

Teaching Torts (1969-2008)

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I started teaching at Yale in January 1969, moved to UCLA in summer 1974, and retired in summer 2008; I also visited at USC, NYU, CUNY and Fordham. I taught courses on family law and legal profession (which I pretended satisfied the PR requirement) and seminars on African law, police reform, neighborhood dispute settlement, comparative legal sociology, and critical legal studies. But half of my teaching was devoted to torts, which I will focus on here. All of you have taken torts; but most of you probably remember as little of it as I do of my first-year courses (57 years ago). Those who have taught torts may find this of greater interest. What I hope to learn from our discussion is whether the course described below differs significantly from conventional courses; and if so, how much of the difference is attributable to CLS, how much to law and society (my primary affiliation), and how much to my idiosyncrasies. Those not interested in the details of how I taught torts can skip to the last few paragraphs, where I draw my own lessons.

At Yale I taught a small section (approximately 18 students) three times; at UCLA I taught a large section (approximately 80 students) annually for 35 years, covering the first 800 pages of the Franklin & Rabin casebook, which I chose because it included material on tort law in action and featured California cases. I had had Guido Calabresi (who was visiting at Columbia in Spring 1963) for the second half of my first-year torts course (intentional torts), which is part of the reason Yale hired me. But he didn't publish *The Costs of Accidents* until 1970, and I was not influenced by it when I began teaching. It took me more than a decade to develop my own approach to torts, which I articulated in the first edition of David Kairys's *The Politics of Law* in 1982 and refined in later editions.¹

In retrospect (though this may be reconstruction), I believe my goal (like that of Socrates) was to unsettle students' preconceptions, to get them to apply Karl Llewellyn's cynical acid to the cases they read. When a student complained to me that, however diligently he prepared, he never anticipated the questions I asked in class, I took it as a compliment. My colleague Gary Schwartz, UCLA's resident authority on torts, once wrote that I could find nothing good to say about tort law. That's pretty accurate. Most tort doctrine is incoherent, and most judicial opinions are poorly reasoned, conclusory, based on factual claims for which no evidence is adduced, probably because there is none.

My approach inevitably discomforted students, most of whom enter law school as naive pandectists, believing in a slot machine theory of judging, a mechanical jurisprudence. (I confirmed this one year by giving students a short questionnaire before my first class.) Students want to learn a body of rules which, when applied to unambiguous facts, will dictate an outcome. They expect to be examined on those rules. But I wanted them to question the rules, examine the judges' underlying justifications, refine their moral intuitions, and reach their own conclusions. Feeling that I should set an example by making my own political orientation explicit, I began one semester by telling the class I was a democratic socialist—and promptly lost their sympathy and my credibility. (This was long before Bernie and AOC.) To give material weight to my stress on meta-analysis, I always divided the final exam into two equal parts: a factual hypothetical calling for a conventional legal analysis; and what students insisted on characterizing as a "policy question," which asked them to criticize the rules and choose among alternatives (fact situations included cougar attacks in Southern California mountains, oycodone overdoses, the 9/11 attacks, tobacco-related illnesses, and gun-related injuries). I believe my approach was most successful in 2001 and 2003, when I taught at NYU, whose students were supremely confident, and least successful in 2007 at CUNY, whose students were acutely apprehensive about the

¹ Abel, "Torts," in David Kairys (ed.), *The Politics of Law: A Progressive Critique*, chap. 9. New York: Pantheon, 1982; chap. 15 (rev. ed. 1990); chap. 20 (New York: Basic Books, 3rd ed. 1998).

bar exam (believing correctly that it dealt exclusively with black-letter law and knowing that the school's pass rate was low). I don't know what my Yale students thought because there were no evaluations. A significant proportion of my UCLA students complained that I taught them no law (even though we read 800 pages of the casebook) because I made them question the reasoning of the cases we analyzed. Some exhorted UCLA to "send the commie back to Russia." (Because I was tenured, these hostile evaluations only delayed merit increases. But believing that students were likely to be far more biased against women and people of color than they were against an old white guy whose politics they detested, I wrote a critique of UCLA's teaching evaluations—with the predictable result that nothing changed.²)

The Franklin & Rabin book begins with a case about a car driver whose epileptic attack injured another, raising questions about who should be responsible. It is an excellent vehicle for posing the alternatives of non-liability, fault-based liability, and strict liability. It questions the relationship between liability and moral culpability. (Although tort law originated as a means of assigning moral responsibility, the culpable rarely pay today because the constantly rising cost of accidents forces plaintiffs to seek a deep pocket: faceless corporations, liability insurers, employers under respondeat superior, and the wealthier of multiple defendants jointly and severally liable. A defendant apologizing to a plaintiff—the goal of restorative justice—almost never occurs.) I showed the students that compensation alone—transferring money from a defendant to a plaintiff—could not be a goal. Where the loss is a fungible item (a new car, totaled but replaceable), imposing liability simply transfers the cost from one party to another. Therefore, the goal must be spreading accident costs. That led to a comparison of social insurance with private loss and liability insurance and how the latter set premiums (often making crude distinctions based on age, gender, and zip code). (Private insurance is wastefully duplicative because potential victims will have to purchase loss insurance and potential defendants liability insurance, whose contributions will be adjusted through subrogation and the collateral source rule, with the result that it costs almost a dollar in transaction costs to deliver a dollar of compensation to the victim. SSI delivers that dollar for 8 cents.) Finally, the case raised questions about the relative merits of criminal law, regulation, and tort liability in promoting an efficient level of safety. Once students have a grasp of these three goals (moral judgment, spreading, and safety), they can begin to understand the tensions between them.

I then turned to damages, which this casebook (like most) postpones to the end of the course, perhaps because there are relatively few rules. I began with damages in the belief that that students could not make sense of when tort law should offer a remedy unless they understood the nature of remedy. Although the editors declare that the goal of tort law is to "return the plaintiff as closely as possible to his or her condition before the accident," the case they use proves just the opposite. Ms Seffert suffered a permanent serious injury to her leg while boarding an LA Transit bus. The editors begin by explaining the single judgment rule, offering several justifications but omitting the real reason: plaintiffs' lawyers want to collect their contingent fees. The rule has several perverse consequences. It creates an arbitrary distinction between plaintiffs who die moments before or after judgment. It compels the jury to make impossible predictions about life expectancy, future earnings with and without the injury (increasingly speculative the younger the plaintiff), and future medical expenses (which tend to rise much faster than general inflation and are rendered more uncertain by scientific innovation). Even without these imponderables, salary replacement is not a perfect substitute for the experience of working, and reimbursing medical expenses does not expunge the experience of undergoing medical

² Abel, "Evaluating Evaluations: How Should Law Schools Judge Teaching?" 40 Journal of Legal Education 407 (1990).

procedures. Both predictions are further complicated by tax consequences, economic cycles, and the fluctuating rate of return on investments.

Even if we could restore the plaintiff to the status quo ante, I wanted students to question the desirability of doing so. After an accidental injury, should the state reproduce preexisting inequalities of income, wealth, medical care, and life expectancy associated with such variables as age, class, gender, sexual orientation, marital status, dependents, race, and education? Should a wrongful death case perpetuate the support dependents would have received from the decedent? Since most tort judgments are satisfied by liability insurance (often compulsory), those unequal entitlements are paid for by everyone, regardless of their income or wealth—a highly regressive form of taxation. It is morally repugnant to make the magnitude of the defendant's punishment for negligence (a capacious behavioral category) turn on the happenstance of the plaintiff's income and wealth. Even more troubling is the fact that entrepreneurs who make the decisions for accidents (in Calabresi's words) are compelled by the market to inflict greater risks on the poor than on the wealthy (the tort equivalent of the environmental justice critique of polluters).

All these objections to "special" damages are compounded by "general" damages for pain and suffering.³ Here the pretense of restoring the status quo ante deteriorates into a parody of Bentham's hedonic calculus—the fiction that any pain can be canceled by an equivalent pleasure. Jurors must simulate a market in sadomasochism, asking what they would require to be paid to experience the plaintiff's suffering. Using another case (a young man, about the same age and education as my students, whose promising life was turned upside down by horrible burns),⁴ I graphed what students said they would award for pain and suffering to show that it did not assume the normal bell-shaped distribution. Some voted for huge damages because nothing less could compensate for the catastrophic loss; others would award little or nothing, either for the same reason or because they felt the plaintiff's life had been changed rather than diminished. (These differences will lead plaintiffs' and defendants' lawyers to seek jurors whose demographics make them more or less likely to empathize with the victim.) I then asked those at the extremes to deliberate as though they were jurors, exposing the difficulty they would have in reaching the consensus required for a verdict. We discussed the fallacies inherent in the ways economists purport calculate these damages: willingness to pay (because the hypothetical is meaningless to someone who has not actually suffered the injury) and wage risk premium (which assumes that the labor market is perfectly competitive and workers have a choice not to work). Because there are no metrics (as this exercise showed), lawyers and judges use special damages to estimate and justify generals. But there is no reason to expect proportionality between the two; and imposing one ensures that the inequalities inherent in specials (noted above) will infect generals and hence intensify unfairness in liability insurance premiums and amplify unequal exposure to risk. Like the single judgment rule, general damages are sometimes justified as defraying contingent fee—but only by jettisoning the fiction that they are necessary to restore the plaintiff to the status quo ante.

This commodification—inherent in capitalism—transcends pain and suffering. In a secular perversion of the Faustian compact, tort law awards damages to those who recover from a coma or suffer diminished life expectancy, as though money can buy experience to make up for the lost years. Paradoxically, there is no compensation for the greatest loss—death—and uncertainty about compensating those in a persistent vegetative state because the dead and comatose cannot buy substitute pleasures. (Students are intrigued by the moral perversity that it is cheaper to kill than to

³ Abel, "General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (but otherwise a great idea)," 55 *DePaul Law Review* 253 (2006).

⁴ *Wry v. Dial*, 503 P.2d 979 (Az 1972).

maim—until I remind them that killing may be a crime.) Nor is there a principled answer to whether pain and suffering awards should survive death (benefiting only dependents). And were we to compensate the dead for death, should we also compensate the living for being born (so-called wrongful life cases)?

Even these intractable problems of incommensurability are dwarfed by the award of damages for harm to relationships through the injury or death of another. Which relationships should be protected: spouses, cohabitants, parents and children, siblings, other kin, friends? If we consider the physical victim's characteristics in evaluating loss of enjoyment (e.g., playing a musical instrument, engaging in athletic activities) should we also calibrate damages for impaired relationships in terms of the characteristics of the injured person—physical attractiveness, sociability, cooking, cognitive skills, caregiving, sexual performance—emulating the ratings of on-line dating? Should we do this in so-called wrongful birth cases for an unplanned pregnancy or a child born with a disability? Should there be an offset for benefit conferred? A duty to mitigate damages by aborting or surrendering the child for adoption?

This analysis of damages unsettles two of the fundamental justifications for tort law: moral judgment (since there is no proportionality between the wrongfulness of the defendant's conduct and the quantum of damages) and compensation (since damages cannot and perhaps should not restore the plaintiff to the status quo ante). The discussion also constructs an essential foundation for addressing the third, and arguably most cogent, justification: producing an efficient level of safety (what Calabresi calls primary accident cost reduction). The casebook introduces negligence with *Adams v Bullock*, a Cardozo opinion denying recovery as a matter of law (despite a jury verdict for plaintiff affirmed by the Appellate Division) to a boy badly burned when a wire he was dangling while walking across a pedestrian bridge contacted a trolley company's high voltage line strung underneath. Cardozo used his extraordinary verbal facility to write a seductive brief under the guise of rendering a judicial opinion, misrepresenting ambiguous facts in the light most favorable to the defendant.

[N]o vigilance, however alert, unless fortified by the gift of prophecy, could have predicted the point upon the route where such an accident would occur. ... at any point upon the route, a mischievous or thoughtless boy might touch the wire with a metal pole, or fling another wire across it. ... No special danger at this bridge warned the defendant there was need of special measures of precaution.

I helped students demystify this reasoning (preparing them to read other misleading Cardozo opinions): the trolley wires were suspended at least 18 feet above the ground (a fact he doesn't mention); the boy's wire was just 8 feet long; gravity brought about this contact and would have made Cardozo's imaginary scenario virtually impossible (it also would have established contributory negligence); and the 18 inch parapet obscured the boy's view of the trolley wire. Although Cardozo maligns the plaintiff as mischievous or thoughtless (apparently he had never done foolish things as a child), the defendant did not assert a defense of contributory negligence because the plaintiff's standard of care was that of a 12-year-old boy. (Cardozo's Supreme Court colleague Holmes famously declared that "the life of the law has not been logic; it has been experience." Holmes failed to add, however, that it was the parochial experience of appellate judges.)

The book then presented *Carroll Towing*, in which Learned Hand presented his influential formulation of negligence as $B < PL$ (the cost of safety must be less than the cost of the accident discounted by its probability). That formula (conventional cost-benefit analysis) makes clear that the legal conceptualization of damages determines what should be spent on safety. I also showed that the formula should be $\Delta B < \Delta P \Delta L$: actors must consider the entire range of safety precautions and the total population of possible accidents, each with its associated probability. (Indeed, it is meaningless to speak of the probability of a unique event, which is vanishingly close to zero. Tort law acknowledges this in the "eggshell plaintiff" doctrine: defendants take their plaintiffs as they find them because the vulnerabilities of the particular plaintiff are just one instance of those in the population of possible

plaintiffs.) Instead of the prospective statistical approach demanded by cost-benefit analysis, however, triers of fact (juries acting within limits set by judges) reflect retrospectively on what happened in the case they are deciding. (This divergence between economic and legal reasoning is the foundation for my later comparison of the relative merits of negligence and strict liability.)

Medical malpractice illustrates additional problems deriving from this economic formulation of negligence. First, expert testimony is essential, raising questions about its availability (because of a conspiracy of silence) and reliability (the *Daubert* issues). I asked students: if you were facing a serious health issue, would you choose among possible diagnoses and treatments by consulting a random selection of ignorant laypeople? Second, informed consent poses a fundamental challenge: this doctrine seeks to protect the patient's autonomy, not to make the most efficient choice among alternative procedures, since the doctor is far more knowledgeable about medicine than the patient. Therefore, the justification must be deontological, not utilitarian. Yet tort law declines to embrace deontology unconditionally: although it entrusts the treatment decision to the patient, it insists on a utilitarian conceptualization of causation (would a reasonable patient with the missing information have chosen a different procedure) and a utilitarian measure of damages (the costs of following the unconsented procedure rather than the dignitary harm of being denied a choice, which cannot be quantified).

Students often simplify tort with the mantra: duty, breach (i.e., negligence), causation, damages. Yet courts rarely address the first issue. Historically, particular duties of care were associated with unique dyads; but modern courts tend to assume a general duty of reasonable care. Situations where courts still relax this duty are illuminating. Solicitude toward landowners may represent a feudal relic, but its preservation is a political choice: Norway (with just 33 people per square mile compared with 702 in the UK, where our legal doctrines originated) affirms the right not only to walk across all land but also to camp on it (if not within sight of a window). Courts defer to the autonomy of parents in raising children and prefer not to intrude in the "private" sphere of families. Charitable immunity was a (misguided) subsidy (the poor should be grateful for shoddy care). Sovereign immunity originated in deference to the crown.

Although there may be other justifications for these lesser duties—families, charities, and governments lack a profit motive, and landowners profit only from business invitees—courts have questioned all these categories and contracted many of them. The "affirmative duty to act," however, remains an intractable problem. Running on the Santa Monica beach, I generally have no duty to use reasonable care to rescue a drowning swimmer, but there are exceptions: commencing to act or a relationship with or reliance by the victim. Yet these concepts are hopelessly vague. Do I commence to act when I leave my house? set foot on the beach? stick a toe in the water? Do I have a relationship with a swimmer I see daily? Do I induce reliance by waving or exchanging a greeting? Is this misfeasance or nonfeasance? There are no answers because this is another situation where two incompatible moral discourses—utilitarianism and deontology—talk past one another. I may be able to save the swimmer at little or no cost (and usually do swim after my run). But the law does not impose that obligation out of respect for my autonomy. (Of course, autonomy is a political choice; a society could choose community and impose such an obligation.) Given this unsatisfactory situation, I ask students to reflect on how social environments shape both a sense of obligation and action: what distinguishes the neighbors in the Queens apartment house who ignored Kitty Genovese's cries for help from the altruism displayed following natural or man-made catastrophes (hurricanes, fires, earthquakes, the 9/11 attacks) or in situations of common peril (backpacking in the Sierras).

The second issue in the student mantra—causation—is irrelevant to the two central goals of tort law: who caused the accident says nothing about the relative ability of plaintiffs and defendants to spread its costs; and we want to encourage an efficient level of safety whether or not risk has led to injury. It is the moral foundation of tort law that restrains it from imposing liability when the trier of fact lacks confidence that the defendant caused the plaintiff's injury. The book's example involves a city

whose contaminated water supply was associated with an elevated level of typhoid cases, but it was impossible to determine whether any particular victim had been injured by the contamination or some other cause. Allowing all to recover would unfairly punish the city for typhoid it did not cause; denying recovery to all would fail to motivate the city to be more careful; and awarding all victims damages discounted by the probability of other causes would not spread their total accident costs.⁵

Trapped by the incompatibility between science, which views causation probabilistically, and law, which must make dichotomous choices between liability or non-liability, the New York court in 1919 adopted criteria for causation that were either oxymoronic (reasonable certainty) or meaningless (reasonable possibilities). Although few cases explicitly address this problem, it is omnipresent: accident avoidance costs (ΔB) can only be correlated probabilistically with accident reduction ($\Delta P\Delta L$). Contemporary judges have displayed no greater sophistication in dealing with probability, demanding a “reasonable degree of medical probability,”⁶ rejecting “a payout scheme on the basis of a statistical chance” because “to dispense with” the requirement of “some degree of certainty” is “to abandon the truth-seeking function of the law,”⁷ complaining that “the use of statistics in trials is...unreliable, misleading, easily manipulated, and confusing to a jury.”⁸ Just two years ago, in a landmark challenge to egregious gerrymandering, Chief Justice Roberts dismissed statistics as “sociological gobbledygook.”⁹ The judiciary is the last bastion of the shamelessly innumerate.

If the issue of “cause in fact” confronts epistemological problems inherent in the incompatible discourses of science and law, proximate cause is law’s self-inflicted wound (and has nothing to do with causation).¹⁰ The doctrine, which introduces a requirement of “reasonable foreseeability,” is redundant since the Hand formula already considers the information cost of anticipating the accident as part of the cost of safety (ΔB). (At this point I pretentiously wrote Occam’s razor on the blackboard: *entia non multiplicanda sunt praeter necessitatem*.) Every year I walked students painfully through that unholy trinity of cases—*Polemis*, *Wagon Mound*, and *Palsgraf*—showing that a different narrative strategy could relate the facts in a way that obviated any need for proximate cause (the accumulation of flammable benzene vapors in the hold of the *Thrasyvoulos*; the information cost of learning that bunkering oil spilled in the cold waters of Sydney harbor could catch fire and burn the *Wagon Mound* after impregnating cotton waste; the information cost of inspecting the packages of every Long Island Railroad passenger in *Palsgraf*—an inconvenience all too familiar to contemporary air travellers; or an alternative story about inadequately secured baggage scales).

As in causation, the criteria judges offered for proximate cause were meaningless: “direct” cause (*Polemis*) “whatever that may mean” (*Wagon Mound*); “remoteness in time and space” (Andrews in *Palsgraf*) (rendered obsolete by Chernobyl, which spread radiation from Italy to Norway and created waste that will remain dangerous for more than 10,000 years); “probable consequences” (*Wagon Mound*) (all consequences are *ipso facto* probable). The judges’ justifications were equally incoherent:

⁵ Recent cases have allowed plaintiffs to join multiple defendants and hold each one liable for a share of total damages proportioned to the probability that it was causally responsible—a typically American private law solution to the public law alternative of taxing the companies and distributing the benefits to their victims.

⁶ *Alberts v. Schultz*, 126 N.M. 807 (1999).

⁷ *Falcon v. Memorial Hospital*, 462 N.W.2d 44 (Mich. 1999) (dissent).

⁸ *Fennell V. Southern Maryland Hospital Center, Inc.*, 580 A.2d 206 (Md. 1990).

⁹ *Gill v. Whitford*, 585 U.S. (2018); see Enos, Fowler & Havasy, “The Negative Effect Fallacy: A Case Study of Incorrect Statistical Reasoning by Federal Courts,” *J. Empirical Legal Studies* (2017) <https://doi.org/10.1111/jels.12158>.

¹⁰ Abel, “Judges Write the Darndest Things: Judicial Mystification of Limitations on Tort Liability,” 80 *Texas Law Review* 1547-75 (2002).

“general public sentiment,” “current ideas of justice or morality” that one should not be liable for “all consequences” of “an act of negligence, however slight or venial” (*Wagon Mound*) (but there is no proportionality between negligence and tort damages); “all are agreed that some limitation there must be” (*Wagon Mound*) (Why? I don’t agree). I reserved my greatest scorn for Judge Andrews’s rambling dissent in *Palsgraf*:

What we do mean by the word “proximate” is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. ... It is all a question of expediency.

His solution was the “substantial factor” test:

whether there was a natural and continuous sequence between cause and effect...a direct connection between them, without too many intervening causes. Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? ... We draw an uncertain and wavering line, but draw it we must as best we can. ...it is all a question of fair judgment...in keeping with the general understanding of mankind.

After reciting this mishmash of platitudes in my most sarcastic tones I threw up my hands in mock despair, declaring that if arbitrariness and expedience were the best we had to offer, we might as well go home. (This drew cheers from the students.) Laws are the reasons the state gives for exercising power. Without persuasive reasons, law is mere ipse dixit, and judges and lawyers have no more legitimacy than laypeople. My students were bemused by this explosion. By this point in the semester they had grown deeply cynical about judges’ efforts to articulate and justify rules (a cynicism I had eagerly encouraged). They preferred the Andrews opinion, which would have allowed the injured and innocent Ms Palsgraf to recover from the deep pocket Long Island Railroad (which had been negligent in letting the passenger carrying the package of fireworks jump aboard a moving train). And they sought comfort in jargon they could memorize to regurgitate on exams. Indeed, the academic support instructor at CUNY pleaded with me to teach the “substantial factor” test and, when I said I couldn’t, undertook to do himself.

I tried to lighten my diatribe against the doctrine with a story. Returning home from Europe one year, I cleared customs in New York. Asked a routine question about what I did, I replied that I taught, when pressed, that I taught at a university, and finally that I taught at a law school. Apparently seeing an incongruity between my alleged profession and my appearance, the inspector wanted to know what I taught. When I mentioned torts, he followed up by asking if I taught *Palsgraf* (proudly noting that his daughter was a law student.) I repeated this incident to my torts class the next day, when I happened to be teaching *Palsgraf*. A student came up afterwards and told me that was no idle chit chat. He had been a customs officer; such a follow-up was standard protocol when you doubted the traveler’s veracity. Every year thereafter I told that story to students mystified by proximate cause, adding: remember *Palsgraf* if you have a stash in your backpack and don’t want to be strip-searched.

The fact situations above showed how an act’s effects could radiate through the physical world of space and time like ripples from a stone dropped into a pond (a metaphor many judges embraced). Causes ramifying through other media posed equally difficult questions. An event could transmit emotional consequences through the psyche: fear for self and others, trauma from witnessing another’s injury, loss of consortium. Courts adopted bright-line rules, cabining recovery in terms of impact, zone of danger, and the nature of the relationship rather than letting those variables influence the quantum of damages. Similarly, an event’s economic consequences could ramify through the market. Here, too, courts promulgated bright-line rules, requiring that property be physically damaged, or compensating property owners for lost profits but not workers for lost earnings (since the former own the means of production—my one explicitly Marxist intervention). I argued that every invocation of proximate cause was simply a power-grab by judges seeking to wrest decisional authority from juries as triers of fact in order to limit liability.

After covering the plaintiff's affirmative case, the book turned to defenses. Should the law view the actions of plaintiff and defendant symmetrically? This could not be justified by concern for safety: plaintiffs are motivated by self-preservation, defendants only by fear of liability. Nor could it be justified by spreading: defendants are more likely to spread the damages as a cost of doing business and to carry liability insurance than plaintiffs are to carry loss insurance (even though the transaction costs of claiming under the latter are lower). Therefore, the argument for contributory negligence must be moral judgment: the parties are *in pari delicto*. But are those who injure themselves as culpable as those who injure others? And if so, why do workers compensation and products liability disregard plaintiff's fault? The diminished influence of moral judgment in tort law is evident in the shift from contributory negligence to comparative fault. Although the law also lets people contract away their entitlement to sue before injury (just as they can settle claims after it), skepticism about freedom of contract sometimes persuades judges to reject agreements not to sue, perhaps recognizing that plaintiffs do not become safer or more likely to insure when bound by such contracts, and defendants may become less safe and less likely to insure. (I used this legal doctrine as an occasion to pose ethical questions. Should a lawyer for a potential defendant draft an agreement not to sue, knowing it is unenforceable but may discourage meritorious claims? Alternatively, should a lawyer for the victim of a defective product advise the client to accept a settlement that is inflated—and will increase the lawyer's contingent fee—because it contains a promise not to warn others endangered or injured by the product?)

When students finally got to read *Murphy v Steeplechase*, about a "vigorous young man" who suffered a fractured knee cap (a serious injury in the 1920s) while riding "The Flopper" to impress his future wife, the libertarians in the class embraced Cardozo for voicing discontents that had been intensifying all semester—and doing so in Latin! "*Volenti non fit injuria*." (Students sometimes sported t-shirts with "*Res Ipsa Loquitur*.") Murphy's fall "was the very hazard that was invited and foreseen." He "made his choice" to join visitors "tumbling about the belt to the merriment of onlookers." "Some quota of accidents was to be looked for in so great a mass." "The timorous may stay at home." As in *Adams v. Bullock*, Cardozo slyly wrote a brief in the guise of an opinion, displaying as little empathy for a young man who chose to join the "tumbling bodies and the screams and laughter" for "merriment and fun" (Ben clearly had been one of the "timorous" who stayed at home) as he had shown for the "mischievous" "thoughtless" 12-year-old boy dangling a wire while walking across a pedestrian bridge. To reach that result, Cardozo told a characteristically partisan story. True, "some quota of accidents was to be looked for in so great a mass"; but Murphy could not know how many. Indeed, the nurse at the emergency hospital maintained by Steeplechase (itself an admission of the riskiness of the amusement park) had cared for others injured on The Flopper; she testified that "none, however, had been badly injured or had suffered broken bones." Cardozo's clincher was a profoundly misleading in terrorem argument: "One might as well say that a skating rink should be abandoned because skaters sometimes fall." But a decision for liability is not a prohibition, only a decision to make Steeplechase pay the costs of its negligence. I asked the students: Who is better able to estimate and reduce the accident costs here, Murphy or Steeplechase? Who is more likely to insure or spread the costs? Is Murphy's "culpability" in riding The Flopper equivalent to that of Steeplechase in designing and operating it? I anticipated the next set of issues by invoking libertarians' own values, arguing that strict liability here would internalize the costs of such accidents among Flopper riders, which was both economically efficient and morally just: the best way to make Flopper riders "assume the risk" of accidents is to eliminate that defense.

One year, a libertarian student resisted my arguments by bravely declaring that society should let Murphy's fractured knee cap go untreated if he could not afford medical care (there was no health insurance in the 1920s). I appreciated the student's principled stance (which made the Socratic dialogue more effective) and missed him in school the next year. He returned a year later and explained that he had gone hang gliding the following summer, been caught by an unanticipated gust of wind when

launching off a cliff, and fallen hundreds of feet, breaking many bones. Lacking health insurance, he had relied on the government to pay his monumental medical costs. Shamefaced, he now agreed those costs should have been internalized in the price of hang gliding. I made it clear I was sorry I had had to learn that lesson so painfully.

Many casebooks begin with intentional torts (although Franklin & Rabin ends with them, suggesting they are intended for a later elective). I chose not to teach them at all (frustrating students who anticipated encountering them on the bar exam). I explained that they had been the staple of tort law before the industrial revolution but now were almost never litigated. I assigned two articles: a psychological study of New Yorkers who failed to complain about personal affronts and David Engel's ethnographic account of why there were so few tort suits in a rural midwestern community (especially compared with contract claims).¹¹ I asked students to offer their interpretations of this behavior. Those from rural backgrounds often confirmed that their neighbors had seen claiming as inconsistent with an ethos of self-reliance. One of the most interesting responses came from an older African American woman, who served as a counselor in an undergraduate women's dorm. A student had come to her with a problem: her roommate was beginning a relationship with a male student and asked if she could have the double room for the night, suggesting that the other women sleep in the bathtub of the common lavatory. That had been such a success that the woman had been asked to repeat this night after night. My student said (in effect): I don't know what's the matter with you white folk; no friend of mine would put up with that! This produced a lively discussion of how different people responded to harms under varying circumstances. I segued from the anecdotal to the statistical, assigning Michael Saks's overview of tort litigation¹² and referring to work by Marc Galanter, Donald Harris (the Oxford Socio-legal Centre's "misfortune" study), and Deborah Hensler (at Rand, replicating the English study in the US) to argue (against many students' strong preconceptions) that most tort victims do not claim, with the result that the legal system cannot achieve any of its goals: moral judgment, spreading, or efficient levels of safety. (I mentioned an article of my own, which I facetiously called "in praise of ambulance chasing."¹³)

The casebook does not address strict liability until page 500. In *Rylands v. Fletcher*, the English House of Lords had to decide in 1868 whether a landowner who excavated a millpond was liable to the adjacent mine owner when the water broke through abandoned shafts in the pond floor and flooded the mine. The engineers who had noted the shafts arguably were negligent but lacked the resources to pay compensation; because they were independent contractors, the defendant was not vicariously liable. Teaching torts for the second time in 1970, I asked my Yale small section what they thought should happen. A student eagerly raised a hand and said strict liability was the obvious solution because otherwise the mineworkers would be jobless, and the student was always on the side of the workers. She was Hillary Rodham (later Clinton). Every time I taught that case thereafter, I asked students what they thought the rule should be before relating that story. But after the '60s ended a few years later, students became reticent about voicing political views.

US courts followed *Rylands*, demonstrating that late-19th century judges had a choice between negligence and strict liability. Sometimes their language made it clear they chose negligence in order to subsidize economic growth (as Horwitz argued). Refusing to apply strict liability to an exploding steam boiler in 1873, the New York Court of Appeals wrote:

We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay [sic] at the basis of all our civilization. ... I am not

¹¹ "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community," 18 Law & Society Review 551 (1987).

¹² "Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?" 140 U. Pennsylvania L. Rev. 1147 (1992).

¹³ Abel, "The Real Tort Crisis—Too Few Claims," 48 Ohio State L.J. 443 (1987).

responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things upon his lands.

(I pointed out that the neighbor did not share the “general good”—an anticipation of trickle-down economics—and probably lacked the capital to put a steam boiler on his own land. The opinion perfectly illustrated Anatole France’s sarcastic epigram two decades later: “The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.”) Six decades after the New York case, the Texas Supreme Court also refused to follow *Rylands*, denying recovery to a landowner damaged by water from a neighbor because “without the storage of water...the great livestock industry of West Texas must perish.” (This repeats the mystification advanced by Cardozo: liability does not prevent the storage of water; it just requires storage to bear the cost of the accidents it causes; and there is no reason to believe that mandating this would destroy “the great livestock industry of West Texas.”) Just as judges could not explain why they sometimes preferred strict liability, they could not offer a coherent rule for when they would do so. English courts offered a miscellany of historical examples (beasts, filth, stench) and invoked the facts of *Rylands*—“bring[ing] on his land something which, though harmless whilst it remained there, will naturally do mischief if it escapes,” distinguishing between “natural” and “non-natural” uses. American courts did something similar, adopting strict liability in blasting cases and then generalizing this in the Restatement’s definition of “abnormally dangerous activities”: those with a “high degree of risk” of “great” harm, which cannot be eliminated by reasonable care, are not “common usage,” and are “inappropriate” to the place where they occur and of less “value to the community” than the danger they create. I show students that these criteria are either unnecessary (if the dangers could be eliminated by reasonable care, the defendant would be negligent) or hopelessly vague (“natural,” “high,” “great,” “common,” “inappropriate,” “value to the community”). Defendants held strictly liable could make those calculations better than courts trying to decide whether to impose strict liability.

Abnormally dangerous activities remain a minor historical anomaly. By the 1960s, however, American courts began to extend strict liability for victims of mass-produced products. This sparked a flurry of economic analyses of the relative merits of negligence and strict liability. Although most followed Posner in preferring negligence, I showed that economists’ primary criterion—efficiency—called for strict liability: the cost-benefit calculus mandated by the Hand formula can be performed more cheaply and accurately by defendants under strict liability than by triers of fact (juries controlled by judges) under negligence; strict liability gives defendants a constant incentive to engage in research and development to discover new ways of reducing accident costs (something the trier of fact is poorly equipped to do); strict liability eliminates false negatives (judgments incorrectly finding no negligence) and reduces the defendant’s incentive to create them (by stonewalling, engaging in defensive medicine, or hiding information); plaintiffs relieved of the need to prove negligence are more likely to claim (further reducing false negatives); and internalizing all accident costs in the price of the product encourages consumers to seek cheaper alternatives. Strict liability also reduces Calabresi’s secondary accident costs—dislocations from bearing the costs of accidents—by placing those costs on the manufacturer or seller, who will spread them among all consumers. The net effect on tertiary (transaction) costs is indeterminate: there will be more claims, but each will be cheaper to resolve because the most contentious issue—negligence—has been eliminated.

If the theoretical justification for strict liability is clear, however, doctrinal development again has been incoherent, perhaps because judges still want to subsidize economic “growth” (but never explain why the injured consumer should pay the subsidy) or remain uncomfortable with the moral implications of holding manufacturers and sellers strictly liable to consumers (who may have been careless). The Restatement explicitly preserves negligence, imposing liability on manufacturers for failing to choose a “reasonable alternative design” or affix a warning, if either would have made the product

“reasonably safe.” Courts have introduced doctrines of “ordinary consumer expectations” (although manufacturers are better equipped to make design decisions), considerations of price (but laissez-faire economics believes consumer choice should be influenced by a price that reflects all costs, including accident costs), unavoidably unsafe products (but internalizing accident costs will produce the efficient level of consumption), and unknowable defects (even though the purpose of strict liability is to create an incentive for manufacturers to learn about them).

I always ended the last class with an anecdote (adapted from a story my father used to tell me), intended to amuse while helping students to answer the final exam’s “policy” question. A princess, ascending to the throne at 21, convened a group of wise people to advise her how to govern (the precursor of federal research grants). Presented with a 20-volume encyclopedia of all knowledge 50 years later, the queen asked for a Nutshell version (the call for further research). The sages took another ten years to condense all wisdom into a single volume. But the queen’s health was failing, and she needed something shorter. On her deathbed, the sages told her: “people are born, they suffer, and they die.” I enacted the tort equivalent by donning a rubber kitchen glove embossed with the Hand formula in large letters and reaching into a deep pocket (props provided by an earlier class).

Although I did not assign my chapter in *The Politics of Law*, most students read it to prepare for the “policy” question. In that chapter I proposed three programmatic reforms, each grounded in a specific political economy. For conservatives wedded to the “free” market and a minimalist night-watchman state, I recommended strict liability, an expansive definition of damages, and incentives to encourage tort victims to claim in order to promote an efficient level of safety. For liberals, I urged that the US follow all other advanced capitalist nations by embracing social democracy, spreading accident costs by guaranteeing universal health care and a minimum income (letting those with higher incomes protect them by buying loss insurance) while ending the commodification of experience (eliminating general damages). Because this response would do nothing for safety, it would have to be combined with either strict liability or aggressive regulation (or both). But because the first two proposals perpetuate the unequal distribution of risk, I advocated a democratic socialist response, offering the example of worker-owned cooperatives, whose members share risk equally and collectively decide which risks to accept. (I wrote an article describing successful experiments by Sunset Scavengers in San Francisco and the Northwest plywood industry.)¹⁴ This would extend the original principles of the French revolution—liberté, égalité, fraternité—from the public sphere to the private, one of the central arguments of critical legal studies.

What did I accomplish in 40 years of teaching torts? My guess is that very few of my students ended up practicing tort law, and those who did would have been hard put to translate anything I said into action. Even fewer became judges or law teachers, for whom my critique of appellate opinions might have been relevant. The rest quickly forgot almost everything they learned—as I did after my three years of law school. Some may retain an image of Learned Hand reaching into a deep pocket and a hazy notion that tort law has something to do with efficient levels of safety and spreading accident costs. I may even have convinced some free marketeers that efficiency requires the internalization of all accident costs. But I doubt that anyone behaved differently as a result.

Did I help to sustain or inculcate a lifelong habit of skeptical inquiry? If so, is that desirable? Skepticism is a valuable antidote to cant—all the more essential in a Trump administration that spouts lies and idealizes ignorance. But skepticism can easily descend into cynicism, nihilism, and quietism. I never bought into the program of subversion for its own sake. I believe that to inspire change, reformers need to articulate attainable goals as well as propose more distant ideals. We are still far from universal health care and a guaranteed minimum income. Corporations continue to spend as little on safety as

¹⁴ Abel, “A Socialist Approach to Risk,” 41 *Maryland Law Review* 695-754 (1982).

they can get away with: McDonnell Douglas, e-cigarettes, Volkswagen. As a crit, I tried to speak truth to power; is that enough?