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Muss es sein? Not Necessarily, Says Tort Law

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MUSS ES SEIN? NOT NECESSARILY, SAYS TORT LAW

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I
INTRODUCTION

When factions quarrel over whether tort law is progressive,[1] they broach a conversation that extends beyond labels and name-calling. Venues for the debate abound. In one, the tort reform battleground, on which millions of dollars and centuries of doctrine are at stake, partisans make conflicting arguments about which side is progressive. One cohort thinks of tort litigation as David aiming his slingshot at Goliath's infinite greed and rapacity;[2] another coins such phrases about injustice as "the tort tax," and "the lawsuit lottery," argues that bloated transaction costs enrich lawyers and bureaucracies, and laments the loss of playgrounds and obstetricians—literally "motherhood issues," as one political scientist calls them, with "equity, efficiency, security, and liberty" at stake.[3] Unabated after many decades,[4] tort-reform rhetoric expresses a struggle over the mantle of progress.

The question whether tort law is progressive extends beyond internecine disputes like the tort-reform conflict. Personal injury law, treated as synonymous with tort law for the purposes of this Article, engages subjects that can

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1. Tsachi Keren-Paz, *An Inquiry Into the Merits of Redistribution Through Tort Law: Rejecting the Claim of Randomness*, 16 CAN. J. L. & JURIS. 91, 128 (2003) (identifying three camps of writings: those that favor "a distributive role for private law," those "critical of using tort law for distributive purposes," and those that "examine the possibility of using private law to effect progressive redistribution to some degree"); *see* Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1059 (1996) (arguing that "individual systems of private justice," apparently including tort law, do not contribute to "political dialogue or public deliberation"); Allan Kanner, *Toxic Tort Litigation in a Regulatory World*, 41 WASHBURN L.J. 535, 536 (2002) (calling tort superior to regulation because it "embodies certain ideals," and condemning tort law for promoting "regressive redistribution"); Thomas S. Ulen, *Courts, Legislatures, and the General Theory of Second Best in Law and Economics*, 73 CHI.-KENT L. REV. 189, 191 (1998) (describing the argument that "piecemeal correction, or correction of a subset of the imperfections," reduces social well-being).

2. Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate Over Tort Reform*, 26 CAP. U. L. REV. 701, 710 (1997).

3. Stephen Daniels & Joanne Martin, *"The Impact That It Has Had is Between People's Ears": Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DE PAUL L. REV. 453, 456 (2002) (quoting Deborah Stone).

4. Fourteen years ago, the *National Law Journal* spoke of "the hundred years' war." Andrew Blum, *The Hundred Years' (Tort) War*, NAT'L L.J., Oct. 15, 1990, at 1.

loom larger than torts: security, freedom, dignity, aggregate efficiency, costs, pain, and the powers and limits of state authority. If it could be answered, or even explored anew, the question might not only help observers decide which side to favor in discrete debates, but also encourage law-focused individuals who call themselves progressive or conservative to find their politics tested and sharpened, in broader contexts. Alliances could shift. Decisions that individuals make about their civic lives—which issues to think about, what projects to pursue—might change.

The main obstacle to answering the question is a lack of crisp definitions: Nobody has said with certainty what "progressive" or its principal antonym, "conservative," means.[5] No definition means no reliable measurement: if "progressive" can mean many things, then almost any tendency might be defended or attacked with one of the adjectives. Put another way, no hypothesis about where to place tort law on a progressive-conservative axis is amenable to testing or falsification.

Despite the difficulty in reaching a definition, adding torts to the progressive-conservative axis can support an understanding of this Symposium's central query: What does it mean for a system or method to be "progressive"? Beyond arguing that American tort law is indeed progressive, this Article contends that it is almost uniquely so. If American tort law is (almost) uniquely progressive, then progressive politics may need American-style torts to do its work.

In lieu of a definition, this Article uses "progressive" to include three themes. The first comes from the *Oxford English Dictionary*:[6] "moving forward or advancing." In a word, motion. The *O.E.D.* further describes motion as "characterized by progress or passing on to more advanced or higher stages; growing, increasing, developing; usually in good sense: advancing toward better conditions; marked by continuous improvement."[7] Progressivism in this spirit expresses optimism about the beneficial effects of change. Things ought to get better and, if human agency can lend a hand, they will get better. Movement is literally part of improvement.

The second theme is esteem for the individual. Part of the task of bettering the human condition calls for concern about the wishes and judgments of persons, whom progressives celebrate for resisting the stasis of anti-individualistic forces. One leader among these forces has been "orthodox culture,"[8] which demands that "people subordinate their own preferences in political and moral

5. Several papers in this Symposium have raised this issue of definition. *See, e.g.*, Girardeau A. Spann, *Just Do It*, 67 LAW & CONTEMP. PROBS. 11, 12-14 (Summer 2004) (discussing "progressive" and "conservative" views on race); Suzanna Sherry, *Warning: Labeling Constitutions May Be Hazardous to Your Regime*, 67 LAW & CONTEMP. PROBS. 33, 33 n.7, 49-50 (Summer 2004) (noting that "it is not clear that any particular philosophy" informs the political labels, and discussing the possible reasons that "'progressive' [has] replaced 'liberal' as the adjective of choice for those on the political left").

6. XII OXFORD ENGLISH DICTIONARY 765 (noting that Milton used the word in this sense in *Paradise Lost*, which was published in 1667).

7. *Id.*

8. ENCYCLOPEDIA OF POLITICAL THOUGHT, "Culture Wars" (Garrett Ward Shelton ed., 2001).

judgment."[9] In contrast to orthodox culture, progressivism seeks to find and honor an individual's anti-authoritarian preferences. Progressivism challenges traditions and conditions that keep individuals in their subordinated place. In this work, it encounters resistance not only from the authorities it questions—church, monarchy, the patriarchal family, and corporatism, or the alliance of governmental power and business interests[10]—but, more generally, from the ideology of conservatism, which prefers past ways of social life to future-oriented, planned schemes of improvement as sources of optimal social ideas and frameworks.[11]

To be conservative, as Michael Oakeshott elaborates in a famous essay,

> is to prefer the familiar to the unknown, to prefer the tried to the untried, fact to mystery, the actual to the possible, the limited to the unbounded, the near to the distant, the sufficient to the superabundant, the convenient to the perfect, present laughter to utopian bliss. Familiar relationships and loyalties will be preferred to the allure of more profitable attachments: to acquire and to enlarge will be less important than to keep, to cultivate and to enjoy; the grief of loss will be more acute than the excitement of novelty or promise.[12]

To be progressive is to disrupt, while conservative means "[c]haracterized by a tendency to preserve or keep intact or unchanged."[13]

Finally, "progressive" attends to economics, although it does not pursue efficiency. While many observers believe that the law effects improvement to the extent that it promotes more efficient results, the quest for efficiency sees the collective, not the individual, as the final object of its work; the progressive perspective on aggregation sees groups as means to the opposite end: the well-being of the individual. Rejecting efficiency as a goal, the progressive cause aspires to redistribute wealth.[14] This aspect of "progressive" has support in the U.S. record: as a political ideology, capital-P Progressivism sought to bring government closer to the people, in particular through broader state-sponsored educational opportunity and greater citizen political participation.[15] Suspicious of concentrated wealth, progressivism approved of the poor getting richer and

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9. *Id.*

10. Robert Locke, *What Is American Corporatism?*, FRONT PAGE, Sept. 13, 2002, *available at* http://www.frongpagemag.com/Articles/leadArticle.asp?IC=3054 (giving as examples of "corporatism" the Export-Import Bank, industrial bailouts, agricultural price supports, and Hillary Clinton's 1993 plan for health care reform).

11. 11 DAVID ROBERTSON, A DICTIONARY OF MODERN POLITICS 107 (3d ed. 2002).

12. MICHAEL OAKESHOTT, RATIONALISM AND POLITICS 409 (1991).

13. Chaucer used the word (spelled *conservatif*) in this sense in the fourteenth century. Another definition notes that the British political party that took the adjective as its name (replacing the older "Tory") retains a commitment to "the maintenance of existing institutions political and ecclesiastical." III OXFORD ENGLISH DICTIONARY 765.

14. The stance that esteems individual well-being without looking to redistribute wealth and along with it power is to some speakers not "progressive" but "liberal." On the indeterminate nature of terms like "conservative," "liberal," and "radical," see STEPHEN E. GOTTLIEB, MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA (2000). I thank Steve Shiffrin for stimulating my thoughts of this point.

15. *See generally* Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers, and Consumers*, 48 RUTGERS L. REV. 673, 725-28 (1996) (recounting a short history of the Progressive movement in a critique of tort reform).

the rich getting poorer, probably with the help of government intervention. For this reason, the *O.E.D.* does not omit from its definition "a name or term adopted by radical, left-wing, or communist parties"—the groups that want money to change hands.[16]

These three impressions of "progressive," though contested and indeterminate, enjoy enough support to start the discussion. American tort law has both obstructed and advanced what one might call the progressive agenda. In the next part, the obstructions will be addressed first, followed by the advances. The presence of pretty good arguments, articulated below in the form of *Contra* and *Pro*, coupled with the lack of definitional precision already mentioned, might encourage the conclusion that tort law is neither progressive nor conservative. But American tort law is uniquely inclined toward motion. Buttressed by procedures and norms that make American courts accessible, tort law calls out a signature demand for accountability—"Must it be?"—and uses the rule of law to hear and answer the demand. This combination of protest and law mounts a progressive struggle against stasis and repose.

II

WHETHER TORT LAW IS PROGRESSIVE: *CONTRA* AND *PRO*

A. *Contra*

Tort law rests on illiberal traditions. An agrarian, feudal past left its imprint on rules and doctrine. Take land, for example. When tort law developed in Britain, the poor did not possess it. As related in tort history, as well as history generally, the encounters that poor people had with possessed land consisted chiefly in paying rents in order to subsist, falling into pits and mantraps, getting hurt by the possessors' unruly animals, trespassing from time to time, and otherwise failing to gain any enduring benefit from what the common law has long called "real" (signifying emblematic or dominant) property.[17] Tort rules often disfavored the poor to the advantage of land possessors. Principles of limited duty, for instance, assigned each visitor-intruder a rank that reflected what the possessor was presumed to think of him. Only one of these ranks, the invitee, a person present for the advantage of the possessor, was entitled to reasonable care while present on the land. When possessors and owners were different people, as in the case of leased lands, tort law favored owners. Despite maxims to the effect that it would not bother with trifles, tort law in its rules about trespass to land made an exception to the precept that a plaintiff needs damages to gain a judgment in court. Land possessors, tort law inferred, will necessarily

16. XII OXFORD ENGLISH DICTIONARY 595.

17. The origin of "real" is the Latin "res" or "thing." This etymology has no particular link to land as compared to other objects of property, suggesting that English law regarded land ownership as crucially real or central.

suffer an injury whenever the blades of their grass are trodden. So much for the theme of redistributing wealth.

So much, moreover, for individualism. While it honored the entitlements of land possessors, early tort law took almost no interest in the emotional, psychological, or dignitary well-being of injured people. Actions for assault and defamation were exceptions to a general disregard for feelings and intangible harm, and even these exceptions were restricted to privileged claimants. Invasion of privacy and the intentional or negligent infliction of emotional distress as claims for relief won recognition only in portents, not genuine precedents, until the twentieth century.[18] Tort law used to condone emotional victimization, just as it indulged economic exploitation of the landless.

Even when tort doctrine permitted plaintiffs to plead their cases, defenses and immunities and other no-liability constructs sheltered defendants from the consequences of their wrongful actions. Well into the twentieth century the concept of contributory negligence imposed a formal bar to otherwise pristine negligence claims: any amount of contributory fault could ruin a plaintiff's entitlement to compensation. Courts never bothered to explain exactly where they found this rule.[19] Assumption of risk barred claims even for injury that laborers suffered in the dangerous worksites of the nineteenth century. Judges contrived "the fellow servant rule" to insulate employers even further from workplace liability.[20] Parents were immune from tort actions by their children; charities, spouses, and governments enjoyed a comparable license to commit torts and get away with them.[21] Statutes of limitation, which legislatures wrote to be brief, were trimmed even further by the judicial stance that a plaintiff could obtain no tolling for latent or undiscoverable injury. A married woman could not bring suit against a person who injured her; her husband owned the prerogative to sue or not. Under the common-law edict that actions for personal injury died with the person, the infliction of death by tortious conduct was not actionable. Labyrinths of writs and forms stood between injured people and the courthouse door.

Although most of these tidbits of common-law history have been superseded, not all the barriers fell. Contributory negligence lives on in a handful of American jurisdictions and casts a shadow via the "not as great as" or "not

18. *See* William L. Prosser, *International Institution of Mental Suffering: A New Tort,* 37 MICH. L. REV. 874, 880 (1939) (summarizing portents).

19. DAN B. DOBBS, THE LAW OF TORTS 494 (2000) (noting the severity of the rule and the absence of a satisfactory rationale for it).

20. The fellow servant rule originated in *Priestley v. Fowler*, 150 Eng. Rep. 1030 (1837), and gained acceptance in the United States following *Murray v. South Carolina Railroad*, 26 S.C.L. (1 McMul.) 385 (1841). *See* Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 644 (1989).

21. Brunner v. Hutchinson Div. Lear-Siegler, Inc., 770 F. Supp. 517, 520-25 (D.S.D. 1991) (discussing the history of parental immunity); Lichty v. Carbon County Agr. Ass'n, 31 F. Supp. 809, 810-11 (M.D. Pa. 1940) (surveying the doctrine of charitable immunity); Testa v. City of Philadelphia, 2003 U.S. Dist. LEXIS 18030 (E. D. Pa., Oct. 8, 2003) (discussing governmental immunity from defamation liability).

greater than" comparative-fault compromises that prevail in most states.[22] While progressivism regards persons as part of groups when such aggregation would advance their individual interests, tort law still tends to think of injured persons as separate from family members and other cohorts when aggregation would benefit plaintiffs. It rejects group libel, seldom permits recompense for the harms that ethnic slurs or epithets inflict, cuts off emotional-distress liability to most "bystanders" (a term that begs the question of who gets hurt by unlawful conduct) and clings to a unitary "objective" approach to the standards of reasonable care long after the paradigm of objectivity, out of the legal context, has grown tattered.[23] Today tort law does more than hew to an anti-progressive past: when it changes, it can move away from progressive aims. The word "reform," which progressives like to think they own, takes the other side in torts discourse, in which "tort reform" means denying remedies to hurt persons and conveying benefits to business.

Even if particular barriers could rise or fall in a progressive direction, tort law would remain tied to common law paths and methods and thus resist various progressive alternatives to this tradition. Here, the figure of the judge looms large. The nation's most reflective and eloquent jurists—Benjamin Cardozo, Oliver Wendell Holmes, Learned Hand, Richard Posner, and others—have acknowledged that judges' experiences and personalities affect the common law.[24] Most contemporary judges, like their predecessors, were reared and educated in affluent settings. They beat out their competitors for scarce posts by following elite dictates. In most of their demographic traits, including race, gender, and class, judges do not constitute a representative specimen of Americans. They deviate in a direction favoring wealth and power.[25]

Judges illustrate a gap between liberalism and progressivism. Many judges are liberal people, perhaps more liberal than other political actors as a group, but liberal predilections do not ensure that progressive politics will take root and flourish. What became known in the 1980s as "litmus tests" continue to screen the politically unwelcome from judicial appointments, particularly to the federal courts. Even the Clinton White House of the 1990s did not use its

22. *See generally* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE (2000) (explaining the dominant paradigms and their evolution).

23. On objectivity as a myth or not, see generally MICHAEL SCHUDSON, DISCOVERING THE NEWS (1978) (identifying objectivity as dear to journalists long after it had been exposed as unattainable); Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447, 1459 (1990) (book review) (arguing that objectivity is one of many myths still deemed true by the law).

24. *See generally* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1949); RICHARD A. POSNER, OVERCOMING LAW 131-35 (1995); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). Hand, in particular, was disturbed by infusion of personality into the work of judging. *See* LEARNED HAND, THE SPIRIT OF LIBERTY 309-10 (Irving Dillard ed., 1960).

25. Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 914 (2001) ("Judges are almost exclusively male, white and wealthy."); Michael J. Frank, *Judge Not, Lest Yee Be Judged Unworthy of a Pay Raise: An Examination of the Federal Judiciary Salary "Crisis,"* 87 MARQ. L. REV. 55, 79-85 (2003) (describing federal judges as wealthy). For evidence that elite origins do not have much effect on judges' decisions, see Daniel M. Schneider, *Statutory Construction in Federal Appellate Cases: The Effect of Judges' Social Backgrounds and of Other Aspects of Litigation*, 13 WASH. U. J.L. & POL'Y 257, 258 (2003).

nomination power to put union-side labor lawyers, police-brutality litigators, or left-wing academics on the federal bench. Liberals are easy for a litmus-tester to spot, even when they have not set their liberal inclinations in type. Moreover, anything given to or by the judiciary can be taken away: when winds shift, successor judges and legislative reforms undo liberal precedents. In this view, tort law is capable of episodic liberality, but not of a progressive politics, because its chances to move in a progressive direction arise too fitfully and leave little imprint.[26]

One might query: Compared to what? *Contra* advocates have an answer. If the judge embodies the inadequacy of the individual as a source of progress in tort law, the group—defined as any collective of persons that is disadvantaged until it comes together—embodies strength through unity. Two illustrative examples are at hand: the civil rights movement and the rise (as well as the fall) of labor unions. Progressive changes in tort law probably owe much to the mid-twentieth century civil rights movement. It was only after African-Americans gained access to the ballot and some access to decent public schools that tort law began to open plaintiffs' access to the courts. These civil rights successes appear to have inspired consumer activists and populist tendencies among plaintiffs' lawyers.[27] Although American legal education likes to tell a civil rights history that cites victory in appellate decisional law, the movement itself preferred to spend its energies on more communal sources of power: legislatures, school districts, demonstrations, national-level civic organizations.

Labor unions present a radical contrast to tort law as a means for the dispossessed to gain wealth and power. As mentioned above, tort rules historically blocked adequate compensation for injured individuals in the workplace. Workman's compensation, implemented in the U.S. during the early twentieth century in part to circumvent tort law's doctrinal pitfalls for hurt workers, soon proved a poor bargain for this group. In exchange for their right to sue, workers received no-fault sums inadequate to compensate them for their loss. They also learned that employers often treated their claims like lawsuits, litigating questions of coverage. The lesson looks clear: only in uniting themselves with other workers can workers wield adequate power in their dealings with injurious employers. Tort law plucks workers apart, turning each into an isolated plaintiff or claimant.

Today it is labor and employment law scholarship that most uses the pejorative neologism "tortification," a word that signifies powerlessness for individuals.[28] To protect herself from harassment and mistreatment, some scholars ar-

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26. Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law,* 74 B.U. L. REV. 387, 392 (1994) (deeming tort's progressive effects only episodic).

27. Gary T. Schwartz, *The Beginning and The Possible End of The Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 610-12 (1992).

28. Duffy, *supra* note 26, at 423 (critiquing the intentional-infliction tort on many grounds, among them its tendency to favor "nonminority male employees" and the difficulties of proof that plaintiffs' face). For more nuanced skepticism about workplace torts, see generally Mark Gergen, *A Grudging*

gue, a worker needs a strong collective bargaining unit rather than a chance to buy a lottery-ticket shot at the million-dollar judgment that every now and then one lucky abused worker will win. Unions provide protections for continued employment that cover many more workers than wrongful discharge litigation can ever deliver. In this view, tort law becomes the rhetorical favorite of the enemy. Of course, the bosses will say, you don't need to organize, you can always sue them if they do you wrong. And you won't have to pay union dues either, imagine! Workplace torts, in short, isolate the individual without protecting his or her rights.[29]

Beyond the employment context, tort reformers have depicted U.S. tort law as anti-progressive. Longtime tort-reform critics Stephen Daniels and Joanne Martin pay tribute to the movement by noting its influence on public opinion: Business interests, Daniels and Martin argue, have succeeded in contending that every American consumer, worker, taxpayer, and seeker of ordinary consumer goods ought to condemn American civil justice as unjust and wasteful.[30] It is wrong to think that only the rich benefit from tort reform, went the reformers' contention: we would all benefit because litigation is at odds with the best American ideals.

> [Tort reform] describes a system where, among other things, the number of personal injury suits is significantly higher than in the past (the litigation explosion); where more people bring lawsuits than should (frivolous lawsuits); where the size of awards is increasing faster than inflation (skyrocketing awards); where the size of most awards is excessive (outrageous awards); where the logic of verdicts and awards is capricious (the lawsuit lottery); where the cost of lawsuits is too high and the delays too great (a wasteful, inefficient system); where there is no longer a fair balance between the injured person and the defendant (exploiting "deep pockets"); and ultimately a system where the cost to society is unacceptably high ("we all pay the price").[31]

Tort reformers add flesh and blood to this critique with examples of baleful consequences that they attribute to an excess of personal injury litigation. It is not progressive, they say, to drive physicians from practice, pull jungle gyms away from children, push struggling municipalities into insolvency, forfeit vaccines and contraceptives and other pharmaceutical products, allow litigation costs to hurt consumers (reformers enjoy the statistic that half the price of a

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Defense of the Role of the Collateral Torts in Wrongful Termination Litigation, 74 TEX. L. REV. 1693 (1996); Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third Party Effects*, 74 TEX. L. REV. 1943 (1996).

29. On the tension between collective-bargaining law and individual employment rights, see Katherine van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992).

30. Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEX. L. REV. 1781 (2002) (recounting effects of tort reform on the plaintiffs' bar).

31. Daniels & Martin, *supra* note 3, at 453-54; *see* Shari S. Diamond, et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DE PAUL L. REV. 301, 309 (1998) (reporting an experimental study finding that the strongest predictor of jurors' liability decisions was their opinion of whether plaintiffs typically receive too much or too little through litigation). *But see* Anthony Chase, *Civil Action Cinema*, 1999 L. REV. M.S.U.-D.C.L. 945 (noting that despite years of tort-reform advocacy and a rightward turn in American politics, Hollywood movie plotlines still depict tort plaintiffs and their lawyers as heroes).

football helmet is attributable to products liability), and lose jobs in industries that cannot compete against foreigners subsidized by rational cultures that oppose litigation. Only foolish plaintiffs,[32] venal attorneys, and an obese bureaucracy benefit from the torts status quo.

Arguments like these do not demonstrate that what has happened *propter hoc* (i.e. litigation, which is not nearly so copious or ruinous as tort reformers suggest) deserves blame for what ensued *post hoc* (the effects on goods, services, businesses, and government finances that tort reformers mourn). And if one assumes that most personal-injury plaintiffs really have been hurt—apocrypha about psychic powers lost to a radiological scan and the like notwithstanding—then somebody has to pay for these losses: if not tortfeasors, then victims themselves, or third parties like governments. Nevertheless, some progressives have conceded that the we-all-pay-the-price tort-reform contention contains a degree of truth.[33]

In sum, the *Contra* stance has left- and right-wing arguments that share a common thesis: Tort law started out illiberal and remains unprogressive, despite having taken up some liberality when the civil rights movement and other extrinsic influences revealed new uses for citizen-initiated litigation. It leave individuals worse off.

B. *Pro*

Alongside its illiberal record, tort law simultaneously has something of a progressive reputation. In the popular imagination, in the lobbies of state legislatures, and through the pages of law journals, Americans associate torts with liberals. Liberal does not mean progressive, as noted, but it comes closer to progressive than "conservative" does. Take tort reform. Those who argue that it is not progressive can cite the one-sided nature of this initiative. But what is being reformed? Something progressive, it would seem—and despite reforms, much of a structure remains intact.

More than other fields of law, tort doctrine makes a claim to the term progressive because it connects claims of injustice to the rule of law. By chafing powerful actors who would otherwise be free to do whatever they like, the rule of law evokes liberality, both in the sense of left-wing politics and the association of the word liberal with neutral ideals. Let us return to the example of land and consider land-use tort law. Were they unchecked by legal rules and norms,

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32. Anecdotes about plaintiffs linger. Greenlee, *supra* note 2, at 712-14 (recounting the one about a manufacturer that paid a $7.5 million settlement "rather than risk an even more generous jury award over the color" of its tricycles, the one about "the woman who cut herself with a knife and sued because it was too sharp," and other perdurable tropes).

33. *See* Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Evolution of the American Health Care System*, 108 HARV. L. REV. 381, 402-03 (1994) (pointing out disadvantages to patients inherent in medical malpractice liability); Greenlee, *supra* note 2, at 735; Note, *"Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1766 (1996) (noting ground held in common between "progressive" tort reform, which facilitated plaintiffs' claims, and contemporary tort reform).

powerful persons and entities would gain or retain possession of land and use it as they please, hurting individual interests along the way. Tort actions derived from trespass and nuisance (alongside public-law regulation and norms) keep powerful actors in line.[34] By the tort rulebook at least (and probably in reality, too), the powerful must either refrain from harming individual interests or internalize the cost of doing so by paying compensation to those they injure.

On the American stage of tort law, a small number of players act out a melodrama of injury and redress. At the end of the performance, one side has been cast as the loser. The rule of law proclaims this outcome as mandated, inevitable, and necessary. Players on the tort stage cast a shadow on non-performers, who know that they can be summoned to act in the next melodrama. Such watchful non-performers, the Deterred, include the business community—which knows, or at least believes, that it is vulnerable to lawsuits.

Next, progressive tendencies emerge through consumerism; and of all the fields in the core of the legal curriculum, torts enjoy the strongest association with the U.S. consumer movement. When Friedrich Kessler and others began revising contract law in the mid-twentieth century to ease what they perceived as the oppression of consumers, they flavored contracts with torts. Contract law needed tort-thinking to release consumers from the bonds of formally correct agreements. Not all of the twentieth-century liberalization of contract law needed conceptual help from torts,[35] but a consumer who is injured by a product or service can recover damages only sporadically if she has to rely on contract law with its notorious escape routes for those who get to frame the bargain and put it in writing: disclaimers, privity defenses, fine print.

According to consumer law, a manufacturer or seller has fulfilled all the elements of tort—a state of affairs more costly to it than merely breaching a contract—if it puts a defective or unreasonably dangerous product or service into commerce and that item injures a person. A defective tangible product links the manufacturer's conduct with every person who lands foreseeably in its injurious path. Because such a product travels beyond the buyer surrounded by her small band of third-party beneficiaries, contract law will not aid the plaintiff who seeks personal-injury damages. The famed Fall of the Citadel of privity acknowledges that contract law is too narrow to cover the array of injuries that products cause.[36] Only tort can make room for a wide group of plaintiffs—including persons who never contracted with the seller, could not manifest agreement, failed to understand tricky disclaimers, or suffered emotional dis-

34. *See, e.g.*, Nieman v. NLO, Inc., 108 F.3d 1546, 1558 (6th Cir. 1997) (holding corporate defendant liable for a continuing trespass based on its discharging uranium onto plaintiff's property); Feikema v. Texaco, Inc., 16 F.3d 1408, 1414 (4th Cir. 1994) (holding that state insurance and trespass actions against the defendant were not preempted by federal regulation, and could proceed).

35. The rise of detrimental reliance as a substitute for consideration, for instance, stays within the boundaries of contract. The leading treatise sites this shift in the twentieth century, with only limited nineteenth-century precedents. E. ALLAN FARNSWORTH, CONTRACTS 91-92 (3d ed. 1999).

36. *See generally* William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

tress as part of their losses. Like consumer law generally, consumer-oriented products liability doctrine could not have developed as it did without the expansive tendencies of negligence.

Third, individualism notwithstanding, tort law has become willing to aggregate injured persons into groups. This move has augmented the power of plaintiffs, or at least of plaintiffs' attorneys, in their battles against defendants.[37] Class actions to redress personal injuries remain relatively rare. When asked, judges typically refuse to certify these classes. And some plaintiffs have fared better on their own in court. Nevertheless, the formation of big blocs sets up injured people on the American political landscape as a kind of successor to the above-mentioned labor unions, now lying in ruins. The class action and its cousins—multidistrict litigation, consolidation, coordination among plaintiffs' lawyers, and global settlements—situate each injured person amidst her fellows. The result is unity: litigants squabble and disagree, but when seen from the other side they look numerous rather than isolated. Even a plaintiff who chooses to opt out is usually better off with the roaring horde nearby. In that unity, there really is strength.

Fourth, tort law can recognize new causes of action to frame grievances. Despite the numerous permutations or refinements of injury a tort-framer could conjure, new causes of action are rarely developed.[38] New torts do emerge, however, identifying new oppressions. Actors deemed paradigmatically blameworthy—employers for a new tort of wrongful discharge, manufacturers and sellers for a new tort of products liability—now cannot return to their pre-formation idyll, when nobody had a name for their mischief. In a parallel move, tort law has dropped some immunities, notably those that shielded charities and persons closely related to the plaintiff, thereby broadening the aforementioned rule of law to cover actors who used to be sheltered while engaged in tortious conduct. The abandonment of some torts can also make a claim to progress.[39] First-wave American feminists, for instance, agitated to abandon family-relation torts like seduction and alienation of affections, based on their belief that recognition of these injuries relied on a disparaging view of women.[40] In revising its understandings of what constitutes wrongful injury, tort law opens and closes doors, often in a progressive direction.

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37. *See* Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation,* 11 DUKE J. COMP. & INT'L L. 179, 189-90 (2001).

38. For more on the limits of new-tort formation, see Anita Bernstein, *How to Make a New Tort: Three Paradoxes,* 75 TEX. L. REV. 1539 (1997).

39. In 1962, Robert Keeton called the recognition of new causes of action and the abandonment of immunities examples of progress, or "continuing reform of tort law through candidly creative judicial action." Robert E. Keeton, *Creative Continuity in the Law of Torts,* 75 HARV. L. REV. 463, 486 (1962).

40. Jane E. Larson, *"Women Understand So Little, They Call My Good Nature Deceit": A Feminist Rethinking of Seduction,* 93 COLUM. L. REV. 374, 379-401 (1993).

Fifth, the resistance of torts to codification can be understood as progressive.[41] The opposite stance has its subscribers: codifiers often apply "progressive" to their product. Out of a clangorous pile of antecedents, they claim, codes form a true jurisprudence, purposeful and oriented toward enlightenment.[42] Elsewhere I have pressed a contrary view, arguing that European codification and its American cousin, restatement, tend to prescribe what I call a masculine order: an amalgam of universalism (attained by assertion, that is), rationalism (to the exclusion of other pertinent contributions), top-down authoritarianism, and a squelching of pluralism and dissent. Concepts that progressive-minded legal scholars invoke—dynamic statutory interpretation, "the nature of the judicial process," "the common law in the age of statutes," pragmatism or practical reason in the judicial context, inductive reasoning, judicial review, procedural justice, substantive due process—align themselves with common law rather than civil law traditions, and tort law is the strongest contemporary bulwark of American common law.[43]

Finally, *Contra*'s admiration of public law for its aggregative effects–its argument that laws originating in collectives are more progressive than those stemming from individual whim–overlooks the partnerships that tort law has formed with legislation and constitutional law to bolster the entitlements of injured persons.[44] Effects are especially visible in constitutional torts and in fee-shifting "private attorney general" inducements. If these categories of litigation warrant the label of progressive, tort law may not deserve much credit. Tort law's contribution had been to deem the sovereign incapable of wrong.

Yet tort law recanted this position, and once the sovereign admitted it could do wrong, devices and procedures from tort law attached liability to errors that once went unremedied. Tort lawyers took the cases, and sued the government. Tort-like civil juries put ordinary people in the shoes of the claimants. Tort concepts proclaimed the injury to be harm to individuals and called for redress via money damages. Absent tort, such claims against the government and its workers could conceivably have been covered by a public law alternative response (such as a punitive reduction of funds to an offending bureau, in effect a fine against an agency), or an equitable remedy like mandamus aimed at a recalcitrant official. But these remedies never took hold. Scholars who continue to debate whether the "tortification" of public law is good or bad can no longer question that tort-thinking now dominates claims of injury done under color of

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

42. So say admirers of the great French and German codes; more recent codifications look less exalted to their reviewers. *See* H. Patrick Glenn, *The Grounding of Codification,* 31 U.C. DAVIS L. REV. 765, 767 (1998) (faulting the codes of Russia, Vietnam, and Quebec for excessive particularity).

43. *See generally* Anita Bernstein, *Restatement (Third) of Torts: General Principles and the Prescription of Masculine Order,* 54 VAND. L. REV. 1367, 1405-09 (2001).

44. Tsachi Keren-Paz goes further, arguing that the presence of tort law prods legislatures to enact measures of progressive redistribution. *See* Keren-Paz, *supra* note 1, at 100-04.

law.[45] Perhaps tort law is progressive, then, in that tort-like devices have grabbed government wrongdoing by the horns and made it actionable, something for which officialdom has to pay. A public law rather than a private law focus might well have been more progressive; but the public law alternative did not ripen, and so tort law gets progress-points for finding yet another means to augment accountability for wrongdoing.

C. The *Pro* and *Contra* Contentions Assessed

Educing a quasi-definition of "progressive" from the three themes with which we began—first, motion, or moving forward to achieve a better end; second, regard for the individual; and third, an inclination toward redistribution of wealth that gives to the poor some of what it takes from the rich—we appear to find a better case under *Pro* than *Contra*; but before we can endorse this conclusion, we need to pause and review. The first element is fairly easy. For most if not all of its life, American tort law has been a storm center of motion. While common law development has withered in other fields that have been taken over by statutes, tort law remains robust in the judiciary as well as the legislature, staking out multiple spaces for change.

The *Contra* camp—both its left and right wings, the socialist and the tort reformers—would not concede the latter two criteria, however. Tort reform need not delay us much. Although the movement's arguments about progress are provocative and have attracted well-earned attention, any understanding of "progressive" that values individuals and redistributes wealth would prefer to keep courthouses open, not close them. The signature of this movement is to close the courthouse doors.[46]

Contra from the left is more difficult to refute. Although regard for individuals is undeniably progressive in comparison to corporatism and orthodox culture—the old enemies of progressivism—those who denounce "tortification" claim that this individualism retards progress because it tends to discourage group-based solidarity against these same antagonists. Here we face the same hypothetical-focused critique just encountered in the context of constitutional torts: there is no telling what a collective, if sufficiently undiscouraged, could create in place of torts. Enlightened statutes, well-formed agencies, energetic nongovernmental organizations, and what the anarchists called "mutual aid" only begin the list.[47] Similarly, macro-redistribution should work more effec-

45. Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719 (1989).

46. Arguments about biases in tort law against racial minorities have not inspired activists in minority communities or those who work in behalf of the poor to take up tort reform as their own cause. An example of this bias is the gain that defamation law gives prosperous plaintiffs or the point that African-American consumers of goods and services play the same price increases to reflect a "tort tax" as do Caucasian-Americans yet collect lower damages for the same injury under tort law as it is now applied. This response may indicate some rejection of the microeconomic premise.

47. Anarchist philosopher Peter Kropotkin argued, partially in response to Darwin, that living in society rather than in isolated individualism enables "the feeblest insects, the feeblest birds, and the

tively than the micro-redistribution of wealth that tort law occasionally provides. This expression of *Contra*, in sum, holds that tort law can be progressive only in contexts where individuals cannot achieve change through collective action; tort law becomes anti-progressive to the extent that it preempts or obstructs such collective action for change. Measured against this ideal of strength through unity, or the unshackling of oppression through a common struggle, tort law will always fall short. If the group-based ideal is feasible, then *Contra* should win the debate over whether tort law is progressive. If not, then *Pro* should win.

If, if. Individualism and redistribution of wealth thus shown to be so indeterminate, we might return to the first criterion, motion. Tort law has certainly been in motion. Is movement inherently progressive? Ludwig von Beethoven, cited here perhaps for the first time in relation to American tort law, once spoke of *Der schwer fasste Entschluss*, "the hard-won resolution." The prize—the *Entschluss*, an answer to our question about progress—comes closer on reflection about the motion inherent in American tort law.

III

MUSS ES SEIN?

By the time Ludwig von Beethoven completed his F major quartet in 1826, he was a distraught man—"half mad," burdened under depression, dwelling on the bungled suicide attempt of his nephew Karl. "[S]uffering from digestive ills, gouty twinges, even difficulties of locomotion," writes musicologist Daniel Gregory Mason, "he was denied wine, prescribed quinine, and generally interfered with in a way to exasperate so impatient a 'patient' as he."[48] Beethoven gave a name to his quartet's final movement, *Der schwer fasste Entschluss.* On the sheet music, the composer wrote ambiguous words: *Muss es sein? Es muss sein!*

Must it be? It must be! A statement of resignation to mortality, some infer: Beethoven did indeed die about six months later. No, it's optimistic or fatalistic. Beethoven's first biographer interpreted the six words as being about a petty debt: Yes, life's rough, you do have to pay the housekeeper.[49] Another anecdote traces the sentences to a casual conversation between Beethoven and an amateur musician who balked at a fee that the composer sought to charge him but then sighed, *Wenn es sein muss!* or *If it has to be*, inspiring Beethoven to use the motif in his next work.[50]

This variety in interpretation finds reiteration in tort law, which continually asks the question that Beethoven posed and then considers a mélange of an-

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feeblest mammals" to enjoy a life of safety and mutual support. PETER KROPOTKIN, MUTUAL AID: A FACTOR OF EVOLUTION 57 (1989).

48. DANIEL GREGORY MASON, QUARTETS OF BEETHOVEN 268-69 (1947).

49. *See* JOSEPH DE MARLIAVE, BEETHOVEN'S QUARTETS 371 (1961) (recounting this interpretation and others that biographer Anton Schindler offered).

50. BASIL LAM, BEETHOVEN STRING QUARTETS 71 (1975)

swers. As a query, *Muss es Sein?* begins where tort law always begins. One antecedent to be found behind every tort—more broadly, every concept, doctrine, incentive, policy vector, and normative commitment related to tort law—is grievance. Plaintiffs take cases to the courts.[51] Although the defendant will typically want to retort that *Es muss sein!* and be done, she does not get to speak the first or the last word. A plaintiff enjoys the first word; judges speak the last one. In response to a claim for relief, the court chooses between *Es muss sein*, a win for the defense, and what might be supplied as *Es muss nicht*, victory for the plaintiff. Economists have claimed that each choice should be favored about half the time in civil cases. The evidence suggests they are more or less right, with a few deviations and complications.[52] Parties win and lose. "Not necessarily," in other words, says tort law.

Within the climate of *Muss es sein?* that defines tort liability, stasis cannot rest in peace. Tort law signifies the potential for disruption. A summons can disrupt anyone—and, as was mentioned, it will disrupt more than its direct recipients: litigated cases cast their shadow over similarly situated persons and enterprises. This shadow fosters discomfort and distress among powerful entities, making them feel vulnerable. Although gaps between agents and principals prevent human tortfeasors from internalizing all the costs they generate—decisionmakers inside a business enterprise typically do not have to pay tort damages out of their own pockets—this discomfort and distress, experienced as the threat of liability, extends beyond money. American civil justice makes powerful individuals anticipate a host of inconveniences that they must absorb personally, beyond what they can deflect to the company treasury.

Many of their inconveniences come from the liberal American discovery regime. In this system, the plaintiff subpoenas any document she wants to see. When she notices her depositions, she takes into account many variables but probably will disregard (except for purposes of settlement pressure) the opportunity cost of a deponent's time. In addition to being liberal with other people's time and money, tort discovery spends the currency of other people's privacy with a comparable liberality. While hunting and fishing, the plaintiff can probe where she likes, bounded only by a need to relate her demands to the pursuit of relevant evidence. Her inquiries cannot be rejected on the ground that they do not pertain directly to the counts of the complaint. A plaintiff is vulnerable to

51. Sounds obvious, might not be. *See* Vincy Fon & Francesco Parisi, *Litigation and the Evolution of Legal Remedies: A Dynamic Model*, 116 PUBLIC CHOICE 419 (2003) (insisting that rational choice principles mandate attention to the rationality of plaintiffs who decide whether to bring a case to court).

52. The classic study is George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). For support in different contexts, see Leandra Lederman, *Which Cases Go to Trial? An Empirical Study of Predictions of Failures to Settle*, 49 CASE W. RES. U. L. REV. 315, 327 (1999) (studying tax litigation); Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169, 172-75 (2002) (studying the Priest and Klein hypothesis with reference to data from the D.C. Circuit). Medical malpractice litigation offers a prominent exception to the fifty-percent norm, one that Priest and Klein did not overlook. Priest & Klein, *supra*, at 5.

comparable intrusions, to be sure; but then every plaintiff has volunteered to play the litigation game. The defendant plays under conscription.

Now, how progressive is this disregard of individual privacy and space, the intrusion into persons' lives without their consent, the infliction of certain discomfort? Litigation against business enterprises suggests a progressive sacrifice of some individual interests to achieve other individual interests and redistribute wealth. Symmetry demands this sacrifice. Recall the gap between agent-tortfeasors and their principals: A legal fiction can hurt the bodies of human beings who otherwise would have "no soul to damn, no body to kick."[53] Victims seeking redress in tort (and potential victims who want, misguidedly perhaps, the protective effect of tort-derived incentives) learn that corporate treasuries do not respond directly to tort law; but the manager or executive vexed by tort law must respond. No wonder that wealthy and powerful Americans shudder in the face of American civil justice, decrying it at a pitch disproportionate to their own financial exposure. Discovery rules weaken the shelter that normally insulates wealthy and powerful people from the consequences of their actions. The roof leaks. Winds blow into the boardrooms.

Just as money does not buy individuals a reliable shield from the legal system, an individual's inability to pay does not stop him from using the legal system as a sword. Contingent fee financing sets much tort law in motion. Differing from subsidy schemes in other affluent countries, American subsidies favor complainants, rather than needy individuals at the receiving end of complaints.[54] The availability of juries in civil cases, another deviation from norms prevailing outside the United States, seems to enrich plaintiffs as a group;[55] and being able to acquire a one-third stake in a personal injury claim encourages lawyers to make themselves available to individuals who cannot afford hourly-rate fees. They are further encouraged by the so-called American rule on costs and fees, which eases the risk of losing.

These financing rules are a remarkable exception within a bulwark of capitalism. In the United States, most of what one can enjoy depends on one's abil-

53. John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment,* 79 MICH. L. REV. 386 (1981).

54. It bears mention that outside the United States contingent fee financing is known, but is less available. Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees,* 80 WASH. U. L.Q. 739, 745 (2002). One comparative survey suggests that a person in need of subsidized counsel would prefer to be a plaintiff in the United States and a defendant or a non-litigant in Europe. Earl Johnson Jr., *The Right to Counsel in Civil Cases: An International Perspective,* 19 LOY. L.A. L. REV. 345 (1985) (noting that many other countries outdo the United States in a variety of contexts where indigent persons often find themselves not plaintiffs, including divorce, bankruptcy, and housing).

55. So it appears, anyway, from data on litigation in Europe, Canada, Japan, and Australia, where plaintiffs are awarded much lower judgments. It is hard to attribute the difference to juries *vel non*, because a large fraction of personal injury damages in the United States covers expenses that other governments provide on a basis of medical need rather than liability. *See generally* Gary T. Schwartz, *A National Health Care Program: What Its Effect Would Be on American Tort Law and Malpractice Law,* 79 CORNELL L. REV. 1339, 1351-53 (1994) (discussing cross-cultural data and role of the U.S. jury in setting damages).

ity to pay.[56] Experiences as well as tangible goods are commodities. But being a person who gets to litigate the question of *Muss es Sein?*—"access" from the view of those who initiate, "capture" or worse for those who respond—remains notably unconnected to wealth. The rich cannot buy their way out of pretrial discomfort unless they settle, rewarding antagonists thereby for initiative. The poor get into court without paying.[57]

Liberal discovery is available well beyond tort, of course, and lawyers occasionally take other types of cases on contingency. But of all the fields of law, tort extends its power and perquisites most expansively to vulnerable Americans. To sue for breach of contract, one needs a preexisting contract. To recover property by judicial means, one needs to have had property in the past. To avail oneself of a statutory right to sue—for civil rights violations, employment discrimination, or one of the treble-damages categories like antitrust and patent law—one needs to have been expressly favored, again in the past, by a legislature. From this vantage point, tort law goes further than even the most munificent legislative extensions enacted in past decades to help the poor. Only tort law shares its entitlements with the world. It imposes fewer hurdles, in principle, than any other field.[58] Anyone can become a member of the plaintiffs' club.

Set free in the last two centuries from the writ system, tort plaintiffs enjoy a comparable freedom from pleading rules and other early procedural strictures when they write their complaints. The tort of negligence can cover a multitude of claims, from wrongful adoption through sloppy auditing and careless driving. The roster of intentional or denominate torts, cut into more particular increments, leaves almost no intentional wrongdoing uncovered. For unenumerated wrongs, an umbrella concept, "the prima facie tort," lies waiting. Although not every injury-causing wrong is actionable, tort law gives plaintiffs more space for creative pleading than any other field in the law.

Muss es sein?, in sum, covers American tort law as it is practiced—a wide swath of opportunity to demand change in behalf of individual interests and the redistribution of wealth. Features of the system include fluid concepts of responsibility, procedural rules for the prosecution of tort claims, civil juries, and pay-them-later-if-ever lawyers. Tort law as practiced is continually poised to

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56. In the affirmative sense. Negative entitlements—"freedoms from"—are fairly profuse in the United States; even the poor partake of them.

57. Confidential settlements and protective orders are an exception; they permit repeat-player defendants to withhold the benefits of experience in repetitive litigation from the individual first-time players who sue them. A growing body of law, however, limits the sheltering effect of these devices. *See* TEX. R. CIV. PROC. 76(a)(2)(b)(c) (creating broad presumption against secrecy in settlements); Laurie Kratky Dore, *Secrecy by Consent: The Uses and Limits of Confidentiality in the Pursuit of Settlement,* 74 NOTRE DAME L. REV. 283, 313-16 (1999) (surveying trend toward more "sunshine" in state statutes and common law); Ross T. Turner, Note, *Rule 26 (c)(7) Protective Orders: Just What Are You Hiding Under There, Anyway?,* 87 KY. L.J. 1299, 1300 (1999) (arguing for expanded disclosure).

58. "The world" is not hyperbole. *See* Anita Bernstein, *Conjoining International Human Rights Law with Enterprise Liability for Accidents,* 40 WASHBURN L.J. 392 (2001) (considering international human rights claims that some U.S. courts have been willing to hear, even though they relate to offshore activity and the plaintiffs have never been inside the United States).

challenge rather than to sigh in acquiescence, *Es muss sein.* Under American tort practices, the burden (a word I mean to use here not in a formal sense, as in "shifting the burden of proof" or "the burden of producing evidence," but in a lay sense) gets shifted. Long before a judgment is entered, tort litigation relocates some of the cost of injuries. It shapes and shifts the ponderous, ever-distracting, shoulder-stooping weight of being in trouble.

IV

CONCLUSION: BUT IS IT PROGRESSIVE?

Using the *Muss es Sein* banner to praise tort law as progressive, I do not mean to overlook the unfortunate consequences of empowering individuals to complain in court. Injustices do result from shifting burdens onto defendants; closing the courthouse doors more tightly would reduce these bad outcomes. Some uncountable number of defendants should on the merits not suffer even inconvenience, let alone liability, at the hands of a plaintiff who demands "Must it Be?" and then goes on to demand that her demand get its day in court. Wrongful antecedents can start tort litigation. Consider extortion, greed, bad faith, bad legal advice, a (mis)perception of a defendant's deep pockets, and attempts to place blame for an injury that could never have been avoided, not to mention simple errors: a plaintiff may identify a wrong culprit; the lawyer may bungle the drafting of a complaint; a court clerk may file one sheaf of papers where another should go. Even for claims with merit, nobody can defend tort law at the systemic level as an ideal way to redress or prevent harm. Tort fails to do a great deal.

Yet if perfection is required, can anything be progressive? Instruments have a certain innate neutrality;[59] a gap always separates what human deployers strive to do with these devices from what they achieve in fact. Redistributing wealth, for instance, might be a progressive goal, but many endeavors undertaken in its name have failed calamitously. Individualism has progressive and antiprogressive aspects. Motion too can move us backward. In this light, our question could be answered that tort law is not progressive, and it is not unprogressive either. Methods, systems, devices, and technologies all face too many variables—including the foibles of human agency, the political and social contexts, and the quirks of fate—for anyone to say that any such device is progressive.

This weary shrug in response to the question denies too much. Although methods and systems may simultaneously have progressive and antiprogressive effects, a look at the set of approaches to the problem of injuries that human beings suffer or believe they suffer—the approaches that have actually been tried, not hypotheses like the dream of enlightened collective action—shows that American tort law offers a progressive mixture. Unlike legislation and regulation, tort law empowers hurt individuals, and contains incentives toward

59. The sentence oversimplifies, of course. For elaboration, see Anita Bernstein, *Engendered by Technologies,* 80 N.C. L. REV. 1 (2001).

motion and redistribution of wealth. Unlike the market it assigns certain boons, like access to juries and the American rule on fees and costs, to the relatively poor. Unlike no-fault insurance schemes to replace torts, it imposes vexation on those who injure others in violation of the law, augmenting accountability for individuals.[60]

Moreover, the conclusion that tort law is progressive enjoys support in economic theory as well as institutional experience. Economists Vincy Fon and Francesco Parisi identify "a monotonic upward trend in the evolution of legal rules and remedies" that will prevail in any system that permits individuals to initiate litigation and that offers a choice of courts and judges who differ from one another in their attitudes toward plaintiffs. Their substitute term for "progressive" is pejorative—Fon and Parisi speak of "a perverse adverse selection mechanism"—but their thesis finds movement nonetheless. Fon and Parisi argue that because plaintiffs have the power to prosecute claims, they will seek to file in "a liberal or pro-plaintiff court," where judges take advantage of plaintiff-favoring asymmetry—that is, the rule that plaintiffs and not defendants set up the docket to create new precedents. Conservative judges have a similar desire to "push the threshold of liability closer to their ideal point" but cannot, because plaintiffs will simply eschew their courts whenever claims are marginal.[61] From this starting point, Fon and Parisi have not quite shown that tort law is progressive. One needs to add the premise that plaintiffs in the aggregate, rather than defendants, tend to articulate progressive stances. In this nation and on this date, however, such a proviso is uncontroversial.[62]

Call it "a perverse adverse selection mechanism" if you like, but progress emerges from the unique conjunction that distinguishes American torts, where the opportunity to cry "Must it Be?" meets the rule of law. To this partnership an injured person brings her own demands, discontents, pluralistic particulars, physical pain, and unique psychosocial understandings of what connects her to the defendant she has named.[63] The rule of law—that is, constraints affecting persons independent of their personal circumstances—helps to check tendencies to excess, aligns remedies with what happened to similarly situated persons

60. This claim does not deny the progressive effects of no-fault insurance. For an endorsement of both tort liability and insurance compensation as progressive, see Leslie Bender, *Tort Law's Role as a Tool for Social Justice Struggle,* 37 WASHBURN L.J. 249, 252 (1998) (arguing that tort law is "the instrument that people used to name the problem—to raise our consciousness. Now we need to design effective, appropriate administrative and insurance compensation schemes for monetary losses due to injuries.").

61. Fon & Parisi, *supra* note 51, at 7, 9.

62. For support coming from outside the United States (by an Israeli scholar, in a Canadian journal) that mixes metaphors to good effect, see Keren-Paz, *supra* note 1, at 116 (noting that "those at the bottom of the ladder have more to gain than to lose from a reshuffling of the deck"). Keren-Paz elaborates some complications, among them the risk of provoking backlash and the possibility of systemic judicial bias against the disadvantaged, but concludes that "the undermining of the status quo is desirable on second-order grounds." *Id.* at 118.

63. *See generally* JOHN C. P. GOLDBERG, ANTHONY J. SEBOK, & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 3 (2004) (expounding on "responsibilities" and "redress," which connect doctrine to the experiences of a plaintiff).

in the past, and gives both power and accountability to public officials—tort judges, that is, who are usually elected, and always responsive to politics. Asserting its perpetual demand of *Muss es sein?* in reaction to oppressions, tort law jolts stasis into change.