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THE FALL AND RISE OF BLAME IN AMERICAN TORT LAW*

Anthony J. Sebok[†]

It is a truism that tort law changed in character sometime in the middle of the twentieth century. At some point—maybe 1950, maybe 1960—tort experienced, in the words of two recent commentators, “a plaintiff-oriented expansion.”¹ Virtually all commentators, regardless of their particular normative views, agree that, as a matter of empirical fact, courts and legislatures changed tort doctrine in ways that made it easier for injured persons to recover. In a path-breaking 1985 article titled *The Invention of Enterprise Liability*, George Priest announced that “since 1960, our modern civil liability regime has experienced a conceptual revolution that is among the most dramatic ever witnessed in the Anglo-American legal system.”² In 1992, Gary Schwartz criticized Priest’s analysis of the post-1960 revolution, but agreed that since 1960 the courts instituted a series of “liability-expanding changes in tort doctrine.”³

One might think from this description that tort law experienced a Kuhnian revolution that shocked its practitioners from one paradigm into another. Thomas Koenig and Michael Rustad gave this impression in their recent book, *In Defense of Tort Law*, in which they state that “the American

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¹ THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* 46 (2001).

² George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundation of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

³ Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 605 (1992).

law of torts was a relatively sleepy outpost prior to the 1940's."⁴ But this statement is true only if one interprets "the law of torts" to mean tort law's doctrines as accepted by the courts and laid out in the treatises. During the 1920s and 1930s, the legal realists set out the theoretical framework for the revolution that would erupt in the 1960s.

As G. Edward White has noted, realism changed tort law in two ways.⁵ First, by attacking nineteenth century conceptualism, scholars such as Leon Green undermined the foundations upon which traditionalists like Francis Bohlen based assertions concerning the existence of concepts like proximate cause, duty and assumption of risk. Green was the ultimate nominalist; his casebook did not have index entries for doctrinal categories like assumption of risk. Instead, he categorized tort cases by context: "automobile traffic" or "manufacturers and dealers."⁶

Green's point was not only that students would become better lawyers if they learned about the patterns of legal decision making, he was also genuinely skeptical about the theoretical assumptions that lay behind conventional tort categories. For example, Green thought that both Justice Cardozo and Justice Andrews made a mess of the famous *Palsgraf* decision.⁷ According to Green, Cardozo's abstract discussion of duty and Andrews's hypotheticals concerning proximate cause simply threw the case into a useless "realm of metaphysics."⁸ Similarly, on the eve of America's entry into the Second World War, William Prosser rejected the idea that proximate cause could be reduced to "absolute rules" and denounced the "fruitless quest for a universal formula" of causation.⁹

The second way in which legal realism changed tort law is that it gave judges a new rationale for decision. Green believed that what both Cardozo and Andrews were concealing in their conceptualist rhetoric was that *Palsgraf* was really a very simple case involving the "adjustment by government of

⁴ KOENIG & RUSTAD, *supra* note 1, at 46.

⁵ In *Tort Law in America*, White described the impact of realism (which he locates as occurring between 1910 and 1945) as foundational. See G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 112 (1985).

⁶ LEON GREEN, *THE JUDICIAL PROCESS IN TORTS CASES* (1931).

⁷ *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

⁸ Leon Green, *The Palsgraf Case*, 30 COLUM. L. REV. 789, 791 (1930).

⁹ WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 319-20 (1941).

risks which . . . cannot be eliminated from the hurly-burly of modern traffic and transportation.”¹⁰ Realism in torts meant that concepts like negligence and causation had to be replaced with interest balancing between parties to a suit, based on the specific context of the accident.¹¹

One might think that the rejection of conceptualism would have committed the realists to a form of legal skepticism or at least agnosticism about how to decide individual tort cases.¹² In fact, Green’s radical nominalism, in a way, implied that every case was *sui generis* and that nothing scientific could be said about cases other than a report of their facts.¹³ However, realists like Harry Shulman found just the opposite. In a review of Green’s casebook, Shulman noted that an implication of Green’s radical organization was that “[i]ndividual cases should be studied not merely as particular private disputes, but as instances of larger social problems.”¹⁴ In the casebook Shulman published with Fleming James ten years later, he boasted openly that the book was designed to teach students to view tort law as an instrument of “social engineering.”¹⁵ This was consistent with the view of realists in other parts of law who saw the “agencies of government, including courts, as social engineers who balanced the claims of competing interests on behalf of the public good.”¹⁶

Where the conventional histories of tort law are correct is that, as a matter of doctrine, tort law did not really exhibit pro-plaintiff tendencies until about 1960. The litany of changes are well known. Courts and legislatures abolished immunities for charities, governments and family members.¹⁷ They

¹⁰ Green, *supra* note 8, at 791.

¹¹ See WHITE, *supra* note 5, at 107.

¹² See, e.g., Harold R. McKinnon, *The Secret of Mr. Justice Holmes, An Analysis*, 36 A.B.A. J. 261 (1950); Morris R. Cohen, *Positivism and the Limits of Idealism in the Law*, 27 COLUM. L. REV. 237, 238 (1927).

¹³ See Fowler Harper, Book Review, 25 IOWA L. REV. 182 (1939); Fleming James, Book Review, 28 GEO. L.J. 1146 (1940) (reviewing the second edition of Green’s casebook).

¹⁴ Harry Shulman, Book Review, 45 HARV. L. REV. 1445, 1448 (1932).

¹⁵ HARRY SHULMAN & FLEMING JAMES, *CASES AND MATERIALS ON THE LAW OF TORTS* vii, viii (1942).

¹⁶ WHITE, *supra* note 5, at 106.

¹⁷ For charities, see, e.g., RESTATEMENT (SECOND) TORTS § 895E (1965); *Colby v. Carney Hospital*, 254 N.E.2d 407 (Mass. 1969); *Howle v. Camp Amon Carter*, 470 S.W.2d 629 (Tex. 1971); N.C. GEN. STAT. § 1-539.9 (2003). For governments, see, e.g., *Owen v. City of Independence*, 445 U.S. 622 (1980) and RESTATEMENT (SECOND) OF TORTS § 895C.

eliminated auto-guest statutes and guest doctrines.¹⁸ Tort law dissolved the special rules of liability for landowners, sometimes even with regard to trespassers.¹⁹ In medical malpractice, the elimination of the locality rule and the emergence of patient-oriented informed consent made it easier for plaintiffs to overcome physician defenses.²⁰ Courts recognized new affirmative duties on the part of building owners, therapists and others to prevent injuries to third parties.²¹ Bars and liquor stores acquired the obligation to prevent injuries caused by drunk driving, as did, on occasion, social hosts.²² The expansion and codification of manufacturers' obligations to consumers, which existed since the early part of the twentieth century, catalyzed the emerging doctrine of strict products liability.²³ The emergence of negligent infliction of emotional distress under the bystander rule and intentional infliction of emotional distress created entirely new forms of civil wrong.²⁴ Comparative fault replaced the defense of contributory negligence, and many courts merged the defense of assumption of risk into comparative fault.²⁵ Courts and legislatures relaxed the rules of causation as well, first with the introduction of alternative liability, then with the expansion of the substantial factor test through the introduction of concepts like market-share liability and loss of chance.²⁶ As Gary Schwartz famously commented, until the early 1980s, the modern cases added to casebooks were "almost

¹⁸ For auto-guest statutes, see, e.g., *McConville v. State Farm Mutual Automobile Insurance Co.*, 113 N.W.2d 14 (Wis. 1962); *Zumwalt v. Limland*, 396 P.2d 205 (Or. 1964); *Brown v. Merlo*, 506 P.2d 212 (Cal. 1973).

¹⁹ See, e.g., *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968); *Peterson v. Balach*, 199 N.W.2d 639 (Minn. 1972).

²⁰ N.Y. PUB. HEALTH LAW § 2805-d (1994); *Morrison v. MacNamara*, 407 A.2d 555 (D.C. 1979); *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990).

²¹ *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970); RESTATEMENT (SECOND) OF TORTS § 337.

²² For social hosts, see, e.g., *Kelly v. Gwinnell*, 476 A.2d 1219 (N.J. 1984); *Hickbotham v. Burke*, 662 A.2d 297 (N.H. 1995). For sales of alcohol, see, e.g., *Stachiniewitz v. Mar-Com Corp.*, 499 P.2d 436 (Or. 1971); *Ontireros v. Borak*, 667 P.2d 200 (Ariz. 1983).

²³ See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963); *Prentiss v. Yale Mfg. Co.*, 365 N.W.2d (Mich. 1984).

²⁴ For negligent infliction of emotional distress, see, e.g., *Dale v. LaCroix*, 179 N.W.2d 390 (Mich. 1970). For intentional infliction of emotional distress, see, e.g., *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282 (Cal. 1952).

²⁵ See, e.g., *McIntyre v. Balantine*, 833 S.W.2d 52 (Tenn. 1952).

²⁶ See, e.g., *Herskovits v. Group Health Co-op of Puget Sound*, 666 P.2d 474 (Wash. 1983); *Summer v. Tice*, 199 P.2d 1 (Cal. 1948); *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980).

all triumphs for the plaintiffs; the collection of these cases could be referred to as 'plaintiffs' greatest hits.'²⁷

One popular explanation for the rise of the plaintiff in the 1960s is that the shift of the balance of power away from defendants and toward victims was an extension of the basic concept of negligence that had developed in American law in the nineteenth century. This argument explains the change in the doctrines, not as a change in the conceptual premises of American tort law, but as an example of the law "working itself pure."²⁸ Thus, for Schwartz, post-1960 tort doctrine was a consequence of judges taking negligence seriously and creating a "full regime of negligence liability."²⁹ His explanation for why this evolution occurred when it did is quite subtle, making the very reasonable point that it was no accident that judicial activism in tort law coincided with judicial activism in other areas of the law, especially civil rights.³⁰ Under this theory, the elimination of arbitrary limitations on liability simply gave more Americans the right to the same redress for injury caused by faulty behavior that other Americans (namely the rich, white or powerful) had enjoyed since the time of Holmes.

Others have viewed the doctrinal change more critically. George Priest, for example, attributed the change to a revolution in tort theory. According to Priest, erosion of the traditional concepts of negligence gave way to an ideology of enterprise liability.³¹ Enterprise liability is a normative claim: It states that the right system of tort law is one which spreads the costs of accidents as broadly as possible by imposing such costs on those actors who are in the best position to charge those costs to the parties best able to bear those costs. Enterprise liability is therefore grounded in a descriptive claim: It assumes that society will be better off if its system of torts spreads the costs of accidents broadly. Finally, according to Priest, enterprise liability is closely linked to one specific doctrinal principle, namely strict liability or liability without fault.³² According to Priest, the reason for the marked shift toward plaintiffs after 1960 is that American judges accepted

²⁷ Schwartz, *supra* note 3, at 604.

²⁸ *Omychund v. Barker*, 26 Eng. Rep. 15, 33 (K.B. 1744).

²⁹ Schwartz, *supra* note 3, at 607.

³⁰ *Id.* at 610-12.

³¹ Priest, *supra* note 2, at 527.

³² *Id.* at 462.

the ideology of enterprise liability and implemented it by expanding strict liability in American tort law.³³

As with all complex historical questions, both sides are right in this debate. Clearly, Schwartz was correct when he observed that the vast majority of doctrinal changes in the torts revolution of the 1960s and '70s were merely extensions of the fault principle, and that even products liability, after a brief flirtation with true strict liability, settled back into a version of the fault principle. But Priest was also correct in that the principles of enterprise liability played a role in the rise of the plaintiff after 1960. Both scholars are correct because the expansion of the fault principle in favor of plaintiffs was part of the legal realists' academic agenda, which set the stage for the revolution of the 1960s. These legal realists believed fervently in the theory of enterprise liability. Scholars in 1930, when Leon Green, Fleming James and Harry Shulman wrote, believed that the idea that the doctrines of fault favoring defendants were arbitrary and formal and should be expanded to allow more plaintiffs to win was consistent with the idea that costs of accidents should be spread broadly. If, as I noted above, one believed, as did the realists, that tort principles were just instruments in the service of social engineering, then there was nothing dishonest about using the language of fault to create the right social outcome.

I want to stress, however, that the realist project, which was most certainly progressive in spirit and pro-plaintiff in effect, had a very different philosophical foundation than the pro-plaintiff consensus described by Schwartz and, in the context of today's "tort wars," defended today by most liberals. The realists' project had two defining features: enterprise liability and the elimination of fault. I discuss each in turn.

The idea that law should solve "social problems" was not just a vague jurisprudential platitude to the realists when it came to torts. It soon took on a very specific and precise meaning. The work of Fleming James, the most outspoken and persuasive realist advocate of enterprise liability, illustrates this meaning. By the 1920s, the American experiment with workman's compensation was well under way. What is remarkable about the history of workman's compensation is how many diverse parts of American society came together to

³³ I take this to be Carl T. Bogus's central claim as well in *WHY LAWSUITS ARE GOOD FOR AMERICA* (2001).

support its adoption. This was in part because its rationale could be viewed differently depending on one's social role. For businesses, it seemed like a necessary way to cut off the incipient expansion of the fault principle into the workplace. For progressives, it seemed like the best way to get capitalists to give back to workers some of the surplus value that the wage system took from them. For James, it was simply an illustration of the principle of risk distribution. That is, it was always better "to divide a loss among a hundred individuals than to put it on any one."³⁴ This was because a single, unpredictable, catastrophic loss to an individual costs far more to society than the same loss distributed in small, predictable payments.³⁵ This was, of course, the theory of enterprise liability.

James and other realists measured all tort rules against the standard of enterprise liability. This usually led to pro-plaintiff conclusions at the level of doctrine, since defendants were generally in a better position to distribute risks.³⁶ For example, William O. Douglas criticized Young B. Smith's defense of the doctrine of vicarious liability, which argued that entrepreneurs should be held liable for costs associated with the actual control they have over their profit-making ventures.³⁷ Douglas was skeptical that there really was any intelligible distinction between the control an enterprise had over its workers and the control it had over independent contractors. He argued instead for vicarious liability based on a firm's size: The bigger the firm, the more able it would be to spread the cost of the accident.³⁸

Sometimes the logic of enterprise liability brought the realists to conclusions which seemed, at first blush, pro-defendant. When Charles Gregory argued in favor of contribution, he thought that he was promoting a progressive reform in the face of nineteenth century conceptualism: From the plaintiff's point of view, imposing the damage burden on

³⁴ Priest, *supra* note 2, at 471 (paraphrasing Fleming James, Jr., *Contribution Among Tort Feasors in the Field of Accident Litigation*, 9 UTAH. B. BULL. 208 (1939)).

³⁵ See Fleming James, Jr., *Contribution Among Joint Tort Feasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941).

³⁶ *Id.* at 1169.

³⁷ Young B. Smith, *Frolic and Detour* (pts. I & II), 23 COLUM. L. REV. 444, 716 (1923).

³⁸ William O. Douglas, *Vicarious Liability and Administration of Risk* (pts. I & II), 38 YALE L.J. 584, 720 (1929).

only one defendant worked against risk distribution.³⁹ James argued that Gregory's analysis was incomplete: The virtue of the old system of several liability was that the victim usually picked the largest and wealthiest of defendants to sue. Contribution would allow that first defendant to spread some of the cost onto a smaller and less solvent faulty party, thus inhibiting the goal of enterprise liability.⁴⁰ Gregory later admitted that James's logic was correct, and he noted that if James's reasoning was extended, tort law should just be replaced by "a program of socialization of loss through taxation . . . [and] I would be most sympathetic."⁴¹

One might think that a realist like James would have been loath to support a doctrine that would have let small enterprises off the hook if they were indeed responsible for injuring people. But that assumes that James and the realists viewed the world of torts through a simple capital versus labor dichotomy. This may have been true of certain sociological jurists, like Brandeis, but by the late 1930s, any class analysis that may have colored nineteenth century progressivism was drained from the movement. For James, the logic that argued for workman's compensation—which he found irresistible—also argued for no-fault automobile insurance, even though there was no obvious class orientation to the set of defendants and plaintiffs in the typical road accident.⁴²

Returning to James's critique of Gregory's argument for contribution, one wonders why James did not view attributing a cost to a faulty party as something that would always benefit society in the end. According to Learned Hand, the purpose of negligence law is to benefit society by making defendants pay for their negligent conduct, where negligence means activities whose cost of prevention is less than the expected loss.⁴³ One would think that James, whose interest seemed wholly focused on social welfare, would have seen that allowing a large enterprise to pay more than its expected loss, and small

³⁹ Charles O. Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 1938 WIS. L. REV. 365, 373.

⁴⁰ James, *supra* note 35, at 1165-66.

⁴¹ Charles O. Gregory, *Contribution Among Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941).

⁴² See Fleming James, Jr. & Stuart C. Law, *Compensation for Auto Accident Victims: A Story of Too Little and Too Late*, 26 CONN. B.J. 70 (1952) (detailing James's thirty-year interest in this topic).

⁴³ See, e.g., *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

enterprises to get away by paying nothing, would defeat the incentive structure of the Hand test. This is, of course, exactly what a law and economics scholar would argue, and, like the realists, law and economics is solely concerned with social welfare.

One certainly should view James as a proto-realist. He can be seen as the direct precursor to Guido Calabresi, a foremost liberal law and economics scholar. But none of this should obscure the one great point of departure between the realists and modern law and economics: The realists were skeptical of the idea that rules of tort law had anything to do with the number of accidents in society. Law and economics scholars premise their entire system on the power of law to incentivize, and the application of the principles of negligence is one of the means by which incentivization occurs.⁴⁴ What law and economics scholars fail to appreciate is that the realists viewed incentivization as another conceptualist myth. To understand why this is so, we must examine the second defining feature of the realist project in torts: the rejection of fault.

Beginning with Holmes's famous rejection of the confusion of criminal and civil wrong in *The Common Law*,⁴⁵ modern tort scholarship took for granted that when we talk about "fault" in tort law, we mean a failure to achieve an objective standard of conduct, not a subjective state of mind that is evil or motivated by wrongful intent. However, those who followed Holmes never adequately explained *why* a negligent person (as opposed to the victim or a third party) ought to pay for an accident. On a pragmatic level, many torts scholars felt that there was no need to answer the question. One could say, as many courts have, that as between two innocents (the faulty defendant and the victim) the faulty party who caused the harm should pay. Yet, as the realists pointed out, this left too much up for grabs. How to define "fault"? What if both parties were at fault? What about duty? Proximate cause? How should these concepts be decided, if not by reference to the defendant's decisions and choices? And so, throughout the early part of the twentieth century and, in fact,

⁴⁴ See generally WILLIAM A. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); ADAM SMITH, *LECTURES ON JURISPRUDENCE* (R.L. Meek et al. eds., 1978); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (5th ed. 1998).

⁴⁵ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1949).

up to today, the content and character of the choices made by the defendant remains a central question in a negligence case.

For the traditional corrective justice theorist, the question of breach is twofold. The factfinder first asks, "did the defendant act reasonably" and then, "could the defendant have acted reasonably?" If the answer to the latter question is "no," then the answer to the former question is irrelevant. For the modern law and economics theorist, the content of the choices made by the defendant is just as important. From the perspective of the Hand test, the question of breach is twofold. The factfinder first asks, "did the defendant act efficiently" and then, "would a finding of liability in a similar case have incentivized the defendant to act efficiently?" If the answer to the latter question is "no," then the answer to the former question is irrelevant.

All of this assumes that, in general, the choices made by the defendant are conscious choices that a self-conscious deliberation could affect. The realists were skeptical of this assumption. As James mentioned in his discussion of the "last clear chance" rule, "[i]t is a wrong not to look for danger when reasonable people would, even though failure to look springs from a habit of inattentiveness which a psychologist might regard as the inevitable outcome of heredity and environment."⁴⁶ This skepticism about the connection between choice and fault formed the foundation of James's insistence on cost spreading as the only scientific goal of tort law. In 1950, James explicitly set out the empirical evidence which he believed supported his viewpoint; he used studies by industrial psychologists and the United States Army to support his view that most accidents were the inevitable consequence of certain persons being more "accident-prone" than others.⁴⁷ James cited one study that suggested that 10% of the workforce was responsible for 75% of workplace accidents, and he cited another that claimed that 4% of drivers were responsible for 33% of all auto accidents.⁴⁸ From these and many other studies, James concluded that although accident-proneness is not randomly distributed throughout the population, its presence in certain persons is not attributable to any self-conscious

⁴⁶ Fleming James, Jr., *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 714 (1938).

⁴⁷ Fleming James, Jr. & John J. Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950).

⁴⁸ *Id.* at 770.

mental state. Absent "from the causes of accident-proneness are 'carelessness' or 'fault' . . . 'accident proneness may be a . . . phenomenon independent of any question of responsibility, conscious action or blameworthiness.'"⁴⁹

If it were true that people who caused accidents were not consciously responsible for their actions, what should the tort system do? James advised (as would Calabresi twenty years later) that there were two choices: (1) take measures that reduce the number of accidents caused by the accident-prone; or (2) take measures that minimize the bad effects of the accidents that do happen.⁵⁰ James briefly considered the idea of the government segregating the accident-prone from society, but, as he noted, the "accident-prone—about four percent of the total population—can scarcely be kept out of work and off the roads."⁵¹ On the other hand, steps obviously could be taken by the individual or her employer to minimize the degree to which the accident-prone individual imposes risks on others. But James thought it obvious that the individual was in a terrible position to regulate her own conduct. Not only is it psychologically impossible for the individual to decrease the risks she imposes on others by self-conscious effort, but the types of decisions which could make a difference—about rates of activity, for example—are precisely the sorts of decisions which only large institutions are good at making.⁵²

This meant, of course, that if one wanted to use tort law to minimize the risks posed by the accident-prone, litigation focusing on the choices made by faulty individual defendants would be ineffectual, because it "emphasize[s] the relatively insignificant part which the individual's conscious free choice plays in causing or preventing accidents."⁵³ Instead, asking large organizations, like corporations and insurers, to make those determinations was far more rational.⁵⁴ And finally, given

⁴⁹ *Id.* at 775 (citation omitted).

⁵⁰ *Id.* at 777.

⁵¹ *Id.* at 776.

⁵² James & Dickinson, *supra* note 47, at 780.

⁵³ *Id.*

⁵⁴ Large organizations could reduce overall costs if they could (1) remove the individual actor from a dangerous position; (2) train the actor to act safely despite his or her accident-proneness; or (3) construct prophylactics so that when the individual acted unsafely (an inevitable event) their injury was ameliorated. Of these three options, industrial America was especially keen on (2) and (3). See John Fabian Witt, *Speedy Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1, 37 (2003) (describing the work of "safety engineers" on behalf of large corporations who wished to reduce their workman compensation costs after 1910).

that accidents were mostly inevitable and were not the result of conscious ill will, the cost of trying to deter them would be at some point much higher than allowing them to occur and spreading their costs. Thus, if accident-proneness was a medical or psychological condition (and not even necessarily a disease), the appropriate response was enterprise liability, not fault-based deterrence or corrective justice.

James's argument against fault was clearly rooted in the new science of behavioralism, which was in vogue in the middle of the twentieth century. But other realists had their own reasons for being skeptical of fault. Albert Ehrenzweig saw fault as an expression of a repressed social desire to impose order onto the world, in much the same way that Freud understood certain psychoanalytic-desires categories that, although repressed, govern action subconsciously.⁵⁵ Ehrenzweig noted that, even though tort law claimed to have abandoned the idea that fault reflected moral defect, there remained, even in the conception of "objective" fault, "a primitive urge to find a wish and a will behind all causation."⁵⁶ Although we agree that a faulty actor might not have been able to act differently, we "single him out . . . [because] we refuse to believe in the harmdoer's innocence, and that negligence, however objectively conceived, implies blame for subconscious fault."⁵⁷

Ehrenzweig anticipated Schwartz's observation that American tort law, because of the pressure exerted on it by various progressive forces, would provide greater and greater recovery to plaintiffs through an expanded menu of claims under the fault principle. What intrigued Ehrenzweig was that the American tort system clung to the fault principle despite its contradictions and suspect conceptualist roots. He cited James's article on accident-proneness and said that no one could possibly believe that the reason the fault rule is retained in automobile cases is for deterrence.⁵⁸ Ehrenzweig could not see how the fault principle, through deterrence, could possibly produce safer products under the emerging doctrine of products liability.⁵⁹ In the end, Ehrenzweig argued, deterrence and reformation were mere rationalizations designed to dress up

⁵⁵ See Albert A. Ehrenzweig, *A Psychoanalysis of Negligence*, 47 NW. U. L. REV. 855 (1953).

⁵⁶ *Id.* at 861.

⁵⁷ *Id.* at 862.

⁵⁸ *Id.* at 865.

⁵⁹ *Id.*

the fault principle so that it would fit into the scientific modes of discourse that characterized social science in the twentieth century. The real mystery, from a socio-psychological point of view, was the persistence of the fault principle, since it seemed obvious to Ehrenzweig that the fault principle was simply a "more refined form of retaliation" rooted in the early "barbaric system of revenge" that Holmes claimed had been left behind with the adoption of the objective system of negligence.⁶⁰

Ehrenzweig was no more impressed by strict liability than by the fault principle. Strict liability merely pushed the question of revenge back to the step of causation. All strict liability says is that "the person innocently causing the harm is 'less innocent' than the injured;" strict liability projects onto innocent conduct a ground for liability.⁶¹ Thus, the selection of an innocent causal actor under strict liability is no different from the selection of a faulty but well-intentioned actor under the objective test for negligence. In both cases, what is doing the legal work is really the subconscious "animism which sees fault in all causation."⁶² Thus, Ehrenzweig observed that in the end, fault is "the mother of all absolute liability statutes."⁶³ For Ehrenzweig, the only "mature" response to accident would be some form of social or loss insurance.⁶⁴ In making this claim, he was, of course, explicitly and half-seriously comparing modern America's "choice" of the fault system to the sorts of immature and self-defeating choices that an immature or untherapized adult might make in his personal life. Ehrenzweig noted that where experts had recommended no-fault programs, society (or influential elements in society) resisted: The Saskatchewan no-fault auto insurance program was undercut by the retention of a right to recover for injuries caused by negligence—thus forcing the insurance scheme to retain "the most irrational feature of our law."⁶⁵

In 1959, Fleming James delivered a lecture at the University of Buffalo School of Law in which he looked back at tort law in the middle of the twentieth century.⁶⁶ According to

⁶⁰ Ehrenzweig, *supra* note 55, at 866.

⁶¹ *Id.* at 870.

⁶² *Id.*

⁶³ *Id.* (citations omitted).

⁶⁴ *Id.*

⁶⁵ Ehrenzweig, *supra* note 55, at 871 (citing Leon Green, *The Automobile Accident Insurance Act of Saskatchewan*, 32 J. COMP. LEGIS. & INT'L L. 39 (1950)).

⁶⁶ Fleming James, Jr., *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFF. L. REV. 315 (1959).

the accepted histories of tort law, this speech occurred just before the beginning of the "revolution" in torts. The tone of the lecture is slightly depressed. James noted that, given the forty years of empirical studies on the question of the incidence and cost of accidents in society, he could easily state a number of conclusions. First, most victims of accidents were undercompensated for their economic losses.⁶⁷ Second, there was a tremendous randomness in the amount of compensation that victims of similar accidents received.⁶⁸ Third, many people had no first party insurance, and the people who needed it the most (the working poor) had it the least.⁶⁹ Fourth, most tort damages were paid not by the party found in fault, but by either an insurer or an employer.⁷⁰ Fifth, since most accidents were caused by accident-prone persons who were ignorant that they were accident-prone, and who would not be able to do anything about it if they knew, "putting the pressure of tort liability directly on individuals" was futile.⁷¹ Sixth, programs like workman's compensation had led to a reduction in industrial accident rates.⁷²

From this James concluded: "[T]he present system is a miserable failure, marked by stark overall inadequacy punctuated by occasional fantastically high awards."⁷³ He suggested that one day America might get around to adopting a system of social insurance based on the principles of enterprise liability. And in the meantime? In a section titled *The Role of Courts in the Meantime*, James listed the things that he thought progressive torts scholars like himself should encourage as satisfactory intermediate steps.⁷⁴

The first idea James endorsed was that the courts adopt a laundry list of pro-plaintiff doctrinal changes. These included: eliminating intra-family and charitable immunities; allowing recovery for negligently inflicted emotional distress; expanding products liability; eliminating the special limitations of liability for landowners; abolishing or reducing contributory negligence; expanding *res ipsa loquitur*; and further developing the

⁶⁷ *Id.* at 328-29.

⁶⁸ *Id.* at 329.

⁶⁹ *Id.* at 329-30.

⁷⁰ *Id.* at 330.

⁷¹ James, *supra* note 66, at 330.

⁷² *Id.* at 331.

⁷³ *Id.*

⁷⁴ *Id.* at 335-37.

substantial factor test in causation.⁷⁵ Of course, this “wish list” contained virtually all of the doctrinal changes that materialized after 1960. What is odd, of course, is that James should have endorsed these moves as part of his realist agenda. As noted above, according to Schwartz, these doctrinal changes were part of the expansion of the fault principle, not its elimination.

The reason for James’s apparent change of heart is easy to see—as a realist, he had no trouble recommending doctrinal changes that would make the tort system look more like a social insurance system, even if the conceptual foundations for those changes were quite different from his own. James did not actually believe in the fault principle, or even in deterrence. He would not, however, oppose the adoption of a doctrine just because its champion believed in that doctrine because it was a perfection of the fault principle (or would achieve deterrence). For James, half a loaf was better than none.

For the remainder of this Article, I describe what has happened since the realists helped us achieve their half a loaf. It is possible that James and Ehrenzweig thought that after tort law expanded to include more participants within the fault system and allowed more recoveries through the litigation process, their real agenda would gradually take hold, and America would replace the negligence system with a system of social insurance. Perhaps they thought that, at the very least, some form of strict liability would replace negligence, so that the problems identified by the realists with the concept of fault would be gradually removed from our law and thrown into the dustbin of tort history, along with other embarrassing concepts like the *wergeld*.⁷⁶ But nothing like that has occurred. I argue that not only has negligence remained vital to our tort system, but, in fact, fault is being “remoralized”—that is to say, more and more tort litigation is using a concept of fault that asks the factfinder to focus on the defendant’s subjective state of mind.

A very interesting episode in the history of American tort law illustrates my argument. The realists were, as I described above, absolutely certain that, after workman’s compensation, automobile accidents would be the next part of American tort law to fall to the logic of enterprise liability.

⁷⁵ *Id.* at 336.

⁷⁶ In ancient Germanic and Anglo-Saxon law, *wergeld* was a person’s value in monetary terms, which was paid by a person committing an offense to the injured party or, in the case of death, to his family.

James was certain that automobile litigation exhibited all the characteristics of an excellent candidate for treatment under a no-fault system. In 1970, Massachusetts enacted the first no-fault automobile insurance law,⁷⁷ and about half the states in the country followed suit within a few years.⁷⁸ No-fault had been the sort of "good-government" issue that many liberals supported. They saw it as part of a progressive, regulatory response to an expensive, inequitable and inefficient system. Not surprisingly, Consumer's Union—probably the leading consumer's rights group in the country at the time—supported no-fault.⁷⁹ The basic argument for no-fault was that it helped low-income drivers by insuring that they received a minimum of guaranteed coverage for economic losses with no litigation in exchange for limits on non-economic damages.

Beginning in the 1980s, no-fault regimes around the country came under attack. The primary complaint was that they had not achieved real reductions in auto insurance costs, although the reasons for that are somewhat complex.⁸⁰ What is more interesting for purposes of this Article is the fact that some of the strongest critics of no-fault today are consumer groups such as Public Citizen and Consumer's Union. In the midst of the somewhat arcane debate over whether any state has really tried a "pure" no-fault scheme (compared to "modified no-fault" which allows litigation once low thresholds are met), one cannot but be amused by Ralph Nader's comments in 1999:

No-fault systems explicitly contradict the fundamental principle of American justice that wrongdoers are held responsible for the harm they cause. By eliminating "fault," no-fault effectively treats good drivers and bad drivers the same. This is not merely a philosophical

⁷⁷ A young Michael Dukakis, who had recently been elected to the state legislature, championed no-fault in Massachusetts.

⁷⁸ See *Auto Choice Reform Act: Hearing on S. 1860 Before the Senate Comm. on Commerce, Science, and Transportation*, 104th Cong. 112-19 (1996) (statement of Mr. Andrew Tobias, insurance reform advocate).

⁷⁹ In 1971, 1973 and 1984, Consumer's Union strongly endorsed no-fault in editorials in its magazine *Consumer Reports*.

⁸⁰ A common criticism of no-fault regimes was that many state legislatures did not adopt true no-fault, but weak hybrids compromised by *add-ons* or *monetary thresholds*. In the *add-on* states there are very few or no restrictions on lawsuits, and typically some plaintiffs recover economic damages in the form of no-fault payments and then use the tort system to sue for pain and suffering. In the *monetary threshold* states, a plaintiff who incurs medical costs above the threshold preserves his right to bring a lawsuit. These thresholds, although varied but most often being low in the dollar level, create an incentive to incur higher medical costs.

concern. A body of evidence shows that no-fault leads to more accidents because it weakens the deterrent effect of the tort law.⁸¹

Nader may be right; maybe James was completely wrong about no-fault insurance, fault, deterrence and accident-proneness. What is incredible to note, however, is how far “progressive” tort law has come since the 1930s. Obviously, at least when it comes to automobile accidents, the consumer movement has very little in common with the philosophical foundations of the realists.

It is no secret that the Naderite organization, Public Citizen, today opposes any effort to move to non-tort compensation schemes. There are cynical explanations for this position, but I do not want to pursue them. Rather, let us take Nader at his word: It is a fundamental principle worth upholding that faulty actors should pay for the injuries they cause. What would be the philosophical foundation that would underpin this new “progressive” view of fault?

One place to gain insight into this worldview is a new book, *In Defense of Tort Law*, written by two self-identified pro-consumer torts scholars, Thomas H. Koenig and Michael L. Rustad. The book begins with a quote from Prosser: “[T]he law of torts is a battleground of social theory.”⁸² At the beginning of the book, they tell with admirable clarity the history described above. They add an additional historical epoch, which they describe as “Tort Law Retraction: 1981-Present.” This makes sense, since as Schwartz noted in the title of his 1992 history of modern tort law,⁸³ by the 1980s the pro-plaintiff explosion in tort doctrine had come to a standstill and might even have begun to reverse. The rest of the book’s six chapters are a guided tour of the current doctrinal areas which Koenig and Rustad think are noteworthy, either because they are emerging areas of tort law or because they are under siege from the forces of “tort reform.” Therefore, although titled a “defense” of tort law, the book does not claim to be a comprehensive defense of all of tort law. One must assume that Koenig and Rustad thought that some parts of the doctrine are so uncontroversial as to require no defense.

⁸¹ Public Citizen Congress Watch, *What People Are Saying About “Choice” No Fault*, available at http://www.citizen.org/congress/civjus/no_fault/articles.cfm?ID=862 (last visited Apr. 4, 2003) (quoting testimony by Ralph Nader given to the Senate Committee on Commerce, Science and Transportation).

⁸² RUSTAD & KOENIG, *supra* note 1, at 1.

⁸³ See Schwartz, *supra* note 3.

Yet, there is something very peculiar about the world of torts described in the book. When Koenig and Rustad discuss medical malpractice, they discuss medical malpractice so heinous that it looks like battery,⁸⁴ and when they discuss products liability, they discuss conspiracies on the part of manufacturers to conceal and deceive.⁸⁵ Of course, as Rustad and Koenig know, as an empirical matter, only a tiny fraction of torts involve conduct which warrants punitive damages.⁸⁶ In reality, modern tort law in America is about car accidents: About two-thirds of all claims, three-quarters of all lawyers' fees and three-quarters of all payouts in the personal injury liability system arise from auto accident cases.⁸⁷ Punitive damages are very rarely awarded in car accident cases for the obvious reason that Americans, litigious as they are, do not claim that the person who struck them was anything more than careless.⁸⁸ The remaining one-third of claims, those arising from non-automobile related injuries, are usually the result of mere accident.

Rustad and Koenig's highly unrepresentative review of "modern" tort law reflects their interpretive standpoint. The reason they highlight such rare and unusual cases is that cases involving highly culpable conduct (as opposed to mere negligence) represent the true core function of modern tort law. In their book's conclusion, Koenig and Rustad describe the "most important function" of tort law as "compensating for wrongs that are rarely [but could be] punished through criminal law."⁸⁹ Criminal activity is an odd place to begin describing the basic or most important function of tort law. Holmes rejected subjective standards of liability in negligence cases, in part because he believed that in the modern world there was and ought to be a great difference between tort law and criminal law. Needless to say, the realists would have found this characterization of tort law strange. James thought that tortfeasors suffered from something akin to an illness. So

⁸⁴ RUSTAD & KOENIG, *supra* note 1, at 137-38. The cases discussed in these pages are, in fact, clear cases of battery.

⁸⁵ *Id.* at 180-81.

⁸⁶ *Id.* at 39.

⁸⁷ DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 120-21 (1991).

⁸⁸ Nonetheless, Americans are likely to blame car accidents on someone else: A Rand Institute study discovered that 90% of drivers in two car accidents blamed someone else for the crash. *See id.* at 159.

⁸⁹ *Id.* at 207.

well was the modern legal academy schooled in the teachings of Holmes that Ehrenzweig thought that the desire to punish, while at the root of modern tort law, was something with which any self-respecting torts scholar would vehemently deny any connection. To put it bluntly, Koenig and Rustad's claim is not merely nonobvious, it contradicts the dominant tradition of modern tort theory.

Political scientists offer two explanations for the resurgence of blame in tort law. One explanation is that reversion to the tort system has proven to be a relatively successful strategy for political actors interested in changing the status quo, because American political institutions are so diffuse and difficult to control. According to this "constitutional theory," decentralization combined with a post-war demand for "governmental activism on social problems" channels to the courts energy that would otherwise go toward other democratic institutions.⁹⁰ Three features of the courts make them a relatively more attractive site for activism in the United States. First, courts are independent of the state apparatuses (the "insulation incentive"); second, they are powerful (the "control incentive"); and third, they do not have to raise funds to achieve the ends which they command—instead they force the losers of the adjudged lawsuits to implement their will, on pain of being found in contempt of court (the "cost-shifting incentive").⁹¹

According to the constitutional theory, it is no accident that Ralph Nader perceives a coincidence between his interest in redistribution and the admittedly inefficient private tort system. Unlike the realists in the 1920s and '30s and progressive social democrats in Europe, Nader has a visceral distrust of government bureaucracies. He believes that government agencies are subject to capture and fall prey to the same cost-benefit reasoning that corporations use.⁹² On the other hand, "for everything wrong with bureaucracies, Nader sees something right with courts."⁹³ Since courts are not part of a centralized and rationalized structure, they can be reached

⁹⁰ See THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS* 13 (2002) (citing Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. PUB. POL'Y & MGMT. 369 (1991)); Robert A. Kagan, *Trying to Have It Both Ways: Local Discretion, Central Control, and Adversarial Legalism in American Environmental Regulation*, 25 *ECOLOGY L.Q.* 718 (1999).

⁹¹ BURKE, *supra* note 90, at 15.

⁹² *Id.* at 53-54.

⁹³ *Id.* at 54.

and persuaded by mavericks with new and unconventional points of view (e.g., people like Nader). Of course, one might argue that rationally organized, bureaucratic approaches to the questions of social policy are more likely to actually help the poor than are "maverick" appeals to isolated courts—that is, of course, the lesson of success of the Weberian tradition in Europe.⁹⁴ Sometimes the tradeoff between the Naderite program—driven as it is by the insulation, control and cost-shifting incentives—and the interests of those it wants to help is quite palpable. For example, in *Lawyers, Lawsuits, and Legal Rights* Thomas Burke details how Nader and his allies in the California Democratic Party fought a coalition of Latino and poverty activists who wanted to push a low-cost, no-fault program through the California legislature in 1988.⁹⁵

The constitutional theory is attractive, but it can only tell half the story. There would be no point to the structural incentives offered by the courts if the substantive decisions made in the courts were not of interest to the groups who were in a position to choose the venue where, all things being equal, they wanted the question of the cost of accidents to be heard. If, for example, judges and juries were indifferent to the rhetoric of blame, or worse yet, were more likely to blame plaintiffs as opposed to defendants for their injuries, then there would be no reason to believe that courts would be a more attractive venue than legislatures and agencies for those interested in redistributing the costs of accidents.

This is where the second theory from political science, which attempts to explain the rise of litigiousness in America, helps to clarify matters. According to Daniel Polisar and Aaron Wildavsky, American political culture has always been a product of the interplay (or tension) between individualism and egalitarianism.⁹⁶ Both ends of this spectrum place blame at the center of their political worldview: Individualists explain accidents by looking at the fault of individuals, while

⁹⁴ See, e.g., STEVEN KELMAN, *REGULATING AMERICA, REGULATING SWEDEN: A COMPARATIVE STUDY OF OCCUPATIONAL SAFETY AND HEALTH POLICY* (1981).

⁹⁵ BURKE, *supra* note 90, at 120-41. For a less restrained and much more bitter account of Nader's role in thwarting no-fault in California, see Andrew Tobias, *Ralph Nader is a Big Fat Idiot*, WORTH, Oct. 1996, at 94.

⁹⁶ Daniel Polisar & Aaron Wildavsky, *From Individual to System Blame: A Cultural Analysis of Historical Change in the Law of Torts*, 1 J. POL'Y HIST. 133, 143-44 (1989). Individualism and egalitarianism form two cells of a four-cell matrix. The other two cells are fatalism and hierarchy. An example of a society suspended in tension between egalitarianism and hierarchy is a social democracy such as Sweden.

egalitarians explain accidents by blaming "the system."⁹⁷ When egalitarians blame "the system," they do so by viewing its symbols—experts, corporations, municipalities, etc.—as filled with the potential for wrongdoing which is made manifest whenever there is an accident.⁹⁸

The theory of system blame is a little misleading, since it is not really about a shift of blame away from individuals to society. In fact, ironically, true *system* blame would not have much use for a tort system. If egalitarians truly believed that "the system" were at fault for the injuries suffered by consumers, auto drivers, workers and patients, then they would probably want to scrap individual litigation designed to identify defendant fault and support government-sponsored insurance schemes and no-fault. True system blame would lead an egalitarian to exactly the same position as that adopted by the realists seventy years ago.

The insight motivating Polisar and Wildavsky's concept of "system blame" is that *blame* is a shared point of orientation around which American political culture, in its different modalities, revolves. This is consistent with Kagan and Burke's analysis of the three incentives that drive political actors toward the courts under the conditions of weak government in their constitutional theory.⁹⁹ Courts, not agencies, are sites where the language of blame is readily heard. System blame is really nothing more than the relative intensification of the number of occasions when society will deem certain actions as potentially blameworthy, and a shift in the identity of the actors. Under the regime of what Polisar and Wildavsky call individual blame, relatively more accidents were presumed or adjudged to be either the victim's or no one's fault, while in the period of system blame, relatively more accidents are presumed or adjudged to be the fault of someone with whom the victim had some sort of relationship.¹⁰⁰

Under this interpretation, there is no a priori reason to presume that the episodes of blaming in law that characterize the constitutional theory and the theory of system blame will go necessarily against capital and achieve redistribution.

⁹⁷ *Id.* at 144.

⁹⁸ Somewhat hyperbolically, Polisar and Wildavsky characterize the effect of the shift from individualism to egalitarianism on American tort law thusly: "Fault once had to be proved; now it is presumed." *Id.* at 146.

⁹⁹ See BURKE, *supra* note 90, at 13-15.

¹⁰⁰ Polisar & Wildavsky, *supra* note 96, at 148.

Indeed, as America's experience with no-fault auto insurance has demonstrated, activists who want to use the tort system to promote redistribution will vigorously defend a regime of blaming through litigation, even when it clearly hurts the poor. One might view the tactical adoption of blame structures as part of a progressive strategy of the second best. That is, if the constitutional theory is correct, then given the embedded separation of powers at the very core of government, private litigation is the best that the poor could ever hope to get, notwithstanding the claims of academics to the contrary.

Another explanation for the postwar embrace of blaming structures by progressives is that American progressivism, like American political culture, is itself deeply affected by the individualism/egalitarianism split identified by Polisar and Wildavsky. That is to say, progressive thought in the United States simply may not be as concerned with economic justice as it was in the earlier parts of this century. To be sure, Polisar and Wildavsky assume that they must solve the problem of why the growing influence of egalitarianism produced the phenomenon they identify as system blame. But consider, if just for a moment, whether progressive political culture became more concerned with identifying and punishing the wrongs of individuals than with improving the average utility functions of society since the era of legal realism. Burke observes, almost as an aside, that although he is skeptical that American political culture is characterized by an increase in "rights talk" (as argued by Mary Ann Glendon in 1991), he is much more persuaded that what followers of Glendon are really seeing is an increase in "punishment talk" in American political discourse.¹⁰¹

Burke does not pursue his point, partly because his constitutional theory is supposed to explain the rise of litigation without reference to political culture, and partly (I suspect) because he associates Glendon's work with a certain kind of political conservatism, which would be hard to square with the pro-litigation actors whose decisions he has tried to explain in his book. Nonetheless, I think that Burke may be on to something. As he notes, punishment talk was doing a lot of work in the Naderite campaign against no-fault auto insurance in California: "[T]he campaign consultant who successfully beat back Proposition 104 . . . found that voters responded less to a

¹⁰¹ BURKE, *supra* note 90, at 184.

rights argument than to a punishment argument—that bad drivers should pay the price for their mistakes.”¹⁰² I suspect that the argument that would work best to convince citizens to keep other unwieldy parts of our tort system—such as medical malpractice or products liability—is not that victims have a right to the sometimes oversized awards they receive, but that a system which provides for punishment is better than one which distributes wealth evenly but bloodlessly.

To conclude, I recommend that scholars engage in further study on the present attraction of punishment to progressive torts scholars and activists. This may seem like a strange research agenda to recommend, given the important role that progressives play today in opposing America’s Draconian criminal justice system. Nonetheless, we may find that, ironically, realism’s assault on the philosophical and psychological assumptions behind the concept of fault has been set aside by realism’s heirs to pursue—perhaps with justification—an agenda in which punishment, and hence blame, provide the clarion call of progressive torts.

¹⁰² *Id.* at 184.

