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ENGEL, DAVID M., and MICHAEL MCCANN, EDS. 2009 *Fault Lines: Tort Law as Cultural Practice*. Stanford, CA: Stanford University Press. Pp. xiii + 384. $80.00 cloth, $27.95 paper.

KEREN-PAZ, TSACHI. 2007 *Torts, Egalitarianism and Distributive Justice*. Hampshire: Ashgate Publishing Limited. Pp. viii + 213. $29.95 cloth.

Drawing on two books central to an emerging sociolegal literature about tort—Fault Lines: Tort Law as Cultural Practice, *a collection edited by David M. Engel and Michael McCann, and* Torts, Egalitarianism and Distributive Justice, *a monograph by Tsachi Keren-Paz—this essay argues that tort law in the United States redistributes wealth in ways that ought to trouble sociolegal scholars and enlist their reformist energy. Read together, the two volumes offer considerable description and critique of a distributive injustice, and lead to important proposals for change.*

INTRODUCTION

Though ready to declare new priorities frequently enough, Law and Society scholars seldom find novelty these days in musty torts. Two leaders have veered from this tradition and now commend the field to sociolegal audiences. In *Fault Lines: Tort Law as Cultural Practice* (2009), a compilation of sixteen chapters by an array of authors, David M. Engel and Michael McCann outline a journey only partly under way. "It is somewhat surprising,"

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they begin, that torts, the topic of their book, does not yet occupy the center of an "extensive interdisciplinary literature" (3).

Engel and McCann offer the collection as an early step along a necessary road, summarizing in sociolegal perspective the state of current writing about American tort law. Anthropologists and sociologists have long taken an interest in dispute resolution. Another sociolegal genre considers "culture" as "an extralegal influence in appellate court opinions" (3) that decide tort cases. Other scholars assert, or explore, what Engel and McCann call "non-empirical allusions to presumed cultural norms such as individualism, adversarialism, rights-consciousness, and litigiousness" (3). And empirical researchers have brought scrutiny to numerous particulars, making it possible now to speak of tort law and society (4). Nevertheless, the editors put together *Fault Lines* not to celebrate, nor even just mark, the current state of "tort law and society" literature. They strive instead to enlarge a field that remains "limited by the predominant theoretical and policy frameworks" (4).

Law and Society scholarship about torts is sparser than it should be, Engel and McCann contend, because social scientists have had their time consumed and diverted by a ferocious tort reform agenda. Tort politics threw them on the defensive ropes. Their quantitative skills, which they could have applied to projects of their own choice with creativity and rigor, have instead gone to refute attacks. "We view most empirical scholarship on tort law as a direct response to the tort reformers and the litigation explosion debate," they write; although they "applaud and endorse" most of this "realist research on tort law," they find the constraints of an external agenda deleterious (5). Having to put out fires that other people set has "limited the theoretical significance of sociolegal scholarship on tort law" (5).

Fault Lines makes a vital contribution toward ameliorating the deficiency it announces. In this essay, I extend its journey by reading it along with *Torts, Egalitarianism and Distributive Justice*, a 2007 monograph by the private-law theorist Tsachi Keren-Paz. The latter book, a learned and densely reasoned turn through tort principles and doctrine, announces a powerful new extension of its venerable source material into the domain of sociolegal study. Implicitly *Torts, Egalitarianism and Distributive Justice*, written by a scholar with sociolegal credentials,[1] presents a friendly intrafamilial challenge to the more commonly found disregard for doctrine within this movement.

Engel and McCann (2009) lay out the conventional sociolegal perspective on doctrine, and tort doctrine in particular, at the beginning of *Fault Lines*. First, they describe sociolegal study as offering an alternative and somewhat iconoclastic perspective on the question of which legal materials are central and which are peripheral: "Most scholarship by professional legal

1. *Torts, Egalitarianism and Distributive Justice* was shortlisted for a sociolegal studies prize, and Keren-Paz has frequently presented at Law and Society Association and Canadian Law and Society Association annual meetings.

scholars addresses the black-letter constructions of [social] concepts and values by scrutinizing official reasoning by judges" (7). Next they say why they, as sociolegal scholars, prefer sociology to doctrine: "[T]he actual black-letter rules of tort law do not tightly constrain decision making by judges, juries, litigants, attorneys, and ordinary disputants. Key concepts, such as proximate cause and assumption of the risk, are notoriously slippery and easy for result-oriented advocates and judges to manipulate" (7). Their illustration of this last point is the persistence of fault following the introduction of "strict" products liability in the 1960s (7). This example aids Engel and McCann's stance against doctrine in two ways. First, it illustrates the futility of actual black-letter rules of tort law in general and, second, the perdurable focus on blame and fault is central to liability in particular. "Hence our chosen title for this volume, *Fault Lines*," Engel and McCann write, "underlines the broader discursive themes that permeate tort disputes in many contexts regardless of doctrinal categories" (7).

Tsachi Keren-Paz (2007), coming from the cohort of "professional legal scholars," makes the study of doctrine more fruitful by taking his material beyond "official reasoning by judges." Without disagreeing that particular rules are notoriously slippery, he maintains that doctrine consists of more than holdings and rationales found in published cases. The principal step toward expansion that he takes in *Torts, Egalitarianism and Distributive Justice* consists of widening doctrine to include its normative reform. For Keren-Paz, doctrine is not only what judges have done in decisional law, but what they *could* do, using their ordinary day-to-day materials, and what legislatures could impose on common law courts. He calls for the revision of tort rules to advance distributive justice.[2]

When he provides illustrations, Keren-Paz chooses tort doctrines that are much less manipulable than the proximate cause and assumption of risk examples focused on by Engel and McCann. In the United States, those two doctrines take the form of jury questions, as does fault, the center of *Fault Lines*. All questions that go to juries do indeed fail to constrain. Other doctrines, however, such as the damages rules and duty classifications that receive extensive attention in *Torts, Egalitarianism and Distributive Justice*, are harder for a result-oriented cohort to manipulate. They are relatively rigid in all legal systems. Legislatures can codify these doctrines; judges can give them relatively determinate effects.

Even this widened version of doctrine, extending past holdings and rationales, invites a question: why should sociolegal scholars care about it? My answer begins by suggesting that they already do care. Engel and McCann

2. His working definition of distributive justice, which I too use in this essay, is the Aristotelian formulation: "a mechanism to distribute benefits and burdens among the members of a relevant group in proportion to some criterion for distribution, such as merit, needs, equality, status, and so on" (Keren-Paz 2007, 5).

have reminded us of the extensive efforts of sociolegal scholars to respond to tort reforms that favor the advantaged. For these researchers, as well as those who learn from their work, the possibility of scholarship about tort reform that might favor the disadvantaged also warrants attention. *Torts, Egalitarianism and Distributive Justice* uses egalitarianism and distributive justice to join a larger conversation about power and resistance in the law—a conversation in which *Fault Lines* is preeminent.

Consider this recommendation from Keren-Paz (2007) about what a new or modified tort rule should seek to accomplish. Spurning narrower and more familiar goals—such as redress, rectification, compensation, or deterrence—Keren-Paz focuses on distributive effects:

> The policy maker should do the following: (1) identify the typical litigants; (2) determine who is more disadvantaged; (3) decide whether the rule in question results in progressive or regressive distribution; (4) evaluate whether such rule is desirable from the perspective of other considerations; and (5) balance the postulations of the different policy considerations, including distributive-egalitarian concerns, and only then reach the decision. (84)

Anyone who complies with this directive honors the progressive agenda that Engel and McCann (2009) declare for their own book:

> Our focus on tort law in relation to all of these forms of social differentiation underscores our commitment to analyzing culture in terms of power relationships and inequalities. We ask how tort law contributes to or challenges the larger patterns of who gets what, when, and how, and of institutionalized privilege and marginalization. (9)

Read as part of the same endeavor, *Torts, Egalitarianism and Distributive Justice* and *Fault Lines: Tort Law as Cultural Practice* help to pull sociolegal scholarship on tort law—at least in its American incarnation that will occupy this essay—out of what Engel and McCann have described as its ditch (5). Decades of tort-reform attacks forced sociolegal theorists to vouch for the innocuousness of the American status quo in its various manifestations relating to tort law, both its specifics (contingent fees, punitive damages) and its broad swaths (jury prerogative, tort liability for medical malpractice). Occupied with these labors of defense, sociolegal scholars writing about tort law did not have time or space to press the redistributive policies that Tsachi Keren-Paz advocates and that most of the contributors to *Fault Lines*, including McCann and Engel, have commended in that collection and other works.

The first two parts of this essay describe each of these two books in relation to the other. First, I locate "torts, egalitarianism and distributive justice," not just "tort law as cultural practice" in Engel and McCann's book.

In the second part, I give Keren-Paz a reciprocal read, identifying the ways in which he explores the terrain that Engel and McCann stake out in the introduction to their book. The third and fourth parts unite Engel and McCann's descriptive claim—that sociolegal scholars have been derailed by tort reform attacks—with Keren-Paz's argument about the optimal content of tort rules. If both points are correct, then a plan for action emerges: sociolegal scholars should, where warranted, consider waging an attack or two. Confining their policy stances to defenses has provided only damage control (and not much of that) rather than new achievements.

Attack what? Current tort law, I contend, also in the third part of this essay, lends a vigorous hand to the advantaged. Far from neutral, or aloof from politics, it now doles out distributive *in*justice. Keren-Paz (2007) skims the surface of this agenda in a section called "The Regressive Nature of Existing Tort Law" (67–70), and a few chapters in *Fault Lines* explore the same point. I take it further. The fourth part of this essay also situates this plan of attack—along with the Keren-Paz and Engel and McCann volumes themselves—in the historic Law and Society project to not only describe tort law in sociologically accurate terms, but also improve it.

A major theme common to both books, pertinent to this task, is a commitment to comparative methodology that goes beyond comparative law. Keren-Paz—who has Israeli and Canadian law degrees and now teaches in Britain—moves fluently from one nation's legal doctrine to another; he applies case holdings and insights to new jurisdictions without strain. *Fault Lines* gives David Nelken, famed for his work on "comparing legal cultures" (Nelken 1997), the leadoff spot in its lineup. Numerous chapters in the book engage in comparative analysis—not just across place, but across time and social and institutional location—to press a contention that comparative work fosters understanding and reform.

A common ground of the two volumes also emerges through interpretation of the word "cultural," present in the *Fault Lines* subtitle and sprinkled through most of its chapters. Cultural studies—an academic movement with which *Fault Lines*, as one of several titles in an imprint called "The Cultural Lives of Law," identifies itself—contains numerous and rivalrous schools of thought that offer opportunities to readers. Varied interpretations of "culture" pervade the chapters; each *Fault Lines* contributor has her or his own understanding of the term (although all share an interest in institutions as cultural sites and find law instantiated in legal practices).

The reading of *Fault Lines* that I explore in this essay—among many possible takes on the work, and one seemingly different from that intended by the editors[3]—emphasizes part of the promise of the Cultural Lives series:

3. The editors see *Fault Lines* as concerned primarily with analysis that enhances understanding of torts as a cultural phenomenon, emphasizing "the ways that legal practice is embedded within the larger framework of cultural norms, routines, and institutional relations"

these books will "attend to the ways law's power . . . is renewed and resisted" (Engel and McCann 2009, 385). Because one critical element of "culture" that pervades *Fault Lines* is power within a society, and because distributive justice seeks to rearrange social goods including power, the follow-the-distributions approach to torts that Keren-Paz deploys aligns usefully with the perspective on torts that I read in *Fault Lines*.

I. TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE IN *FAULT LINES*

Immediately after the introduction by Engel and McCann, *Fault Lines* (2009) shows the terrain that culture has in common with distributive justice in the context of tort law. Two overview chapters by comparativists David Nelken and Keebet von Benda-Beckmann defend the concept of legal culture by arguing for its descriptive accuracy. When widened to accommodate Lawrence Friedman's expansion into "external legal culture," a term that covers "the understandings, norms, values, and attitudes brought to bear on law by wider social groups" (32), "legal culture" recognizes both "folk culture" (33), an antecedent that describes social proclivities away from positive law and its systems, and what Nelken calls "the institutional possibilities provided" (33).

Nelken warns of the danger of tautology; ideologues can use legal culture to account at the same time for both a cause and a result. Why does the Netherlands have a low litigation rate? Its legal culture. What is the legal culture of the Netherlands? Litigation-aversion. Yet the possibility of misuse does not extinguish the value of the explanatory category, Nelken argues. A sociolegal investigator seeking explanation for a divergence between, for example, two similar national legal systems will obtain little benefit from the tautology but may be able to map the difference on a larger contrast of institutional alternatives. Legal culture acquires more descriptive power for an investigator who considers social units other than the nation-state. Nelken speculates that "the successful spread of Anglo American lawyering," in contrast to its civilian counterpart, may relate to the tendency of common law systems "to focus more on the link among law, economics, and society, while civil law systems focus principally on that among law, politics, and society" (35).

The utility of legal culture, says Nelken, is to repair "power differentials" (38). Drawing on Ann Scales's chapter later in the volume, he asks what good

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(Engel and McCann 2009, 6–7). The book focuses on "the experiential frames of meaning through which social life is understood and transacted" (5), the "cultural understandings and norms as they are enacted in social practices" (6), and, in general, the process of meaning-making in the reciprocal relationship between law and legal culture.

it can do to document yet again "the inequality and discrimination" of contemporary tort doctrine (Scales 2009, 285–86). Scales argues that as an explanation of oppression, legal culture seems quiescent, and its tautology-tendency threatens to undo reformist work; as it was in the beginning, legal culture is now, and ever shall be, world without end, amen (284–86). Nelken shares Scales's concern about egalitarianism and distributive justice in tort law but not her pessimism. Although scholars cannot make inequities "disappear by unmasking them," he concludes, "exposing injustice is at least part of such a task . . . [a]nd, for better or worse, cultural assumptions also help shape the range of options thought acceptable by political elites" (Nelken 2009, 38). Nelken thus pleads for distributive justice as a constituent of sociolegal study.

Country-studies in *Fault Lines*—a series of chapters that announce their plans to consider national cultures—also all address egalitarianism and distributive justice. The nations outside the United States that have their own chapters are Japan, the United Kingdom, Thailand, and India; *Fault Lines* also contains asides about tort liability in Italy, Germany, the Netherlands, and Swaziland. Marc Galanter (2009), in his chapter "India's Tort Deficit," decries a "low-use, low-accountability, low-remedy system" (58) and a "litigation implosion" (50) in India, notwithstanding a common notion that this particular society is litigious. Legal culture in this country, Galanter argues, oppresses disadvantaged people and thwarts their claims for civil justice. He links the false perception of a litigious culture to the British colonialist belief that people in India are "inclined to misuse opportunities for legal remedy to pursue status and carry on feuds" (48). This natives-are-restless stereotype has endured despite many decades of national independence and detailed factual refutation (52–53). Galanter, who in the 1980s lent his expertise to the plaintiffs in litigation following the Bhopal disaster, observes that the settlement between Union Carbide and the government of India may be deemed "beneficial to the victims" only if one considers the catastrophic overcrowding and underfunding of Indian civil courts (57–58). Speaking bluntly about an unjust allocation of social goods that tort-based formal entitlements did not repair, he declares that "the distribution of the [Bhopal] settlement funds was niggardly and inefficient" (58).

The distributive theme, with attention to what Keren-Paz (2007) calls "who is more disadvantaged" (84), carries over to the other countries studied in *Fault Lines*. Eric Feldman (2009) summarizes data about increases in medical malpractice litigation in Japan to suggest that these increases may be both a cause and an effect of greater social acceptance of going to courts for redress. Feldman's scholarly interests about disadvantage extend to the category of gender. He writes that one reason for the uptick in medical claims in Japan might be the increased number of women licensed to practice law (219); female lawyers may find plaintiffs' work congenial because they are treated poorly in law firms that represent defendant businesses and have had

their own negative dealings with Japanese medical care. Takao Tanase (2009), writing about injury attributed to asbestos, finds distribution central: "In Japan, the system for paying compensation to all victims—an ideal of equal and collective justice—is an important ingredient of the normal" (248).

David Engel (2009) contrasts Thai cultural understandings about what causes injury with those ascendant in the United States, arguing that they are "surprisingly similar" (267). To me the most striking similarity lies in reprieves for wrongdoers. Many people in Thailand attribute their injuries to ghosts or karma; many people in the United States use "individual responsibility" to disconnect risks from their social, systemic antecedents, and also to blame plaintiffs. Liability-thwarting heuristics vary, but all have distributive consequences.

Fault Lines next moves to Britain, where the distributive theme continues. Charles Epp (2009, 190–91) describes police-misconduct litigation as a relatively strong weapon against racism. Lynn Mather (2009, 194) follows the money to explore differences between American and British liability for tobacco-caused injury.

The chapters in *Fault Lines* that investigate American culture include Tom Baker on liability insurance; Valerie Hans on "juries as conduits for culture" (80); William Haltom and Michael McCann on fast-food litigation in the United States; and an especially impressive piece, Joyce Sterling and Nancy Reichman's examination of personal injury claims against railway and tramway defendants adjudicated in Denver from 1862 to 1917. All cover Keren-Paz's themes of torts, egalitarianism, and distributive justice, albeit in divergent ways. For example, Haltom and McCann present a battle among (1) corporate producers and vendors of fast food; (2) diet peddlers and exercise gurus; (3) scientific health expects, medical specialists, and research organizations; (4) liberal public interest litigators; and (5) antidiscrimination activists seeking to advance the cause of "fat rights" (98–100). While they focus mainly on the alliances, conflicts, and media portrayals that unite and divide these cohorts—a discussion about distributive justice in its own right—at the same time they tell a story about money. Haltom and McCann express astonishment "that the debate over fast food has barely acknowledged the class-based factor at stake in consumption of food that is, above all, cheap and accessible and heavily marketed as well as fast" (114).

The remaining *Fault Lines* chapters—about gender, sexual identity, and race—address inegalitarianism and distributive justice more overtly. All four of them place American tort law in the midst of systemic caste-oppression. To varying degrees, they all claim that American law and legal institutions make these unjust conditions worse. Anne Bloom, in a chapter about the relations between tort law and intersexual bodies, reaches the most benign conclusions of the four. Bloom suggests that the constitutional law of Colombia, interpreted in 1995 to hold that performing sex-reassigning surgery on an infant violates the infant's rights even when the parents consent to this operation,

is more progressive than the choices American judges now make to "embrace and, indeed, enforce an understanding of sexual identity that is deeply rooted in cultural assumptions about what is 'natural' and 'normal'" (139–40). Bloom also argues that "courts are handling sexual identity in much the same way that they once handled racial identity" (154), yet she refrains from overt condemnation of this status quo.

At the other end of this spectrum stands Ann Scales. Scales includes "Tort Law and Women Loathing" (277) and "Taking Sex Oppression Seriously" (281) among her subheadings; she says that for women the idea that the Food and Drug Administration regulates drug safety is "a cruel joke" (282); and she proposes that "harms done to women by pharmaceutical actors" be classified by statute as civil rights violations (282). Concerned not only about gender but about wealth, Scales writes that linear conceptions of causation have grown frayed between "obscene profits on one side and obscene group-based injuries on the other" (286) and that "corporate defendants are perfectly well aware that if you're going to hurt somebody, it is way better to hurt poor people" (280). I will return to Scales's activist stance below.

II. TORT LAW AS CULTURAL PRACTICE IN *TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE*

While much of Keren-Paz's (2007) *Torts, Egalitarianism and Distributive Justice* does not purport to describe "tort law as cultural practice"[4]—and, in fact, is grounded in law and economics—the thesis of this book, along with its many illustrations of what would constitute desirable changes to tort rules, rests on a premise that anchors the chapters of *Fault Lines* as well: "[T]ort law and culture are inseparable dimensions of a single domain in which risk, injury, liability, compensation, deterrence, and normative pronouncements about acceptable behavior are crucial features" (Engel and McCann 2009, 3).

Tarry a moment at the most numbers-filled page in *Torts, Egalitarianism and Distributive Justice*, where Keren-Paz (2007, 108) provides six columns of spreadsheet-like variables. Here he has in mind a hypothetical intervention that makes automobiles safer. Must an automobile owner—at pain of being liable for negligence should the automobile be involved in an accident that causes harm that the intervention could have prevented—pay for this device and install it?

4. Law and economics, which some commentators regard as the opposite of culture, or cultural studies, dot this book. In Chapter 5, for example (what one reviewer has called "in many ways the core of the book" (Cane 2008, 3)), Keren-Paz works through several economic analyses of negligence, giving examples of where a defendant would be liable for having foregone certain precautions that have dollar prices (Keren-Paz 2007, 105–11). Keren-Paz also includes a brief defense of his egalitarianism as "efficient" (51–53).

Orthodox law and economics approaches negligence by comparing the cost of precautions to the expected costs of accidents. Tort's hypothetical reasonable person makes (only) cost-justified investments in safety. According to Judge Learned Hand's famous formula announced in *United States v. Carroll Towing* (1947), the reasonable person compares *B* (the "burden" or cost of the safety precaution) with *PL*, which is the product of *P* (the probability of harm occurring) times *L* (the magnitude of the loss that the harm would cause). If $B < PL$, then the owner must install the device, because spending a lesser quantity of money to avoid a greater quantity of harm is the prudent thing to do. Contrary results—that is, $B > PL$, or even $B = PL$—dictate no such obligation, and the actor who declines to install the intervention when its cost is not lower than the expected cost of the harm will escape liability. Keren-Paz (2007) starts his discussion duly compliant with these tenets. His column heads—focusing on variables like "Overall accident cost per group" (108)—will look familiar to readers who regularly encounter economic analyses of torts.

Quickly, however, Keren-Paz roams from this orthodoxy. He presents his "types of drivers" in five spreadsheet rows: "Very rich, Rich, Average, Poor, and Very poor" (108)—that is, with reference to the category of "class," to which he says tort law ought to pay attention. Furthermore, for him the phrase "adjusted accident cost" includes his assertion that "the expected cost of the accident is determined on the basis of the defendant's status" (108). Adjusting the expected cost of an accident to reflect the characteristics of the person who caused the accident rejects a central premise of standard negligence law, in general, and economic analysts' negligence law, in particular.[5] Judges hold rich and poor defendants to the same standard.[6]

Even when he works within economic analyses of negligence law, Keren-Paz refuses to play by economic analysts' rules and insists on bringing culture-based descriptors and conditions into play. Keren-Paz asserts that the cost of the same accident is higher when the defendant is of high economic status and lower when the defendant is of low economic status (108–09). In his illustration involving the hypothetical safety intervention noted above, he

5. Starting with its nineteenth-century rejection of a subjective standard of care that would hold an actor to his own mix of limitations and abilities, favoring instead a "reasonable man" ideal devoid of these particulars (*Vaughan v. Menlove* 1837; Holmes 1881, 108), through its insistence that courts may not take defendants' wealth into account when determining liability (Arlen 1992), modern negligence law has continually refused to consider defendants' empowering and limiting characteristics. I review the minor exceptions to this generalization in Bernstein (2002).

6. Putting aside the special (and rare) instance of punitive damages, the closest that tort law comes to agreeing with Keren-Paz that the wealth of the defendant matters is in its venerable "common carrier" rule, which seems to demand extra care from railroads and other transporters to their passengers. But the demands of this rule, which are probably incoherent in any event (Posner 1982, 342), never complicate "expected cost" (Keren-Paz 2007, 108) as Keren-Paz does in his recommendation.

proposes that "only the rich and the very rich [should] be considered negligent" (109) if they forgo the safety device in question. Other quotations from his economics-focused Chapter 5 also defy standard premises from law and economics: "While the use of cheap coal by the poor is reasonable, its use by the rich is negligent" (113); "courts should adopt what is in practice a strict liability rule regarding risks that are channeled downwards to the disadvantaged" and thereby discourage such choices as siting a refinery in a poor neighborhood (114); and "the reasonable person is as capable of being *homo distributus* as she is capable of being *homo economicus*" (126).

That tort law should transfer wealth and other goods from advantaged to disadvantaged persons is such a bold thesis that torts-focused readers, accustomed to a more traditional outlook, might not immediately think to query how Keren-Paz construes "disadvantaged." It turns out that Keren-Paz views disadvantage with reference to the categories that pervade *Fault Lines*:

> As for the terms "disadvantage" and "the disadvantaged," they should be understood contextually; these terms are related to asymmetrical models of equality and the politics of difference, and are relational and relative. . . .
>
> An important aspect of the disadvantage is that it is attached to immutable characteristics. These include both traits that are completely immutable such as race, [ethnicity],[7] sexual orientation and sex (sex operations notwithstanding), and traits that can be changed, if at all, only with much difficulty, such as class. The immutability calls into attention both the strong important group membership aspect of the disadvantage and the injustice ingrained in attaching burdens based on such characteristics. (Keren-Paz 2007, 12)

Familiar enough from statutory civil rights law in the United States and other countries, this view of "disadvantaged" may seem quite conventional. But in the torts context, it breaks new ground. Contemporary reform efforts in the United States that work to change tort law have found disadvantage far away from Keren-Paz's categories of race, sex, sexual orientation, class, and ethnicity. They take no interest in immutable characteristics (and in any case view class as mutable), and the transfers they have espoused run exactly in the opposite direction from what Keren-Paz recommends. As Engel and McCann (2009) remind us, in recent American history the major sustained effort toward redistribution within torts has been one that shifts wealth from the disadvantaged to the advantaged (5).

Consider the most widespread recent tort-reform achievements, given form in statutes and case law. New immunities relieve business corporations

7. The text of the book mistakenly says "authenticity" where Keren-Paz intended "ethnicity" (e-mail from Keren-Paz, January 19, 2010, in author's possession).

of their older obligations to internalize the costs of risky activities (Davis 1996). Caps on damages have lowered the amounts that wealthy defendants have to pay for inflicting unlawful accidental injury (for a feminist analysis of this development, see Finley 2004). A few states take this immunity further by capping out-of-pocket medical expenses, not just noneconomic damages (for example, Virginia Code Annotated). Barriers to the courts like mandatory alternative dispute resolution (which, though seldom imposed on personal-injury plaintiffs, are a real impediment to filing claims for dignitary or emotional harm in the workplace), and medical-malpractice review panels preserve the wealth of well-heeled tortfeasors. Changes to the rules of evidence and damages enacted in recent decades redound to the benefit of defendants and their insurers.[8] Although tort reformers occasionally purport to be repairing American law for the benefit of subordinated persons—children, for instance, are said to need the playgrounds and vaccines that suppliers might withdraw should liability become too costly—they have shown no interest in studying the effects of their reforms to learn whether these groups really did become better off.

Let us now assess how those groups that Keren-Paz (2007) identifies as pertinent to his egalitarian project have fared under the more liberal tort reforms in the United States that took place in the middle of the twentieth century. These groups, it turns out, do not align closely with the beneficiaries of those historical plaintiff-favoring changes. Only one doctrinal shift, the elimination of intrafamily tort immunity, had an egalitarian effect that Keren-Paz would recognize: permitting individuals to bring actions against members of their immediate family added to the welfare of women vis-à-vis men, and children vis-à-vis adults.

Mid-twentieth century reforms moved in an egalitarian direction but did little to repair distributive injustice; their effects are especially thin in comparison to the big ideas Keren-Paz presents. Recall the brief reference by Engel and McCann (2009, 5) to the move from negligence to strict liability for tort actions alleging that a product was defective. Opening the courts to products liability claims in the mid-twentieth century probably enhanced the welfare of consumers, although the point is debated (Priest 1987; Rubin and Shepherd 2007); in both its design and its result, however, the shift had

8. Preeminent among these changes are modifications to the collateral source rule, the venerable common law doctrine that prevents a tortfeasor from telling jurors that a personal injury plaintiff has had the medical bills associated with her injury paid by some other source, typically an insurer. In jurisdictions that retain this rule, prevailing plaintiffs receive jury awards reflecting the cost of their injuries even if they did not actually spend these monies. Tort reformers have modified the collateral source rule by legislation in about half the states, permitting defendants in some cases to submit evidence of compensation from a collateral source (Goldberg, Sebok, and Zipursky 2008, 481–82). This change reduces the liability exposure of defendants, and allows insurers to collect full premium revenue from the sale of first-party insurance while limiting the amount they have to pay out on their third-party liability and indemnity policies.

virtually no effect on distributive injustices rooted in race, gender, or sexual orientation. Strict products liability left class-based disadvantage mostly undisturbed as well. Wealthier consumers "exhibit a higher level of dissatisfaction with their purchases" not because of worse flaws in what they buy, but because their expectations "are more demanding, partly as a result of the consumer movement which, in its composition, is exclusively middle-class" (Felstiner, Abel, and Sarat 1980–1981, 643). Regarding sex or gender, several scholars have shown that courts, once they took a more liberal approach to personal injury, did not give female litigants the benefit of this liberality in proportion to the harm these claimants experienced (Bernstein 2003, 2009; Berger and Twerski 2005; Scales 2009). Martha Chamallas (2009a) argues in *Fault Lines* that another mid-century change, the 1948 adoption of a new rule in *Restatement (Second) of Torts* to permit claims for intentional infliction of emotional distress, delivered relatively little redress for race- and gender-based affronts (125–30). The move toward weakening the pejorative common law designations of trespasser and licensee, the two types of visitors not entitled to reasonable care from a land possessor (American Law Institute 2009, subsec. 51; *Rowland v. Christian* 1968), modestly benefits the disadvantaged, although again most of the groups that Keren-Paz (2007) has listed have reaped no gains from the change.

This assessment brings us to the point about culture that ties *Torts, Egalitarianism and Distributive Justice* to *Fault Lines*. Keren-Paz's understanding of egalitarianism and distributive justice presses a thesis that fits nicely amid the *Fault Lines* chapters. Insisting that multiple disadvantages, such as the disadvantage of race plus the disadvantage of gender that combine to burden black women in the United States, exist, Keren-Paz requires anyone following his recommendations to make qualitative and contextual judgments about the relative weight of an individual's mix. (For example, if a proposed tort rule would advantage only white women or black men but not both, while a contrary rule would advantage the other cohort, the rule writer would need another variable that makes reference to culture to consider the relative weight of these disadvantageous conditions in relation to the harm regulated.) Rejecting the welfare-economics convention that reduces classifications to dollar amounts, Keren-Paz understands "class" as a way to sort persons with reference to more than how much money they have.

The redistributive project in *Torts, Egalitarianism and Distributive Justice* aspires to transfer holdings of not just money but social power. Keren-Paz underscores his opposition to what the cultural-studies scholar Michael Bérubé (2009) calls "economism, the favorite monocausal explanation of the left intellectual" (50) when he observers that egalitarianism includes more than the redistribution of wealth. All of Keren-Paz's favored groups evince the priorities and preoccupations that *Fault Lines* has grouped under the rubric of culture.

III. "THE REGRESSIVE NATURE OF EXISTING TORT LAW" AS BROACHED BY *TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE* AND EXPANDED IN *FAULT LINES*

Although *Torts, Egalitarianism and Distributive Justice* "focuses on what tort law might become rather than on what it currently is" (Cane 2008, 4), Keren-Paz (2007) comments occasionally on the status quo of tort within contemporary common law. A chapter subheading titled "Some Courts Endorse Egalitarian Considerations in Standard of Care Analysis" (127) introduces a summary of decisional law from Australia, Britain, Canada, and the United States (127–29). It promises to tell readers how courts will characterize behavior as faulty (or not) based on the advantaged or disadvantaged condition of the plaintiff or the defendant. While reading, I seized eagerly on that subhead, keen to learn about egalitarian considerations that so far have never emerged for me in the cases. Do common law courts really endorse egalitarian considerations when they analyze the standard of care?

This contention in *Torts, Egalitarianism and Distributive Justice* is central to any project of achieving social change through revisions to tort law. If courts do indeed take litigants' relative advantage into account in reaching judgments about liability, then they can deploy doctrine toward egalitarian ends. To the extent that they lack this power, or have never used it, then *Torts, Egalitarianism and Distributive Justice* becomes of interest only to the small group of "professional legal scholars" that Engel and McCann (2009, 7) situate far away from sociolegal studies.

It turns out that while courts have expressed some openness to the role that Keren-Paz prescribes for them, the evidence he garners to support his point is skimpy. Keren-Paz (2007) discusses few supporting cases from any jurisdiction, and the only US case presented here, *Matthews v. Amberwood Associates Limited Partnership, Inc.* (1998), is a divided and opaque decision.[9] He errs in the opposite direction a few pages later. "Any consequential loss to the victim that is the result of his lack of funds is considered too remote to be compensated for, even if it is foreseeable," he writes (70), apparently referring to the 2004 English decision of *Lagden v. O'Connor*. But *Lagden* as summarized by Keren-Paz went the other way; in it, the House of Lords held that "impecunious plaintiffs could be compensated for the more expensive credit hire agreement for replacing a car when they were unable to afford commercial hire charges" (185).

9. *Matthews* upheld a judgment of liability against a landlord for a fatal attack by a dog on the sixteen-month-old guest of a tenant. The attack took place inside the apartment rather than the "common spaces" or "common areas" in which landlord liability for personal injury typically resides. The expansion in *Matthews* of the space for which a landlord could be liable "was motivated by a distributive-egalitarian concern," Keren-Paz speculates (2007, 129). Nothing in the decision demonstrates the existence of an egalitarian motive, however.

Keren-Paz despairs too soon, because tort doctrine is actually fairly open to recompense for injury attributable to a victim's "lack of funds" (70). He is correct that most of the time it will not deliver such recompense to impecunious victims, but it can do what Keren-Paz would like it to do. For example, physicians and other professionals must hew to uniform standards of care, even if they collect subpar fees or display other indicia of serving a poor clientele. Suppose a patient or client engages an inferior provider on the basis of price—she can afford no one better—and this individual, whom wealthier clients have the means to eschew, furnishes a service in a way that does not fulfill the professional standard of care. Such injurious conduct, which would not have hurt the victim but for her lack of funds, is actionable.

Similarly, express assumption of risk doctrine has an exception that favors the poor: the landmark *Tunkl v. Regents of California* (1963) rejected a release that a government hospital had imposed on an indigent patient. Here an advantaged defendant thought it had a deal whereby it would waive or reduce fees for treatment and in turn patients who are disadvantaged would waive their right to sue. *Tunkl* gave (disadvantaged) Hugo Tunkl the benefit of the bargain, at the expense of (advantaged) UCLA Hospital.

Stepping back to summarize, Keren-Paz (2007) decries an "inherent regressive bias" within "existing tort law" (67). On the nature and content of this regressive bias, and how Keren-Paz knows that it is inherent, he leaves his readers hungry again—"Existing tort law is regressive by nature. One reason for this is the basic compensation principle: full compensation or *restitutio ad integrum*. Another reason lies with the principles that govern the scope of liability and the objective standard for liability" (67).

When used to describe a social phenomenon like tort doctrine, however, a principle is at least as much an effect as a cause or a reason. Doctrines undoubtedly have power, but they do not originate in a vacuum or by nature, and their variation across times and places suggests that they are subject to change. The phrase "full compensation" is misleading as well. It sounds progressive enough—the notion of compensating injured people fully rather than unfully—but Keren-Paz means to critique *restitutio ad integrum*, the Latin rendition of "restitution or restoration to the previous condition" (Black's Law Dictionary 2009). As courts apply this precept, Keren-Paz (2007) argues, they perpetuate a "message that the rich, the young and the healthy are worth more than the poor, the old and the sick" (68).

Keren-Paz recites four ways that *restitutio ad integrum* hurts the poor. First, tortfeasors gain advantage when they impose risks on poor people rather than rich ones, because poor people are cheaper to hurt: "since the poor have less to lose, it is cheaper to compensate them" (68). Second, after getting hurt, "the poor are both less likely to sue and less likely to succeed in their suits" (69). Third, the precept fosters a regressive cross-subsidy, whereby purchasers pay uniform prices for liability insurance but the poor get

nonuniform, inferior coverage because of damages rules.[10] Fourth, *restitutio ad integrum* ignores the Econ 101 tenet of diminishing marginal utility. By sending money to people who need it less—that is, to litigant-victims who are fortunate and privileged enough to reach a civil justice system and reap its benefits—tort damages rules remove advantage from people who need it more.

The difficulty for Keren-Paz emerges in his Chapter 4, where he notes three levels of potential inegalitarianism in tort law. First, he writes, tort law might be inegalitarian as a compensation system, as compared to social insurance schemes. Second, tort doctrine might hold inegalitarian preferences for fault-based over strict liability responses to accidental injury. Third, particular tort rules might tend to yield inegalitarian outcomes (71–73). Here is the problem: when Keren-Paz is inspired to recommend progressive changes to existing tort rules, he remembers that tort courts will restore the unjust status quo ante through their damages rules, and thus will undo the gains of reform. As long as tort insists on reifying distributive injustices of the past, it will remain regressive; only first-order inegalitarianism—the injustices of tort compared to social insurance—can be repaired, and that inegalitarian condition will disappear only through the abolition of tort, which Keren-Paz does not wish to advocate. Tinkering with strict liability versus fault, or liberalizing regressive doctrines, still leaves the odious *restitutio* in place.

Keren-Paz gives his ideas for reform in a brief conclusion (182); his proposals would ameliorate the damages problem without abolishing tort law. The first suggestion is "standardizing awards" (182), by which I think he means awarding damages without reference to the recipient's personal traits that now bear on compensation. This reform would decline to replace lost wages, a category of injury shot through with race, sex, and age discrimination, and instead hold that the same injury has the same price for any sufferer. The second is "using a means-based multiplier in order to increase or decrease damages, based on the classification of either or both defendant and plaintiff as poor or rich" (182). Third, judges could gain discretion to reduce damages based on how much money the defendant lacks. Finally, tort law might revise its roster of protected interests. Taking a leaf from Richard Abel (1986), courts could cease to protect property from accidental loss.[11] All of these reforms would eject *restitutio ad integrum* from its high perch. The trouble, as

10. They also get a poor insurance return in exchange for the extra prices they pay for consumer goods; Keren-Paz (2007, 123) cites George Priest but does not discuss his explications of this point.

11. They could also follow the suggestion of Stephen Sugarman and Patrick Atiyah and abolish personal injury liability (cited in Keren-Paz 2007, 182), but this suggestion does not belong on the list because throughout most of *Torts, Egalitarianism and Distributive Justice*, Keren-Paz is seeking to mend rather than end tort law. His occasional references to abolishing torts are entirely cursory.

Keren-Paz (2007) immediately acknowledges, is that decision makers will be "reluctant to adopt such radical solutions across the board" (182).

These solutions also appear to be in search of a problem, because Keren-Paz has provided such a sparse account of inegalitarianism in tort law as practiced. What does the reformer aspire to cure? Resembling Nelken's (2009) analysis of cultural explanations as circular—ideologues cite legal culture as both a cause and an outcome of tort-liability distributions within a nation (32)—*restitutio ad integrum* is for Keren-Paz both the source of trouble (in that it encourages actors to impose risks on poor people rather than rich people) and the trouble itself. When a constituent of any analysis looms this large—carrying normative and descriptive freight and doing harm—and also enjoys foundational status, observer-reformers cannot defeat it unless they find other tools.

Readers open to the claim that tort law ought to pursue distributive justice have a baseline sense of what Keren-Paz is trying to achieve.[12] Next comes assessment: reformers need to know the rough scope and size of the undertaking. What exactly is the Regressive Nature of Existing Tort Law? At present, Keren-Paz's four recommendations to undo the pernicious effects of *restitutio ad integrum* look "radical," as he says, because they are offered so starkly. His proposals would become more integral to tort law, and also less disruptive, if current conditions of distributive injustice and inegalitarianism in torts could emerge in more detail. As a friendly reader of *Torts, Egalitarianism and Distributive Justice*, I, aided by *Fault Lines*, will do some of that work for his thesis here. Toward this end I write from my own immersion in one national legal system; I have American examples of my points at hand, but the illustrations have counterparts in the other countries in which both two books under study here take an interest. Below are a few ways in which tort doctrine increases and enlarges distributive *in*justice.

Boundaries and Procedures

Distributive justice follows a tripartite approach to the allocation of social goods, as Keren-Paz (2007) explains early in his book, invoking Aristotle's *Nicomachean Ethics*. The three categories of distributive justice are "(1) the participants in the distribution; (2) the thing to be distributed; and (3) the criterion/criteria for distribution" (5). All three of these categories share an interest in boundary lines.

12. In this essay, I do not discuss Keren-Paz's jurisprudential argument; it has little connection to *Fault Lines* or the larger sociolegal literature and is not central to the recommendations that Keren-Paz offers (which *are* of sociolegal interest). In brief, Keren-Paz asks readers to assume the desirability of distributive justice and then shows that tort law is competent to achieve distributive results for classes or groups of people, in addition to repairing the particular plaintiff-versus-defendant conditions that litigants dispute. For an approving summary of his jurisprudential contentions, see Cane (2008).

Boundaries and procedural rules either advance or retard distributive justice because they establish and advance social consensus about entitlements. The task that Keren-Paz has set for himself—to use a particular area of legal doctrine as an instrument of redistribution—requires attention to classes of players; identities and classifications tell people what they may, or may not, or must receive. Keren-Paz emphasizes substantive doctrines rather than boundaries or procedures, which he treats as beyond the scope of his project. It falls to other writers to describe the institutional instruments.

Fault Lines presents several instances of the first Aristotelian category, participants in the distribution. In the United States, assuming the category of "participants" can include persons who do not themselves pay or receive money, one key participant in the tort system is the jury. Contributing authors address this aspect of distributive justice in this book by examining the jury not only vis-à-vis the trial judge but also what Keebet von Benda-Beckmann (2009) calls "the community" (39). Benda-Beckmann concludes that because this community concept is "sociologically incoherent" (39), no jury can speak for it, although she stops short of questioning the legitimacy of this participant. Valerie Hans (2009, 80) follows up on the jury later in the book. Both Benda-Beckmann and Hans also juxtapose judges against juries, examining each of these institutional actors with reference to their function. Neither author condemns the jury or the judge-jury divide as a source of distributive injustice, but both highlight the boundary, whose distributive consequences have been the object of scholarly attention.

The participants boundary receives another investigation in *Fault Lines* when Jennifer Wriggins (2009) (coauthor with Martha Chamallas of a recent book called *The Measure of Injury: Race, Gender and the Law of Torts*) explores "Whiteness, Equal Treatment, and the Valuation of Injury in Torts, 1900–1949." During the half-century that Wriggins studies, African American citizens could not participate in personal injury adjudication as jurors or judges (157); only the roles of witnesses and litigants were open to them. Forced onto the disadvantaged side of a binary, African Americans experienced race-based detriments in tort long after the end of de jure segregation.

The other two Aristotelian boundaries, addressing the questions of what to distribute and with reference to which criteria, also pervade *Fault Lines*, notably in Tom Baker's (2009) chapter. In "Liability Insurance at the Tort-Crime Boundary," Baker points out that in the United States there is no strong separation between tort and crime on the question of responsibility, but insurance law insists on dividing the two (67); negligence liability is an insurable interest, whereas insurance against criminal liability, though not unheard of (78–79), is very seldom available for purchase in American markets. Baker uses the well-known phrase "good fences make good neighbors" (67) to remind readers that the familiar boundaries of one's own legal system are not natural phenomena like planar fractures in rocks—the geological kind of fault lines—but instead originate in social designs. For him, as

a scholar of insurance law, one artifice that warrants attention is the supposed incompatibility of insurance with criminal liability. Neither natural nor immanent nor inevitable under the laws of microeconomics, Baker argues, the absence of insurance against criminal liability functions to express moral disapproval of crimes and criminals, a desire that outweighs the wish to have deserving victims compensated.

Other boundaries around and across personal injury law generate distributions that are no more inevitable than the near-ban on criminal-liability insurance. Once we assume that in the aggregate, personal-injury plaintiffs are disadvantaged compared to defendants—an assumption supported by the reality that individuals and entities are worth suing only if they hold wealth while the *restitutio ad integrum* rule makes poor people cheaper to hurt—then it becomes clear how boundaries patrolled by tort rules and classifications function to favor the advantaged and burden the disadvantaged. We may consider other nonsubstantive demarcations that tort law uses to reinforce existing distributions.

In egalitarian statutory tort rules, on the books in particular legal jurisdictions, complement Keren-Paz's (2007) study of inegalitarian common law rules as manifested in decisions issued by Anglo-American courts. For instance, legislators write tort statutes of limitation to be short, arguably because of the difficulty of keeping and retrieving evidence. Should these limitation periods exist at all for personal injury claims that allege toxic exposure, now that recordkeeping technology has been making records durable for a long time? One toxic torts scholar built the case for repeal more than twenty years ago (Green 1988); the cost of preserving evidence has only dropped since then.

Other rules cut off injured persons from recourse, and in the timeline of their recent development, one discerns a similar pattern that favors the advantaged. Civil litigants' needs to reach the courts have not diminished, but Congress and the Supreme Court have imposed new restrictions (for example, Class Action Fairness Act 2005; *Iqbal v. Ashcroft* 2009). Rules about the sufficiency of pleadings, or the quantity and quality of evidence that a plaintiff needs to survive defense motions for summary disposition, presume that the status quo ought to stay put, but revisions to the law that favor the advantaged can take place swiftly and sometimes under cloak of relative darkness (for example, mandatory arbitration). Unequal access to power makes plaintiff-favoring changes to doctrine conspicuous, because the disaffected-advantaged cohort can holler in response, while defense-favoring changes to doctrine continue to impose detriment on a scattered and disempowered class.[13]

13. At this juncture old-school readers may wonder about what they might still be calling ATLA: don't the trial lawyers have counterpower in this debate? The acronym endures, even though in 2006 plaintiffs' lawyers voted out Association of Trial Lawyers of America and

The same stealth effect causes power to linger in boundaries that American tort law has purported to supersede. Contributory negligence offers an example of this phenomenon.[14] Conventional understanding holds that apportionment rules replaced this archaic doctrine; modern American tort law, say commentators, now applies comparative negligence, where the plaintiff's fault only lessens rather than negates what she can recover in a tort action. But the barrier persists, albeit to a diminished extent. Here I do not speak about the small number of US states that have retained contributory negligence;[15] these jurisdictions are indeed outliers. More to the point about distributive justice is the apportionment rule followed in a majority of states; plaintiffs cannot recover if their share of responsibility exceeds that of defendants. The asymmetry immunizes a defendant from responsibility when the proportion of causally relevant negligence attributable to the plaintiff exceeds 50 percent.

"Not greater than" comparative negligence marks a progressive shift only if one takes the old contributory negligence bar as given—as if any degree of fault, no matter how slight, ought to deprive plaintiffs of any recovery whatsoever. If contributory negligence marks an acceptable baseline, then "not as great" comparative negligence becomes a concession to the disadvantaged, and "not greater than" is even more munificent to these careless plaintiffs. But contributory negligence never made sense anyway, except as a blunt instrument to keep grievances out of court. Judges never explained in decisional law why they favored the rule. Lacking a rationale, this instance of distributive injustice tells progressive reformers that tort traditions have needed no reason to support the advantaged. Modifications to contributory negligence only ameliorate, rather than eliminate, a distributive injustice.

Duty Rules

Economic analysis of negligence law has a reputation for favoring the advantaged. In torts folklore, the subcompact Pinto, manufactured during the

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substituted a less memorable AAJ, the American Association of Justice. The perdurability of ATLA notwithstanding, the end of an organization by that name is my point: it sums up both an existence (i.e., of opposition to tort reform) and nonexistence (of affirmative power). What AAJ's Web site calls "a broad-based, international coalition of attorneys, law professors, paralegals, and law students" continues to work hard on behalf of injured persons (http://www.justice.org/cps/rde/xchg/justice/hs.xsl/default.htm (accessed June 19, 2010)). Tort reform antagonists have by no means defeated the entity formerly known by two potent acronymic syllables. Yet the entity functions only defensively. Its wins in recent decades have consisted only of fending off discrete aggressions of the tort reform movement.

14. Contributory negligence is the defense to negligence that uses any quantity of fault-based responsibility on the part of the plaintiff to defeat her negligence claim even if the defendant's negligence was a much larger source of her harm.

15. Alabama, the District of Columbia, Maryland, North Carolina, and Virginia.

1970s by the then-mighty Ford Motor Company, came to stand for the evils of cost-benefit calculation whenever severe physical injury to human beings occupies the cost side of the ledger (Schwartz 1991). "What could be more abstract and distancing," protested the feminist torts scholar Leslie Bender (1988) in a much-cited law review article, than the notorious "algebraic formula" composed to declare which precautions a defendant is entitled to forgo on the ground that they are too costly (30, note 113)? This vein of criticism identifies the Hand calculus and other quantitative approaches to negligence as too indulgent of hurtful activity.

But the indulgence goes deeper; a defendant can be negligent under the Hand formula and still owe no compensation to the plaintiff because of the plaintiff's failure to prove a "duty." This element of a negligence claim, which courts use to limit negligence actions categorically, requires the plaintiff to establish that the defendant had an obligation to act reasonably in the first place. Some claims will fail on this ground. Rules of limited duty give a defendant a prerogative to act unreasonably. And the detriments of this rule fall disproportionately on disadvantaged groups.

Several limited-duty doctrines articulate this absence of an entitlement to reasonable care. One of them puts emotional distress on a low plane: tort rules in the United States and other countries permit a defendant to act unreasonably, sometimes even outrageously, without redress for the harms that result, so long as these harms are deemed emotional rather than physical. In her *Fault Lines* chapter, Martha Chamallas (2009a) notes the under-theorized distributive effects of emotional-tort doctrines that are tough on plaintiffs. Within American legal education, she writes, "discussions of social equality tend to be confined to public law courses, such as constitutional law or employment discrimination" (119). Chamallas goes on to argue that American tort law could have recognized discrimination as "outrage," the main element of intentional infliction of emotional distress, but has not done so (135–36).

Keren-Paz (2007) takes a complementary interest in tort remedies for discrimination. Whereas Chamallas seeks to expand liability for intentional infliction of emotional distress so that litigants can engage societal disapproval of civil rights violations that cause emotional injury, Keren-Paz devotes his last substantive chapter to what he calls "Discrimination as Negligence" (161). He accepts an intentional-tort approach to discriminatory behavior along with other legal remedies (162), but prefers to think of discrimination as unreasonable (that is, negligent), that is to say, a breach of duty (168). Here, *Torts, Egalitarianism and Distributive Justice* aligns with another argument in *Fault Lines*, the proposal by Ann Scales (2009) that harms done to women's bodies by "pharmaceutical actors" be deemed civil rights violations (284).

Read concurrently, the arguments of Chamallas (2009a), Scales (2009), and Keren-Paz (2007) remind us that tort law protects injurers with its

limited-duty rules. Doctrines of limited duty in effect announce that negligent acts or omissions[16] are acceptable because the actor had no obligation to act reasonably toward the plaintiff. Duty functions to identify classes of people not owed reasonable care, and classes of injury not entitled to redress in court.

To take a step beyond Scales and Keren-Paz, distributive injustice pervades other limited-duty categories. The ideological message can be overt, as in the case of land-visitor categories that rank plaintiffs hierarchically based on how much the owner-possessor wanted them present on the its land. Of the three tiers—(1) positively unwanted, (2) tolerated, and (3) sought-after for business reasons—only the third classification of visitor, the "invitee," is entitled to reasonable care with respect to conditions on the land.[17] More nuanced, perhaps, is the no-duty category of "bystander," a person whose emotional distress following a traumatic event like a car crash is typically not compensable unless this plaintiff was in "the zone of danger." Some feminist writers have argued that the bystander label, which posits that human beings are radically separate rather than interconnected, privileges a masculine ontology (Bender 1988; West 1988). As Chamallas has contended in her writings outside *Fault Lines* (Chamallas 1998, 490; 2009b, 1110), the tort premise that physical injuries outrank emotional ones bespeaks a similar disregard for injury associated with women.[18] Statutory caps on recovery for noneconomic losses—though a rule of damages rather than duty—resemble no-duty rules; these caps have the effect of condoning negligent conduct by excusing it from the obligation to pay its way in full.

The other big no-duty category in negligence law is consequential economic loss, and it indicates another source of distributive injustice. When an unreasonably careless act causes a victim only to lose money, rather than suffer bodily injury or damage to tangible property, courts in the United States and most other countries generally deny recompense.[19] This no-duty rule imposes detriments that appear not to offend distributive justice of the kind Keren-Paz has in mind, because complainants are usually businesses rather than people. Negligent acts that cause purely economic loss to human beings, at least the ones that end up in court, tend to involve an affluent set of

16. Negligent in the sense of careless: unreasonably dangerous or morally wrong, or what one casebook means when it refers to "small *n* negligence" in contrast to Negligence, the tort that contains other elements for the plaintiff to establish (Goldberg, Sebok, and Zipursky 2008, 137).

17. A majority of states maintain some or all of the traditional three classifications. But several, including California and New York, have abandoned this hierarchy, as have other common law countries including the United Kingdom and Australia.

18. For responses to the objection that nonphysical damages should be less recoverable than damages related to physical injuries because of difficulties relating to measurement and administerability, see Dobbs (2008, 59), Grey (2009), and Levit (1992, 177).

19. The doctrine is complex. For my review of its permutations, including references to the law of nations other than the United States, see Bernstein (2006).

plaintiffs: disappointed investors, buyers of defective buildings, charterers of sinking ships, ill-counseled clients. *Advantaged vs. Advantaged*, one might conclude.

Yet regressive politics are here too if, as one commentator has argued, the no-duty rule buffs "the rough edges of capitalism by truncating inquiry" (Silverstein 1999, 432). Allowing persons who suffer injury from careless conduct to bring a tort claim acknowledges that for most people, ruinous "economic vulnerability is only one accident away" (437). Once courts recognize an entitlement not to lose money because of the carelessness of other people—mere lapses, not just a fraud or other harder-to-prove intentional wrong—they have honored economic security as something close to a right. Recovery for consequential economic loss "would call attention to the dangers of material insecurity in an economy," notwithstanding the tendency of liability rules to deny the power of the market "operating in the normal course of business to cause serious financial injury" (437). Stephen Perry (1992) contends that courts enforce this "no duty" rule because it would be hypocritical not to do so; they are already condoning more purposeful hurtful behaviors like boycotts and predatory pricing. Tort law accepts a prerogative to behave unreasonably, these writers argue, not only because of concerns about limitless ripples of injury, but because the prerogative rests on the same ideologies that maintain modern capitalism.

The Doctrinal Dog That Did Not Bark

References in *Fault Lines* to missing constituents extend the generalization in *Torts, Egalitarianism and Distributive Justice* that tort law is regressive—not only in its rules, but also in the rules it could in principle have, but in practice does not. Tom Baker (2009), for example, suggests that we cannot know where tort law would have gone if insurance considerations did not dominate pleadings and litigation strategy (66). Broadening Baker's point, what other hurts and injuries that people inflict and suffer receive no recognition from tort?

In the story "Silver Blaze" (Conan Doyle 1894), the most famous detective in fiction found an absence telling:

> Gregory [a Scotland Yard detective]: Is there any other point to which you would wish to draw my attention?
> Sherlock Holmes: To the curious incident of the dog in the night-time.
> Gregory: The dog did nothing in the night-time.
> Holmes: That was the curious incident. (49–50)

A "curious incident" of torts is its lack of interest in various injuries that resemble familiar actionable harms yet gain no redress in common law courts.

The project undertaken in *Torts, Egalitarianism and Distributive Justice*—to enhance distributive justice through doctrinal change—becomes more compelling when one considers the state of distributive injustice through silence or other absences within current tort doctrine. Declining to remedy real harm that an individual can link to faulty conduct is tort's dog that did not bark.

Understandings of where misfortune originates gives a sense of how little doctrine we have in relation to what we might aspire to regulate through tort law. In *Fault Lines*, for example, David Engel (2009) reports that his fieldwork in both Thailand and the United States taught him "that theories about responsibility for injuries varied from one social group to another yet rarely resembled the black-letter rules of tort law" (262). This inconsistency might even extend to particular cases; as Haltom and McCann (2009) write, newspaper stories about fast food litigation invoked "individual responsibility," "corporate responsibility," "governmental responsibility," "parental responsibility," and "corporate duplicity," among other explanatory frames (106, 108–09). With all this variegated ascription available, it becomes curious that tort law has failed to recognize other categories of obligation and entitlement.

Torts, Egalitarianism and Distributive Justice, by declaring that a tort rule creator should put egalitarianism to good use by applying it to the writing of new doctrine, suggests a working method. Reformist cooks can start with the recipe that Keren-Paz (2007) proposes. As readers will recall, he tells the rule writer to identify the categories of litigants governed by the tort doctrine in question, array them on a matrix of relative advantage, evaluate the distributive consequences of the doctrine at issue, and take these consequences into account when framing a rule. For Keren-Paz the starting "unit of analysis," to borrow a phrase from Benda-Beckmann (2009, 40), is the problem presented as needing tort law to regulate it. Keren-Paz starts with a problem of distribution and seeks a doctrinal remedy.

But *Fault Lines* has shown rule creators and critics how little we know, how partial and self-serving our most cherished rules and explanations might be. A different place to start is the disadvantaged category; we might identify a group and review tort law to see what this unjustly deprived group needs and thus should receive through rules of law. Although he does not embrace this method overtly, near the end of his book, Keren-Paz indicates how the approach might work.

Keren-Paz (2007) presents his repairs to *restitutio ad integrum*, the damages tenet that tells courts to restore plaintiffs, to the extent that is feasible via money damages, back to where they had been before tortious conduct injured them. Identified group: the poor. Changes that would help? Keren-Paz proposes expanded entitlements to compensatory damages, a thumb on the cost-benefits scale used to determine whether the defendant's conduct was reasonable, and means-tested reductions in liability for relatively poor defendants.

The end of the book also features his new doctrine of prenatal injury. Identified group: children harmed in utero by their mothers' negligence. The class of defendants, negligent mothers, is probably also disadvantaged, however. Zero-sum? How can tort rules cause both plaintiff and defendant to prosper? Optional liability insurance, says Keren-Paz. A woman seeking to protect her child from the harms of her maternal negligence may, but need not, choose to insure against it. (Assuming that insurers offer such policies; if they do not, then Keren-Paz would reject liability (154).) If she has such insurance, Keren-Paz argues, then her child should be allowed to bring an action against her, and the child should receive compensation from insurance.

Perhaps, but I notice a couple of other dogs not barking. Men, for instance, have inflicted harm on fetuses. Some of them batter expectant mothers (pregnancy increases a woman's risk of suffering domestic violence); a larger fraction of them perform less than reasonably as resource providers or safety enhancers. Keren-Paz barely considers men as sources of prenatal harm[20] (142–45). A nontort unbarking dog is first-party insurance, which would focus on a child's disability or other loss rather than the mother's liability for it. Keren-Paz omits discussion of this alternative as well. First-party insurance would provide better compensation to the child in relation to the premium costs that its mother would pay, because defense-and-indemnification insurance covers something extra (that is, litigation expenses), and this coverage must be financed by collecting premium revenue. Liability insurance as a solution to the problem of maternal negligence also opens vexing questions about which maternal behaviors would constitute breach and what to do when more than one injurious antecedent is present (for example, the mother abused alcohol during her pregnancy, but also drank contaminated water that her landlord negligently supplied, and the child was born with brain damage linked to both fetal-alcohol syndrome and the drinking water hazard). Query also—as would Tom Baker (2009), I presume—whether American law and culture, so outraged by "drunken brawlers, wife batterers, child molesters, doctor and dentists who rape sedated patients, and other moral monsters who commit a second crime by asking the insurance company to pay for the first one" (77), would permit a careless fetus-hurting mother to insure against the harms that she, through her own negligence, causes her child. Linking the solution to the prejudices of a nation's insurance culture unnecessarily limits the range of options.

I mention this particular idea from Keren-Paz not to attack it but to recommend filling the reformist hopper with other proposals to benefit more

20. Contrast Keren-Paz (2007) on the gendered consequences of sterilization gone wrong: he would—in the name of distributive justice, and contrary to British decisional law—permit a woman to recover pregnancy-related damages from the surgeon who performed a vasectomy negligently on her partner; he notes that women are "disadvantaged in comparison both to men who undergo a vasectomy and the physicians who operate on these men" (135).

cohorts. Some will turn out to be duds, of course, but the exercise of focusing on groups (in addition to types of torts) enhances a movement toward egalitarianism and distributive justice in tort law. Gender is the advantage/disadvantage category with the biggest tort literature on point. Other groups are eligible for inclusion; policy makers responding to Keren-Paz's call for new tort rules that favor disadvantaged cohorts have the task of identifying the axes of advantage and disadvantage. The large sociolegal literature on power held by groups would aid the endeavor. Here are a few other category-based reformist ideas that hew approximately to the categories that Keren-Paz has identified as disadvantaged; his list of groups helps identify whom we are purporting to help.

Keren-Paz mentions only in passing persons who identify themselves with reference to their minority sexual orientation, a category that I will abbreviate here, *faut de mieux*, as an adjective: LGBT (lesbian, gay, bisexual, transsexual). Positive law in the United States disadvantages LGBT persons. Reformers concerned about this category of inegalitarianism and committed to the redistribution agenda of *Torts, Egalitarianism and Distributive Justice* might consider how tort doctrines as codified by legislatures or applied by judges could change to defy the larger pattern of law-based disadvantage. Changes to the rules about tort damages (for example, making wrongful death and consortium recovery available to same-sex partners), duty (for example, allowing claims by same-sex partners to recover for the emotional distress they suffered as "bystanders" who observed their partners suffer physical injury attributable to the negligence of the defendant), and what constitutes outrage, to give a few examples, could shift power in favor of this disadvantaged cohort.

Children comprise another disadvantaged group that receives only passing attention in *Torts, Egalitarianism and Distributive Justice*. Although the powerlessness of children vis-à-vis adults (Kulynych 2001; Bernstein 2002; Woodhouse 2008) is of interest, for this purpose we may stay within the Keren-Paz list of categories and note here only their "class," which is to say their lack of power derived from their lack of wealth. Children are poorer than other groups; the National Center for Child Poverty, based at Columbia University, estimates that 41 percent of children in the United States live in families whose income is too low to make ends meet (Wright, Chau, and Aratani 2010). Pediatrics is a relatively low-income medical specialty; dollar stores, oriented toward poor customers, devote much of their shelf-space to children's goods. The only proposal in *Torts, Egalitarianism and Distributive Justice* written to benefit children, Keren-Paz's endorsement of voluntary maternal liability for harms to children, does not address this material disadvantage.

Other tort reforms could deliver more distributive justice to children. Elsewhere I have proposed that just as asbestos plaintiffs can join a deferred docket (Bernstein 2009, 338–39) to preserve potential tort claims against

supplying defendants, registries could be available also to children who may have been exposed to lead paint, given that 16 percent of children have suffered brain damage as a result of exposure, and some fraction of this injury would not have occurred but for the negligence of suppliers (350). Legislatures and judges could modify statutes of limitation to permit more claims by adult plaintiffs for abuses that they suffered in childhood. Courts could construe duties of care more capaciously to impose liability on schools and those who run schools, including units of government, for the harms that bullying and harassment inflict.

The *Fault Lines* chapters by Wriggins (2009) and Chamallas (2009a) invite reformers to consider "torts, egalitarianism and distributive justice" with respect to race. By bracketing her findings inside the years 1900 to 1949, Wriggins situates race-based disadvantage in tort's past, but, elsewhere, she has shown how these injustices persist (Wriggins 1997, 2005). Chamallas (2009a), arguing that tort liability can and should safeguard civil rights, observes that the tort concept of "outrage" covers distinct ground away from what statutory civil rights law protects, and can describe detriments imposed on people because of their race.

Again one can readily find more than one doctrinal dog that did not bark. Courts offer almost no recourse for harms occasioned by racist hate speech. Contemporary defamation law does not recognize claims of group libel by aggrieved members of ethnic minorities.

The biggest omission is espied in *Torts, Egalitarianism and Distributive Justice* (2007) itself, which observes that "discrimination as negligence" (chap. 7), though suited to current conceptions of duty and breach, has gained no purchase in common law courts: "there are almost no modern cases imposing liability for discrimination" based on this tort (162). Keren-Paz explains that if breach of duty "means a conduct that a reasonable person of ordinary prudence would not undertake under the circumstances" (172), then discrimination fits the bill. "There is almost no conceptual or analytical difficulty in viewing discriminatory behaviour as unreasonable according to this standard. A reasonable person is one who behaves according to acceptable social standards. Since bigotry and discrimination are generally unacceptable, there is no reason not to see discriminatory behaviour as unreasonable" (172–73). Gains of egalitarianism and distributive justice follow: courts and the public benefit from hearing accusations of discrimination as breaches of duty.

Here Keren-Pez proposes widening negligence law to cover harms that are not accidents. Eyebrow-raising, perhaps, as doctrine, this idea makes more sense and becomes more familiar the more one considers its parallels, some of which *Fault Lines* has furnished. Tom Baker (2009) has reminded us that insurance is indeed available, if very rarely, to cover criminal behavior by the insured. Blurring the tort-crime line here suggests that it may be coherent for tort law to tolerate overlapping characterizations of harmful conduct as both

negligent and intentional. More examples are at hand.[21] Why not deem discrimination negligence? It is unreasonable, after all.

This brief survey of tort law as a source of advantage to the advantaged, and an enforcer of preexisting distributive injustice, answers the call to activism that Engel and McCann (2009) include in their introduction to *Fault Lines* and that I will take up in the next part of this essay. It also expands the critique of tort doctrine that Keren-Paz (2007) begins in *Torts, Egalitarianism and Distributive Justice*. Gathering evidence of malignant effects would open a second front in the tort reform war, thereby responding to the concern that introduces *Fault Lines*, and help cure the *restitution ad integrum* problem, blazoned in *Torts, Egalitarianism and Distributive Justice*, that vexes any attempt at progressive change to tort law. Demonstrating the disadvantageous effects of substantive tort rules makes arguments for revisions to the damages rules more convincing.

IV. WHERE TORTS MEETS LAW AND SOCIETY

Having discussed commonalities and overlapping material in *Fault Lines* and *Torts, Egalitarianism and Distributive Justice*—two very different books written for different audiences—I now turn to what they accomplish in partnership that extends what they achieve when read separately. My argument in this section is that the two books jointly fulfill a Law and Society mandate regarding tort law. Emerging from a more central Law and Society base, *Fault Lines* does more of this work; *Torts, Egalitarianism and Distributive Justice* helps to complete the endeavor.

A recurring theme in reflective accounts of Law and Society scholarship is the coming-together of accurate description and socially progressive prescription. Felice Levine (1990), for example, in her Law and Society Association presidential address, invoked a big tent that, though capacious, nevertheless does make these two demands on its members: "Even among less activist colleagues [within Law and Society] there is a sense that one's work should be relevant and important" (23). Frank Munger (2001) made the same point in his own presidential address, speaking of "inquiry and activism and law and society" (7).

The combination of inquiry and activism carries on a tradition that the Realists launched. In a recent paper Brian Tamanaha, exploring instrumentalism, describes Legal Realism as

> [1] the promotion of an instrumental view of law as a means to serve social ends; [2] the pursuit of social-scientific approaches to law; [3] the

21. Courts have recognized liability for battery when the defendant intended humorous horseplay rather than harm. Moreover, liability for defamation, misrepresentation, and nuisance can be based on intentional or accidental conduct.

> attempts of reformers seeking to transform legal education in order to improve legal practice and judging; [4] the initiatives of reformers seeking to advance a progressive political agenda in and through law; or some amalgam of all four. (2009, 737)

Fault Lines (2009) fits these descriptive criteria well, especially the first, second, and fourth elements. I would contend that the third is present too; although no contributor sets out "to transform legal education" (Tamanaha 2009, 737) in the sense of recommending curricular changes, several of the chapters—particularly those by Benda-Beckmann, Baker, Haltom and McCann, Engel, and Scales—assess various mainstays and conventions that pervade the training of lawyers. The other three Tamanaha-phrased constituents, which cover the inquiry and activism advocated by Frank Munger, pervade this anthology.

Fault Lines also contains a warning against trying to separate the descriptive and normative strands of sociolegal study, along with a pertinent reference to its Realist heritage. "I suppose that I am a Law and Society person," Scales (2009) writes near the end of the volume, "if the point of that identification is to endorse the generation of data and analyses to inform legal discussions and to suggest legal directions. That is essential to the realization of the promise of the Legal Realism of the 1930s" (274). Empirical research "explains, over and over again, the real benefits and burdens in social arrangements" (274–75). "Yet, empiricism for empiricism's sake is problematic for feminists, for at least three reasons," Scales continues. First, women are not believed when they gather data to point out a gender injustice (275). Second, furnishing facts never of itself satisfies demands for more and better "methodologically sound studies" (275). An auditor can always call for more empirical evidence. Third, "if we do prove the harms to women as women, we're marginalized as practitioners of 'victimology'" (276). One might add that "empiricism for empiricism's sake" cannot be saved by eschewing feminism, or any other activist ideology, on the ground that activism impinges on the purity of collected or collectible data. The antonym of feminism—or, again, of any other activist ideology—is not neutrality. Other contributions in *Fault Lines* agree, for example, Nelken (2009, 38) and Bloom (2009, 154–55).

Setting out to improve as well as to describe, then, *Fault Lines* joins a tradition within American scholarship about tort law and extends an inquiry that Legal Realism launched. The Realist leader Karl Llewellyn (1960) declared that torts, as a constituent of all conflicts that private litigants present for adjudication, was foundational. "What, then, is this law business about? It is about the fact that our society is honeycombed with disputes. Disputes actual and potential; disputes to be settled and disputes to be prevented; both appealing to law, both making up the business of law" (2). In his review of the newly published first *Restatement of Torts*, Leon Green reproached its Reporters for embracing blackletter rules rather than

alternative content that he deemed more instructive and useful: the facts of cases, their procedural posture, the inclinations of judges who decide them, and the doctrinal maneuvers available to advocates (cited in White 1997, 37). Studies of American tort law in the early decades of the twentieth century blended description and prescription. Roscoe Pound, who would later break with Realism, generalized in 1922 about tort's march toward progress, undertaken by ever more expansive assurances of security within civilization (Pound 1922, 82, 169–70).

Numerous prescriptions concerning tort law take up the progressive invitation and fill *Fault Lines*. Make tort fairer to African American litigants, urges Jennifer Wriggins (2009). Integrate it with a civil rights agenda, proposes Martha Chamallas (2009a). Use it to depict abusive behaviors by the police as systemic, suggests Charles Epp (2009). Worry about national legal systems that do not have enough of it, cautions Marc Galanter (2009); worry about the discursive power of mass media to stigmatize "efforts of public interest advocates to challenge corporate power and advance consumer welfare," write William Haltom and Michael McCann (2009, 97); worry about the ways in which it reinforces prevailing levels of sexism and misogyny, argues Ann Scales (2009).

Differing from many other contributors to *Fault Lines*, Scales takes an interest in doctrinal change and offers proposals to modify the law of causation. That prescriptive writings in a sociolegal anthology about tort law by and large omit proposals to change tort rules further shows how Law and Society resembles its Realist antecedents; much (but by no means all) prescriptive scholarship on torts in both the Legal Realist and the Law and Society traditions has been willing to forfeit the doctrinal-change baby when throwing out the formalist bathwater.

Fleming James (1958–1959), the great Realist tort scholar of the middle twentieth century, anticipated contemporary legal sociology in 1959 when he called tort doctrine "a heterogeneous mass of stuff" (315) and set out to supersede it with better technologies of compensation and loss prevention. Workers' compensation and no-fault automobile insurance, both reforms born of disdain for tort doctrine, are Realist innovations that sociolegal scholars have found of interest (see Friedman and Ladinsky 1967; Tomlins 1993; Kritzer 2009). In one Law and Society favorite among book-length treatments of negligence in the United States, *Settled Out of Court*, H. Laurence Ross (1980), when discussing rear-end automobile collisions, contrasts the doctrinal rule "that liability depends on a careful and case-specific analysis of the accident and a consideration of whether the drivers exercised the degree of care that a reasonable person would ordinarily exercise in that situation" (cited in Baker 2005–2006, 11) with law in action as effected by insurance adjustors, that the driver of the car in back is "liable in all cases" (11). Doctrine submerged.

Enter Tsachi Keren-Paz. The hybrid approach to torts chosen in his monograph—a formalist interest in doctrine coupled with a progressive-

instrumentalist attention to disadvantaged groups and social goals—builds on the revival of sociolegal tort law that David Engel and Michael McCann (2009) undertake in *Fault Lines*. Each of these two books nourishes the other in its separate work. *Fault Lines* brings depth to the redistributive project by considering the groups that would instigate and benefit from doctrinal change; *Torts, Egalitarianism and Distributive Justice* shows the sociolegal prospects of new rules.

One precedent in Realist history, adumbrated by the legal historian G. Edward White (2003), demonstrates the combined force of the two. White reminds his readers of William Prosser. Working in the middle of the twentieth century, when Realism was at its heyday, Prosser set out to find a middle ground between formalism and instrumentalism. His classic treatise (Prosser 1941) cited cases for their holdings, but also described this case law as chaotic, bizarre, and contradictory. He wrote rules, but he also declared that tort law ought to pursue social engineering. Dense, lengthy, and acclaimed as a foundational book in American law immediately after it was published (White 2003, 154–58), Prosser's *The Law of Torts* may seem very unlike the slender, sometimes abstruse, and overtly normative *Torts, Egalitarianism and Distributive Justice*, written as aspiration for a transnational academic audience. Prosser offers a model for American readers of *Torts, Egalitarianism and Distributive Justice*, however, especially those interested in sociolegal studies or who question the value of studying doctrine.

The contribution of Keren-Paz (2007) that legal sociologists should most care about goes beyond reclaiming tort doctrine; Keren-Paz uses doctrine as the means to another end that many in this audience will find congenial. Law and Society scholars have traditionally regarded tort as a source—a flawed source, to be sure—of recompense to injured persons. Reform proposals rooted in legal sociology have generally started by questioning whether tort has achieved compensation and then, after naming and documenting various infirmities, moving to recommend better avenues to this goal. Having indicted tort law for its failure to effect compensation, on one hand, but not having eliminated tort, on the other, scholars who remain interested in a sociological perspective on this field of law need another destination, because they have refuted compensation as a fact on the ground. *Fault Lines* has added the destination of understanding the role of "culture," writ large. Keren-Paz adds the destination of distributive justice.

As portrayed in his book, distributive justice overlaps with compensation but can go further. Expanding liability for a particular combination of behavior by a defendant combined with harm experienced by a plaintiff—take, for example, Keren-Paz's idea about expanding the liability of mothers to their children for prenatal injury—might deliver compensation that is indeed inadequate compared to the compensation that an alternative measure like insurance could deliver. But compensation is only part of what has taken place. A defendant deemed liable experiences a detriment that to

her feels like a tax or a fine. Even when plaintiffs do not collect enough tort-money for anyone to conclude that compensation has been achieved, and even when the defendant's pecuniary suffering does not suffice to attain the other grail—deterrence—observers know that wealth has moved. If the defendant had started out with an unjustly large share of wealth, then this deprivation might advance distributive justice. Identifying the systemic goods that law can pursue, and measuring their exchange value or their relative weight, are tasks that call for sociolegal expertise.

CONCLUSION

To unite the varying themes of this essay, recall the tort reform fracas as noted in the *Fault Lines* introduction. Engel and McCann (2009) explained there that the activist side of Law and Society suffered blows when tort reformers forced them to defend the status quo. I have argued that one well-founded response to this decades-long broadside would be for normative-minded cohorts in this movement to give their empirically inclined colleagues some relief by advocating for changes to tort rules that would favor disadvantaged groups.

I conclude by noting another lesson to take from the tort reform movement, congenial to the agenda of Keren-Paz and several *Fault Lines* contributors: doctrine may never occupy the whole of tort, but it does matter. Tort reformers devoted considerable time and energy to replace rules they deemed too indulgent of personal injury claims. The high value that this agenda placed on tort doctrine suggests that a progressive initiative like *Torts, Egalitarianism and Distributive Justice*, which sets out to write new law (rather than contend, in the mode of *Settled Out of Court* (Ross 1980) and other older Law and Society treatments of tort, that tort law does not matter), focuses on material worth noting.

In "Tort Law and Power: A Policy-Oriented Analysis," an essay published in 1994 to honor Tom Lambert, the plaintiffs' bar pioneer, Richard S. Miller offers a pertinent examination of tort as it functions in the United States. Drawing on *Jurisprudence for a Free Society*, a 1992 jurisprudential work by Harold Lasswell and Myres McDougal, Miller locates what he calls power in American tort law. Power, he says, referencing Lasswell and McDougal, is the ability to affect decisions (Miller 1994, 1072). Significant work in the Law and Society tradition explores the futility of tort doctrine (Ross 1980; Tomlins 1993, 296–97) or concludes that although tort liability has the potential to effect change, societal barriers stop injured people from prevailing in adjudication (Galanter 1974; Felstiner, Abel, and Sarat 1980–1981; Kritzer and Silbey 2003). Miller (1994) does not refute these charges but complicates them, focusing on the ways in which the power glass of tort is partially full.

Injured persons in the United States can engage with and leverage the power that tort holds, Miller says, with respect to seven of its functions: (1) the *prescribing* function, which gives these litigants, along with their adversaries, input into the writing of new rules through precedent-making; (2) the *intelligence* function, which covers pretrial discovery as a device to extract pertinent facts; (3) the *promoting or recommending* function, whereby litigants advocate changes in policy; (4) the *invoking* function, or "the ability to set a decisional process in motion" (1073); (5) the *applying* function, or "the rendering of or refusal to render" (1074) what a plaintiff has demanded, which in practice is shared, if not dominated by, claims adjusters and defense lawyers; (6) the *appraising* function, used to evaluate how well tort law is performing with respect to policy goals; and (7) the *terminating* function, the converse of the prescribing function, which puts an end to existing doctrine (Miller 1994, 1072–75).

Functions like these depend on tort rules for their power. Tort doctrine, by deeming disputes over redress as of social interest and effect beyond the parties, shifts power and wealth. Tort doctrine also constitutes investments by judges and legislators that take form in the content of decisional law. The rules that absorb Keren-Paz and several of the *Fault Lines* contributors tell injured people just how much their injuries count. Superseding, or retreating from, tort doctrine is a sociolegal stance with material consequences; it means that persons hurt by careless behavior can do much less prescribing, gathering intelligence, promoting, invoking, applying, appraising, and terminating.

Because tort law gives voice to people who have suffered injury, it has the capacity to redistribute money and power in a progressive direction: Keren-Paz (2007) has started to show sociolegally inclined readers how. Because it also gives voice to their injurers, it has the capacity to redistribute money and power in a regressive direction: the tort reform movement has shown how. Engel and McCann (2009) prepared *Fault Lines* in part to say that legal sociologists have been pouring their energies into the second of these two sources of potential—with considerable success, but in a reactive mode. The first potential, combining inquiry and activism, fits their expertise even better.

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