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By G. Edward White[*]

I. INTRODUCTION

In *Tort Law in America: An Intellectual History*, I made the general argument that the development of tort law in the nineteenth and twentieth centuries had been more influenced by ideas

* University Professor, John Barbee Minor Professor of Law and History, and Class of 1963 Research Professor, University of Virginia. My thanks to Kenneth Abraham and Robert B. Williams for their comments on earlier drafts.

than previous scholars had suggested.[1] In making that argument I employed the terms "ideas" and "influence" at multiple levels of generality. The argument would perhaps have been better understood if I had more clearly particularized the specificity and generality of my claims about ideas as causal agents.[2]

At the most specific level, I employed the term "ideas" to refer to particular doctrinal and policy proposals for tort law advanced by particular scholars and judges. Examples would be the "vice principal" doctrine,[3] or the doctrine of "last clear chance,"[4] or proposals for a system of workmen's compensation governing certain types of industrial accidents.[5] On a more general level, I used the term "ideas" to describe the starting presuppositions about the purposes and goals of the American tort system that drove those proposals, such as the idea that the primary purpose of tort law should be to compensate injured persons, or the competing idea that its primary purpose should be to deter or to punish risky conduct.[6]

At a still higher level of abstraction, I used the term "ideas" to refer to broad conceptions of law, as embodied in competing jurisprudential "schools" that surfaced in the American legal profession in the late nineteenth and twentieth centuries. Examples of those "schools" include what I called "conceptualism," which treated law as the embodiment of universal principles of civil conduct represented in the concepts that were embedded in legal doctrines; "realism," which equated law with the current doctrines and policies that courts believed had the greatest functional efficacy; and "neoconceptualism," which revived an image of law, including tort law, as ordered by comprehensive principles, the source of which was no longer immanent universal truths but general insights about human behavior drawn from other scholarly disciplines.

Finally, I used the term "ideas" to refer to changing perceptions of the sources of human knowledge in the nineteenth and twentieth centuries, a span of time in which human-oriented mod-

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1. *See generally* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980).

2. Some reviewers of *Tort Law in America* suggested that I was advancing a deterministic view of the influence on ideas, in which no particular set of ideas could hope to transcend its particular historical context, while others suggested that my methodology was "idealist," privileging ideas over material factors as significant causal factors in history. *See, e.g.*, Jay M. Feinman, *The Role of Ideas in Legal History*, 78 MICH. L. REV. 722 (1980); Peter R. Teachout, Book Review, 67 VA. L. REV. 815 (1981).

3. WHITE, *supra* note 1, at 51-55.

4. *Id.* at 45-50.

5. *Id.* at 38.

6. *Id.* at 147-53, 237-39.

els for explaining and controlling change in the natural and social worlds, centering on forms of scientific inquiry, replaced externally-oriented models, centered on religious, natural, or historical forces.[7]

My different uses of the term "ideas" were not accompanied by an explicit theory of the causal relationships among the sets of ideas I described. Instead I drew the general conclusion that all of those sets of ideas "influenced" the course of tort law in nineteenth- and twentieth-century America. I continue to agree with that conclusion, but in this Essay, which surveys developments in tort law in the last two decades of the twentieth century, I want to particularize what I mean by ideas and their influence.

The sets of ideas I described in *Tort Law in America* can be thought of as causally connected, and their relative specificity and generality can be taken as signaling their place in a hierarchy of causal influence. The more general and abstract the ideas, the greater causal force they have. This causal hierarchy may seem problematic because the most easily discernable examples of ideas altering the course of tort law involve ideas in their most specific manifestations, doctrines and policies embodied in judicial or legislative decisions. But although this evidence of influence can readily be traced, it cannot be explained without resort to inquiries that involve higher levels of abstraction. In asking *why* a particular doctrinal or policy change seemed attractive to scholars, courts, and legislatures, we turn to larger ideas: starting presuppositions about the purposes of tort law driving those changes, conceptions of law animating those starting presuppositions, and, ultimately, assumptions about how humans make sense of their experience and of law as a mechanism for human-directed governance of that experience.

At this point, at a level of abstraction where the *Palsgraf* case comes to be seen as an illustration of altered theories of causal agency in the universe,[8] some may think the term "ideas" has be-

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7. *Id.* at 23-26, 238-39.

8. One could see both the majority and dissenting opinions in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928), as reflecting an altered view of the methodology for determining legal responsibility in cases where the issue involves a causal connection between negligent conduct and injury. Both opinions jettison the physical model of "proximate causation," based on an external, relatively fixed conception of "remote" and "proximate" physical propinquity, derived from the natural world, for a legal model, to be administered by human judges and juries. In Cardozo's majority opinion, physical "proximate cause" cases become "duty" cases, with "duty" to be determined by the judge or jury's weighing of the risks of a defendant's conduct and the relationship between that defendant and an injured plaintiff. *See id.* at 99-101. In Andrews' dissent "proximate cause" becomes "legal cause," an issue of legal policy. *See id.* at 101-15 (Andrews, J., dissenting). Physically derived models of causation, for Andrews, can not be definitively determined because casual connections are potentially infinite: humans charged with making decisions in legal cases simply have to draw lines. *Cf.* WHITE, *supra* note 1, at 96-101.

come too all-encompassing to be helpful. It may seem more satisfying, if one is interested in the influence of ideas on tort law, carefully to compare, say, the arguments for strict liability in defective products assembled in Prosser's 1941 treatise with those advanced by Traynor in his concurrence in *Escola v. Coca Cola.*[9] But ultimately, in investigating Prosser's influence on Traynor, one needs to determine why Prosser was himself attracted to strict liability; why his arguments resonated with Traynor; why they both thought strict liability superior, in some respects, to negligence in the products liability area; why they thought judges were appropriate persons to change products liability rules; why tort law was generally taken to be a good mechanism for compensating persons injured by defective products; why such persons were taken as deserving of compensation; and why humans were regarded as capable of redressing fortuitous injuries to other humans caused by unforeseeable defects in products placed on the market.

In the interest of sparing readers too much detail and too much abstraction, I will not be making an extended investigation of each of the sets of ideas potentially implicated in developments in tort law between 1980 and 2000. But my survey reflects the above particularization of my general arguments about ideas and their influence on tort law in two respects.

First, I have treated trends in academic theory and doctrinal trends as parallel developments, rather than searching for evidence of the specific influence of scholars on courts. This is not just because, as we will see, the kind of academic-judicial symbiosis illustrated by Prosser and Traynor has been much rarer in the late twentieth century. It is also because demonstrating that a judicial decision drew upon a work of scholarship only begins the process of determining influence.

Second, I have looked beyond particular parallels between scholarship and doctrine towards larger trends in the history of legal education, and in late twentieth-century American culture generally, which might help explain the parallels. In the process of broadening the search for explanations of parallel trends, I have asked not just what ideas were accepted but what ideas were implicitly rejected, and what doctrinal and policy choices were not made. The defining jurisprudential tendency in tort law in the last twenty years of the twentieth century, I conclude, has been the per-

9. *See* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-45 (Cal. 1944) (Traynor, J., concurring); WHITE, *supra* note 1, at 198-200.

sistence of negligence theory and doctrine. The persistence of a negligence-based model of tort liability has been reflected not only in judicial decisions, but also in the congeniality of that model with the dominant academic theories of the period, welfare economics and corrective justice. In seeking to explain this tendency I have asked what starting assumptions the negligence-based model shares with those theories as well as what alternative assumptions have been rejected in the persistence of a negligence-centered tort regime. Finally, I have sought to explain why I find the tendency unexpected.

In my judgment, the influence of ideas on tort law in the last two decades is not as readily illustrated by specific comparisons between scholarly writings and judicial opinions as in some of the earlier periods I examined in *Tort Law in America*. In part, this may simply be a product of altered definitions of the enterprise of legal scholarship, which have moved scholars away from earlier generations' preoccupation with doctrinal analysis and synthesis. But it may also be because the question of scholarly influence on doctrinal developments is more complicated than linear comparisons between academic writing and judicial opinions might suggest. Thus, this survey does not undertake detailed comparisons of particular academic writings with particular judicial decisions, and its conclusions about influence may appear to verge on the metaphysical. But its emphasis on the future foreseen in the 1970s, the future that did not happen, is designed to suggest that if one broadens the history of late twentieth-century tort law to include prospective academic and doctrinal developments that were widely anticipated but did not occur, one gets a powerful sense that the parallel developments that *did* occur, even though unexpected, were destined to take place. They were destined to take place because Americans, collectively if not universally, changed the direction of their thinking about government, free markets, and the role of risk and injury in the late twentieth century. The negligence model unexpectedly persisted in tort law because one set of connected ideas about those subjects came to appear more attractive than another set.

II. DEVELOPMENTS IN TORT LAW, 1980-2000

A. Trends in Academic Theory

The direction of torts scholarship in the last two decades of the twentieth century can be placed in bold relief if one recalls what a member of the community of torts scholars in the 1970s might

have predicted as the theoretical and doctrinal course of tort law for the rest of the century. That scholar's predictions would have been affected by three elements of his or her context. One element would have been an awareness of the strong tradition among torts scholars and scholars in other fields of law which associated influential legal scholarship with syntheses of existing doctrinal developments, accompanied by proposals for "law reform," implicitly defined as the reorganization of doctrine to conform to particular policy imperatives. That scholar would have been aware that the most visible torts scholars of the last thirty years—Leon Green, Fleming James, Page and Robert Keeton, John Wade, and most conspicuously William Prosser—had engaged in that form of scholarship.[10]

Second, the hypothetical torts scholar would have been aware of the emergence, in a period stretching from the 1940s through the 1960s, of theories of tort liability based on alternatives to the negligence model. Those theories had produced legislation replacing traditional tort liability with a system of workmen's compensation for job-related injuries in some industries, academic literature[11] and judicial decisions endorsing "strict" (non fault-based) tort liability for abnormally dangerous activities and defective products,[12] and proposals for "no-fault" automobile accident compensation.[13] A recent article has characterized these theories as propounding a model of "enterprise liability" for injuries, in which certain enterprises or industries engaged in risky activities, or the manufacture, design, or distribution of risky products, should be assessed the primary costs of injuries associated with their conduct,

10. *See, e.g.*, FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS (1956); LEON GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE (1958); LEON GREEN ET AL., CASES ON THE LAW OF TORTS (1957); ROBERT E. KEETON, COMPENSATION SYSTEMS: THE SEARCH FOR A VIABLE ALTERNATIVE TO NEGLIGENCE LAW (1969); WILLIAM L. PROSSER & JOHN W. WADE, CASES AND MATERIALS ON TORTS (1971); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (1941); WARREN A. SEAVEY, PAGE KEETON, & ROBERT E. KEETON, CASES AND MATERIALS ON THE LAW OF TORTS (1957).

11. *See, e.g.*, ALBERT A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951), *reprinted in* 54 CAL. L. REV. 1422 (1966); Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 COLUM. L. REV. 408 (1959); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

12. *See, e.g.*, Elmore v. Am. Motors Corp., 451 P.2d 84 (Cal. 1969); Vandermark v. Ford Motor Co., 391 P.2d 168 (Cal. 1964); Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1963).

13. *See, e.g.*, ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965) (arguing for the establishment of a no-fault automobile insurance scheme).

regardless of whether the injuries were related to their negligence.[14]

Finally, a scholar asked in the 1970s to predict the future course of tort law would have been aware of emerging literature which sought to assess both traditional negligence-based tort liability and enterprise liability from the perspectives of economics and moral philosophy. Among the questions that literature addressed was whether negligence-based or enterprise-liability based systems were more effective in creating general or specific incentives to reduce the costs of accidents,[15] whether, on the whole, they resulted in efficient allocations of the risks of injury-creating conduct,[16] and whether they comported with principles of corrective justice.[17]

Taken together, those features of academic scholarship in the 1970s would have led most predictors to anticipate that the forthcoming decades would witness the growing prominence of enterprise-based theories of tort liability. There was evidence that courts were developing enterprise liability doctrines.[18] Torts scholars might have been expected to continue their concern with doctrinal synthesis and reorganization, and leading scholars had already endorsed enterprise liability in some areas of tort law.[19] Other scholars had become advocates for no-fault compensation plans.[20] True, some scholars were beginning to reconsider tort liability from the perspective of economics or moral philosophy, a de-

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14. *See generally* Virginia E. Nolan & Edmund Ursin, *The Deacademification of Tort Theory*, 48 U. KAN. L. REV. 59 (1999). Nolan and Ursin use the term "enterprise liability" to include not only judicial decisions employing strict liability standards rather than negligence standards of liability, but legislative programs designed to place the costs of activities on those engaging in the activity through the mechanism of social insurance. Under their definition, no-fault plans for compensating persons injured in automobile accidents would be a form of enterprise liability.

Nolan and Ursin's broader use of the term enterprise liability emphasizes, for me, one of the central differences between late twentieth-century negligence-based models of liability and alternative models, the distributive assumptions of the alternative systems. For that reason, I am employing the term "enterprise liability" in its broader sense in this Essay.

15. *See, e.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).

16. *See, e.g.*, Richard A. Posner, *A Comment on No-Fault Insurance for All Accidents*, 13 OSGOODE HALL L.J. 471 (1975); Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973) [hereinafter Posner, *Strict Liability*]; Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) [hereinafter Posner, *A Theory of Negligence*].

17. *See, e.g.*, Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

18. *See, e.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57 (Cal. 1963); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

19. *See, e.g.*, LEON GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE (1958); Fleming James, Jr., *Products Liability*, 34 TEX. L. REV. 44 (1955); Prosser, *supra* note 11.

20. *See, e.g.*, KEETON & O'CONNELL, *supra* note 13.

velopment that might have signaled that new definitions of the enterprise of legal scholarship were surfacing. Those tendencies were not, however, inconsistent with an expanded role for enterprise liability. When 1970s scholars had applied economic or moral theories to tort law, they had done so in the course of making comparative assessments of the efficacy of negligence and strict liability models in torts, and some had concluded that strict liability models were more efficient or more just.[21]

In short, many 1970s scholars would have been likely to predict that enterprise liability would be common in tort law by the end of the century. But that did not occur. Nor did the period between 1980 and 2000 witness debates between enterprise liability and negligence theorists. Instead, torts scholarship in that period took some unexpected turns. First, as legal scholars refined the perspectives of economics and moral philosophy they applied to tort law, those perspectives evolved from their earlier status as potential competitors to complementary theories, each reinforcing—from different vantage points—the same model of tort liability. The dominant economic and moral theories that emerged in legal scholarship after 1980 were no longer associated with the two sides of a debate between negligence-based and enterprise liability. Instead they provided two different rationales for preferring the negligence model over its rivals.

Second, the interest exhibited by a handful of 1970s scholars in eschewing doctrinal synthesis and reorganization for more abstract and ambitious theoretical work became the norm in the legal academy in the 1980s and 1990s. Although this trend would not seem to have any particular implications for the choice between negligence-based and enterprise liability models of tort law, two developments that occurred in its wake did. With some conspicuous exceptions,[22] prominent torts scholars no longer occupied themselves with doctrinal reorganization proposals, or with the advocacy of alternative compensation systems to that of tort law. This halted the momentum for doctrinal or systemic reorganization along enterprise liability lines that had been building in earlier decades.

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21. *See, e.g.*, CALABRESI, *supra* note 15, at 286-87, 301-08; Epstein, *supra* note 17, at 189.

22. *See, e.g.*, VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY (1995); STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS (1989); Nolan & Ursin, *supra* note 14; Jeffrey O'Connell, *Alternatives to the Tort System for Personal Injury*, 23 SAN DIEGO L. REV. 17 (1986); Jeffrey O'Connell & Geoffrey Paul Eaton, *Binding Early Offers as a Simple, if Second-Best, Alternative to Tort Law*, 78 NEB. L. REV. 858 (1999).

Moreover, as the literature applying moral and economic theories to tort law proliferated, new critiques appeared of earlier approaches to deterring risky conduct or allocating the costs of that conduct. The result was a closer scrutiny of the distributive moral and economic assumptions on which enterprise liability theories had been based.

In the early 1970s, some torts scholars applying the insights of economic theory had begun to use as their normative baselines economic models designed to achieve efficiency in risk distribution through the maximization of individual utility, rather than models that aimed to improve efficiency by spreading and shifting risks throughout society. Those scholars assessed particular tort liability rules by asking whether they could deter risky conduct by creating individual incentives for safety.[23] They also critiqued some of the economic assumptions of enterprise liability in its original formulation, emphasizing the unanticipated administrative costs of alternatives to the torts system and the lack of empirical evidence showing that enterprise liability rules created greater incentives for safety on the part of manufacturers or consumers than negligence rules.[24]

Meanwhile, legal scholars who sought to apply the insights of moral philosophy to tort law were increasingly drawn to theories of corrective justice.[25] From the perspective of corrective justice theorists, enterprise liability models appeared to be founded on some dubious moral assumptions, such as the severing of tort liability from a finding of intentional or negligent conduct. In the view of those scholars, enterprise liability schemes could be seen as requiring persons who had not intentionally or carelessly contributed to injuries, such as consumers of a strictly liable defendant's products or drivers of cars in a state with compulsory automobile insurance and a no-fault automobile accident plan, to contribute to the compensation of injured persons.[26]

Neither of those new scholarly offshoots of the legal academy should be regarded as inevitably hostile to the growth of enterprise

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23. *See, e.g.*, William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1981); Posner, *A Theory of Negligence*, *supra* note 16.

24. *See, e.g.*, Posner, *A Comment on No-Fault Insurance for All Accidents*, *supra* note 16; Richard A. Posner, *The Cost of Accidents—A Legal and Economic Analysis*, 37 U. CHI. L. REV. 636 (1970); Posner, *Strict Liability*, *supra* note 16.

25. *See, e.g.*, Jules Coleman, *Moral Theories of Torts: Their Scope and Limits*, 1 LAW & PHIL. 371 (1982); Ernest Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37 (1983).

26. *See, e.g.*, Fletcher, *supra* note 17, at 568.

liability models in tort law. The legal academics who increasingly turned away from doctrinal synthesis and reorganization after 1980 could have employed economic and moral theory to support the distributive assumptions of enterprise liability. They could have chosen to ground proposals for no-fault alternatives to the tort system or for strict liability for defective products on economic and moral theories, citing, for instance, the ease by which an insured enterprise could spread or shift its costs or the powerlessness of consumers to appraise the risks of defective products.[27]

Instead these scholars chose to critique such theories. So the decades after 1980 have not just witnessed the increased influence of economic and moral theory in torts scholarship, they have witnessed the dominance of *particular versions* of economic and moral theory. Those versions, I have previously suggested, tend to complement negligence models of tort liability rather than enterprise liability models. But before pursing that suggestion in more detail, I turn to the unexpected persistence of negligence-based liability in another arena: the courts.

B. Doctrinal Trends

Even a cursory survey of developments in tort doctrine between 1980 and 2000 will reveal the perpetuation of the negligence model as the dominant mechanism for determining liability in torts cases. Some commentators, noticing this trend, have evaluated it in light of the expansion in enterprise liability that was anticipated in the 1970s, and characterized it as a "liability-limiting" tendency.[28] In some areas, particularly products liability, the characterization appears to be apt: courts have retreated from previous doctrinal positions that would have widened the ambit of an enterprise's accountability.[29] But in other areas of tort law, decisions reveal that the negligence principle has been used to expand liability. The characterization of those decisions as expansionist relies on a dif-

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27. These justifications for strict liability had been advanced by both Prosser and Traynor as early as the first half of the 1940s. *See* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring); WILLIAM L. PROSSER, THE LAW OF TORTS 689-93 (1941).

28. *See, e.g.*, Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455 (1999) (describing the apparent retrenchment of strict liability in the California courts over the last fifteen years).

29. *See, e.g.*, Soule v. General Motors Corp., 882 P.2d 298 (Cal. 1994); Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549 (Cal. 1991); Brown v. Superior Court, 751 P.2d 470 (Cal. 1988); Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239 (N.J. 1990); Feldman v. Lederle Labs., 479 A.2d 374 (N.J. 1984).

ferent baseline for comparison. The baseline is not enterprise liability but established subsidiary doctrines in traditional negligence cases, doctrines that had the effect of allowing defendants who engaged in an unacceptably risky level of conduct (defendants who were "negligent in the air") to escape liability altogether. The decisions can be seen as refining those subsidiary doctrines of traditional negligence theory to tie the actual exposure of tort defendants more closely to their unacceptably risky conduct.

The two lines of decisions, using negligence standards to both contract and expand liability, caution against any inference that tort law's general thrust in the last two decades has been to reduce the role of the torts system as a device for compensating injured persons. Instead, the two lines of decisions suggest a closer equation of tort liability with determinations of fault, whether on the part of defendants or plaintiffs. Only some of the decisions exhibit a preference for more restrictive negligence-based standards as opposed to expansionist enterprise liability alternatives, and those "liability-limiting" decisions could be said to be less vivid examples of tort doctrine staking out new paths. Several other decisions, however, are not so much concerned with liability expansion or contraction but with what might be called liability tailoring: developing more refined connections between a determination that a party in a torts case engaged in unacceptably risky conduct—was negligent—and that party's exposure to tort liability. Taken together, the latter set of decisions demonstrates the encroachment of negligence principles not only into the realm of enterprise liability, but into a preexisting realm of no liability.

1. The Persistence of Negligence: Liability-Limiting Examples

The most conspicuous example of the persistence of negligence theory in the face of enterprise liability alternatives has been a line of California defective products cases in which a strict standard of liability, originally conceived as an enterprise liability-based alternative to negligence,[30] became riddled with doctrinal concepts borrowed from negligence and increasingly limited in its scope.[31] California's tendency to limit the scope of strict liability in

30. *See, e.g.*, Barker v. Lull Eng'g Co., Inc., 573 P.2d 443 (Cal. 1978); Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1963); *Escola*, 150 P.2d at 440-44 (Traynor, J., concurring).

31. *See, e.g.*, Peterson v. Superior Court, 889 P.2d 905 (Cal. 1995); *Soule*, 882 P.2d at 298; *Anderson*, 810 P.2d at 549; *Brown*, 751 P.2d at 470.

defective products was followed in other jurisdictions,[32] so much so that a section of the *Restatement (Second) of Torts*, originally drafted in 1965, which anticipated the widespread use of enterprise liability throughout the area of defective products law, has been replaced by a draft section in the *Restatement (Third) of Torts* which confines enterprise liability in defective products to manufacturing defect cases.[33] The change in the *Restatements* recognizes that late twentieth-century courts have been employing, in cases raising design defect issues, criteria for determining "defectiveness" that were virtually identical to the criteria for determining "reasonable conduct" in negligence cases.[34]

Another line of cases that has been read as demonstrating a connection between negligence theory and the development of limitations on liability involves suits for recovery based on emotional distress. A study of the California courts in the years between 1987 and 1999 noted that the judicial criteria employed for determining eligibility for emotional distress recovery has evolved from multiple factors offered for the consideration of juries to limiting rules. Instead of the factors being guidelines for juries to assess the genuineness of an emotional distress claim, they have become, increasingly, ways for courts to limit the scope of emotional distress recovery.[35]

Those cases may show that negligence criteria can limit as well as extend tort liability—negligence criteria were employed to launch emotional distress recovery where emotional injury had previously not been compensable[36]—but they do not illustrate the rejection of enterprise liability alternatives. The relevant doctrinal baseline in emotional distress cases has never been between strict liability and negligence—emotional distress recovery has always been predicated on a showing of intentional or negligent conduct—but between negligence-based liability and no liability at all.

Two features have distinguished emotional distress cases. One is the fact that the defendant's risk-creating conduct was such that it could have produced, or did produce, *physical* harm to one

32. *See, e.g.*, Phipps v. General Motors Corp., 363 A.2d 955 (Md. 1976); Uloth v. City Tank Corp., 384 N.E.2d 1188 (Mass. 1978); Prentis v. Yale Mfg., 365 N.W.2d 176 (Mich. 1984); Voss v. Black & Decker Mfg. Co,. 450 N.E.2d 204 (N.Y. 1983); Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979).

33. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1-2 (1998).

34. *See, e.g., Soule*, 882 P.2d at 298; Camacho v. Honda Motor Co., Ltd., 741 P.2d 1240 (Colo. 1987).

35. Sugarman, *supra* note 28, at 482.

36. *See, e.g.*, Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

party, even though the gravamen of the suit is *emotional* harm to that party or to a third party. Courts have been very reluctant to allow recovery for emotional distress when the defendant's conduct did not expose anyone to physical risks.[37] Thus emotional distress cases can be said to be a subset of physical injury negligence cases, where, fortuitously, risks of physical injury eventuated in emotional harm. In this sense the negligence analysis—the determination of reasonable conduct on the part of the defendant—is no different in emotional injury cases from physical injury cases.[38]

The other notable feature of emotional distress cases has been an emphasis on criteria limiting liability. Those criteria have followed from the general concern, in such cases, that once a defendant's conduct falls below an appropriate level of reasonableness, that defendant might be liable for fortuitous and idiosyncratic emotional injury. Courts have used the rubric of proximate causation to limit liability for some fortuitous injuries in physical harm cases, but have not limited liability for idiosyncratic physical harm (the so-called "thin skull" cases).[39] In the emotional harm area, however, there has been concern about how to distinguish idiosyncratic harm from harm that is feigned. The multiple factors used to determine eligibility for emotional distress recovery have been efforts to identify "genuine" harm. But the tightening of those factors still permits negligence-based recovery where *no recovery* had been the previous baseline. Thus liability-restricting developments in emotional distress cases should not be seen as having any implications for the choice between negligence and enterprise-based models of liability, only as tying recovery more closely to established criteria developed under a negligence model.

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37. The two major exceptions to this generalization are recovery for negligently incorrect reporting of the death of a close relative and recovery for the negligent mishandling of dead bodies. *See, e.g.*, Gammon v. Osteopathic Hosp. of Me., Inc., 534 A.2d 1282 (Me. 1987); Johnson v. State, 334 N.E.2d 590 (N.Y. 1975). These exceptions illustrate that the principal concern in emotional distress recovery is distinguishing genuine from idiosyncratic or feigned claims. Often the genuineness of a claim can be derived by focusing on the fact that the defendant's conduct was sufficiently risky to cause physical as well as emotional harm. The exceptions are cases where even though risks of physical injury would not be created by the defendant's conduct, genuine anguish on the part of most relatives of the third party in question could be reasonably anticipated.

38. I am indebted to Kenneth Abraham for this description of emotional distress cases.

39. *See, e.g.*, Bartolone v. Jeckovich, 103 A.D.2d 632 (N.Y. 1984); McCahill v. New York Transp. Co., 94 N.E. 616 (N.Y. 1911).

2. The Persistence of Negligence: Liability-Tailoring Examples

A similar effort to tie eligibility for recovery in tort more closely to findings of unacceptably risky conduct can be seen in several lines of cases modifying traditional subsidiary doctrines in negligence law. Cumulatively, the modifications tie the accountability of both plaintiffs and defendants in negligence cases more closely to findings that they were at fault. Sometimes modifications have had the effect of reducing the recovery of particular plaintiffs, or the liability of particular defendants, especially in cases involving multiple parties, but on the whole they have served to establish closer connections between a party's negligence and that party's responsibility to contribute to the costs of an injury.

One example has been the refinement of comparative negligence principles, well established in many jurisdictions by the 1970s, to deal with complexities raised by multiple party cases. In some jurisdictions, comparative negligence has been applied in a "pure" form, resulting in some recovery for parties whose contribution to their injuries was deemed greater than 50%.[40] Other jurisdictions have provided for the reallocation of liability among multiple parties where one negligent party, whose comparative contribution had been assessed, was unaccountable for any injuries because of insolvency.[41] The principal effect of these cases has been to tie the accountability of parties in negligence cases more closely to jury findings of that party's "equitable share," determined by the party's comparative level of fault. Under a contributory negligence regime, or one not providing for reallocation of equitable share liability in comparative negligence suits involving multiple parties, negligent defendants might be deemed to have no accountability to contributory negligent plaintiffs, or the contributory negligence of plaintiffs might be ignored by juries or obviated by doctrines such as last clear chance. In addition, the presence of a negligent but insolvent party in a multiple parties case might result in accountability, or recovery, out of proportion to a plaintiff of defendant's fault. Thus these developments can be seen as efforts to replace pockets of "no liability" within a negligence-based regime with more tailored connections between unacceptably risky conduct and liability.

40. *See, e.g.*, Sutton v. Piasecki Trucking, Inc., 451 N.E.2d 481 (N.Y. 1983) (allowing a driver found to be 99% at fault to recover one percent of his damages).

41. *See* UNIFORM COMPARATIVE FAULT ACT § 2(d), 12 U.L.A. 136 (1996).

Another example is the surfacing of doctrines based on probabilistic causation in negligence cases. Traditionally, a party found to have engaged in unacceptably risky conduct would escape liability for that conduct if no injured person could show a greater than 50% chance that the conduct had caused his or her injuries. Under the so-called "but for" requirement of proof in a negligence action, an injured plaintiff needed to establish that it was more probable than not that "but for" a defendant's negligent conduct, the plaintiff would not have been injured. In several recent cases, however, plaintiffs have been able to recover some damages from negligent defendants without a showing that it was more probable than not that the defendants caused those damages. Examples include a plaintiff's recovery for damages calculated on the basis of a negligently created, but less than 50%, "lost opportunity" to survive unpreventable complications from an operation,[42] and a negligently created, but less than 50% "enhanced risk" of specific future injury.[43] In an analogous line of cases, plaintiffs have been able to recover damages for injuries they suffered from an unacceptably risky product's placement on the market, even though they were only able to establish the market share of a particular defendant in the industry manufacturing that product, not prove that there was a greater than 50% probability that that defendant actually supplied them with the product.[44] Although these developments all result in the extension of liability where it would previously not have existed, their principal thrust is to tie accountability in the tort system more directly to negligence, since without a modification of the "but for" requirement in those cases negligent defendants would remain unaccountable.

Yet another example comes from a line of third-party negligence cases characterized by Robert Rabin as "enabling torts."[45] Those cases have permitted recovery against a third-party defendant where that defendant's conduct has the effect of unacceptably increasing the risks others might impose on members of the public. Examples are cases where defendants leave cars unlocked with keys in the ignition, increasing the risk of car thieves endangering others after stealing the cars;[46] cases where defendants negligently

42. *See, e.g.*, Falcon v. Mem'l Hosp., 462 N.W.2d 44, 56 (Mich. 1990).

43. *See, e.g.*, Petriello v. Kalman, 576 A.2d 474, 484 (Conn. 1990).

44. *See, e.g.*, Sindell v. Abbott Labs., 607 P.2d 924, 937-38 (Cal. 1980); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1078 (N.Y. 1989).

45. Robert Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 435-38 (1999).

46. *See, e.g.*, Palma v. U.S. Indus. Fasteners Inc., 681 P.2d 893, 902-03 (Cal. 1984); Cruz v. Middlekauf Lincoln-Mercury, Inc., 909 P.2d 1252, 1255-57 (Utah 1996).

entrust potentially dangerous instrumentalities to identifiably risky persons;[47] cases where manufacturers of dangerous products such as handguns take inadequate precautions to prevent those products from reaching unauthorized persons;[48] and cases where manufacturers of products containing safeguards which render the products less hazardous, but less convenient to operate, make it possible for their customers to bypass the safeguards, thereby enhancing the risks of injury to users of the products.[49] All those cases represent modifications of the common law principle that there is no affirmative "duty" to protect third parties against the conduct of risky others: their rationale is that the third party defendant is accountable because it affirmatively "enabled" that risky conduct. Were the liability of such "enablers" to be cut off by invocation of the traditional doctrine that citizens own no affirmative duties to protect the general public from risks created by others, there would be a less precise connection between unacceptable risk-enhancing conduct (negligence) and accountability for injuries related to that conduct.

Recent successful class action suits against industries that create public health risks, most conspicuously the tobacco industry, combine elements of the above lines of cases. Critical to the success of suits against tobacco manufacturers has been the emergence of new classes of plaintiffs, so-called "secondhand" victims of the risks associated with smoking. One class has been composed of nonsmokers whose occupations place them in close contact with cigarette smoke, such as airline flight attendants.[50] Another class has been state governments required to pay the enhanced medical costs associated with the serious damage to their citizens' health by smoking.[51]

These classes of plaintiffs are proceeding on a theory of liability resembling that in the "enabling" negligence cases: they are claiming that cigarette manufacturers negligently enhanced the risky conduct of smokers by not adequately warning them of the risks posed to themselves and to others by regular exposure to cigarette smoke. They have an important advantage in their suits over smoker plaintiffs. Smoker plaintiffs, even having surmounted the

47. *See, e.g.*, Vince v. Wilson, 561 A.2d 103, 104 (Vt. 1989).

48. *See, e.g.*, Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 827-33 (E.D.N.Y. 1999); Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146, 170-73 (Cal. Ct. App. 1999).

49. *See, e.g.*, Lopez v. Precision Papers, Inc., 492 N.E.2d 1214, 1215 (N.Y. 1986).

50. *See, e.g.*, Broin v. Philip Morris Co., 641 So. 2d 888 (Fl. Dist. Ct. App. 1994).

51. *See* Rabin, *supra* note 45, at 448.

obstacle of establishing causal connections between smoking and health risks, are confronted with the fact that they continued to smoke after becoming aware of those risks. Nonsmoking "secondhand" victims of exposure to cigarette smoke, once a connection between that exposure and enhanced health risks is established, face no comparable contributory fault obstacles. Nor, of course, do governmental entities seek to recover heath costs.

But all plaintiffs in suits against the tobacco industry face the potential difficulty of not being able to identify the particular defendant who increased their health risks or medical costs. These plaintiffs now have available to them the theory of market share liability. The success of "secondhand victim" suits against the tobacco industry may result in a revival of suits by individual smoker plaintiffs, and it is possible that both comparative negligence and market share liability principles will come to govern those suits. If smoker plaintiffs could establish a concerted effort by tobacco manufacturers to conceal the riskiness of their product, then their having continued to smoke after learning of the risks, or their inability to identify the precise defendant who concealed the risks from them, would not bar recovery, although it would reduce it.

One feature of mass tort litigation against industries creating public health risks[52] may point away from seeing this development as consistent with the expansion of negligence-based liability. If, as in the asbestos, contraceptive, and implant examples, the goodwill costs of being a visible defendant in a mass torts case with significant public health overtones lead those defendants to settle even where they might defeat or significantly reduce their liability through negligence doctrines, one might say that in those instances mass tort lawsuits are being used to establish the equivalent of enterprise liability. The history of mass torts suits against the manufacturers of Dalkon Shield contraceptives, asbestos products, and silicone implants reveals a pattern now surfacing in the tobacco cases: manufacturers initially used negligence law to defend themselves, but agreed to large-scale compensation packages when the public health risks of their products became notorious. One could also argue, however, using the cigarette industry example, that such enterprises only agree to compensation settlements when lawsuits establish strong enough evidence of their negligence in concealing the riskiness of their products that they fear massive jury

52. In addition to the tobacco industry, such industries include manufacturers of handguns, widely used toxic products such as asbestos, and widely used dangerous health care products, such as contraceptives or implants.

verdicts. If so, their accountability is in fact tied to their unacceptably risky conduct.

Except for the last example, all of the above developments, whether liability-contracting, liability-expanding, or liability-tailoring, demonstrate the robustness of the negligence model in the late twentieth century. But pockets of enterprise liability remain, not only in the areas of abnormally dangerous activities and defective products, but also in a principle cutting across a variety of tort actions, that of the vicarious liability of employers for the negligence of their employees. This principle, which allows suits against not only private enterprises but also school boards, state colleges and universities, and municipalities for injuries they had no direct role in causing, carves out a relatively large space for enterprise-based liability in the contemporary torts system. It often makes an employer defendant accountable simply because that defendant employed a person whose negligence caused harm to another. One could argue, in addition, that a principal justification for vicarious liability has been the superior capacity of employers, as compared to their employees, to spread and shift the costs of injuries caused by the employees' risky conduct.[53]

Gary Schwartz, however, has argued that vicarious liability rests primarily on deterrence principles: it creates incentives on the part of employers to take safety measures in the selection, training, supervision, and performance assessment of their employees. He suggests that such measures often occur in time frames so remote from the actual risk-creating conduct of employees that they are difficult to recover by plaintiffs or courts, necessitating a prophylactic "enterprise liability" rule if employers are to be given incentives to make their employees' conduct safe.[54] Following this line of argument, one could see the "scope of employment" limitation on vicarious liability, which all jurisdictions recognize, as representing a tacit understanding that employer deterrence is only effective when the employer is actually in a position to protect against the risk-creating conduct of its employees. Thus the vicarious liability doctrine, although not technically consistent with negligence-based liability, is consistent with one of the principal goals of a negligence system: to provide incentives for people to make realistic tradeoffs

53. Patrick Atiyah, *Vicarious Liability*, *in* RIGHTING THE LIABILITY BALANCE: REPORT OF THE CALIFORNIA COMMISSION ON TORT REFORM (1977).

54. *See* Gary T. Schwartz, *The Hidden and Fundamental Issue of Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1759-64 (1996).

between preventing and paying for the costs of their unacceptably risky conduct.

C. Parallels Between Academic Theories and Doctrinal Trends

Every one of the developments related to the persistence of negligence theory, whether its effect has been to contract or to expand liability, can be seen as consistent with both efficiency-based economic perspectives on tort law and with corrective justice perspectives. Few explicit citations to the literature of economic theory or moral philosophy can be found in opinions, but one would not expect that literature to be treated as the equivalent of legal authority. Specific correlations between theoretical torts scholarship and judicial opinions are thus more difficult to draw than they were in the 1950s or 1960s. Nonetheless, the parallels between dominant academic perspectives and trends in tort law from 1980 to 2000 are highly suggestive.

Consider each of the doctrinal developments surveyed above. The reduced role of strict, enterprise-based liability in products liability appears consistent with efficiency arguments emphasizing deterrence. First, those arguments suggest that a strict liability standard creates no more incentives for enterprises to make products safer than does a negligence standard, especially given the goodwill costs to enterprises of having their products labeled "defective."[55] Second, the arguments suggest that a strict liability standard might encourage enterprises to build the projected costs of products liability lawsuits into the market prices of their products, rather than conveying more information to consumers about the products' risks.

The dominance of negligence theory in products liability cases also appears consistent with corrective justice arguments, especially if comparative negligence principles are applied. There are two reasons for this. First, comparative negligence results in a negligent plaintiff who was injured by a defective product being neither barred from suit, nor recovering in full, but securing a recovery consistent with his or her contribution to the injury. Second, if jurors are asked to compare the contribution of a defendant whose liability is based on strict liability doctrines with the contribution of a negligent plaintiff, they may have difficulty conceptualizing the comparison in terms of comparative "fault." The original

55. *See, e.g.*, PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES, 155-61 (1988).

versions of enterprise liability in defective products anticipated that contributory negligence defenses would not be available to defendants in products liability suits, because invoking those defenses would defeat the distributive goals sought in a strict liability regime.[56] Even when jurisdictions began to adopt comparative negligence, some judges balked at giving defendants found to have placed defective products on the market an opportunity to assess plaintiffs' a portion of their damages when they had contributed to their injuries.[57] Recently the trend has been to treat enterprise liability as a species of fault for comparative purposes, and to compare all the fault of plaintiffs against that of defendants.[58] Corrective justice arguments would support this trend, suggesting that a plaintiff's recovery should be reduced to the extent, and only to the extent, that his fault contributed to his injury.

In general, the development of comparative fault in cases involving suits that combine claims based on enterprise liability and negligence appears consistent with both efficiency and corrective justice theories, especially when coupled with the increased use of a procedure for the reallocation of "equitable share" responsibility among multiple parties. Under an equitable shares procedure that provides for reallocation of an insolvent party's share, all parties engaged in risk creating conduct, either to others or to themselves, will have their equitable shares affected by the extent to which they could have reasonably prevented the risks. According to the normative assumptions of efficiency literature, they will thus be deterred from engaging in risky conduct up to the point where their marginal costs of preventing or avoiding risks remain lower than the benefits they receive from that conduct.

The refinement of comparative principles of liability can also be seen as an attempt to calibrate the risky conduct of a party to his responsibility to contribute to the costs of an injury related to that conduct. The practice of reallocating the "equitable share" of insolvent defendants in multiple party cases implements the policy that no party, whether negligent or accountable on enterprise liability principles, should receive a windfall or suffer a loss disproportionate to his or her comparative responsibility for contributing to the risky conduct that produced injury. In other words, reallocation means that parties whose risky conduct has been compared in the

56. RESTATEMENT (SECOND) OF TORTS § 484 (1965).
57. *See, e.g.*, Daly v. Gen. Motors Corp., 575 P.2d 1162 (Cal. 1978) (Mosk, J., dissenting).
58. *See, e.g.*, Whitehead v. Toyota Motor Corp., 897 S.W.2d 684 (Tenn. 1995).

assignment of their equitable responsibility will be made to pay according to their comparative deserts. In this regime, rather than an alternative to fault-based accountability, enterprise liability becomes simply another species of fault.

The emergence of probabilistic doctrines of factual causation, including market share liability, is consistent with efficiency theories emphasizing deterrence. Under those doctrines, defendants engaged in unacceptably risky conduct will not always be able to escape liability just by showing that the plaintiffs injured by that conduct cannot establish it was more probable than not that it was the defendants' risky conduct that caused their injuries (sometimes because plaintiffs were unable to identify the particular defendant whose risky product they used). Their additional exposure in these situations would seem to give such defendants additional incentives to raise the safety levels of their conduct.

The emergence of probabilistic-based doctrines is also consistent with corrective justice. One of the most prominent features of those doctrines—recovery for a less than 50% enhanced risk of injury, recovery for a less than 50% lost opportunity to survive, or recovery against a defendant, based on that defendant's share in a market of risky products, where a plaintiff could not establish that it was more probable than not that the defendant's product had actually caused the plaintiff's injuries—is the precise tailoring of plaintiffs' recoveries to the percentage of the damages that can be attributed to the defendant through either lost opportunity, enhanced risk, or market share. Without such doctrines, plaintiffs would recover nothing, even though they had established that defendants had engaged in unacceptably risky conduct that either caused them injury or increased their risks of being injured.

Similarly, the development of liability for persons whose negligence makes it more likely that others will injure third parties is consistent with efficiency theories, because the prospective liability of such "enablers" could be expected to provide additional disincentives for persons to explicitly or implicitly encourage risky conduct in others. The extension of negligence-based "enabling" liability would also appear to be consistent with corrective justice theories, because judicial recognition of enablers as tort defendants results in injured plaintiffs being able to proceed against two potential parties in a suit where "enabling" conduct has arguably contributed to their injuries. If comparative fault principles are applied, the availability of an additional defendant could be expected to result in a more precise tailoring of tort liability to moral desert in enabling cases.

Mass tort claims against enterprises associated with public health risks, another developing feature of the torts landscape in the late twentieth century, have previously been characterized as making use of doctrinal modifications in the "enabling torts" and probabilistic causation cases. One would thus expect findings of manufacturer liability in mass public health cases to be consistent with both deterrence and corrective justice theories, in the same fashion that extensions of liability in enabling torts cases and probabilistic causation cases are consistent with both theories. The increased exposure of manufacturers of products with public health effects should, under efficiency theory, create additional incentives for them to make those products safer or to better inform the public of their risks. In a similar manner, the increased exposure of tobacco companies to claims from "secondhand" plaintiffs would seem consistent with corrective justice principles. Indeed the use of somewhat modified traditional negligence principles in mass tort public health cases can be seen as providing an alternative to the disposition of such claims against enterprises allegedly producing public health risks by a social insurance scheme emphasizing enterprise liability.

Even vicarious liability, reformulated as a prophylactic rule placing a burden on employers to ensure that their employees do not impose unreasonable risks on others, can be seen as promoting both efficiency, by creating incentives for employers to insist that their employees maintain a reasonable level of safety, and corrective justice, by providing injured persons with another potential source of compensation for their injuries, one similar to that provided through enabling torts.

Thus there are striking parallels between, on the one hand, the dominance of economic theories emphasizing deterrence versions of efficiency and moral theories emphasizing corrective justice in the late twentieth-century legal academy, and, on the other hand, the persistence of negligence-based models of tort liability in the courts of the same time. I now turn to ask whether those parallel developments are more than coincidental, and, if so, what factors might have produced such unanticipated shifts in academic theory and legal doctrine. In *Tort Law in America*, I sought to explain changes in the theoretical and doctrinal fabric of nineteenth- and twentieth-century tort law by looking at the legal academy's, and the larger culture's, changing conceptions of law and its role as a mechanism for responding to the plight of injured persons in American society. The question is whether that approach can help make sense of the recent developments surveyed above.

D. Internal Explanations for the Parallel Developments

One explanation for why efficiency-based and corrective-justice based theories of tort law emerged after 1980 might emphasize the persistence of scholarly impulses I had characterized in *Tort Law in America* as "neoconceptualist." That term denoted a renewed attention on the part of torts scholars to comprehensive theories of tort liability, based on concepts drawn from other disciplines rather than from the essentialist principles of "law as a science" that served as the starting presuppositions of "conceptualist" tort theory in the late nineteenth century.[59] My discussion there of neoconceptualist torts scholarship focused on two efficiency-based theories, that advanced by Guido Calabresi and that promulgated by Richard Posner, and two corrective justice-based theories, those of George Fletcher and Richard Epstein.[60]

In retrospect, the "neoconceptualist" impulses I identified in some torts scholarship in the 1970s were precursors of larger scholarly trends within the legal academy that became dominant by the end of the century. Those trends aimed to replace the models of legal scholarship dominant from the 1930s through the early 1970s, which emphasized doctrinal analysis and synthesis, and proposals for doctrinal innovation in specific areas of law, with models emphasizing far more abstract and general theories of the subject of law itself, typically based on the metatheoretical assumptions of other disciplines. From this perspective, the application of efficiency-based theories to torts cases could be seen as an instance of the application of economic theory to law as a whole. Likewise, the application of corrective justice theories to torts cases could be taken to be part of a general reconceptualization of law around first principles of moral philosophy.

Numerous scholars have documented late twentieth-century legal scholars' increased interest in "grand theories" of law derived from other disciplines, and a corresponding decline of their interest in the doctrinal work that characterized of previous generations.[61] But there was an additional development in torts scholarship, as torts scholars increasingly adopted efficiency-based and corrective-justice based theories. Although perhaps these new theories were

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59. WHITE, *supra* note 1, at 37-56, 211-15.

60. *Id.* at 219-29.

61. *See generally* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996); Symposium, *Legal Scholarship*, 90 YALE L.J. 955 (1981).

initially competitors, pitting "efficiency" against "justice,"[62] efficiency-based and corrective justice-based theories began to converge, in one important respect, as they developed. In torts, each theory abandoned one strand of the discipline from which it emerged.

Legal theorists interested in applying the insights of economics to tort law emphasized the starting assumptions of the welfare economics strand, as it had developed in the years after World War II, which promoted the maximization of individual utility and market-based solutions to social policy issues.[63] They rejected the distributive strand of economic theory, which had been the mainstream thrust of the discipline of economics in the 1930s and 1940s and had been endorsed by some of the legal scholars attracted to enterprise liability in the years from 1930 to 1970.[64]

Similarly, theorists interested in applying the insights of moral philosophy to tort cases increasingly rejected the strand of moral philosophy concerned with distributive justice. Their interest turned instead to developing correlations between moral desert, or moral obligation, and compensation or liability in the tort system.[65] They were not interested in using the tort system as a means of making all members of society responsible for alleviating the condition of the disadvantaged.[66] Thus both perspectives increasingly rejected a role for tort law as a mechanism for compensating injured persons by distributing risks and obligations throughout society. That was precisely the role that some members of a previous generation of scholars, also employing arguments based on economic and moral theories, had associated with doctrines and policies predicated on enterprise liability.

So the general trend toward grand theory in the legal academy, or even the predominance of theories derived from economics and moral philosophy, would not seem to explain why particular versions of economics and moral philosophy came to be dominant among legal scholars while other theories garnered far less attention. Nor, in a time period in which torts scholars paid less attention to the actual decisions of judges in torts cases and produced

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62. *See* CALABRESI, *supra* note 15, at 291-92.

63. *See, e.g.*, NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 301 (1995); James Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 LAW & HIST. REV. 275 (1997).

64. *See* Nolan & Ursin, *supra* note 14, at 68-72, 75-77.

65. *See* ERNEST WEINRIB, THE IDEA OF PRIVATE LAW 122-26 (1995).

66. *Id.* at 36-38; *see also* Fletcher, *supra* note 17, at 568.

less scholarship of direct relevance to those judges in their decisionmaking, has there been the kind of academic-judicial symbiosis that one can find in the scholarly writings of Prosser and the torts opinions of Traynor. Indeed, despite the parallels I have noted between efficiency- and corrective justice-based theories in the academy and negligence-centered decisions in the courts, one rarely finds judges citing efficiency or corrective justice theorists.

If anything, torts scholars' preoccupation with increasingly abstract, comprehensive theory after 1980 might incline one to conclude that their theories have been less influential in the courts in the past two decades. Certainly, trends in academic scholarship partly explain the decrease in explicit judicial reliance on academic literature in that period. One could hardly expect judges to cite scholars who are preoccupied with disciplines other than law and who pay comparatively little attention to doctrinal analysis or synthesis. But to conclude that, at least in tort law, academic theory grew away from judicial doctrine in the last two decades would be misleading. There is abundant evidence that between 1980 and 2000, dominant trends in tort theory and dominant trends in tort doctrine generally reinforced one another. Thus one must look beyond both the academy and the courts to see why those parallel developments occurred.

E. External Explanations for the Parallel Developments

Let us return briefly to the period between 1930 and 1970, whose cumulative developments would likely have induced a 1970s scholar to foresee the continued growth of enterprise liability models as alternatives to the traditional negligence-based model of tort liability. Consider the starting assumptions that united advocates of such enterprise-liability models, assumptions we can group into two related categories. The first category would contain assumptions about the torts system: that it embodied the same sorts of inefficiencies and inequities that were embedded in the increasingly problematic system of free market capitalism. The second category would include assumptions about governmental units as distributors of the risks associated with activity in a modern industrial society and of the costs of injuries related to that activity: that governmental units were superior (fairer and more efficient) distributors. In short, enthusiasts for enterprise-based liability systems began from distributive premises, identified a negligence-based tort

system with market failure, and believed that alternative systems should reflect the superior distributive capacities of government.[67]

Thus workmen's compensation proposals from this period assumed that legislative imposition of enforced contributions to a compensation fund by employers (and, indirectly, by employees, who forfeit a certain percentage of tort claims and whose benefits are treated as part of their job income),[68] coupled with administrative determinations of the scope of eligibility for coverage in individual cases, would be superior to the existing torts system, which was characterized as reflecting inequities in the safety levels of industrial jobs that were related to inequities in the market power of employers and employees.[69]

Similarly, no-fault accident plans initially developed in the 1960s have assumed that a legislatively imposed, administratively enforced compensation fund system is superior to the existing tort system because the existing system, with its fortuitous jury verdicts, its opportunities for defendants to delay compensation as long as possible, and its reliance on lawyers operating under contingent fee arrangements, amounts to a "failed market" in distributing the risks and the costs of injury-creating conduct, and because the governmental units implementing no-fault will be more efficient and fairer distributors of those risks and costs.[70]

Finally, advocates of enterprise-based liability in the defective products area assumed that strict liability rules imposed by the courts, rather than negligence rules derived from standards of reasonable safety in the manufacture, design, or use of products placed on the market, would do a better job of distributing the risks, and the costs, of injury from defective products throughout the population. In the absence of such strict rules, they assumed, optimal levels of distributing the risks and costs would not be reached, because defendants in defective products cases would seek, through the invocation of traditional tort defenses, to place the costs of injuries on

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67. *See generally,* EHRENZWEIG, *supra* note 11; Fleming James, Jr., *Products Liability* (Part I), 34 TEX. L. REV. 44 (1955); Fleming James, Jr., *Products Liability* (Part II), 34 TEX. L. REV. 192 (1955).

68. *See* Lawrence Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents,* 67 COLUM. L. REV. 50, 70-72 (1967); *see generally* NOLAN & URSIN *supra* note 22, at 21-26.

69. *See, e.g.,* Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance,* 57 YALE L.J. 549 (1948); Leon Green, *The Duty Problem in Negligence Cases,* 28 COLUM. L. REV. 1014 (1928); Leon Green, *The Individual's Protection Under Negligence Law: Risk Sharing,* 47 NW. U. L. REV. 751 (1953).

70. *See* JEFFREY O'CONNELL, THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN 160 (1979).

consumers, rather than making greater efforts to increase the safety of their products, or, alternatively, insuring themselves against accidents and distributing the cost of that insurance among their consumers in the form of higher prices.[71]

Now consider the current stature of those pro-government, anti-market assumptions among academic theorists and in American society in general. Both categories of assumptions have been called into question. In academic literature, for example, "public choice" studies of the legislative process have challenged the assumption that legislatures are equitable or efficient distributors of the risks and costs of injury-creating activity. These studies emphasize the significant incentives on the part of legislators to preserve their own incumbency, and in the process to welcome support from established interest groups and lobbyists whose market power increases their access to legislators and whose goals are to further their own political and economic agendas rather than to promote a fairer or more efficient distribution of the costs of injuries.[72]

Another set of studies has emphasized the unanticipated costs of administrative distribution of the risks and costs of injuries, citing delays produced by the bureaucratic levels of administrative government and the tendency of administrative procedures for determining eligibility for compensation to harden, over time, into arbitrary rules with little capacity to promote distributive efficiency and justice.[73]

Yet another set of studies has suggested that judge-made enterprise liability rules in the defective products areas may not have had the effects judicial policymakers anticipated, producing neither distributive efficiency nor distributive justice. In some areas of defective products law, users of a product, not manufacturers, insurers, or prospective consumers, may be the best position to assess the comparative costs and benefits of making that product safer but less convenient. More generally, strict liability rules, imposed in lieu of traditional negligence rules, may not in themselves create greater incentives for safety, since even when an enterprise can show that it could not reasonably have avoided a defect in its prod-

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71. *See* EHRENZWEIG, *supra* note 11, at 1440-41.

72. *See* Richard Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 535-37 (1999).

73. *See* ALEXANDER V. MATEJKO, THE SELF-DEFEATING ORGANIZATION: A CRITIQUE OF BUREAUCRACY 265-70 (1986); Oliver Williamson, *Public and Private Bureaucracies: A Transaction Cost Economic Perspective*, 15 J.L. ECON. & ORG. 306, 309 (1999).

uct, it would still incur reputational costs in having the product labeled defective in a products liability suit.[74]

These studies throw into doubt both sets of starting assumptions held by proponents of enterprise-based liability as an alternative to a negligence-based torts system. They suggest that some of the distributive inefficiencies and inequities those proponents associated with the negligence-based system and more generally with a market-based industrial economy, can also be associated with governmental distributors of the costs and risks of injuries. More fundamentally, they dispute the distributive premises of enterprise-based liability, suggesting that on the whole market solutions to the problem of compensating injured persons in a modern economy, adjusted to take into account corrective justice principles, produce more efficient and fairer outcomes.

This preference for market solutions seems to be widely shared in contemporary American political and economic culture. If the rhetoric of political figures and economic policymakers is taken as a touchstone, the tendencies of the last twenty years have shifted decisively in the direction of decreasing the presence of government as a distributor of social and economic risks and benefits, and buttressing the role of markets in that capacity. Consider, for example, the comparative stature, between the 1970s and the present, of government-based distributive policies in two major areas: public education and public welfare. In the 1970s governmental agencies consciously attempted to design programs to spread and shift the costs of perceived inefficiencies and inequities in the educational and job markets.[75] Today the welfare benefits approach of the 1970s has been conspicuously abandoned,[76] and discussions of public education begin by conceding that the current system is in disarray and may only be repaired by increasing the opportunities to parents to make educational decisions in the same manner as consumers in other markets.[77]

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74. *See*, HUBER, *supra* note 55, at 155-61.

75. *See* ROBERT W. JACKMAN, POLITICS AND SOCIAL EQUALITY: COMPARATIVE ANALYSIS 27-28 (1975); HAROLD L. WILENSKY, THE WELFARE STATE AND EQUALITY: STRUCTURAL AND IDEOLOGICAL ROOTS OF PUBLIC EXPENDITURES 4-5 (1975).

76. *See* ANTON ZIJDERVELD, THE WANING OF THE WELFARE STATE: THE END OF COMPREHENSIVE STATE SUCCOR 93 (1999); Max Sawicky, *The New American Devolution: Problems & Prospects*, *in* THE END OF WELFARE?: CONSEQUENCES OF FEDERAL DEVOLUTION FOR THE NATION 15-19 (Max B. Sawicky ed., 1999).

77. *See, e.g.*, JEROME HANUS & PETER COOKSON, CHOOSING SCHOOLS: VOUCHERS AND AMERICAN EDUCATION (1996).

III. CONCLUSION

Thus the underlying cause of the parallel developments in academic theory and tort doctrine I have identified, and the central reason why a negligence-based model of tort liability has unexpectedly persisted since the 1980s, is the widespread loss of faith in government-run distributive solutions to social problems. Traditional negligence theory has continued to flourish because it is far less distributive, and requires far less participation from governmental units, than enterprise liability alternatives.

The unexpected persistence of negligence should not suggest that tort liability is in a period of contraction, as a survey of doctrinal developments has shown. Nor should it suggest that negligence-based doctrines have persisted, and enterprise liability-based alternatives receded in importance, primarily because of the influence of academic theorists on judicial decisions: if anything, that influence seems less explicit than it once did. Negligence-based tort liability can be shown to be more consistent with the assumptions of welfare economics and corrective justice than enterprise liability, but that showing raises the broader question why those assumptions, rather than the assumptions driving economic and moral theories furthering distributive ends, have increasingly been treated as the baseline for evaluating the efficacy of approaches to tort liability. When one probes that question, it appears to lead to a counterintuitive conclusion, at least for those who regard life in the legal academy as increasingly otherworldly and isolated from the worlds in which contemporary torts cases are argued and decided.

The conclusion is that academic theories, as well as judicial decisions, more closely track larger changes in the dominant models of political economy in America than one might suspect. I began this Essay by suggesting that if legal scholars in the 1970s had been asked to predict the future course of doctrinal development in tort law, many would have anticipated a reduced role for traditional negligence-based theory and an increased role for alternative systems emphasizing enterprise liability. That prediction would have been based, to a large extent, on the intuitive attraction many 1970s scholars felt for government-sponsored, distributive approaches to injury in a modern industrial society. Who would have suspected that at the moment of that hypothetical prediction the appeal of those approaches, not only for legal academics and policymakers but for Americans generally, had peaked and was beginning to decline?

History confirms that the future is never identical to the past, and if one reflects upon that fact, it suggests that the future can never be identical to the present either. But historical actors, at any given moment in time, have a limited capacity to separate the weight of their past and the condition of their present from the future they imagine, and thus tend to project their sense of their immediate present too vividly onto their anticipated future. The last twenty years of tort law should be a reminder of how important a role our current predilections play in our predictions, and, consequently, that our capacity to anticipate our future is even more limited than our capacity to make sense of our present. It should also remind us that the question of whether legal academics are intimately concerned with or relatively indifferent to doctrinal trends in law is not as important to the course of those trends as legal academics might like to think. The unexpected persistence of negligence as the dominant model of tort liability in the last two decades of the twentieth century, this survey suggests, would very likely have occurred whether legal scholars endorsed that development or not. But, as it turns out, legal scholars would have been very unlikely not to endorse it.

In thinking about the role of ideas as an "influence" in the course of legal doctrine, we need to pay attention not merely to the specific doctrine or policy proposals advanced by judges and commentators, but to the background assumptions driving these proposals. In seeking to make sense of unexpected doctrinal developments, we need to consider not only paths that were taken but also paths that were implicitly abandoned. In considering these abandoned paths, we will arrive at a deeper, richer sense of how ideas influence the law.