sup>96</sup> So-called "key-in-the-ignition" cases offer a third spin on this theme. These cases arose when a defendant vehicle owner did not affirmatively *lend* her car to another, but instead merely left her keys in her unlocked vehicle.<sup>97</sup> If a thief subsequently stole the vehicle, and the thief's unsafe driving ultimately injured a third party, some courts would reach back to hold the car owner responsible, particularly if the owner-defendant left the car and keys in a crime-ridden area.<sup>98</sup>

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**94** This discussion of doctrines that serve to maximize insurance coverage is drawn, in part, from Engstrom, *When Cars Crash*, *supra* note 5, at 325–26.

**95** See, e.g., *Dep't of Water & Power v. Anderson*, 95 F.2d 577, 582 (9th Cir. 1938) ("[I]f one intrusts his automobile to another, knowing that the latter is an incompetent, reckless, or careless driver, and likely to cause injuries to others in the use of the automobile, the owner is negligent."); *Raub v. Donn*, 98 A. 861, 862 (Pa. 1916) (endorsing a jury instruction stating that "[i]t is the duty of a man to see that his automobile is not run by a careless, reckless person, but that it is in the hands of a skillful and competent person"). Published in 1934, the first Restatement of Torts heartily endorsed this principle of liability with the illustration: "A permits B, a boy of ten, who has never previously driven a motor car, to drive his motor car on an errand of B's own. B drives the car carelessly, to the injury of C. A is liable to C." RESTATEMENT OF TORTS § 390, cmt. b, illus. 2 (AM. L. INST. 1934).

**96** R. E. Barber, Annotation, *Modern Status of Family Purpose Doctrine with Respect to Motor Vehicles*, 8 A.L.R.3d 1191, 1196 (1966). For early applications, see *Fuller v. Metcalf*, 130 A. 875, 875–76 (Me. 1925); *Birch v. Abercrombie*, 133 P. 1020, 1022 (Wash. 1913); *Jones v. Cook*, 111 S.E. 828, 830 (W. Va. 1922). For early discussion, see generally Walter E. Treanor, *The Family Automobile and the Family Purpose Doctrine*, 1 IND. L.J. 89 (1926). The family purpose doctrine is no longer necessary as modern standard-form automobile insurance policies include liability coverage for all family members. See Insurance Services Office, *Personal Auto Policy Part A*, § B.1., reprinted in KENNETH S. ABRAHAM & DANIEL SCHWARCZ, *INSURANCE LAW AND REGULATION* 694–95 (7th ed. 2020).

**97** Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 440 (2000) (describing key-in-the-ignition liability).

**98** See, e.g., *State Farm Mut. Auto. Ins. Co. v. Grain Belt Breweries, Inc.*, 245 N.W.2d 186, 189 (Minn. 1976); *Mezyk v. Nat'l Repossessions, Inc.*, 405 P.2d 840, 843 (Or. 1965); *Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P.2d 1252, 1255 (Utah 1996); see also Rabin, *supra* note 97, at 440–41 (collecting authority).



Would these doctrinal innovations—which reach *behind* the impecunious driver, to the oftentimes insured owner—have come about without liability insurance? We doubt it. Indeed, these doctrines were created, sometimes expressly, to “insure justice to the parties injured by the negligence of drivers of automobiles without imposing undue hardship upon the owners.”<sup>99</sup>

For our purposes, the points are these: Like an old fence post covered in ivy, liability insurance and tort law are inexorably tangled, and they stand together to offer one another mutual support. And, just as importantly: Certain changes to the tort liability system are not the product of—or traceable to—a foundational tort principle. Rather, they stem from liability insurance availability: an exogenous force that influenced, and continues to influence, the fabric of tort.

### 3.2 Idiosyncratic Spice: Of Catchy Phrases, Copycats, Political Compromises, and Crises

In addition to policy, cultural change, and insurance availability—what we believe are the main “ingredients” of tort law’s evolution—there are further spices that Mama put in her soup: random add-ins that made their way into the broth and affect its taste and texture. One of those spices—which we call “catchy phrases and copycats”—speaks to the near supernatural power of certain decisions to elicit followers. Looking, specifically, to the rise of comparative responsibility (in lieu of contributory fault), the second spice is political compromise. Zeroing in on the rise of market-share liability in response to the DES crisis, the third is tort law’s ability to respond and adapt in the face of salient exigencies.

#### 3.2.1 Catchy Phrases and Copycats

One special spice that has influenced, and continues to influence, tort law is its contagious nature—such that an outlier rule created in one place by one court,

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<sup>99</sup> *Hutchins v. Haffner*, 167 P. 966, 968 (Colo. 1917). See *Nelson v. Johnson*, 599 N.W.2d 246, 248 (N.D. 1999) (explaining that the family purpose doctrine was “created in furtherance of the public policy of giving an injured party a cause of action against a financially responsible defendant”); Frank J. Vandall, *A Critique of the Restatement (Third), Apportionment as it Affects Joint and Several Liability*, 49 EMORY L.J. 565, 602 (2000) (declaring that “the family purpose doctrine, was developed to provide deep pockets in order to allow people injured by the negligent driver to recover”). Others recognized what courts were up to but were more critical. See, e.g., Richard M. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROBS. 476, 488 (1936) (criticizing these extensions, while suggesting that courts that recognize them “are concerned more with the desirability of insuring recovery to injured plaintiffs than they are with maintaining the symmetry and balance of traditional liability patterns”).

may, within a matter of years or decades, become frequently imitated and firmly entrenched.

One such example, familiar to any tort student, is Justice Cardozo's opinion in *Wagner v. International Railway Co.*<sup>100</sup> The case arose when, on August 20, 1916, two cousins, Arthur (age 30) and Herbert (age 24), spent a lazy summer Sunday on Lake Erie's Grand Island, just south of Niagara Falls.<sup>101</sup> The cousins' late evening return trip home to Buffalo was interrupted, however, when the trolley they were riding suddenly lurched.<sup>102</sup> That lurch was so intense, in fact, that, as Herbert later testified: "somebody... knocked up against me and swung me around and I lost my foothold."<sup>103</sup> With his foothold lost, Herbert fell out of the open back door of the moving trolley, which, as luck would have it, was crossing a trestle—and he plunged approximately 20 feet to the ground below.<sup>104</sup> Soon after Herbert's fall, the trolley screeched to a halt, and, after pausing to speak to the conductor, Arthur disembarked and set off in search of his missing cousin.<sup>105</sup> Unfortunately, however, while looking for Herbert, Arthur climbed up the trestle, "missed his footing, and fell."<sup>106</sup> Seriously injured in *that* fall, Arthur ultimately sued the Railway Co., and, in that suit, the pertinent question was whether a rescuer might successfully prosecute a claim against a defendant that had imperiled an initial victim and, by extension, occasioned the rescuer's subsequent injury.<sup>107</sup>

At the time of its filing, Arthur's suit was hardly a slam dunk. Although Arthur, riding in the trolley alongside his cousin, was a foreseeable plaintiff, it does not tax the imagination to identify situations in which a rescuer is *not* foreseeable—and a court, worried about slippery slope concerns, might have resisted any expansion of the strict duty rules that prevailed during the period.<sup>108</sup> Just as easily, Arthur might

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**100** 133 N.E. 437 (N.Y. 1921).

**101** Kenneth S. Abraham & G. Edward White, *Recovering Wagner v. International Railway Company*, 34 *TOURO L. REV.* 21, 24 (2018).

**102** 133 N.E. at 437. In fact, there is some question whether there ever was a lurch: "Of all the witnesses who were present when Herbert Wagner fell off the car as it went around a curve, only one, Herbert himself, testified that just before he fell off, the car 'lurched.'" Abraham & White, *supra* note 101, at 23.

**103** Abraham & White, *supra* note 101, at 23 (quoting Record on Appeal at 46, *Wagner v. International Railway Co.*, 133 N.E. 437 (N.Y. 1921)).

**104** Abraham & White, *supra* note 101, at 28, 43.

**105** Before Arthur began his search, he "had to wait for the trolley to move several hundred feet and stop" and he also took the time to speak with the conductor. *Id.* at 47.

**106** *Id.* Ultimately, both cousins' bodies were found "lying under the trestle." *Id.* at 35.

**107** For a discussion of Arthur's devastating injuries, see *id.* at 42–44. Ironically, Herbert was not seriously injured. *Id.* at 43.

**108** Indeed, seven years after *Wagner*, the same court, in *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928), took a very restricted view of duty and to which plaintiffs it applied.

have lost on proximate cause grounds because his *considered* decision to attempt a rescue (after the trolley came to a halt and after he took the time to speak to the conductor) could have been classified as a superseding cause.<sup>109</sup> (Indeed, an earlier decision by the New York Court of Appeals had suggested as much, in a case in which the court took pains to emphasize that the father's rescue of his son was sudden and instinctual.<sup>110</sup>) Finally, Arthur's rescue attempt—undertaken after “[n]ight and darkness had come on”—might have constituted contributory negligence or even assumption of risk.<sup>111</sup> This is particularly true because, unlike the other rescuers who also disembarked from the trolley to look for Herbert that night, Arthur—somewhat inexplicably—climbed *up* on the trestle and bridge tracks, rather than scanning the ground below.<sup>112</sup>

Judge Cardozo's clarion cry, “danger invites rescue,” swept away all of those impediments.<sup>113</sup> And that decision, perhaps owing to that catchy phrase, quickly spread like wildfire.<sup>114</sup> Published in 1934, the first Restatement of Torts adopted one aspect of *Wagner* in § 445, declaring that “normal efforts” to rescue another or their property are not a superseding cause of harm,<sup>115</sup> and, in the ensuing decades, a robust “rescuer doctrine” has taken root, which permits rescuers to recover without examining the rescuers' foreseeability for duty or scope of liability purposes.<sup>116</sup> Is there a foundational principle for tort law that was unleashed by Judge

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**109** Defendant's lawyer forcefully made such an argument, insisting: “[T]he action of the plaintiff in this case... was deliberative; he had time for reflection and did reflect; during every instant of time while he was walking back from the car throughout the distance of 600 feet to the place where he fell, he had chance for thought.” Abraham & White, *supra* note 101, at 49 (quoting Brief of Respondent at 31–32, *Wagner v. International Ry. Co.*, 133 N.E. 437 (N.Y. 1921)).

**110** See *Gibney v. State*, 33 N.E. 142 (N.Y. 1893).

**111** *Wagner*, 232 N.Y. at 179.

**112** Abraham & White, *supra* note 101, at 39 (“The image conveyed by those witnesses was that of Arthur Wagner going off on an inexplicable wild goose chase in search of his cousin, while all the other members of the search party... went to the logical place to search.”).

**113** *Wagner*, 232 N.Y. at 180. The exception was for rescuers who act sufficiently rashly to fall afoul of the lenient contributory negligence standard applied to them.

**114** Abraham & White, *supra* note 101, at 58 (tracing the decision's rapid and widespread acceptance).

**115** RESTATEMENT OF TORTS § 445 (AM. L. INST. 1934).

**116** Furthermore, although the doctrine employs comparative fault to reduce the recovery of those who engage in foolhardy or unreasonable rescue efforts, it does so with a thumb on the rescuer's side of the scale when apportioning liability, to reflect the altruistic nature of the rescuer's act. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 32 (AM. L. INST. 2005); DAN B. DOBBS ET AL., THE LAW OF TORTS § 202 (2d ed. Supp. 2021). This is contrary to a central tenet of civil recourse theory that the relational requirement for a duty exists when the plaintiff is foreseeable victim. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 71 (2020).

Cardozo's inimitable turn of a phrase into the modern rescuer doctrine? We are deeply skeptical.

The judicially constructed doctrine of parental immunity was similarly contagious—but to different effect.

In the latter part of the 19th century, Sallie A. Hewellette—a minor, who was married but separated from her husband—sued her mother for false imprisonment because her mother had arranged for her confinement in an asylum where she was detained for 11 days.<sup>117</sup> The jury awarded Sallie \$200 in actual damages.<sup>118</sup> But, in the 1891 decision *Hewellette v. George*, the Mississippi Supreme Court reversed, contending that, to permit such litigation, would disrupt “the repose of families and the best interests of society.”<sup>119</sup>

The *Hewellette* opinion is hardly a model of judicial clarity, and the foundation on which it rests was shallow, at best. As one commentator has summarized: “The [*Hewellette*] court neither cited authority for this holding, nor gave any further explanation of its reasoning.”<sup>120</sup> Yet, those deficiencies didn't keep the decision from catching on: “[C]ourts in all except eight states followed the [*Hewellette*] court's example and... adopted some type of parent-child immunity.”<sup>121</sup>

But, in time, the pendulum swung: By 1979, the Second Restatement had largely scrapped parental immunity, based on a panoply of exceptions and the trend in “a substantial minority of jurisdictions.”<sup>122</sup> A century after *Hewellette*, the Mississippi Supreme Court, too, overruled it, permitting a child to sue a parent for harm suffered in an automobile accident caused by the parent's negligence.<sup>123</sup> And, the Third Restatement of Torts is about to endorse the Second Restatement's treatment of parental immunity, citing additional states that have abrogated the doctrine in significant part.<sup>124</sup>

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**117** *Hewellette v. George*, 9 So. 885, 887 (Miss. 1891).

**118** *Id.*

**119** *Id.*

**120** Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 *FORDHAM L. REV.* 489, 494 (1982).

**121** *Id.* See W.W. Allen, Annotation, *Liability of Parent or Person in Loco Parentis for Personal Tort Against Minor Child*, 19 *A.L.R.2d* 423 (1951) (“Since the [*Hewellette*] opinion cites no authority and offers virtually no discussion ... its far-reaching effect among the American courts is doubtless remarkable.”).

**122** *RESTATEMENT (SECOND) OF TORTS* § 895G (AM. L. INST. 1979). The exception is for discretionary determinations about discipline or supervision. *Id.* § 895G, cmt. k.

**123** See *Glaskox v. Glaskox*, 614 So. 2d 906, 912 (Miss. 1992) (“We hold that the judicially created doctrine of parental immunity has outlived its purpose and adopt the majority view abrogating the principle as it applies to the negligent operation of a motor vehicle.”).

**124** *RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS: IMMUNITIES* § 2 (AM. L. INST. Council Draft No. 2, 2021).

Did a foundational principle influence the Mississippi Supreme Court in 1891? Or was *Hewellette* an aberration that was corrected by an immanent tort theory? We think the answer to both questions is no. Returning to our argument in Part 3.1.2., *Hewellette* emerged in a day when society viewed children very differently from today. Meanwhile, drawing from our argument in Part 3.1.3., no liability insurance was available at the time of *Hewellette*. But, during the 20th century, that on-the-ground reality changed dramatically, and that change eased the financial burden of intrafamily litigation—and paved the way for such suits.<sup>125</sup>

Yet another invocation of a catchy and contagious phrase, this one also far less felicitous than Judge Cardozo's in *Wagner*, was Francis Bohlen's adoption of "substantial factor" as the basis of factual causation in the first Restatement of Torts.<sup>126</sup> At the time he adopted it, the phrase was not to be found in judicial opinions.<sup>127</sup> Bohlen borrowed it from an article by Jeremiah Smith, though Smith had used it to inform, not factual cause, but scope of liability.<sup>128</sup> No matter. The term, once minted, caught on—likely because, in its vague yet plausible sounding language, it could be most anything to anyone who wanted to mold it for almost any purpose. Prosser carried the term forward in the Second Restatement,<sup>129</sup> and it is widely used today despite the Third Restatement's efforts to banish it.<sup>130</sup>

This tablespoon of the "substantial factor" herb produces a most unpleasant taste for Mama's soup. We do not labor on the criticism of this term, which is considerable,<sup>131</sup> nor the efforts to extirpate it, which are ongoing,<sup>132</sup> because our

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**125** Not surprisingly, an early exception to parental immunity existed when the parent had liability insurance. See *FOWLER V. HARPER ET AL.*, HARPER, JAMES AND GRAY ON TORTS § 8.11 (3d ed. & Supp. 2020).

**126** See RESTATEMENT OF TORTS § 431(a) (AM. L. INST. 1934). There are some who claim that "substantial factor" was meant to encompass scope of liability or proximate cause. See Michael D. Green, *Professor Francis Hermann Bohlen*, in SCHOLARS OF TORT LAW 133, 158 n.144 (James Goudkamp & Donal Nolan eds., 2019). We think the best understanding of what Bohlen did in the first Restatement was to use the term to refer to factual cause. *Id.* at 158–59.

**127** *Id.* at 160 n.151.

**128** See Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103 (1911); see also Peter Zablotsky, *Mixing Oil and Water: Reconciling the Substantial Factor and Results-With-In-The-Risk Approaches to Proximate Cause*, 56 CLEV. ST. L. REV. 1003, 1013 (2008) ("The substantial factor test was first proffered as a test for proximate cause by Jeremiah Smith in his seminal, early twentieth century article entitled 'Legal Cause in Actions of Tort.'").

**129** RESTATEMENT (SECOND) OF TORTS § 431(a) (AM. L. INST. 1965).

**130** See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 (AM. L. INST. 2010).

**131** See *id.* § 26, Reporters' Note to cmt. j.

**132** See, e.g., *Culver v. Bennett*, 588 A.2d 1094 (Del. 1991) (holding that use of "substantial factor" language in jury instruction was reversible error); *John Crane, Inc. v. Jones*, 604 S.E.2d 822 (Ga. 2004) (holding that lower court's omitting "substantial factor" from instruction was correct as there is no requirement that a defendant's causal contribution exceed any threshold); *Doull v.*

point is that a phrase, once used, caught on—and its spread has had a significant impact on tort law.

### 3.2.2 Political Compromise

Just as surely, certain doctrines in tort law are forged through political compromise. Exhibit A here is the abolition of contributory negligence in favor of comparative responsibility, arguably the most profound doctrinal shift over the past century.<sup>133</sup> Comparative responsibility swept the country, we suggest, not because of any broad theory or grand design. Instead, it finally took hold in the shadow of—and owing to pressure exerted by—the contemporaneous push for auto no-fault legislation.

To understand all of this, a bit of background is necessary. Auto no-fault legislation—the brain child of Robert Keeton and Jeffrey O’Connell, which sought to replace the tort system in the realm of motor vehicle accidents with a first-party system of partial, but certain, compensation—burst onto the scene in the late 1960s and early 1970s.<sup>134</sup> As it did, it entered a world where contributory negligence was, by turns, criticized and circumvented. Regarding the former, as early as 1934 one commentator declared, “[l]ittle remains to be written about contributory negligence save its obituary,”<sup>135</sup> while, in 1953, the Supreme Court dismissed it as “a discredited doctrine.”<sup>136</sup> Meanwhile, judges carved numerous exceptions to its harsh provisions—including, most notably, the last clear chance

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Foster, 163 N.E.3d 976 (Mass. 2021) (adopting but-for to replace the substantial-factor standard for factual causation); *Stanley v. City of Philadelphia*, 69 Pa. D. & C. 4th 63 (Ct. C.P. 2004) (explaining Pennsylvania’s elimination of the substantial factor test from its standard jury instructions and employing, in its place, the *sine qua non* standard); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 & cmt. j (AM. L. INST. 2010).

**133** See Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 868 (1996) (suggesting that the move toward apportioning liability—which is seen most clearly in the advent of comparative negligence—is the most “important” development in tort law since “the coming of insurance”); Robert L. Rabin, *Past as Prelude: The Legacy of Five Landmarks of Twentieth-Century Injury Law for the Future of Torts*, in *EXPLORING TORT LAW* 52, 72 (M. Stuart Madden ed., 2005) (identifying comparative fault, and its “erosion of the all-or-nothing character of the common law tort system,” as one of the five “most critical” developments “in restructuring the very foundations of tort law in the twentieth century”).

**134** See Engstrom, *supra* note 70, at 304.

**135** Charles L. B. Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 674 (1934).

**136** *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953). Fittingly, Roscoe Pound, among others, dismissed the doctrine as “fundamentally and radically unjust,” Roscoe Pound, *Comparative Negligence*, 13 NACCA L.J. 195, 197 (1954).

doctrine<sup>137</sup>—while sympathetic juries oftentimes ignored the rule altogether.<sup>138</sup> But, though it was a “chronic invalid,” by 1968, only a handful of states had abolished contributory negligence, and, somewhat surprisingly, there was no discernable push for reform.<sup>139</sup>

Starting in 1969, debate over auto no-fault legislation upended this unsatisfying equilibrium.<sup>140</sup> At the time, those promoting no-fault laws criticized *many* things about the tort system. One persistent critique, however, was that the tort system left too many seriously injured auto accident victims (45 percent, by the Department of Transportation’s estimate) completely empty-handed,<sup>141</sup> whereas no-fault, its supporters insisted, would patch the “gaps in the fabric of compensation for auto-related accidents.”<sup>142</sup> No-fault’s opponents, meanwhile, seized on this critique of the tort system and exploited it. They thus agreed with proponents’ diagnosis: Compensation through tort *was* too stingy.<sup>143</sup> But they disagreed with the proponents’ proposed cure, insisting that, if the problem were that too few injured Americans benefited under the current liability system, the liberalization of tort doctrine—rather than tort’s elimination—was the appropriate response.<sup>144</sup>

By focusing the public’s attention on persistent gaps in compensation, and also leading many opponents of auto no-fault to conclude that comparative negligence was the lesser of two evils, the no-fault push thus rejiggered the political economy surrounding contributory negligence. In so doing, auto no-fault prompted some who had long defended the harsh all-or-nothing doctrine to abandon their support.<sup>145</sup> It led certain states to address the under-compensation problem in *two* ways: by *simultaneously* enacting auto no-fault and *also*

**137** For various common law exceptions, including the rule of last clear chance, see Lowndes, *supra* note 135, at 685–708.

**138** *See id.* at 674 (discussing juries’ “notorious” inability “to perceive contributory negligence”).

**139** For “chronic invalid,” see WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 428 (3d ed. 1964). For the absence of a discernable push for reform, see, for example, Marianne M. Jennings, *The Impact of Alternative Negligence Defense Rules on Litigation Behavior and Tort Claim Dispositions*, 5 *BYU J. PUB. L.* 33, 41 (1991).

**140** Henry Woods, *The New Kansas Comparative Negligence Act—An Idea Whose Time Has Come*, 14 *WASHBURN L.J.* 1, 3 (1975) (“In 1969 the dam collapsed. . .”).

**141** AM. BAR ASS’N, SPECIAL COMMITTEE ON AUTOMOBILE INSURANCE LEGISLATION, *AUTOMOBILE FAULT INSURANCE* 13 (1978) (“It is difficult to find any advocacy of changes in automobile insurance. . . that does not mention the DOT’s finding[] that: Only 45% of all those killed or seriously injured in auto accidents benefited in any way under the tort liability system.”).

**142** ABRAHAM, *supra* note 40, at 99.

**143** Trevor M. Gordon, Note, *To Reform or Repudiate; An Argument on the Future of No-Fault Auto Insurance*, 17 *QUINNIPIAC HEALTH L.J.* 63, 66–67 (2014).

**144** Engstrom, *supra* note 70, at 360–61 (recounting this history and collecting sources).

**145** *See id.* at 363–64.

eradicating contributory negligence.<sup>146</sup> And, it prompted still other states that declined to adopt auto-no-fault to report that they had addressed the under-compensation problem using another mechanism—by adopting comparative responsibility.<sup>147</sup>

In all, by the time the no-fault dust settled in the early 1980s, 37 states had replaced contributory negligence (wherein, at least formally, any fault on the plaintiff's part barred her recovery) with the more lenient standard of comparative fault.<sup>148</sup> Once again, we cannot understand how some immanent tort glue can explain the change from a rule that barred a negligent plaintiff from recovery to one that apportioned liability among all who acted negligently.

### 3.2.3 Crises and Technological Changes

Third and finally, other tort doctrines were born of moments of crisis. An example is market-share liability: a controversial common law invention that relieves the plaintiff from the obligation to show that any particular defendant's negligence factually caused the plaintiff's particular injury. In its relaxation of the actual cause requirement, market share liability represents a sharp break with bedrock tort principles.<sup>149</sup> Why, then, did some courts create this doctrine?<sup>150</sup> The answer, we suggest, rests in the particularly compelling circumstance in which the doctrine took root.

As any first-year law student knows, market-share liability traces its development to the DES crisis of the late 1970s and 1980s. That crisis involved scores of mostly white and middle- and upper-class women (“DES daughters”) who had sustained injury *in utero* owing to their mothers' ingestion of Diethylstilbestrol, a supposed miscarriage preventative, which, years later, manifested in vaginal or

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<sup>146</sup> *Id.* at 362 & n.270.

<sup>147</sup> *Id.* at 363 & n.271.

<sup>148</sup> *Id.* at 361.

<sup>149</sup> See *Sindell v. Abbott Labs.*, 607 P.2d 924, 938 (Cal. 1980) (Richardson, J., dissenting) (characterizing market share liability as a “wholly new theory” of liability that flies in the face of “well established... principles of causation”); *id.* at 939 (“[T]he majority rejects over 100 years of tort law which required that before tort liability was imposed a ‘matching’ of defendant’s conduct and plaintiff’s injury was absolutely essential.”).

<sup>150</sup> To be sure, as the text reflects, only “some” courts embraced the doctrine. A roughly equal number declined to do so. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 28, cmt. p (AM. L. INST. 2010) (“A number of courts... adopted a new ‘market share’ theory that permitted apportionment of liability among defendant-manufacturers based on each one’s share of the relevant market for DES. . . . A roughly equal number of courts have declined to craft a new theory for DES plaintiffs, expressing concern that to do so would rend too great a chasm in the tort-law requirement of factual causation.”).



cervical cancer.<sup>151</sup> Many daughters sued. But the daughters' claims were complicated because they did not know and could not prove *which* manufacturer's drug their mothers had, in fact, ingested.<sup>152</sup> Identification was frequently impossible because, given a quirk in the drug's patent application, some 267 drugmakers manufactured DES, and all brands' pills contained the identical active ingredient, so pharmacies filled doctors' prescriptions willy nilly.<sup>153</sup> Compounding the difficulty, decades had elapsed between the mothers' DES ingestion and their daughters' diagnoses; this delay dimmed some mothers' recall and wholly thwarted others, as, by the time of injury manifestation, some mothers were no longer alive to offer testimony, and pharmacy records were often unavailable.<sup>154</sup>

In the face of this serious causal deficiency, courts, of course, could simply have denied the daughters' claims.<sup>155</sup> After all, as the New York Court of Appeals put it: "extant common-law doctrines, unmodified, provide no relief for the DES plaintiff unable to identify the manufacturer of the drug that injured her."<sup>156</sup> But rather than letting defendants off the hook, under intense public pressure,<sup>157</sup> first the California Supreme Court, and then others, discarded the (formerly key)

**151** It is unknown exactly how many American women took DES; estimates range from 1.5 to 6 million. Anita Bernstein, *Hymowitz v. Eli Lilly and Co.*, *Markets of Mothers*, in *TORTS STORIES* 151 (Robert L. Rabin & Stephen D. Sugarman eds., 2003). For the fact that "[t]he exposed population was mostly white, upper-income, and reasonably well educated," see *id.* at 155. For the fact that DES exposure manifested in "the latent development of vaginal and cervical cancer" some "10 to 30 years after birth," see Symposium, *The Problem of the Indeterminate Defendant: Market Share Liability Theory* *Hymowitz v. Eli Lilly and Co.*, 55 *BROOK. L. REV.* 863, 865 (1989). More recent research reveals that prenatal exposure to DES increases one's risk of numerous ailments, beyond vaginal and cervical cancers, including inter alia, infertility, preterm delivery, miscarriage, preeclampsia, and breast cancer. See Robert N. Hoover et al., *Adverse Health Outcomes in Women Exposed in Utero to Diethylstilbestrol*, 365 *NEW ENG. J. MED.* 1304 (2011).

**152** Paul D. Rheingold, *The Hymowitz Decision—Practical Aspects of New York DES Litigation*, 55 *BROOK. L. REV.* 883, 883 (1989) ("[T]he great majority of DES plaintiffs could not identify the manufacturer of the DES their mother had taken. . .").

**153** For the fact that pharmacists "filled prescriptions from whatever brand of the drug happened to be in stock," see *Sindell*, 607 P.2d at 926. For the 267 figure, see Bernstein, *supra* note 151, at 162.

**154** See *Sindell*, 607 P.2d at 929–30 (discussing these dynamics); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1072 (N.Y. 1989) (same).

**155** Not surprisingly, prior to *Sindell*, many courts granted judgment for the defendants, in the face of this deficiency. See *Sindell*, 607 P.2d at 927–28 (cataloging "judgments in favor of the drug company defendants because of the failure of the plaintiffs to identify the manufacturer of the DES prescribed to their mothers"). Some have, even after the development of the market-share theory. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 28, cmt. p & Reporters' Note to cmt. p. (AM. L. INST. 2010).

**156** *Hymowitz*, 539 N.E.2d at 1075.

**157** In New York, the legislature prompted the Court of Appeals to adopt a market-share scheme by changing the state's statute of limitations to adopt a discovery rule and making the change

requirement that a plaintiff must prove who inflicted her injury. In so doing, these courts permitted plaintiffs to recover a portion of their damages from each manufacturer who sold DES, measured by the manufacturer's market share.<sup>158</sup> Pursuant to courts' novel approach, each defendant's share of liability for the plaintiff's injuries would be calculated based on the *likelihood* that its product injured a particular plaintiff.

What prompted some courts to take this bold and controversial step? Some might suggest it was a principled tort theory at work. We believe it was something different. We believe that the judicial innovation came about because of a complex mix of factors that surrounded this crisis: the fresh memories of a prior catastrophe—Thalidomide<sup>159</sup>—which the episode stirred, as well as the publicity the young women received, the public sympathy their serious injuries aroused,<sup>160</sup> and the political clout they mustered, particularly in New York, where legislators amended the state's statute of limitations expressly to pave the way for their lawsuits.<sup>161</sup> Take some or much of that away, and tort doctrine—we suggest—might well have clung to the traditional causal requirement.<sup>162</sup>

## 4 The Role of Theory in Restatements

So far, we have explained our view that there is no immanence providing the structure of tort law. Instead, tort law is a complex *mélange* of public policy, societal

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retroactive, thereby removing the defense, which then enabled hundreds of DES victims to bring suit a decade after *Sindell*. See *Hymowitz*, 539 N.E.2d at 1073.

**158** *Sindell*, 607 P.2d at 924.

**159** See THE INSIGHT TEAM OF THE SUNDAY TIMES OF LONDON, *supra* note 83.

**160** Here, the victims' race and class (as noted above, mostly white and prosperous) quite likely played a role. Cf. Katie Robertson, *News Media Can't Shake 'Missing White Woman Syndrome,' Critics Say*, N.Y. TIMES, Sept. 22, 2021 (discussing the disproportionate media coverage heaped upon white victims).

**161** In deciding *Hymowitz*, the New York Court of Appeals expressly noted that it was moved to recognize "a realistic avenue of relief for plaintiffs injured by DES" in part because "the Legislature consciously created these expectations by reviving hundreds of DES cases." 539 N.E.2d at 1075. For more on the *sui generis* nature of the DES cases, see *McCormack v. Abbott Lab'ys*, 617 F. Supp. 1521, 1526 (D. Mass. 1985) (observing that "the magnitude of the physical and psychological injuries which are at issue in DES cases counsels toward permitting a remedy under some form of a market-share theory of liability"); *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 283 (Fla. 1990) (explaining that adoption of market share is warranted because of "the unique circumstances surrounding the injury suffered by the DES plaintiff").

**162** Consistent with that intuition, market-share liability has not been broadly accepted outside of the DES context. See Mark A. Geistfeld, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*, 155 U. PA. L. REV. 447, 500 (2006).

change, insurance availability—plus idiosyncratic spices—as tort law reflects everything from catchy phrases, copycats, legislative compromise, and crises.

But let us, for a moment, assume that we're wrong. Let's assume that there is a foundational principle that furnishes the glue that holds tort law together. We proceed in this Part to explain why, even if that were so, such a theory would still be of little or no value for the vast majority of issues that Restatement Reporters confront.<sup>163</sup> Here, we show that, when it comes to our work, tort theory has little utility for two reasons: (i) Theory tends to be pitched at the wrong level of abstraction, and (ii) even when tort theorists do address a particular and specific issue, the theorists themselves very often disagree about key questions, returning a Restatement Reporter back to square one.

## 4.1 The General Versus the Specific

Even if descriptive tort theories existed and could address gaps where court opinions are outdated, inconsistent, muddled, or incoherent, we would be stumped by two additional problems: First, there is a fundamental mismatch between levels of abstraction—and there is a large gap between the high altitude at which theory speaks and the lower altitude where Reporters (and, we would venture, also judges) work. When it comes to the work of Restatements, this altitudinal mismatch, we posit, compromises or even defeats tort theory's practical utility.<sup>164</sup>

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**163** Jules Coleman, a scholar closely affiliated with the corrective justice theory, conceded this point:

[M]uch of the content of the first-order duties that are protected in tort law is created and formed piecemeal in the course of our manifold social and economic interactions. . . . If I am right about this, then it seems unlikely that we could ever have a general theory from which we might derive the first-order duties protected by tort law.

JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 34–35 (2001). There are exceptions. One prominent exception concerns duty. In particular, the Third Restatement held that actors owe a broad duty to the world. See *RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM* § 7 (AM. L. INST. 2010). The founders of civil recourse theory objected that the Restatement's account failed to recognize the role of duty in the sense of obligation, i.e., whether the defendant was obliged to take care to avoid harming the victim in the way she was harmed. See John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 *VAND. L. REV.* 657, 724–31 (2001). It's a fair criticism—and it is also true that a commitment to civil recourse would have resulted in a very different (and much narrower) duty provision. See *id.*

**164** This is a fact that two prominent tort theorists—John Goldberg and Ben Zipursky—have recognized, conceding that their theory of choice (civil recourse theory) “informs but does not determine the content of tort law.” GOLDBERG & ZIPURSKY, *supra* note 35, at 234.

Second (and relatedly), our work is chock full of line drawings. We frequently face situations where there is broad consensus that situation X ought to be treated one way and disparate situation Y ought to be treated another way. But X and Y are two distant points on a continuum. And it is not enough to distinguish between X and Y; rather, *between* X and Y, we must draw an articulable, administrable, defensible line. When it comes to this common line-drawing exercise, existing theory has little, if anything, useful to say.

To illustrate both points, we identify just a small smattering of the knotty issues that the Third Restatement of Torts: Concluding Provisions has confronted and resolved (or proposes to resolve in current drafts):

- 1) What is the requisite for the formation of a physician-patient relationship that then imposes on the physician an affirmative duty of reasonable care? Does a “curbside consult” (where a fellow physician is informally asked to furnish advice about a patient’s care without ever meeting the patient) suffice? And, assuming not, particularly in the age of video visits (where *meeting* a patient cannot be the *sine qua non* of relationship formation) how do we articulate a satisfying distinction between those casual one-off curbside consults and bona fide treatment?
- 2) If spouses, children, and parents can assert loss of consortium claims for the relational impairment caused by a loved one’s tortious injury, can grandparents, stepchildren, aunts, and third cousins, twice removed?
- 3) Assuming medical monitoring claims are to be permitted when a tortfeasor imposes on the plaintiff a *significant* risk of *serious* future bodily harm, just how significant and serious should those thresholds be? Relatedly, much like (P) and (L) in Learned Hand’s famous formula, can the thresholds balance (so that a more frequently fatal diagnosis might justify monitoring, even in the face of a more modest uptick in the chance of that diagnosis—and vice versa)? To make it concrete: What if a tortfeasor triples the plaintiff’s risk of a kidney ailment, but the ailment is actually quite curable? Or what if a tortfeasor doubles the plaintiff’s risk of a fatal cancer diagnosis, but, even after doubling, the plaintiff’s chance of the diagnosis remains miniscule (from 1 in 100,000 to 2.2 in 100,000, say)? When, exactly, is medical surveillance justified?
- 4) Assuming that *some* defendants are entitled to the protection of the firefighter’s rule (that old common law rule that holds that, when firefighters—or, on occasion, other professional rescuers—are tortiously injured by the very peril they have been called to confront, they have no claim against the actor who created that peril), are defendants entitled to the rule’s protection even when they intentionally create the calamity? And, given that the answer to that question is surely no (arsonists cannot start a blaze and then cloak themselves

in the rule's protection), what of the other myriad defendants whose conduct falls somewhere in the hazy space between innocence and intentionality?

- 5) When a plaintiff seeks to recover for the violation of her “right of sepulcher” because of the defendant’s tortious mishandling of a loved one’s remains, are the plaintiff’s claims constrained by a severity threshold requirement keyed to the seriousness of his or her emotional distress? If yes, how do we reliably gauge distress severity? And where is the line between those sufficiently connected with the decedent and those who are not to determine who is eligible to recover for emotional harm at the mishandling of the decedent’s remains? Only the spouse? All members of the decedent’s nuclear family? Other family members? Close or intimate friends?
- 6) Should the stand-alone wrongful acts doctrine (variously called the “serious misconduct bar” or “*ex turpi causa non oritur actio*”) endure to bar certain wayward plaintiffs’ claims? Or, like so much else, should the wrongful acts doctrine be abolished in light of comparative fault?
- 7) Should parental immunity, with its shallow roots in *Hewellette v. George*, be retained or abolished?<sup>165</sup> Or, if the answer is partial (i.e., “mostly abolished”), which standard should govern parental actions going forward, in order to protect parents’ legitimate exercise of discretion—but not insulate abuse or egregiously cavalier parenting?
- 8) On those occasions where spouse 1 asserts a consortium claim against the defendant because of an injury sustained by spouse 2 that has impaired the marital relationship, but where spouse 1 was *also* at fault for in the injury to spouse 2, should spouse 1’s recovery vis-à-vis the defendant be reduced via comparative fault principles? Or, should spouse 1 collect a full recovery from the defendant, notwithstanding his or her complicity in the underlying accident?
- 9) Should a discovery rule delay the running of the statute of limitations’ clock, and, assuming yes, just how much does a plaintiff need to know? Should “discovery” be based on the plaintiff’s knowledge that she sustained an injury? Should it be ratcheted up and keyed to her awareness that she suffered an injury as well as her knowledge of the source of the injury? Or, ratcheting up the requirement further, can the statute only run if the plaintiff knows of injury, its source, and that the injury is traceable to the defendant’s tortious conduct?

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165 9 So. 885, 887 (Miss. 1891).

## 4.2 Intramural Disagreements Stunt Understanding and Application

Worse, even when tort theory has *something* to say regarding an issue, the lack of consensus about the theory's nuts or bolts or its application to a particular situation means that concrete guidance for Reporters is rare.

An example comes, once again, from market-share liability—the novel doctrine courts devised to deal with the claims of DES daughters. Defining, endorsing, or cabining the doctrine of market-share liability—or devising a better way for courts to address this tortfeasor identification problem—is surely the stuff of Restatements. But what, exactly, should such a Restatement provision say? That question was, and remains, vexing because case law addressing this particular proof problem was, and remains, limited and contradictory, as only a small number of jurisdictions have weighed in, and disagreements on key questions exist among those that have.<sup>166</sup>

Into this muddle, might theory offer a useful perspective to guide the Reporters' work? Nope. Here, theorists (in particular, those writing from corrective justice perspectives) did weigh in on the use and contours of market-share liability, but they *disagreed with one another*. Some thought that liability can only properly exist when the plaintiff has been harmed by the particular defendant's risk-creating conduct<sup>167</sup>—a perspective that means *Sindell* (the California Court's decision accepting market-share liability) was wrongly decided—and that DES daughters would have been left without a remedy. But others claimed that market-share liability was consistent with corrective justice.<sup>168</sup> Still another waffled, declaring market-share liability as second-best to causally connecting defendant's wrongful conduct to plaintiff's harm.<sup>169</sup>

<sup>166</sup> See *supra* note 150 (discussing the doctrinal disagreement).

<sup>167</sup> See Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHL.-KENT L. REV. 407 (1987) (arguing that causation is essential to the corrective-justice mission of tort law by particularizing the plaintiff who has been harmed by the risk-creating conduct of a defendant).

<sup>168</sup> See Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risk*, 37 UCLA L. REV. 439 (1990) (claiming that imposing liability for creating risk, even before harm has occurred, is consistent with corrective-justice principles); Kenneth W. Simons, *Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformulation*, 15 HARV. J.L. & PUB. POL'Y 849, 884–85 (1992) (explaining that market-share liability can be squared with corrective justice by conceptualizing the harm as creating the risk of injury, and even can be squared with the non-exculpation rule of *Hymowitz*, on the ground it furthers accuracy in determining the harm caused by each defendant).

<sup>169</sup> See Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1118 n.163 (2001) (characterizing market-share liability as second-best theory to imposing liability based on a factual causal relation between defendant's tortious conduct and plaintiff's harm). That position evolved from an earlier one in

Commenting on disagreements among corrective justice theorists led onetime Torts Restatement Reporter Gary Schwartz to observe that “the fact that various [corrective justice adherents] disagree with each other as sharply as they do permits the non-philosopher to believe that these are intramural disputes he can properly ignore.”<sup>170</sup> We share that view.

## 5 Conclusion

We return to where we began this Essay: Tort theory plays virtually no role in the crafting of Restatements. First, we have strong doubts that there is a single descriptive tort theory that *captures* tort law. To the contrary, we find ourselves in agreement with Oliver Wendell Holmes’s conclusion after inquiring “whether there is any common ground at the bottom of all liability in tort.”<sup>171</sup> He wrote: “Such a general view is very hard to find. The law did not begin with a theory. It has never worked one out.”<sup>172</sup>

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which Wright pragmatically endorsed market-share liability as consistent with corrective justice. See Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1073 (1988) (“[I]f each defendant is held liable only for her share of the risk exposure [i.e., several liability for the market share of that defendant], there is no conflict with the corrective-justice view.”).

**170** Schwartz, *supra* note 35, at 1810–11.

**171** HOLMES, *supra* note 58, at 77.

**172** *Id.* Almost a quarter century ago, Gary Schwartz proposed that we recognize that tort law has “mixed theories” informing it. See Schwartz, *supra* note 35, at 1815–26. And he acknowledged that even a mixed theory doesn’t do it all: “Admittedly, efforts to develop a mixed theory applicable to all of tort law do not immediately pay off. Possibly, as tort law has developed over time, it has drawn on deterrence and corrective justice in a rather haphazard and eclectic way.” *Id.* at 1834. Jules Coleman, a prominent torts theorist of the corrective justice camp, agrees:

I reject the suggestion that an adequate account of tort practices requires that there be a general theory of first-order duties from which we can derive them all systematically. Indeed, I am dubious about the prospects for such a theory. On my view, much of the content of the first-order duties that are protected in tort law is created and formed piecemeal in the course of our manifold social and economic interactions. These generate conventions that give rise to expectations among individuals regarding the kind and level of care they—we—can reasonably demand of one another. The content of these duties is then further specified in the practice of tort law itself—in the process of litigation, in the development of case law, in the writing of restatements, and the like. If I am right about this, then it seems unlikely that we could ever have a general theory from which we might derive the first-order duties protected by tort law.

COLEMAN, *supra* note 163, at 34–35 (footnotes omitted).

Instead of one encompassing tort theory, as we argue in Part 3, we believe that, much like Mama's soup surprise, tort law has come together, haphazardly, and in a piecemeal fashion. In its contemporary incarnation, tort is drawn from an eclectic mix of ingredients, including judges' drive to promote sound public policy, their willingness to adapt in the face of shifting norms and cultural currents, and their interest in maximizing insurance coverage, in order to avoid making tort liability "an empty form."<sup>173</sup> Beyond that, tort law's evolution has been affected by myriad other forces, including contagious catchy phrases, political compromises, and salient crises.

Moreover, even if it were otherwise, tort theory would *still* have little bearing on our work, as Restatements are consciously driven by case law—where, through the common law process, a tort rule is newly minted, expanded, narrowed, excepted, or even discarded. In this process, tort theory provides little or no help.<sup>174</sup>

If we are wrong and there is a brooding omnipresence out there, we find it hard to understand the bubbling dynamism in tort law, which has been far from static since its recognition as a distinct body of law in the mid-19th century.

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<sup>173</sup> King v. Smythe, 204 S.W. 296, 298 (Tenn. 1918).

<sup>174</sup> See Posner, *supra* note 39, at 475–85 (documenting the paucity of judicial citation to the civil recourse work of John Goldberg and Ben Zipursky). Nor have law and economics scholars fared better: We found 63 cases citing Guido Calabresi's *The Costs of Accidents* in the half-century plus since it was published. The law and economics scholars who point out a specific inefficiency in tort law and recommend revision, such as Ariel Porat, *Misalignments in Tort Law*, 121 YALE L.J. 82 (2011), can hardly be found anywhere in judicial opinions—no case citation in a decade.



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