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# Tort in Three Dimensions

John C.P. Goldberg\*

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## I. INTRODUCTION

It is a privilege to participate in an event that aptly honors Mr. Justice Linden by inviting us to consider how U.S. tort law might serve as a model for other legal systems.<sup>1</sup> His Honor has for some time now been a leading importer and exponent of a distinctively American approach to tort.<sup>2</sup> In writings marked first and foremost by their concern for the well-being of ordinary citizens, he has provided a spirited defense of an institution that too often is the target of undeserved criticism. Viva Linden!<sup>3</sup>

This is also a propitious time to consider lessons that might be drawn from the U.S. experience. Nations around the world, including our own, are reassessing tort law. Domestically, the American Law Institute's massive *Restatement (Third) of Torts* project is headed into its third decade.<sup>4</sup> Tort reform rolls on. With European unification have come important efforts to harmonize European tort law.<sup>5</sup> Citizens of China are living with new tort

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\* Professor, Harvard Law School. Thanks to Tony Sebok and Ben Zipursky for helpful comments, to Dean Martha Minow and Harvard Law School for generous support of my scholarship, and to the gracious hosts of this excellent conference. Errors in what follows are my responsibility.

1. Strictly speaking, there is relatively little "U.S. tort law" given that primary authority to define tort law is vested in the States and the District of Columbia. For purposes of this paper, I will use phrases like "our tort law" and "U.S. tort law" to refer to institutions and rules that are common to most or all of these jurisdictions.

2. See, e.g., Allen M. Linden, *The American Influence on Canadian Tort Law*, 50 UCLA L. REV. 407, 408-14 (2002).

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

4. See AMERICAN LAW INSTITUTE, A CONCISE RESTATEMENT OF TORTS ix-x (Ellen M. Bublick ed., 2d ed. 2010).

5. See EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW: TEXT AND COMMENTARY (2005).

provisions.<sup>6</sup>

What might be learned from studying our tort law? The answer must of course turn primarily on the particular circumstances, institutions, traditions, norms, and ambitions of those doing the studying. But it also hinges on having a clear-eyed view of the thing being studied. Alas, I fear that to an outside observer, U.S. tort law is likely to present itself—somewhat deceptively—as a body of law that vacillates incoherently between two extremes. Impertinently, I will argue that this appearance of “bipolarity”<sup>7</sup> owes much to the well-intentioned efforts of American jurists, including our honoree, to advance a thin, *two-dimensional* account of tort, according to which it is entirely a matter of *forum* and *function*. A richer and more satisfactory view of tort recognizes that it has three dimensions—that it is a matter of forum, *fill*, and function. One cannot hope to extract lessons from U.S. tort law without understanding each of these dimensions and how they stand in relation to one another.

## II. THE NOBLE DREAM AND THE NIGHTMARE<sup>8</sup>

What is distinctive about American tort law? An outside observer might answer this question by listing features including the following:

(1) ready court access for complainants, driven by a decentralized, aggressive plaintiffs’ bar, contingent fees, and the American Rule for litigation costs;<sup>9</sup> (2) notice pleading, broad discovery, and minimal judicial oversight of intensely adversarial litigation;<sup>10</sup> (3) reliance on lay jurors for fact-finding and application of legal standards;<sup>11</sup> (4) generous damage awards to successful plaintiffs;<sup>12</sup> and (5) a willingness among judges to

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6. For an English translation of the recently adopted Chinese tort provisions, see Tort Law of the People’s Republic of China (promulgated by the Standing Committee of the Eleventh National People’s Congress, Dec. 26, 2009, effective July 1, 2010), [http://www.procedurallaw.cn/english/law/201001/t20100110\\_300173.html](http://www.procedurallaw.cn/english/law/201001/t20100110_300173.html) (last visited Jan. 6, 2010).

7. With apologies to Ernest Weinrib. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 64–66 (1995) (relying on a different sense of “bipolarity” to articulate tort law’s structure).

8. See H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977) (positing a tendency among American legal scholars to offer either radically skeptical or radically overstated accounts of the extent to which adjudication is law-governed).

9. See DAN D. DOBBS, *THE LAW OF TORTS* 38 (2000); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 974 (1995) (discussing the uniqueness of the U.S. contingent fee system).

10. See Arthur R. Miller, *From Conley to Twombly and Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 3–5 (2010) (identifying these features as central to the influential 1938 federal rules of civil procedure).

11. See *id.* at 5 (noting that modern procedural rules were constructed around the jury trial).

12. See Anthony J. Sebok, *Translating the Immeasurable: Thinking About Pain and Suffering Comparatively*, 55 DE PAUL L. REV. 379, 390–92 (2006) (offering evidence that pain and suffering awards in the United States tend to be magnitudes larger than those in Germany).

treat individual disputes as occasions to fashion law to achieve policy objectives such as consumer protection.<sup>13</sup>

In narrative form, the story is this. A person who thinks she has suffered a compensable injury can easily find a lawyer to pursue her complaint; the economics and the norms of the legal profession encourage a “throw-it-at-the-wall-and-see-what-sticks” mentality. Early dismissal of suit is unlikely—trial judges are inclined to give complainants (and jurors) their due. Discovery will ensue, with both sides seeking information largely free from judicial supervision. At the same time, the parties will seek to negotiate a settlement. In many cases, settlement is reached, but in some there is a trial before a jury. Jurors are instructed to apply the law, but they rely heavily on their pre-legal, all-things-considered judgments of the equities of the case as framed by counsel. Sympathetic plaintiffs stand to obtain verdicts that are frequently accompanied by a monetary award in the hundreds of thousands or millions of dollars. The award might even be in the hundreds of millions if plaintiff’s counsel (or defense counsel, inadvertently) induces juror indignation over the defendant’s conduct or litigation tactics. Judges will sign off on even substantial verdicts, particularly in personal injury cases, so long as they believe that some social good is being achieved, such as the protection of ordinary citizens against corporate corner-cutting on safety.

Although the foregoing depiction of U.S. tort law surely has some support in observable features of tort law, our imagined observer might just as easily have fastened on a different set of attributes. These would include:

(1) barriers to litigation, including caps on contingent fees,<sup>14</sup> “loser pays” rules,<sup>15</sup> mandated preliminary screening mechanisms,<sup>16</sup> and standard-form contracts redirecting claims to defendant-friendly fora;<sup>17</sup> (2) heightened pleading requirements;<sup>18</sup> (3) judicially and

13. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 15 (5th ed. 1984) (emphasizing the degree to which considerations of public policy do and should shape judicial decisions in tort cases).

14. See, e.g., TENN. CODE ANN. § 29-26-120 (2010) (capping contingent fees in medical malpractice litigation).

15. See generally Walter Olson & David Bernstein, *Loser-Pays: Where Next?*, 55 MD. L. REV. 1161 (1996) (reviewing use of the “English Rule” in U.S. jurisdictions).

16. CATHERINE T. STRUVE, EXPERTISE IN MEDICAL MALPRACTICE LITIGATION: SPECIAL COURTS, SCREENING PANELS, AND OTHER OPTIONS 55–67 (2003), [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Medical\\_liability/medical\\_malpractice\\_101603.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Medical_liability/medical_malpractice_101603.pdf).

17. See generally Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS. 253 (2004).

18. See, e.g., 15 U.S.C. § 78u-4 (2010) (articulating the pleading standard for securities fraud claims); *Ashcraft v. Iqbal*, 129 S. Ct. 1937, 1949–51 (2009) (affirming the dismissal of plaintiff’s constitutional tort claim under Rule 12 of the Federal Rules of Civil Procedure).

legislatively imposed limits on juror discretion;<sup>19</sup> (4) substantial legislative and judicial controls on damage awards;<sup>20</sup> and (5) a sense among judges that they must set liability limitations, even arbitrary ones, to achieve important policy objectives, particularly the protection of businesses against crushing or unjust liability.<sup>21</sup>

A narrative corresponding to this list might stress that: potential claims often are not filed; filed claims are frequently dropped or settled for small sums, in part because they are often too expensive to pursue in light of expected recoveries; procedural and substantive rules grant defendants multiple opportunities to evade liability; successful plaintiffs often find jury awards substantially reduced by trial and appellate judges; and common law and statute grant an array of immunities from liability.

Were she asked to reconcile these two pictures, our imagined observer might be tempted to conclude that U.S. tort law is an unstable mixture of diametrically opposing tendencies. An open, flexible, plaintiff-friendly, jury-driven system of ad hoc regulation and compensation, tort also appears to be a minefield for claimants, with the mines justified as necessary to ward off ad hoc regulation and compensation. One could perhaps ascribe “balance” to this body of law, but only if one uses that term to describe a de facto stalemate, the way one might use the phrase “balance of power” to describe a tenuous and temporary peace among nations aiming to conquer one another. As neither of the two opposing camps has prevailed in the “tort wars,” we are left with a system that, at least for now, arbitrarily splits the difference.

Returning now to the question of U.S. tort law’s value as a model for other nations, what are we to conclude? The answer seems obvious. Even to one who grants that certain aspects of U.S. law are well-suited for export, it seems farcical to imagine that the riven creature I have just described is one of them. The sounder conclusion would seem to be that academics familiar with U.S. tort law owe a duty to other nations to warn them against adopting it.

### III. TORT LAW IN TWO DIMENSIONS

I will suggest below that tort law in the United States is not so bipolar as I have been suggesting. Before doing so, however, I would like to consider

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19. *See, e.g.*, FED R. EVID. 702 (2010) (inviting judges to screen out purported expert witnesses whose proposed testimony lacks a sufficient scientific basis); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) (prohibiting jurors from considering harms caused to non-parties by the defendant in calculating a punitive damages award).

20. *See e.g.*, CONGRESSIONAL RESEARCH SERVICE, MEDICAL MALPRACTICE LIABILITY REFORM: LEGAL ISSUES AND FIFTY-STATE SURVEY OF CAPS ON PUNITIVE DAMAGES AND NONECONOMIC DAMAGES (updated April 11, 2005), <http://shelby.senate.gov/legislation/MedicalMalpractice.pdf>.

21. *See, e.g.*, *Thing v. La Chusa*, 771 P.2d 814, 878 (Cal. 1989) (emphasizing desirability of establishing clear limits on liability for negligent infliction of emotional distress); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061–62 (N.Y. 2001) (emphasizing the need for courts to limit negligence liability for gun-related injuries).

briefly why it is today plausible to perceive tort law to be at war with itself.

The tale begins at the start of the twentieth century. This too was a time when many jurists were skeptical of tort, although for reasons other than those invoked by most modern-day skeptics. Back then, tort was decried as the poster child for regressive formalism. It was, after all, home to the privity limitation on liability for injuries caused by carelessly made products,<sup>22</sup> the “one-leap rule” for carelessly caused fire damage,<sup>23</sup> and the “unholy trinity” of employer defenses to claims for injuries caused by carelessly created workplace dangers.<sup>24</sup> The *Ives* decision, which struck down a New York workers’ compensation scheme, was but a particularly vivid demonstration of the seemingly inescapable linkage between the common law of tort and an each-man-for-himself conception of rights and (ir)responsibility.<sup>25</sup>

And yet this linkage quickly proved to be anything but inexorable.<sup>26</sup> At a jurisprudential level, Holmes had already shown how tort law could be decoupled from notions of rights and instead be conceived as a scheme by which judges, based on policy considerations, set rules specifying when one person should pay for a loss caused to another.<sup>27</sup> Cardozo further demonstrated that, even from within a traditional conception of judicial craft and role, courts enjoy considerable authority to revise and innovate.<sup>28</sup> The U.S. Supreme Court’s subsequent rejection of the reasoning in *Ives*<sup>29</sup> and the broad implementation of workers’ compensation schemes pointed toward a world of possibilities for innovative schemes of deterrence and compensation.

Buoyed by these developments, mid-century revisionist scholars, including Leon Green and Justice Linden’s mentor, William Prosser, developed a new understanding of the field. Tort was not doomed to be low-rent, intellectually bankrupt, and politically suspect “private law.” It could

22. See, e.g., *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402 (Ex.) 403; 10 Meeson & Welsby 109, 109.

23. See, e.g., *Ryan v. N.Y. Cent. R.R. Co.*, 35 N.Y. 210 (1866).

24. See KEETON ET AL., *supra* note 13, § 80, at 569 (using the phrase to refer to the fellow-servant rule, contributory negligence, and assumption of risk).

25. See *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 439–42 (N.Y. 1911).

26. See John C. P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1799–1811 (1998) (explaining how the linkage of tort law to *laissez-faire* depended on a combination of dubious philosophical claims and contingent political concerns that largely ceased to obtain by the mid-twentieth century).

27. See OLIVER W. HOLMES, JR., *THE COMMON LAW* 79 (Little, Brown & Co. 1945) (1881) (asserting that the point of tort law is to set rules of conduct which, if broken, require an actor to indemnify another for losses caused to that other).

28. See Goldberg & Zipursky, *supra* note 26 at 1767–69 (discussing modern scholars’ treatment of Cardozo’s *MacPherson* opinion as exemplifying a progressive or realistic approach to common law adjudication).

29. *N.Y. Cent. R.R. v. White*, 243 U.S. 188 (1917).

be part of the exciting new world of “public law”—a branch of the emergent administrative state in which regulations directed toward certain kinds of influential actors—especially professionals, businesses, and government entities—would be crafted primarily by jurors and judges on a case-by-case basis.<sup>30</sup> One merely had to recognize that tort law, like criminal law and regulatory law, operates as a mechanism of governance. By granting to persons who suffer injuries the power to haul others into court, it of course offers individuals a chance to obtain relief. But it also directly (through damage awards) and indirectly (through publicity) pressures entities and institutions that exercise substantial influence over ordinary citizens’ lives to act with greater attention to the public welfare.<sup>31</sup> In Justice Linden’s famous metaphor, tort law could operate as an “ombudsman.”<sup>32</sup> As such, it could be “a weapon of social progress”<sup>33</sup> by providing assistance to and an outlet for ordinary people who have suffered setbacks.<sup>34</sup>

To view tort in this manner is to regard it as having two dimensions. I will label these “forum” and “function.” On this conception, tort first provides a *forum* in which an individual can complain and demand that her complaint be attended to. To gain access to this forum one needs only to “feel[] injured.”<sup>35</sup> If a person believes that something bad has happened to her, she has the right to have that grievance adjudicated. The complainant will not always obtain relief. At a minimum, though, she is given a hearing and a ruling.

The filing of the complaint in turn creates a space and an occasion for governance. It is now the job of judges and jurors, subject to legislative oversight, to decide what to make of these occasions. And they do so based primarily on a sense of what *functionally* might be accomplished by the imposition or rejection of liability. In addition to providing a measure of relief to the injured, the most obvious function tort might play is to send a message to powerful actors that they must give due consideration to the well-being of others. Tort cases can also foster public dialogue and debate about social problems, particularly problems related to the use and abuse of power.<sup>36</sup> To be sure, judges’ and jurors’ regulatory activities cannot be completely ad hoc—they are guided by substantive and procedural rules. However, these rules must be treated pragmatically, rather than woodenly or formalistically: as rules of thumb that, in the typical case, point toward good outcomes but may be relaxed or abandoned when they do not. If the tort

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30. See Allen M. Linden, *Tort Law as Ombudsman*, 51 CAN. BAR REV. 155, 155–68 (1973) [hereinafter *Ombudsman*].

31. See *id.*

32. See *id.*; Allen M. Linden, *Reconsidering Tort Law as Ombudsman*, in ISSUES IN TORT LAW 1, 1–23 (Freda M. Steel & Sanda Rodgers-Magnet eds., 1983) [hereinafter *Reconsidering*].

33. *Ombudsman*, *supra* note 30, at 164.

34. See *Reconsidering*, *supra* note 32, at 14.

35. *Ombudsman*, *supra* note 30, at 158.

36. *Reconsidering*, *supra* note 32, at 5; *id.* at 21 (suggesting that tort law “enables individuals to protest peacefully and rationally against the abuse of power”).

system is working well then some relief—though perhaps not as much as the plaintiff might hope to obtain—ordinarily ought to be forthcoming, at least for any grievance based on a genuine injury that is (a) not wholly self-inflicted and (b) suffered by a person who is not well-positioned to cope with it.<sup>37</sup>

In sum, in the two-dimensional view, plaintiffs are “private attorneys general.” Through the process of claiming for themselves, they invite an independent government official—the judge-jury composite—to acknowledge their claims, to respond to their losses, and to do something for the public’s benefit, thereby correcting for gaps or deficiencies in governance by the political branches.<sup>38</sup>

There is much to be said for the progressive reconceptualization of tort. Its driving impulses are humanitarian and egalitarian. In the period from 1940 to 1980, it helped to fuel a number of salutary doctrinal developments.<sup>39</sup> Outmoded and ill-considered limitations on liability were either removed or relaxed. Important new forms of liability emerged, including strict products liability, as well as the privacy and emotional distress torts. Alternatives to tort, such as no-fault, received careful attention as potentially superior regulatory mechanisms.<sup>40</sup>

Yet for all its virtues, the progressive vision soon generated a backlash—one that exploded onto the scene as part of a broader reaction to the Great Society era.<sup>41</sup> As expressed in the modern tort reform movement, the backlash turned out to be the “conservative” mirror-image of the progressive vision.<sup>42</sup> The tort reformer accepts the progressive’s two-dimensional view of what tort law is. However, he then rejects the progressive’s assessment of it, emphasizing at every turn tort’s deficiencies as a species of regulatory law.<sup>43</sup>

In contrast to the progressive, the conservative is deeply skeptical that

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37. See *Ombudsman*, *supra* note 30, at 164 (offering examples of cases in which an injury victim cannot recover for lack of defendant fault and describing these as “problems” that a suitably up-to-date and flexible tort system would “solve” by affording compensation to the victim).

38. See *Reconsidering*, *supra* note 32, at 18 (advocating reforms that would permit a tort trial to function more fully as “a type of *ad hoc* royal commission”).

39. See generally Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981) (charting these developments).

40. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 3–16 (1970) (reviewing and critiquing several such plans).

41. Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 619 (1992).

42. See Deborah L. Rhode, *F frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 473 (2004).

43. The following characterization of “the conservative” view of tort is a composite. Representative statements of the view include: PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1990) and WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991).



tort provides a forum for *genuine* grievances, or at least grievances beyond those that ought to be borne by the complainant as part of the ordinary hardships of life. The font of tort suits, he insists, is not losses. It is a desire to get a “piece of the pie”—i.e., funds sitting in the bank accounts of businesses and insurance companies. Indeed, he would say that the U.S. tort system has created an entire class of well-trained professionals whose livelihood depends on finding ways to invoke the law as a means of getting at these funds. Simply put, it is in the interest of plaintiffs’ lawyers and would-be plaintiffs that the latter view themselves as victims. Not surprisingly, many do, even when they really should not. Hence the conservative’s need for multiple roadblocks to liability.

Contemporary reformers also see in the progressive rendition of the forum-and-function account of tort a serious problem of political legitimacy. According to progressives, the plaintiff’s complaint initiates the sort of proceeding that individuals would otherwise lack the ability to initiate. To the progressive this is one of tort law’s chief virtues: the condition of relative political powerlessness is precisely what tort law helps the ordinary citizen to overcome. The conservative is deeply skeptical. Of the plaintiff-private attorney general he asks: “Who deputized you to commence these proceedings? What if we don’t want you to sue?” In a similar vein he asks: “How is it that, in a democratic political system with elected and expert policymakers, judges and jurors possess the authority to run a shadow regulatory system that lacks clear rules of operation and is often at odds with the system that first-line regulators have sought to put in place?” Not surprisingly, to combat the alleged evils of illicit regulation, reformers have sought and obtained measures whose main aim is to reduce the occasions for tort regulation. This is what the capping of contingent fees and damages, and the wiping out of particular causes of action, are said to accomplish.

The progressive understanding of tort in terms of forum and function has been sufficiently influential that, in this country—and perhaps in others—it tends to be mistaken for tort law itself. When reformers criticize tort law, they are in fact criticizing this understanding of tort. The notion that tort law today is a mere hodgepodge of pro-liability and anti-liability measures is no less premised on that understanding.

#### IV. TORT LAW IN THREE DIMENSIONS

The progressive and the reformer have left their marks on modern tort law. Fortunately, however, their shared understanding of tort has never been fully embraced by academics, much less judges. In fact, the two-dimensional account is inaccurate and unsustainable. It is too thin or “flat” to be capable of making sense of tort.

What is missing from the picture, and what renders it ill-fitting and unstable, is the suppression of the third and most basic dimension of tort. For alliteration’s sake, I will dub this tort law’s “*fill*.” One could just as easily refer to it as tort law’s “character” or “substance.” Tort is not merely forum and function. It is forum, fill, and function. To use a tired metaphor,

two-dimensional accounts attempt to stage *Hamlet* without the Prince.<sup>44</sup> One can't understand the place of forum and function in tort law without understanding its fill. Tort law's three dimensions are deeply intertwined.

To say that tort law has a certain "fill" is to say that torts are distinctive legal creatures. This is in part what Professor Weinrib aims to get at in claiming the mantle of "formalism."<sup>45</sup> To point out a table, and distinguish it from a chair or sofa, he says, is to refer to a particular type of thing—something with a particular "form."<sup>46</sup> So, too, when one points to tort, one is looking at a distinct body of law that stands in contrast to other bodies of law, such as criminal and regulatory law. To commit a tort is to violate a norm that specifies how one must act in relation to others. More specifically, it is to violate a *relational norm of non-injury* recognized as binding in judicial decisions and/or statutes (even if only implicitly). Every tort involves conduct that is wrongful toward and injurious of another. Each is a trespass in the particular sense of being a mistreatment of another.

To recognize that torts are injurious "wrongings" of others is to recognize that it is misleading to describe tort law as a governmental response to tragedies that befall citizens, or to problems that they face. The facts of tort cases are often tragic. Victims often experience torts as calamities. Torts frequently pose grave economic and psychological problems for victims, family members, friends, and colleagues. Tort suits ideally will help victims cope with the losses they have suffered by virtue of being victimized. Yet torts are not natural disasters. Nor are they tragedies or problems to which the state attends in its capacity as regulator or provider of welfare services. They are wrongs inflicted by one on another. The state's job, in this domain of law, is to identify with reasonable precision and plausibility what sort of interactions count as wrongful injurings, and to provide an avenue for victims to respond to those who have wronged them. A tort is never a (unilateral) mishap; it is always a (bilateral) mistreatment. A victim of misfortune that is not traceable to mistreatment—a medical patient who has a bad outcome even though her treatment was proper; a person injured by a well-designed product; an innocent citizen who, with probable cause, is detained for a reasonable period by police—may certainly be entitled to our sympathies. She might justifiably demand of government that it take steps to prevent or reduce the incidence or severity of these sorts of incidents and that it provide her with after-the-fact assistance, should she need it, in coping with this sort of misfortune. But she is not the victim of a

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44. A lawyer appearing before Judge Jack Weinstein once invoked this metaphor to argue that a proceeding could not take place because of the absence of a key party. Without hesitation, Judge Weinstein ruled that the litigation could proceed under the authority of *Rosencrantz and Guildenstern are Dead*. TOM STOPPARD, *ROSENCRANTZ AND GUILDENSTERN ARE DEAD* (1966).

45. WEINRIB, *supra* note 7, at 25–29.

46. *Id.* at 28.

tort, and her demands, however justified, are not the province of tort law.

The concept of tortiousness is also not coextensive with, or exhausted by, the idea of abuse of power. It is a mistake to think of tort law simply as a device for empowering ordinary citizens to assert a measure of control over entities and institutions to which citizens would otherwise be vulnerable. The commission of a particular tort might involve an abuse of power, and when it does, it often generates a claim for a special form of victim redress: namely, punitive damages.<sup>47</sup> Moreover, some torts, such as intentional infliction of emotional distress, often involve abuses of power.<sup>48</sup> However, a plain-vanilla negligence suit by one car driver against another does not typically provide an occasion for the courts to level an uneven playing field between victim and injurer, nor to call attention to anti-social conduct by a powerful entity. The same is true of many standard instances of assault and battery, defamation, invasion of privacy, nuisance, and trespass.

To deny that torts are tragedies is *not* to deny that torts are occasions for both lamentation and government action. Likewise, to deny that tort law is safety regulation or a compensation system is not to dispute that a liberal-democratic government should provide such institutions to its citizens. Finally, to deny both of these things is not to insist that tort law has nothing to do with forum or function. Tort law does indeed provide a forum for citizens, but it is not a general-purpose public forum for the airing of grievances. It is not a locus for lodging complaints about governmental overreaching per se, or corporate inattention to consumer welfare, or the indifference of professionals to the well-being of their clients or patients. It is a limited-purpose forum—a forum for alleging, pursuing, and perhaps prevailing on a claim that one has suffered a wrong at the hands of another.<sup>49</sup> Correlatively, its function is to specify what counts as mistreatment (the defining of those injurious acts that count as torts) and to provide an avenue of recourse for those who have been mistreated.

Understood in terms of forum, fill, and function, tort reemerges as something distinct from the un-canalized delegation of regulatory authority to judges and juries that is championed by progressives and demonized by reformers. It is not an ombudsman. It poses to judges and jurors the circumscribed job of determining whether a tort—a breach of a relational norm of non-injury—has occurred, and if so, what remedy is due to the victim of the wrong. This is hardly an ignoble task, nor, as I will explain below, is it one that necessarily entails a circumscribed domain of liability,

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47. See *Huckle v. Money*, (1763) 95 Eng. Rep. 768 (K.B.) 768–69; 2 Wilson, K.B. 205, 205–06.

48. Facts that support findings of “outrageous” mistreatment of the sort that will support liability for intentional infliction of emotional distress may often involve abuses of power relationships, though such abuse is not necessary or sufficient to establish outrageousness. RESTATEMENT (SECOND) OF TORTS § 46 cmt. e, at 74 (1965).

49. Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 17 (1998).

but it is a discrete task.<sup>50</sup>

With the recognition of tort law's third dimension and the rejection of a flat, two-dimensional conception, it is possible to recognize that current conflicts about the scope and domain of tort law need not be, and often are not, simply fights about whether or not to regulate a given activity through tort. The tort wars are more complicated than this, which is why the presence of pro- and anti-liability features of U.S. law often do not signal incoherence. Before condemning tort as a grab-bag of pro-liability and anti-liability features, we need to know much more about the content and justifications for the particular features under consideration.

The justification for the distinctive, and in some respects, pro-liability aspects of the U.S. tort system, such as the contingent fee, is not that it permits a person of modest means to call powerful actors to task, or receive needed aid. It is to ensure, as much as possible, that one can press a claim of wrongdoing even if one does not have the money on hand to do so. Likewise, reliance on jurors to decide basic issues relevant to liability turns on the idea that claimants and defendants are usually entitled to ask ordinary citizens to provide judgments concerning, for example, the content of basic norms of conduct and the extent to which a wrongdoer ought to be held responsible for injuring another.

Much the same goes for anti-liability features of tort. Screening panels and harder-look scrutiny of complaints are not simply checks on the aggregate amount of malpractice liability; they are checks that aim to ensure that claims of wrongdoing presented to judges and jurors are credible—they aim to help tort law do its job of defining wrongs and providing redress for them.<sup>51</sup> Likewise, exemptions from liability must be understood and assessed not merely as exemptions, but on their merits. Whether sound or unsound, Congress's decision to immunize gun manufacturers from "negligent marketing" and other similar claims is vastly more defensible than would be a statute immunizing gun manufacturers from claims for injuries caused to users of guns by shoddy manufacturing.<sup>52</sup> The former addresses a very attenuated form of wrongdoing or mistreatment—the wrong of carelessly "enabling" another to intentionally harm someone—that has gained little or no traction in the courts.<sup>53</sup> It is legislation that, in substance, is respectful of and responsive to tort law's fill.

U.S. tort law today is being buffeted by contending political forces. Many aspects of tort law, both pro-liability and anti-liability, are surely ripe

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50. See *infra* pp. 332–35.

51. Whether they actually do a good job of this is a different question.

52. Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–03 (2005).

53. John C.P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211, 1218–44 (2009).

for revision or elimination. But the collection of statutes and judicial decisions that one finds, even after the thirty-year war over torts, is not simply random liability and no-liability pockets that are to be totted up into some sort of aggregate liability-level index. They are, by and large, attempts—some wise, some foolish; some well-motivated, some poorly motivated—to fashion a workable law of wrongs and redress that is responsive to modern circumstances.

## V. TORT LAW AND LIBERALITY

Progressives who champion a two-dimensional view of tort seem to suppose that a three-dimensional understanding entails a miserly, uncompassionate conception of tort or a downplaying of tort's importance to the U.S. political and legal systems.<sup>54</sup> This is simply a mistake. The scope of tort on a three-dimensional understanding will depend on which forms of human interaction courts and legislatures can plausibly deem, and do deem, to be mistreatments to be recognized as torts. There is no doubt that American courts and legislatures have at times adopted indefensibly cramped accounts of what is regarded as a wrongful injuring. They have also adopted indefensibly broad accounts of when a victim should be deemed to have forfeited her right to complain about having been wrongfully injured. However, there is nothing inherent in the idea of relational, injurious wrongs that entail these outcomes, and many of these errors have been corrected or ameliorated, though not always as swiftly as they should have been. Since about 1970, most U.S. jurisdictions have (cogently, if controversially) treated as a wrong the injuring of a consumer by a manufacturer through the sale of a product rendered dangerous by a manufacturing defect, irrespective of the degree of care exercised by the manufacturer.<sup>55</sup> This is a capaciously defined wrong. Although most progressives would presumably be hostile to the idea, one could likewise imagine a return to older conceptions of libel and slander, under which wrongful injuries to reputation could give rise to a vast domain of liability.

There is also no reason to associate a three-dimensional conception of tort with formalist adjudication or an especially narrow conception of the judicial role. Though Cardozo's tort opinions are often appropriated by progressives in aid of their vision, they actually attest to the idea that a judge working within a three-dimensional view can be flexible and pragmatic. The author of *The Nature of the Judicial Process* was no formalist, but neither was he an exemplar of the progressive vision of judge as ad hoc regulator, a point that Leon Green and William Prosser seemed to understand, even if others have not.<sup>56</sup> Cardozo accepted that the job of the

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54. A fellow conferee used the term "antiseptic."

55. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

56. For example, both Green and Prosser criticized important Cardozo tort opinions for being too conceptual. See Leon Green, *The Palsgraf Case*, 30 COLUM. L. REV. 789, 791 (1930); William L.

judge in a tort case is to determine whether the plaintiff has alleged a wrong that is cognizable on the basis of existing law or a reasonable extension or revision of it.<sup>57</sup> To be this sort of judge is not to be an ascetic or moralist (in a pejorative sense), nor is it to deny that the roster of wrongs to be treated as torts will and should change over time with changes in economic, political, and social conditions.<sup>58</sup>

There is nothing inherently miserly about the three-dimensional view, just as there is nothing inherently progressive about the two-dimensional account. In fact, it is likely the case that some actors who have wrongfully injured others can today *avoid* liability to which they would otherwise be subject because of the influence of a two-dimensional conception of tort. Here I have in mind the law of governmental liability, a branch of tort law that not coincidentally emerged during the period in which two-dimensional accounts have been ascendant.

My sense is that American tort law probably departs significantly from that of England and Commonwealth countries in the degree to which it protects governmental officials from liability for wrongfully subjecting citizens to physical force or confinement, and for failing to protect them from attacks by another private actor.<sup>59</sup> The full-blown version of sovereign immunity is, of course, a thing of the past. But there remain formidable barriers to recovery in the form of qualified immunities enjoyed by individual officials against claims for constitutional torts,<sup>60</sup> immunities enjoyed by governmental entities under the Federal Tort Claims Act's "discretionary function" exemption and its state-law equivalents,<sup>61</sup> and exemptions provided by common law no-duty rules.<sup>62</sup> Other Anglo-American systems seem on the whole more prepared to hold government entities accountable to victims of official wrongdoing, though of course they

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Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 7 (1953). Judge Posner, on the other hand, wrongly supposes that Cardozo made ad hoc policy judgments but then dressed them up in legal language. See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 53–55, 126, 134 (1990); John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1438–41, 1450–55 (1999) (criticizing Posner's account).

57. See Goldberg, *supra* note 56, at 1446; BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921), reprinted in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 107, 164 (Margaret E. Hall ed., 1967).

58. See Goldberg, *supra* note 56, at 1440, 1474.

59. See Andrew Hyer, *The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis*, 2007 BYU L. REV. 1091, 1093.

60. See SHELDON H. NAHMOD, ET AL., *CONSTITUTIONAL TORTS* 445–63 (2d ed. 2001) (collecting and discussing Supreme Court decisions on qualified immunity).

61. See Hyer, *supra* note 59, at 1104–16 (summarizing current discretionary function doctrine and criticisms of it).

62. See, e.g., *Kircher v. City of Jamestown*, 543 N.E.2d 443 (N.Y. 1989); *Riss v. City of N.Y.*, 240 N.E.2d 860 (N.Y. 1968).

too recognize significant limits.<sup>63</sup>

If this broad-brush contrast is accurate, it perhaps provides an example of an instance in which the forum-and-function model of tort—championed by its adherents as a way of expanding legal protections for ordinary citizens—has actually skewed doctrine in a way that is unfavorable to claimants who have been wronged. One can assert that tort suits against government officials are a means of forcing, for example, a police or human services department to adopt better internal procedures. But doing so only invites a standard rejoinder that seems to strike a chord with many U.S. courts: “Even if it is our business to regulate the conduct of private actors through tort suits, it is emphatically not our business to instruct officials in a coordinate branch of government how to go about their jobs.”

The foregoing example notwithstanding, I can only expect that progressives—even progressives who are generations removed from the era in which it made sense to worry that tort law on a three-dimensional view is fated to be a handmaiden of capital—will continue to insist that the three-dimensional view is miserly. In an effort to beat back this misimpression, I will endeavor to conclude on a Lindenian note from within a three-dimensional conception of tort.

I suggested above that forum-and-function accounts of tort offer an impoverished conception of the plaintiff’s right of action as an ignition key that starts the motor of government. In offering this suggestion, I did not and do not mean to assert that private rights of action lack public or political significance, as if tort suits were purely private affairs. Quite the opposite, I have been foolish enough to suggest that tort law and tort suits are a part of this nation’s basic political architecture.<sup>64</sup> A person’s right to have one’s grievances against another heard in court, and to have a remedy for a wrong done to him, is no less a part of the constitution of our liberal-democratic polity than the rights to speak freely, to petition, and to assemble.<sup>65</sup>

Tort suits are politically empowering; they enable people to make complaints that must be attended to. In principle—though not necessarily in practice—they are open to all on equal terms. Tort law thus allows ordinary citizens to activate public institutions, the operation of which they ordinarily have little say. But it does so only in a particular way. It permits them to harness state power to obtain an answer from those alleged to have aggrieved them in certain ways, even where they would otherwise lack the wherewithal, power, or clout to do so. And it does so without requiring complainants to win the favor of legislators and bureaucrats or to pursue a cause that is popular or that happens to sit well with current regulatory policy. In all these ways, tort law—like the law of property, contract, and

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63. See, e.g., ROBERT STEVENS, TORTS AND RIGHTS 218–43 (2009) (analyzing English law).

64. See *supra* notes 30–33 and accompanying text; John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 524 (2005).

65. 1 WILLIAM BLACKSTONE, COMMENTARIES \*136–41.

restitution—reaffirms to individuals that *their interests* matter, not just the interests and concerns of the state or the public. Whatever their other virtues and efficacies, top-down systems of government benefits cannot serve these constitutional values.

## VI. CONCLUSION

Wise soul that he is, Justice Linden has always been alert to the constitutional significance of tort law's provision of a forum for ordinary citizens and their grievances. In this, his work shares a close kinship with the work of eminent contemporary scholars, including Anita Bernstein and Michael Rustad.<sup>66</sup> All rightly insist that the sometimes grubby, unpleasant, materialistic, and discomfiting phenomenon of tort litigation is a fundamentally democratic practice with an integral place in our polity, not merely a branch of the modern administrative state that is ready to be supplanted by the market or the creation of additional safety agencies or benefits schemes.<sup>67</sup> Tort law is not "public law" in the sense that Leon Green or William Prosser meant. But insofar as the identification of tort law as "public" is meant to capture the political role that it plays in our system of government, the identification is apt. Our longstanding commitment to the idea that the courts must provide fora to resolve claims of wrongful injury is a commitment that we should celebrate and that other nations should consider emulating, if they do not already. And in fact, there is some reason to suppose that, notwithstanding the more collective and bureaucratic bent that is sometimes said to typify European governance structures, the idea of empowering individuals to assert claims on their own behalf is gaining some traction there.<sup>68</sup> Perhaps the same will prove true in China under its new tort code.

If tort law merely gives occasion to ad hoc efforts at compensation and regulation fenced in by arbitrary limits, we cannot in good conscience hold it up as a model for others. If it is to point a way forward, it must be understood as a law of wrongs and recourse—that is, in terms of forum, fill, and function.

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66. See, e.g., Anita Bernstein, *Muss Es Sein? Not Necessarily, Says Tort Law*, 67 LAW & CONTEMP. PROBS. 7, 7–8 (2004); Michael L. Rustad, *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 ELDER L.J. 331, 390–91 (2006) (arguing that damage caps for suits brought by victims of nursing home negligence are unwarranted and have effectively deprived victims of nursing home negligence of the right to pursue redress for wrongs done to them).

67. See Bernstein, *supra* note 66, at 7–8; *Reconsidering*, *supra* note 32, at 22.

68. Anthony J. Sebok & Lars Trägårdh, *Adversarial Legalism and the Emergence of a New European Legality: A Comparative Perspective*, in IMAGINING NEW LEGALITIES: PRIVACY AND ITS POSSIBILITIES IN THE 21ST CENTURY (Austin Sarat, Lawrence Douglas, & Martha Merrill Umphrey, eds., forthcoming 2011).



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