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John C.P. Goldberg

ESSAY

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INTRODUCTION

In *The Idea of Private Law*, Ernest Weinrib makes an arresting claim. He says that private law—by which he means primarily the law of contract, restitution, and especially tort—is "just like love."[1]

Even members of a discipline devoted to analogies may be forgiven for not immediately perceiving the point of this one, particularly if we focus on the private law of tort. Few law students would mistake negligence, defamation, or battery for love, and if they did, their professors might be concerned for their well-being. Likewise, it is difficult to recall another law professor writing of love and tort in the same breath, except perhaps in connection with the old causes of action, now regaining some currency, for alienation of affections and criminal conversation.[2]

Still, it is a mark of a beautiful mind—and Professor Weinrib has one—to be able to draw connections others have not thought to

* Professor of Law, Vanderbilt University. B.A. 1983, Wesleyan University; M. Phil. (Politics) 1985, University of Oxford; M.A. (Politics) 1989, Princeton University; J.D. 1991, New York University. This essay was originally presented as a speech at Stetson University College of Law. Thanks to Peter Lake for providing the occasion, and to the faculty and students of Stetson for enduring the talk. Thanks also for helpful comments to: Mark Brandon, Lisa Bressman, Curtis Bridgeman, Allison Marston Danner, Julie Faber, Homer Goldberg, Don Herzog, Richard Nagareda, Erin O'Hara, Anthony Sebok, Elizabeth TeSelle, Ernest Weinrib, and Ben Zipursky. It is especially worth noting in the context of an "Essay" of this sort that I alone bear responsibility for its mistakes.

1. ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 6 (1995).

2. This is not to say that others bave not drawn connections between love and law. *See, e.g.*, W.H. AUDEN, *Law Like Love*, *in* COLLECTED SHORTER POEMS, 1927-1957 154 (1967).

draw. So it is worth pondering this comparison: In what way is tort law "just like love," according to Weinrib?

His answer is that tort law is like love in that it cannot be understood by reference to its purpose or function. To make this assertion is not to deny that tort law has practical significance. Love, after all, is of the utmost importance. Rather, it is to say that tort law cannot be made intelligible by reference to the social functions it happens to perform.[3] We do not gain an appreciation of love by describing it in terms of a function that it serves. Of course, one could describe the phenomenon of love as, say, a practice that permits the socially optimal allocation of scarce emotional resources. One could even profitably describe it that way, although the profit would stem from the ill-fittingness of the description: By exactly failing to capture the phenomenon, it would thus teach us something important about it.

Similarly, says Weinrib, we should understand tort law not for all the things it *does*, but for what it *is*. To invoke a different analogy, tort to Weinrib resembles sport. The sports fan appreciates how the rules, practices, and participants in a game like baseball or basketball come together to create a distinctive enterprise. Yet he or she does not ask what is the point or purpose of the sport. That issue is out of bounds. Again, this is not to say that sport has no consequences. Rather, it is to say that when trying to grasp sport—and so, by analogy, when thinking about tort—we ought to strive to understand it from the inside, as an internally intelligible practice without reference to its social functions.

Weinrib attaches the label "formalism" to his provocative plea for the exclusive validity of internal comprehension. This choice of label is a further provocation, invoking deliberately the long-discredited legacy of Langdell against the triumphant modern trinity of functionalism, instrumentalism, and pragmatism.[4] Others have criticized Weinrib's formalism,[5] and I will do some of that as well. My main purpose, however, is not to launch a frontal attack, but to suggest that Weinrib's commitment to "formalism" reveals an interesting fact about the status of tort law as a subject. Specifically, I maintain that, notwithstanding its continued presence in the first-year curriculum, tort is a department of the law that has fewer serious champions than any comparable subdiscipline. In saying that tort is

3. WEINRIB, *supra* note 1, at 5-6.

4. *See* ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 48-57 (1998) (discussing Langdellian formalism).

5. *See, e.g.*, Robert L. Rabin, *Law for Law's Sake*, 105 YALE L.J. 2261 (1996) (reviewing ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995)).

just like love, Weinrib unintentionally helps demonstrate a different point: Tort law is *unloved.*

I.

To assert that tort law is unloved necessarily poses the question: "by whom?" Here, I do not have in mind students. To most 1Ls at least, tort is just another one of those classes assigned to them without their informed consent. Many of them will have had to endure the thrice-tried suit over a classroom kick in *Putney*,[6] the mysterious algebra of *Carroll Towing*,[7] and the flammable falling plank of *Polemis*.[8] So they may have reasons for not loving particular aspects of tort. Still, even if not always held in affection, a course in torts, simply by virtue of appearing on the first-year schedule, carries with it a certain legitimacy. In this, it is at least on par with criminal law, property, or civil procedure.

Nor do I have in mind the American lay public, which has more of a love-hate relationship with tort. We tend to froth over accounts—often distorted[9]—of hundreds of thousands or even millions of dollars changing hands over repainted BMWs[10] and spilled coffee.[11] On the other hand, many of us are apparently anxious to retain the right to sue HMOs for negligent coverage decisions.[12] More fundamentally, we cannot really accept that, when it is one of "us"—instead of one of "those" whiners who is the victim of a wrongdoing—the state need not provide a means of individualized redress. The notions of responsibility and recourse that undergird tort law remain an unusually prominent feature of American political culture. Indeed, with the exhaustion of the idea of "equality" that fueled the Civil

6. Vosburg v. Putney, 50 N.W. 403 (Wis. 1891).

7. United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

8. Polemis & Furness, Witby & Co., 3 K.B. 560 (Eng. C.A. 1921).

9. See THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 6-8 (2001) (discussing misleading accounts of the spilled-coffee case).

10. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) (reversing as unconstitutionally excessive a $4 million punitive damage award to a physician who purcbased a BMW that the distributor had surreptitiously repainted in part to cover cosmetic damage incurred while in transport).

11. *See* KOENIG & RUSTAD, *supra* note 9, at 6.

12. *The Public, Managed Care, and Consumer Protections*, KAISER PUB. OPINION UPDATE (Henry J. Kaiser Family Found., Menlo Park, CA), Aug. 2001, at 2, *at* http://www.kff.org/content/2001/3172/PublicOpinionUpdate.pdf (noting that sixty-nine percent of Americans support the right to sue managed care organizations for wrongful coverage decisions, although eighty percent would place limits on recoveries for noneconomic losses).

Rights movement, "responsibility" has arguably become the dominant trope through which Americans reason about justice.[13]

Rather, the unlovers of tort whom I have in mind are those who make it their business to think and write about the subject, namely scholars of tort. Tort, I claim, is unloved by those who best know tort law and tort theory. Familiarity, in this instance, has bred contempt, or indifference, or various other dispositions not plausibly falling within the description of love.

Tort scholars' distaste for their chosen subject is in some sense understandable. What is to love about an area of law littered with lost lives, broken bodies, distressed survivors, damaged and polluted property, and destroyed reputations? Still, one must recall that, notwithstanding its hideous visage, tort law was at one time admired, or at least appreciated, by those who made it their business to study it. Blackstone understood "tort"—civil remedial law—as a small piece of what he took to be the gorgeous mosaic of the liberal state's complex system of law. In his eyes, it provided the means by which individuals could vindicate their rights against wrongful invasions by others.[14] Just as the structure of English government—King, Parliament, and common law—helped protect rights against official tyranny, so tort defined and defended the right not to be battered, detained, defamed, dispossessed or otherwise injured by others. Tort therefore helped fulfill the social contract. Upon entering civilized society, individuals give up their natural right to wreak vengeance on their wrongdoers in

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13. This is equally true for political "liberals" and "conservatives." Frustrated with the fading power of equality discourse, civil rights leaders, for example, have turned to the ideas of responsibility and reparations in suing corporations for unjustly enriching themselves via the institution of slavery. *See, e.g.*, Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*, 115 HARV. L. REV. 1689 (2002) (analyzing reparations claims); Anthony J. Sebok, *The Brooklyn Slavery Class Action: More Than Just a Political Gambit*, FINDLAW, Apr. 9, 2002, *at* http://writ.news.findlaw.com/sebok/20020409.html (same). Conservatives, for their part, have invoked tort-like notions to undergird a relatively narrow conception of both the substance of the right to Equal Protection, and of Congress's power under Section 5 of the Fourteenth Amendment to implement that right. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997) (stating that Congress's Section 5 power is essentially a power to remedy past or continuing wrongs; hence, it must be employed in a manner proportionate and congruent to the wrong it aims to redress or prevent); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235-37 (1995) (holding that race-based classifications in legislation are permissible only to remedy injuries traceable to identifiable wrongful and discriminatory acts by defendants). In a forthcoming article, Rebecca Brown argues that the right to liberty, overshadowed in the mid–twentieth century by the concept of equality, is now reemerging at the center of current constitutional jurisprudence. Rebecca L. Brown, *Liberty: The New Equality*, 77 N.Y.U. L. REV. (forthcoming Dec. 2002). The development she charts is in some sense the flip side of what I am describing, namely the reemergence of the individual qua rights-bearer and responsible agent as the focal point of modern thinking about justice.

14. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 55-56, 120-37 (facsimile ed. 1979) (1765-69).

exchange for the positive legal power to invoke the apparatus of the state to obtain legal redress from them.

Blackstone's understanding of tort appears to have remained the conventional wisdom on both sides of the Atlantic for the next hundred years. In the second half of the nineteenth century, however, a new champion for American tort law emerged in the person of Holmes. Holmes was the first modern theorist of tort.[15] As such, he

15. *See* Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1226 (2001). Grey's article makes three claims. First, he notes that nineteenth-century Anglo-American jurists disagreed on whether to treat "tort" as a department of substantive law unto itself, or as a part of civil procedure and/or remedies. *Id.* at 1226-27. Second, he maintains that Holmes was largely responsible for establishing tort's modern status as a substantive subject. *Id.* at 1227. Third, he argues that Holmes accomplished this task by building the category of tort around the emerging welter of accident cases. *Id.* Thus, Grey suggests that Holmes's achievement was to render tort law as co-extensive with accident law, thereby defining tort, in contrast to criminal law, as the department of law through which the state regulates and responds to the lesser form of antisocial conduct characteristic of accidents, namely fault (the failure to meet the objective reasonable person standard). *Id.* at 1256-58.

These historical claims hint at a fourth claim that is more normative than historical. On Grey's account, tort sports an unimpressive—*accidental*—pedigree. Moreover, its original and only claim to coherence is as a scheme for deterring accidents and compensating accident victims. Given tort's unimpressive lineage, and that we can now attend to the costs of accidents through arguably more rational systems of administrative regulation and insurance, Grey's analysis at least suggests that tort *deserves* to be treated as a second-class citizen among modern departments of law.

Grey's article is an important contribution to the history of tort law. However, it may give a misleading impression of what was at stake in the nineteenth-century debates, and of what Holmes had in mind.

Nineteenth-century disputes over whether tort was best described as remedial or substantive were not disputes about the purpose or usefulness of the tort causes of action. It was no slight to the actions for trespass and trespass on the case to describe them as part of procedural or remedial law. *See* BLACKSTONE, *supra* note 14, at 55-56 ("For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law."). Moreover, a somewhat different appreciation of the importance of remedial law was the foundation for Holmes's famous change of heart about tort's status as a subject. As Grey notes, in 1871, Holmes declared torts "not a proper subject" because it was merely a collection of remedial writs rather than a coherent body of law. Grey, *supra*, at 1232. Yet in 1873, Holmes published an essay entitled "The Theory of Torts." *Id.* What explains the change? The answer may lie in Holmes's increasing enchantment with the prediction theory of law, about which he first seems to have written in the intervening year of 1872. *See* OLIVER W. HOLMES, JR., *Book Notice*, 6 AM. L. REV. 723, 724 (1872), *reprinted in* FREDERIC R. KELLOGG, THE FORMATIVE ESSAYS OF JUSTICE HOLMES: THE MAKING OF AN AMERICAN LEGAL PHILOSOPHY 91, 92 (1984) ("The only question for the lawyer is, how will the judges act?").

In the 1873 essay, Holmes notes that the "worst" objection to treating torts as a subject is that to do so would be to put the "cart before the horse," and "the substantive under the adjective law." Oliver W. Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 652-54 (1873), *reprinted in* KELLOGG, *supra*, at 117-124. Why is this the "worst" objection? Because, under the prediction theory, remedy defines right. One can only know what the law *is* by knowing when one will be sanctioned by a court for one's conduct, and that in turn requires one to know when a claim of trespass or case will succeed. In short, those who identified torts as a subject were on the jurisprudential cutting edge: They understood that substance always reduces to remedy. *Id.* at

presided over its reorientation around the tort of negligence, as well as its corresponding elevation to the status of a major department of the law. (Admittedly, it is a bit of a stretch to describe Holmes as a lover of tort, for he seems not to have been a lover of anything or anyone. Let us say, then, that he mustered at least as much affection for tort as for anything else in his life.)[16]

From Holmes, the torch was passed next to members of the ensuing generation, including most prominently Francis Bohlen and Benjamin Cardozo. Both men devoted themselves to recrafting the common law of tort to better fit the new age of industrial and motorized vehicle accidents.[17] Cardozo, in particular, saw in the concepts and byways of the common law all the resources necessary to adapt Blackstone's law of private redress to the wrongs perpetrated by railroad owners, automobile drivers, and product manufacturers.[18]

Yet if tort continued to enjoy a certain buoyancy into the early years of the twentieth century, the seeds of its fall from grace were being planted at the same time. Even as Holmes was developing his theory of tort, tort law was being called upon to do something it had never been asked to do before: handle a major economic, social and political problem, namely the phenomenon of mechanized accidents,

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124-25 ("[A]n enumeration of the actions which have been successful, and of those which have failed, defines the extent of the primary duties imposed by the law . . . ."). Of course, in *The Common Law*, Holmes would go on to assert that, upon studying the various tort causes of action, one could induce tbat (almost) all of tbem turned on the same liability standard: objective fault. OLIVER W. HOLMES, JR., THE COMMON LAW 94-5 (1881). But that inductive claim was not a basis for distinguishing tort from other departments of law. Quite the opposite, Holmes in the same book asserted that criminal liability, like tort liability, also turned on the objective negligence standard. *Id.* at 51. Instead, he held to the (conventional) view that the primary difference between tort and crime is at the level of remedy. Criminal law sanctions unreasonable acts through punishment, whereas tort law sanctions actors by ordering them to compensate for harms caused by their unreasonable acts. *Id.* at 46, 79. (Also conventionally, Holmes distinguished contract as concerned with liability arising from voluntary undertakings, as opposed to those imposed by the state). *Id.* at 77.

This perspective on the nineteenth-century debates, and Holmes's contribution to them, removes much of the implicit normative sting of Grey's account. To the extent modern tort can trace its status as a freestanding department of the law to the work of Holmes, it is not rightly characterized as having been originally conceived as "mere" accident law, i.e., a primitive device fortuitously constructed by judges for deterring and redistributing the cost of accidents.

16. *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 48-49 (1977); *see also* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK AND LEGACY OF JUSTICE HOLMES 31-40 (2000) (suggesting that Holmes was self-absorbed, aloof, detached, uncharitable, and unhappy, albeit an excellent correspondent).

17. *See* George Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 465-68 (1985).

18. *See* John C. P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1455-74 (1999) (review article) (arguing that Cardozo elaborated, rather than deconstructed, tort concepts to adjust law pragmatically to changing economic and social conditions).

particularly workplace accidents.[19] In the eyes of many, tort failed this test quite miserably. Too many businesses employed shamelessly unsafe practices; too many maimed workers were left without redress; too many widows and orphans were left without support. At best, tort had proved itself unable to cope with the problems posed by a central feature of the industrial world. At worst, it was—as Charles Gregory and Morton Horwitz would later suggest[20]—a mere handmaiden of capital.[21]

Note how closely the widespread dissatisfaction with tort paralleled the simultaneously emerging general lawyerly and academic disposition against the jurisprudence of constitutional rights.[22] Just as tort failed to protect workers and their families, so, too, did constitutional law fail them by barring ameliorative legislation. The same sort of thinking that led judges to throw out causes of action under the fellow-servant rule simultaneously led them to strike down industrial reform legislation as violating the due process rights of employers. By observing this parallel, we can now better appreciate why the progressive lawyer-scholars of this era were probably less upset with *Lochner v. New York*[23] than with the New York Court of Appeals' 1911 decision in *Ives v. South Buffalo Railway Co.*,[24] in which the court partially struck down on due process grounds a workers' compensation scheme meant to replace the deficient law of negligence. *Ives* presented the apogee of anti-progressive law: regressive constitutional law invoked to protect regressive tort law.

For his part, Holmes, now sitting as a Supreme Court Justice, was not particularly fazed by the progressive critique of tort's handling of workplace accidents. Nor is this surprising, for not only did he hold tort in affection, but he also disliked progressives.[25] Thus,

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19. *See* John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First Party Insurance Movement*, 114 HARV. L. REV. 691, 726-66 (2001) (describing the pressure put on tort in the post–Civil War period by the rise of workplace accidents).

20. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 85-99 (1977); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 361-70 (1951).

21. My point is not that, once industrialization occurred, tort's individualized inquiry into wrongdoing and responsibility was rendered irrelevant. Rather, I am noting the contingent historical fact that industrial and mechanized accidents first posed the question of whether government should respond to accidents, or certain types of accidents, by supplementing or supplanting tort with an actuarially-based insurance scheme.

22. *See generally* John C. P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 147 U. PA. L. REV. 1733 (1998) (elaborating on this parallelism).

23. 198 U.S. 45, 58 (1905).

24. 94 N.E. 431 (N.Y. 1911).

25. *See supra* note 16 (referencing Gilmore's evaluation of Holmes).

he found himself in a potentially uncomfortable position when the *Arizona Employers' Liability Cases* came to the Court in 1919.[26] These cases posed at the federal level the same issue that *Ives* had presented at the state level: whether there is any constitutional bar to legislation partially supplanting the common law of negligence with a no-fault workers' compensation scheme. In his previous incarnation as lawyer-theorist, Holmes had invested a decade's worth of historical research and analytic argument to prove that the negligence standard is the only standard of liability compatible with liberal principles of government, and that strict liability ought to be eliminated as running counter to those principles.[27] Given this effort, and his disdain for progressivism, one might have predicted that Holmes would conclude that these principles, incorporated into the U.S. Constitution through the Due Process Clause, barred no-fault liability in workers' compensation. Yet here Holmes's commitment to "judicial restraint" trumped his commitment to tort. "There is some argument," he noted, "for the general proposition that immunity from liability when not in fault is a right inherent in free government . . . ." "But," he continued, "if it is thought to be public policy to put certain voluntary conduct at the peril of those pursuing it, whether in the interest of safety or upon economic or other grounds, I know of nothing to hinder."[28] In other words, the common law of negligence *is* the expression of liberal principles, and is to be admired for that, but if the legislatures want to go ahead and behave in the manner of mush-minded, illiberal redistributivists, that is their business.[29]

Bohlen and Cardozo, in contrast to Holmes, were more progressive in disposition. Yet, each was a bit complacent in thinking that the damage to tort's reputation flowing from its failure to handle industrial accidents could be contained.[30] Bohlen, in fact, helped lead the charge for replacement of tort in this area with workers' compensation schemes.[31] However, he did so only on the understanding that this was the one necessary exception to the

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26. 250 U.S. 400 (1919).

27. *See* Goldberg & Zipursky, *supra* note 22, at 1753-56 (outlining Holmes's liberal tbeory of tort).

28. 250 U.S. at 431-32 (Holmes, J., concurring).

29. I do not mean to imply that Holmes was wrong or inconsistent in adopting this position on the issue of workers' compensation. To love tort is not to idealize or idolize it, but to recognize that it brings something distinctive to the table, and hence ought not to be cast aside without a clear-eyed view of what is being lost and gained by replacing it.

30. *See* Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 378 (1939) (noting that Cardozo was content to work within, rather than question, the common-law tort paradigm).

31. *See* Priest, *supra* note 17, at 466-67 (offering this account of Bohlen).

otherwise still coherent and admirably useful common law of tort. The leading scholars of the next generation would conclude otherwise.

II.

The period from roughly 1930 to 1970 saw the emergence for the first time of an extended community of professional tort scholars and, with it, the establishment of two main lines of tort scholarship. Both, I will suggest, drank deeply of the progressive critique of tort. As a result, both demonstrated unlove for tort, although in very different ways.

This claim is easiest to establish with respect to the first line of scholars, which included the likes of Fleming James and Albert Ehrenzweig, because these scholars explicitly condemned tort.[32] The lesson they took from tort's sorry record in handling workplace accidents was simple: Tort is slow, expensive, and arbitrary in doling out needed relief to victims, who were usually blue-collar workers and their families. The same would hold true for tort applied to any large-scale phenomenon, including automobile accidents and the production and distribution of consumer products. For these scholars, there was no reason for tort to govern any area of accident law and every reason to get rid of it. And so it was that tort became unloved in the eyes of one group of leading scholars in the field, a group whose latter-day descendants include such distinguished scholars as Mark Franklin and Jeffrey O'Connell.[33]

The second line of torts scholarship that emerged in this era was led by the decanal duo of Leon Green and William Prosser.[34] Here my claim will take more work to establish. Prosser, after all, made it his life's work to advise lawyers and the judiciary—through his

32. *Id.* at 470-83 (providing the classic account of James's critique of tort); *see also* WALTER J. BLUM & HARRY KALVEN, JR., PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS 3-8 (1965) (identifying numerous compensation theorists critical of tort's handling of auto accidents).

33. Judge (then-Professor) Calabresi, heir in some ways to the Jamesian tradition, briefly entertained the idea that tort might be worthy of his attentions. He fairly quickly concluded, however, that he could never love a body of law so fixated on the backward-looking issue of causation and so inattentive to the forward-looking issue of efficient deterrence. *See* Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 85 (1975). It remains to be seen whether, as a judge, he will sculpt tort into the sort of efficient regime of accident deterrence that he could love. *See* Liriano v. Hobart Corp., 170 F.3d 264, 271-72 (2d Cir. 1999) (Calabresi, J.) (holding that the plaintiff in a failure-to-warn case need not prove that the warning would have caused him not to be injured).

34. *See generally* LEON GREEN, THE LITIGATION PROCESS IN TORT LAW (1st ed. 1965) (collected writings on tort); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (1st ed. 1941) (torts treatise).

treatise, his casebook, and his *Restatement*—that tort could be modernized to handle new problems and new policies. If this commitment does not count for love of a department of the law, what does?

Yet Prosser, Green, and their intellectual heirs never loved tort law for what it is. They loved it only for the power it creates: not only power in judges and juries, but also power in the armchair policymakers (law professors) who would advise them. In other words, they were fully prepared to exploit tort law, but exploitation is surely not to be mistaken for love. To take up with tort was to marry into power and gain the ear of princes.

The fundamental virtue of tort for Prosser, Green, and their intellectual descendants is not its content—indeed, as we will see, it was vital to them that tort have minimal content—but rather its ability to confer jurisdiction. The tort of negligence, in particular, presented itself to them as a golden ticket, a blank check. Lots of behavior, they realized, might be described as negligent, particularly, in hindsight, after someone's been hurt. This realization not only stemmed from the tractability of the concepts of fault and reasonableness, but also was predicated upon an important fact about American political culture, which is that we simply do not cotton to notions of fate. To us, every accident has an explanation, every bad outcome a responsible party. Europeans and other strange peoples might think in terms of systemic failures and unavoidable accidents. Not so for us.

So negligence was there, waiting in the wings, ready to vest judges and juries with jurisdiction to address all manner of social problems. Yet its reach remained bounded by a set of restraining concepts under which judges—even progressive judges like Cardozo—continued to operate: concepts such as duty, reasonableness, proximate causation, and contributory negligence. And so, invoking the mantra of "Realism," Prosser and Green proceeded to gut each of these restraining concepts of their content. By the mid-1950s, the project was well under way. Thus, in his famous Cooley lectures, Prosser brazenly declared that "the law [of negligence], "like the Constitution, is what we make it."[35] (Note the complicity between scholar and judges implicit in this use of "we"!) Breach and proximate cause, Green had already concluded, are what "we" say they are.[36]

35. William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953).

36. LEON GREEN, RATIONALE OF PROXIMATE CAUSE 195-201 (1927) (arguing that the inquiry often conducted under the guise of "proximate cause" is a policy determination to be made by judges as to whether liability should or should not attach in a given instance of harm-

Tort law is not a substantive body of law, he concluded, but merely a process of decisionmaking.[37]

Emptied of content and potentially applicable to all manner of conduct, the new negligence provided judges, juries, and law professors with a mandate to undertake de novo "social engineering."[38] The hope was that, having been freed of the conceptual constraints that once caused them to render pro-capital, anti-plaintiff decisions, these actors would set about reforming and expanding tort in a decidedly progressive direction. Tort, according to this view, would play an analogous role to the post–New Deal, pre-*Lopez* Commerce Clause, which empowered Congress to enact pretty much any legislation for which two majorities and a presidential signature could be mustered.[39] Negligence suits were no longer to be understood as "cases or controversies" raising Blackstone's issues of responsibility and redress. Rather, they provide *occasions* for judges and juries to legislate or regulate. This observation is the upshot of Green's claim that tort law is "public law in disguise."[40]

The Prosser-Green vision has, of course, predominated. For a contemporary example, consider the argument of Professors Koenig and Rustad in a recent book, somewhat ironically entitled *In Defense of Tort Law*.[41] Tort law, they note, is nominally a system for providing redress to those injured by the wrongs of others. But that is not the basis on which it is to be defended. Rather, it is to be defended for its "latent" public policy function, namely, "furthering the cause of social justice" by uncovering and punishing corporate misconduct.[42] In short, tort law is embraced not for what it is, but for what it empowers judges and juries and right-thinking legal policy analysts to do.

In describing Prosserians and Greenians as exploiters of tort law, I do not mean to suggest that their work was or is without virtues. Prosser, Green, and their heirs have contributed mightily to the advancement of the law.[43] And each of them sincerely believed or

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producing conduct); Leon Green, *The Negligence Issue*, 37 YALE L.J. 1029, 1032, 1044 (1928) (arguing that breach or unreasonableness is what a given jury says it is).

37. *See* GREEN, *supra* note 34.

38. PROSSER, *supra* note 34, § 3, at 15 (title of third section of hornbook).

39. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-4, at 816 (3d ed. 2000) (describing the breadth of the commerce power).

40. Leon Green, *Tort Law Public Law in Disguise* (Parts I & II), 38 TEX. L. REV. 1, 257 (1959 & 1960).

41. See KOENIG AND RUSTAD, *supra* note 9. Perhaps a better title would have been *The Political Usefulness of Tort Law*.

42. *Id.* at 2.

43. Thus, the California Supreme Court, liberated by Prosserian Realism, modernized many antiquated doctrines pertaining to social-host liability, charitable immunity, etc. *See, e.g.*,

believes that judges and juries ought to use the power conferred by negligence to legislate wisely, in the name of public policy and the public good. The problem with which I am concerned is instead that their conception of negligence qua enabling act has presented judges and juries with power largely unbounded by legal or institutional constraints. Of course, each of these scholars desires and expects judges and juries to use this power wisely, and they have tirelessly advised them how to do so. But in this, the Prosserians are not wholly dissimilar to the Divine Right theorists of the early seventeenth century—the ones who argued with sincerity that James the First's possession of absolute power should be of no great concern to the citizenry, as he would of course be mindful of the common good in his decisionmaking.[44]

Finally, lest the foregoing statements be taken for an attack on the liberal *politics* of Koenig and Rustad (or Green and Prosser), let me be clear in disavowing that claim. The present meditation on love and torts should not be misconstrued as an "Ode to Tort Reform." I could just as easily level the criticism of Prosser at a conservative Realist such as Judge Posner. Posner, no less than Prosser—in fact more so, because he is a judge–exploits tort for its jurisdiction, not its content. If, for Koenig and Rustad, the great thing about tort is that it permits judges and juries to adopt the role of unappointed corporate ombudsmen, for Posner the great thing about tort is that it permits judges to act as roving efficiency commissioners charged with the task of identifying and achieving the cost-efficient mix of precaution and injury.[45] In fact, one of the great ironies of Koenig and Rustad's "defense" of tort law is that it plays directly into the hands of the tort reformers whose cause they seek to defeat. Victor Schwartz, a lawyer at the forefront of the modern movement to kill, or at least

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Rowland v. Christian, 443 P.2d 561, 563-68 (Cal. 1968) (in bank) (employing Prosserian-duty analysis to eliminate traditional plaintiff status categories in premises liability cases). This is not, however, to say that Prosserian Realism was necessary to the introduction of those changes, or even the best way to achieve them—simply that it did so.

44. *See* J. P. SOMMERVILLE, ROYALISTS AND PATRIOTS: POLITICS AND IDEOLOGY IN ENGLAND 1603-1640 39 (2d ed. 1999) (noting that theorists of absolutism argued that the King's extralegal obligations to God and his people would suffice to restrain him from tyrannical acts).

45. I take this to be the clear implication of Posner's rejection of the idea that law and moral principles constrain adjudication, his corresponding overt embrace of open-ended, policy-based judicial decisionmaking, and his belief that aggregate efficiency is, at a minimum, the prime policy consideration to which he (and presumably other judges) attends and should attend. *See* Larissa MacFarquhar, *The Bench Burner*, NEW YORKER, Dec. 10, 2001, at 78, 88-89 (describing Posner's disbelief in the existence of legal and moral constraints on judges' decisions); Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 99, 103-11 (D. Owen ed., 1995) (arguing that persons of otherwise divergent views can subscribe to an account of tort law as promoting wealth-maximization).

substantially curtail, tort—a movement with very different aspirations than the kill-tort movement of the early twentieth century—is only too delighted to argue about the worth of tort as an instrument for social engineering.[46] If that is all it is good for, then it is hard to gainsay his point that democratically elected legislatures and expert regulators should be permitted to reengineer the world to make it safer for corporate America.[47]

III.

Tort law, I have suggested, is not at all loved by compensation theorists such as Fleming James or Jeffrey O'Connell, who have steadily called for its elimination in favor of no-fault schemes. Nor is it loved by mainstream Prosserian Realists, who value tort only in a calculating way. Still, there is another major camp of tort scholars that we must consider, namely the corrective justice theorists. And here we will eventually wend our way to Weinrib and his claim that tort law is "just like love." Before doing so, however, we may profitably pause to note the views of two other scholars who have been affiliated with the corrective justice camp, Richard Epstein and Jules Coleman.

In the early 1970s, Epstein emerged as, in some respects, the leading suitor of tort. At a time when automobile no-fault schemes and strict products liability seemed to be pointing toward the eventual replacement of tort with a New Zealand–style accident fund, Epstein boldly proclaimed that tort law could and should be defended for articulating, through law, moral notions of individual liberty and responsibility reflected in everyday usage of the concept of causation.[48] In this regard, he seemed poised to take on the mantle of Harry Kalven, Jr., an earlier corrective justice theorist, and one of the authors of the casebook Epstein would later inherit.[49]

Alas, Epstein's love of tort never really blossomed because, from the outset, he placed on it the most stringent demands as a condition of it receiving his affections. First, tort had to relinquish its

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46. *See, e.g.*, Victor E. Schwartz & Mark A. Behrens, *Federal Product Liability Reform in 1997: History and Public Policy Support Its Enactment Now*, 64 TENN. L. REV. 595 (1997).

47. *See* John C. P. Goldberg & Benjamin C. Zipursky, The Restatement (Third) *and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 732-36 (2001) (noting that being a Realist these days may play into the hands of tort reformers).

48. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 166-89, 200-04 (1973).

49. *See* CHARLES O. GREGORY & HARRY KALVEN, JR., CASES AND MATERIALS ON TORTS (2d ed. 1969); BLUM & KALVEN, *supra* note 32, at 56 (suggesting that tort is concerned with "corrective" rather than distributive justice). Epstein joined as a coauthor on the third edition in 1974. *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS xxv (7th ed. 2000).

favorite modern pastime—negligence.[50] If tort was to live up to Epstein's ideals, it had to come in the form of strict liability, for only strict liability expressed the notions of causation and responsibility that Epstein found embedded in our ordinary language. Second, and somewhat gallingly, tort could earn his affection only by dressing up as its older sibling, property, for property is what tells us when a bad outcome must be transferred, via a compensatory payment, from victim to tortfeasor.[51] Third, and more gallingly, tort had to know its proper place. Specifically, it was required to lie low whenever contract might be at hand to set the terms of the relationship between the parties.[52]

Professor Coleman's intellectual journey in the field of corrective justice is revealing in a different way. His initial project was to explain why a New Zealand–style system—in which general revenues pay for an injury fund from which accident victims can receive payment without identifying a responsible tortfeasor—was no more or less an instantiation of justice than a system of tort liability. Each system, he argued, was compatible with an "annulment" conception of corrective justice.[53] Soon, however, Coleman reversed course, coming to the view that a New Zealand system would not be faithful to the idea of corrective justice, precisely because it does not attempt to assign responsibility to individual wrongdoers to repair their wrongs.[54]

One might have expected Coleman's conclusion that tort law enjoys a unique status as a practice of corrective justice to entail a corresponding embrace of that practice. Yet Coleman still maintains a cool distance, although in a different way than in his earlier work. True, tort is more or less intelligible as a system that embodies the principle of corrective justice. But that does not mean that corrective justice is the sort of value, or tort the sort of system, we want to endorse. Maybe we should employ the New Zealand system after all: not because it achieves corrective justice, but because it might be the

50. *See* Epstein, *supra* note 48 (arguing for a regime of strict liability).

51. *See* Jules L. Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91, 102 (1995) (analyzing the central role within libertarian tort theory played by the idea of actors "owning" good and bad outcomes).

52. *See* Richard A. Epstein, *The Economics of Tort Law: A Hurried and Partial Overview*, 10 KAN. J.L. & PUB. POL'Y 60, 72 (2000) (urging judges presiding over tort suits to ask themselves, "Why isn't this a freedom of contract issue?").

53. Jules L. Coleman, *Tort Law and the Demands of Correetive Justice*, 67 IND. L.J. 349 365-66 (1992).

54. Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 437-38 (1992).

case that our legal system would be better if it never aspired to achieve corrective justice.[55]

My point is not to accuse Coleman of inconsistency. One can argue for a particular understanding of an area of law such as tort without being committed to justifying it. Rather, it is to note that the later Coleman, armed with a deep and subtle appreciation of tort as a practice tied to a conception of justice, is no less anxious than the early Coleman to avoid embracing tort. Even as he now gingerly embraces tort, Coleman is looking past it, eyeing New Zealand, wondering whether we ought to be there instead.

And so back to Weinrib. As we have seen, he adopts a position not wholly removed from Coleman's, although I will try to show now that it is different in an important way. Tort law, he says, is just like love. It is just like love because it is not to be understood for what it does, only for what it is. What sort of attitude toward tort does this claim bespeak?

Weinrib's analogy might suggest a Platonic argument for tort. In this argument, there is no point to considering whether or not one might choose to love tort; it is no less inevitable as part of the human experience than gravity, or respiration, or . . . well . . . love. If, on this reading of Weinrib, we were to personify tort law and ask it to justify itself, its response might come from the pages of Exodus: ***"I am that I am."***[56]

I doubt this sort of divine proclamation is what Weinrib has in mind. In his view, if tort law personified were to declare its existence, it would not invoke the overtones of omnipotence and inevitability that attend the word of the Deity. Instead, it would sound more in the blue-collar parlance of Popeye: "*I y'am what I y'am*," meaning, roughly, "This is who I am, this is what I do." Tort law is a practice. It need not exist. But it does exist, and its existence is best described in terms of the features that render it an intelligible or coherent practice.

Suppose we grant that Weinrib is correct—as I think he is—to argue that tort law is, or once was, a relatively coherent practice, and that modern scholars have misunderstood tort by seeking to reduce its content to the functions of deterrence and compensation. Does it follow that there is nothing else to be said about tort law other than it holds together as a practice that we happen to heed? Could we not say instead that an adequate "formalist" understanding of the general

55. Most recently, Coleman seems to suggest that corrective justice comes near to collapsing into distributive justice, in that it assigns duties to repair according to political principles that set out to fairly distribute all the losses traceable to buman conduct. See JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE 52-53 (2002).

56. *Exodus* 3:13-14.

coherence of tort is a necessary first step to a broader, more comprehensive analysis of tort? To trot out a deservedly well-worn Holmesian aphorism, Weinrib may be entirely correct to argue that sound legal analysis must begin by "getting the dragon out of the cave," and that doing so requires formal analysis. However, once we have roused the beast with our analytic poking, is it not incumbent upon us to take up Holmes's second question: whether to tame or kill it?[57]

Weinrib, in fact, seems reluctant to pose the second prong of Holmes's two-part analysis. Perhaps he hesitates because he is satisfied with the institution of tort law, so much so that he does not see the point in questioning it. I doubt that; after all, he has published an important article criticizing the common law's lack of a general duty to take steps to effect easy rescues.[58] Alternatively, his quiescence may flow from a particular conception of the judicial role. It may be that, in the end, what he is saying (here in direct opposition to Prosser and Posner) is that *judges* are not authorized to do anything other than understand and apply tort law as it is.[59] On this reading, it is judges, and only judges, who must view tort like love, for contained within their contract of employment (or implicit in the definition of their office) is a commitment to apply the law rather than legislate. By contrast, legislatures and legal scholars need not accept the tort-love analogy, for they are not so bound. Weinrib's view of how to understand tort would then perhaps better be described not as formalism but as a cousin of Austinian positivism: one that conceives of the judicial role as confined to following rules made by others.

Whatever its explanation, the point I wish to emphasize is that Weinrib, in a manner not unlike Coleman, seems reticent about tort. He asks us to think of tort as love, but does he love tort? Clearly, he does not despise tort. Nor is he a calculating exploiter of tort. Nor does he treat tort as the poor relation of property and contract. Nor is he intrigued but unsure of his feelings toward tort. Indeed, Weinrib seems quite steadfast in his faith in tort.

Still, it is a faith fueled more by fatalism than fervor.[60] Just as one is born a Jew or a Protestant, or born a Canadian or an American, so one is born into the common-law system and the law of tort. Each of us might have been born into a different religion, or in a different country; we might even have chosen these different fates if given the

57. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

58. Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

59. I owe this speculation to Ben Zipursky.

60. I owe this characterization to Tony Sebok.

option. But we were not given that option and now there is nothing to be done. (True, one can later opt to change religions or nationalities, but it is not clear that doing so will rid oneself of various characteristics connected with one's original identity.) Tort and its underlying principle of corrective justice are ours; we are stuck with them, and we are left to explain and understand them.

Weinrib's earnest fidelity to "our" tort law is powerful, almost moving. But, still, I insist, it is not love. It is not love precisely because of its fatalistic undertones. Weinrib says that we must attend to corrective justice because we are who we are; we can do no other. In so saying, he fails to capture the ineliminable aspirational aspect of love. One cannot love something that one does not respect, admire, or embrace, at least a little bit. A person or thing must contain at least a shadow or flickering of the good before it can become the object of our affection. It is not enough that he, she, or it is simply ours.

The ideal of justice is the highest aim of any legal system. Thus, it is no accident that we find that aspiration etched into the marble of the U.S. Supreme Court, and on the facades of scores of American law schools. Weinrib, like Coleman, believes that tort law embodies a conception of corrective justice. But that belief is carefully expressed to be devoid of aspiration. So, I am led to ask: What sort of justice is it that provokes so much reticence, so little enthusiasm? Not, I submit, a form of justice that we love.

CONCLUSION

Generally among legal academics, tort law has been and is disdained or exploited. Even those who might seem most inclined to express love for tort turn out to hold it at arm's length, uncertain of whether to embrace it or to endure it. Is there any other department of the law subject to similar treatment at the hands of those who study it? Are professors of contracts, or criminal law, or corporate law similarly hostile or indifferent to their subject areas? My impression is that they are not. To be sure, scholars in all fields make it their business to point out the anomalies and dis-functionalities in the law.[61] But are they busy disavowing their subjects generally? Do they routinely entertain seriously the suggestion that contract, or criminal, or corporate, or constitutional law ought not to exist?

What is it about tort that makes us, at a minimum, discomfited? Does it still smack too much of crude vengeance? As a

61. Some scholars are unlovers of law, i.e., globally skeptical about 'substantive' law, compared to the 'real' subjects of jurisdiction, process, and remedies. As these scholars have no less love for tort than for criminal or constitutional law, I leave them to one side.

subject, is it too grim, or too preposterous? My supposition is that modern tort has become awkward for at least three reasons. First, we have asked too much of it. As scholars too numerous to mention have long noted, tort law is not well-suited to solve the large-scale social and political problems it is being asked to solve (if only by default).[62] The tort system, for example, is not a social insurance scheme, and if it is the case that a wealthy society ought to have such a scheme as a matter of justice, then we should adopt that scheme independently of the tort system.[63] Second, and relatedly, modern academics have tended to gauge tort on a set of rigged criteria. Since Holmes's time, pretty much the only question asked of tort has been: How well does it deliver tangible goods such as a reduction in the number of accidents or an increase in the number of injuries for which victims receive compensation? By fiat, this question excludes consideration of the intangibles that tort can deliver, such as the vindication of rights, redress of wrongs, and an articulation of notions of responsibility.[64] Third, academics have sucked much of the law out of tort, leaving institutional actors, particularly judges, with a diminished sense of professional self when confronting tort suits. Many judges seem to view tort cases as presenting a simple, non-law-governed choice: permit the jury to do "flabby equit[y],"[65] or deny liability as a matter of law in the name of "public policy."

Intellectual history suggests that the respective status of law's various subdisciplines wax and wane. About seventy-five years ago, scholars clamored for the "Death of Contract."[66] Of all things, they

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62. That is, at least not without the help of an army of superhuman judges. *See* John C. P. Goldberg, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2062-63 (1997) (identifying one such judge).

63. This last comment is arguably a species of academic NIMBY-ism, whereby a writer working in a particular area says: "By all means the legal system should be designed to attend to worthy goals such as distributive justice, just not *my* branch of the legal system." I suspect one can find equivalent statements by scholars in most law departments. Having attacked myself, let me defend by suggesting that, while the tort system can serve to provide sporadic advances toward distributive justice, this sort of "ad hoc-ery" generates hostility not only to tort (hence modern tort reform), but to the perceived beneficiaries of the tort system, i.e., the persons who stand to benefit from a more above-the-board system of redistribution. Of course, if one is persuaded that the choice is random redistribution through tort or no redistribution at all, then the ad hoc solution looks more attractive.

64. My point is not that these tangibles are undesirable goals, nor that the tort system's attainment of those goals provides no value. Rather, it is that an evaluation of the tort system exclusively in terms of those goals is one-sided, and thus fails to account for important social goods that tort may actually deliver.

65. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 615 (1908).

66. *See generally* GRANT GILMORE, THE DEATH OF CONTRACT (1974) (arguing that contract ought to collapse into tort by adopting the guiding principle of restoring the injured to the status quo ante).

fervently hoped that contract would give way to . . . tort! That particular scholarly campaign, of course, was a spectacular failure. Contract is more important and more valued today than at any time since the late nineteenth century. Perhaps one day the present hostility and suspicion of tort will subside, and scholars will once again embrace a body of law that has long empowered individuals and preserved civil society by providing them an avenue for peacefully seeking redress from those who can fairly be held responsible, under law, for having wronged them.

For that to happen, however, we may need to ask less, yet expect more, of tort. In particular, we may have to wean ourselves from the habit of treating tort as a means of devising ad hoc solutions to perceived social ills. By this I do not mean to say that tort ought not to address contemporary problems—it does and it should. Rather, I am suggesting that we must recapture the idea that tort cases are concerned with the focused task of identifying and remedying instances in which an actor has wronged another, as opposed to providing localized compensation or insurance schemes, regulating antisocial conduct for the good of society, or the like. Relatedly, we will have to recapture a sense of tort as a body of law, rather than as an occasion for doing whatever seems right or practical at the time. Perhaps then tort could regain our love, or at least a grudging recognition of its worth.

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