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THE NEW-TORT CENTRIFUGE

Anita Bernstein*

For the last three years, the *National Law Journal* (“*NLJ*”) has run a feature on new torts, enumerating causes of action unknown to the Torts treatises and casebooks. Examples include “pharmacy malpractice,”¹ “borrower harassment,”² and “wrongful interference with the doctor-patient relationship.”³ The list is derived from a review of the year’s largest jury verdicts, followed up with interviews of lawyers and judges.⁴ All of the phrases became noteworthy to the *NLJ* for what they achieved in a tough arena. They survived defense efforts toward settlement or dismissal before trial, impressed jurors as conceptions of wrongful conduct, yielded profits to plaintiffs’ lawyers, and struck judges as stable innovations within tort law.⁵

Margaret Cronin Fisk, the journalist who built the new-tort beat at the *NLJ*, has not settled firmly on what to call the items on the annual list. The occasional reference to new torts in *NLJ* headlines is not hers; Fisk would prefer to say “emerging torts.”⁶ There are no new torts, she contends: “it’s all new wrinkles on old ones.”⁷ This problem of when, how, and why to name new types of tort claims—you might mistake Fisk’s point for a quibble—is the subject I want to address here. At a different gathering back in 1996 (“the Texas symposium”),⁸ I cast my lot implicitly with the *NLJ* headline writers, arguing that

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1. Margaret Cronin Fisk, *Looking for a New Cause of Action?*, NAT’L L.J., May 19, 1997, at A1, A13 [hereinafter *New Cause of Action*].

2. Margaret Cronin Fisk, *10 Innovative Tort Claims*, NAT’L L.J., July 20, 1998, at A1, A16 [hereinafter *Innovative Tort Claims*].

3. *New Cause of Action*, *supra* note 1, at A13. For Fisk’s 1999 stories on this subject, see Margaret Cronin Fisk, *Old Torts, New Bottles*, NAT’L L.J., Sept. 27, 1999, at A1; Margaret Cronin Fisk, *The Whistleblower Juggernaut*, NAT’L L.J., Aug. 9, 1999, at A1.

4. Telephone Interview with Margaret Cronin Fisk, Contributing Editor for the *National Law Journal* (Oct. 8, 1998) [hereinafter *Fisk Interview*].

5. See generally *New Cause of Action*, *supra* note 1 and *Innovative Tort Claims*, *supra* note 2 (explaining the inception and development of a variety of new torts).

6. *New Cause of Action*, *supra* note 1, at A1; *Innovative Tort Claims*, *supra* note 2, at A2.

7. *Fisk Interview*, *supra* note 4.

8. W. Page Keeton Symposium on Tort Law, Nov. 1996; proceedings published in 75 TEX. L. REV. 1499 (1997).

activists create new torts, a handful of which become familiar and even powerful.⁹

What exactly is a new tort?

At the Texas symposium, I ventured a definition that strove for parsimony, in my belief that the task of describing how new torts are formed commends a short list rather than an expansive one, to forestall criticism among the lines of "that's all very well, but loss of, say, recreational value of a natural resource isn't really a new tort."¹⁰ To keep the list tight and pristine, I insisted that the nominated cause of action be "both novel and free-standing."¹¹ The free-standing criterion eliminated claims that expanded the domain of damages (parental consortium, for instance), variations on a theme of negligence (for instance, I would not have admitted "pharmacy malpractice"), and private rights of action based on violations of the Constitution or statutes.¹² I also wanted to see evidence that lawyers, judges, and commentators had accepted the newcomer into the fold of American torts. Blackletter in the *Restatement* provided such evidence, although I admitted wrongful discharge into the roster without it. The criteria yielded three clear winners in addition to wrongful discharge: intentional infliction of emotional distress, invasion of privacy, and strict products liability. These three causes of action are all closely associated with the same impresario, William Prosser.¹³

The stances and strategies of Prosser built the most successful new torts in the United States. Although the evidence is by hypothesis unattainable, one may assume that Prosser's new torts were accompanied by stunted, aborted contemporaries—that is, failed proposals now forgotten.¹⁴ New torts on the current drawing board, including "sup-

9. See Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1544 (1997).

10. Respondents mentioned this new tort in interviews. See *Innovative Tort Claims*, *supra* note 2, at A17.

11. Bernstein, *supra* note 9, at 1540.

12. *Id.* at 1540-41.

13. See generally William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939) [hereinafter Prosser, *Intentional Infliction*] (summarizing and extending the tort of intentional infliction of emotional distress); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960) [hereinafter Prosser, *Privacy*] (listing four types of privacy claims, a scheme found also in the *Restatement of Torts*); William L. Prosser, *Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) [hereinafter Prosser, *Assault*] (detailing and extending the end of privity barriers to consumer litigation against product manufacturers).

14. Cf. Philip Yancey, *Genes and Evolution: Do Humans Have a Dark Nature?*, CURRENT, May 1, 1999, at 18 (noting a tenet of evolutionary biology that only a minority of potential new individuals survive).

pression"¹⁵ and hate speech,¹⁶ by their fragility support the inference that most proposals are precarious and others doomed. The print version of my Texas symposium piece, *How to Make a New Tort: Three Paradoxes*,¹⁷ offered an argument presented in the form of "paradoxes," or institutional obstacles, about why proposed new torts fail. These paradoxes—presumptions against novelty, famed activists, and even tort law itself—entrench resistance to new tort proposals.¹⁸

A couple of participants at the Texas symposium took issue with the parsimony of my working definition of "new tort." Gary Schwartz, for instance, said that the erosion of immunities amounted to new torts in all but name. Back home, one of my colleagues said he saw no good reason to exclude from the new-tort roster the expansion in private rights of action for violations of statutes. I held my ground, or most of it. As this Clifford Symposium demonstrates, new-tort formation warrants attention as a discrete event, and I would have hated to say that the entire project merges into vaguely bounded "judicial activism," expansion of rights and remedies, access to the courts, or the culture of complaint. Labels like those convey little more than partisan noise.

The way to redeem and refine the new-tort thesis of *How to Make a New Tort*, I now think, is to acknowledge that the project of making new torts is rooted in a particular age. Seen as a group, the Prosser triumphs, as well as the narrow definition of a new tort that I extrapolated from them, are historically anomalous. For centuries, the common law of torts never resembled a well-codified recitation of offenses (or should one say trespasses?) parallel to the list of common-law crimes. Instead its defining traits have always included ambiguity, gaps between real stories and conventions of pleading, uncertainty about objectives, and even basic doubts about its own nature—as we instructors who try at our first class meetings to announce a definition of "tort" can attest.

With the word centrifuge, then, I not only mean to evoke a mechanism that breaks formations apart but also to suggest that this function has a centripetal counterpart, a force that pulls toward the center.

15. See Rory Lancman, *Protecting Speech From Private Abridgement: Introducing the Tort of Suppression*, 25 Sw. U. L. REV. 223, 238-44, 262-63 (1996).

16. See Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 179-81 (1982); see also Edward A. Amley, Jr., Note, *Sue and Be Recognized: Collecting \$ 1350 Judgments Abroad*, 107 YALE L.J. 2177, 2207-08 (1998) (siting hate speech tort in the context of wider legal regulation that includes criminal law and international human rights law).

17. Bernstein, *supra* note 9.

18. As Judge Clarence Newcomer has put it, "[t]ruly new torts are rarely accepted." Arch v. American Tobacco Co., 175 F.R.D. 469, 494 (E.D. Pa. 1997).

Concepts spin away but also coalesce. *How to Make a New Tort* described the process of coming together;¹⁹ this Article turns to a process of dispersal. Neither component tells the full story of new torts.

References to the past, present, and future of new torts invite predictions. I'll plunge ahead. Although an era that encouraged conceptual coalescence made new-tort formation easier for Prosser than for his predecessors and successors, observers can expect some version of new-tort formation to persevere. Formally delineated torts may come again into vogue, just as they did in the twentieth century. Current indicators, however, suggest that in the near future we can expect an increase in dispersal—a kind of anti-formation—in the common law of torts. By dispersal I do not mean chaos, and “the new-tort centrifuge” isn't a postmodernist celebration, or lament, of the end of doctrine. As in the heyday of the writ system, post-Prosser tort development does not stick rigidly to definitional boundaries. But even as it disperses, tort law maintains fidelity to unifying principles.

I. THE TWENTIETH-CENTURY ANOMALY

The idea that new torts form is a concept uniquely situated in one particular century. Only about fifty years ago did judges start to take explicit note of new causes of action.²⁰ The phrase “new tort” began to appear in legal scholarship in 1939²¹ and soon took hold. From the start, proposals by plaintiffs' lawyers and scholars faced an uphill battle. Although judicial authors in recent decades have frequently refused to accept a plaintiff's invitation to create a new tort,²² writers

19. See Bernstein, *supra* note 9, at 1544-59.

20. See, e.g., *Wallace v. Shoreham Hotel Corp.*, 49 A.2d 81, 82-83 (D.C. 1946) (surveying the literature on insult and outrage while considering new-tort liability); *Eick v. Perk Dog Food Co.*, 106 N.E.2d 742, 743 (Ill. App. Ct. 1952) (accepting privacy tort); *Wright v. E-Z Finance Co.*, 267 S.W.2d 602, 605 (Tex. App. 1954) (expressing uneasiness with the new tort of intentional infliction of emotional distress). Prosser identified harbingers of this judicial recognition. See William L. Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 42-43 (1956) (suggesting that “somewhere around 1930 it began to be generally recognized that the intentional infliction of mental disturbance . . . could be a cause of action in itself”).

21. See Prosser, *Intentional Infliction*, *supra* note 13, at 874 (“It is time to recognize that the courts have created a new tort.”).

22. See Bernstein, *supra* note 9, at 1546 n.38 (citing cases where courts refuse to create new torts). For more recent refusals, see *Vice v. Conoco, Inc.*, 150 F.3d 1286, 1291 (10th Cir. 1998) (declining to accept new tort of wrongful discharge); *Country Corner Food & Drug, Inc. v. First State Bank & Trust Co.*, 966 S.W.2d 894, 898-99 (Ark. 1998) (refusing proposed new tort for breach of a general obligation of good faith in contracting); *Patel v. OMH Med. Ctr., Inc.*, No. 1999 Okla. 33, 1999 Okla. LEXIS 38, at *49-54 (Apr. 27, 1999) (rejecting plaintiff's attempt to gain relief in tort for “litigation-related misconduct”).

continue to propose new causes of action.²³

How to Make a New Tort, having proposed to study inductively the formation of new torts, hewed to the convention of the waning century.²⁴ My premise was that when distinct, individually delineated new torts survive the rigors of formation and enter the judicial lexicon, they become sources of redress for injured plaintiffs—sources that were not in place beforehand. For example, a worker is better off with a new tort of “wrongful discharge,” a consumer is aided by “strict products liability,” and so forth.²⁵ Although *How to Make a New Tort* began with a soupçon of cynicism from S.F.C. Milsom, adverting to the futility of creating new torts,²⁶ it concluded that these products of reformers did yield progressive effects.²⁷

How to Make a New Tort used its title phrase to label three distinct paradoxes about resistance.²⁸ The first paradox consists of new torts *qua* torts (“tort”), the second of novelty (“new”), and the third of agency (“how to make”). The tort paradox may be observed from the relative success of different doctrinal labels. An unfamiliar *tort* is more jarring than a newly articulated right of contract or property; therefore some new torts hide under these alternative rubrics. Judge-made *novelty* also provokes resistance about authority and legitimacy, resembling the concerns raised about judicial invalidation of statutes as unconstitutional.²⁹ Lastly *agency*, the power of a reformer with an

23. See Bernstein, *supra* note 9, at 1539, 1559-63. Newer additions to the literature include Arnold Anderson, *The New Tort of Negligent Supervision*, WIS. LAWYER, Sept. 1998, at 14; M. Mercedes Fort, *A New Tort: Domestic Violence Gets the Status It Deserves in Jewett v. Jewett*, No. 93-2-01846-5 (Wash. Super. Ct. Spokane County April 21, 1993), 21 S. ILL. U. L.J. 355 (1997); Eric Jorstad & John Borger, *Invasion of Privacy: Minnesota's New Torts*, BENCH & BAR MINN., Oct. 1998, at 39.

24. See Bernstein, *supra* note 9, at 1544-47.

25. *Id.* at 1557-58. Some commentators have disagreed. See, e.g., Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387, 389-90 (1994) (noting that wrongful discharge claims are often found in a long, redundant “laundry list” in a worker’s complaint); Prosser, *Assault*, *supra* note 13, at 1114 (suggesting that strict products liability would give plaintiffs almost nothing they did not already have under negligence and warranty).

26. See Bernstein, *supra* note 9, at 1539.

27. *Id.* at 1539 n.2.

28. See *id.* at 1544-59.

29. A point I treated only obliquely in *How to Make a New Tort* relates the paradox of novelty to the constitutional-law “countermajoritarian difficulty.” See Bernstein, *supra* note 9, at 1547. Scholarship on this subject does not focus on temporal concerns, stressing instead that the legislative work product is associated with majorities in a democracy, whereas some judges—and all Article III federal judges—exercise political power without having stood for election. Institutions, rather than temporal precedence, take center stage. Yet, most writing on the subject presumes, with little elaboration, that new judge-made law is more problematic than old. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962) (emphasizing judicial nullification of statutes where judges have the

agenda, clashes with the belief that the common law develops gradually and organically, rather than by the stroke of a lawmaker's pen.³⁰ Despite these obstacles, new torts did form in the twentieth century, and the man who (more than anyone else) made them illustrates what helps them take shape. William Prosser was aided by unique resources: sharp wit, a shrewd command of case law, good connections in the American Law Institute, and sincere disdain for plaintiffs that refuted any suspicions about a bleeding heart.³¹ I now contend, however, that Prosser had another essential resource: his times. He found an ally in the conjunction of Legal Realism and formalism.

We may like to think that the middle of the twentieth century was a heyday for Realism, a time for right-thinking observers to scoff at Christopher Columbus Langdell and his works. Such scoffing took place abundantly during the years of Prosser's craftsmanship. Nevertheless new torts were able to take shape because of opportunities rooted in formalism as well as Realism.

Legal Realism invited well-situated European-American men like Prosser to embark without shame on changing the law. It weakened the claims of Blackstone and others that the common law emerges from—and gives extra authority to—unvarying and inviolate natural rights and thereby built an intellectual avenue for reform. Relating case outcomes to circumstances, Legal Realism proposed that law should strive to be useful in its context. Contexts, which change over time, include the relevant insights of social science, the group-based sources of identity for judges and legislators, and the policy influences that affect how cases are presented and decided.³² Prosser, then, came of age in a liberating era, a reform-nurturing moment in tort law.

Yet in order for new tort agendas to thrive, this nurturing effect needed a complementary phenomenon. Realism gave reform its intellectual legitimacy, but formalism gave reformers discrete projects, reassured onlookers that their measure would not go out of control,

last word); MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 152, 169-73 (1994) (faulting as "romantic" judges who make new law without feeling constrained by various preceding conditions). See generally Christopher J. Peters, *Adjudication As Representation*, 97 COLUM. L. REV. 312, 435 (1997) (arguing that common law change must take place with great care in order to not threaten "truly democratic legitimacy"). Novelty thus bears closely on the legitimacy of judicial lawmaking. I return to the question of legitimacy below at *infra* notes 33-34 and accompanying text.

30. See Bernstein, *supra* note 9, at 1552.

31. *Id.* at 1553.

32. See generally JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995) (describing common themes among diverse writings in the Realist tradition).

and provided stabilizing links to precedent. "The forms of action,"³³ a frequently invoked phrase in Torts, points up the centrality of formalism to civil redress for injury. Formalism took on extra importance in the era of new-tort formation: while all common-law formation needs a degree of formalism to buttress its legitimacy,³⁴ Torts is peculiarly dependent on this support.³⁵ I have recounted the suspicion and panic surrounding tort innovations and the cleverness of reformers, Prosser in particular but also others, who were able to invoke the law of contracts and property, both stronger domains of formalism, when making new torts.³⁶

In the locution of *How to Make a New Tort*, formalism helped law reformers overcome the paradoxes of tort, novelty, and agency.³⁷ We may chortle along with Roscoe Pound and Jerome Frank about the naivete of believing that logic, rules, or syllogisms can tell us how cases come out.³⁸ These devices, however, retain appeal to onlookers

33. FREDERICK WILLIAM MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* (1909).

34. The common law has been, and remains, perpetually vulnerable to accusations of lawlessness from European civilians and their admirers. See Jack Beatson, *Has the Common Law a Future?*, 56 CAMBRIDGE L.J. 291, 299-300 (1997) (contending that the common-law judge tends to ignore statutes, despite their proliferation and importance); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 13-14 (Amy Gutmann ed., 1997) (warning of the danger of usurpation by common-law judges); Benjamin P. Friedman, Comment, *Fishkin and Precedent: Liberal Political Theory and the Normative Uses of History*, 42 EMORY L.J. 647, 702-03, 703 n.282 (1993) ("[a] common law judicial system and a liberal political system do not match" because only the civil law can provide for self-reflection, discussion, and enlightened input); cf. Peter G. Stein, *Judge and Jurist in the Civil Law: A Historical Interpretation*, 46 LA. L. REV. 241, 252 (1985) (adverting to the ideal among the drafters of the French Civil Code that any judge "imbued with the spirit" of the Code could, and should, apply it mechanically and predictably).

35. One condition that makes American tort law vulnerable to criticism about legitimacy is the civil jury. This institution distinguishes American tort law from the tort law of other nations in a way that some critics find unstable, if not lawless. For a summary of current accusations and a retort, see Philip H. Corboy et al., *Illinois Courts: Vital Developers of Tort Law as Constitutional Vanguard, Statutory Interpreters, and Common Law Adjudicators*, 30 LOY. U. CHI. L.J. 183, 186-91 (1999) (applauding judicial invalidation of state tort reform statute). I return to the jury below. See *infra* notes 51-52 and accompanying text.

Even tort systems that lack juries, however, often appear chaotic to observers. The criticisms of Australian judge Robert French are apposite. See Robert S. French, *Statutory Modeling of Torts*, in *TORTS IN THE NINETIES* 211, 217 (Nicholas J. Mullany ed., 1991) (proposing that statutes replace the common law of torts because they are "conducive to a more ordered, rational and legitimate" legal system). See generally Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 5 (1997) (describing pressures on the tort system to become more uniform and predictable).

36. See Bernstein, *supra* note 9, at 1561-62.

37. *Id.*

38. The principal works of these authors on the subject of indeterminacy are JEROME FRANK, *LAW AND THE MODERN MIND* (1949); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). Frank once compared traditional legal reasoning to the "the necks of the flam-

because they (appear to) limit and constrain caprice among those who interpret the law.

This combination of two opposing jurisprudential postures permitted new torts to form and to be labeled as new formations. Realism declared that judges make as well as find the law and that advocates and agenda-bearers participate in lawmaking. Formalism supported the premise that torts, like crimes, each present a separate set of defining elements, sharp distinctions between elements of the prima facie case and defenses, and an element of clarity that warns potential offenders about how far they can go. These novel perspectives departed sharply from a long common-law heritage.

II. TORTS TRADITIONS: DISPERSAL AND UNITY

Tort law believes (if the reader will forgive or tolerate a personification) that disputes between individuals must be resolved in terms of unifying concepts. To aid administration, tort law classifies and labels disputes, but its labels are broader than the narrower recitations that characterize modern criminal law. It was ever thus, at least since the Norman conquest. Here I need to recite, with no scholarly pretensions, a short standard history of the kind one can read in first-year casebooks and other pedagogical materials.

Beginning in the late eleventh century, the king's courts required litigants to obtain writs; oral complaints standing alone would no longer be heard in this forum.³⁹ Many litigants and advocates favored the king's courts over local tribunals because of their power to hear bigger cases, and so they learned to live with writs. At the king's court, the writ—or what we would now call a writing—was a form purporting to be a letter from the king. This document contained an order addressed to the sheriff of a county, instructing him to bring a defendant into court. About 200 years later the standard writs, or "brevia," became fixed. Without the ability to create new writs, litigants had to tailor their complaints to fit these standard patterns.⁴⁰

Fictions in pleading developed from these rigidities. The most famous contrivance, for us who teach contemporary tort law, was the extension of "trespass" to include "case." Trespass, the ancestor of

ingos in *Alice in Wonderland*, which failed to remain sufficiently rigid to be used effectively as mallets by the croquet-players." *United States v. Rubinstein*, 151 F.2d 915, 923 (2d Cir. 1935) (Frank, J., dissenting).

39. See STROUD FRANCIS CHARLES MILSOM, *STUDIES IN THE HISTORY OF THE COMMON LAW* 31 (1985).

40. See Michel Bastarache, *The Challenge of the Law in the New Millennium*, 25 MANITOBA L.J. 411, 411-12 (1998) (providing a "gross simplification of a complex history").

much criminal law as well as tort law, concerned itself with actions taken *vi et armis* and *contra pacem domini regis*—breaches of the peace or direct and immediate action that caused injury without excuse. With the help of a fiction, persons injured by indirect means reached the king's courts on the same writ. "Trespass in a similar case," it was said.⁴¹

If that artifice of pleading does not sound silly enough—we Torts people may be too used to this fiction by now—consider ejectment, somewhat less familiar within the speciality. Two men dispute title to a parcel of land. Each claims he owns it. Shall one or both of them take the question to court and seek a declaratory judgment? Not so fast. For centuries the king's courts allowed no such remedy.⁴² Instead the plaintiff was compelled to invent a fictitious lease, held by a fictitious lessee, the ever-quarrelsome John Doe. According to the plaintiff's complaint, the tenant John Doe was wrongfully ejected from the parcel of land by another figment of the lawyer's imagination, Richard Roe. Now the court may proceed with the question of title.⁴³

What could have been the point of such fictions?⁴⁴ Why make plaintiffs' counsel speak falsely in Latin and law French—*vi et armis*, references to violence—before a hurt person can gain recompense for accidental injury?⁴⁵ The metaphor of centrifugal and centripetal forces in tort development helps to describe the function of legal fictions as they originated in England and moved to the United States.

41. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 71-74 (3d ed. 1990).

42. Jacob Corré, a legal historian, reminds me that the writ of right provided a medieval analogue to modern declaratory judgment. The writ had many applications, including the resolution of land-title disputes. See STROUD FRANCIS CHARLES MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 128-29 (2d ed. 1981) (noting that the writ of right was used to restore property to the heirs of those dispossessed in war). The writ of right, however, in function did not obviate the need to resort to ejectment. See *infra* note 44.

43. For a discussion of ejectment fictions, see DEREK ROEBUCK, THE BACKGROUND OF THE COMMON LAW 55 (2d ed. 1990).

44. See MILSOM, *supra* note 42, at 162 (noting that "an element of pantomime" was involved in the use of the ejectment writ; there must have been considerable advantages to using the writ, "[b]ut we do not know what they were").

45. Cf. I. de S. et ux. v. W. de S. (Y.B. Lib. Ass'm, folio 99, placitum 60 (1348)) (reporting plaintiff's contention that the defendant "beat" the plaintiff's wife "with force and arms" even though, according to the plaintiff's own account, the defendant had only flung a hatchet at the door of his tavern without touching the wife). Milsom notes a 1317 case involving a claim that the defendant had diluted the plaintiff's wine with salt water after the plaintiff had left the wine in the defendant's custody. MILSOM, *supra* note 42, at 289. This act was alleged to have been done "with force and arms to wit with swords and bows and arrows . . . against the king's peace." *Id.* Milsom adds that "[b]latant" distortions of *vi et armis* and *contra pacem regis* became rarer in the late fourteenth century, mainly because "lawyers were being discreet." *Id.*

Embedded in the concept of a legal fiction are two temporal constituents: the solid rock-ribbed past and shaky present exigency.⁴⁶

"Trespass," as a wrong, tells subjects and citizens that the sovereign will not tolerate disruption and provocation without cause. The principle unites and reassures. Meanwhile, or soon afterwards, variations and new circumstances challenge the core of the principle. Lawyers can argue for a "case" writ by showing that mediated carelessness causes injuries similar to those caused by trespass, implicates the same social welfare concerns, and is equally receptive to judicial control. By maintaining connection to trespass, the action for "case" expresses respect for the past and insists on continuity in tort law—a centripetal force. By repudiating the requirement of immediacy, the "case" writ provides redress for a variety of accidents unrelated to the direct application of force. Case law becomes more varied, eclectic, scattered—the centrifuge.

Similar forces operate in contemporary tort development. Judges and commentators sometimes say that we have outgrown legal fictions⁴⁷ in the way that modernists occasionally claim that they are no longer shackled to circumlocution and social convention. As a result, the writs have been abandoned, though more slowly and tentatively than one might suppose.⁴⁸ Meanwhile, a tug to the center continues. In the formation process described in *How to Make a New Tort*, we

46. In his ingenious commentary on the three languages of the common law—English, Latin and French (now called Anglo-French or law French)—J.H. Baker builds an argument that I have found useful in pressing the metaphor of centrifugal and centripetal energy. After describing the functions of these three languages in the formation of the common law, Baker relates them to substantive effects. See J.H. Baker, *The Three Languages of the Common Law*, 43 MCGILL L.J. 5, 7-8 (1998). For example, lawyers used English in speech and French in papers, maintaining two sets of words for many common concepts—buy/purchase, give/donate, bequeath/devise, steal/[commit] larceny—and this partial redundancy put law in a formal sphere, intelligible yet also outside of daily life. *Id.* at 8. Mummified and precise, Latin helped establish the common-law fixation on precedent and technicality, a stabilizing fulcrum between the other two languages. *Id.* at 15. Like me, Baker is struck by paradox within legal change: how peculiar of the common law, he comments, to embrace Latinate vocabulary while rejecting Latinate law. *Id.* A mix of accessibility and obscurity, precision and disorder, and stability and change at least accompanied the development of a unique legal system and may have been a cause of that uniqueness.

47. See Lon L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 519-29 (1930) (describing fictions as transitional devices); see also *In re Clarke's Will*, 284 N.W. 876, 878, 878 n.1 (Minn. 1939) (quoting anthropologist Sir Henry Maine, who praised legal fictions as "the agencies by which law is brought into harmony with society . . . but fictions have had their day").

48. Cf. MAITLAND, *supra* note 33, at 1 (1909) ("The forms of action we have buried, but they still rule us from their graves."). Maitland's aphorism retains power. See Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 520 n.171 (1996) (noting that the forms of action were not yet "buried" in American federal courts when Maitland wrote, and that in contemporary pleading, lawyers still must categorize their claims).

observe an emphasis on unity rather than dispersal. Prosser was better than anyone at the job of making a new tort look conservative, related to origins more respectable than tort (i.e. contract and property), not really new at all, and scarcely the product of human agency. The current new-torts scene shows an inclination toward decentralization as well as centralization.

“Are new torts being developed?” is the Clifford Symposium query, our panel’s *raison d’assemblage*. The passive voice is revealing. Who or what is the agent of development? Where is the locus of these new formations? Writers have referred interchangeably to “courts” and “judges” when discussing common-law formation and legal interpretation.⁴⁹ Readers have understood that the question adverts to rivalry between the judiciary and another institution, usually the legislature, about the power to make law.⁵⁰

But courts contain more than judges. For openers, one sector within “courts” that does not include judges is the civil jury, an entity of interest to Clifford conveners in the past.⁵¹ Torts scholarship identifies the jury as an institution in its own right, controlled only in part by judges and rules. Like a Heraclitean river the jury remains the same yet not the same over time. Researchers and consultants study “juries” to generalize about them, even though they know that the same group of people will never assemble again to make or influence “judicial” decisions.⁵²

Also found under the judicial umbrella, shoving each other now and then, are sectors in the bar that identify professionally with either plaintiffs or defendants. The respective histories of the *Second* and *Third Restatements of Torts*, both of which are especially noted for

49. Michael D. Green, *The Road Less Well Traveled (And Seen): Contemporary Lawmaking in Products Liability*, 49 DEPAUL L. REV. 377 (1999); Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience With “New” Torts*, 49 DEPAUL L. REV. 455 (1999).

50. Chief Justice Marshall said something famous in *Marbury v. Madison* about judicial power vis-a-vis the executive branch, but—quick—did he arrogate it to the courts or to judges? It hardly matters. See 5 U.S. (1 Cranch) 137, 165 (1803). See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 23-26 (2d ed. 1988) (referring interchangeably to “the courts,” “judicial review,” and “judges”).

51. See generally Symposium, *The American Civil Jury: Illusion and Reality*, 48 DEPAUL L. REV. 197 (1998) (discussing the civil jury).

52. For surveys of research on the function of juries in civil cases, see generally STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* (1995) (presenting numerous surveys). See Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 853-61 (1998). Professor Vidmar notes that, curiously, the researchers have not often studied judges’ perceptions of juries, *id.* at 854, thereby forfeiting attention to continuity and institutional coherence within the political system.

their treatment of products liability,⁵³ offer an illustration of this change away from unity and toward dispersal. Section 402A provoked a hostile response from the defense bar: shortly after its publication, the Defense Research Institute contended that its proclamation of strict products liability departed from existing law and was not a true restatement.⁵⁴ But this protest, little known and seldom recalled, is a droplet when compared to the rivers of partisan outcry that accompanied the revision of 402A in the 1990s. Today, lawyers identified with plaintiffs routinely group themselves together to support or, more often, oppose a proposal that would affect torts practice in the courts. We see them in Congress, at the state legislatures, in the American Law Institute, around think tanks and working groups. Meanwhile, the defense sector, though sometimes riven by divided interests (sellers of goods versus insurers, manufacturers versus retailers), has even more potent influence on judicial outcomes.⁵⁵

Dispersal spreads beyond the divisions and subcamps previously called "the courts" and "the judiciary," as legislation continues to alter the content of tort law. Statutes are often thought of as tending to unify rather than to disperse; in Torts, however, they operate against a stubborn common-law background that does not always yield with grace to their official supremacy.⁵⁶ Neither the judiciary nor the legislature has the last word on what constitutes new tort law,⁵⁷ and this

53. The first segment of the *Restatement (Third) of Torts* to be adopted by the American Law Institute concerned products liability. The *Second Restatement*, a comprehensive encyclopedia of tort law, has been cited more often on products liability than on any other subdoctrine in Torts. See James A. Henderson & Aaron D. Twerski, *Will a New Restatement Help Settle Troubled Waters: Reflections*, 42 AM. U. L. REV. 1257, 1260 n.17 (1993) (noting that section 402A is "the most frequently cited section of any Restatement").

54. See Herbert Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U. L.J. 185, 190 (1968).

55. See generally Ralph Nader, *Lawyers and Law Students as Tools of Democracy*, 17 WHITTIER L. REV. 3, 5 (1995) (ascribing great power to "the tortfeasors' lobby"); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 952, 952 n.48 (1995) (differing with a suggestion by Professor John Coffee that the defense bar, as a community, spreads and receives strategic knowledge about torts practice faster than the plaintiffs' bar).

56. In *Bird v. Holbrook*, 130 Eng. Rep. 911 (1828), the court struggled to construe a statute that prohibited the use of spring guns under most circumstances. The statute took effect after the plaintiff's injury but before the court's decision. The judges apparently resented the dominion of Parliament, if their reading of some portions of the Act as "declaratory" (that is, not constraining their decision making) and others "prohibitive" (that is, an unfortunate obstacle to judicial power) is any guide. The judicial attitude in *Bird* has a modern flavor and enjoys modern support. See Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533 (1999) (recommending that judges regard some statutes less reverently than the principle of legislative supremacy would dictate).

57. One might think of this division in terms of "checks and balances," but that phrase implies stasis and certainty, traits less in evidence today than in the old Prosser era, the new-tort time, when sectors did not compete openly and self-consciously to affect the formation of tort rules.

fact is acknowledged more openly now than before. Again, products liability provides an example of dispersal and new assertions of power within the common law of torts. For several decades, some lawyers and scholars denounced the rise of strict liability in tort for product-caused injury at the expense of the Uniform Commercial Code's overlapping scheme codifying (through the legislature, whose lawmaking is supposed to outrank that of judges) the law of warranties, disclaimers, and third-party beneficiaries.⁵⁸ Courts won that battle, perhaps, but the war continues, especially in the familiar theater of judicial review.⁵⁹ Judges have struck down several tort reform statutes in the last decade, using their powers under state and federal constitutions.⁶⁰

The picture is almost unique to Torts. Although judicial experience with sentencing guidelines, for instance, suggests that the conflict between legislatures and courts continues in other areas of the law, statutes occupy an especially uncertain place in tort doctrine. As Mark Rosen has pointed out, when Oliver Wendell Holmes prepared his exegesis on the common law, he chose to write about six doctrines: criminal law, torts, contract, bailments, wills, and succession.⁶¹ Today, a century later, five of the six subjects have been reduced to codes.⁶² Torts continues to resist codification in general, while absorbing new statutes as sources of doctrine. The uneven reception contributes to dispersal.

58. Compare *Phipps v. General Motors Corp.*, 363 A.2d 955 (Md. 1976) (rejecting GM contention that the UCC blocked adoption of strict liability in tort), with *Cline v. Prowler Indus. of Maryland*, 418 A.2d 968, 980 (Del. 1980) (holding that the UCC preempted strict tort liability). See also Reed Dickerson, *The ABC'S of Products Liability—With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 452 (1969) (attacking strict liability in tort as contrary to legislative supremacy); Richard E. Speidel, *The Virginia "Anti-Privacy" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804, 851 (1965) (expressing preference for "an ultimate legislative solution" to problems of products liability).

59. See *supra* note 29.

60. See *Wells v. Thomson Newspaper Holdings*, 183 F.R.D. 225 (S.D. Ohio 1998) (invalidating Ohio statute of repose); see also *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997) (invalidating state tort reform statute in its entirety); *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998) (striking down punitive damages statute as violative of Kentucky constitution); *Morris v. Savoy*, 576 N.E.2d 765, 769 (Ohio 1991) (striking down caps on damages). See generally Victor E. Schwartz, *What You Can Do to Save Tort Reform from Judicial Nullification*, METROPOLITAN CORP. COUNS., Nov. 1998, at 1 (noting that dozens of judicial decisions in the last decade have held state tort reform unconstitutional).

61. See Mark D. Rosen, *What Has Happened to the Common Law? Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119, 1123.

62. *Id.*

Compendia such as the torts *Restatements* help to blur the line between statutes and case law.⁶³ The traditional *Restatement* mission was to extract a code in blackletter out of case law, relying mostly on judges' *ratios decidendi* but adding a dose of improvement.⁶⁴ The apparatus first makes codification out of case holdings and then cycles back to influence the outcome of case holdings with codification. As if this mechanism were not a sufficient muddying of the distinction between statutes and case law, the *Third Restatement* chose, for the first time, to "restate" statutes as well as case holdings; in Comments to the products liability blackletter, the *Third Restatement* relies in part on tort reform statutes to support its claim of a trend or direction in the courts.⁶⁵ Thus doctrine has dispersed among three separate sectors: statutes, case law, and nonstatutory codification.

These centrifugal forces are countered by other forces that unify. Statutes and the *Restatement* bring outcomes and rationales together. Sectors of the bar that advocate either for plaintiffs or defendants have contributed procedural unity (modern class actions, consolidation, multidistrict practice), stable political alliances (against or in favor of tort reform, for instance), and an element of predictability in litigation. Even the civil jury, so often blamed for its hard-to-predict responses, traces its origins well past the United States Constitution and provides a source of continuity over time.

A more fundamental centripetal effect operates as well in Torts. Unity around principles, or at least themes, characterizes doctrinal development. The content of these principles can certainly be disputed, and so rather than try to come up with a canon—or land again in my old pitfall of thinking that parsimonious criteria can avert difficulty⁶⁶—I would just name a couple. Breach of the peace perseveres in various newer doctrines. When we get past the image of "swords and bows and arrows,"⁶⁷ we see breach of the peace in modern nuisance, for instance, in addition to most of the intentional torts that allege personal injury. Constitutional torts stipulate that the king can do wrong indeed, or at least his minions can, and so disruption of the peace in the form of official brutishness is actionable. One might even think of strict liability in terms of breach of the peace: liability without

63. Influential model legislation such as the Uniform Products Liability Act of the late 1970s, which was not adopted in its entirety by any state legislature, is of similar effect.

64. I elaborate in Anita Bernstein, *Restatement Redux*, 48 VAND. L. REV. 1663 (1995).

65. See, e.g., RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. e (1997) (immunizing non-manufacturer sellers from strict liability); *id.* § 2 cmt. d (requiring plaintiffs to prove a reasonable alternative design).

66. See *supra* note 10 and accompanying text.

67. See *supra* note 45.

fault usually bespeaks a jarring departure from a more orderly set of routine actions.⁶⁸ The academic literature that endeavors to explain restrictive recovery for economic loss, in which some participants from this Symposium have joined,⁶⁹ has not said as much in so many words, but one might venture to argue that economic loss is less compensable because it is less of a visual disruption, a violent jarring, than personal injury or damage to tangible property.⁷⁰

In Torts the concept of trespass/breach is our most venerable ancestor, but Torts has other centripetal themes too. Off the top of my head I would mention autonomy and human dignity (even when utilitarianism would dictate a contrary conclusion);⁷¹ an abiding commitment to the money-matrix (in Torts we eschew equitable remedies and seldom think seriously about nonpecuniary recompense for injury);⁷² a belief (which is expressly contrary to the principles of criminal law) that maiming a person can be worse, in the sense of cost to the defendant, than extinguishing her life;⁷³ a tendency to encourage injured people to come forward with their complaints and then to find these ac-

68. See generally George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (contrasting reciprocal and non-reciprocal risks).

69. See Richard L. Abel, *Should Tort Law Protect Property Against Accidental Loss?*, 23 SAN DIEGO L. REV. 79, 80 (1986); Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1513 (1985); Gary T. Schwartz, *Economic Loss In American Tort Law: The Examples of J'Aire and of Products Liability*, 23 SAN DIEGO L. REV. 37, 37-38 (1986).

70. "One" took this plunge in Anita Bernstein, *The Representational Dialectic (With Illustrations from Obscenity, Forfeiture, and Accident Law)*, 87 CAL. L. REV. 305, 344-45 (1999).

71. See Richard W. Wright, *Principled Adjudication*, 7 CANTERBURY L. REV. 265 (1999) (noting that consent doctrine defies utilitarian prescriptions).

72. On the status of equitable relief in tort actions, see *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (expressing judicial reluctance to issue an injunction). On non-monetary paths not taken in American tort law, see, for example, Leslie Bender, *Changing the Values in Tort Law*, 25 TULSA L.J. 759, 772 (1990) (proposing that corporate tortfeasors be compelled to provide caregiving as well as money damages to injured plaintiffs); Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC'Y REV. 461, 481-83 (1986) (considering apology as a remedy for crimes and torts).

73. Although the common law maxim *actio personalis moritur cum persona* ("a personal right of action dies with a person") has been superseded by wrongful-death and survival statutes, tort law continues to reward the maimed-yet-alive plaintiff more generously than one killed by tortious conduct. See Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 887 (1993) (noting that damages for death are lower than damages for severe trauma resulting in such effects as "quadriplegia, blindness, and brain damage"). By contrast, it is a truism of criminal law that murder is the worst crime a person can commit (putting aside those exceptionally situated persons capable of such exotica as significant treason). See RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 81-82 (1993); Don E. Scheid, *Constructing a Theory of Punishment, Desert, and the Distribution of Punishments*, 10 CANADIAN J.L. & JURISPRUDENCE 441, 494 (1997).

counts wanting, to dismiss them;⁷⁴ and a centrist view of victims' contribution to their own injuries that, regardless of the official doctrinal or statutory flag flying at any time, tends to reject the harshness of contributory negligence but while making plaintiffs pay for their folly or venturesomeness.⁷⁵ The ALI statement provides another recitation of unifying principles in tort law.⁷⁶ Another writer might draft yet another list. The included items vary slightly, but few would deny the continuity of some tort principles.

III. THE WIDER CENTRIFUGE

The centrifugal forces that make new-tort formation more varied and disunited operate elsewhere in the common law. Think again of Prosser. His kind cannot return because scholars can no longer obtain from doctrinal writing the prestige on which Prosser drew to get his new torts formed. (Senior scholars would worry, I think, about a junior colleague who proposed to write articles titled "Proximate Cause in California" or "Transferred Intent."⁷⁷) If there has indeed been a "decline of law as an autonomous discipline," as Judge Posner suggests,⁷⁸ then law—especially the common law, but also statutes and regulations—will continue to receive influence from more sources and become more varied in its reaches.

A. *The Rise of Consequentialism*

Consider the leading extradisciplinary influence. Efficiency often militates in favor of fundamental doctrinal change. It challenges even the most famous Cardozo opinion: correlativity between the plaintiff's injury and the defendant's wrong, so beloved to traditionalists like Ernest Weinrib and other readers of *Palsgraf*,⁷⁹ has nothing to do with social welfare and could profitably be abandoned, if profitability can be expressed in terms of better incentives. Cost internalization and risk reallocation need not depend on the cooperation of injured, liti-

74. In pursuing this line of thought I have benefited from correspondence with Alan Calnan and reading his unpublished writings.

75. See Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1773 (1981).

76. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 2 (Discussion Draft 1999) (identifying broad common concepts in negligence liability.)

77. See William L. Prosser, *Transferred Intent*, 45 TEX. L. REV. 650, 650 (1967); William L. Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369, 369 (1950).

78. See Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 761 (1987).

79. See Ernest L. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 512-13 (1989); see also Heidi M. Hurd, *Correcting Injustice to Corrective Justice*, 67 NOTRE DAME L. REV. 51, 94-95 (1991) (elaborating on this view).

gating plaintiffs. Even stalwarts of tort like "injury," "compensation," and "actual cause" become dispensable.⁸⁰ Tort law has not yet gone so far, but then the influence of allocative efficiency has not yet peaked.

A more diffuse consequentialism attracts more support among Torts constituencies and adds to the centrifugal forces spinning tort law away from a center. Take invasion of privacy, another twentieth-century new tort, for example. To Prosser, invasion of privacy amounted to four variations, each duly numbered in *Restatement* blackletter.⁸¹ Contemporary scholars are more inclined to think of other things, usually costs. What motivates a blackmailer, and how can we stop him from causing social loss?⁸² How can doctrine help to extract the best use out of the value in a person's image or likeness?⁸³ Feminist scholars explore privacy in terms of its consequences for women.⁸⁴ Other writers analyze the privacy tort in relation to unwanted revelations about another person's homosexuality or HIV/AIDS status.⁸⁵ Even Susan Gilles's article about recharacterizing part of privacy law as "breach of confidence"—a work replete with doctrine about contracts, torts, fiduciaries, and the First Amendment—considers the effects of privacy law on women, gay persons, and rape victims.⁸⁶ Presumably Prosser also cared about what would happen if his proposals succeeded and whose ox would be gored, but his expositions seldom ad-

80. I believe Richard Wright was the first Torts scholar to make this point. See Richard W. Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435, 439 (1985).

81. See Prosser, *Privacy*, *supra* note 13, at 389. The *Second Restatement* sections are § 652B, § 652C, § 652D, and § 652E.

82. See Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 675 (1988) (noting similarities between blackmail and ordinary trade); Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663, 1674 (1993) (studying blackmail with reference to the Coase theorem); Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1859-65 (1993) (contending that blackmail is wrong because it is wasteful).

83. Compare Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1 (1997) (defending the right of publicity, which includes the right to retain financial gains associated with one's fame), with Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 205-28 (1993) (decrying right of publicity as unsound).

84. The works of Anita Allen-Castellitto, published under an earlier surname, are preeminent. See generally ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988); Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723 (1999).

85. For analyses of the privacy tort with respect to AIDS-related and HIV-related disclosures, see Jeff Glenney, Note, *AIDS: A Crisis in Confidentiality*, 62 S. CAL. L. REV. 1701, 1727 (1989); Grace-Marie Mowery, Comment, *A Patient's Right of Privacy in Computerized Pharmacy Records*, 66 U. CIN. L. REV. 697, 714 (1998).

86. See Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 13 (1995).

verted to consequences and therefore could stay close to a formalist center.

B. Technology

The growth of electronic legal texts sends the common law swirling in the same centrifugal eddy. Cases now divide into new fragments that unite with other fragments, away from the body of the opinion. Words migrate into different contexts, allowing influences to spread across doctrines and sources of law (it's easy enough to open two windows at once, say a law review article and a statute). Electronic data storage has given contemporary case law an unprecedented accuracy in the filing and retrieval of judicial opinions—few scrivener's errors, no temporal delays to speak of⁸⁷—but also an unequally unprecedented power to mislead by misplacement and to cut off judicial subtlety before it even reaches a reader.

Powerful search engines drive this force: whereas his predecessors read, or tell younger people they used to read, encyclopedias and treatises and digests, a contemporary law student in need of information about the law knows some of the awesome power of the password and turns first (maybe “only” is the adverb, rather than “first”) to a computer. The most effective searches look for one unusual word, or two in a close sequence, and so context and nuance that situate discussions in their original place are clipped away.⁸⁸ I'm not shaking my fist at today's wayward youth: I conduct my research myself at an office computer, and it's great for what it can do.⁸⁹ The point is rather that part of the power of electronic searching consists of centrifugal energy; whether anyone likes it or not, a generation of lawyers now cuts judicial opinions into new pieces. New units drive out the old. The page break is dead: long live “/s” and “/p”!⁹⁰ When perceptions and

87. See Bernstein, *supra* note 64, at 1672.

88. See William T. Braithwaite, *How is Technology Affecting the Practice and Profession of Law?*, 22 TEX. TECH. L. REV. 1113, 1122 (1991) (expressing worry about future trends); Stephen L. Haynes, *Modern Technology and Its Effect on Research and Communication*, 86 AM. SOC'Y INT'L L. & PROC. 604, 610 (1992) (arguing that information technology has deleterious effects on legal expression); Molly Warner Lien, *Technocentrism and the Soul of the Common Law Lawyer*, 48 AM. U. L. REV. 85, 101 (1998) (lamenting “the absence of an enlightened, broad perspective” in online searches).

89. For example, when I wanted to find a few law review articles hostile to Ronald Dworkin's posture that judicial integrity can be understood in terms of a personified heroic judge, I found it expedient to type “Hercules,” a name I knew is often invoked with scorn, into Lexis.

90. See generally Anthony Aarons, *Cite-Fight: The War on West*, L. OFFICE COMPUTING, April/May 1995, at 47 (noting shifts in perception, originating in technological change, that now interpret judicial opinions as broken at the sentence or paragraph level rather than at the page level).

usages make new fragments out of the published judicial opinion, changes in common law development must follow.

IV. CONCLUSION

"Sounds kind of postmodern," said a friend to me. I blanched,⁹¹ but had to admit that the new-tort centrifuge does bear a certain resemblance to the old pommo shuffle. In contrast to new-tort formation in a more formalist era, I have contended, new torts form today, if they form at all,⁹² in a much more contingent and local fashion. Annual surveys in the *National Law Journal*⁹³ do foster the conclusion that new torts look like a postmodern exegesis on knowledge: "dispersed, multiple, fragmented, and theoretically varied," in contrast to the "continuity, unity, totality, comprehensiveness and consistency" that marked the Prosser era.⁹⁴ If postmodernism is a word susceptible to definition, then some of its content fits.

I would agree that a move resembling the transition from modernism to postmodernism has occurred in new-tort formation. Prosser always spoke *ex cathedra*, even when he wrote only as a scholar and not an ALI lawmaker. By contrast most contemporary Torts scholarship concedes that it is telling only part of a story and does not have a universal claim to authority. In the heyday of the *Restatements*, Torts readers could tell the most certain truths by their blackletter type font and find the next level of certainty in the Comments, down through Illustrations and Reporter's Notes. (I exaggerate, but not that much.) Contemporary readers and writers, by contrast, see the inverted commas around the "objective" standard for negligence, find gendered exclusion (plus other meanings) in "the reasonable man," disagree about basic questions of legal history (did tort doctrine subsidize industry in the nineteenth century? was early liability for accidents strict or based on fault?), and question whether first-year vocabulary about accidents, like "fault," "proximate cause," or "defect," means anything constant from one setting to another.⁹⁵

91. The word can be an epithet. See Jeffrey N. Wasserstrom, *Are You Now or Have You Ever Been . . . Postmodern?*, CHRON. HIGHER EDUC., Sept. 11, 1998, at B4.

92. See *supra* note 7 and accompanying text.

93. See *supra* note 4 and accompanying text.

94. See Hugh J. Silverman, *Modernism and Postmodernism*, in ENCYCLOPEDIA OF PHILOSOPHY SUPPLEMENT 353, 354 (Donald M. Borchert ed., 1996).

95. For an all-under-one-roof compendium of arguments on some of these questions, see RICHARD A. EPSTEIN, TORTS 70-75 (1999) (discussing controversies over the history of tort liability); 89-91 (discussing subsidy theory); 110-13 (contrasting objective and subjective approaches to reasonableness); 395-433 (summarizing points of contention in products liability law). The debate over the gendered status of the reasonable man emerges nicely from two sources: Margo Schlanger, *Injured Women Before Common Law Courts, 1890-1930*, 21 HARV.

Important distinctions remain, however, between postmodernism and the understanding of current new-tort formation proposed here. I have offered the centrifuge as a metaphor for *part* of new-tort development today. The centripetal counterforce, which received more than its share of attention in *How to Make a New Tort*, continues to maintain unity in torts. The centrifuge makes fragments fly, but tort law keeps hold of its broad principles. I see integrity in its refusal to accept codification, its insistence on a last word beyond statutes, the *Restatement*, academic fashions, and "policy" generally. Legal scholars and students who dislike Torts disagree, finding the subject vacuous and impossible to control. We at the Clifford Symposium have found something affirmative in these fissures.

Whether or not "the new-tort centrifuge" is a postmodernist construct, however, I appreciate the epithet for at least two reasons, neither of them particularly kind to postmodernism. First, we may worry, along with philosopher Simon Blackburn, about encouraging the centrifuge to operate at too high a speed. Blackburn reproaches postmodernist thought for

a cavalier dismissal of the success of science in generating human improvement, an exaggeration of the admitted fallibility of any attempt to gain knowledge in the humane disciplines, and an ignoring of the quite ordinary truth, that while human history and law admit of no one final description, they certainly admit of more or less accurate ones, just as a landscape permits of no one unique map; yet, there can be more or less accurate maps.⁹⁶

The earnest task of righting wrongs, described in *How to Make a New Tort*, is an endeavor that we in Torts ought to admire and preserve.⁹⁷ The alternative may be in the end even more hidebound than resistance to new tort proposals.⁹⁸

The other reason to be grateful for the wake-up call inherent in using "postmodern" as an epithet is that it reminds those of us con-

WOMEN'S L.J. 79 (1998); Barbara Y. Welke, *Unreasonable Women: Gender and the Law of Accidental Injury, 1870-1920*, 19 LAW & SOC. INQUIRY 369 (1994). For general summaries of academic contention around Torts questions, see Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785 (1990); David M. Becker, *My Two Cents on Changing Times*, 76 WASH. U. L.Q. 45, 54 n.33 (1998); Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49 (1991).

96. SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY 294-95 (1994).

97. Cf. Jurgen Habermas, *Modernity—An Incomplete Project*, 22 NEW GERMAN CRITIQUE 3 (1981) (arguing that postmodernism is premature because modernity needs to conclude its work).

98. See generally RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989) (advocating a reconciliation of postmodernism and social activism); MADAN SARUP, *AN INTRODUCTORY GUIDE TO POST-STRUCTURALISM AND POSTMODERNISM* (1989) (arguing that postmodernism has conservative tendencies).

cerned with law reform to remember the ends of new-tort formation as well as the means. Again, I take here a slightly contrary posture to the one of *How to Make a New Tort*. There I laid down the choice for activists—if they are successful they can form a new tort, or they can allow a progressive social movement to develop around their overt leadership; but any gain in one realm will cause a loss in the other—and concluded that I preferred new torts. I still do, but let us now praise expanded health insurance, meaningful safety regulation, and funding for legislative mandates—all tasks that are still uncompleted. Taken to excess, new-tort preoccupation can distract reformers and policymakers from pursuing some of what these new torts would hope to achieve.

As tort development continues to spin outward and inward, the existence of new-tort formation will continue to be debated. Causes of action will look like new torts on centripetal days, but like “new wrinkles on old ones”⁹⁹ when we are in a centrifugal mood. Observers of Torts might have hoped for better calibration of our instruments of change;¹⁰⁰ but then if you like certainty, you’ll have been drawn to almost any other area of American legal doctrine.

99. See *supra* note 7 and accompanying text.

100. Justice Michel Bastarache of the Canadian Supreme Court, for instance, criticizes the Canadian legal system—his point applies with equal force to the law of the United States, which develops from a similar variety of inputs and institutions—for its inability to perceive whether it is responding effectively to ambient change. He queries whether the Canadian legal system is mired in the equivalent of old, unresponsive writs, and therefore unable to cope with society at “the new millennium.” Bastarache, *supra* note 40, at 412. He foresees dangerous new sources of dispersal, mentioning in particular the challenges of minority-group identity and a menacing version of twenty-first-century technological change. *Id.* In this Article, by contrast, I have spoken affectionately of the writ system, praising its combination of stability and innovation, and also insisted that dispersal in tort law responds to a counterforce. Perhaps dispersal in the future will grow less benign in its aims and means. For whatever comfort it can give Justice Bastarache, I commend Professor Baker’s sanguine history of language-conflict and invasion at the dawn of the common law. See Baker, *supra* note 46, at 15.

